Agenda

Advisory Committee on Rules of Professional Conduct

May 19, 2014

5:00 to 7:00 p.m.

Law and Justice Center

645 South 200 East

Board Room

Welcome and approval of minutes March 24, 2014 April 21, 2014	Tab 1	Steve Johnson
The seven boxes	Tab 2	Gary Sackett
Rule 1.1	Tab 3	Tom Brunker
Rule 4.4 and Rule 8.5	Tab 4	Leslie Van Frank
Rule 5.5	Tab 5	Steve Johnson
Next meeting		Steve Johnson

Tab 1

Minutes of the Committee on Rules of Professional Conduct

March 24, 2014

Draft. Subject to approval.

Meeting convened at 1700.

Attending: Diane Abegglen, John H. Bogart, Thomas B. Brunker, J. Simon Cantarero, Gary L. Chrystler, Nayer H. Honarvar, Steven G. Johnson, Chair, Judge Darold J. McDade, Trent D. Nelson, Vanessa M. Ramos, Kent Roche, Gary G. Sackett, Stuart Schultz, Paula K. Smith, Judge Vernice S. Trease, Leslie Van Frank, Paul Veasy, Billy L. Walker

Staff: Philip Lowry, Tim Shea

(1) Approval of minutes

The minutes of the previous meeting were read and approved.

(2) Consideration Of Comments To Advertising Rules

Mr. Johnson convened the meeting at 1700 and described the process to date.

The first part of the meeting was designated to the text of and comments to the advertising rules.

The discussion turned to whether the comments should be so illuminating, that is, should they be so important? Can the rules just state what the rules state? This followed immediately into a lively discussion of whether to include comment 5, as it raised in the minds of some committee members concerns regarding the first amendment. The concern was whether this comment really targeted false and misleading advertising, or merely advertising in bad taste. The comment was made that Rule 1.2 does not state "comply," but rather its purpose is to inform clients what standards apply. A motion was made to have comment 5 eliminated, and have a comment 4a that says everything in red under 5a except for the "and comment 5" language. The motion carried with one dissenting vote.

There next followed a motion to adopt the committee's recommendation to adopt proposed rule 7.1 (as just amended). The Motion carried with one dissent.

Next followed a discussion of proposed rule 7.2. The Staff report reflects that (a) is written differently than previous versions, and has been redefined by taking out the word *advertising*. A discussion followed about what the commissioners did, and the focus on communications to influence the public. The commission felt there was no need to define advertising in this way, so they took out the term. Mr. Johnson commented that some of the language was not anticipating other advertising forms. A concern was raised by Mr. Chrystler that word of mouth could be advertising. But, it was pointed out language must originate from lawyer, so the concern was

withdrawn. Mr. Sackett raised a concern that a letter to a client could be an advertisement, as it is a communication to induce retention. Mr. Bogart raised concerns about all kinds of ways lawyers burnish their image in the community (teaching, blogs, etc.). Mr. Walker pointed out that the definition is not the problem, but rather other standards governing ethicality of advertisement.

The discussion then turned to rule 7.3. The rule allows solicitation to attorneys without limitation (CLE, e.g.). Ms. Honarvar discussed the need to consider motivation, such as seeking pecuniary gain, inducing persons to use the lawyer's services. Mr. Johnson raised the issue of whether we need to define advertising. There was further discussion of Rule 7.2(a) and what constitutes advertising.

A Motion was made to leave it Rule 7.2(a) as proposed by the subcommittee. The motion carried. Favor: 10. Opposed: 5.

The discussion then turned to Rule 7.2(b). The staff recommended adopting the first part of commissioners' (b), but left out "in the event actors . . ." language. The concern was raised that it is uncertain how a disclosure could continue for the duration. The thought is that if you disclose that an advertisement is fictional, this seems to imply that actors are being used. Old Robert Vaughan ads come to mind. The motion was made that Rule 7.2(b) be accepted as proposed. The motion carried unanimously.

