

NOV 02 2011

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE:)
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UTAH STATE BAR,)
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PETITIONER.)
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THE UTAH STATE BAR ("Bar") hereby files this Petition to Create a New Ethics Advisory Opinion Safe Harbor in the Rules of Lawyer Discipline and Disability. By creating a "safe harbor" for practicing Utah attorneys, this provision would allow lawyers to rely on an ethics advisory opinion for immunity from the OPC's prosecution for conduct which the ethics advisory opinion expressly approved. The new rule also would help resolve potential conflicts between the Bar's Ethics Advisory Opinion Committee's ("EAOC") and the Bar's Office of Professional Conduct's ("OPC") where ethical evaluations differ and the lawyer is caught in the middle of varying viewpoints. Finally, appropriate safeguards are included for meaningful review and the Court retains the ultimate authority over ethical interpretations of the Utah Rules of Professional Conduct. A copy of the proposed redlined rule is attached at Exhibit "1."

BACKGROUND

Before 1995, the procedural rules for the EAOB were not formalized in substantial detail. In 1994, the EAOB undertook to develop a more detailed set of procedural rules, which the Board of Bar Commissioners ("Commission") first adopted on December 1, 1995, and amended on December 6, 1996. Both as a matter of practice prior to 1995 and as incorporated in the EAOB's 1995 rules, ethics advisory opinions were subject to final Commission approval at regularly scheduled meetings. The approval was typically obtained by the EAOB chair's presentation upon which the Commission would decide to either approve and issue the opinion, return it for further consideration or modification, or reject it. For a variety of reasons, including but not limited to the amount of time that this process took, the Commission concluded in 2001 that a better way to handle these matters was to rely on the experience and expertise of EAOB members in analyzing ethical issues. The Commission largely removed itself from the ethics opinion process except for formal, direct appeals.

At approximately the same time, the Commission also adopted a rule that made the EAOB opinions binding on OPC.¹ This step was taken after much deliberation and again, for a variety of reasons. One reason underlying this decision was to avoid uncertainty where a lawyer had obtained an ethics opinion, diligently complying with the advice, but still be subjected to the possibility of OPC prosecution. For lawyers seeking to do the right thing in an increasingly

¹ "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." R. Governing Ethics Adv. Op. Comm. R. V(b) (2001).

complex world of legal practice, and most importantly, the Commission desired more consistency and reliability for Utah lawyers in avoiding potential conflicts with OPC. Yet another reason was the desire to attract and retain qualified volunteer attorneys on the committee, rather than have their work reduced to a philosophical and academic exercise.

Sometime in late 2005 after attending an out-of-state conference where she was asked about a Utah ethics advisory opinion's interpretation of Utah Rule of Professional Conduct 8.4(c), Chief Justice Christine M. Durham wrote the Bar's general counsel. She inquired as to the binding nature of ethics opinions on OPC and wanted to know when that had occurred. She also expressed concern as to how the Court could retain ultimate authority over the interpretation of ethical rules when OPC was prohibited from prosecution if their viewpoint differed from the EAOC's. Thereafter, both the EAOC and the Commission submitted their reasons supporting the binding provision for the Court's review. The Court also requested OPC to provide its perspective on the EAOC rule.²

After consideration of the issue at a Court conference in December 2006, the Chief Justice indicated that EAOC Rule V(b) should 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

² In part, OPC provided comparison information with other jurisdictions as to whether those ethics opinions were binding on disciplinary authorities. An updated chart from the National Conference of Bar Counsel from early 2011 has been included with this petition. Out of 50 states (the chart also includes the District of Columbia and a number of local bar associations that issue ethics opinions), 11 jurisdictions have binding (to some degree) ethics opinions on which an attorney may rely. See Exhibit "2."

Professional Conduct.”³ A copy of the Court’s letter dated April 5, 2007, is attached as Exhibit “3.”

RECENT DEVELOPMENTS

A discipline matter was concluded on September 17, 2009 wherein the Chair of the Ethics and Discipline Committee issued a private admonition against a lawyer who earlier had sought an ethics advisory opinion. The respondent lawyer initially raised the defense that his conduct was in compliance with the opinion which had concluded that the lawyer’s conduct would be ethical under the circumstances as understood. (The opinion based its analysis in part on the fact that the lawyer’s client was a “mature minor” and therefore, the proposed conduct would not violate URPC 4.2(a)). OPC’s prosecution, however, was based on facts different than those contained in the ethics opinion. A judge had concluded that the lawyer’s conduct was “wrong, out of line, unethical and inappropriate” and struck all the attorney’s pleadings because he had determined that the client was a minor represented by the Office of Guardian ad Litem, not an emancipated and unrepresented “mature minor.” Based on this fact, the lawyer’s conduct therefore violated URPC 4.2(a). This case was summarized in the “Attorney Discipline” section of the *Utah Bar Journal*. The summary, in light of the lawyer’s initial defense that he had relied on the ethics advisory opinion, also included the following language:

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

³ R. Governing Ethics Adv. Op. Comm. R. V(b) (2009).

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 EAO. 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.⁴

The same issue of the *Utah Bar Journal* published an article by a member of the EAO, urging lawyers to seek ethical guidance from the EAO when in doubt about an ethical issue and explaining the general procedures of the Committee.⁵ The coincidental appearance of these two items in the same issue of the *Utah Bar Journal* re-invigorated the EAO's and the Commission's long-standing desire to make ethics opinions binding on OPC, providing a safe harbor for lawyers who rely on them.

In the following issue, Maxwell A. Miller, then-chair of the EAO, wrote a letter to the editor of the *Utah Bar Journal* citing "confusion and no small amount of consternation by many members of the Bar...[W]hy should the Bar even have an EAO whose opinions cannot be relied upon and are disregarded by the OPC?"⁶ Another article authored by a former EAO chair, Gary G. Sackett, was then published in a following *Utah Bar Journal* issue, discussing the diminishing effect of ethics opinions and highlighting the need for a different approach other than the "rebuttable presumption" that the Court had previously instituted.⁷

⁴ "Attorney Discipline," UTAH BAR J., Jan. - Feb. 2010, at p. 47. A copy of the disciplinary summary is attached as Exhibit "4."

⁵ "Ethical Conundrum? Try Asking the Ethics Advisory Opinion Committee," UTAH BAR J., Jan.-Feb. 2010, at p. 23. A copy of the article is attached as Exhibit "5."

⁶ UTAH BAR J., Mar. - Apr. 2010, at p. 7. A copy of the Letter to the Editor is attached at Exhibit "6."

⁷ UTAH BAR J., May - Jun. 2010, at p. 37. A copy of the article entitled "Irony is Alive and Well in the Utah Bar Journal" is attached at Exhibit "7."

The EAOOC members have maintained a steadfast belief that it would be beneficial to the members of the Bar and the general public who seek legal services of Utah lawyers to modify the current "rebuttable presumption" rule and establish that, while the EAOOC's ethics opinions are subject to review procedures, a lawyer who relies on an opinion that is effective at the time of the lawyer's conduct should not be prosecuted by OPC relative to that conduct. The committee then drafted and discussed a revised rule at its December 2010 meeting. Maxwell Miller then arranged to attend a Court conference on April 6, 2011, to revisit the issue of having a revised rule. The result of the conference was that a new rule which the Bar understands was given tentative approval by the Court at the conference and was subsequently ratified by the EAOOC, was forwarded to the Commission for its consideration. At a regularly scheduled meeting on September 30, 2011 and another meeting on October 28, 2011, and after discussion and additional EAOOC feedback, the proposed rule was slightly modified. It has now been submitted to the Court for its review.

