

Utah Ethics Opinions

1995.

95-04. USB EAOB Opinion No. 95-04

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 95-04

Approved April 28, 1995

Issue: May a lawyer or a law firm enter a franchise agreement with a firm that provides marketing and other service arrangements?

Opinion: It is unethical for a lawyer or a law firm to enter into a franchise agreement when the franchisee is not in a partnership or professional corporation relationship with the franchisor. (fn1)

Analysis: This request was submitted by a solo practitioner who desires to enter a franchise arrangement with an out-of-state firm that provides a trade name, marketing and other service arrangements for franchisees. Because of the multiplicity of potential relationships or affiliations among law firms, this Opinion is limited to consideration of a "franchise" arrangement having as its essential element the marketing of legal services under a common trade name. We do not address the many issues that could arise if the franchisor had the ability through the agreement to prescribe methods and processes for the franchisee or otherwise affect the independent professional judgment of the lawyer. (fn2) We assume the franchise arrangement provides for lower operating costs without an impact on individual firm autonomy and that the relationship does not provide for a partnership or professional corporation arrangement between the franchisee and the franchisor. The franchisee firm and the franchisor firm will be marketed on letterhead, in law directories, etc., using a common trade name.

Although the subject of a law firm's entering into a franchise agreement is a matter of first impression for this Committee, the general theme of using a firm name that implies a misleading relationship is not new. (fn3) As a survey of other jurisdictions that have considered the question of franchising indicates, the application of Rules 7.5(a) and 7.1 of the Utah Rules of Professional Conduct is most appropriate. Rule 7.5(a) provides: "A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1." Rule 7.1 sets out that:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) Compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when it is the fact.

This Committee's Opinion No. 139 applied the rules above to a particular misleading firm name, but other jurisdictions have specifically applied analogues of Utah Rules 7.1 and 7.5(a) in determining that a franchise system as described above would be unethical.

The State Bar of Michigan Standing Committee on Professional and Judicial Ethics issued an opinion that "it is unethical for lawyers to offer or make an agreement to franchise a law firm name when the franchisees in fact are not in a partnership or professional corporation relationship with the franchisors." (fn4) The Michigan Bar determined that a franchise arrangement which facilitated the use of a trade name, common marketing plans and other services to the franchisee implied a partnership or professional corporation when none existed, and that the franchise arrangement, therefore, violated Michigan's Rule 7.5(d). (fn5)

Employing the same reasoning, the Michigan Bar subsequently found it unethical for specialty law firms with an "affiliation" to use a common letterhead trade name to "undertake matters in various specialties as needed without the high overhead costs incurred by large law firms." (fn6) For much the same reason the requesting attorney in this case seeks a franchise arrangement that can create an unjustified expectation regarding the lawyer's services in relation to what appears to be one firm. The 1994 Michigan opinion warned that even a disclaimer by separate firms on common letterhead regarding the actual nature of the relationship is inadequate to prevent the misleading inference that the lawyers are in one firm.

In a recent opinion addressing relationships between law

firms, the American Bar Association outlined concerns with such trends as networking, affiliating, and franchising. Concerning franchising, the ABA emphasized that:

Lawyers have an obligation not to mislead prospective clients as to what the lawyer is able to bring to bear on the client's matter in terms of the size of the firm, the resources available to the firm or the relationship between the firm and other law firms with which it is associated. . . . [i]f a law firm licenses its name to other firms, all firms so licensed must, in fact, operate as a single firm and be treated as part of a single firm for all purposes under the Model Rules. (fn7)

In such a network of franchisees, in contrast to associated or networked firms that retain their own identities, the ABA observed that "the use of the same name by all the firms in a network will effectively represent that they are all offices of one and the same firm." (fn8) As indicated in the 1994 Michigan opinion, even a disclaimer accompanying the letterhead is insufficient to prevent the franchise relationship from being misleading. (fn9)

