MINUTES OF THE MEETING OF THE
COMMITTEE ON RULES OF PROFESSIONAL CONDUCT

November 3, 2014

The meeting commenced at 5:05 pm.

Attending: Steve Johnson, Paula Smith, Nayer Honarvar, Kent Roche, Gary Sackett, Paul Veasy, Dan Brough, John Bogart, Vanessa Ramos, Billy Walker, Leslie Van Frank, Trent Nelson.

Excused: Gary Chrystler, Tom Brunker, Phillip Lowry, Diane Abegglen, Simón Cantarero, Judge Vernice Trease, Judge Darold McDade,

Staff: Nancy Sylvester

Guests : Bar counsel- Joni Seko, Elizabeth Wright, and Steve Waterman.

(1) Introduction of members

Mr. Johnson had everyone introduce themselves and their area of law practice in light of Mr. Brough's first meeting with the committee.

(2) Approval of Minutes from September 2014 Meeting

Ms. Van Frank requested to change the minutes to say "Ms. Van Frank moves," as opposed to "Ms. Frank moves" in the second paragraph.

Mr. Veasy moved to approve the updated minutes. Another person seconded. The committee members present unanimously voted to approve the meeting minutes.

(3) Discussion of Rule 5.5

Mr. Johnson opened the discussion of Rule 5.5 by addressing the comments made by the Utah State Bar during that comment period that ended in October. The Bar's comments mostly focused on the proposition that Rule 5.5 effectively nullified Rule 14-719, which deals with house counsel attorneys.

Mr. Johnson brought up the fact that 14-719 didn't take into account government attorneys, whereas Rule 5.5 did.

Ms. Van Frank brought up the ABA Model Rule 5.5 document that she had sent around via email. She said she wasn't sure where we discussed rule 5.5 and rule 14-719. Steve pointed out that the material Leslie sent around was an old ABA version of rule 14-719. The current ABA Model rules that the committee worked from are the 2012 version. So paragraph (e) dealing with 14-719 is not in the current one.

Mr. Johnson said our Rule 5.5(e) is the ABA model rule, and the redline represents minor changes we made from the ABA's version.

Ms. Wright pointed out that these rules are a problem with pro hac vice applicants. She gave an example of an attorney not knowing that he had to appear because of his reliance on this rule. He lost all of his attorney fees. Ms. Wright said the amendments that the committee is proposing confuse people.

Mr. Johnson noted that it sounded like the real concern was that the rule even before these proposed amendments needed to be fixed.

Mr. Waterman said that as the rule currently reads, paragraph (d)(2) can be interpreted as attorneys can practice in Utah if they have a license elsewhere as long as they are only practicing Federal Law. Mr. Johnson said that (d)(2) says something different and that these attorneys are clearly not reading very carefully.

Ms. Seko said Admissions is having problems with people practicing for a while here and not realizing they are running afoul of the law. She said the bigger problem is in the language of paragraph (d), which says, "through an office or other systematic and continuous presence…." They think they can set up an office here because of that language.

Mr. Johnson again reiterated that the attorneys are not reading the rules very carefully.

Mr. Watermans asked, what is the committee trying to accomplish by the "systematic presence" language?

Mr. Johnson responded that rule 5.5 originally had something about foreign legal consultants and the committee thought that we didn't need to go to that extent. The ABA has been pushing for a multi-jurisdictional practice, a national bar. Mr. Johnson read from the ABA recommendations and then pointed out that the committee didn't think the Bar wanted to go that way. The Bar counsel present agreed.

Ms. Seko noted that the Bar does allow people to practice law, though, while their Utah application is pending.

Mr. Johnson pointed out that he spoke extensively with Katherine Fox about this, as did Mr. Bogart about the pro hac vice issue.

Mr. Waterman pointed out that Ms. Fox didn't deal with House Counsel as much as she dealt with pro hac vice.

Mr. Waterman said he was at a conference once where there was an ABA representative promoting the model rules. He asked her who was going to regulate

character and fitness under these rules. She said that that is not what the ABA was concerned with in promulgating the rules.

Mr. Waterman continued. He said, we have adopted admission by motion from other states, but it requires character and fitness evaluations. Our concern is protecting the public and you do that by evaluating the moral character and fitness. If you adopt a multi-jurisdiction practice rule, who is going to regulate these people? The ABA doesn't have the answer to that. Most people are good, but we have people wanting to come in on reciprocity who have multiple character problems. We also have problems with people from other jurisdictions who have been practicing here and have been causing multiple problems. Other jurisdictions are not always interested in prosecuting attorneys for what they are doing here. Mr. Waterman gave the example of a Nevada attorney practicing in St. George who bilked tons of money from elderly man. He said in cases like that, Billy Walker's office (Office of Professional Conduct) does not necessarily have jurisdiction to prosecute. But, where a Utah citizen is actually injured, his office gains jurisdiction.

