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Timothy Shea
Senior Staff Attorney
Administrative Office of the Courts
450 South State Street
Salt Lake City, UT 84114

*Re: Proposed Change to Rule 14-504*

Dear Mr. Shea:

I have posted this opinion on the Court's website, but, because of its length and the inclusion of a redlined proposal at the end (which the comment function on the website will not accommodate), I am sending my comment in hard-copy form as well.

The Bar's petition to rectify the situation in which Utah attorneys have been, for the past five years, unable to rely on the opinions issued by the Ethics Advisory Opinion Committee is laudable. An attorney who takes an action (or forgoes action) on the basis of the considered opinions of that Committee should not be vulnerable to prosecution by the Office of Professional Conduct if it happens to disagree with a Committee opinion.

The Bar's proposed language purports to resolve the problem and provide a safe harbor to lawyers who rely on the Committee's opinions. The petition appears to intend that a lawyer may rely upon a Committee opinion if the lawyer's behavior is addressed by an opinion that has not been withdrawn, superseded, overruled or amended.

However, the Bar's petition and, more particularly, the proposed rule contain potentially problematic language requiring that an opinion that a lawyer seeks as a safe harbor "must *expressly* recognize and approve the lawyer's conduct" (emphasis in Petition). This could reasonably be interpreted by an aggressive prosecutor or Ethics and Discipline Panel as requiring a strict "all fours" congruence for the lawyer's situation vis-à-vis that in an otherwise applicable ethics opinion. It might even

be interpreted as requiring that the lawyer request and obtain an opinion specific to that attorney from the Committee in order to provide protection. Indeed, the wording in the proposed rule is most troublesome, as the lawyer is only protected for an "act that was expressly approved" by an ethics opinion.

A plain-English interpretation of "express approval" would be that the lawyer would be required to seek direct approval for the conduct in question. But, this would eviscerate the rule and put Utah lawyers in little better position than they are now. It is often impractical to seek "express approval" for an action that may not wait for the several months that might be required for the Committee to process a request. A lawyer whose conduct is reasonably within the ambit of a opinion should not have to seek ratification of his/her specific situation.

If this interpretation is *not* the intent of the Bar's petition (and, it is my understanding that it is *not*), the language of the proposed rule should be modified to make it clear that the lawyer's conduct will be subject to a reasonable application of one or more applicable, extant Utah ethics opinion. The use of the phrase "expressly approved" implies a far higher standard than would ordinarily be expected in a person's compliance with an applicable law—whether a statute, rule or a judicial opinion.

To provide a reasonable safe harbor for ethical conduct, the proposed rule should provide that a lawyer who acts or fails to act *in compliance with* a currently effective and directly applicable ethics opinion shall not be subject to disciplinary action; the "expressly approved" requirement is seriously ambiguous and may provide very little protection to a lawyer who does not seek explicit approval or can't match every factual predicate in the opinion.

The binding nature of an ethics opinion should not raise a higher barrier to its use by a lawyer than any other applicable law. OPC, for example, would be free to argue that the facts and circumstances of a particular situation did not fit the invoked opinion (this is consistent with the Bar petition's note that applications would be "fact dependent"), but neither OPC nor an Ethics and Discipline panel would be entitled to ignore an applicable opinion and replace the Committee's judgment by OPC's or the panel's.

An approach subsection (d) of Rule 14-504 that is more nearly aligned with the usual application of statutes, regulations and applicable case law would read (showing changes relative to the proposed rule):

(d) *Effect of ethics advisory opinions.* The ~~[OPC]~~Office of Professional Conduct shall not prosecute a Utah lawyer for ~~[any act that was expressly approved by]~~violating the Utah Rules of Professional Conduct for conduct that is in compliance with an ethics advisory opinion that has not been withdrawn at the time of the conduct in question. No court is bound by an ethics opinion's interpretation of the Utah Rules of Professional Conduct.

Although "in compliance with" is itself subject to some interpretation, it provides the normal ability for either side of a prosecution issue to argue the extent to which the instant facts and circumstances are governed by the opinion in question. It would not be different from any normal legal proceeding in that regard, and it would reduce the likelihood of an overly zealous prosecutor to claim that a respondent lawyer's inability to match every jot and tittle of an opinion renders the opinion of no application.

