Agenda

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

April 5, 2021
5:00 to 7:00 p.m.

Via Webex

Welcome and approval of minutes	Tab 1	Simón Cantarero, Chair
Referral fees, fee sharing, and solicitation: Discuss Rule 1.5 and 5.4	Email	Alyson McAllister, Gary Sackett, Dan Brough, Shelley Miller, Angela Allen, Tim Conde, Steve. Johnson, Lucy Ricca, Jeffrey Eisenberg, Simón Cantarero
Rules 8.4 and 14-301: Clarify subcommittee assignment	Tab 2	Simón Cantarero, Adam Bondy
Remote work: American Bar Association Formal Opinion 495, Ethics Advisory Opinion 19-03, and Rule 5.5.	Tab 3	Joni Jones, Billy Walker
Projects in the pipeline: • Client fees issue from Bar Foundation (Kim Paulding) • Rule 1.0 comments to the Supreme Court		--

2021 Meeting Schedule: 1st Monday of the month at 5pm.

Next meeting: May 3, 2021.

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

Tab 1

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

[Draft] Meeting Minutes
March 1, 2021

WEBEX

5:00 p.m.

J. Simon Cantarero, Chair

Attendees:
J. Simón Cantarero, Chair
Steven Johnson (Emeritus)
Katherine Venti
Alyson McAllister
Jurhee Rice
Vanessa Ramos
Cory Talbot
Hon. James Gardner
Billy Walker
Adam Bondi
Joni Jones
Hon. Trent Nelson
Austin Riter
Gary Sackett (Emeritus)
Shelley Miller
Amy Oliver
Prof. Dane Thorley
Hon. Mike Edwards
M. Alex Natt, Recording Secretary

Staff:
Nancy Sylvester

Guests:
Nick Stiles, Shelly Miller, Lucy Ricca, Jeff Eisenberg

1. **Welcome and approval of the January 4, 2021 meeting minutes:** Mr. Cantarero.

Mr. Cantarero welcomed everyone to the meeting and asked for approval of the minutes.

There was discussion about the previous meeting minutes. Mr. Riter identified himself in the prior meeting minutes as the attendee identified only by telephone number. With that, the record was corrected.

Mr. Riter moved approval. Ms. McAllister seconded. The motion passed unanimously.

With Mr. Natt joining the Committee as Recording Secretary, the members were asked to identify themselves according to the rules and did so.

2. **Rule 1.5(e) Changes:** Ms. McAllister.

The Committee followed up on the last meeting's review of draft revised Rule 1.5(e) involving how referral fees may be paid to attorneys who are not staying actively involved with the matter to be referred. The draft language was reviewed and comments were sought.

Ms. Oliver asked whether these proposed revisions have been tested in other jurisdictions. Ms. McAllister indicated that they have. Mr. Riter inquired whether #1 and #2 are duplicative. Mr. Eisenberg indicated that "up front" payments should not be permitted. He also stated that the term "referral fee" may not be clearly different from "co-counsel fees" which he indicated in his opinion would be a different matter. Mr. Johnson suggested that the comment should indicate that the Rule would not apply in co-counsel situations. Mr. Walker took issue with #4, suggesting that the client is protected by #5 in terms of reasonableness of the fees and that "informed consent" of the client is not required in this circumstance. Ms. McAllister replied that this rule is intended to ensure that the client is aware of what referring counsel is receiving for the referral. Mr. Cantarero considered #4 to be a desirable consumer protection matter. Mr. Cantarero said he would like the rule to explicitly state that these restrictions apply also to co-counsel fees paid for referrals between different firms when both counsel remain as counsel. Mr. Eisenberg agreed that making it explicit would be better. Mr. Cantarero inquired whether the rule should be changed to address fees as being "reasonable" rather than "shall not be unreasonable."

Ms. Ricca suggests that she understood that the subcommittee's task in this area was intended only to govern fees paid to non-lawyers. Mr. Cantarero suggested a different understanding and Mr. Johnson confirmed his understanding that it was to address both issues.

Ms. Venti suggested that the word "unreasonable" is appropriate as it is consistent with 1.5(a) as that is the ethical violation detailed in the rule.

The matter was referred back to the subcommittee for further study.

3. **Online Reviews:** Ms. Oliver.

   Ms. Oliver discussed proposed changes to rules governing how attorneys can respond to online reviews.

