

17-01

Opinion No. 17-01

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

April 3, 2017

ORDER

The Utah State Bar Ethics Advisory Opinion Committee ("EAOC") received a request for an ethics opinion "explaining the limits or constraints on lawyers with respect to advocacy in connection with an election for confirmation of a judge in Utah." The opinion request includes the following inquiries:

1. "May a lawyer contribute to an entity that engages in advocacy concerning the retention of a Utah judge? If so, must the entity comply with the Utah Rules of Professional Conduct?"
2. "May a lawyer be an officer or employee of such an entity?"

OPINION

3. When a judge standing for retention election has drawn opposition, the judge may establish a committee to support his or her retention, and an attorney may contribute financially or through statements of support to that committee. *See* Rule 4.2, Utah Code of Judicial Conduct ("UCJC"); Rules 8.2 & 8.4, Utah Code of Professional Conduct ("URPC"). In accordance with an attorney's constitutional right to free speech, an attorney may also make public statements against the retention of a judge and make contributions to a campaign committee or entity advocating against the retention of a judge. However, whether supporting or opposing retention, an attorney may not personally or through the acts of another make a statement that the attorney "knows to be false or with reckless disregard as to truth or falsity concerning the qualifications or integrity of a judge." URPC Rule 8.2. Nor may an attorney "engage in conduct that is prejudicial to the administration of justice" or "knowingly assist a judge . . . in conduct that is a violation of applicable rules of judicial conduct or other law." URPC Rule 8.4(d) & (f).

BACKGROUND

A. Utah Judge Retention Elections

4. Utah Code Section 20A-12-201 codifies the Utah

judicial appointment and retention election process. The Utah governor appoints a committee of lawyers and non-lawyers for each Utah judicial district, including the Utah appellate courts. These committees are called judicial nominating commissions (justice.utah.gov). Commission members review the applications for vacant judicial positions and select candidates to interview. After interviews have been conducted, the commission refers five names (for each district and juvenile court judge) or seven names (for appellate court judges) to the governor. The governor then appoints one of the nominated judicial candidates as a Utah judge, who the Utah State Senate must thereafter confirm by majority vote.

5. Pursuant to Article VII, Section 9 of the Utah Constitution, Utah judges must stand for retention election at the end of each term of office, which term expires after eight years of service. Section 20A-12-201(1)(a) provides: "Each judicial appointee to a court is subject to an unopposed retention election at the first general election held more than three years after the judge or justice was appointed." Utah law further provides:

At the general election, the ballots shall contain, as to each justice or judge of any court to be voted on in the county, the following question:

Shall _____ (name of justice or judge) be retained in the office of _____? (name of office, such as "Justice of the Supreme Court of Utah"; "Judge of the

Court of Appeals of Utah"; "Judge of the District Court of the Third Judicial District"; "Judge of the Juvenile Court of the Fourth Juvenile Court District"; "Justice Court Judge of (name of county) County or (name of municipality)")

Yes ()

No ()

Utah Code Ann. § 20A-12-201(4)(a).

B. Requested EOAC Opinion Issues

6. This requested EOAC opinion, deciding whether a Utah attorney may "contribute to an entity that engages in advocacy concerning the retention of a Utah judge," raises multiple related, yet distinguishable, issues depending upon what accurately describes a "contribution" to entity advocacy. Hypothetically, for example, an attorney's "contribution to an entity" could conceivably be the attorney's financial contribution to an entity, such as a nonprofit foundation, which advocates in favor of or against

political issues, including advocacy for Utah citizen confirmation or defeat of a Utah judge in a retention election. An attorney's "contribution to an entity" could also conceivably be the attorney's direct comment, either positive or negative, intended for a publication that impacts Utah citizens voting in a judge's retention election. The attorney submits his or her comments to an entity, which then publishes and/or makes such comments publically available. These hypothetical examples raise different applicable analyses that this EOAC opinion discusses and decides based upon the Utah Rules of Professional Conduct.

