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# *Titanic Changes to Rules of Professional Conduct Under Consideration*

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Some topics deserve more than one article. This is one of those topics.

In March, Keith wrote about the potential for significant changes to the Utah Rules of Professional Conduct. See Call, *Legal Industry Disruption May Be Here: A Primer on Regulatory Reform in Utah*, 33 UTAH B. J. 47 (Mar./Apr. 2020). We are now one step closer to those changes. On April 24, 2020, the Utah Supreme Court formally posted for comment several proposed changes to Rules 1.5, 5.4, and 7.1 through 7.5. You can see the specific rule changes at <http://www.utcourts.gov/utc/rules-comment/> (last visited May 22, 2020). Here is a brief summary.

### **Proposed Change to Rule 1.5**

The court proposes to eliminate Rule 1.5(e) relating to the division of fees. Rule 1.5(e) currently provides:

A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

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This proposed rule change would eliminate restrictions on fee sharing among lawyers of different firms. Referral fees and other forms of fee sharing would apparently be permitted, even if the lawyer receiving the fee does not actively participate in the representation.

### **Proposed Changes to Rule 5.4**

Rule 5.4 addresses professional independence of a lawyer. Among other things, Rule 5.4 currently prohibits fee sharing with non-lawyers (with very narrow exceptions) and prohibits partnerships with non-lawyers if the partnership activities will include practicing law. These specific prohibitions are designed to preserve the lawyer's professional independence from outside forces, including economic incentives. In other words, fee sharing and partnering are prohibited *in order to preserve* professional independence.

Under the proposal, Rule 5.4 will be substantially re-written and divided into two parts, Rule 5.4A and Rule 5.4B. The proposed rules would eliminate the blanket prohibitions on fee sharing and non-lawyer partnering. Instead, the new rule would allow fee sharing and partnering with non-lawyers *provided* the lawyer maintains professional independence.

Specifically, under proposed Rule 5.4A, a lawyer would be allowed to share fees with a non-lawyer if the following conditions are met:

- (1) written notice to the client and any other person paying the fees;
- (2) the written notice describes the fee-sharing relationship;
- (3) the written notice is given before accepting the representation

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or sharing fees; and (4) there will be no interference with the lawyer's independent judgment, loyalty to the client, and protection of client confidences.

Referral fees would also be permitted under proposed Rule 5.4A(c), again with the condition that there will be no interference with the lawyer's independent judgment, loyalty to the client, and protection of client confidences.

Proposed Rule 5.4A(d) maintains the same general prohibition on practicing law with non-lawyers as exists in the current version of Rule 5.4, but it would be subject to a significant new exception that appears in proposed Rule 5.4B. Proposed Rule 5.4B would allow the practice of law with non-lawyers if the following conditions are met: (1) there will be no interference with the lawyer's independent judgment, loyalty to the client, and protection of client confidences; (2) it must be permitted by Utah Supreme Court Standing Order No. 15 (see below); (3) the lawyer must provide written notice to the client; and (4) the lawyer must explain to the client in writing the financial and managerial structure of the organization. The comments to the proposed rules emphasize the lawyer's obligation to maintain professional independence under all circumstances.

### **Proposed Changes to Rules 7.1 through 7.5**

The proposed changes are also game changers in the arena of lawyer advertising. The court is proposing to completely eliminate all of Rules 7.2 (advertising), 7.3 (solicitation of clients), 7.4 (communication of fields of practice), and 7.5 (firm names and letterheads). In place of all of these restrictions, the proposed changes would add eighteen new words to Rule 7.1: "A lawyer shall not interact with a prospective client in a manner that involves coercion, duress or harassment." Thus, the proposal would strike a long list of detailed rules and proscriptions and replace them with a more general rule to guide lawyer conduct. Proposed new comments to Rule 7.1 clarify that lawyers would be allowed to truthfully advertise pricing, use actors and dramatizations to portray the lawyer and events, and state that he or she "specializes" in a particular field.

### **Proposed Standing Order No. 15**

The supreme court has also circulated for comment its proposed Standing Order No. 15 (order). This proposed order would "establish[] a pilot regulatory sandbox and an Office of Legal Services Innovation to assist the Utah Supreme Court with respect to overseeing and regulating the practice of law by

nontraditional legal service providers or by traditional providers offering nontraditional legal services.” Utah Supreme Court Standing Order No. 15 (Draft), p. 1, available at <http://www.utcourts.gov/utc/rules-comment/> (last visited May 22, 2020).

