Utah Ethics Opinions

1996.

96-10. USB EAOC Opinion No. 96-10

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 96-10

Approved December 6, 1996

Issue: May an attorney employ a paralegal who owns a proprietary interest in a collection agency the attorney represents as a client?

Opinion: If there is no violation of a statute, including Utah Code Ann. § 78-51-27, and if there is no sham arrangement in which the paralegal would nominally own an interest in a collection agency that is in reality owned by the attorney, the Rules of Professional Conduct do not prohibit an attorney from employing a paralegal who owns an interest in a collection agency the attorney represents as a client. The attorney's conduct within such an employment relationship would at all times be governed by the requirements of the Rules of Professional Conduct, including Rule 5.3, "Responsibilities Regarding Nonlawyer Assistants."

Facts: An individual who is not an attorney holds an ownership interest in a collection agency that is duly registered and bonded with the State of Utah. This individual has experience in collection matters based in part on having formerly been employed by an attorney. The same attorney desires to re-employ the individual as a paralegal, represent the collection agency as its attorney, and assign the owner-paralegal to assist the attorney in providing legal services to the collection agency.

Analysis: The issue presented is related to an issue previously considered by the Utah State Bar: whether an attorney simultaneously may own an interest in a collection agency and represent the collection agency as a client. Utah Ethics Advisory Opinion No. 45, issued in 1978, held that an attorney could not represent a collection agency in lawsuits to collect on assigned accounts if the attorney owned stock in or had an interest in the collection agency.

On July 29, 1993, Utah Ethics Advisory Opinion No. 111 reconsidered Opinion No. 45 in light of cases and rule changes that loosened the restrictions on lawyer solicitation and advertising. Opinion No. 111 determined, in view of these changes, that "the ethical propriety of a collection agency owner-attorney cannot revolve around the issue of what kind of solicitation and advertising is allowed under the Rules of Professional Conduct. Rather, the issue must now be examined from the perspective of whether there is an improper conflict of interest." After determining that the facts presented involved no inherent conflict interest, Opinion No. 111 reasoned that "Opinion No. 45's interest-ownership restriction on an attorney who represents a collection agency was based on a legal premise that has been overruled since that opinion was issued. Because the Committee can identify no other ethical offense in the relationship, the Committee finds that it is not *per se* unethical for an attorney who has a financial interest in a collection agency to represent the agency in lawsuits to collect on assigned accounts."

Opinion No. 111 noted, however, that there might be legal constraints on the owner-attorney imposed by statute, in particular Utah Code Ann. § 78-51-27(1):

An attorney or counsel shall not: (1) directly or indirectly buy, or be in any manner interested in buying or having assigned to him, for the purpose of collection, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

Opinion No. 111 therefore concluded that, "Subject to any legal constraints imposed by Utah Code Ann. § 78-51-27(1), it is not *per se* unethical for an attorney who has a financial interest in a collection agency to represent the agency in lawsuits to collect on assigned accounts."

On May 26, 1994, after an extensive study of various aspects of attorneys' relationships with collection agencies, the Board of Bar Commissioners of the Utah State Bar approved eight recommendations of the Collection Task Force of the Utah State Bar. (fn1)

The Collection Task Force's Recommendation No. 5 discussed the question of an attorney's simultaneous ownership of an interest in a collection agency and representation of the collection agency as a client. The Task Force's discussion of this question is set forth in full below:

Recommendation 5: Lawyers may own a proprietary interest in collection agencies but may not concurrently represent the agency in civil litigation of creditor assignments.

Question: Doesn't Ethics Advisory Opinion No. 111, approved by the Bar Commission on July 29, 1992 [sic], reverse Ethics Advisory Opinion No. 45 and allow a lawyer to have a financial interest in a collection agency and

represent the agency in assigned accounts?

Answer: It was the opinion of the Utah Ethics Advisory Committee that the U.S. Supreme Court's opinions beginning with *Bates v. Arizona* and in particular *Shapero v. Kentucky Bar Association* made the reasoning of Opinion No. 45 (1978) inapplicable today. However, that Committee properly referred to U.C.A. § 78-51-27(1) (1953) which prohibits a lawyer from suing on an assigned debt but offered no legal opinion. However, the Bar Commission has considered § 78-51-27 and has modified Opinion 111 "to the extent that it is inconsistent with U.C.A. § 78-51-27(1)(1953)." Thus lawyers are prohibited from agency ownership and legal representation of the agency by statute. A lawyer engaging in such conduct violates Rule 21(a) of the Rules of Integration which states "It is a duty of an attorney and counselor: to support the Constitution and the laws of the United States and of this state." It is therefore the opinion of the Office of Attorney Discipline that a violation of Rule 21(a) noted above would also be a violation of Rule 8.4(d) of the RPC which states "It is professional misconduct for a lawyer to (d) engage in conduct that is prejudicial to the administration of justice." (fn2)

The Bar Commission's 1994 determination was not based on a disagreement with Opinion No. 111's analysis of applicable conflicts and solicitation provisions of the Utah Rules of Professional Conduct. Instead, the Bar Commission's determination was based on its interpretation of Utah Code Ann. § 78-51-27(1), which the Bar Commission read as directly prohibiting an attorney from both owning an interest in a collection agency and representing the collection agency as a client. The Collection Task Force's recommendations illustrate that the relationship between attorneys and collection agencies requires special vigilance by attorneys.

