

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 97-03

Approved April 25, 1997

Issue: May an attorney engage in a direct solicitation, by mail and for pecuniary gain, that advertises mediation and arbitration services?

Opinion: A solicitation that is limited to alternative dispute resolution services is not prohibited, provided that the solicitation makes it clear to all parties that the alternative dispute resolution services are not legal services and that no attorney-client relationship will be established.

Analysis: An attorney proposes to engage in providing mediation and arbitration services and advertises those services by mail. The first sentence of the attorney's letter to a prospective client would read: "Recently, you entered into legal proceedings with another party in connection with a dispute which you have." The solicitation recites a number of disadvantages to litigation and compares them with the advantages of alternative dispute resolution (ADR). The solicitation also identifies the attorney as a "licensed Attorney with 14 years of experience in business, employment and contracting law as well as litigation experience," and it explains the ADR services that are available through the attorney's business.

Under some circumstances, the Utah Rules of Professional Conduct prohibit attorneys from making a direct, in-person solicitation of clients if done to "solicit professional employment." (fn1) The mailing in question is a written communication by an attorney, directed to specific individuals who are parties in pending litigation. However, our inquiry into whether such a letter is governed by Rule 7.3 turns on whether the "professional employment" the attorney seeks includes the type of service this rule intended to regulate. Because we conclude it is not, we need not reach the question of whether the letter would otherwise violate Rule 7.3.

Under Utah statute, neither formal legal education nor membership in the Utah State Bar is required to provide mediation, arbitration or similar services. (fn2) It follows that ADR services are not considered by the Utah

Legislature to be legal services or the practice of law.

The drafters of Rule 7.3 apparently intended that the direct solicitation described in the rule be prohibited only when legal services are solicited. In this regard, the language of Rule 7.3 might seem ambiguous, as it prohibits an attorney from soliciting "professional employment from a prospective client" without including such phrases as "practice of law" or "legal services." However, the comments to Rule 7.3 and the context of the rule indicate an intent that the prohibition be limited to the solicitation of legal services in a direct relationship where the attorney, as advocate, represents the client, and that the rule's reference to "professional employment" would not be construed to include non-legal services such as arbitration and mediation.

We must, however, make two cautionary comments. First, because the solicitation at issue here was conducted by an attorney, we call attention to Utah Ethics Advisory Opinion No. 151. (fn3) That opinion reviewed the conduct of a lawyer who had been appointed by an insurance company as an independent appraiser of the property of an insured of the company. The lawyer also provided legal services for the insurance company on unrelated matters. In holding that the lawyer's conduct as an appraiser did not constitute legal services subject to the Rules of Professional Conduct, the opinion stated that:

If the lawyer does not make it clear to all parties who may be otherwise misled that the appraisal services are not legal services and that a client-lawyer relationship is not being established, the lawyer will be governed by the Rules of Professional Conduct in the provision of appraisal services to the extent the insurance company client of the insured might reasonably believe that a client-lawyer relationship exists between the lawyer and the insurance company for the performance of the appraisal services.

Here, the direct solicitation letter is being sent to parties involved in litigation. Many of these parties may be particularly vulnerable to the implication that, because an attorney is offering alternative dispute resolution services, they are being asked to employ an attorney for legal services under which an attorney-client relationship would be established. Unless such an implication is clearly dispelled, the attorney's services in the alternative dispute resolution context would be subject to the Rules of Professional Conduct.

Second, to the extent that the mailing at issue would be sent to persons involved in an ADR program under the auspices of a Utah court, it would be subject to the Utah Rules of Court-annexed Alternative Dispute Resolution (the

"ADR Rules"). The ADR Rules provide a Code of Ethics for ADR Providers, under which "[a] provider should not directly contact a party to solicit the selection of that provider in a particular case if the party is represented by counsel." (fn4)

The ADR Rules have been established by the Judicial Council and are administered by the Administrative Office of the Courts under the supervision of the Director of Dispute Resolution Programs. (fn5) While a violation of the ADR Rules may not, of itself, constitute a violation of the Rules of Professional Conduct, we must caution persons issuing solicitations in the ADR context to be mindful of the rules governing ADR providers-particularly in connection with Utah's Court-annexed ADR program. (fn6)

Conclusion: Provided that the proposed mailing is modified to make it clear to all parties that legal services are not being offered and that no attorney-client relationship will be established, the mailing would not violate the Utah Rules of Professional Conduct's limitations on direct solicitation of prospective clients for legal services. The person initiating the mailing should also decide whether the Utah Rules of Court-annexed Alternative Dispute Resolution apply to the proposed mailing.

Footnotes

1. A lawyer may not solicit, in-person, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "in-person" includes in-person and telephonic communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Utah Rules of Professional Conduct 7.3(a).

2. Applicants for certification as an alternative dispute resolution provider shall:

(1) submit an application in a form as prescribed by the division; (2) pay a fee as determined by the department under Section 63-38-3.2; (3) be of good moral character; and (4) complete a program of education or training, or both, in ADR or have demonstrated sufficient experience in ADR, as determined by the division in a collaboration with the board.

Utah Code Ann § 58-39a-5 (1996). In addition, Utah Code Ann § 78-31b-5(3) provides:

The rules of the Judicial Council shall include provisions: .

. . .

(h) to establish the qualifications of ADR providers for each form of ADR procedure including that:

(i) an ADR provider may, but need not be, a certified ADR provider pursuant to Title 58, Chapter 39a, Alternative Dispute Resolution Providers Certification Act; and

(ii) formal education in any particular field may not, by itself, be either a prerequisite or sufficient qualification to serve as an ADR provider under the program authorized by this act; . . .

3. 1994 WL 631268 (Utah St. Bar).

4. Utah R. Court-annexed ADR, Canon I, ¶(h)(1995).

5. Utah Code Ann. § 78-31b-5(1)(1996).

6. *See also* Utah Rules of Professional Conduct 8.4(d), under which it is professional misconduct to "[e]ngage in conduct that is prejudicial to the administration of justice."

Rule Cited:

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