   First, whether Rule 7.1 should be amended to permit attorneys to respond to online reviews. The subcommittee believed that amending the rule was unnecessary at this time. It then considered whether Rule 1.6 should be amended to permit lawyers to reveal confidential information to respond to an online review and the subcommittee determined that it was inappropriate to do so.

   The subcommittee considered whether Rule 7.1 should be amended to compensate former clients for online reviews and it was referred to Ms. McAllister's subcommittee for further investigation. No changes are currently contemplated. Mr. Johnson indicated that the ABA has reached a recent similar conclusion on the first two matters considered by the subcommittee.

4. **Rule-Like Comments:** Mr. Johnson.

   Mr. Johnson related a conversation with Justice Lee in which Justice Lee indicated that compulsory language like "shall" should not be in comments since they are rule-like. Mr. Johnson proposed deleting compulsory language in the comments to the Rules as a long-term project, starting with Rule 1.0. He proposed the following amendments to comment [6]:

   See, e.g, Rules 1.2(c), 1.6(a), and 1.7(b), 1.8, 1.9(b), 1.12(a), and 1.18(d). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must Other rules require the lawyer to make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. See, e.g., Rules 1.4(b) and 1.8.

5. **Rule 1.0 and Government Lawyers:** Mr. Johnson.

   John Bogart raised a concern that Rule 1.0 defines government lawyers as a firm, but Rule 1.10 says that for conflicts they aren't a firm. Comment [1a] to Rule 1.10 explains the distinction, but in the interest of usefulness and understanding, Steve Johnson said we should perhaps also state in the comments to Rule 1.0 that the rules apply to government lawyer firms, except when it comes to conflicts of interest.

   The committee added the following to comment [2]:
   "The general rule that government law departments constitute a firm for the purposes of these rules does not apply to conflicts of interest questions. See Rules 1.10(f) and 1.11."

Mr. Cantarero asked for a motion to approve the amended language to Rule 1.0, comments [2] and [6]. Mr. Talbot moved. Judge Gardner seconded. The motion passed unanimously.

6. **Rules 8.4 and 14-301:** Mr. Johnson and Mr. Riter.

The committee discussed Rule 8.4(g), which in part defines professional misconduct to include harassment and discriminatory conduct. The question before the Committee is whether based on the *Becerra* analysis, are the proposed revisions to the rule narrowly tailored to survive a strict scrutiny standard and serve a compelling state interest? Mr. Johnson discussed the status of recent decisions and indicated that a commenter suggested that our comment [6] appears to itself be discriminatory on its face by focusing only on "underserved populations." Mr. Johnson suggested that "underserved" be changed to "any particular population" to avoid this criticism. Mr. Johnson opined that the revisions to the rule are sound and pass Constitutional muster. Mr. Cantarero asked whether the revisions could be challenged as content-based discrimination and Mr. Johnsen indicated that comment [5] specifically references the First Amendment and that [g] would not apply to that protected speech.

The committee then discussed Rule 14-301. Mr. Johnson and Mr. Riter suggested that the proposed language may run afoul of the Constitution as well as impede the ethical responsibility of counsel to be effective advocates for their clients. It was suggested that clarifying language be added to permit conduct by attorneys which would appear on its face to violate the rule, so long as the conduct can be said to be necessary for effective advocacy. The Committee discussed the proposed language at length. Mr. Cantarero suggested that this matter be returned to the subcommittee for further consideration, particularly with respect to paragraph 3.

<u>Assignment to Subcommittee:</u>
The key question that needs to be answered is this: Do Rules 8.4(g), (h), and the amendments to 14-301 (especially paragraph 3) violate constitutional protections of the First Amendment? Put differently, are they written in such a way that would survive strict scrutiny analysis? Basically, are these rules narrowly tailored to advance a compelling interest? Looking at other prohibitions on conduct, or expression, in our rules would be helpful as a comparison. For example, where a lawyer could lose their law license for misconduct that is not "illegal" or "criminal" in the sense it violates a statute or ordinance.

There is another related issue, and that is the compulsory language in the Comment to 14-301(3), which requires lawyers to refrain from manifesting and acting upon bigotry, discrimination, etc. The subcommittee should look at that and determine if it should be incorporated into the rule instead of being in the advisory or explanatory comment.

Also, where the rules discuss discrimination, the rule benefits from applying a distinction or clarification that invidious discrimination is the sort the rules seeks

to prevent and prohibit. Maybe a short comment that any discrimination solely based on bias or prejudice would help to clarify that concern.