We first note that Utah Code Ann. §§ 78-51-27(1) and (2) provide *legal* constraints on the attorney's actions and relationships. As we have already pointed out, § 78-51-27(1) has been found by the Utah State Bar to preclude an attorney's direct ownership of a collection agency that he represents. This finding does not appear to be directly applicable to the case before us. Second, whether Utah Code Ann. § 78-51-27(2) (fn3) has any applicability to the current question is also a legal issue.

Rule III(a)(3) of the Rules of Procedure of the Ethics Advisory Committee of the Utah State Bar provides that the Committee "shall not respond to requests . . . [f]or a legal opinion, rather than an ethics opinion." Rule IV(a) of the Committee's Rules of Procedure provides that the Committee "shall not interpret state or federal law except as necessary to the opinion." Whether an attorney may, under Utah Code Ann. § 78-51-27(1) or § 78-51-27(2), simultaneously represent a collection agency and employ as a paralegal an owner of the collection agency is a legal question that is beyond the authority of the Committee to determine. If the subject relationship violates § 78-51-27 or any other statute, it is, of course, unethical for an attorney to employ as a paralegal an owner of a collection agency the attorney represents as a client.

This opinion will address, *however*, the ethical considerations of the narrow facts before the Committee, which do not suggest a sham arrangement that would permit the attorney to do indirectly what would be directly proscribed under § 78-51-27. In the absence of a statutory prohibition, nothing in the Utah Rules of Professional Conduct prohibits *per se* an attorney from employing, as a paralegal or otherwise, an individual who holds an ownership interest in an organization the attorney represents as a client.

Conduct within the proposed relationship would be generally governed by Rule 5.3 of the Utah Rules of Professional Conduct, "Responsibilities Regarding Nonlawyer Assistants." (fn4)

The Official Comment to Rule 5.3 states:

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Under Rule 5.1, law firm partners and supervisory attorneys must make reasonable efforts to ensure that subordinate lawyers conform to the Rules of Professional Conduct. Because not every rule applies to non-lawyer assistants, Rule 5.3 requires that attorneys make reasonable efforts to ensure that the conduct of their non-attorney assistants is "compatible with" the professional obligations of the attorney. The attorney's conduct within the proposed relationship should at all times comply with the requirements of Rule 5.3.

Rule 5.3(c) states: "A lawyer shall be responsible for conduct of such a person [a nonlawyer employee] that would be a violation of the rules of professional conduct if engaged in by a lawyer if: (1) the lawyer orders, or with knowledge of the specific conduct, ratifies the conduct

involved." Under the Bar Commission's interpretation of Utah Code Ann. § 78-51-27(1), an attorney may own a proprietary interest in a collection agency but may not concurrently represent the agency in civil litigation of creditor assignments. As provided in Rule 5.3(c), an attorney could not ethically order a paralegal/employee to engage in a sham arrangement in which the paralegal would nominally own an interest in a collection agency that is in reality owned by the attorney. Likewise, an attorney could not ethically ratify the conduct of an employee/paralegal who engaged in such an arrangement.

However, in the absence of the violation of a statute or a sham arrangement, nothing in the Utah Rules of Professional Conduct prohibits an attorney from employing a paralegal who owns an interest in a collection agency. Utah Code Ann. § 78-51-27(1), and the Bar Commission's interpretation of that statute, pertain to the conduct of attorneys. Although an attorney may not ethically use a paralegal to accomplish what the lawyer could not do directly, the specific facts presented do not suggest that such is the case here. Accordingly, on the specific facts presented, Rule 5.3(c) does not prohibit the proposed employment relationship. Conduct of the attorney within the relationship is governed by the requirements of the Rules of Professional Conduct, including Rule 5.3.

Footnotes

1. *See* "Bar Commission Accepts Recommendations of Collection Task Force," 7 Utah B.J., No. 8, at 40 (Oct. 1994).

2. *Id.* at 41-42 (emphasis in original; footnotes omitted).

3. Utah Code Ann. § 78-51-27(2) provides:

An attorney or counselor shall not: . . . (2) by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person as an inducement to placing, or in consideration of having placed, in his hands or in the hands of another person a demand of any kind for the purpose of bringing an action thereon or of representing the claimant in the pursuit of any civil remedy for the recovery thereof; but this subdivision does not apply to any agreement between attorneys and counselors to divide between themselves the compensation to be received.

4. With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for the conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule Cited:

5.3