PROPOSED RULE

A redlined copy of the proposed rule can be found at Exhibit "1 " along with a "clean" final copy. The new rule has been incorporated into current Rule 14-504 (OPC Counsel) setting forth the powers and duties of the OPC office. Rule 14-504 also imposes restrictions on OPC counsel as to how their work is carried out. New subsection (d) reads as follows:

(d) Effect of ethics advisory opinions. A Utah lawyer who acts in accordance with an ethics advisory opinion shall not be subject to discipline for any act that was expressly approved by an ethics advisory opinion that has not been withdrawn at the time of the conduct in question.

(d)(1) The OPC may at any time request the Bar's Ethics Advisory Opinion Committee to review, modify or withdraw an ethics advisory opinion and if so, any OPC investigation or prosecution is suspended pending the final outcome of the request. The Ethics Advisory Opinion Committee may issue a modified opinion, withdraw the opinion or decline to take any action but shall report its action or recommendation to the Board of Bar Commissioners and the Board will take such final action as it deems appropriate.

(d)(2) The OPC may also request the Supreme Court to review, affirm, reverse or otherwise modify an ethics advisory opinion.

While the newly proposed rule is binding on OPC, it contains several safeguards. The first is that the ethics advisory opinion invoked by a Utah lawyer must *expressly* recognize and approve the lawyer's conduct under certain circumstances. It is therefore fact dependent, which narrows the scope of the protection rather than makes it general in nature. Second, OPC may at anytime request reconsideration in the form of review, modification or withdrawal from the EAOC of any opinion with which it disagrees. The EAOC then reports its response to the Commission and the Commission may then take such action as it deems appropriate. Third, OPC may also request this Court to review, affirm, reverse or otherwise modify an ethics advisory opinion with which OPC disagrees. Thus, the Court retains ultimate authority over these opinions and OPC with this route of direct judicial appeal.

CONCLUSION

The Commission believes that the proposed rule allows Utah lawyers to confidently proceed in their work and zealously represent their clients in an honorable and professional manner without violating the Utah Rules of Professional Conduct by providing a safe harbor against prosecution in

appropriate and tailored circumstances. Moreover, appropriate mechanisms are included within the new rule for the EAOC's, the Commission and ultimately, the Court's review of an opinion when a difference of viewpoints arises. Towards that end, the Commission respectfully requests that the Court adopt the proposed new rule.

Dated this 2 day of November, 2011.

UTAH STATE BAR

A handwritten signature in cursive script, appearing to read "Katherine A. Fox", written over a horizontal line.

Katherine A. Fox
General Counsel

EXHIBIT “1”

Rule 14-504. OPC counsel.

(a) Appointment and qualifications. The Board shall appoint a lawyer admitted to practice in Utah to serve as senior counsel. Neither the senior counsel nor any full-time assistant counsel shall engage in the private practice of law for payment.

(b) Powers and duties. The senior counsel shall perform all prosecutorial functions and have the following powers and duties, which may be delegated to other staff:

(b)(1) screen all information coming to the attention of the OPC to determine whether it is within the jurisdiction of the OPC in that it relates to misconduct by a lawyer or to the incapacity of a lawyer;

(b)(2) investigate all information coming to the attention of the OPC which, if true, would be grounds for discipline or transfer to disability status, and investigate all facts pertaining to petitions for reinstatement or readmission;

(b)(3) for each matter not covered in Rule 14-510 brought to the attention of the OPC:

(b)(3)(A) dismiss;

(b)(3)(B) decline to prosecute;

(b)(3)(C) refer non-frivolous and substantial informal complaints to the Committee for hearing; or

(b)(3)(D) petition to the district court for transfer to disability status;

(b)(4) prosecute before the screening panels, the district courts, the Supreme Court, and any other courts, including but not limited to, any court of the United States all disciplinary cases and proceedings for transfer to or from disability status;

(b)(5) attend the Character and Fitness Committee proceedings in all cases for readmission, and represent the OPC before the district courts, Supreme Court, and any other courts including, but not limited to, any court of the United States in all cases for reinstatement and readmission;

(b)(6) employ or appoint and supervise staff needed for the performance of prosecutorial functions and delegate such responsibilities as may be reasonably necessary to perform prosecutorial functions, including supervising attorneys who provide pro bono services to the Bar, by supervising the practice of respondents who have been placed on probation;

(b)(7) notify promptly the complainant, the respondent, and any counsel of record of the disposition of each matter;

- (b)(8) notify each jurisdiction in which a respondent is admitted of a transfer to disability status or any public discipline imposed in Utah;
- (b)(9) seek reciprocal discipline where appropriate when informed of any public discipline imposed by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction;
- (b)(10) forward a certified copy of the judgment of conviction to the disciplinary agency in each jurisdiction in which a lawyer is admitted when the lawyer is convicted of a crime in Utah which reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;
- (b)(11) maintain permanent records of discipline and disability matters subject to any expungement requirements and compile statistics to aid in the administration of the system, including but not limited to, a log of all informal complaints received, investigative files, statistical summaries of rules violated and dispositions, any transcripts of proceedings, and other records as the Supreme Court requires to be maintained;
- (b)(12) expunge after seven years all records or other evidence of the existence of any informal complaint terminated by dismissal or a declination to prosecute;
- (b)(12)(A) Notice to respondent. If the respondent was contacted by the OPC concerning the informal complaint, or the OPC otherwise knows that the respondent is aware of the existence of the informal complaint, the respondent shall be given prompt written notice of the expungement.
- (b)(12)(B) Effect of expungement. After a file has been expunged, any OPC response to an inquiry requiring a reference to the matter shall state that there is no record of such matter. The respondent may answer any inquiry requiring a reference to an expunged matter by stating that no informal complaint was made.
- (b)(13) provide informal guidance concerning professional conduct to members of the Bar requesting guidance, participate in seminars which will promote ethical conduct by the Bar, formulate diversionary programs, monitor probations, and disseminate disciplinary results to the Bar and the public through the Utah Bar Journal and otherwise as appropriate, maintaining the confidentiality of respondents subject to private discipline; and
- (b)(14) along with the executive director annually formulate the budget for the OPC and submit the budget to the Board for approval. OPC counsel may petition the Supreme Court for review of modifications to the budget imposed by the Board.

(c) Disqualification. In addition to complying with the Rules of Professional Conduct regarding successive government and private employment (Rule 1.11 of the Rules of Professional Conduct), a former OPC counsel shall not personally represent a lawyer following completion of the OPC counsel's service in any proceeding as provided in these rules which former OPC counsel investigated or prosecuted during his or her employment by OPC.

(d) Effect of ethics advisory opinions. The OPC shall not prosecute a Utah lawyer for any act that was expressly approved by 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.

(d)(1) The OPC may at any time request the Bar's Ethics Advisory Opinion Committee to review, modify or withdraw an ethics advisory opinion and if so, any OPC investigation or prosecution is suspended pending the final outcome of the request. The Ethics Advisory Opinion Committee may issue a modified opinion, withdraw the opinion or decline to take any action but shall report its action or recommendation to the Board of Bar Commissioners and the Board will take such final action as it deems appropriate.

