Ethics Advisory Opinion Committee
Ethics Opinion 22-02
Issued March 7, 2022

ISSUES

1. Now that the Utah Rules of Professional Conduct have been altered regarding "Information About Legal Services" by deleting Rules 7.2 through 7.5 of the Utah Rules of Professional Conduct and substantially rewriting the remaining Rule 7.1, what prior Opinions of the Ethics Advisory Opinion Committee ("**EAOC**") are still applicable? Which Opinions can no longer be relied upon?

2. Now that the Utah Rules of Professional Conduct have been altered regarding paying for referrals and fee-sharing with nonlawyers (Rule 7.2 and Rule 5.4 of the Utah Rules of Professional Conduct), what prior Opinions of the EAOC are still applicable? Which Opinions can no longer be relied upon?

OPINION

3. Opinions that relied upon communication being "false or misleading" are still applicable. Opinions that concluded certain arrangements were not fee sharing with nonlawyers or paying for referrals are still applicable. Opinions that disapproved of arrangements because they involved paying for referrals or fee-sharing with nonlawyers should no longer be relied upon, as the proposed arrangements might be permitted by the Utah Supreme Court under Standing Order No. 15. Opinions that disapproved of in-person solicitation should no longer be relied upon as in-person solicitation is no longer prohibited, but coercions, duress and harassment continue to be prohibited.

DISCUSSION

Communications Regarding the Lawyer

4. Rule 7.1 of the Utah Rules of Professional Conduct has long provided that "communications" about a lawyer or the lawyer's services must not be "false or misleading." Utah R. Prof. Cond. 7.1(a). That standard remains the guiding light under the rewritten Rules. "Firm names," previously addressed by Rule 7.5, "letterhead and professional designations are communications concerning a lawyer's services." Utah R. Prof. Cond. 7.1 cmt. [7].

5. The following Opinions were based upon the prohibition against "false or misleading" communications and **continue to be applicable:**

- Opinion 113—Provided that the statement is not false or misleading, a lawyer may list him or herself as a CPA.
- Opinion 138—It would be false or misleading and therefore improper for a solo practitioner who used to have associates to continue to use the name "& Associates."
- Opinion 95-04—It would be false or misleading and thus improper for a lawyer or firm to enter into a franchise agreement with a firm that provides a trade name, marketing and other services for franchisees. However, such an arrangement might be approved under revised Rule 5.4 through specific authorization by the Utah Supreme Court.
- Opinion 96-14—Provided an attorney makes no false or misleading statements, the attorney may form a partnership with an out-of-state attorney or a foreign attorney.
- Opinion 00-02—It would be false or misleading for an attorney who is an inactive attorney in another state to indicate that that attorney is "also admitted" in the other state.

- Opinion 00-07—It would be misleading and therefor improper for lawyers who participate in an "association" of independent practitioners (which is not a firm) of lawyers licensed to practice in various foreign countries to use joint letterhead.
- Opinion 01-07—It is not a "false or misleading" communication for a lawyer or law firm to use a trade name such as "Legal Center for the Wrongfully Accused" provided: (1) the firm actually represent clients who claim to be in the category referenced; and (2) the firm uses the trade name uniformly across those clients.
- Opinion 03-03—So long as the ad is not false or misleading, a lawyer may advertise representation in Social Security hearings where paraprofessionals conduct the hearings.
- Opinion 04-03—It is not a "false or misleading" communication for a firm to use the moniker "& Associates" when the only other attorneys in the firm are "of counsel" or working on a contract basis, provided these other lawyers "regularly spend the majority of their working time on legal matters for the firm."
- Opinion 09-01—As long as the advertising is not false or misleading, testimonials, dramatizations and fictionalized representations may be used in advertising.
- Opinion 14-04—To avoid false and misleading communication, a firm may claim a "super" or "best" rating only if the comparing organization made an appropriate inquiry into the lawyer's fitness, the lawyer does not pay to receive the rating itself, the comparing organization's methodology is fully disclosed and available to the public and the communication disclaims the approval of the Utah Supreme Court and/or the Utah State Bar. Likewise, the factual basis for the rating must be verifiable. Paying an entity to rank one as "super" or "best" would also continue to be "false and misleading" in

violation of Rule 7.1 of the Utah Rules of Professional Conduct. (See below regarding Rule 7.2).

- Opinion 18-01—In order to comport with the prohibition against false or misleading communications, a firm may continue to include the name of a founding partner who is an elected legislator in a part-time legislature provided the lawyer "regularly engages in law practice when the legislature is not in session," but if the lawyer spends his out-of-session time working almost exclusively on legislative matters, the firm may not include his name.

In-Person Solicitation of Clients

6. Prior versions of Rule 7.3 of the Utah Rules of Professional Conduct prohibited in-person approaches to soliciting clients, with some exceptions. The current Rules do not prohibit in-person solicitation. However, Rule 7.1(b) provides that a lawyer "shall not interact with a prospective client in a manner that involves coercion, duress, or harassment." Utah R. Prof. Cond. 7.1. Comment [6] to Rule 7.1 provides: "In order to avoid coercion, duress, or harassment, a lawyer should proceed with caution when initiating contact with someone in need of legal services, especially when the contact is 'live,' whether that be in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection."

7. Accordingly, **the following opinion is withdrawn as follows:**

- Opinion 99-04—Presented seven scenarios regarding in-person solicitation none of which involved coercion, duress or harassment. The Opinion is withdrawn.

