Agenda

Supreme Court's Advisory Committee on the Rules of Professional Conduct

February 2, 2015
5:00 to 7:00 p.m.

Law and Justice Center
645 South 200 East
Board Room

Welcome and approval of minutes: November 3, 2014 meeting	Tab 1	Steve Johnson, Chair
Rule 5.5	Tab 2	Gary Sackett and Bar Leadership
Overlap between the Standards of Professionalism and Civility and the Rules of Professional Conduct	Tab 3	Robert Clark and Billy Walker
Advertising Rules Comments	Tab 4	Steve Johnson
Next meeting@ Matheson Courthouse 2/23		Steve Johnson

Tab 1

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

November 3, 2014
Draft: Subject to Approval

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 Cantatero, 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 (d) dealing with 14-719 is not in the current one.

Mr. Johnson said our Rule 5.5 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 Catherine 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 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.

Tab 2

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Rule of Professional Conduct 5.5

2 messages

Gary Sackett <GSackett@joneswaldo.com> Mon, Dec 8, 2014 at 3:03 PM
To: Joni Seko <joni.seko@utahbar.org>, "ewright@utahbar.org" <ewright@utahbar.org>
Cc: "Steven G. Johnson" <stevejohnson5336@comcast.net>, Nancy Sylvester <nancyjs@utcourts.gov>

Joni and Elizabeth,

Following the adoption of certain proposed changes to Rule of Professional Conduct 5.5 on November 3 by the Supreme Court Advisory Committee, Steve, Nancy and I discussed revisiting certain aspects of the modifications before sending a recommendation to the Supreme Court.

Shortly after the meeting, I discussed with Joni what I would call the "House-Counsel Gap" in Rule 5.5(d): the six-month grace period during which in-house counsel is entitled to practice under Rule 14-719(d)(2) without having a House Counsel Application on file, but would be in violation of Rule 5.5(d) under the new November 3 language. I think the attached modifications, as explained in the memo, solve the problem.

We intend to bring this issue (and unrelated issues on placement and text of ancillary comments) back to the full Committee for consideration with what we believe will solve the "gap problem." The attached documents provide an explanation of what we intend to propose, along with the proposed text, redlined relative to the version that was approved at the November 3. As you will see, this also includes some modifications to the comments that are not related to the "gap."

We wanted to run the new proposed modifications past the two of you first to see if you have any suggestions.

—Gary

3 attachments

Memo Utah Rule 5.5 Dec 2014.pdf
50K

Rule 5.5 Utah 2014 ggs v Nov 3 version.pdf
55K

Rule 5.5 Utah 2014 ggs C.doc
43K

Joni Seko <joni.seko@utahbar.org> Mon, Dec 8, 2014 at 5:38 PM
To: Gary Sackett <GSackett@joneswaldo.com>, Elizabeth Wright <Elizabeth.Wright@utahbar.org>
Cc: "Steven G. Johnson" <stevejohnson5336@comcast.net>, Nancy Sylvester <nancyjs@utcourts.gov>

Thanks so much for your work on this. There is an Admissions Committee meeting this coming Monday

(December 15th). I would like to present this to that Committee for comment.

Either I or Elizabeth will be in touch with you next week with more feedback from our end.

Joni

Joni Dickson Seko
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From: Gary Sackett [mailto:GSackett@joneswaldo.com]
Sent: Monday, December 08, 2014 3:04 PM
To: Joni Seko; Elizabeth Wright
Cc: Steven G. Johnson; Nancy Sylvester
Subject: Rule of Professional Conduct 5.5

[Quoted text hidden]

SUGGESTED MODIFICATIONS TO UTAH RULE 5.5 AND COMMENTS.
(Ad hoc subcommittee [1] of Supreme Court Advisory Committee on the Rules of Professional Conduct)

The attached redline version compares the Ad Hoc Committee's suggestions to modify the version of Rule 5.5 and Comments that were adopted at the November 3, 2014, meeting of the full Committee.

The House-Counsel "Gap"

The Admissions Office's proposal to make Rule 5.5(d) an "only if" provision reverses the logical construction in the existing rule and leads to the problem of a House-Counsel Applicant being in violation of Rule 5.5(d)(1), even though the applicant is practicing within the six-month period provided by Rule 14-719(d)(2). The problem can be solved by returning to the original "if, then" logic of the ABA and current Utah rules.