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(b)(3) for each matter not covered in Rule 14-510 brought to the attention of the OPC:

(b)(3)(A) dismiss;

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(b)(4) prosecute before the screening panels, the district courts, the Supreme Court, and any other courts, including but not limited to, any court of the United States all disciplinary cases and proceedings for transfer to or from disability status;

(b)(5) attend the Character and Fitness Committee proceedings in all cases for readmission, and represent the OPC before the district courts, Supreme Court, and any other courts including, but not limited to, any court of the United States in all cases for reinstatement and readmission;

(b)(6) employ or appoint and supervise staff needed for the performance of prosecutorial functions and delegate such responsibilities as may be reasonably necessary to perform prosecutorial functions, including supervising attorneys who provide pro bono services to the Bar, by supervising the practice of respondents who have been placed on probation;

(b)(7) notify promptly the complainant, the respondent, and any counsel of record of the disposition of each matter;

- (b)(8) notify each jurisdiction in which a respondent is admitted of a transfer to disability status or any public discipline imposed in Utah;
- (b)(9) seek reciprocal discipline where appropriate when informed of any public discipline imposed by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction;
- (b)(10) forward a certified copy of the judgment of conviction to the disciplinary agency in each jurisdiction in which a lawyer is admitted when the lawyer is convicted of a crime in Utah which reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;
- (b)(11) maintain permanent records of discipline and disability matters subject to any expungement requirements and compile statistics to aid in the administration of the system, including but not limited to, a log of all informal complaints received, investigative files, statistical summaries of rules violated and dispositions, any transcripts of proceedings, and other records as the Supreme Court requires to be maintained;
- (b)(12) expunge after seven years all records or other evidence of the existence of any informal complaint terminated by dismissal or a declination to prosecute;
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- (b)(14) along with the executive director annually formulate the budget for the OPC and submit the budget to the Board for approval. OPC counsel may petition the Supreme Court for review of modifications to the budget imposed by the Board.

(c) Disqualification. In addition to complying with the Rules of Professional Conduct regarding successive government and private employment (Rule 1.11 of the Rules of Professional Conduct), a former OPC counsel shall not personally represent a lawyer following completion of the OPC counsel's service in any proceeding as provided in these rules which former OPC counsel investigated or prosecuted during his or her employment by OPC.

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(d)(2) The OPC may also request the Supreme Court to review, affirm, reverse or otherwise modify an ethics advisory opinion.

EXHIBIT "2"

Spring 2011

<u>JURISDICTION</u>	<u>ISSUE ETHICS OPINIONS? TYPE?</u>	<u>WHO ISSUES OPINIONS?</u>	<u>FORCE & EFFECT OF OPINIONS</u>	<u>OPINION TOPICS</u>
ALABAMA	Yes - Formal Opinions	Office of the General Counsel (with the concurrence of the Disciplinary Commission of the Ala. State Bar)	Unknown <i>UPDATED: YES</i>	General topic coverage.
Birmingham Bar Association	Yes	Committee on Professional Ethics of the Birmingham Bar Association	Unknown	General topic coverage
Mobile Bar Association	Yes	Ethics Committee of the Mobile Bar Association	Unknown	General topic coverage
ALASKA	Yes - Formal Opinions; Informal Opinions	Ethics Committee of Alaska State Bar Association (following approval by the Bar's Board of Governors)	Formal Opinions adopted by the Board of Governors are binding on Alaska attorneys and are grounds for discipline; good-faith compliance with a Formal Opinion may be considered as a defense or mitigation evidence in a disciplinary proceeding. Informal Opinions are non-binding; however, if attorney relies on the informal advice and has accurately presented facts, then Committee will most likely not find a violation.	General topic coverage - Committee will not issue opinions on matters that are currently or may become attorney grievances.
ARIZONA	Yes - Formal Opinions; Informal Opinions	Committee on Rules of Professional Conduct of the State Bar of Ariz.; Ariz. State Bar UPL Advisory Committee	Formal Opinions are advisory only and non-binding and are passed only by approval of majority of Committee. Informal Opinions are the opinion of only one member of the Committee and are advisory and non-binding. Reliance on individual advice given over the hotline can be mitigation evidence in a disciplinary proceeding.	General topic coverage - based on personal, prospective conduct; opinions will not be issued on pure questions of law, on questions solely of judgment/discretion, on propriety of an attorney's fees, on division of fees, or on attorney liens.
ARKANSAS	Yes	Ark. Bar Association Standing Committee on Professional Ethics and Grievances	Opinions are advisory only and non-binding; (opinion requests must be accompanied by a \$50.00 payment for administrative costs).	General topic coverage - based on personal, prospective conduct; opinions will not be issued on matters of substantive law or subject to pending litigation.
CALIFORNIA	Yes - Formal Opinions;	Standing Committee on Professional Responsibility and Conduct of the State Bar of Cal.	Formal Opinions are advisory only and are non-binding, but are often cited by Cal. courts and the Bar Review Dept.	General topic coverage - hypothetical fact patterns.

<u>JURISDICTION</u>	<u>ISSUE ETHICS OPINIONS? TYPE?</u>	<u>WHO ISSUES OPINIONS?</u>	<u>FORCE & EFFECT OF OPINIONS</u>	<u>OPINION TOPICS</u>
Bar Association of San Francisco	Yes	Legal Ethics Committee of the Bar Association of San Francisco	Unknown	General topic coverage
Los Angeles County Bar Association	Yes - Formal Opinions	Ethics Committee of the Los Angeles County Bar Association	Formal Opinions are advisory only and non-binding; courts may be inclined to follow the opinions when no contrary authority exists.	General topic coverage - opinions will not be issued on questions of law or on matters currently in dispute.
Orange County Bar Association	Yes - Formal Opinions	Professionalism and Ethics Committee of the Orange County Bar Association	Opinions are advisory only and are non-binding on courts or disciplinary authorities.	General topic coverage
Sacramento County Bar Association	Yes - (No longer issues opinions)	Sacramento County Bar Association Committee on Professional Responsibility	Unknown - Comm. no longer issues opinions.	General topic coverage
San Diego County Bar Association	Yes - Formal Opinions	Legal Ethics Committee of the San Diego County Bar Association	Formal Opinions are advisory only and are non-binding, but are often cited by Cal. courts; good-faith compliance may be offered as mitigation evidence in disciplinary proceeding.	General topic coverage - based on hypothetical attorney conduct; opinions will not be issued on questions of substantive law.
COLORADO	Yes - Formal Opinions; Informal Opinions	Ethics Committee of the Colo. Bar Association	Formal and Informal Opinions are advisory only; are non-binding, and provide no protection from disciplinary actions.	General topic coverage - based on personal, prospective conduct; opinions will not be issued on questions of substantive law.
CONNECTICUT	Yes - Formal Opinions; Informal Opinions	Committee on Professional Ethics of the Conn. Bar Association (Formal Opinions are approved by the House of Delegates)	Formal and Informal Opinions are advisory only and non-binding.	General topic coverage - based on personal, prospective conduct; opinions will not be issued on matters of substantive law.
DELAWARE	Yes - Formal Opinions; Ethical Inquiries	Committee on Professional Ethics of the Del. State Bar	Opinions are advisory only and are non-binding.	General topic coverage - based on personal, prospective conduct.
DISTRICT OF COLUMBIA	Yes - Formal Committee Opinions; Letter Opinions from Committee Chair	Legal Ethics Committee of the D.C. Bar	Opinions are viewed only as persuasive authority by the Court and disciplinary authority; good-faith compliance with an opinion may not be used as a defense in a disciplinary action and it is questionable whether it may be used as mitigation evidence.	General topic coverage