With respect to harassment, the case law in employment law is pretty clear that it must be persistent and pervasive to be actionable. We have a similar standard in referring to egregious and repeated violations of 14-301, but we could benefit from the subcommittee's review that harassment is adequately addressed in 8.4 and its comments.

Finally, the subcommittee should consider including the "legitimate advice or advocacy" exception into the rules as opposed to being in the comments.

Subcommittee Members
Adam Bondy, chair, and the following members:
1) Judge Edwards
2) Dan Brough
3) Austin Riter
4) Dane Thorley
5) Amy Oliver
6) Vanessa Ramos
7) Judge Nelson

7. Adjournment

The remainder of the agenda was tabled.

The meeting adjourned at 7:04 p.m. The next meeting will be held on April 5, 2021 at 5 p.m. via Webex.

Tab 2

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;~~.~~

(g) engage in any conduct that is listed as a discriminatory or prohibited employment practice under Sec 2000e-2 [Section 703] of Title VII of the Civil Rights Act of 1964, as amended, or under Section 34A-5-106 of the Utah Antidiscrimination Act, as amended, or pursuant to applicable court cases, notwithstanding the number of employees in the lawyer's firm; or

(h) egregiously violate, or engage in a pattern of repeated violations of, Rule 14-301 if such violations harm the lawyer's client or another lawyer's client or are prejudicial to the administration of justice.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct or knowingly assist or induce another to do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[1a] An act of professional misconduct under Rule 8.4(b), (c), (d), (e), (f), or (g)~~, or (h)~~ cannot be counted as a separate violation of Rule 8.4(a) for the purpose of determining

sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(a) for the purpose of determining sanctions.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race~~,~~; color; sex~~,~~; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion~~,~~; national origin~~,~~; disability~~,~~ ~~age~~, sexual orientation; gender identity~~,~~; or genetic information ~~socioeconomic status,~~ may violate ~~violates~~ paragraph (d) when such actions are prejudicial to the administration of justice. The protected classes listed in this comment are consistent with those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a) (2016), and in federal statutes and is not meant to be an exhaustive list as the statutes may be amended from time to time. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). ~~A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

~~[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a~~

~~pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).~~

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law governs the application of paragraph (g), except that for purposes of determining a violation of paragraph (g), the size of a law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from a representation, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of paragraph (g). Lawyers may discuss the benefits and challenges of diversity and inclusion without violating paragraph (g). Unless otherwise prohibited by law, implementing or declining to implement initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] Paragraph (g) does not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

[6] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[7][~~4~~] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a

Comment [NS1]: Change to "any particular population" per Steve in response to article.

good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[8] ~~[5]~~ Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[9] This rule differs from ABA Model Rule 8.4 to the extent that it changes paragraph (g), adds paragraph (h), and modifies the comments accordingly.

Rule 14-301. Standards of Professionalism and Civility.

Preamble

For the purposes of these Standards, the term "lawyer" includes a licensed paralegal practitioner. A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

Lawyers should educate themselves on the potential impact of using digital communications and social media, including the possibility that communications intended to be private may be republished or misused. Lawyers should understand that digital communications in some circumstances may have a widespread and lasting impact on their clients, themselves, other lawyers, and the judicial system.

We expect judges and lawyers will make mutual and firm commitments to these standards. Adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this State. We further expect lawyers to educate their clients regarding these standards and judges to reinforce this whenever

clients are present in the courtroom by making it clear that such tactics may hurt the client's case.

Although for ease of usage the term "court" is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards. Nothing in these standards supersedes or detracts from existing disciplinary codes or standards of conduct.

Although originally intended to be aspirational, the Supreme Court, by adopting Rule 8.4(h) of the Rules of Professional Conduct, has made these Standards mandatory to the extent that an egregious violation of the Standards or a pattern of repeated violations of the Standards where a client is harmed or if the conduct is prejudicial to the administration of justice, may subject the lawyer to disciplinary action.

Cross-References: R. Prof. Cond. Preamble [1], [13]; : R. Prof. Cond.8.4(h); R. Civ. P. 1; R. Civ. P. 65B(b)(5); R. Crim. P. 1(b); R. Juv. P. 1(b); R. Third District Court 10-1-306; Fed. R. Civ. P. 1; DUCivR 83-1.1(g).