ANALYSIS

A. Applicable Provisions of the URPC, UCJC, and Utah Code

7. Rules 8.2(a), 8.4(d) and 8.4(f) of the Utah Rules of Professional Conduct regulate "A [Utah] Lawyer's Responsibilities," including an attorney's comments about judges. Rule 8.2(a) states:

(a) A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

URPC Rule 8.2(a). The Comment to Rule 8.2 explains:

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

URPC Rule 8.2 cmt. Rule 8.4, *Misconduct*, further states:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice; [or] ...

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

URPC Rule 8.4 (emphasis added). Comment 1 to Rule 8.4 explains that Rule 8.4 essentially prohibits lawyers from engaging in the misconduct identified above, and/or assisting another person or entity's misconduct in a judicial retention election: "Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct or knowingly assist or induce another to do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf." URPC Rule 8.4 cmt. 1. Rule 8.4(a) does not, however, prohibit a lawyer from advising a client concerning action the client is legally entitled to take. *See* URPC Rule 8.4(a).

8. Rule 8.4(f) of the Utah Rules of Professional Conduct prohibits a lawyer from knowingly assisting a judicial officer in conduct that violates the applicable rules of judicial conduct. *See, e.g., In re Wilder*, 764 N.E.2d 617 (Ind. 2002) (lawyer obtained ex parte injunction without following proper procedures for which judge issuing order was suspended for violating Code of Judicial Conduct); *Lisi v. Several Attorneys*, 596 A.2d 313 (R.I. 1991) (lawyers made loans to judge before whom some regularly appeared); *see also In re Dean*, 129 P.3d 943 (Ariz. 2006) (prosecutor had romantic relationship with judge hearing felony cases in which prosecutor involved, and misrepresented relationship to state bar authorities).

9. In addition to Rule 8.4(f) of the Utah Rules of Professional Conduct that prohibits lawyers from knowingly assisting a judge in conduct that violates the Utah Code of Judicial Conduct, the Canons and Rules 4.1 and 4.2 of the Utah Code of Judicial Conduct also regulate judicial elections and require judge maintenance of impartiality and justice. Canon 1 provides: "A Judge Shall Uphold and Promote the Independence, Integrity, and Impartiality of the Judiciary and Shall Avoid Impropriety and the Appearance of Impropriety." Canon 4 likewise states: "A Judge or Candidate for Judicial Office Shall not Engage in Political or Campaign Activity that is Inconsistent with the Independence, Integrity or Impartiality of the Judiciary." In addition, Rule 4.1 of the Utah Code of Judicial Conduct addresses "Political and Campaign Activities of Judges and Judicial Candidates in General." And Rule 4.2, "Political and Campaign Activities of Judges in Retention Elections," states, in pertinent part: "If a judge standing for retention has drawn public opposition, the judge may operate a campaign subject to" certain limitations including

The judge shall not directly solicit or accept campaign funds or solicit public statements of support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support. Committees may solicit campaign contributions and public statements of support from lawyers and non-lawyers

UCJC Rule 4.2(B)(2).

10. A lawyer must comply with Rule 8.4(f) of the Utah Rules of Professional Conduct and not assist a judge to violate Rules 4.1 or 4.2 of the Utah Code of Judicial Conduct. Accordingly, because a judge is entitled to "operate a campaign" only if he or she "has drawn public opposition," an attorney may not operate a campaign on behalf of a judge unless there is opposition. UCJC Rule 4.2. If a campaign is permitted, the judge may "establish committees of responsible persons" to "solicit campaign contributions and public statements of support." UCJC Rule 4.2(B)(2). An attorney may therefore participate on such a campaign committee that is established, and/or may contribute financially or with statements of support to that campaign committee.

11. The Utah Code of Judicial Conduct does not address attorneys mounting a campaign in opposition to the retention of a judge. Thus, attorneys' actions to oppose the retention of a sitting judge must look to the Rules of Professional Conduct for applicable limitations. Attorneys who have appeared before certain judges may have special insight regarding the qualifications and integrity of such judges. Yet "false" statements or statements made "with reckless disregard as to . . . truth or falsity" by attorneys impugning the integrity or qualifications of a court and its judges violate Rules 8.2 and 8.4(d) of the Utah Rules of Professional Conduct because they undermine the judicial system. URPC Rule 8.2(a). As the Colorado Supreme Court explained:

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office.... Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

In re Green, 11 P.2d 1078, 1084 (Colo. 2000).