Respectfully submitted,

JONES, WALDO, HOLBROOK & MCDONOUGH, PC

Gary G. Sackett

# *Irony Is Alive and Well in the* Utah Bar Journal

*by Gary G. Sackett*

**Two Hypotheticals**

As a preliminary exercise, consider medical patient *P,* who is currently under the care of physician *D1. D1* has advised *P* that *P* should undergo spinal surgery to relieve major back pain. *P* decides that, before going under the knife, *P* would like a second opinion on the matter and consults privately with *D2,* who examines and diagnoses *P* and suggests a period of therapeutic treatment before making a final decision on surgery. Is *D2* out of line for talking to *D1's* patient? No, of course not. No one would question the prudence of *P's* action, or the propriety of *D2's* responding to *P's* request for a second opinion before making such a life-affecting decision.

Now change patient *P* to client *C,* and *D1* and *D2* to lawyers *L1* and *L2,* respectively. *L1* has advised *C* to become a plaintiff in a major lawsuit that has the potential for exposure to a significant counterclaim against *C. C* is inclined to go forward, but wants to consult *L2* privately to get a second opinion before proceeding with *L1.* No one would seriously suggest that *L2* should be constrained from providing such additional advice as *C* might seek on such an important matter, independent of whether *L1* was aware of the contact.

This brings us to two items that appear, maybe serendipitously – maybe not, in the January-February 2010 issue of the *Utah Bar Journal:* Meb Anderson's article *Ethical Conundrum? Try Asking the Ethics Advisory Opinion Committee* and a report ("Disciplinary Note") on page 47 about a lawyer who provided legal services to a "mature" minor whose best interests were already represented by a court-appointed guardian ad litem (GAL).

**Irony in the *Bar Journal***

A thoughtful article by Mr. Anderson, a member of the Ethics Advisory Opinion Committee (the "Ethics Committee"),[1] urges lawyers to seek ethical guidance from that committee when in doubt about an ethical issue. In the *Attorney Discipline* section of the same issue, a scant 16 pages further on, the Office of Professional Conduct ("OPC"), which authors the entries in this section,[2] pointedly warns Utah lawyers that the opinions of the Ethics Committee cannot be relied upon and are "inconclusive":

> The Rules of Procedure for the Ethics Advisory Opinion Committee ("EAOC") state: "A lawyer who acts in accordance with an ethics advisory opinion enjoys a rebuttable presumption of having abided by the Utah Rules of Professional Conduct." The Utah Supreme Court has advised that it expects the OPC to take action whenever it believes a disciplinary rule has been violated and that the OPC cannot adequately perform that function if it is bound by the opinions issued by the EAOC. As was the case in this matter, the opinions are advisory, and the presumption that an attorney who follows an opinion has not violated a Rule is rebuttable and inconclusive.

Attorney Discipline, Utah Bar J., Jan.-Feb. 2010, at 47. The irony of these two items being published within a few pages of each other is conspicuous and palpable.

The warning in the Disciplinary Note that the Ethics Committee's opinions are not binding on OPC is technically accurate as of 2007, but there are two major problems with it: (a) It sends a dreadful message to Utah attorneys – namely, if you have an ethical dilemma about which you prudently seek and obtain thoughtful, reasoned advice from the Ethics Committee, that and $3.00 may get you a latté at Starbucks and very little else. After reading these items in the *Bar Journal,* an anonymous member of the Ethics Committee noted that, "The lesson is, if we [the Committee] say you *can't* do it, don't do it; and if we say you *can* do it, don't do it." (b) The Disciplinary Note appears to have been unnecessary to conclude that a private admonition was appropriate disciplinary action in the case at hand and, accordingly, it was unnecessary to negate the salutary effects of Mr. Anderson's otherwise timely article.