1. Lawyers ~~shall~~must advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers ~~shall~~must treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

Comment: Lawyers should maintain the dignity and decorum of judicial and administrative proceedings, as well as the esteem of the legal profession. Respect for the court includes lawyers' dress and conduct. When appearing in court, lawyers should dress professionally, use appropriate language, and maintain a professional demeanor. In addition, lawyers should advise clients and witnesses about proper courtroom decorum, including proper dress and language, and should, to the best of their ability, prevent clients and witnesses from creating distractions or disruption in the courtroom.

The need for dignity and professionalism extends beyond the courtroom. Lawyers are expected to refrain from inappropriate language, maliciousness, or insulting behavior in depositions, meetings with opposing counsel and clients, telephone calls, email, and other exchanges. They should use their best efforts to instruct their clients and witnesses to do the same.

Cross-References: R. Prof. Cond. 1.4; R. Prof. Cond. 1.16(a)(1); R. Prof. Cond. 2.1; R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5(d); R. Prof. Cond. 3.8; R. Prof. Cond. 3.9; R. Prof. Cond. 4.1(a); R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

2. Lawyers ~~shall~~ must advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct unless such matters are directly relevant under controlling substantive law or are necessary for legitimate advocacy.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 1.2(a); R. Prof. Cond. 1.2(d); R. Prof. Cond. 1.4(a)(5).

3. Lawyers ~~shall~~must not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Neither written submissions nor oral presentations may disparage the integrity, intelligence, morals, ethics, or personal behavior of any adversary or other participant in the legal process unless such matters are directly relevant under controlling substantive law or are necessary for legitimate advocacy.

Lawyers ~~should~~ must avoid hostile, demeaning, ~~or~~ humiliating, or discriminatory conduct in law-related activities ~~words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive l~~Discriminatory conduct

Comment [NS1]: Would eliminating these words eliminate the vagueness issues?

includes all discrimination against protected classes as those classes are enumerated in the Utah Antidiscrimination Act of 1965, Utah Code section 34A-5-106(1)(a), and federal statutes, as amended from time to time.

Comment: Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any person in the legal process, even if a client requests it.

Comment [NS2]: This should go in the rule itself, not the comment. Simon's version had "shall" not "should."

Law-related activities include, but are not limited to, settlement negotiations; depositions; mediations; court appearances; CLE's; events sponsored by the Bar, Bar sections, or Bar associations; and firm parties.

~~Hostile, demeaning, and humiliating communications include all expressions of discrimination on the basis of race, religion, gender, sexual orientation, age, handicap, veteran status, or national origin, or casting aspersions on physical traits or appearance. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it. Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention.~~

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 3.1; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

4. Lawyers ~~shall~~must never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.5(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

5. Lawyers ~~shall~~must not lightly seek sanctions and ~~will~~ must never seek sanctions against or disqualification of another lawyer for any improper purpose.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. Civ. P. 11(c); R. Civ. P. 16(d); R. Civ. P. 37(a); Fed. R. Civ. P. 11(c)(2).

6. Lawyers ~~shall~~must adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

Cross-References: R. Prof. Cond. 1.1; R. Prof. Cond. 1.3; R. Prof. Cond. 1.4(a), (b); R. Prof. Cond. 1.6(a); R. Prof. Cond. 1.9; R. Prof. Cond. 1.13(a), (b); R. Prof. Cond. 1.14; R. Prof. Cond. 1.15; R. Prof. Cond. 1.16(d); R. Prof. Cond. 1.18(b), (c); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3; R. Prof. Cond. 3.4(c); R. Prof. Cond. 3.8; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.3(a), (b); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

7. When committing oral understandings to writing, lawyers ~~shall~~must do so accurately and completely. They ~~shall~~must provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers ~~shall~~must bring to the attention of other counsel changes from prior drafts.

Comment: When providing other counsel with a copy of any negotiated document for review, a lawyer should not make changes to the written document in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. Changes should be clearly and accurately identified in the draft or otherwise explicitly brought to the attention of other counsel. Lawyers should be sensitive to, and accommodating of, other lawyers' inability to make full use of technology and should provide hard copy drafts when requested and a redline copy, if available.

Cross-References: R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. App. P. 11(f).

8. When permitted or required by court rule or otherwise, lawyers ~~shall~~must draft orders that accurately and completely reflect the court's ruling. Lawyers ~~shall~~must promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Civ. P. 7(f); R. Third District Court 10-1-306(6).

9. Lawyers ~~shall~~must not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers ~~shall~~must timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

10. Lawyers ~~shall~~must make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(d); R. Prof. Cond. 8.4(d); R. Third District Court 10-1-306 (1)(A); Fed. R. Civ. P. 16(2)(C).