<u>JURISDICTION</u>	<u>ISSUE ETHICS OPINIONS? TYPE?</u>	<u>WHO ISSUES OPINIONS?</u>	<u>FORCE & EFFECT OF OPINIONS</u>	<u>OPINION TOPICS</u>
FLORIDA	Yes - Formal Opinions; Informal Opinions	Formal opinions are issued by the Professional Ethics Committee and Standing Committee on Advertising. Informal opinions are issued by Florida Bar staff.	Formal and Informal Opinions are advisory only and non-binding; may be raised as a defense in disciplinary proceedings.	General topic coverage - personal, prospective conduct; opinions will not be issued on questions of substantive law, questions of rules or court procedures, or if the matter is the subject of pending disciplinary proceedings; may decline to issue opinions if the inquiry is the subject of current litigation or if the inquiry asks a question for which there is no previous precedent or underlying bar policy on which to base an opinion.
GEORGIA	Yes - Formal Opinions; Informal Opinions	Formal Advisory Opinions Board of the State Bar of Ga. (following approval by the Ga. Supreme Court); Standing Committee on the Unauthorized Practice of Law	Formal Opinions are binding only on the State Bar, Disciplinary Board and the inquiring attorney, not the Ga. Supreme Court (unless the SC approves or modifies the opinion, at which point it is accorded same precedential authority given published judicial opinions of the SC. Informal Opinions are the personal opinion of the issuing attorney of the Office of the General Counsel and are neither binding nor a defense to a complaint. Good-faith compliance with either a formal or informal opinion shall be considered as mitigation evidence in disciplinary proceedings.	General topic coverage - based on personal, prospective conduct.
HAWAII	Yes - Formal Opinions	Disciplinary Board of the Haw. Supreme Court	Unknown	General topic coverage
IDAHO	Yes - Formal Opinions; Informal Opinions	Committee on Ethics of the Idaho State Bar	Unknown <i>updated; # extremely persuasive</i>	General topic coverage
ILLINOIS	Yes	Committee on Professional Ethics of the Ill. State Bar	Opinions do not have the force of law and should not be relied upon as a substitute for individual legal advice.	General topic coverage - based upon hypothetical attorney conduct.

<u>JURISDICTION</u>	<u>ISSUE ETHICS OPINIONS? TYPE?</u>	<u>WHO ISSUES OPINIONS?</u>	<u>FORCE & EFFECT OF OPINIONS</u>	<u>OPINION TOPICS</u>
Chicago Bar Association	Yes - Informal Opinions	Committee on Professional Responsibility of the Chicago Bar Association	Informal Opinions are advisory only and are non-binding and compliance with an opinion shall not be asserted as a defense or as mitigation evidence in a disciplinary proceeding.	General topic coverage
INDIANA	Yes - Formal Opinions; Unpublished Opinions	Legal Ethics Committee of the Ind. State Bar Association	Opinions are advisory only and have no force of law.	General topic coverage - based upon hypothetical attorney conduct.
Bar Association of Indianapolis	Yes - Unpublished Opinions	Legal Ethics Committee of the Indianapolis Bar Association	Opinions are advisory only, do not carry the weight of law, and are not to be relied upon as a substitute for individual legal advice.	General topic coverage - opinions will not be issued on matters of pending litigation or disciplinary action.
IOWA	Yes - Formal Opinions	Iowa State Bar Association Committee on Ethics and Practice Guidelines	Opinions are advisory only and non-binding.	General topic coverage
KANSAS	Yes - Formal Opinions; Informal Opinions	Ethics Advisory Committee of the Kan. Bar Association	Formal and Informal Opinions are non-binding on any court or disciplinary authority.	General topic coverage - based on prospective conduct; opinions will not be issued on matters of substantive law or matters subject to pending litigation.
KENTUCKY	Yes - Formal Opinions; Informal Opinions	Ethics Committee of the Ky. Bar Association; Ky. Attorney Advertising Commission	Formal and Informal Opinions are advisory only; an attorney's good-faith compliance with an opinion furnished to the attorney on his petition (provided the petition clearly and accurately states the facts) shall provide a "safe harbor" for the attorney with respect to disciplinary proceedings.	General topic coverage - advertising material must first be submitted to the KY Attorney Advertising Commission.
LOUISIANA	Yes - Private Opinions; Public Opinions	Rules of Professional Conduct Committee of the La. State Bar Association	Public and Private Opinions are non-binding on courts or disciplinary authorities. Public Opinions may be cited, Private Opinions may not be cited.	General topic coverage - opinions will not be issued based on hypothetical questions.

<u>JURISDICTION</u>	<u>ISSUE ETHICS OPINIONS? TYPE?</u>	<u>WHO ISSUES OPINIONS?</u>	<u>FORCE & EFFECT OF OPINIONS</u>	<u>OPINION TOPICS</u>
MAINE	Yes - Formal Opinions; Informal Opinions	Professional Ethics Commission of Maine's Board of Overseers of the Bar issues Formal opinions (M. Bar R. 11); Bar Counsel also provides informal advice, usually by phone - see Board of Overseers Regulation # 28.	Unknown - opinions shall be admitted as evidence in any proceeding interpreting or applying a provision of the Code of Professional Responsibility.	General topic coverage
MARYLAND	Yes	Committee on Ethics of the Md. State Bar Association	Opinions are advisory only.	General topic coverage - typically based on personal, prospective conduct; opinions will not be issued on questions of law, matters subject to pending litigation; generally opinions will not be issued based on the conduct of others, but the Comm. may do so if an organization or court having jurisdiction over the conduct requests the opinion.
MASSACHUSETTS	Yes	Mass. Bar Association Committee on Professional Ethics	Opinions are advisory only and are non-binding; although successive bar counsel have stated that, as a general rule, they will not take disciplinary action against attorneys who follow the Committee's advice provided the attorney has provided all relevant facts.	General topic coverage - opinions will not be issued on questions of law, hypothetical situations, conduct of another attorney, or matters subject to pending litigation.
Boston Bar Association	Yes	Boston Bar Association Ethics Committee	Unknown	General topic coverage
MICHIGAN	Yes - Formal Opinions; Informal Opinions	Committee on Professional and Judicial Ethics of the State Bar of Mich.	Formal and Informal Opinions are advisory only and non-binding.	General topic coverage - based on personal, prospective conduct; opinions will not be issued on questions of substantive law, hypothetical fact patterns, or conduct of another attorney.
MINNESOTA	Yes	Minn. Lawyers Professional Responsibility Board	Opinions are advisory only and are non-binding; attorneys may not be disciplined solely on the basis of a violation of a Board Opinion.	General topic coverage - based on personal, prospective conduct.

<u>JURISDICTION</u>	<u>ISSUE ETHICS OPINIONS? TYPE?</u>	<u>WHO ISSUES OPINIONS?</u>	<u>FORCE & EFFECT OF OPINIONS</u>	<u>OPINION TOPICS</u>
MISSISSIPPI	Yes - Formal Opinions	Ethics Committee of the Miss. State Bar (following approval by the Bar's Board of Commissioners)	Unknown <i>Yes / updated</i>	General topic coverage
MISSOURI	Yes - Formal Opinions; Informal Advisory Opinions	Formal Opinions are issued by the Advisory Committee of the Mo. Supreme Court; Informal Opinions are issued by the Legal Ethics Counsel	Formal Opinions - status has not been clarified by the Mo. Sup. Ct., but appear to have status close to that of a rule. Informal Opinions are advisory only and are non-binding; compliance with an informal opinion may be taken into consideration during the disciplinary process.	General topic coverage - based upon personal, prospective conduct; opinions will not be issued based upon hypothetical situations, questions of law, or the conduct of another attorney.
MONTANA	Yes - Formal Advisory Opinions; Informal Advisory Opinions	Ethics Committee of the State Bar of Mont.	Formal Opinions - advisory only; non-binding; accorded <u>some level</u> of deference when raised as a defense in a disciplinary action. Informal Opinions - advisory only, non-binding; accorded less deference than Formal Opinions in disciplinary proceedings.	General topic coverage - will not opine on issues arising from out-of-state organizations concerning marketing/referral programs; will not address conduct of judiciary; will not address matters subject to pending litigation.
NEBRASKA	Yes - Advisory Opinions	Advisory Committee of the Neb. State Bar Association	Both Formal and Informal Opinions are advisory and non-binding; however, good-faith compliance with an opinion may be asserted as a defense in a disciplinary proceeding.	General topic coverage - personal, prospective conduct; opinions will not be issued on questions of substantive law.
NEVADA	Yes - Formal Advisory Opinions	Standing Committee on Ethics and Professional Responsibility of the State Bar of Nev.	Formal Opinions are advisory only and are non-binding.	General topic coverage - hypothetical fact patterns; will not issue an opinion on issues of pending litigation or disciplinary action, questions of substantive law, or Comm.'s procedural handling of complaints.
NEW HAMPSHIRE	Yes - Opinions and Ethics Articles	Ethics Committee of the N.H. Bar Association	Opinions are for specific situations. Articles are for issues of general applicability.	General topic coverage - hypothetical fact patterns;

