

MEMORANDUM

To: Utah Supreme Court Advisory Committee on the Rules of Professional Conduct
From: Gary Sackett
Date: May 13, 2013
Subject: Rule 5.5 Comments and renumbering portions of Rules 14-801 and -802

Comments [2] and [21a] of Rule 5.5 of the Utah Rules of Professional Conduct refer directly to the definition of the “practice of law” that is currently codified under Rule 14-802, Authorization to Practice Law. The current text of the two comments refers to Chapter 13A, Rule 1.0, where the definition originally resided. Those corrections are easily made.

In connection with reviewing and approving the needed corrections, the Committee may wish to revisit the logical placement of the definitional provisions of Rule 14-802 and the title of the Article where they appear.

As Rule 14-801 contains a broad collection of definitions for application to Article 8, a more logical place to put the definitions of “the law” and “practice of law” may be among the rest of the Article 8 definitions in Rule 14-801.

In addition, the current title of Article 8, Special Practice Rules, is somewhat misleading. The practice-of-law provisions of the current Rule 14-802 are not in any sense “special.” They are provisions of general applicability to defining and describing authorized practice. This can be remedied by simply augmenting the title of Article 8 to read “Practice of Law and Special Practice Rules.”

The highlights below are non-precision indicators where changes have been made. There has been no attempt to make an accurate red-line version that would highlight every renumbering and minor change.

ARTICLE 8. PRACTICE OF LAW AND SPECIAL PRACTICE RULES

Rule 14-801. Definitions.

As used in this article:

(a) “active status” means a Bar licensing category as defined by Rule 14-203(a) and Rule 14-802803 [?], and the Bar’s rules, regulations and policies;

(b) “approved legal services organization” means a Utah not-for-profit legal services organization which is approved by the Bar as set forth herein. A legal services organization seeking approval from the Bar shall file a petition with the Bar, attaching copies of its Articles of Incorporation and Bylaws, if any, and certifying that it is a not-for-profit organization, reciting with specificity:

(b)(1) the structure of the organization and whether it accepts funds from its clients;

(b)(2) the major sources of funds used by the organization;

(b)(3) the criteria used to determine potential clients’ eligibility for legal services performed by the organization;

(b)(4) the types of legal and nonlegal service performed by the organization;

(b)(5) the names of all members of the Bar who are employed by the organization or who regularly perform legal work for the organization; and

(b)(6) the existence and extent of malpractice insurance which will cover the volunteer attorneys with such documentation being updated on an annual basis;

(c) "attorney applicant" means a lawyer applicant as defined by the Rule 14-701;

(d) "Bar" means the Utah State Bar;

(e) "CLE" means MCLE accredited continuing legal education;

(f) "inactive status" means a Bar licensing category as defined by Rule 14-203(a)(4), Rule 14-802803, and the Bar's rules, regulations and policies;

(g) in connection with the definition of the practice of law below, "the law" is the collective body of declarations by governmental authorities that establish a person's rights, duties, constraints and freedoms and consists primarily of:

(g)(1) constitutional provisions, treaties, statutes, ordinances, rules, regulations and similarly enacted declarations; and

(g)(2) decisions, orders and deliberations of adjudicative, legislative and executive bodies of government that have authority to interpret, prescribe and determine a person's rights, duties, constraints and freedoms;

(h) "MCLE" means Mandatory Continuing Legal Education as set forth in Rule 14-401 et seq.;

(i) "Mentoring Completion Certification" means the certification form in the NLTP appendix of forms.

(j) "NLTP" means the Bar's New Lawyer Training Program as set forth in Rule 14-808;

(k) "OPC" means the Bar's Office of Professional Conduct;

(l) "person" includes the plural as well as the singular and legal entities as well as natural persons;

(m) "practice of law" is the representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person's facts and circumstances;

(n) except as used in Rule 14-807, "supervising attorney" means an active member of the Bar who generally supervises a volunteer attorney. The supervising attorney must:

(n)(1) be employed by an approved legal services organization;

(n)(2) assume professional responsibility as contemplated by Rule 5.1 of the Utah Rules of Professional Conduct for supervising the conduct of any litigation, administrative proceeding or other legal services in which the volunteer attorney participates providing, however, that concurrent administrative or judicial appearance is at the discretion of the supervising attorney;

(n)(3) assist the volunteer attorney in his or her legal service preparation to the extent that the supervisory attorney considers it necessary; and

(n)(4) ensure along with the agency that the volunteer attorney has appropriate and adequate training, knowledge and competency to perform the legal service permitted under these rules.