The discussion then turned to Rule 7.2(c). There was a discussion regarding dissemination, and whether the rule contained a potential redundancy. Mr. Johnson mentioned that the Court would like to see a joint petition from this committee and the commissioners on the rules. There was additional concern over whether the attorneys' address should be included. A motion was then made "to include the name of the attorney and the attorney's street address". The motion was revised on Line 8 of 7.2(c) to insert "and office address" after "name". The motion carried unanimously.

The discussion then turned to Rule 7.2(d). The staff reported that the Rule covers contingency fees. Payment of costs has been added to payment of expenses. There was a brief discussion on requirements and advisability of flat fee arrangements.

Little discussion occurred on Rule 7.2(e). With respect to Rule 7.2(f), a concern was raised that what is listed is a nonsense list. The staff opined that it's harmless and provides guidance. Mr. Sackett suggested putting them in the comments, then. There was a motion to strike 7.2(f) in its entirety. The motion carried. Favor: 12. Oppose: 4.

With respect to Rule 7.2(g), the Commission has broken out subsections into b(1) and b(2). (3) and (4) have been stricken because they are already covered by other rules.

A motion was made on (d), (e) and (g). Mr. Chrystler expressed concerned about a lawyer giving value for a recommendation—what's the harm? He was concerned about the intermediary having undue sway on the client's decision to hire the lawyer. Mr. Bogart mentioned outlandish rates charged for legal notices. Mr. Walker expressed concern about fee splitting if an exorbitant rate is paid to a vendor.

A motion was made to adopt (d), (e), and (g). They were adopted with one dissent.

The discussion then turned to the comments on Rule 7.2. The changes mentioned are ABA changes. There was a discussion of [5]. There will need to be a change to the reference to (g), which now needs to be a reference to (f). Ms. Van Frank expressed concern about communication being equated with advertisement. The point was made that communication need not be made by lawyer, which is the distinguisher. Ms. Van Frank talks about being Gephardt approved. A lawyer can pay that fee if he choose. Mr. Johnson raised the example of an estate planner who would pay insurance salesman to refer clients to him. This is not permitted. Ms. Van Frank observed that putting a poster in a chiropractor's office might very well be permitted. It was decided to delete the entire line of 7b. The discussion then turned to whether to retain comment 8. It was resolved that it would be good attorney guidance. A suggestion was made to change 8a to remove language "and lists certain . . . ."

A motion was then made on the comments. The motion was to accept the committee's recommendations as amended and to adopt 7.2 comments, except for the phrase in 8a, delete 7b, and change references (g) to (f). The motion was unanimously approved.

Attention then turned to Rule 7.3. All comment changes are proposed by the ABA, in the nature of updates. The Commission did not look at the comments to 7.3, even though 7.1 and 7.2 depend on it. Mr. Sackett pointed out that 1a is redundant. It was moved to strike 1a. This was unanimously approved. A motion was made on Rule 7.3 to adopt it as recommended by the subcommittee, with the elimination of comment 1a. The motion carried unanimously.

Mr. Sackett then presented on getting rid of 7.2 a and b, and replacing these with some advisory function.

(3) Advertising Advisory Committee

It was then proposed to create an advertising advisory committee. A draft dated March 14, 2014 detailed the proposal. A key element would be the safe harbor effect of an advisory opinion from this body. Its function closely tracks the ethics advisory opinion committee rules.

The proposed committee's rules of procedure are also modeled after the EAOC rules. There would be two channels of approach, one for an advisory opinion for an applicant who is a lawyer, and one for nonlawyers. The initial request is made to the OPC or the committee. The

committee acts within 30 days, and the advertisement can go forward until committee deems the advertisement is unacceptable. The Committee can approve, reject or approve with changes. A reasoned opinion is not required, and there would be no need for findings or conclusions. A denial should be explanatory without detail.

The second channel can be from a member of the public. There need not be a notarized complaint. The Committee can refer the matter to OPC if it determines that the ad is out of bounds. OPC can do what it wants at that point. This would be analogous to a probable cause hearing.