11. Lawyers ~~shall~~must avoid impermissible ex parte communications.

Cross-References: R. Prof. Cond. 1.2; R. Prof. Cond. 2.2; R. Prof. Cond. 2.9; R. Prof. Cond. 3.5; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 77(b); R. Juv. P. 2.9(A); Fed. R. Civ. P. 77(b).

12. Lawyers ~~shall~~must not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

Cross-References: R. Prof. Cond. 3.5(a); R. Prof. Cond. 3.5(b); R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d).

13. Lawyers ~~shall~~must not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

Cross-References: R. Prof. Cond. 8.4(c); R. Juv. P. 19.

14. Lawyers ~~shall~~must advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers ~~shall~~must agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers ~~shall~~must never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

Comment: Lawyers should not evade communication with other counsel, should promptly acknowledge receipt of any communication, and should respond as soon as reasonably possible. Lawyers should only use data-transmission technologies as an efficient means of communication and not to obtain an unfair tactical advantage. Lawyers should be willing to grant accommodations where the use of technology is concerned, including honoring reasonable requests to retransmit materials or to provide hard copies.

Lawyers should not request inappropriate extensions of time or serve papers at times or places calculated to embarrass or take advantage of an adversary.

Cross-References: R. Prof. Cond. 1.2(a); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Juv. P. 54.

15. Lawyers ~~shall~~must endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers ~~shall~~must never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers ~~shall~~must notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers ~~shall~~must cooperate in making any reasonable adjustments.

Comment: When scheduling and attending depositions, hearings, or conferences, lawyers should be respectful and considerate of clients' and adversaries' time, schedules, and commitments to others. This includes arriving punctually for scheduled appointments. Lawyers should arrive sufficiently in advance of trials, hearings, meetings, depositions, and other scheduled events to be prepared to commence on time. Lawyers should also advise clients and witnesses concerning the need to be punctual and prepared. Lawyers who will be late for a scheduled appointment or are aware that another participant will be late, should notify the court, if applicable, and all other participants as soon as possible.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 5.1; R. Prof. Cond. 8.4(a); R. Juv. P. 20; R. Juv. P. 20A.

16. Lawyers ~~shall~~must not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

Cross-References: R. Prof. Cond. 8.4; R. Civ. P. 55(a); Fed. R. Civ. P. 55(b)(2).

17. Lawyers ~~shall~~must not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers ~~shall~~must not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 4.1; R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4; R. Civ. P. 26(b)(1); R. Civ. P. 26(b)(8)(A); R. Civ. P.

37(a)(1)(A), (D); R. Civ. P. 37(c); R. Crim. P. 16(b); R. Crim. P. 16(c); R. Crim. P. 16(d); R. Crim. P. 16(e); R. Juv. P. 20; R. Juv. P. 20A; R. Juv. P. 27(b); Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 26(g)(1)(B)(ii), (iii).

18. During depositions lawyers ~~shall~~must not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers ~~shall~~must engage only in conduct that would be appropriate in the presence of a judge.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 30(c)(2); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 30(c)(2); Fed. R. Civ. P. 30(d)(2); Fed. R. Civ. P. 30(d)(3)(A.

19. In responding to document requests and interrogatories, lawyers ~~shall~~must not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor ~~shall~~must they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 8.4; R. Prof. Cond. 3.4; R. Civ. P. 26(b)(1; R. Civ. P. 37; R. Crim. P. 16(a); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 37(a)(4).

20. Lawyers ~~shall~~must not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

Adopted by Supreme Court order October 16, 2003.

Tab 3

Rule 5.5 And Practicing "Remotely" Outside of Your Jurisdiction

FBA Newsletter:

Is this something our committee should address?

Ethics Attorneys Hopeful COVID-19 will Prompt Changes in Remote Working Rules:
The American Bar Association has released Formal Opinion 495, which clarifies remote working rules. Before the opinion, Model Rule 5.5 could have been read by state bars to prohibit a lawyer from working in one state if his or her clients and license were in a different state. The formal opinion makes it clear that, as long as lawyers do not hold themselves out as being members of a bar in a state where they live, there is no ethical requirement that they be a member of the bar in that state to work from home.
Both **Florida** and the **District of Columbia** have already taken steps to indicate they may not consider such remote work unethical.

- UT Eth. Op. 19-03 (Utah St.Bar.), 2019 WL 3208016:

  "The Utah Rules of Professional Conduct do not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed even if the out-of-state attorney does so from his private location in Utah. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah business."

