

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 98-08

Approved September 11, 1998

Question: May a law firm wholly own an accounting-practice subsidiary that is staffed by employees other than the firm's lawyers and would perform services for the lawyer's clients and others?

Response: Yes, although the law firm will be subject to the Utah Rules of Professional Conduct with respect to the provision of these law-related services in certain circumstances.

Analysis: In 1994 the American Bar Association addressed the general issue of attorneys who are involved with "law-related" services, such as those raised in this inquiry. After much debate, the ABA determined that it was not unethical for lawyers to offer non-legal services in conjunction with their law practices, but that the lawyers should be subject to the Rules of Professional Conduct with regard to those services. (fn1)

Model Rule 5.7 provides that a lawyer is subject to the Rules of Professional Conduct if the lawyer provides the law-related services in circumstances that are not distinct from the legal services offered or when the lawyer controls the entity that provides the law-related services and has not made reasonable efforts to inform clients that they are not receiving legal services and thus are not protected by an attorney-client relationship.

Although the Utah Supreme Court has not adopted Model Rule 5.7, its provisions are not inconsistent with the existing Utah Rules of Professional Conduct and our Ethics Advisory Opinions. Rules 5.1 and 5.3, for example, provide that a lawyer is responsible for the ethical conduct or misconduct of lawyers and non-lawyers whom the lawyer directs or controls in the context of offering legal services. Rule 8.4(a) prohibits a lawyer from directing others to do what the lawyer cannot ethically do herself. The controlling concept is that the lawyer is responsible for the ethical conduct or misconduct of others when the lawyer is in control of their actions, and cannot abrogate that responsibility merely by delegating the action to a

non-lawyer.

Several Utah Ethics Advisory Opinions conclude that a lawyer is held to the ethical standards of a lawyer when performing non-legal services. (fn2) Utah Ethics Opinion 151 (fn3) in particular holds that the Rules of Professional Conduct will apply to a lawyer acting as an appraiser, unless the lawyer makes clear to the client, in writing, that she is not providing legal services and that an attorney-client relationship is not established.

One basis for those opinions is that a lay person receiving advice and service from a lawyer may not distinguish between legal and non-legal services and may expect to receive the protections of an attorney-client relationship-protections of confidences and against conflicts, for example.

That a lawyer is responsible for the ethical conduct or misconduct of those whom she controls and is held to the standards of the Rules of Professional Conduct when acting as a non-lawyer under certain circumstances are the concepts that underlie Model Rule 5.7.

Other states that have not adopted Model Rule 5.7 have allowed lawyers to provide law-related services under strict guidelines designed to protect the clients receiving the non-legal services. (fn4) While we may not agree with the particular restrictions imposed, we agree with the prevailing concern of protecting the clients receiving the law-related services.

Therefore, in Utah, a lawyer or law firm may ethically own an accounting firm that provides services to the lawyer's clients and to the public. (fn5) We note that an accounting firm fits the Model Rule 5.7 definition of law-related services as those that (a) might reasonably be performed in conjunction with, and in substance are related to, the provision of legal services, and (b) are not prohibited as the unauthorized practice of law when provided by a non-lawyer.

The lawyer will be responsible for the ethical conduct of the employees of the related entity, however, unless the lawyer has made reasonable attempts to inform the clients of the law-related services that they are not receiving legal services and are not protected by the attorney-client relationship. Such attempts to protect the clients are dependent upon the facts, but may include:

Providing written notice of the lawyer's interest in the wholly owned entity before providing the law-related services, with written acknowledgement of the notice by the

client.

Keeping the offices of the lawyer and the wholly owned accounting firm physically separate.

Providing disclaimers in any marketing or advertising.

Maintaining separate letterhead, or providing clear notice of the relationship between the lawyer and the entity. (fn6)

In addition, the lawyer should remember that the Rules of Professional Conduct will apply to the lawyer's own actions, regardless of the actions of the wholly owned accounting firm. For example, the lawyer must take care not to disclose confidential information to the accounting firm regarding a joint client to which the accounting firm is not otherwise entitled. Neither may the lawyer accept value for referring clients to the accounting firm in violation of Rule 7.2(c), nor may the lawyer share fees with the accounting firm in a manner that violates Rule 5.4. The lawyer must be particularly careful of the potential of conflicts of interest that may arise between the lawyer, the client and the accounting firm. The lawyer should carefully review each of the Rules to determine which may cause difficulty under these circumstances.

Footnotes

1.(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in para-graph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protection of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

2. Responsibilities Regarding Law-Related Services, ABA Model Rules of Professional Conduct 5.7 (1996).

3. See Utah Ethics Advisory Op. 5 (Utah St. Bar Jan. 13, 1972) (attorney selling life insurance is held to the ethical standards of an attorney in both professions); Utah Ethics Advisory Op. 17 (Utah St. Bar Nov. 28, 1973) (lawyer engaged in a real estate business is held to the ethical

standards of a lawyer in both occupations); Utah Ethics Advisory Op. 30 (Utah St. Bar Oct. 14, 1976) (attorney who is president of a title company must comply with the ethical rules of a lawyer in both occupations); Utah Ethics Advisory Op. 108, 1990 WL 600110 (Utah St. Bar) (attorney who is a licensed CPA may so indicate on letterhead but must be alert to protect the attorney-client privilege).

4. Utah Ethics Advisory Op. 151, 1994 WL 631268 (Utah St. Bar).

Penn. Ethics Advisory Op. No. 93-01 (1993) (lawyer may own an adoption agency but must get consent from the clients of the agency before providing legal services to them, must inform the clients about the different roles played by the lawyer and the adoption agency and the potential conflict that may arise because the lawyer could potentially represent the agency, and must keep the law offices and adoption agency offices physically separate); N.J. Ethics Advisory Op. No. 657 (1992) (lawyer may provide law-related services only if they are kept in a physically distinct location and if there is no joint advertising or marketing, and the lawyer may refer clients to the law-related business only if the lawyer's interest is disclosed in writing and signed by the client, and the client is advised she can go elsewhere for the services and is urged to consult with independent counsel regarding the decision to accept law-related services from the lawyer); S.C. Ethics Advisory Op. No. 93-05 (1993) (a lawyer may refer clients to a wholly owned accounting firm, but must be aware of the danger of the unauthorized practice of law, and the lawyer may not provide value—capital, man-agement advice, employee compensation, referrals—in exchange for referrals).

5. Although certain aspects of this Opinion mirror the provisions of Model Rule 5.7, we draw these conclusions from an analysis of the existing Utah Rules of Professional Conduct. We do not necessarily endorse Model Rule 5.7; adoption of any such rule is the purview of the Utah Supreme Court.

6. See Utah Ethics Advisory Op. 131, 1993 WL 750907 (Utah St. Bar) (firm may list on its letterhead a non-lawyer CPA if the letterhead is otherwise not misleading).

Rule Cited:

ABA Model Rule 5.7