<u>JURISDICTION</u>	<u>ISSUE ETHICS OPINIONS? TYPE?</u>	<u>WHO ISSUES OPINIONS?</u>	<u>FORCE & EFFECT OF OPINIONS</u>	<u>OPINION TOPICS</u>
NEW JERSEY	Yes - Published Opinions; Informal Inquiries	Advisory Committee on Professional Ethics (appointed by the N.J. Supreme Court); Committee on Attorney Advertising (Issues Advertising Opinions)	Published Opinions are binding on the Ethics Committee. Informal Inquiries are non-binding nor admissible in any judicial or disciplinary proceeding.	General topic coverage - personal, prospective conduct; will not opine on issues of substantive law or matters currently subject to disciplinary proceedings.
NEW MEXICO	Yes - Formal Opinions; Informal Advisory Opinions	Ethics Advisory Opinions Committee of the State Bar of N.M.	Opinions are advisory and are non-binding.	General topic coverage - will not issue opinions on matters of substantive law.
NEW YORK	Yes	Committee on Professional Ethics of the N.Y. State Bar Association	Opinions are advisory and are non-binding yet are regarded as persuasive authority; good-faith compliance with an ethics opinion may be used as a defense or mitigation in a disciplinary proceeding.	General topic coverage - will not opine on hypothetical situations, matters subject to pending litigation, or conduct of another attorney; will not address inquiries that have also been submitted to another ethics committee.
Association of the Bar of the City of New York	Yes - Formal Opinions	Committee on Professional Ethics of the Association of the Bar of the City of N.Y.	Unknown	General topic coverage
Bar Association of Nassau County	Yes	Committee on Professional Ethics of the Bar Association of Nassau County	Unknown	General topic coverage
Monroe County Bar Association	Yes - Unpublished Formal Opinions; Unpublished Informal Opinions	Ethics Committee of the Monroe County Bar Association	Unknown	General topic coverage
New York County Lawyers' Association	Yes	N.Y. County Lawyers' Association Committee on Professional Ethics	Formal Opinions are advisory and are non-binding; some courts and disciplinary authorities consider full, good-faith compliance with an ethics opinion as a defense or as mitigation evidence.	General topic coverage - will not opine on questions of law.

<u>JURISDICTION</u>	<u>ISSUE ETHICS OPINIONS? TYPE?</u>	<u>WHO ISSUES OPINIONS?</u>	<u>FORCE & EFFECT OF OPINIONS</u>	<u>OPINION TOPICS</u>
New York Women's Bar Association	Yes	Standing Committee on Professional Ethics and Discipline of the N.Y. Women's Bar Association	Unknown	General topic coverage
Queens County Bar Association	Yes	Professional Ethics Committee of the Queens County Bar Association	Unknown	General topic coverage
Suffolk County Bar Association	Yes	Professional Ethics Committee of the Suffolk County Bar Association	Unknown	General topic coverage
NORTH CAROLINA	Yes - Formal Opinions; Unpublished Opinions (Ethics Decisions); Ethics Advisories	Ethics Committee of the N.C. State Bar	Opinions may be relied upon by inquiring attorney and evidence of this reliance may be offered in disciplinary action as evidence of good-faith effort to follow RPC.	General topic coverage - will not issue opinions on questions of substantive law or when material facts of inquiry are presently in dispute.
NORTH DAKOTA	Yes - Opinions; Advisory Letters	Ethics Committee of the State Bar Association of N.D.	Opinions and Advisory Letters are advisory and non-binding; good-faith compliance with opinion creates "safe harbor" in disciplinary proceedings for attorney who requests opinion and presumptive "safe harbor" for others who follow opinion.	General topic coverage - personal, prospective conduct; will not resolve factual disputes nor opine upon questions of substantive law.
OHIO	Yes - Formal Opinions; Informal Opinions	Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association	Unknown ND	General topic coverage
Ohio Supreme Court	Yes - Informal Advisory Opinions	Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court	Opinions are advisory and are non-binding; opinions will serve as guidance/persuasive authority (when applicable) to courts and disciplinary authorities; good faith compliance may be asserted as a defense in disciplinary proceedings.	General topic coverage - personal, prospective conduct; will not issue opinions on conduct of another attorney, questions of law, matters subject to pending litigation or on narrow/incomplete fact scenarios.
Akron Bar Association	Yes	Professional Ethics Committee of the Akron Bar Association	Unknown	General topic coverage

<u>JURISDICTION</u>	<u>ISSUE ETHICS OPINIONS? TYPE?</u>	<u>WHO ISSUES OPINIONS?</u>	<u>FORCE & EFFECT OF OPINIONS</u>	<u>OPINION TOPICS</u>
Cincinnati Bar Association	Yes	Ethics Committee of the Cincinnati Bar Association	Unknown	General topic coverage
Cleveland Metropolitan Bar Association	Yes	Professional Ethics Committee of the Cleveland Bar Association	Opinions are informal, advisory and non-binding; compliance with an opinion may possibly be asserted as a defense or as mitigation evidence in a disciplinary proceeding.	General topic coverage - personal, prospective conduct.
Columbus Bar Association	Yes (No longer issues opinions)	Professional Ethics and Grievance Committee of the Columbus Bar Association	Opinions were advisory and non-binding; Comm. no longer issues opinions.	General topic coverage
Cuyahoga County Bar Association (now Cleveland Metro Bar Assn.)	Yes	Ethics Committee of the Cuyahoga County Bar Association	Unknown	General topic coverage
OKLAHOMA	Yes - Advisory Opinions	Legal Ethics Committee of the Okla. Bar Association	Advisory Opinions are advisory only and only have such force and effect as they are given by the Okla. Supreme Court.	General topic coverage - prospective conduct; will not issue opinions based on questions of substantive law, past or present conduct, or a situation that presents an actual controversy between parties; may refuse to issue opinion on matters of pending litigation or disciplinary action.
OREGON	Yes - Formal Advisory Opinions; Informal Advisory Opinions	Legal Ethics Committee of the Or. State Bar (following approval by the Bar's Board of Governors)	Formal and Informal Advisory Opinions are advisory and non-binding; however, good-faith compliance with written advisory opinions may be considered as mitigation evidence in a disciplinary action.	General topic coverage - personal, prospective conduct; will not opine on questions of substantive law, past conduct or matters pending in litigation or disciplinary actions.
PENNSYLVANIA	Yes - Formal Opinions; Informal Opinions	Committee on Legal Ethics and Professional Responsibility of the Penn. Bar Association; Unauthorized Practice of Law Committee (Issues Formal Opinions)	Formal and Informal Opinions are advisory and are non-binding on any court or disciplinary authority; however, the Board/Court will look to opinions for guidance.	General topic coverage - personal, prospective conduct.