Thus, if a lawyer admitted in another state has a pending application for Utah admission in one form or another, that lawyer may practice as in-house counsel (lower case) during the pendency of the application. That covers the period after the application is filed. For the six-month "grace" period allowed to a House Counsel Applicant before an application is filed, Rule 5.5(d)(2) provides protection: The "services provided are authorized by . . . applicable rule"—namely Rule 14-719(d)(2). The last part of Comment [15a] cites this rule to guide in-house lawyers in this situation.

On a related point, Rule 5.5(d)(1) should also cover in-house counsel who is seeking admission by other means. There seems no reason to single out a pending house- counsel application in (d)(1). It's possible that an out-of-state lawyer working exclusively for an employer might also have submitted an application for admission by motion (14-705) or as a military lawyer (14-804). In fact, the military admission looks in many respects like house-counsel admission—a practice limited to representing one's employer.

Comment [18] is restored to the ABA text. Existing references to DUCivR 83-1.1, and Rule 14-804 are moved to an expanded Utah-v-ABA explanation in Comment [18a], which also notes that Rule 14-719(d)(2) covers the six-month "gap" for House Counsel applicants.

Conformation of Comments to Prior Committee Practice

When the Committee approved certain changes to Rule 5.5 and the associated comments on November 3, the Committee's closely followed policy of including ancillary comments where the Utah rule differs significantly from the ABA rule was

[1]Gary Sackett, Steve Johnson, Nancy Sylvester.

not fully implemented.

In that connection, portions of the current Comment [21a] should be re-aligned with the ABA comments they explain. The first two sentences of current Comment [21a] explain variations due to the Utah definition of "practice of law." They are appropriate and should be renumbered as comment [2a] to place them near the first place where the difference arises.

The last part of current Comment [21a], "Utah has not adopted the ABA's provisions dealing with foreign lawyers, as it has adopted Rule 14-718 of the Supreme Court Rules of Professional Practice, Licensing of Foreign Legal Consultants, covering this matter" should be inserted after Comments [13] and [15].

The new reference to "a license" in Rule 5.5(d) is somewhat anomalous. There is no other use of "license" as a noun in the Rules of Professional Conduct (or comments). "License" is not defined in either set of rules (although "licensed to practice" is used in the Comments). The term used throughout the Rules of Professional Conduct is "admission" to practice, and that terminology is used in these modifications.

December 8, 2014

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:

(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

(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:

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

(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;

(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

(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 ~~only~~ provide legal services through an office or other systematic and continuous presence in this jurisdiction without ~~first obtaining a license~~admission to the Utah Sate Bar if:

(1) the services are provided to the lawyer's employer or its organizational affiliates while the lawyer has a pending ~~house counsel~~ application for admission to the Utah State Bar and are not services for which the forum requires pro hac vice admission; or

(2) the services provided are authorized by specific federal ~~law~~ or ~~other~~Utah law or by applicable 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 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.

[2a] The Utah rule modifies the second sentence of ABA Comment [2] to reflect and be consistent with Rule 14-802(b)(1), Authorization to Practice Law, 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.

[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).

[13a] The last sentence in Comment [13] to ABA Model Rule 5.5 has been omitted to comport with Utah's definition of the "practice of law" in Rule 14-802-(b)(1).

[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.

[15a] Utah's Rule 5.5(d) differs from the ABA Model Rule by requiring a person providing services to the lawyer's employer to have submitted an application for admission to the Bar, such as an application for admission of attorney applicants under Supreme Court Rules of Professional Practice, Rule 14-704; admission by motion under Rule 14-705; admission as House Counsel under Rule 14-719; or admission for military-lawyer practice under Rule 14-804.

[15b] Utah Rule 5.5 does not adopt the ABA's provisions dealing with foreign lawyers, as Rule 14-718 of the Supreme Court Rules of Professional Practice (foreign legal consultants) covers this matter.

[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 is subject to Utah admission and licensing requirements, including assessments for annual licensing fees and 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~~ admission of attorney applicants under Rule 14-704; admission by motion under Rule 14-705; licensing of foreign legal consultants under Rule 14-718; admission as House Counsel under Rule 14-719; admission for military-lawyer practice under Rule 14-804.

[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~~by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[18a] The Utah version of Paragraph (d)(2) clarifies that a lawyer not admitted to practice in Utah may provide legal services under that paragraph only if the lawyer can cite specific federal or state law or ~~or court~~an applicable rule that authorizes the services. See, e.g., Rule DUCivR 83-1.1, Rules of Practice of the United States District Court of the District of Utah~~, or~~; Rule 14-804 of the Supreme Court Rules of Professional Practice, ~~Special Admission Exception~~ admission for ~~Military Lawyers~~military-lawyer practice; Rule 14-719(d)(2), which provides a six-month period during which an in-house counsel is authorized to practice before submitting a House Counsel application; practice as a patent attorney before the United States Patent and Trademark Office.

