

17-04

Opinion No. 17-04

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

September 26, 2017

ISSUE

1. When a Utah attorney acts as local counsel, what are the Utah attorney's duties under the Utah Rules of Professional Conduct where the lead attorney is not licensed in Utah and is admitted pro hac vice, and the client and/or the pro hac vice attorney want local counsel to do as little as possible so that the client incurs the minimum amount of fees for local counsel's work?

OPINION

2. Acting as local counsel for a pro hac vice attorney is not a minor or perfunctory undertaking. Local counsel violates the Utah Rules of Professional Conduct when local counsel acts as nothing more than a mail drop or messenger for the pro hac vice attorney. All attorneys admitted to the Utah State Bar are required to comply with all of the Utah Rules of Professional Conduct, including when they are acting as local counsel. Under Rule 5.1 of the Utah Rules of Professional Conduct, local counsel has a general duty to adequately supervise pro hac vice counsel and to provide expertise regarding Utah law, statutes, cases, rules, procedures, and customs in Utah. Local counsel is responsible to the client and responsible for the conduct of the Utah court proceedings. Under Rule 1.2 of the Utah Rules of Professional Conduct, local counsel may be able to limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Regardless of any limited scope representation agreement, if local counsel determines that the pro hac vice attorney is engaging in conduct that is likely to seriously prejudice the client's interests, or the administration of justice, local counsel must communicate local counsel's independent judgment to the client, and, if necessary, to the court or tribunal.

BACKGROUND

3. Rule 14-806 of the Utah Rules of Judicial Administration sets forth the requirements for admission of attorneys pro hac vice who are not admitted to the Utah State Bar but are admitted to practice in another state or a federal court. Rule 14-806 provides that local counsel, who must be a resident of Utah, shall move "to admit the

applicant pro hac vice" and shall "file a written consent to appear as associate counsel." Utah R. Jud. Admin. 14-806(e), (f)(3). Local counsel must "sign the first pleading filed, ... continue as one of the counsel of record in the case unless another member of the [Utah State] Bar is substituted as associate counsel," and "be available to opposing counsel and the court for communication regarding the case and the service of papers." *Id.* 14-806(f)(4)-(6). Further, the "court may require Utah counsel to appear at all hearings. Utah counsel shall have the responsibility and authority to act for the client in all proceedings if the nonresident attorney fails to appear or fails to respond to any order of the court." *Id.* 14-806(g). Rule 14-806 requires a pro hac vice attorney to comply with and be subject to "Utah statutes, rules of the Supreme Court, including the Rules of Professional Conduct and Article 5, Lawyer Discipline and Disability, the rules of the court in which the attorney appears, and the rules of the Code of Judicial Administration." *Id.* 14-806(h).

4. In the federal district court for the District of Utah, nonresident attorneys may be admitted pro hac vice if they associate with "an active member of the bar of [the] court with whom opposing counsel and the court may communicate regarding the case and upon whom papers will be served." DUCivR 83-1.1(d)(2)(b). Further, DUCivR 83-1.1(g) provides:

All attorneys practicing before this court, whether admitted as members of the bar of this court, admitted pro hac vice ... are governed by and must comply with the rules of practice adopted by this court, and unless otherwise provided by these rules, with the Utah Rules of Professional Conduct, as revised and amended and as interpreted by this court. The court adopts the Utah Standards of Professionalism and Civility to guide attorney conduct in cases and proceedings in this court.

5. The Ethics Advisory Opinion Committee has been asked to opine as to what a Utah attorney acting as local counsel must do, at a minimum, to fulfill local counsel's obligations under the Utah Rules of Professional Conduct, regardless of what the client or pro hac vice attorney want local counsel's level of involvement to be in the case.