**Factual Setting**

The disciplinary action that led to this paradoxical situation arose when a "mature" minor became dissatisfied with having had no contact for two years from his court-appointed GAL and, accordingly, sought assistance from another, private attorney.[3] The private attorney, being concerned about a possible violation of Rule 4.2,[4] which prohibits certain direct contacts with parties known to be represented by counsel, prudently researched the issue and found Utah State Bar Advisory Opinion 07-02 that addressed, in part, a nearly identical situation. Utah State Bar Ethics Advisory Opinion Committee, Op. 07-02 (2007).

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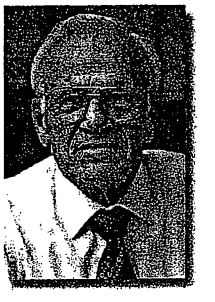

Opinion 07-02 primarily focused on the normal situation of a minor who is not legally competent to make reasoned decisions, but the end of the opinion addressed a situation involving a "mature" minor whose personal wishes might be different from the societal norm of "his best interests." The opinion cites Utah Ethics Advisory Opinion 110, which confirmed the general proposition that a currently represented client has every right to seek a second opinion from an independent lawyer (*L2* in the opening example) and that the second lawyer does not violate Rule 4.2 by providing such an opinion. *See id.*, Op. 110 (1993). On that basis, Opinion 07-02 concluded: "[I]f a mature minor independently and voluntarily attempts to obtain a second opinion or independent representation from an uninvolved attorney, that attorney does not violate Rule 4.2 by speaking with the minor, even if the communication is without the GAL's prior permission or consent." *Id.*, Op. 07-02, ¶ 23.

Having found Opinion 07-02 in his research, the attorney reasonably believed that he could entertain the mature minor's plea for assistance in dealing with a non-responsive GAL. However, the Disciplinary Note indicates that, following that consultation, the attorney went beyond the action that Opinion 07-02 had approved. After consulting with the minor, the minor was apparently told that the attorney could represent him in a currently pending court proceeding. The attorney then filed a notice of appearance in the minor's case in which the GAL was already the attorney of record. The attorney appears, in effect, to have attempted to usurp the position of the duly appointed GAL.[5] Nothing in Opinion 07-02 could be construed to provide such license.

**Historical Perspective**

Before an analysis of the paradoxical picture painted by these two items, a historical context may be useful.

Before 1995, the procedural rules for the Ethics Committee were not set out in substantial detail. In about 1994, the Committee undertook to develop a more detailed set of procedural rules, which the Utah State Bar Commission first adopted on December 1, 1995, and approved on December 6, 1996, with minor modifications.

Both as a matter of practice prior to 1995 and as incorporated in the 1995 rules, the Ethics Committee's opinions were subject to Bar Commission approval. Approval was typically obtained by an in-person presentation by the Ethics Committee Chair to the Bar Commission. After discussion, the Bar Commission would vote on whether to issue the opinion, return it to the Ethics Committee for further consideration or modification, or – rarely – reject it. Over the years, several opinions the Ethics Committee issued generated controversy among various factions of the practicing bar that spawned major campaigns by lawyers – both on their own behalf and for their clients – to oppose certain Ethics Committee opinions before the Commission. In a few cases, the issues became highly charged, complete with intense lobbying of individual Commissioners by proponents or opponents of a particular opinion.

After a number of these contentious proceedings, the Commission concluded in 2001 that a better way to handle these matters and eliminate the lobbying of Commissioners was to give initial issuance authority directly to the Ethics Committee. A key ingredient to this procedural change was a well-defined process allowing lawyers and certain others to take a direct formal appeal to the Bar Commission. The rules also provide an interested party the opportunity to seek reconsideration before the Ethics Committee. This is optional and is not a required step in taking an appeal to the Bar Commission.

Under the auspices of the Bar Commission, a special subcommittee drafted a comprehensive set of rules governing appeals to the Commission that were presented to and approved by the Bar Commission in late 2001. *See* Utah State Bar Rules Governing the Ethics Advisory Opinion Committee § VI, *available at* www.utahbar.org/rules_ops_pols/rules_governing_eaoc.html; *see also* Ethics Advisory Opinion Committee Rules of Procedure § III(e), *available at* www.utahbar.org/rules_ops_pols/eaoc_rop.html. As a part of the comprehensive Commission consideration of the Ethics Committee's rules to make the opinion process less political and more definitive, the Commission had also approved a provision that made the opinions of the Committee binding on OPC. The rule amendments the Bar Commission adopted in October 2001 provided: "Compliance with an ethics advisory opinion shall be considered evidence of good-faith compliance with the Rules of Professional Conduct. Opinions are binding interpretations of the Rules of Professional Conduct in matters within the Board's jurisdiction. *Opinions shall bind the Office of Professional Conduct.*" Utah State Bar Rules Governing Ethics Advisory Opinion Committee § V(b) (2001) (emphasis added).