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Allegheny County Bar Association	Yes	Professional Ethics Committee of the Allegheny County Bar Association	Opinions are advisory only and are non-binding, carrying only such weight as a reviewing authority may choose to give it.	General topic coverage
Philadelphia Bar Association	Yes - Formal Opinions; Informal Opinions	Professional Guidance Committee of the Phila. Bar Association	Formal and Informal Opinions are advisory and are non-binding; good-faith compliance with opinion may be used as a defense or as mitigation evidence in a disciplinary action.	General topic coverage - personal, prospective conduct.
RHODE ISLAND	Yes	Ethics Advisory Panel of the R.I. Supreme Court	Opinions - any attorney who acts in accordance with an opinion given by the panel shall be conclusively presumed to have abided by the Rules. <i>yes</i>	General topic coverage - prospective conduct based upon the Rules.
SOUTH CAROLINA	Yes - Advisory Opinions	Ethics Advisory Committee of the S.C. Bar	Opinions are advisory only, are non-binding and are not intended to be a substitute for the lawyer's own judgment of ethical conduct under the Rules.	General topic coverage - personal, prospective conduct; will not issue opinions on questions of substantive law and will not review particular attorney advertisements.
SOUTH DAKOTA	Yes	Ethics Committee of the State Bar of S.D.	Opinions do not have the force of law and should not be relied upon as a substitute for individual legal advice.	General topic coverage - personal, prospective conduct; will not issue opinions based on questions of substantive law, matters subject to pending litigation, conduct of another attorney nor will the Comm. resolve factual disputes.
TENNESSEE	Yes - Formal Opinions; Informal Inquiries	Board of Professional Responsibility of the Tenn. Supreme Court;	Formal Opinions shall bind the issuing Ethics Committee, the inquirer, and the Board. Informal Inquiries are advisory, are not binding on Committee, Board, or Court; compliance with an Informal Inquiry provides no defense/mitigation in a disciplinary action.	General topic coverage - will not issue opinions on matters subject to pending litigation or disciplinary action.

<u>JURISDICTION</u>	<u>ISSUE ETHICS OPINIONS? TYPE?</u>	<u>WHO ISSUES OPINIONS?</u>	<u>FORCE & EFFECT OF OPINIONS</u>	<u>OPINION TOPICS</u>
TEXAS	Yes	Professional Ethics Committee of the State Bar of Tex.; Unauthorized Practice of Law Committee	Formal Opinions are not binding on the Tex. Supreme Court, but serve, to some degree, as guidance for the disciplinary authorities and the court in disciplinary matters; good-faith compliance with an opinion will likely result in some degree of leniency before the disciplinary authorities.	General topic coverage - hypothetical fact patterns; will not issue opinions on questions of substantive law, matters subject to pending litigation or on particular attorney advertisements.
Dallas Bar Association	Yes (No longer issues opinions)	Legal Ethics Committee of the Dallas Bar Association	Opinions were advisory only and are non-binding on any party; Comm. stopped issuing opinions in 1998.	General topic coverage - will not resolve general legal or factual disputes.
UTAH	Yes - Formal Opinions	Ethics Committee of the Utah State Bar	Formal Opinions - Lawyer acting in accordance with opinion enjoys a rebuttable presumption of compliance with the Rules.	General topic coverage - will not issue opinions based upon past conduct, conduct of a specific attorney in a pending dispute, or on questions of substantive law.
VERMONT	Yes. Written	Vermont Bar Association's Committee on Advisory Ethics Opinions	Persuasive ONLY	General topic coverage
VIRGINIA	Yes - Advisory Opinions; Informal Staff Opinions	Standing Committee on Legal Ethics of the Va. State Bar; Standing Committee on Lawyer Advertising and Solicitation	Opinions are advisory only and are non-binding on any judicial or administrative tribunal.	General topic coverage - hypothetical fact patterns; will not issue opinions based on questions of law nor will the Comm. make factual determinations; Comm. may decline to issue an opinion on matters subject to pending litigation or disciplinary action; Advertising Comm. handles advertising/solicitation opinion requests.

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WASHINGTON	Yes - Formal Opinions; Informal Opinions	Rules of Professional Conduct Committee of the Wash. State Bar Association (Formal Opinions are approved by the Bar's Board of Governors (Informal Opinions are not so approved))	Formal Opinions are binding upon all members of the WA Bar. Informal Opinions are advisory and are non-binding.	General topic coverage - will not issue opinions on questions of law, matters subject to pending litigation or disciplinary action; Comm. generally will not issue opinions on past conduct or the conduct of another attorney; Informal Opinions are only issued on non-legal ethics questions and only on the conduct of the inquiring attorney.
WEST VIRGINIA	Yes - Formal Advisory Opinions; Informal Advisory Opinions	Lawyer Disciplinary Board (Pre-1996: Opinions were issued by the Legal Ethics Committee of the W. Va. State Bar)	Formal Opinions are binding only on the Disciplinary Board and on the Hearing Panel in disciplinary proceeding involving requesting lawyer, but not on the W. Va. Sup. Ct. of App. Informal Advisory Opinions are non-binding but memorialized opinions may be introduced as evidence in disciplinary proceedings involving inquiring attorney.	General topic coverage - personal, prospective conduct.
WISCONSIN	Yes - Formal Opinions; Informal Opinions; Memorandum Opinions (Informal and Memorandum Opinions are no longer issued)	Professional Ethics Committee of the State Bar of Wis.	Formal Opinions are advisory only and are non-binding, but the Office of Lawyer Regulation often takes the opinions into consideration when evaluating propriety of a lawyer's misconduct.	General topic coverage - personal, prospective conduct; will not issue opinions based on matters of substantive law, on past conduct, or on the conduct of another attorney

<u>JURISDICTION</u>	<u>ISSUE ETHICS OPINIONS? TYPE?</u>	<u>WHO ISSUES OPINIONS?</u>	<u>FORCE & EFFECT OF OPINIONS</u>	<u>OPINION TOPICS</u>
WYOMING	No - Formal Opinions (Do not appear to have been published or issued)	Wyo. Board of Professional responsibility	The issuance of Formal Advisory Opinions is discretionary and the Board does not appear to have published any Formal Opinions; inquirer's reasonable compliance with a Formal Opinion shall be a complete defense to a complaint against the inquirer; reasonable compliance with a Formal Opinion given to another attorney shall be persuasive authority to the Board in determining whether misconduct has occurred; reliance on an ABA Formal Opinion interpreting the same/substantially similar rule as a Wyo. rule shall be persuasive authority to the Board in determining whether misconduct has occurred. VCS	General topic coverage - Board appears to have full discretion in deciding whether or not to issue an opinion on any particular topic.

EXHIBIT “3”

Supreme Court of Utah

450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone (801) 578-3900
Fax (801) 578-3999
Supreme Court Reception 238-7967

Marilyn M. Branch
Appellate Court Administrator

Pat A. Bartholomew
Clerk

Christine M. Durham
Chief Justice

Michael J. Wilkins
Associate Chief Justice

Matthew B. Durrant
Justice

Jill A. Parrish
Justice

Ronald E. Nehring
Justice

April 5, 2007

Augustus G. Chin
President
Utah State Bar
c/o Summit County Attorney's Office
6300 North Silver Creek Drive, #4
Park City, UT 84098

Dear Gus:

At a recent court conference, the justices discussed the treatment of opinions issued by the Ethics Advisory Opinion Committee of the Utah State Bar and reviewed your letter of December 8, 2006, as well as the memoranda prepared by Gary Sackett and Billy Walker.

As you know, lawyer discipline is a Supreme Court responsibility. The Office of Professional Conduct ("OPC") works under the Court's direction and regularly reports to it. The Court expects the OPC to take action whenever it believes a disciplinary rule has been violated. It is the Court's view that the OPC cannot adequately perform this function if it is bound by the opinions issued by the Ethics Advisory Opinion Committee.

The Court values and appreciates the excellent work of the Ethics Advisory Opinion Committee. It has relied upon the committee's analysis and substantive research in the past, and it will continue to do so in the future. As I stated in my letter to you of August 10, 2006, the Court believes that a lawyer who acts in accordance with an opinion issued by the Ethics Advisory Opinion Committee should enjoy a rebuttable presumption of having abided by the Rules of Professional Conduct. However, that presumption should not be conclusive, and it is important for the Court to have the opportunity to address interpretations of the Rules of Discipline about which there may be uncertainty.