Paying for Referrals, Sharing Legal Fees with Nonlawyers

8. Prior versions of Rule 7.2(f) of the Utah Rules of Professional Conduct provided: "A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising permitted by these Rules and may pay the usual charges of a lawyer referral service or other legal service plan." Rule 7.2 has been withdrawn in its entirety. Similarly, prior versions of Rule 5.4 provided that "a lawyer or law firm shall not share legal fees with a nonlawyer," with certain limited exceptions. Rule 5.4 provides that "a lawyer may practice law with nonlawyers . . . provided that the nonlawyers or the organization has been authorized as required by Utah Supreme Court Standing Order No. 15. . ." Comment [3] to Rule 5.4 provides:

> Paragraph (c) permits individual lawyers or law firms to pay for client referrals, share fees with nonlawyers, or allow third party retention. In each of these instances, the financial arrangement must be reasonable, authorized as required under Supreme Court Standing Order No. 15, and disclosed in writing to the client before engagement and before fees are shared. Whether in accepting or paying for referrals, or fee-sharing, the lawyer must protect the lawyer's professional judgment, ensure the lawyer's loyalty to the client, and protect client confidences.

9. In light of these changes, the following Opinions should be **amended or withdrawn as follows**:

- Opinion 100—Disapproved a collection agency paying a lawyer a flat monthly fee to handle all cases and retaining court-ordered lawyers' fees that exceeded that flat amount. Under the current rules such an arrangement might be permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.

- Opinion 97-11—Disapproved financing the cost of a case by borrowing money from a nonlawyer pursuant to a non-recourse promissory note where the note was secured by the attorney's interest in the contingent fees as impermissible fee sharing with a nonlawyer. Under the current rules such financing arrangements might be permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.
- Opinion 00-03—Disapproved a lawyer and real estate title officer forming a business partnership to challenge real estate taxes. Under the current rules such a business partnership might be permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.
- Opinion 01-02—Provided that an attorney may not reimburse the client for the referral fee the client paid to a referral service given Rule 7.2. Under the current rules such reimbursement might be permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.
- Opinion 02-04—Disapproved an attorney-CPA contemporaneously practicing law and accounting out of the same office. Under the current rules such an arrangement might be permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.
- Opinion 07-01—Provided that an attorney could not purchase the exclusive right to referrals from an organization. Under the current rules such a purchase might be permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met, and provided there

was no "false or misleading communication" as a result of the exclusive referral arrangement.

- Opinion 12-03—Prohibited a community association management company from allowing its in-house attorney to do compensated legal work for others. Under the current rules such an arrangement might be permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.
- Opinion 14-02—Disapproved of an attorney paying a marketer for referrals where the payment was a percentage of fees paid to the attorney. Under the current rules such a payment might be permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.
- Opinion 14-03—Disapproved of reciprocal referral agreements between two lawyers or two firms as giving something of value for a referral. Under the current rules such a reciprocal referral agreement could be permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.
- Opinion 14-04—In part disapproved of paying a public figure or celebrity to endorse the lawyer. Under the current rules such an arrangement might be permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.
- Opinion 17-05—Disapproved a referral service receiving an agreed-upon fee once the client's case was accepted. Under the current rules such an arrangement might be

permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.

- Opinion 18-05—Disapproved a Registered Investment Advisory firm and an attorney partnering together to do legal and estate planning work for clients. Under the current rules such an arrangement might be permitted if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.

10. One opinion regarding funding of legal fees **is still applicable:**

- Opinion 13-05—Disapproved of an on-site fee/retainer funding program based on conflicts of interested prohibited by Rule 1.7 and 1.8 as well as the provisions of Rule 5.4 that prohibit a third party directing an attorney's legal work. There have been no changes in these provisions and this Opinion should continue to be applicable.

11. Other Opinions permitted various arrangements as **not** impermissibly sharing attorneys' fees with a nonlawyer, or impermissibly partnering with a nonlawyer, or impermissibly paying referral fees. These Opinions **continue to be applicable:**

- Opinion 111—Concluded that it was permissible for an attorney with a financial interest in a collection agency to represent that agency.
- Opinion 139—Concluded that a law firm's nonlawyer employee could be compensated based on a percentage of the gross income of the firm provided the compensation was not tied to the receipt of particular fees. Under the current rules the proviso might be eliminated if approved under Supreme Court Standing Order No. 15 and the other requirements of Rule 5.4 (reasonable, disclosed to client) were met.

- Opinion 96-08—Concluded that it was permissible for a lawyer to represent a nonlawyer to collect a "finder's fee" for the nonlawyer client.
- Opinion 98-08—Concluded that a law firm may own an accounting-practice subsidiary staffed by nonlawyers who provide services to the lawyer's clients, but noted that the Rules of Professional Conduct may apply to those service in accordance with Rule 5.7.
- Opinion 02-01—Concluded that it was permissible for a lawyer to finance litigation costs through a loan from a third-party lender where the lawyer is obligated to repay the loan and the client is obligated to reimburse the lawyer for these costs.
- Opinion 02-03—Concluded that it was permissible for an insurance defense attorney to comply with the insurance company's guidelines provided it did not impair the lawyer's independent professional judgment in representing the insured.
- Opinion 02-07—Concluded that it was permissible for a lawyer to hire a paralegal as an independent contractor and compensate the paralegal based on a percentage of the lawyer's fees provided the paralegal does not control the lawyer's professional judgment.