ANALYSIS

6. A Utah attorney serving as local counsel is sometimes encouraged to be, or thought of, as a mere mail drop or messenger for pro hac vice attorney in a matter. There is nothing in the Utah Rules of Professional Conduct, however, that limits the duties of an attorney admitted to the Utah State Bar who happens to be acting as local counsel for a pro hac vice attorney. In fact, Rule 5.5 provides, in

pertinent part:

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

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

Utah R. Prof. Conduct 5.5(c)(1) (emphasis added).

7. All attorneys admitted to the Utah State Bar are required to comply with the Utah Rules of Professional Conduct, including when they are acting as local counsel. These Rules include, but are not limited to, Rule 1.1, which states that "a lawyer shall provide competent representation to a client," meaning the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Utah R. Prof. Cond. 1.1. They also include Rule 1.3 that provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." Utah R. Prof. Cond. 1.3. Local counsel must also follow Rule 1.4's mandates, which require a lawyer to:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Utah R. Prof. Cond. 1.4(a). Rule 1.4 also dictates that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Utah R. Prof. Cond. 1.4(b).

8. While local counsel must comply with Rules 1.1, 1.3, and 1.4 governing a lawyer's competence, diligence, and client communication, local counsel does not have to duplicate the work already performed by the pro hac vice attorney so long as the pro hac vice attorney is complying with the Utah Rules of Professional Conduct. Indeed, such duplication would be unnecessary and unduly expensive,

and would be to the client's detriment. *See* Utah R. Prof. Cond. 1.5(a) ("A lawyer shall not make an arrangement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.").

9. Local counsel has a duty, however, to take reasonable steps to ensure that the pro hac vice attorney follows the Utah Rules of Professional Conduct, even if that entails some duplication of efforts. Rule 5.1(b) states that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure the other lawyer conforms to the Rules of Professional Conduct." Rule 8.4(a) states that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through acts of another...." Utah R. Prof. Cond. 8.4(a). Local counsel should thus advise the pro hac vice attorney of pertinent law, rules, procedures, and customs in Utah applicable to the matter at hand and monitor the pro hac vice attorney closely enough to know whether the pro hac vice attorney is following them. An efficient way for local counsel and the pro hac vice attorney to minimize the added expense of local counsel's involvement in the case while still ensuring that both lawyers comply with the Utah Rules of Professional Conduct would be for the pro hac vice attorney and the client to copy local counsel on all substantive written communications and to include local counsel in substantive attorney client meetings, perhaps with local counsel appearing by telephone to save on costs.

10. In some circumstances, the client and/or the pro hac vice attorney do not want local counsel to have any direct contact with the client and want all communications with the client to go through the pro hac vice attorney only. Rule 1.2 allows a lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Utah R. Prof. Cond. 1.2(c). Comment 3 to Rule 1.2 provides: "At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such advance authorization." It may thus be possible for the client (as opposed to the pro hac vice attorney) to give informed consent that the pro hac vice attorney shall alone communicate directly with the client about the matter and that local counsel may rely upon the representations of the pro hac vice attorney as to the substance of those communications. *See* Utah R. Prof. Cond. 1.2(a) ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."). This informed consent would commonly be encompassed in the engagement letter between local counsel and the client at

the outset of the representation.

11. Where local counsel is retained in a contingency fee case, and/or if a contingency fee agreement already exists between the pro hac vice attorney and the client, local counsel should ensure that an (amended) fee agreement is entered into with the client that explains local counsel's role in the case and the portion of the contingency fee to which local counsel is entitled. That percentage may vary depending upon the extent of local counsel's involvement, the scope of which, if limited, should be explained in the agreement and signed by the client. *See* Utah R. Prof. Cond. 1.5(e).