An attorney submitting under the attorney channel who receives a negative response can appeal to EAOC. A concern was raised that EAOC cannot be expected to act as quickly as 30 days. Mr. Walker opined that best way to proceed is under Rule 14-504 rather than Rule 14-510, since the threshold to investigate is much easier. Particularly, the best way to proceed would be Rule 14-504(b)(2), under the general investigative authority.

The next question was how to resolve subsection (g), which concerns a 60-day safe harbor. This time period allows a full cycle of meetings. The practical effect is that inaction becomes a temporary reversal. This was discussed in detail. The question arose, What about 60 days without a decision is an affirmance? The issue of the presumptive state arose. Another question arose about whether a letter opinion rather than a full opinion might expedite action.

Mr. Johnson proposed the matter be tabled until the next meeting, with Mr. Sackett liaising with EAOC on a procedure with which they feel comfortable.

The meeting adjourned at 1900.

(4) Next Meeting

The next meeting is scheduled for 1700 21 April 2014. The topics will be addressing the advisory committee, confidentiality, and Rule 1.6.

Minutes of the Committee on Rules of Professional Conduct

April 21, 2014

Draft. Subject to approval.

Meeting convened at 1704.

Attending: Diane Abegglen, John H. Bogart, Thomas B. Brunker, J. Simon Cantarero, Gary L. Chrystler, Steven G. Johnson, Chair, Trent D. Nelson, Kent Roche, Gary G. Sackett, Stuart Schultz, Paula K. Smith, Judge Vernice S. Trease, Leslie Van Frank, Paul Veasy, Billy L. Walker

Excused: Nayer H. Honarvar, Judge Darold J. McDade, Vanessa M. Ramos

Staff: Philip Lowry, Tim Shea

(1) Approval of minutes

Ms. Van Frank noted that her name needs to be corrected. Mr. Sackett proposed that the minutes be approved at the next meeting, since so much had been discussed, and the draft had been circulated only earlier that day. This motion was approved unanimously.

(2) Recognition

Mr. Schulz was recognized for his service. He has finished his maximum number of terms and will be leaving the committee. He was presented with a certificate from the Court recognizing his service.

(3) Concerns over Confidentiality in OPC Proceedings

Mr. Johnson raised the issue of whether the committee members have experience with documents regarding confidentiality of proceedings before the OPC. The problem arises in the context of multiple interrelated claims. A letter from the OPC Counsel has raised the concern that confidential information might be improperly disclosed.

The proceeding is confidential, and this raises the issue of what is a proceeding. Are the documents the proceeding? Mr. Sackett raises the issue of whether disclosure to the complainant is a breach. Mr. Johnson does not believe so. There is also the issue of who the duty is imposed on. It seems that OPC, and not the claimant, has the duty not to disclose. Discussion of this matter ensued.

Mr. Walker opines that everything that happens after a complaint has been filed constitutes a proceeding. A nonattorney may not be bound by the rules, but her credibility may be adversely affected by her disclosure of confidential information. Even when one lawyer discloses against

another lawyer, this is not a violation of a rule of professional conduct, but rather of a procedural rule.

Mr. Sackett notes that the letter from the OPC Counsel seems to threaten the recipient through referral to the rules. Ms. Van Frank notes that the rule seems to refer to all participants, not just lawyers. Mr. Walker notes that the complainant in question has not been measured in her restraint.

(4) Advertising Advisory Committee

There are two errors in the draft of Rule 7.2. The first paragraph of 7.2 and comment 7a should be deleted.

The discussion then shifted to the advertising advisory committee (AAC). The comment was made that ethics advisory opinion committee (EAOC) does not want to be the appellate body for decisions issuing from the AAC. They don't want to get into the technical aspects of advertising. The current proposal is that the EAOC needs to weigh in, even on advertising, so in the end the EAOC is the de facto appellate authority.

Mr. Bogart raises the issue of whether the EAOC or the AAC can opine on what is offensive to the lay person. He is concerned about this. Mr. Sackett raises the issue of whether criticism of the judiciary should be deemed false or misleading. Mr. Johnson raises the issue that "offensive" statements may not necessarily be false. Mr. Walker raises the point that the catchall provision regarding impugning the judiciary could be a predicate for disciplinary action. Mr. Shea raises the issue of whether such a statement is the kind of representation that should appear before the AAC.