- (o) "Supreme Court" means the Utah Supreme Court; and
- (p) "volunteer attorney" means a person who meets the requirements of Rule 14-803.

Advisory Committee Comment:

As defined in section (g), "the law" is a comprehensive term that includes not only the black-letter law set forth in constitutions, treaties, statutes, ordinances, administrative and court rules and regulations, and similar enactments of governmental authorities, but the entire fabric of its development, enforcement, application and interpretation.

Laws duly enacted by the electorate by initiative and referendum under constitutional authority would be included under section (g)(1).

Section (g)(2) is intended to incorporate the breadth of decisional law, as well as the background, such as committee hearings, floor discussions and other legislative history, that often accompanies the written law of legislatures and other law-and rule-making bodies. Reference to adjudicative bodies in this section includes courts and similar tribunals, arbitrators, administrative agencies and other bodies that render judgments or opinions involving a person's interests.

The practice of law defined in section (m) includes: giving advice or counsel to another person as to that person's legal rights or responsibilities with respect to that person's facts and circumstances; selecting, drafting or completing legal documents that affect the legal rights or responsibilities of another person; representing another person before an adjudicative, legislative or executive body, including the preparation or filing of documents and conducting discovery; negotiating legal rights or responsibilities on behalf of another person.

Because representing oneself does not involve another person, it is not technically the "practice of law." Thus, any natural person may represent oneself as an individual in any legal context. To the same effect is Article 1, Rule 14-111(b), *Integration and Management*: "Nothing in this article shall prohibit a person who is unlicensed as an attorney at law or a foreign legal consultant from personally representing that person's own interests in a cause to which the person is a party in his or her own right and not as assignee."

Similarly, an employee of a business entity is not engaged in "the representation of the interest of another person" when activities involving the law are a part of the employee's duties solely in connection with the internal business operations of the entity and do not involve providing legal advice to another person. Further, a person acting in an official capacity as an employee of a government agency that has administrative authority to determine the rights of persons under the law is also not representing the interests of another person.

Rule 14-802. Authorization to practice law.

(a) Except as set forth in section (b) of this rule, only persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah.

(b) For purposes of this rule:

(b)(1) The "practice of law" is the representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person's facts and circumstances.

(b)(2) The "law" is the collective body of declarations by governmental authorities that establish a person's rights, duties, constraints and freedoms and consists primarily of:

(b)(2)(A) constitutional provisions, treaties, statutes, ordinances, rules, regulations and similarly enacted declarations; and

(b)(2)(B) decisions, orders and deliberations of adjudicative, legislative and executive bodies of government that have authority to interpret, prescribe and determine a person's rights, duties, constraints and freedoms.

(b)(3) "Person" includes the plural as well as the singular and legal entities as well as natural persons.

(b) Whether or not it constitutes the practice of law, the following activity by a non-lawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted:

(b)(1) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(b)(2) Providing general legal information, opinions or recommendations about possible legal rights, remedies, defenses, procedures, options or strategies, but not specific advice related to another person's facts or circumstances.

(b)(3) Providing clerical assistance to another to complete a form provided by a municipal, state, or federal court located in the State of Utah when no fee is charged to do so.

(b)(4) When expressly permitted by the court after having found it clearly to be in the best interests of the child or ward, assisting one's minor child or ward in a juvenile court proceeding.

(b)(5) Representing a party in small claims court as permitted by Rule of Small Claims Procedure 13.

(b)(6) Representing without compensation a natural person or representing a legal entity as an employee representative of that entity in an arbitration proceeding, where the amount in controversy does not exceed the jurisdictional limit of the small claims court set by the Utah Legislature.