After the rule had been in effect for more than five years, the Chief Justice of the Utah Supreme Court in late 2006 raised the issue of the extent to which the Ethics Committee's opinions should be binding on the Bar's prosecutors, the OPC.

At the Chief Justice's request, the matter was discussed at length within the Ethics Committee and the Bar Commission. One of the several attempts to "soften" the hard-and-fast binding effect on OPC of then-Rule V(b) without reducing the Ethics Committee's opinions to mere musings of a group of volunteer lawyers was the following:

> A Utah lawyer's compliance with an ethics advisory opinion shall be considered evidence of good-faith compliance with the Rules of Professional Conduct. In any disciplinary action brought against an attorney, the attorney will be presumed to have acted in compliance with the Rules if the attorney's actions are substantially the same as actions found to be in compliance with the Rules by one or more currently in-force formal opinions of the Ethics Advisory Opinion Committee. This presumption is subject to rebuttal

> by the establishment before the applicable tribunal that any Committee opinion on which the attorney has relied either (i) is inapplicable on the facts of the attorney's alleged violation of the Rules, or (ii) is a clearly erroneous interpretation or application of the Rules with respect to the subject behavior.

Memorandum from Gary Sackett to the Ethics Committee (April 24, 2007) (on file with the Ethics Committee).

This appeared to the Ethics Committee to provide a middle ground on this issue. But, OPC vigorously opposed this proposal and all other modification short of giving OPC sole final authority to prosecute members of the Bar without being bound by the opinions of the Ethics Committee. Representatives from OPC – one of whom sits as a non-voting *ex officio* member of the Ethics Committee – repeatedly assured and reassured the Committee that it was highly unlikely that OPC would ever prosecute an attorney who had complied with an Ethics Committee opinion.

After the extensive consideration of the issue, the Chief Justice and the Supreme Court in 2007 required that Rule V be modified to read: "When issued and published by the Committee, an Ethics Opinion shall be advisory in nature. A Utah lawyer who acts in accordance with an Ethics Opinion enjoys a rebuttable presumption of having abided by the Utah Rules of Professional Conduct." Utah State Bar Rules Governing Ethics Advisory Opinion Committee § V (2009).

**Analysis**

There are several aspects of the Disciplinary Note that bear consideration.

The attorney's initial action in responding to a request from a mature minor for advice cannot, by itself, reasonably be construed as a violation of Rule 4.2. If it were, then *no* attorney could render a second opinion to anyone who is currently represented by counsel but wants a fresh set of eyes on their legal problems, unless the current attorney was willing to consent. This would thwart a person who wanted a private second opinion without "firing" the original attorney. Such a result would be fundamentally wrong and was never the intent of Rule 4.2. The Rules of Professional Conduct were not designed, nor should they be interpreted, to form a barrier to a person who seeks legal advice from more than one source. *See* UTAH R. PROF'L CONDUCT R. 4.2, cmt. [6] ("This Rule does not preclude communication with a represented person who is seeking a second opinion from a lawyer who is not otherwise representing a client in the matter.").[6]

One result of the Disciplinary Note is to throw the entire issue of second opinions into a state of uncertainty and confusion. The Note reports that the lawyer was found to have violated Rule 4.2(a), which indicates that the very act of communicating with a person who was seeking legal advice in addition to the advice (or absence of advice) from the minor's court-appointed attorney was a violation. There is nothing in the Disciplinary Note to distinguish the minor's request of a second lawyer for such advice from the request of any other person who has a lawyer and wants to obtain a second opinion.