B. Utah and United States Supreme Court Cases Interpreting Applicable Rules

12. In *Peters v. Pine Meadow Ranch Home Association*, 2007 UT 2, 151 P.3d 962, the Utah Supreme Court reprimanded and financially sanctioned a Utah attorney

who violated Rule 8.2 of the Utah Rules of Professional Conduct. The essential facts of the *Peters* case are that petitioners' counsel filed briefs that were "replete with attacks on the integrity of the court of appeals panel that decided the cases below. Those attacks [were] unfounded, scandalous, irrelevant . . . and disrespectful of the judiciary." *Id.* ¶ 23. Petitioners' briefs before the Utah Supreme Court identified claimed errors in the Court of Appeals' decision under review. *Id.* ¶ 10. The briefs further alleged that those errors "were intentional and the result of improper motives." *Id.* However, the Utah Supreme Court concluded that petitioners' counsel did not factually support the lawyer's accusations, but instead offered "nothing beyond the fact that the errors were made." *Id.* ¶ 10. Hence, the Utah Supreme Court concluded that such accusations "personally attack[ed] the integrity of the court of appeals panel, suggesting serious intentional misconduct." *Id.* ¶ 15. The Utah Supreme Court noted that petitioners' counsel should have known his unsupported accusations were inappropriate, citing to Rule 8.2 of the Utah Rules of Professional Conduct. *Id.* ¶ 15.

13. The Utah Rules of Professional Conduct's limitations on the type and extent of negative statements attorneys may make personally about a judge or the judiciary and/or support by contributing financially to a third party advertising entity publishing such criticism of a judge or the judiciary do not violate the attorney's First Amendment constitutional rights to freedom of speech. Multiple courts have adjudicated such freedom of speech issues by balancing an attorney's First Amendment rights against the need to protect judges from false criticism. The First Amendment generally protects statements related to a public official's conduct, unless the statement is a maliciously false assertion. A determination of speaker malice requires a judicial finding that the speaker knew the statement was false, or made such statement in reckless disregard of its veracity. While the courts have not clearly defined "reckless disregard" of truth in adjudicating such issues, the "reckless" standard is generally understood to mean that the speaker made the statement with a high degree of awareness that the statement was false, or that the speaker had serious doubts as to the truth of the statement. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Statements of pure opinion that do not imply an undisclosed factual basis are First Amendment protected speech. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

14. In *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015), the petitioner, a Florida lawyer ("Yulee"), mailed and posted an on-line letter soliciting financial contributions to her campaign for judicial office. 191 L.Ed.2d at 581. Florida is one of 39 States, including Utah, where voters elect judges for retention elections. *Id.* at 579-80. To promote public confidence in the integrity of

the judiciary, the Florida Supreme Court adopted Canon 7C(1) of its Code of Judicial Conduct, which provides that judicial candidates "shall not personally solicit campaign funds ... but may establish committees of responsible persons" to raise money for election campaigns. *Id.* at 580-81. The Florida Bar disciplined Yulee for violating a Florida bar rule requiring candidates to comply with Canon 7C(1), which bans personal judicial candidate solicitation of campaign funds for elections. *Id.* at 581. Yulee contended that the First Amendment protects a judicial candidate's right to personally solicit campaign funds in an election. *Id.* at 581-82. Yet the Florida Supreme Court upheld the disciplinary sanctions, concluding that Canon 7C(1) is narrowly tailored to serve the State's compelling interest with respect to preserving impartial judicial adjudication of Florida litigation. *Id.* at 582. The United States Supreme Court affirmed the Florida Supreme Court's decision that enforcement of Canon 7C(1) did not violate the First Amendment of the United States Constitution. *Id.* at 584.

C. Other State Court Decisions

15. By adjudication of an ethics issue virtually identical to the issue this EOAC opinion decides, the Colorado Supreme Court stated in *In re Green*, 11 P.3d 1078 (Colo. 2000) that the legal basis for proving a violation of Rule 8.2 of the Colorado Rules of Professional Conduct, thus subjecting an attorney to discipline for statements criticizing a judge, is premised on a two-part standard, specifically:

(1) whether the disciplinary authority has proven that the statement was a false statement of fact (or a statement of opinion that necessarily implies an undisclosed false assertion of fact); and (2) assuming the statement is false, whether the attorney uttered the statement with actual malice-- that is, with knowledge that it was false or with reckless disregard as to its truth.