Mr. Walker addresses the integrity of the judiciary provision as being implicitly misleading, unless proven true. The falseness provides the offense. Ms. Van Frank raises the issue of when the committee refers impugning issues over to OPC.

Ms. Van Frank raises the issue of what is the fine line between expressing opinion and making disparaging remarks concerning the judiciary. Mr. Walker discusses how puffing or similar statements act to shift the burden to the lawyer to prove it is not false and misleading speech. The discussion continues between Ms. Van Frank and Mr. Walker regarding bias and recusal and its relationship to general representations and more particularly advertising.

Mr. Johnson raises the issue of a blog or a tweet, outside the realm of traditional advertising, and how a disparaging comment could be made in that context.

Mr. Chrystler raises the issue of whether legislators who disparage the judiciary are subject to ROPC. Mr. Walker indicates that they are. Mr. Shea points out that the integrity of a judge is really the issue, not the judiciary.

Ms. Van Frank raises the issue of whether something undignified is impermissible, even if true.

Mr. Sackett likes the idea of having a short version of what constitutes false or misleading to give the public an idea of what is false or misleading, and allow them to check a corresponding box. Mr. Sackett suggests seven boxes, none of which mention undignified statements. The suggestions are limited to false and misleading. A Motion is made to modify the set of boxes so there are seven boxes, a, b, c, d, and the seventh box would be "other". No second.

A substitute motion is made to keep the definition of offensive conduct to three boxes: false, misleading or other. The motion is seconded. Mr. Sackett is concerned that this does not give sufficient guidance to the public.

A vote is taken on having three boxes: reduce categories IV(b) to false, misleading or other. The motion fails.

Mr. Johnson summarizes the suggestions. The committee discussed alternative phrases describing the grounds for complaints about advertising. Mr. Sackett will revise the draft for the next meeting.

A motion is made to submit rules 7.1, 7.2, and 7.3 and Mr. Sackett's proposal to the commission. This would also eliminate 7.2A and 7.2B, which has already been voted on. The motion carries unanimously.

(5) Discussion of Rule 1.6

The Rule concerns an attorney changing employment. This is an ABA model rule, and the subcommittee recommends that it be adopted with some stylistic changes. Mr. Bogart raises an issue as to whether certain bars to disclosure could prevent a merger. Mr. Walker indicates that they are distinguishing Rule 1.6 from the attorney-client privilege. This raises the need to secure a waiver from the client, which Mr. Bogart indicated may not be possible.

Mr. Sackett indicates that in the past there has been confusion regarding the proper standard of successor or merger counsel.

Ms. Smith raises a question about references to comments to the Utah rule. The comments apparently do not figure in this draft. We need to ensure that the packet that goes up includes a complete draft of the text and comments. Ms. Smith suggests that the pending draft be adopted subject to cross-checking Rule 5.3 comments 3-4 to ensure accurate cross-referencing. The motion carries unanimously.

There was a discussion of which rules remain pending for discussion. Rules 1.1 4.4, 5.3 and 5.5 remain. They will be the subject of the next meeting, to be convened at 1700 on 19 May 2014.

The Meeting is adjourned at 1830.

Tab 2

Advertising Advisory Committee Rules of Procedure

PART I. DUTIES AND AUTHORITY.

(a) Duties. The Advertising Advisory Committee of the Utah State Bar (the "Committee") shall:

(a)(1) Respond to requests by members of the Utah State Bar and Utah law firms for advisory approval of specific legal advertising which the requesting party is using or intends to use is in compliance with Rules 7.1 through 7.5 of the Utah Rules of Professional Conduct ("Advertising Rules");

(a)(2) Respond to complaints and requests by members of the Utah State Bar, Utah law firms and members of the public who raise issues about whether a specific, current lawyer advertisement is in violation of the Advertising Rules;

(a)(3) Make recommendations to the Office of Professional Conduct ("OPC") of the Utah State Bar for possible prosecution of lawyers whose advertising is subject to a request under § I(a)(2) and for which the Committee finds probable cause that the advertising is in violation of the Advertising Rules; and

(a)(4) Compile and deliver to the President of the Board of Bar Commissioners an annual report of the Committee's activities.