The regulatory sandbox would allow lawyers *and non-lawyers* to offer legal services in non-traditional ways, including ways not currently authorized under the Utah Rules of Professional Conduct. The Office of Legal Services Innovation, consisting of nine individuals appointed by the court, would be charged with approving and monitoring these types of legal services to assure the public is served, and not disserved. Sandbox participants, including non-lawyers, who are able to demonstrate over a period of time that their legal services are “safe” for the public may be approved to exit the sandbox and may be granted the appropriate license to practice law consistent with their sandbox experience.

Standing Order No. 15 would establish a two-year pilot period for the regulatory sandbox, after which the supreme court would determine if, and in what form, the Office of Legal Services Innovation would continue.

### What Is Driving These Proposals

As stated in proposed Standing Order No. 15, “the overarching goal of this reform is to improve access to justice.” Standing Order No. 15 (Draft), p. 5. The proposed Order cites formal studies showing that a high percentage of the public facing civil legal problems receives “inadequate or no legal help.” *See id* p. 1.

Lawyers will certainly have differing opinions on whether these sweeping changes will actually solve or abate the access to justice problem and whether they will give rise to a host of other unintended consequences. The court expressed its view in the proposed Order: “The Utah Supreme Court’s view is that adherence to this objective will improve access to justice by improving the ability of Utahns to meaningfully access solutions to their justice problems, including access to legal information, advice, and other resources, as well as access to the courts.” Standing Order No. 15 (Draft), p. 5.

We are aware of three states that have enacted legislation to launch a regulatory sandbox: Utah, Arizona (<https://www.azag.gov/fintech> (last visited May 26, 2020)), and Wyoming (<http://wyoming-bankingdivision.wyo.gov/home/areas-of-regulation/laws-and-regulation/financial-technology-sandbox> (last visited May 26, 2020)). The regulatory sandboxes for Arizona and Wyoming focus primarily on allowing the financial services industry to operate within the legal market. Arizona is also considering changes to

their Rules of Professional Conduct similar to those of Utah that would eliminate the prohibition of lawyers and non-lawyers jointly operating law offices, a change that is “viewed by proponents as a significant effort needed to close the Access to Justice Gap.” *See* Joe Hengemuehler, *Proposed Rules Changes Affecting the Practice of Law*, ARIZONA BAR (Feb. 25, 2020), <https://www2.azbar.org/newsevents/newsreleases/2020/02/proposedrulechange02252020/>. California has also recently considered moving forward with a regulatory sandbox with a focus on increasing access to legal services. *See* Sam Skolnik, *California Bar Trustees Move Toward New Regulatory ‘Sandbox’*, BLOOMBERG LAW (May 14, 2020), <https://news.bloomberglaw.com/us-law-week/california-bar-trustees-move-toward-new-regulatory-sandbox>.

The model that appears to provide the most helpful data for Utah’s Task Force regarding expected impacts on law firms and the legal market comes from the United Kingdom, which passed the Legal Services Act of 2007 to allow non-lawyer ownership of legal practices. *See* Lucy Ricca, *UK Legal Service Reforms Under the Legal Services Act (2007)* (Feb. 21, 2019), <http://www.utcourts.gov/utc/rulespc/wp-content/uploads/sites/27/2019/02/Summary-of-Legal-Services-Act-and-ABS-regulation.pdf> (citing sources monitoring the effect of the Legal Services Act of 2007’s effect on consumers and the legal market); *Alternative Business Structures*, THE LAW SOCIETY (Nov. 22, 2019), <https://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures/>. Like Arizona and Wyoming, the Legal Services Act of 2007 was focused on opening law firms and the legal market to the financial services industry.

### Comment Period Ends July 23

Lawyers and the public are encouraged to share their views on these proposed changes. The comment period expires on July 23, 2020, so there is still time for you to weigh in. You can easily submit your comments using the internet at <http://www.utcourts.gov/utc/rules-comment/2020/04/24/supreme-court-regulatory-reform-proposal-comment-period-closes-july-23-2020/> (last visited May 22, 2020). I also found it by Google searching “Utah court rules published for comment.” Make sure to scroll down to the bottom of the page to the “Leave a Reply” section. You can also read the numerous other comments that have been submitted, as well as the various replies and interesting debate among the lawyer “community.”

*Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.*