

MEMORANDUM

To: Advisory Committee on the Utah Rules of Professional Conduct
From: Gary G. Sackett
Subject: Proposed Amendment to Rule 14-802
Date: February 26, 2018

Elizabeth Wright, Utah State Bar General Counsel, has asked the Committee to consider a possible amendment to Rule 14-802(b) in connection with the current requirement that a non-Utah lawyer who is in-house counsel for his employer in Utah must apply and be admitted under Rule 14-719, Qualification for Admission of House Counsel Applicants.

According to Ms. Wright, a non-Utah lawyer, who is (or intends to be) employed in Utah as in-house counsel, has observed that the third paragraph of the comment to Rule 14-802(b) appears to describe a person serving as house counsel:

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.

This paragraph was intended¹ to “carve out” company employees whose duties include “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,” which is a part of the definition of the “practice of law” in § 14-802(b)(2). For example, company employees dealing with compliance law in countless areas are engaged in these activities, yet they do not fit the notion that they are engaged in the “practice of law” that requires oversight by the Utah State Bar. The reason as stated in the comment: Such compliance employees are not actually “represent[ing] the interest of another person.” Rather, they are an integral part of that “person” in much the same way as a law professor who lectures and discusses “the law” (Rule 14-802(b)(2)) is not engaged in the practice of law.

The inquiry relayed from Ms. Wright highlights a fundamental question that cannot be solved by the “fix” suggested at January’s Committee meeting: What is it that distinguishes the following two company employees:

¹It may seem presumptuous to state what was intended by the rule, but as chair of the *ad hoc* subcommittee of this Committee that crafted the proposed rule and associated comments that were the basis for the Supreme Court’s adoption of Rule 14-802 and the “official” comments, I invoke some historic license on the subject.

- A non-lawyer with 20 years of experience in compliance with the arcane safety and operational rules imposed on an interstate pipeline company by the Federal Energy Regulatory Commission, whose job description is to read, understand and apply those rules to the facts and circumstances of the company's operations.
- A traditional in-house counsel whose duties and job description are to advise the employer on a somewhat broader range of subjects that involve "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."

It seems to me the task for the Committee is to decide what distinguishes these two individuals, where an employee is simply applying various aspects of compliance law for her company to stay on the right side of applicable rules, regulations, ordinances and statutes, and another employee is looked to by his employer for a wider range of legal assistance within the company.

The proposal suggested at the January meeting does not solve the problem:

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 or to the business entity.

This appears to misread the sense of the original sentence, which is an *explanation*—not a limitation—that the "activities involving the law" within the employee's company duties do not constitute the provision of legal advice to another person and, therefore, do not amount to the "practice of law," as defined in § 14-802(b)(1).

The proposed remedy seems to assume that the "do not involve providing legal advice" phrase is a limitation, when it is an *explanation* that such actions by an employee do not amount to the "practice of law," because *another person* is not involved. The proposed language appears to imply that "advice" in the context of this rule is something only a lawyer can provide—whether licensed in Utah or otherwise. There was no such implication in the drafting and approval of this comment. "Advice" was used in its dictionary sense: "guidance or recommendations concerning prudent future action, typically given by someone regarded as knowledgeable or authoritative." There was no intention that "advice" was to be considered as something only lawyers can render.

Perhaps the confusion could have been avoided by a minor modification to the sentence: "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~~ ; they do not involve providing legal advice to another person."²

For reasons not relevant here, my personal view is that the House Counsel rule as written is a bureaucratic mechanism that needlessly burdens a company and its in-house lawyers—but I lost that battle some time ago.

Therefore, given that there is a category of non-Utah lawyers who toil as in-house counsel and whom the Utah State Bar thinks it needs to regulate, it will be necessary to characterize such individuals so as to distinguish them from those in-house lay experts, e.g., in various compliance disciplines to make them subject to disciplinary prosecution by the Office of Professional Conduct.

The January 2018 proposal does not meet this test. I have no immediate suggestion and suggest the Committee appoint a subcommittee to consider the matter further.

²I will take the blame for any less-than-crystal-clear syntax in the original drafting of this sentence.