[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 in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services 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 Rule 14-802(b)(1), Authorization to Practice Law 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.~~

Rule 5.5 Proposal of the Ad Hoc Committee of the Rules of Professional Conduct Advisory Committee

December 8, 2014

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

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(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

(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:

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

(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;

(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

(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 without admission to the Utah Sate Bar if:

(1) the services are provided to the lawyer's employer or its organizational affiliates while the lawyer has a pending application for admission to the Utah State Bar and are not services for which the forum requires pro hac vice admission; or

(2) the services provided are authorized by specific federal or Utah law or by applicable rule.

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 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.

[2a] The Utah rule modifies the second sentence of ABA Comment [2] to reflect and be consistent with Rule 14-802(b)(1), Authorization to Practice Law, 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.

[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).

[13a] The last sentence in Comment [13] to ABA Model Rule 5.5 has been omitted to comport with Utah's definition of the "practice of law" in Rule 14-802(b)(1).

[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.

[15a] Utah's Rule 5.5(d) differs from the ABA Model Rule by requiring a person providing services to the lawyer's employer to have submitted an application for admission to the Bar, such as an application for admission of attorney applicants under Supreme Court Rules of Professional Practice, Rule 14-704; admission by motion under Rule 14-705; admission as House Counsel under Rule 14-719; or admission for military-lawyer practice under Rule 14-804.

[15b] Utah Rule 5.5 does not adopt the ABA's provisions dealing with foreign lawyers, as Rule 14-718 of the Supreme Court Rules of Professional Practice (foreign legal consultants) covers this matter.

[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 is subject to Utah admission and licensing requirements, including assessments for annual licensing fees and client protection funds, and mandatory continuing legal education. See Supreme Court Rules of Professional Practice, admission of attorney applicants under Rule 14-704; admission by motion under Rule 14-705; licensing of foreign legal consultants under Rule 14-718; admission as House Counsel under Rule 14-719; admission for military-lawyer practice under Rule 14-804.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[18a] The Utah version of Paragraph (d)(2) clarifies that a lawyer not admitted to practice in Utah may provide legal services under that paragraph only if the lawyer can cite specific federal or state law or an applicable rule that authorizes the services. See, e.g., Rule DUCivR 83-1.1, Rules of Practice of the United States District Court of the District of Utah; Rule 14-804 of the Supreme Court Rules of Professional Practice, admission for military-lawyer practice; Rule 14-719(d)(2), which provides a six-month period during which an in-house counsel is authorized to practice before submitting a House Counsel application; practice as a patent attorney before the United States Patent and Trademark Office.

[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 in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction are governed by Rules 7.1 to 7.5.

Tab 3

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Re: Standards of Professionalism and Civility and the Rules of Professional Conduct

Steven G. Johnson <stevejohnson5336@comcast.net> Wed, Dec 10, 2014 at 7:37 PM
To: Billy Walker <billy.walker@utahbar.org>
Cc: "Nancy J. Sylvester" <nancyjs@utcourts.gov>

Thanks for the heads up, Billy. We'll put this on the agenda for our February 2nd meeting. That agenda is rapidly filling up, but we should at least initialize our discussion of these matters. If Mr. Clark would like to attend, he can bring us up to speed on the issues and on the Court's concerns.
Steve

From: "Billy Walker" <billy.walker@utahbar.org>
To: Stevejohnson5336@comcast.net
Cc: "Robert Clark" <rclark@parrbrown.com>, "Tim Shea" <tims@utcourts.gov>
Sent: Wednesday, December 10, 2014 3:51:31 PM
Subject: Standards of Professionalism and Civility and the Rules of Professional Conduct

Me and Rob Clark met this morning with the Supreme Court on the topic or the overlap between the Standards of Professionalism and Civility and the Rules of Professional Conduct. The Court would like the Rules of Professional Conduct Committee to advise them on whether the Rules of Professional Conduct should be modified (in either text or comments) to specifically address circumstances where an attorney egregiously and/or repeatedly breaches the Standards of Professionalism and Civility. The Court took particular note that Rule 8.4 (d) (Conduct Prejudicial to the Administration of Justice) might be implicated by this type of conduct, however there may other Rules also such as 3.3 (Candor Toward the Tribunal) and 3.5 (Impartiality and Decorum of the Tribunal) i.e. 3.5 (d) which addresses conduct intended to disrupt a tribunal that might be implicated. Various Rules of Professional Conduct are cross referenced as part of the Standards of Professionalism and Civility.