Mr. Walker said the system, though, is inefficient. He said, the best result is an order of discipline, and that is sent back to the home jurisdiction. A second approach they take is to develop a case and then send the case back to the home jurisdiction to prosecute. If the person is not licensed in any state, UPL takes action and has jurisdiction. Ms. Wright pointed out that her office can seek civil remedies at that point, and if the person is associated with an attorney, they can go after the attorney, too.

Mr. Walker pointed out that there is a problem with immigration attorneys saying they only practice federal law. But that is a misnomer because there is a great overlap with state law in immigration proceedings. He said the rule is not clear about federal practice. It's close to what the model rule says, but the rule still needs help.

Mr. Bogart said he didn't understand how removing the redline language helps the Bar.

Ms. Seko said the redline language gives attorneys another argument that they can set up shop here without a Utah license.

Mr. Waterman said that at least in the past, we could say you could come in on a temporary basis, but only for a case. But now you could work for house counsel under this and never register.

Mr. Johnson proposed adding this language to paragraph (d)(1): "Subject to rule 14-719, the rules of practice for house counsel…" But, he pointed out, this fixes the house counsel rule but not others.

Mr. Sackett said we don't usually make reference to other rules in these rules except in comments so we shouldn't do so now.

Ms. Sylvester pointed out that there are Rules of Civil Procedure that refer to other rules and that they are Supreme Court rules like the Rules of Professional Conduct.

Ms. Seko suggested putting in the comments that attorneys need to check with the Utah Bar to make sure they are not violating the rules.

Mr. Williams said he agrees with Ms. Seko that the comments would help by providing guidance, particularly by mentioning that paragraph (d)(1) is talking about rule 14-719.

Mr. Johnson brought up a concern about government attorneys that can practice for a year before applying for admission. He said paragraph (d)(2) deals with this. If you take that out, then they can't do that.

Mr. Waterman pointed out that the supremacy clause will control, even if we take it out. He said this paragraph is problematic because attorneys point to this rule for the principle that they can practice here without a Utah Bar license. He said, we point out to them that they are wrong, but by that point they have been here for 5 years.

Ms. Seko said that the typical problem occurs as follows: someone is hired here as general counsel for a company and is here practicing for 5 years even though they have been admitted elsewhere. They then file a motion to be admitted based upon the 5-year rule. The Bar then says, your 5 years here don't count. You must have beeen in the jurisdiction that admitted you.

But, Mr. Waterman pointed out, if they are house counsel, then yes they can come in subject to character and fitness.

Ms. Seko then pointed to the suggestions made by the Bar in the comments to rule 5.5, which, she suggested, could resolve these concerns.

Mr. Sackett brought up a concern about the house counsel rule. He said the house counsel rule concerns him, having represented attorneys who practiced under it. He is concerned about what public interest they are interested in protecting. He gave an example of the Walmart employer. He said, when Walmart hires an attorney, the corporation is in the best position to determine his character and fitness because the employer has accepted the person. Not only that, usually the attorney is locked away in a cubicle not interacting with the public. The Bar then makes them go through all of these other trappings. If he had his way, he would take another look at the house counsel rule. He said, it's a Catch 22: you don't see the 6 month rule, then upon discovering it, you are well past the deadline and then your character and fitness goes down the drain.

Ms. Seko said in that case, we will bring them in and ask for explanation of how they missed the requirement. For house counsel, we don't require the bar exam, and they do not even have to have graduated from an ABA-approved law school. The problem, though, is that most people think of house counsel as those attorneys who are working locally for a big corporation like Chevron, for example. But often times, a person is with a small firm consulting as house counsel with several small shops, and that is where we run into problems.

Mr. Waterman said that Mr. Sackett is correct that the employer is in the best position to assess character. But he gave the example of an attorney creating "Landlord LLC." The attorney makes himself house counsel, who then goes out and is dealing with people out in the public. He said, our tendency is to think of large law firms and large corporations. But we have the most problems with small firms, small businesses, and solo practitioners. You won't find anyone who is in-house counsel in the traditional sense that does not have good character. Currently there are only 50 traditional in-house counsel attorneys here in Utah.

Mr. Bogart asked, does the Bar know what Goldman Sachs is doing? He said they have law school grads who are working in compliance. Goldmans makes clear that they are not practicing law, but that is highly debatable. The bar counsel said they have heard of that, but that most are getting licensed.

Mr. Johnson noted that Ms. Seko has a recommendation to change paragraph (d), (d)(1), (d)(2), and then Comments [17] and [18] would add information about the Utah Bar.

Mr. Roche said the Bar comments make sense.

Mr. Roche then moved to adopt Ms. Seko's amendments. Mr. Walker seconded. The committee voted unanimously to adopt Ms. Seko's proposed amendments.

Mr. Johnson said that the committee will need to look at the advertising comments when they come back on December 16th. The committee agreed on **February 2nd for the next meeting**. Ms. Sylvester will send out the comments to the committee when they come back.

The meeting adjourned at 600 pm.