

ETH 18-02

Opinion No. 18-02

Utah Ethics Opinion

Ethics Advisory Opinion Committee

January 8, 2018

ISSUE

1. What are the Utah attorney's duties under the Utah Rules of Professional Conduct when the attorney is retained by a law firm to act as a consulting lawyer on a specific subject matter area? It is anticipated that the consulted lawyer will not have any direct contact with the consulting firm's client, and that the consultation will be hypothetical in nature.

OPINION

2. In the scenario presented, the consulted lawyer does not have a client-lawyer relationship by the virtue of the consultation alone. However, the consulted lawyer may acquire a duty of confidentiality regarding the information received.

BACKGROUND

3. The Ethics Advisory Opinion Committee has been asked to opine as to a Utah attorney's obligations under the Utah Rules of Professional Conduct while consulting for another lawyer.

4. In 1998, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 98-411, "Ethical Issues in Lawyer-to-Lawyer Consultation," which provides practical guidance. This opinion referenced the American Bar Association's Standing Committee on Ethics and Professional Responsibility's 1988 Formal Opinion 88-356 "Temporary Lawyers," which also provides guidance.

ANALYSIS

5. All attorneys admitted to the Utah State Bar are required to comply with the Utah Rules of Professional Conduct. These Rules include Rule 1.1, which states that "a lawyer shall provide competent representation to a client," meaning the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Utah R. Prof. Cond. 1.1. In this way, lawyer-to lawyer consultation is encouraged as the client receives expertise in a specific area of

law as that skill-set becomes needed.

6. Rule 1.6, comment [4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved. In the event that the identity of the client or the situation involved can be ascertained, then other duties will apply. In addition, there are duties which would apply to the consulting law firm which are not addressed herein.

7. In the scenario presented, no client-lawyer relationship between the consulting lawyer's client and the consulted lawyer arises as a result of the consultation. (ABA Formal Opinion 98-411.) Both the consulting and the consulted lawyers are obligated to protect the information that she receives that she has agreed explicitly or implicitly to keep confidential under Rule 1.6(a), which requires that:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted

CONCLUSION

8. Consultations are advisable and valuable to both practitioners and clients, however, careful consideration and caution is required. Although the consultation does not create a lawyer-client relationship between the consulting firm's client and the consulted lawyer and the scenario presented contemplates advice requested in the form of a hypothetical, the consulted lawyer is obligated to protect the information that she receives that she has agreed explicitly or implicitly to keep confidential.