The Court would like this to be placed on the Committee's agenda and have Robert Clark who is the Chair of the Professionalism Counseling Board created by the Supreme Court's Standing Order No. 7 attend to give the Committee some background on the Court's interest in this issue.

If you have any questions, let me know

Billy Walker

Tab 4

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Comment to RPC 7.01, 7.02, and 7.03

Alison Adams-Perlac <alisonap@utcourts.gov> Mon, Dec 22, 2014 at 10:23 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Nancy,

The comment period to RPC 7.01, 7.02, and 7.03 is now closed. The proposals received the following six comments:

This comment relates to RULE 7.2 – ADVERTISING.

The last sentence of Comment 1 to Rule 7.2 states, "[A]dvertising by lawyers entails the risk of practices that are misleading or overreaching." Overreaching may occur when there is one-on-one or real-time contact. The important thing in mass media advertising is to make sure it is not false or misleading. This is covered by Rule 7.1 (incorporated into Rule 7.2), which clearly precludes communication that is false or misleading.

The U. S. Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350, 364, 97 S.Ct. 269, 53 L.Ed.2d 810 (1977) struck down attorney advertising bans. Nevertheless, the tendency of State Bars has been to restrict and limit truthful and non-misleading advertising.

THE FTC STRONGLY URGES STATE BARS TO PERMIT ADVERTISING THAT IS NOT FALSE OR MISLEADING.

The FTC letters to the New York State Bar and the Louisiana State Bar are found on the internet:

http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-office-court-administration-new-york-state-unified-court-system-concerning/v060020-image.pdf and
http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-louisiana-state-bar-association-concerning-proposed-rules-lawyer-advertising-and/v070001.pdf

The New York letter (p. 2) states that "imposing overly broad restrictions that prevent the communication of truthful and non-misleading information that some consumers may value is likely to inhibit competition and frustrate informed consumer choice."

As to paid endorsements, the audience reasonably expects the endorser to be paid. If not, "requiring disclosure rather than prohibiting such endorsements protects the consumer while encouraging the truthful flow of information to consumers." (p. 4)

The Louisiana letter (p. 2) expressed concern that when competing attorneys decide what advertising is permissible, that "may deter truthful and non-misleading advertising and present risks to competition."

As indicated in the Louisiana letter (p. 3), New York incorporated nearly all of the FTC suggestions. Louisiana did not change its proposed amendments as much, and its ethical rules failed to fully comply with federal law. Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board, 632 F.3d 212 (5th Cir. 2011).

AN ADVERTISEMENT CANNOT BE BARRED AS FALSE OR MISLEADING WITHOUT GOOD PROOF.

In the case of Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), an attorney was censured because his letterhead noted he had an NBTA certification. The justification for prohibiting such a notation was that it was potentially misleading. The Court reiterated that "the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive." Id., 496 U.S. at 100.

The Court stated that there must be evidence of deception before an advertisement can be categorized as "actually misleading." Id., 496 U.S. at 106. It then stated that a potentially misleading communication does not justify "a categorical prohibition against the dissemination of accurate factual information to the public." Id., 496 U.S. at 109.

The Court did note that it could be misleading "if the certification had been issued by an organization that had made no inquiry into petitioner's fitness, or by one that issues certificates indiscriminately for a price." Id., 496 U.S. at 102.

THERE IS A HEAVY CONSTITUTIONAL BURDEN TO RESTRICT TRUTHFUL AND NON-MISLEADING ADVERTISING.

The case of Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) and its progeny set forth strict criteria that courts must apply to permit restrictions on truthful and non-misleading advertising.

Specifically, (1) there must be a substantial state interest warranting the restriction; (2) the restriction must substantially further that interest; and (3) the restriction must not be overly broad. Furthermore, the entity restricting commercial speech has the burden to prove the criteria are satisfied: "[T]he First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement." Id. 447 U.S. at 572.

RULE 7.2 MUST CLEARLY COMPLY WITH THE UNITED STATES CONSTITUTION.

There is no substantial state interest furthered by precluding payment to a person for recommending the lawyer's services in a truthful and non-misleading advertisement.

Therefore, the list of permitted advertising costs in Comment 5 to Rule 7.2 should specifically include such a payment. That is, the third sentence of that Comment should read something like: "Paragraph (f), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio air time, domain-name registration, sponsorship fees, SPOKESPERSONS RECOMMENDING THE LAWYER'S SERVICES, internet-based advertisements, and group advertising."