(b) Authority.

(b)(1) In responding to requests under § I(a), the Committee shall interpret the Advertising Rules and, except as may be necessary to the opinion, shall not interpret other of the Utah Rules of Professional Conduct or other law.

(b)(2) The following requests are outside the Committee's authority:

(b)(2)(i) Requests that require interpretation of the Utah Rules of Professional Conduct other than the Advertising Rules.

(b)(2)(ii) Requests for opinions on advertising that has been used in the past but is no longer in use and for which there is no evidence it will be in used in the foreseeable future.

PART II. GENERAL COMMITTEE PROCEDURES

(a) Meetings.

(a)(1) The Committee shall hold scheduled meetings every month except July and at such other times as the Chair may designate.

(a)(2) The Committee shall meet at the Utah Law and Justice Center or such other places as the Chair may designate.

(a)(3) To conduct official business at a Committee meeting, more than 50% of the members must be present, either in person or by telephone or audio-visual conference connection.

(a)(4) The Secretary or other member of the Committee designated by the Chair shall prepare and the Committee shall approve minutes of Committee meetings.

(b) Complaints and Requests.

(b)(1) Requests and complaints shall be in writing and filed with the Committee or OPC. Requests filed with the OPC shall be forwarded to the Committee.

(b)(2) Unless the Chair determines there is good cause that a request or complaint be considered by the Committee en banc, the Chair will assign each request or complaint filed with the Committee to a panel of three members of the Committee and will designate a member as panel chair.

(b)(3) Three-member panels will be chosen in a manner that distributes cases among Committee members as uniformly as practicable.

(b)(4) A Committee panel's determination of a request or complaint will be deemed a final disposition by the Committee.

PART III. PROCEDURE—REQUESTS FOR ADVISORY APPROVAL.

(a) Any member of the Utah State Bar in good standing or a representative of a Utah law firm may submit to the Committee a specific advertisement for legal services and seek Committee approval that the advertisement complies with the Advertising Rules.

(b) Requests under this rule shall include:

(b)(1) Exact copies of the advertising for which approval is sought and any variations that are anticipated;

(b)(2) A statement of what advertising media the applicant intends to employ for the advertising;

(b)(3) A brief statement indicating why the Committee should issue an advisory approval; and

(b)(4) Citations to any relevant ethics opinions, judicial decisions and statutes.

(c) For each request or complaint submitted under this Part, the Committee shall:

(c)(1) Determine that the advertising is in compliance with the Advertising Rules;

(c)(2) Determine that, with certain modifications specified by the Committee, the advertising would be in compliance with the Advertising Rules; or

(c)(3) Determine the advertising violates one or more of the Advertising Rules.

(d) Upon the Committee's determination under this Part, the Chair shall inform the requesting party of the Committee's advisory opinion. Except for any suggestions for making the submitted advertising compliant with the Advertising Rules under § IV(d)(2), the advisory opinion will only state whether the advertising does or does not have advisory approval of the Committee. The Committee is not required to issue findings, conclusions or discussion in connection with an advisory opinion.

(e) The Committee shall, to the maximum extent practicable, endeavor to respond to requests under this Part within days of receipt of the request by the Committee.

(f) If the Committee has not responded to a request under this Part within days of the Committee's receipt of the request, the advertising may be used without exposure to prosecution by OPC for violations of the Advertising rules until such time as the Committee issues an advisory opinion finding the advertising not to be in compliance with the Advertising Rules. After the issuance of such an advisory opinion, the requesting party may be subject to prosecution by OPC if the unapproved advertising is not removed from advertising media within seven calendar days of the issuance of such an opinion.