OPC's finger-wagging language in the Disciplinary Note leaves the practicing bar in a no-man's-land with respect to second opinions and Rule 4.2. Will a lawyer who responds to a request for a second opinion without the consent of the client's first attorney get crosswise with OPC's interpretation of Rule 4.2? After all, if OPC chose to ignore

the result of Opinion 07-02 in this case, will it also choose to reject the underlying opinion, No. 110, which explicitly approved providing second opinions without obtaining Rule 4.2 consent from the first lawyer? Sorry, but Utah attorneys will have to operate without guidance, because – as the Disciplinary Note makes perfectly clear – OPC is as free to decide to "rebut" Opinion 110 as it was to rebut Opinion 07-02.

Utah State Bar members have now been put on notice that they may take little comfort in the analysis and conclusions of the 200 opinions issued by the Ethics Committee since 1975. Not only does the Disciplinary Note point out that the conclusions of the Ethics Committee's opinions are "rebuttable," but the Note goes further and characterizes the ethics opinions as "inconclusive." This term is a construct of OPC as author of the Disciplinary Note; it does not appear in the Bar's rules governing the Ethics Committee or in the Ethics Committee's procedural rules. *See* Utah Rules Governing Ethics Advisory Opinion Committee, § V; *see also* Ethics Advisory Opinion Committee Rules of Procedure § V(b).

Now there is no "safe harbor" for the prudent lawyer who aspires to verify that an action to be taken does not run afoul of an ethical obligation. But, if OPC has the controlling word on any such action, why not seek an opinion from that office? Answer: OPC does not issue "advisory" opinions. If OPC responds to an inquiry about the ethical propriety of a given course of action, it always qualifies the advice with (a) a standard this-opinion-is-not-binding-on-our-office disclaimer and – the irony intensifies – (b) a suggestion that the attorney seek a formal opinion from the Ethics Committee. From the OPC pages of the Bar's website:

> [A]dvice given by the OPC on the Hotline is not intended to be legally binding on the office. In this regard, you [the inquiring lawyer] are told: This is an informal opinion of our office, based upon a reading of the Rules of Professional Conduct. You should read the rules and exercise [your] own judgment. Formal opinions can be requested from the Utah State Bar's Ethics Advisory Opinion Committee.

The Utah State Bar's OPC Ethics Hotline For Attorneys, *available at* http://www.utahbar.org/opc/opc_ethics_hotline.html.

One cannot dismiss this conundrum by suggesting that lawyers should always apply the Rules of Professional Conduct conservatively in their practice and avoid actions that might be in the interstices of the black letter rules. That, of course, is not practical and is often not consistent with the lawyer's duties to clients to pursue their legal interests with all due vigor and zeal. *See, e.g.,* UTAH RULES PROF'L CONDUCT, Preamble § [9]. It is not clear how it furthers the administration of justice and provision of service to clients by foreclosing procedures that would allow attorneys attempting to fulfill their ethical obligations to obtain definitive guidance from the very institution that regulates them.

Importantly, it appears to have been unnecessary to raise this OPC-has-the-last-word-in-ethics issue in the discipline of this attorney and in OPC's blunt message to attorneys in the Disciplinary Note. It is a well-established American jurisprudential principle that tribunals should generally decide issues on narrow or factual grounds when possible, without resorting to establishing broad principles. That path appears to have been available in this case, but OPC as both prosecutor and reporter of the matter chose not to adhere to this principle.

The attorney's actions in this case of inserting himself in place of the GAL in ongoing litigation went further than what Opinion 07-02 gave license for. In that regard, the attorney may properly have been subject to discipline. But merely advising a mature minor who sought "outside" advice should not have been construed as a violation of Rule 4.2 and should not have been the focus of the attorney's discipline. Using the professional-conduct rules to deny a mature minor justifiable relief from a system that may have, for one reason or another, failed to provide adequate legal protection to him, is inconsistent with promoting the administration of justice.