12. Only an attorney who is a member of the Utah State Bar and counsel of record is both required and allowed to electronically file documents with the Utah district courts. Utah R. Jud. Admin. 4-503(1), (3). Local counsel must therefore file all documents with the court under local counsel's electronic signature, including those that are prepared by the pro hac vice attorney. Rule 11 of the Utah Rules of Civil Procedure provides:

(b) By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney ... is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Utah R. Civ. P. 11(b); *see also* Utah R. App. P. 40(a) ("Every motion, brief, and other document must be signed by at least one attorney of record who is an active member in good standing of the Bar of this state or by a party who is self-represented."). Likewise, Rule 3.1 of the Utah Rules of Professional Conduct states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous...." *See also* Utah R. Prof. Cond. 3.3 & 3.4. Local counsel must therefore investigate the merits of

the case to the extent necessary to be satisfied that the substance of the documents, both legal and factual, prepared by the pro hac vice attorney complies with Rule 11 and Utah law generally before filing them with the district court. *See, e.g., Lewis v. Celina Fin. Corp.*, 655 N.E.2d 1333, 1338 (Ohio Ct.App. 1995) (holding that local counsel had personal, nondelegable duty to determine that pleadings complied with Rule 11 and could not rely on the pro hac vice attorney who forwarded pleadings for filing by local counsel under local counsel's signature to fulfill that duty). The pro hac vice attorney should give local counsel an opportunity to review all documents to be filed with the court far enough in advance of the filing deadline that local counsel can advise the client and the pro hac vice attorney about any revisions that need to be made to the documents to comply with Utah law before local counsel files them with the court or they are served on the other parties.

13. Along these same lines, because Utah Rule of Judicial Administration 14-806 requires local counsel to "be available to opposing counsel and the court for communication regarding the case and the service of papers," local counsel has a duty to keep reasonably informed about the case as it progresses and to take reasonable measures to ensure that the pro hac vice attorney appears at hearings and complies with court orders. *See* Utah R. Prof. Cond. 5.1(b).

14. Some violations of the Utah Rules of Professional Conduct by the pro hac vice attorney may require local counsel to take remedial action to fulfill local counsel's duties to the court and to other counsel or parties. If local counsel becomes aware that the pro hac vice attorney is violating or has violated such rules as Rule 3.3 (Candor towards the Tribunal), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 3.5 (Impartiality and Decorum of the Tribunal), or Rule 8.4 (Misconduct) of the Utah Rules of Professional Conduct, local counsel must take remedial action to prevent the avoidable consequences of the misconduct. Rule 5.1 states, in pertinent part:

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Utah R. Prof. Cond. 5.1(c). Local counsel might first address the matter directly with the pro hac attorney, but if

the pro hac attorney does not or will not take appropriate action, then local counsel must do so. *See, e.g.*, Utah R. Prof. Cond. 5.1 Cmt. [5] ("A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.").

15. Similarly, if local counsel determines that the pro hac vice attorney is engaging in conduct that is likely to seriously prejudice the client's interests, such as failing to respond to discovery, local counsel has a duty to advise the client of local counsel's independent judgment that differs from that of the pro hac vice attorney and to take action to protect the client's interests, even where local counsel has agreed not to have any direct contact with the client. Rule 2.1 provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, or political factors that may be relevant to the client's situation." Utah R. Prof. Cond. 2.1; *see* Utah R. Prof. Cond. 5.1(c)(1) (stating that a lawyer is responsible for another lawyer's violation of the Utah Rules of Professional Conduct where the lawyer, "with knowledge of the specific conduct, ratifies the conduct involved"); Utah R. Prof. Cond. 8.4(d) ("It is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice.") Regardless of the extent of the pro hac vice attorney's involvement, local counsel remains responsible to the client for the conduct of the case before the Utah court. Depending upon the severity of the misconduct and the pro hac vice attorney's willingness or ability to rectify it, local counsel may also decide to withdraw from the representation of the client or to have the pro hac vice attorney's admission revoked. Local counsel would need to discuss either of those options with the client before pursuing them, assuming local counsel could reach the client, and would need to comply with Rule 1.16 of the Utah Rules of Professional Conduct governing the conditions under which an attorney may withdraw from representation of a client.