PART IV. PROCEDURE—REQUESTS FOR EVALUATION OF ADVERTISING CURRENTLY IN USE

(a) Any person may submit to the Committee a signed statement complaining of, or requesting that the Committee determine whether, an advertisement currently in use through one or more media violates the Advertising Rules.

(b) A statement submitted under this rule need not be notarized or otherwise attested to and shall be substantially similar to:

I believe the advertisement (check one)

☐ specifically described below,

☐ a copy of which is attached

may violate lawyer advertising rules because it (check all that may apply):

☐ is false

☐ is misleading

☐ contains a material misrepresentation of fact or law

☐ creates an unjustified or unreasonable expectation

☐ compares the lawyer's services with other lawyers' services

☐ contains an improper testimonial or endorsement

☐ other: _____,

and should be evaluated or investigated for compliance with applicable rules.

(c) For each request or complaint submitted under this Part, the Committee shall either:

(c)(1) Determine there is no probable violation of the Advertising rules; or

(c)(2) Determine there is a probable violation of the Advertising Rules, and refer the matter to OPC with a recommendation that OPC initiate an investigation pursuant to its authority under the Rules of Lawyer Discipline and Disability § 14-504(b)(2).

(d) The Chair shall inform the requesting party of the Committee's determination.

PART V. OPINION REVIEW.

(a) An advisory opinion issued by the Committee is subject to review by the original requesting party or OPC by filing a petition with the Ethics Advisory Opinion Committee of the Utah State Bar ("EAOC") within days after the date of the Committee's final disposition of a request for advisory approval.

(b) A petition for review under this Part shall be in writing and shall state the bases in fact, law or policy in support of the request.

(c) Any person filing a petition for EAOC review under this Part shall serve a copy of the petition on the Committee Chair.

(d) Notwithstanding the filing of a petition for review of Committee action pursuant to these provisions, the action of the Committee shall be effective for the period during which EAOC review is pending.

(e) Upon receipt of a timely petition for review of Committee action, the EAOC, or a subcommittee of the EAOC specifically designated, shall review the action of the Committee. The EAOC or subcommittee may affirm, affirm with modifications or overrule the action of the Committee after conducting such procedures as it deems appropriate.

(f) If the EAOC has not responded to a request under this Part within days of the EAOC's receipt of the request, the advertising may be used without exposure to prosecution by OPC for violations of the Advertising Rules until such time as the EAOC issues an advisory opinion finding the advertising not to be in compliance with the Advertising Rules. After the issuance of such an advisory opinion, the requesting party may be subject to prosecution by OPC if the unapproved advertising is not removed from advertising media within seven calendar days of the issuance of such an opinion.

PART VI. CONFIDENTIALITY.

Committee members may not disclose the particulars of pending issues to persons outside the Committee; provided, however, that: (a) members may be assisted by their partners, colleagues, employees, associates or law student volunteers in researching issues raised by a request for an advisory opinion; and (b) members may discuss general principles of the Advertising Rules as they relate to a pending issue with non-Committee members. Those assisting a Committee member and members of the Office of Professional Conduct must also observe the confidentiality requirements of this section.

Tab 3

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed C consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. [See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1 .6 (confidentiality), and 5.5(a) (unauthorized practice of law).] The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct: rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[~~6~~8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Tab 4

Rule 4.4. Respect for Rights of Third Persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive ~~documents~~ a document or electronically stored information that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidently transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning deleting the ~~original~~ document or electronically stored informarion, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically store information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically store information that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically store information " includes in addition to paper documents, e-mail ~~or other electronic modes of transmission~~ and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving ~~the document~~ it that it was inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Rule 8.5. Disciplinary Authority; Choice of Law.

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(b)(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(b)(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct ~~occur~~ occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See Rules 6 and 22, Utah Rules of Lawyer Discipline and Disability.