(b)(7) Representing a party in any mediation proceeding.

(b)(8) Acting as a representative before administrative tribunals or agencies as authorized by tribunal or agency rule or practice.

(b)(9) Serving in a neutral capacity as a mediator, arbitrator or conciliator.

(b)(10) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements or as otherwise allowed by law.

(b)(11) Lobbying governmental bodies as an agent or representative of others.

(b)(12) Advising or preparing documents for others in the following described circumstances and by the following described persons:

(b)(12)(A) a real estate agent or broker licensed by the state of Utah may complete State-approved forms including sales and associated contracts directly related to the sale of real estate and personal property for their customers.

(b)(12)(B) an abstractor or title insurance agent licensed by the state of Utah may issue real estate title opinions and title reports and prepare deeds for customers.

(b)(12)(C) financial institutions and securities brokers and dealers licensed by Utah may inform customers with respect to their options for titles of securities, bank accounts, annuities and other investments.

(b)(12)(D) insurance companies and agents licensed by the state of Utah may recommend coverage, inform customers with respect to their options for titling of ownership of insurance and annuity contracts, the naming of beneficiaries, and the adjustment of claims under the company's insurance coverage outside of litigation.

(b)(12)(E) health care providers may provide clerical assistance to patients in completing and executing durable powers of attorney for health care and natural death declarations when no fee is charged to do so.

(b)(12)(F) Certified Public Accountants, enrolled IRS agents, public accountants, public bookkeepers, and tax preparers may prepare tax returns.

Advisory Committee Comment:

"Active" in this section (a) refers to the formal status of a lawyer, as determined by the Bar. Among other things, an active lawyer must comply with the Bar's requirements for continuing legal education.

Subsection (b).

The practice of law defined in Subparagraph (b)(1) includes: giving advice or counsel to another person as to that person's legal rights or responsibilities with respect to that person's facts and circumstances; selecting, drafting or completing legal documents that affect the legal rights or responsibilities of another person; representing another person before an adjudicative, legislative or executive body, including the preparation or filing of documents and conducting discovery; negotiating legal rights or responsibilities on behalf of another person.

Because representing oneself does not involve another person, it is not technically the "practice of law." Thus, any natural person may represent oneself as an individual in any legal context. To the same effect is Article 1, Rule 14-111 Integration and Management: "Nothing in this article shall prohibit a person who is unlicensed as an attorney at law or a foreign legal consultant from personally representing that person's own interests in a cause to which the person is a party in his or her own right and not as assignee."

Similarly, an employee of a business entity is not engaged in "the representation of the interest of another person" when activities involving the law are a part of the employee's duties solely in connection with the internal business operations of the entity and do not involve providing legal advice to another person. Further, a person acting in an official capacity as an employee of a government agency that has administrative authority to determine the rights of persons under the law is also not

representing the interests of another person.

As defined in subparagraph (b)(2), "the law" is a comprehensive term that includes not only the black-letter law set forth in constitutions, treaties, statutes, ordinances, administrative and court rules and regulations, and similar enactments of governmental authorities, but the entire fabric of its development, enforcement, application and interpretation.

Laws duly enacted by the electorate by initiative and referendum under constitutional authority would be included under subparagraph (b)(2)(A).

Subparagraph (b)(2)(B) is intended to incorporate the breadth of decisional law, as well as the background, such as committee hearings, floor discussions and other legislative history, that often accompanies the written law of legislatures and other law- and rule-making bodies. Reference to adjudicative bodies in this subparagraph includes courts and similar tribunals, arbitrators, administrative agencies and other bodies that render judgments or opinions involving a person's interests.

To the extent not already addressed by the requirement that the practice of law involves the representation of others, subsection (b)(2) permits the direct and indirect dissemination of legal information in an educational context, such as legal teaching and lectures.

Subsection (b)(3) permits assistance provided by employees of the courts and legal-aid and similar organizations that do not charge for providing these services.

Subsection (b)(7) applies only to the procedures directly related to parties' involvement before a neutral third-party mediator; it does not extend to any related judicial proceedings unless otherwise provided for under this rule (e.g., under subsection (b)(5)).