- Rule 5.5, cmt 4

  [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 A lawyer not admitted in Utah who lives here and practices law in another state in which the lawyer is licensed does not violate this rule so long as the lawyer does not establish a public office in Utah or solicit Utah business. See also Rules ~~and 7.5(b)~~.

- **Rule 7.1. Communications Concerning a Lawyer's Services.**

Currentness

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified or unreasonable expectation about results the lawyer can achieve or has achieved; or

(3) contains a testimonial or endorsement that violates any portion of this Rule.

*7.5 was repealed

UT Eth. Op. 19-03 (Utah St.Bar.), 2019 WL 3208016

Utah State Bar
Ethics Advisory Opinion Committee
Opinion Number 19-03
Issued May 14, 2019

ISSUE

***1** 1. If an individual licensed as an active attorney in another state and in good standing in that state establishes a home in Utah and practices law for clients from the state where the attorney is licensed, neither soliciting Utah clients nor establishing a public office in Utah, does the attorney violate the ethical prohibition against the unauthorized practice of law?

OPINION

2. The Utah Rules of Professional Conduct do not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed even if the out-of-state attorney does so from his private location in Utah. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah business.

BACKGROUND

3. Today, given electronic means of communication and legal research, attorneys can practice law "virtually" from any location. This can make it possible for attorneys licensed in other states to reside in Utah, but maintain a practice for clients from the states where they are licensed. For example:
• An attorney from New York may decide to semi-retire in St. George, Utah, but wish to continue providing some legal services for his established New York clients.

• An attorney from California may relocate to Utah for family reasons (*e.g.*, a spouse has a job in Utah, a parent is ill and needs care) and wish to continue to handle matters for her California clients.

ANALYSIS

4. Rule 5.5 of the Utah Rules of Professional Conduct (the "**URPC**"), which is based upon the Model Rules of Professional Conduct, defines the ""unauthorized practice of law," and Rule 14-802 of the Utah Supreme Court Rules of Professional Practice defines the "practice of law." In the question posed, the Ethics Advisory Opinion Committee (the "**EAOC**") takes it as given that the out-of-state lawyer's activities consist of the "practice of law."

5. Rule 5.5(a) of the Utah Rules of Professional Conduct provides that a "lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction." Rule 5.5(b) provides:
A lawyer who is not admitted to practice in this jurisdiction shall not:

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

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

URPC 5.5(b).

6. THE LAW OF LAWYERING explains the meaning and relationship of these two sections:

> Rule 5.5(b) ... elaborates on the prohibition against unauthorized practice of law contained in Rule 5.5(a) as it concerns out-of-state lawyers. Rule 5.5(b)(1) broadly prohibits a lawyer from establishing an office or other "systemic and continuous presence' for practicing law in a jurisdiction in which the lawyer is not licensed.

***2** Geoffrey C. Hazard, Jr., W. William Hodes, Peter R. Jarvis, THE LAW OF LAWYERING § 49.02, at 49-7 (4th ed. 2018).

7. With that as our touchstone, it seems clear that the out-of-state attorney who lives in Utah but continues to handle cases for clients from the state where the attorney is licensed has not established an office or "'other systemic and continuous presence' for practicing law in [Utah] a jurisdiction in which the lawyer is not licensed" and is not in violation of Rule 5.5 of the Utah Rules of Professional Conduct.

8. While one could argue that living in Utah while practicing law for out-of-state clients does literally "establish a systematic and continuous presence in this jurisdiction for the practice of law," and that it does not have to be "for the practice of law IN UTAH," that reading finds no support in case law or commentary.