[1a] Utah has declined to adopt the portion of ABA Model Rule 8.5 Comment [1] providing that a lawyer who is subject to Utah disciplinary authority under Rule 8.5(a) is deemed to have appointed a court-designated official to receive service of process. This would be a substantive procedural rule that is not appropriate for these Rules. The last sentence of ABA Comment [1] is an unnecessary comment on jurisdiction in civil matters, and Utah has declined to adopt it.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct ~~that~~ which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best ~~interests~~ interest of both clients and the profession (as well as the bodies having authority to regulate the profession).

Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that, as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct ~~occurs~~ occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct ~~occurs~~ occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this Rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct and in all events should avoid proceeding against a lawyer on the basis of ~~now~~ two inconsistent rules.

[7] The choice-of-law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Tab 5

For purposes of discussion: ABA Model Rule Changes [with changes to the Utah Rule recommended for other reasons highlighted in yellow]

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(b)(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(b)(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(c)(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(c)(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(c)(3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(c)(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(d)(1) are provided to the lawyer's employer or its organizational affiliates; ~~and~~ are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(d)(2) are services that the lawyer is authorized to provide by federal law or other law or rule of this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to

practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or public authority.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer's assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. The "practice of law" in Utah is defined in ~~Chapter 13A, Rule 1.0~~ Rule 14-802(b)(1), Authorization to Practice Law, of the Supreme Court Rules of Professional Practice. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the

lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3).

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. ~~as well as~~ Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also *Model Rule on Temporary Practice by Foreign Lawyer*. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or `foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See *Model Rule for Registration of In-House Counsel*.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law,

which includes statute, court rule, executive regulation or judicial precedent. See, e.g., The ABA Model Rule on Practice Pending Admissions.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction are governed by Rules 7.1 to 7.5.

[21a] Utah Rule 5.5 differs from the ABA Model Rule 5.5 in Comment [2], where the second sentence has been modified to reflect and be consistent with ~~Chapter 13A, Rule 1.0~~ Rule 14-802(b)(1), Authorization to Practice Law, ~~or~~ of the Supreme Court Rules of Professional Practice, which both defines the "practice of law" and expressly authorizes nonlawyers to engage in some aspects of the practice of law as long as their activities are confined to the categories of services specified in that rule. Similarly, the last sentence in ABA Model Rule 5.5 Comment [13] has been omitted to comport with Utah's definition of the "practice of law."

Subcommittee Recommendations Regarding Rule 5.5

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(b)(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(b)(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(c)(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(c)(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(c)(3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(c)(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(d)(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(d)(2) are services that the lawyer is authorized to provide by federal law or other law or rule of this jurisdiction.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer's assisting another person. For example, a lawyer may

not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. The "practice of law" in Utah is defined in ~~Chapter 13A, Rule 1.0~~ Rule 14-802(b)(1), Authorization to Practice Law, of the Supreme Court Rules of Professional Practice. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraphs (c) and (d) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this

jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3).

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues

involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See Rule 14-718 of the Supreme Court Rules of Professional Practice, *Licensing of Foreign Legal Consultants*, and 14-719 of the Supreme Court Rules of Professional Practice, *Qualifications for Admission of House Counsel Applicants*.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., Rule 14-804 of the Supreme Court Rules of Professional Practice, *Special Admission Exception for Military Lawyers.*

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

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[21a] Utah Rule 5.5 differs from the ABA Model Rule 5.5 in Comment [2], where the second sentence has been modified to reflect and be consistent with ~~Chapter 13A, Rule 1.0~~ Rule 14-802(b)(1), Authorization to Practice Law, ~~or~~ of the Supreme Court Rules of Professional Practice, which both defines the "practice of law" and expressly authorizes nonlawyers to engage in some aspects of the practice of law as long as their activities are confined to the categories of services specified in that rule. Similarly, the last sentence in ABA Model Rule 5.5 Comment [13] has been omitted to comport with Utah's definition of the "practice of law". Utah's Rule also differs from the ABA Model Rule 5.5 in that Utah has not adopted the ABA's provisions dealing with foreign lawyers. Utah has its own Rule 14-718 of the Supreme Court Rules of Professional Practice, *Licensing of Foreign Legal Consultants*, covering this matter.