Page Two
April 5, 2007

In view of its position, the Court requests the Bar Commission to make whatever changes are necessary to the rules governing the Ethics Advisory Opinion Committee to provide that the committee's opinions are advisory only.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Christine M. Durham".

Christine M. Durham
Chief Justice

cc: Billy Walker
John Baldwin

EXHIBIT “4”

Attorney Discipline

ADMONITION

On September 17, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 4.2(a) (Communication with Persons Represented by Counsel) and 8.4(a) (Misconduct).

In summary:

An attorney was contacted by a minor whose parents were involved in a divorce proceeding in district court. The minor informed the attorney that the minor had been appointed a Guardian ad Litem (GAL), though the minor had not heard from the GAL in over two years. The minor asked the attorney for representation in the district court proceeding. The attorney researched the possibility of representation, and reviewed Ethics Advisory Opinion 07-02. That opinion addresses the situation that the attorney was presented with, and advises that in the case of a mature minor, an attorney may speak with the minor even without the permission of the GAL and not violate Rule 4.2. The attorney spoke again to the minor after conducting research. The attorney filed a Notice of Appearance in the case. The GAL filed a Motion to Strike Notice of Appearance of Counsel. The attorney conducted further research to determine if the minor was a "mature minor" as described in the ethics opinion. The attorney filed a response to the motion to strike. A pretrial hearing was held where the attorney's representation was discussed. The attorney asked to withdraw from the case after the representation was challenged by the father's counsel and the GAL. The court

removed the attorney from the case, struck all of the pleadings that had been filed, and chastised the attorney for what had been done. The court stated that the attorney's actions were "wrong," "out of line," "unethical," and "inappropriate." The attorney followed all orders of the court.

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.

PUBLIC REPRIMAND

On November 13, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Larry N. Long for violation of Rules 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), Rule 5.5 (Unauthorized practice of Law; Multijurisdictional Practice of Law), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Long was hired by the complainant to represent a client on

Utah State Courts E-Filing Training

The Utah Court's IT service is rolling out the electronic filing system. This program is designed to provide information on how e-filing is being managed and how it could impact your practice.

- Overview of the E-filing Project
- Types of E-filing Opportunities for Firms and Solo Practitioners
- Walk through demonstration of the web based e-filing program

January 21
9:00-10:00 am

Feb. 16
9:00-10:00 am

Utah Law
& Justice Center

\$25

Register on-line at www.utahbar.org/cle

EXHIBIT "5"

Ethical Conundrum? *Try Asking the Ethics Advisory Opinion Committee*

by *Meb W. Anderson*

It is five minutes to five and you are sitting in your office just about to leave for the weekend, when of course the phone rings. It is a former client calling from the county jail. He asks you to mail him his entire client file. You say, "OK, I'll locate it and send it to you," and you hang up. On the drive home, you recall that this particular client file contains explicit crime scene photos, third-party medical reports, victim identification information, psychological and psychosexual evaluations, and so on, and you also recollect that a number of these documents are subject to court-ordered restrictions. You also recall, albeit faintly, that at some point in your career someone told you that when a former client requests the file, the Utah Rules of Professional Conduct define what constitutes the file, and require that most, if not all, of it should be turned over to the client.

On Monday morning you ask around the office, but nobody gives you the certainty you desire in addressing this issue. You do some legal research, but continue to feel uncertain. Do you send the former client the entire file, as required by Utah Rule of Professional Conduct 1.16(d)? Do you commit an ethical violation — or worse — if you send the former client the restricted documents? Certainly someone somewhere must have faced a similar ethical dilemma.

A Utah lawyer once confronted this exact scenario. Luckily, this lawyer knew where to turn, and his dilemma became the subject of an ethics opinion. On December 8, 2006, the Utah State Bar Ethics Advisory Opinion Committee issued Opinion 06-04, which advises that: "Absent prosecutorial or court-ordered restrictions, a former client's access to his client file may not be restricted. In limited circumstances, a lawyer may delay transmission of certain information in a current client's file." Utah State Bar Ethics Advisory Opinion Committee, Op. 06-04 (2006).

What is the Ethics Advisory Opinion Committee?

The Ethics Advisory Opinion Committee ("the Committee") is authorized to issue letter responses and to issue and publish formal written opinions responding to requests from members of the Bar for advisory opinions regarding the ethical propriety of anticipated professional or personal conduct. The Committee consists of fourteen voting members, each of whom is an active member of the Utah State Bar in good standing, and at least one of whom is a sitting or former judge. An attorney from the Office of Professional

Conduct serves as a non-voting consultant to the Committee.

The current Committee members are: Maxwell A. Miller, Chair; Judge Kate Toomey, Vice-Chair; Linda F. Smith, Secretary; Nelson T. Abbott; Meb W. Anderson; Alain C. Balmanno; Herschell Bullen; Paul C. Farr; John Morris; Karra J. Porter; John D. Ray; John A. Snow; Ryan Tenney; Shelley Wismer; and Judith D. Wolferts. These individuals represent a broad range of practice areas, and include attorneys in private practice affiliated with firms of all sizes, government employment, and academia.

Each year the Committee receives a variety of requests for ethics advisory opinions concerning Utah lawyers' ethical behavior under the Utah Rules of Professional Conduct. The Committee responds to all such requests either by issuing a formal ethics opinion to be published and thereby available to Utah lawyers and the public at large, or by issuing a letter response to the requesting party.

Ethics opinions focus on "the ethical propriety of anticipated professional or personal conduct of Bar members." Ethics Advisory Opinion Committee Rules of Procedure 1(a)(1). Accordingly, the Committee does not entertain requests for legal opinions or opinions on any other subject outside the scope of its authority. Moreover, the Committee may exercise its discretion to decline a request if it "does not involve a significant subject or involves isolated conduct," *id.* R. 1(b)(3)(i), or if the request "is clearly resolved by applicable Committee opinions, the Rules of Professional Conduct, statutes or case law," *id.* R. 1(b)(3)(ii). The Committee also may, in its discretion, decline an otherwise appropriate request if it involves a matter that is already the subject of review by a court or by the Office of Professional Conduct, and may decline a request to opine upon the propriety of the conduct of an attorney who is not the author of the request.

MEB W. ANDERSON is an Associate with the law firm Stirba & Associates.



The Committee is not the Office of Professional Conduct. Nevertheless, because an attorney from the Office of Professional Conduct serves as a consultant to the Committee, its views and perspectives are available to the Committee.

How Do I Request an Ethics Advisory Opinion?

The Board of Bar Commissioners, any member of the Bar in good standing, or any “person with a significant interest in obtaining an advisory opinion on legal ethics may request an opinion.” *Id.* R. III(a)(1). Requests must be in writing, and include a brief description of the facts; a concise statement of the issue presented; and relevant citations to rules and ethics opinions, judicial decisions, and statutes. *See id.* R. III(a)(2), (3). The requests may be submitted directly to the Committee, or filed with the Board of Bar Commissioners or the Office of Professional Conduct, in which case those entities must forward the request to the Committee. *See id.* R. III(a)(2).

Once received, the Committee reviews each request, making a preliminary determination as to whether it is within the Committee’s authority, should be declined, or should be the subject of an opinion. The Chair or the Chair’s designee conducts a preliminary determination, which is followed by the full Committee’s review. Regardless of the Committee’s ultimate disposition of the requests, each receives considerable effort and discussion. In appropriate circumstances, the Committee may seek the views of appropriate Bar sections or committees, request public comment, invite the requestor to make additional oral or written presentations, or consult with the Office of Professional Conduct. *See id.* R. III(c).