9. In *In re: Discipline of Jardine*, Utah attorney Nathan Jardine had been suspended from the practice of law in Utah for eighteen months. 2015 UT 51, ¶ 1, 353 P.3d 154. He sought reinstatement, but the Office of Professional Conduct argued against reinstatement because he had violated Rule 14-525(e)(1) of the Supreme Court Rules of Professional Practice by engaging in the unauthorized practice of law while he was suspended. 2015 UT 51, ¶¶ 6, 20. The disciplinary order allowed Mr. Jardine "with the consent of the client after full disclosure, [to] wind up or complete any matters pending on the date of entry of the order," but "Mr. Jardine never informed [the client] that he was suspended, nor did he wind up his participation in the matter." *Id*. ¶¶ 8-9 (quotation omitted). Instead, he continued to advise the client and sent a demand letter on the client's behalf, giving his Utah address but indicating California licensure. *Id*. ¶ 9. Mr. Jardine argued that he did not engage in the unauthorized practice of law because this matter was for an Alaska resident and the resulting case was filed in an Idaho court. *Id*. ¶ 22. Nevertheless, the Utah Supreme Court found that Mr. Jardine engaged in the unauthorized practice of law in Utah, in violation of his disciplinary order, reasoning: "The disciplinary order expressly prohibited Mr. Jardine from 'performing *any* legal services for others' or 'giving legal advice to others' within the State of Utah." *Id*. (emphasis added). All of the work Mr. Jardine performed for the Alaska client was performed in Mr. Jardine's Utah office, Mr. Jardine's text messages were made from Utah, and Mr. Jardine's demand letter listed his Utah address. *Id*.

10. *In re Jardine* does not control the question posed. Not only did the Utah Supreme Court analyze the "unauthorized practice of law" in the context of a suspended Utah attorney violating a disciplinary order that forbid him from performing *any* legal services whatsoever for others, but Mr. Jardine was continuing his legal work out of a Utah office and using a Utah business address. The question posed here to the EAOC deals with attorneys in good standing in other states who simply establish a residence in Utah and continue to provide legal work to out-of-state clients from their private Utah residence.

***3** 11. We can find no case where an attorney has been disciplined for practicing law out of a private residence for out-of-state clients located in the state where the attorney is licensed. Indeed, the United States Supreme Court held in *New Hampshire v. Piper*, 470 U.S. 274 (1985), that a New Hampshire Supreme Court rule limiting bar admission to New Hampshire residents violated the rights of a Vermont resident seeking admission under the Privileges and Immunities Clause of the U.S. Constitution. *Id*. at 275-76, 288. Thus, there can be no prohibition on an attorney living in one state and being a member of the bar of the another state and practicing law in that other state.

12. Rather, the concern is that an attorney not establish an office or public presence in a jurisdiction where the attorney is not admitted, and that concern is based upon the need to protect the interests of potential clients in that jurisdiction. In *Gould v. Harkness*, 470 F. Supp. 2d 1357 (S.D. Fla. 2006), a New York attorney sought to establish an office and advertise his presence in Florida, but advertise "New York Legal Matters Only" or "Federal Administrative Practice." *Id*. at 1358. The case concerned whether his First Amendment right to freedom of commercial speech under the United States Constitution was violated by the Florida Bar's prohibition on such advertisements. *Id*. at 1358-59. The *Gould* court held that the Florida Bar was entitled to prohibit such advertisements in order to protect the interests of the public—the residents of Florida.

1364.

13. Similarly, in *In re Estate of Condon*, 76 Cal. Rptr. 2d 933 (Cal. Ct. App. 1998), the court approved payment of attorney fees to a Colorado attorney who handled a California probate matter for a co-executor who lived in Colorado. *Id*. at 924. The *Condon* court held that the unauthorized practice of law statute "does not proscribe an award of attorney fees to an out-of-state attorney for services rendered on behalf of an out-of-state client regardless of whether the attorney is either physically or virtually present within the state of California." *Id*. at 926. Here, too, the *Condon* court highlighted concern for in-state California clients:

> In the real world of 1998 we do not live or do business in isolation within strict geopolitical boundaries. Social interaction and the conduct of business transcends state and national boundaries; it is truly global. A tension is thus created between the right of a party to have counsel of his or her choice and the right of each geopolitical entity to control the activities of those who practice law within its borders. In resolving the issue ... it is useful to look to the reason underlying the proscription [of the unauthorized practice of law ....] [T]he rational is to protect California citizens from incompetent attorneys ....

Id. at 927.

14. An interesting Ohio Supreme Court case further supports this Opinion that an out-of-state attorney practicing law for clients from the state where he is licensed should not be seen to violate Rule 5.5 of the Utah Rules of Professional Conduct's prohibition on the unauthorized practice of law. In *In re Application of Jones*, 2018 WL 5076017 (Ohio Oct. 17, 2018), Alice Jones was admitted to the Kentucky bar and practiced law in Kentucky for six years. *Id*. at *1-2. Her Kentucky firm merged with a firm having an office in Cincinnati, Ohio. *Id*. at *1. For personal reasons, Ms. Jones moved to Cincinnati and transferred to her firm's Cincinnati office. *Id*. at *2. She applied for admission to the Ohio bar the month before she moved. *Id*. While awaiting the Ohio Bar's decision, she practiced law exclusively on matters related to pending or potential proceedings in Kentucky. *Id*. Nevertheless, the Board of Commissioners on Character and Fitness chose to investigate Ms. Jones for the unauthorized practice of law and voted to deny her admission to the Ohio Bar. *Id*.