As reported in the Disciplinary Note, the lawyer's transgression against the judicial system was not in the act of consulting with a mature minor who had apparently been neglected by his GAL, but in his apparent attempt to displace or otherwise supplant

the GAL as the representative of the best interests of the minor. Such activities constituted a fundamental breach of professional responsibility and appear to be the kinds of actions that Rule 8.4(d) contemplates: "It is professional misconduct for a lawyer to... engage in conduct that is prejudicial to the administration of justice." Sup. Ct. R. of Prof'l Practice 8.4(d).

Had OPC prosecuted on that basis and written a corresponding report in the Disciplinary Action section of the *Bar Journal*, the "warning" about the non-binding nature of the Ethics Committee's opinions would not have been necessary, and the mixed messages to Utah lawyers would not have struck such a discordant and confusing note.

It is also notable that the minutes of the Ethics Committee meetings at which Opinion 07-02 was discussed do not reflect that OPC's Ethics Committee representative raised any objection or other concern about the "mature minor exception" during the course of the Ethics Committee's final adoption of the opinion. The Ethics Committee voted 9-0 to issue the opinion, with one abstention. *See* Ethics Committee Minutes for May 8, 2007 meeting (on file with the Ethics Committee). Perhaps more importantly, OPC did not seek reconsideration of the opinion before the Ethics Committee, and it did not seek to have the Bar Commission review it and overturn or modify it, both of which are its prerogatives under both the Ethics Committee's enabling rules and its procedural rules, *see* R. Governing Ethics Adv. Op. Comm. §VI; Ethics Adv. Op. Comm. R. Proc. § III(e), and it did not take any other action indicating its disagreement with the conclusions of Opinion 07-02.

If OPC's position is at odds with an Ethics Committee opinion, OPC should at least make its opposition, and its intent to disregard the opinion, publicly known so that attorneys may make informed judgments and govern themselves accordingly, lest they step in a hidden bear trap.

In effect, OPC possesses near-absolute veto power over the Ethics Committee's opinions. And, this power is even more problematic than a "normal" veto, as it takes the form of a "springing veto." That is, the veto doesn't become apparent until it "springs" to life when OPC takes action against a lawyer who has relied on an opinion of the Ethics Committee.

A final observation: The Disciplinary Note sends a discouraging message to lawyers who are serving, or might be inclined to serve, on the Ethics Committee. The unnecessary statement of OPC authority has the real effect of diminishing the value of the volunteer services rendered by the Bar members, many of whom donate significant time and resources to elevate their profession and to assist other lawyers in establishing where they can and cannot go in the realm of proper professional conduct.

In the final analysis, these ironically juxtaposed items in the *Utah Bar Journal* highlight the need for a definitive means for a lawyer to establish that a proposed course of action in furtherance of clients' interests is inside the perimeter drawn by the Rules of Professional Conduct. Currently, there is no such mechanism, as the OPC Disciplinary Note has emphatically made clear to the nearly 10,000 members of the Utah State Bar.

1. The Ethics Advisory Opinion Committee is a committee of the Utah State Bar under the general authority of the Utah Supreme Court.
2. The summaries published in the Attorney Discipline section are not directly attributed, but it is well established that the OPC, in its prosecutorial role for the Bar, provides the text for the items in that section. *See Pendleton v. Utah State Bar*, 2000 UT 96, ¶ 6, 16 P.3d 1230.
3. The genders of the participants are not indicated in the Disciplinary Note. Masculine pronouns are used generically in this article.
4. Utah Rule 4.2 of the Supreme Court Rules of Professional Practice is quite different from the ABA Model Rule 4.2 in several respects, but the applicable provisions for this case are not substantively different.
5. The liberal use of such hedge words as "appear" and "seem" are required in this discussion, as the only facts in the case are those set forth in the Disciplinary Note. The proceedings of the Ethics and Discipline Committee in cases resulting in a private admonition are confidential and not available to the public. Accordingly, there is some uncertainty about the full factual situation. That, however, does not detract from the point of this article – namely, the OPC's citation of the non-binding nature of ethics opinions is inconsistent with the action urged in Mr. Anderson's article.
6. Comment [6] was not a part of the Utah Rules of Professional Conduct or the ABA Model Rules in 1993 when Opinion 110 was issued. *See* Annotated Model Rules of Professional Conduct 393 (ABA 6th ed. 2007).