The identities of persons or entities involved in making a request for an ethics opinion are confidential and shall not be disclosed in a published opinion without their consent. *See id.* R. VI. All voting and non-voting members of the committee and their staff are bound to maintain the confidentiality of the requesting persons or entities, and further, may not disclose the particulars of pending requests or circulate draft opinions. *See id.* (noting some limited exceptions for circulating drafts among colleagues and consulting non-Committee members concerning general issues).

In the event you disagree with an ethics opinion, recourse is available. *See id.* R. III(e). Generally, ethics opinions and letter responses are subject to review by the Board of Bar Commissioners within thirty days of their issuance. Also, a request for reconsideration of an ethics opinion may be filed with the Committee at the requesting party’s option. The ethics opinion under review “shall remain in full force and effect for the period during which the review is pending, unless the Board, in its discretion, issues a stay pending the outcome.” *Id.* R. III(e)(1)(iii). Appeal procedures for letter responses are handled a bit differently, with a mandatory request for reconsideration to the Committee. *See id.* R. III(e)(2).

What Does an Ethics Opinion Do For Me?

The ethics opinions are advisory in nature, and assist attorneys in avoiding unethical conduct. Assuming a factual context similar to what was posed by the request, a Utah lawyer who acts in a manner that is consistent with what was prescribed in an ethics opinion enjoys a “rebuttable presumption” of having conformed his or her conduct to the Utah Rules of Professional Conduct.

Where Can I Find Ethics Opinions?

An index of the Committee’s opinions can be found at: http://www.utahbar.org/rules_ops_pols/index_of_opinions.html

Recent ethics opinions of interest include:

Opinion No. 09-01

Issue: What are the ethical limits for the use of testimonials, dramatizations or fictionalized representations in lawyers’ advertising on television or web sites? See Utah State Bar Ethics Advisory Opinion Committee, Op. 09-01 (2009).

Opinion: Advertising may not be “false or misleading.” Testimonials or dramatizations may be false or misleading if there is substantial likelihood that a reasonable person will reach a conclusion for which there is no factual foundation or will form an unjustified expectation. The inclusion of appropriate disclaimer or qualifying language may prevent testimonials or dramatizations from being false or misleading. *See id.*

Opinion No. 08-01

Issue: May an attorney provide legal assistance to litigants appearing before a tribunal *pro se* and prepare written submissions for them without disclosing the nature or extent of such assistance? If so, what are the attorney’s obligations when full representation is not undertaken? *See id.* Op. 08-01 (2008).

Opinion: Under the Utah Rules of Professional Conduct, and in the absence of an express court rule to the contrary, a lawyer may provide legal assistance to litigants appearing before tribunals *pro se* and help them prepare written submissions without disclosing or ensuring the disclosure to others of the nature or extent of such assistance. Although providing limited legal help does not alter the attorney’s professional responsibilities, some aspects of the representation require special attention. *See id.*

Opinion No. 07-01

Issue: May a lawyer purchase the exclusive right to referrals generated from the membership base of an organization whose members from time to time may have need of the legal services offered by that lawyer? *See id.* Op. 07-01 (2007).

Opinion: The proposed arrangement, which contemplates the

exclusive funneling of referrals to one lawyer or firm, is not permitted, as it violates Utah Rule of Professional Conduct 7.2(b), which prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services. The fact that the recommendation is made by an organization does not change the outcome here. *See id.*

Opinion No. 06-05

Issue: Do the Utah Rules of Professional Conduct preclude a lawyer from participating in an ad hoc legal advisory group to a private, nonprofit, public interest legal organization, if the persons served by the legal services organization have interests adverse to the interests of a client of the lawyer or the lawyer's law firm? *See id.* Op. 06-05 (2006).

Opinion: Generally, no. Rule 6.3 of the Utah Rules of Professional Conduct, with respect to legal services organizations, and Rule 6.4, with respect to organizations involved in the reform of law or its administration, provide that service as an officer or director of such organizations or membership in such organizations

does not by itself create an attorney-client relationship with the organization or the organization's clients. These rules do require that a lawyer be observant of the lawyer's duties under Rule 1.7 to the lawyer's clients and to the clients of the lawyer's firm. Rule 6.3 requires that the lawyer not knowingly participate in a decision of the organization that is incompatible with the lawyer's obligations under Rule 1.7, or that could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer, or on the representation of a client of the lawyer or the lawyer's firm. Rule 6.4 requires that when the lawyer knows a client of the lawyer may be materially benefited by a decision of the law reform organization, that the lawyer-member disclose this fact to the organization. Under some circumstances, a lawyer's participation on an ad hoc litigation advisory group may create an attorney-client relationship with the organization or the organization's clients requiring the lawyer to comply with Rules 1.6, 1.7, and 1.9 before representing or continuing to represent clients adverse to the interests of the organization or the organization's clients in such matters. *See id.*

EXHIBIT “6”

Letters to the Editor

The *Utah Bar Journal* has been receiving and publishing word of lawyers who do pro bono work at various clinics, and that work is commendable indeed. Not published in these lists, however, are the names of those who do their alms in secret. Recently I was blessed by someone from the latter group.

While at an OSC hearing for a Water Quality Act violator I had prosecuted, the defendant had a physical meltdown. Having run out of money and lost his original attorney, he literally collapsed outside the court at the thought of going to the hearing. Luckily, a hero was present.

Local attorney Sheldon Carter stepped in and represented the defendant. We quickly worked out a resolution. Little acts like this, routinely done, form thousands of points of light that brighten our profession. Sheldon's example for us all shows that he is truly a great American.

Paul Wake

The Bar Commission's recent petition to increase licensing fees deserves scrutiny, particularly in comparison to other Utah licensing fees. Professional licensing fees administered by the Utah Division of Occupational and Professional Licensing (which licenses and regulates over 80 professions, including all the medical professions) range from approximately 25% to 50% of the proposed bar licensing fees. Does it really cost that much more to license and regulate attorneys?

DOPL fees are subject to the Utah Budgetary Procedures Act. Bar fees are not. DOPL fees cover licensing and regulation only. Bar fees include mandatory association membership fees, requiring all Bar licensees to pay for extras including the *Bar Journal* and lobbying efforts. It is time for a fresh evaluation of the core licensing and regulatory functions Bar licensees should be required to pay.

Sincerely,
Thad LeVar

The January-February *Utah Bar Journal* included an article by Meb Anderson, a member of the Ethics Advisory Opinion Committee, urging lawyers to seek ethical guidance from the EAOC when in doubt on an ethical issue. The EAOC Opinion 07-02 had concluded that "If 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 ["a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer."] Yet the same issue of the *Bar Journal* includes notice in the Attorney Discipline section, authored by the Office of Professional Conduct, in a case involving Rule 4.2 and Opinion 07-02 that the EAOC opinions are "advisory, and the presumption that an attorney who follows an opinion has not violated a Rule is rebuttable and inconclusive."

This apparently inconsistent result between the OPC and the EAOC has engendered confusion and no small amount of consternation by many members of the Bar. Why should the Bar even have an EAOC whose opinions cannot be relied upon and are disregarded by the OPC?

Gary Sackett, former Chair of the EAOC has submitted an article for publication in the next issue of the *Utah Bar Journal* discussing and analyzing the disciplinary note that has prompted this difficulty, and explaining why OPC's admonition to Bar members not to rely on EAOC opinions was unnecessary. For the benefit of Bar members, this issue needs to be resolved.

Maxwell A. Miller
Chair EAOC

EXHIBIT “7”

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).

GARY G. SACKETT is of Counsel at Jones, Waldo, Holbrook & McDonough, P.C. Mr. Sackett served as Chair of the Ethics Advisory Opinion Committee for 11 years and is a member of the Utah Supreme Court Advisory Committee on the Rules of Professional Conduct.



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

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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).

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