***4** 15. The Ohio Supreme Court unanimously reversed this decision. *Id*. at *4. A majority of the *Jones* court held that Ms. Jones' activities did not run afoul of the unauthorized practice of law provision because Rule 5.5(c)(2) of the Ohio Rules of Professional Conduct permitted her to provide legal services on a "temporary basis" while she awaited admission to the Ohio bar. *Id*. at *3. However, three of the seven Ohio Supreme Court justices concurred on a different basis. *Id*. at *5 (DeWine, J., concurring). They found that denial of Jones' application on these facts would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as the Ohio Constitution's related provisions. *Id*. at *9 (DeWine, J., concurring). Both constitutions protected one's right to pursue her profession, subject to governmental regulation only to the extent necessary to promote the health, safety, morals, or general welfare of society, provided the legislation is not arbitrary or unreasonable. *Id*. at *7-8 (DeWine, J., concurring). The concurring opinion noted that "the constitutional question here turns on identifying Ohio's interest in prohibiting Jones from representing her Kentucky clients while working in a Cincinnati office. The short answer is that there is none." *Id*. at *8 (DeWine, J., concurring). Two state interests supported attorney regulation—attorneys' roles in administering justice through the state's court system and "the protection of the public." *Id*. (DeWine, J., concurring).

> But when applied to a lawyer who is not practicing Ohio law or appearing in Ohio courts, Prof.Cond.R. 5.5(b) serves no state interest. Plainly, as applied to such a lawyer, the rule does not further the state's interest in protecting the integrity of our court system. Jones, and others like her, are not practicing in Ohio courts. Nor does application of the rule to such lawyer serve the state's interest in protecting the Ohio public. Jones and others in her situation are not providing services to or holding themselves out as lawyers to the Ohio public. Jones's conduct as a lawyer is regulated by the state of Kentucky—the state in whose forums she appears.

Id. at *9 (DeWine, J., concurring). The three concurring Ohio Supreme Court justices concluded that Rule 5.5(b) of the Ohio Rules of Professional Conduct, as interpreted by the Ohio Board of Commissioners, would be unconstitutional when applied to Jones and others similarly situated. *Id*. (DeWine, J., concurring).

16. The question posed here is just as clear as the question before the Ohio Supreme Court: what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah?

And the answer is the same—none.

17. Finally, a perusal of various other authorities uncovers no case in which an attorney was disciplined for living in a state where he was not licensed while continuing to practice law for clients from the state where he was licensed

Joni Jones
RPC COMMITTEE | 3/1/2021 15:17:21

NOTING NO CASE HAS HELD THAT AN ATTORNEY PRACTICING IN ONE STATE AND LIVING IN ANOTHER VIOLATES PROFESSIONAL RULES

. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 *Jurisdictional Scope of the Practice of Law by a Lawyer* (2000); ROY D. SIMON, SIMON'S NY RULES OF PROF. COND. § 5.5:6 (Dec. 2018); and *What Constitutes ""Unauthorized Practice of Law" by Out-of-State Counsel*, 83 A.L.R. 5th 497 (2000).

CONCLUSION

***5** 18. Accordingly, the EAOC interprets Rule 5.5(b) of the Utah Rules of Professional Conduct in a way consistent with the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution; the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution; Article 1, Section 7 of the Due Process Clause and Article 1, Section 24 of the Uniform Operation of the Laws Clause of the Utah Constitution; and all commentators and all persuasive authority in support of permitting an out-of-state attorney to establish a private residence in Utah and to practice law from that residence for clients from the state where the attorney is licensed.

UT Eth. Op. 19-03 (Utah St.Bar.), 2019 WL 3208016

End of Document

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

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

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

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

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

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

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

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

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

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

(d) A lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services through an office or other systematic and continuous presence in this jurisdiction without admission to the Utah State Bar if:

(d)(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

(d)(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; or admission as House Counsel under Rule 14-719.

[15b] Utah Rule 5.5 does not adopt the ABA's provisions dealing with foreign lawyers, as other rules in Article 7 of the Rules Governing the Utah State Bar cover 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 under paragraph (d)(1), 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.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized 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.