Posted by Lynn P. Heward December 15, 2014 11:36 AM

RPC 7.03 seems not to allow an attorney to contact a prospective client when the name and contact information for the prospective client has been referred to me by another attorney or another person, perhaps a family member of the prospective client. For example, John Doe calls or sends an email to me informing me that Jane Sparks has a particular problem with which John believes I can be of help and asks me to call Jane and then provides me her contact information. It would appear under RPC 7.03 that I would be in violation if I contacted her because it would appear that I am soliciting her for pecuniary gain. At least I do not see any exception for this kind of example that often occurs.

Posted by Michael A Jensen October 30, 2014 12:10 PM

Almost every aspect of Rule 7.3, including the proposed changes, are completely ridiculous and sweepingly broad for the stated purposes within the rule. Rule 7.3 is reminiscent of the movie Minority Report, where Tom Cruise worked on a team punishing "pre-crime" because someone might commit a crime sometime in the near future. A Utah attorney cannot even call Bill Gates or President Obama to offer their services because they, the attorneys, may possibly exercise some undue influence over the richest and most powerful people on Earth. Really? We also cannot hire a salesman to do if for us because salesmen who work for attorneys somehow become dangerous when both prior and after working for the attorney, they were relatively benign salesmen. Again...really?

Though a number of states follow the ABA model rule, many other states permit in person solicitation. From a quick Google search I found that VA, NJ, MO, ME, NH, CT, and RI permit in person solicitation. Even CA and DC, some of the most regulated places in America, allow in person solicitation. Others probably also allow it, but

they don't come up on the first page of Google. California has yet to fall in the sea and the other states have not yet collapsed into societal ruin. In fact, they seem to be doing fine.

I had a NY lawyer ask me who he needs to take to lunch to start obtaining business around here. I explained to him rule 7.3 and he was appalled we had to market under such draconian regulations.

Soliciting via in person and real time communication is by far the least expensive method of solicitation. Further, no shortage of legal work exists if we can only let the public know about our services. The vast majority of the population of Utah does not have an estate plan. Most LLCs do not have an operating agreement. The public is increasingly turning to non-lawyers to draft their contracts and online services to obtain their estate plans. We can stop this bleeding from the legal economy best by marketing our services effectively. Television and print ads are only effective if one has tens of thousands in a marketing budget.

Ultimately Rule 7.3 only serves as a protectionist device to prevent new attorneys and associates from competing with the more established attorneys. Rule 7.3 should be eliminated in its entirety. The proposed changes restrict access to work even further because, as we were previously not permitted to solicit prospective clients, we will no longer even have the ability to call potential employers to ask for a regular full time job. This may even apply to finding a job outside of the legal field.

Why are we strangling the members of the Bar with regulations?

Posted by Paul Maxfield October 29, 2014 11:43 AM

Proposed Rule 7.03 appears to extend the prohibition on real-time communications to existing clients known to be in need of legal services. If so, I find this rule impracticable and I object to its expanded scope. It fails to serve the interests of the client or the attorney in an ongoing and mutually beneficial relationship. The rules need to assume that clients have the will power to cease using an attorney's services where said services are no longer satisfactory.

Posted by Jared Clark October 28, 2014 02:46 PM

Proposed Rule 7.2(b) is unduly burdensome as to website photography and unlikely to bring any real protection to prospective clients in that respect. Video advertising should be subject to this rule, but web photography should not. New lawyers in particular need to use stock photography in order to afford the benefit of a professional website that the more established firms enjoy. A new lawyer should be able to portray professional looking photos consistent with the level of practice they perform without paying for a professional photographer. Consumers are accustomed to stock photos and can often distinguish between stock and real photos by the representation of names, titles, etc. that often accompany non-stock photography.

Posted by Jared Clark October 28, 2014 02:38 PM

The essence of RPC 7.01(b) is already covered in rule 7.1(a) and other rules of professional conduct. The terms "unjustified" and "unreasonable" are too subjective when compared to more objective terminology such as "material misrepresentation" in rule 7.1(a). Also, an attorney cannot be expected to manage "expectations" of which he cannot know and which often occur even with ample disclosures and continual assertions of a kind meant to limit those expectations. The one-sided "expectations" standard puts too much control in the hands of an upset and vindictive client. Why create a standard separate from the more objective and less ambiguous "material misrepresentation" standard?

Posted by Jared Clark October 28, 2014 02:25 PM

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