In addition to the issues outlined above, other jurisdictions have expressed concerns about franchise-type arrangements. The bars of New York and New Jersey have expressed concerns that such a franchise arrangement may imply that a firm is in partnership with the franchisor and other franchisees when there is no lawyer licensed in the state with responsibility for the group.¹⁰ The New York opinion cited a previous ABA opinion, reading:

In any interstate partnership, association or employment relation, the most important requirement is that the local man must be admitted to the state and must have the ability to make and be responsible for making decision for the lawyer group. . . . Lawyers in different states associating themselves for the practice of law must not mislead the public. A partnership must not be implied where none exists, and it must always be clearly indicated after the name of each the limitations of their authority in the states where they have offices.¹¹

Finally, the New Jersey Supreme Court considered constitutional questions in upholding a state rule prohibiting an out-of-state firm from opening a New Jersey office under its name. Although the circumstances are somewhat different from the franchising arrangement contemplated by the requesting attorney in the case before us, the New Jersey court determined that the state rule prohibiting an out-of-state law firm from opening a New Jersey office under its own name did not invoke constitutional protection under the First Amendment (not protected commercial speech), the Commerce Clause, the Privileges and Immunities Clause, nor the Equal Protection Clause. (fn12)

In summary, a franchise arrangement in which a lawyer or firm is provided with a trade name, marketing and related services, as described by the requesting attorney and addressed in the opinions above, is inherently misleading because it implies to potential clients a partnership or professional corporation. Even a disclaimer strategically located on a letterhead is not enough to overcome this implication.

Footnotes

1. This Opinion concerns the franchising of a trade name for the practice of law. It does not address multiple law firms that retain their separate identities in marketing to the public, but also associate as a network for the referral of clients and indicate their association on letterhead, in law directories, etc.

2. *See, e.g.*, Utah Rules of Professional Conduct 2.1. Nor do we address the conflicts issue that could arise in such a relationship under Utah Rules of Professional Conduct 1.7, 1.8, 1.9 and 1.10.

3. Most recently, the Committee rendered the opinion that "[a] lawyer may not use '& Associates' as part of a firm name where no attorney associates are currently employed by that firm." Utah State Bar Ethics Op. No. 139, 1994 WL 579849 (Jan. 27, 1994). *See also* Utah State Bar Ethics Op. No. 34 (Dec. 30, 1976) (non-partner office-sharing, using a common "firm" name and common telephone number on letterhead, is not permitted); Utah State Bar Ethics Op. No. 86 (Jan. 27, 1989) (improper for solo practitioners to use common letterhead that "in any way implies that they are partners.").

4. State Bar of Mich. Standing Comm. on Professional and Judicial Ethics, Op. No. RI-130, at 2 (April 27, 1992).

5. The Michigan Bar found such a franchise arrangement with the implication of a partnership or professional corporation to be misleading, and that "[c]onsumers of legal services have a right to understand what individual or entity they can look to for the provision of legal services and who they can hold responsible for the manner in which services are provided." *Id.* at 1 (citation omitted).

6. State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Op. No. RI-200, at 1 (Mar. 29, 1994).

7. ABA Formal Op. No. 94-388, ABA/BNA Lawyer's Manual on Professional Conduct 1001:241.

8. ABA Formal Op. No. 94-388 provides that if firms retain their own separate identities, but represent that they are an "associated" or "affiliated" firm of another firm, this form of networking is permissible under Rules 7.1 and

7.5(a) provided the clients receive "information that will tell them the exact nature of the relationship and extent to which resources of another firm will be available in connection with the client's retention of the firm that is claiming the relationship." *Id.*

9. State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Op. No. RI-200, at 1 (Mar. 29, 1994).

10. *Rosenberg v. Johns-Manville Sales Corp.*, 416 N.Y.S.2d 708 (N.Y. Sup. Ct., Special Ct. 1979); *In re Professional Ethics*, 444 A.2d 1092 (N.J. 1982).

11. 416 N.Y.S.2d at 710 (citations omitted).

12. 444 A.2d at 1092.

Rules Cited:

7.17.5