Id. at 1085. Similarly, the Virginia Supreme Court held that the Virginia Bar has the burden of proving two facts to show a violation of Rule 8.2 of the Virginia Rules of Professional Conduct: "First the Bar must establish that a lawyer made a statement about a judge or other judicial officer involving his or her qualification of integrity. Second, the Bar must prove that the statement was made with reckless disregard of its truth or falsity with knowledge that the statement was false." *Pilli v. Virginia State Bar*, 611 S.E.2d 389, 397 (Va. 2005).

D. Application of Applicable Rules and Cases to Requested EOAC Opinion

16. Based upon the above cited and discussed applicable rules and cases, a Utah attorney may lawfully and ethically "contribute" to an entity that engages in advocacy impacting

retention election of a Utah judge, meaning submit a comment to the entity about a Utah judge subject to a retention election. Such comment may lawfully advocate the confirmation or defeat of the judge in a retention election, provided the comment: (a) is not made with "reckless disregard for the truth," especially if the comment ignores obvious sources of truth; (b) is not malicious; and (c) avoids hostile, demeaning and humiliating words. Hypothetically, a permissible comment could be that a Utah attorney recommends Utah citizens voting in a judge retention election either should confirm or defeat the judge in his or her retention election based upon the judge's diligence, temperament, or public treatment of parties, witnesses and jurors.

17. Based upon the same applicable rules, cases and analysis summarized in the above paragraphs, a Utah attorney could lawfully contribute financially to an entity that advertises either for or against the retention of a Utah judge. Where the entity is the campaign committee established to support a judge's retention, the judge must "review and approve the content of all campaign statements and materials produced by his or her campaign committee before their dissemination." UCJC Rule 4.2(B)(3). Thus, any favorable comment will be reviewed and approved by the judge prior to its dissemination.

18. In cases of opposition to a judge, where the campaign quotes the attorney, the attorney will be subject to Rules 8.2 and 8.4 of the Utah Rules of Professional Conduct regarding truth or reckless disregard for the truth or falsity of his or her comment which the campaign disseminates. Where the attorney is contributing financially to a campaign against the judge, it is presumed (but not absolutely predictable) that in most cases, the attorney would not know of the specific comments the entity would publish and/or issue against a judge's retention. That likelihood is presumable unless the entity sought agreement, confirmation, and/or authorization from the attorney to issue the entity comment before it was issued. If the entity issues a negative comment against the judge subject to retention, even assuming the comment is malicious, the attorney is not and cannot be held responsible for an entity's comment of which the attorney had no knowledge and did not authorize. The entity is and presumably would be an independent speaker, and conceivably could be held liable for malicious and false statements. However, Rule 8.4(a) of the Utah Rules of Professional Conduct establishes that it is "professional misconduct for a lawyer to ... violate ... the Rules of Professional Conduct through the acts of another." So if the attorney did know that the campaign against the judge to which he was contributing financially would issue statements that were false or with reckless disregard for their truth or falsity, then the lawyer would be in violation of Rules 8.2 and 8.4 of the Utah Rules of

Professional Conduct.

19. The entity campaigning against a judge need not comply with the above-cited applicable Utah Rules of Professional Conduct, presuming the entity is not controlled by a Utah attorney, but must nonetheless comply with applicable First Amendment case law that protects free speech that is not malicious and false.

20. Based upon the applicable rules, cases and analysis summarized in the above paragraphs, an attorney could lawfully be an officer or employee of such an entity organization that advocates for the defeat of a Utah judge in his or her retention election provided: (a) the attorney is aware of the entity's proposed comments about a Utah judge's retention election before such comments are published and/or made publicly available; (b) the entity's comments comply with the above-cited rules and case law so that the comments are neither false nor malicious; and (c) the attorney/officer is authorized to preclude himself/herself and/or the entity from commenting about a Utah judge's retention election when such comments violate the Utah Rules of Professional Conduct, as summarized above.