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Intra-Commission Emails Following Agenda Mailing:

May 19, 2015 Kehr Email to Drafting Team, cc Difuntorum & Mohr:

Toby and all: I want to point out ---

- 1) The word "member" is used but not defined in your proposal. That would work if the same term is used and defined elsewhere in the Rules, but it would not work if "member" is changed to "lawyer" as did the first Commission. The first Commission in its Rule 5.3.1 therefore included a definition of "member" as Rule 5.3.1(a)(2). The alternative would be to use "lawyer" in this Rule even if "member" is changed to "lawyer" for the balance of the Rules. I think the first Commission got this slightly wrong b/c it did not use the word "member" by itself, and the subject of the Rule was referred to as "lawyer". This will need to be thought through depending the terminology the Commission adopts.
- 2) The use of "which" in proposed (B)(6) is contrary to § 4.3A. of the Guidelines for Drafting and Editing Court Rules.
- 3) Proposed paragraph (D) uses "employ" while the two preceding paragraphs use "employ, associate professionally with, or aid". If the requirements of (D) are to be as broad as the prior paragraphs, the full phrase should be used. If not, the history of the Commission should show the use of the single term to have been intentional. If the broader meaning is intended, the definition of "employ" in paragraph (A)(1) could be expanded to include all three elements so that the word "employ" could be used by itself in (B), (C), and (D). This would work with (E) and (F), both of which already use a version of "employ" alone.
- 4) As a minor drafting nit in the first sentence of Comment [2], I suggest moving "on the client's matter" forward to immediately after "performed".
- 5) If the convention will be to cite a newer case before an older one, the order of cases in Comment [1] needs to be changed.
- 6) The second sentence of Comment [2] is passive. It could be reordered and simplified as: "If the client is an organization, the lawyer shall serve the notice required by paragraph (D) on its highest authorized officer, employee, or constituent overseeing the engagement." See § 2.3 of Guidelines for Drafting and Editing Court Rules.

May 19, 2015 Ham Email to Kehr, cc Drafting Team, Difuntorum & Mohr:

The member/lawyer issue isn't unique to our sub-committee. I'm sure the issue will be addressed at an omnibus level.

May 19, 2015 Lee Email to Kehr, cc Difuntorum & Mohr:

I tried to implement your comments into the drafting teams proposed rule draft. I was unclear only about your point #3 from your email. Did you want me to add "associate professionally with, or aid" to the definition in paragraph (A)(1) or did you want me to add it to paragraphs (D)(E)(F) as I have done in the attached redline. Please review and let me know.

Attached:

RRC2 - [1-311] - Rule - DFT3.1 (05-19-15)RLK - Cf. to DFT3 (05-11-15).docx

May 19, 2015 Kehr Email to Lee, cc Difuntorum & Mohr:

- What I had in mind for paragraph (a) is: ““Employ” means to engage the services of or associate professionally with another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid.”
- Your redlined paragraph (2) should say: “[2] Bob Kehr recommends adding a definition of “member,” if “member” will be a term used in this rule and if “member” otherwise is replaced with “lawyer” throughout the other Rules; however, it probably would work to use “lawyer” instead of “member” in this Rule.]
- Paragraph (B) then could begin: “A lawyer shall not employ or aid a person the lawyer knows” The same could be done with (C), (D) and (E). but (F) becomes a bit rocky. I suggest: “When the lawyer no longer employs or aids” Expanding the definition in (a) would avoid having to repeat all of the words in each of these paragraphs.

May 19, 2015 Lee Email to Kehr, cc Difuntorum & Mohr:

For your 3rd point, your suggested language says lawyer. I’m assuming that until the Commission decides whether to replace “member” with “lawyer” globally, it’s safe to use “member” instead?

Attached:

RRC2 - [1-311] - Rule - DFT3.2 (05-19-15)RLK-ML - Cf. to DFT3 (05-11-15).docx

May 19, 2015 Rothschild Email to Kehr, cc Drafting Team, Difuntorum & Mohr:

Thanks, Bob. This is helpful. I think we need to see what the convention becomes on “lawyer/member”. If the change is made, I think this rule is one of a very few, possibly the only one, where we may want to keep “member” in some contexts. If so, you are right that we need to define it. One of the issues is whether we want to address the status of disbarred, etc., lawyers from other jurisdictions.

As to the rest of your comments, I agree with all of them.

Kevin and Randall – How do changes such as this get addressed in the process?

May 19, 2015 Kehr Email to Rothschild, cc Drafting Team, Difuntorum & Mohr:

Mimi already is putting together an alternative draft.

May 19, 2015 Difuntorum Email to Rothschild, cc Drafting Team, Kehr, Mohr & Lee:

As the Rule 1-311 team leader, you can choose to act now and poll your team members by email to ascertain if there is a consensus to accept some or all of these changes. If there is a consensus, then staff can work with you to substitute a revised rule and report that will be posted in the place of your current report. If you are not confident that consensus can be reached in short order, then you may choose to hold the changes and make them a part of your

presentation at the May meeting. In either case, the alternative draft that Mimi is preparing is intended to help facilitate due consideration.

May 19, 2015 Rothschild Email to Difuntorum, cc Drafting Team, Kehr, Mohr & Lee:

Thanks, Randy. Jim and Aja – What is your feeling on this? As I said before, I am comfortable with all of Bob's suggestions except the first, which I think needs to wait for the global decision on "member/lawyer". Any thoughts?

May 19, 2015 Brown Email to Drafting Team, cc Kehr, Difuntorum, Mohr & Lee:

I'll provide my comments tomorrow. I'll have an opportunity to review early tomorrow morning.

May 19, 2015 Ham Email to Rothschild, cc Drafting Team, Kehr, Difuntorum, Mohr & Lee:

I am in agreement with your approach.

May 22, 2015 Rothschild Email to Difuntorum & Lee, cc Drafting Team & Mohr:

Please prepare the report for 1-311 with all of Bob Kehr's suggested changes except his first. Do I need to add Bob's first comment to the report? Let me know if I need to do anything.

May 22, 2015 Lee Email to Rothschild, cc Drafting Team, Difuntorum & Mohr:

I have implemented Bob's suggested changes. Please review the revised report. I did add Bob's first comment to Section X:

The word "member" is used but not defined in your proposal. That would work if the same term is used and defined elsewhere in the Rules, but it would not work if "member" is changed to "lawyer" as did the first Commission. The first Commission in its Rule 5.3.1 therefore included a definition of "member" as Rule 5.3.1(a)(2). The alternative would be to use "lawyer" in this Rule even if "member" is changed to "lawyer" for the balance of the Rules. I think the first Commission got this slightly wrong b/c it did not use the word "member" by itself, and the subject of the Rule was referred to as "lawyer". This will need to be thought through depending the terminology the Commission adopts.

If it looks good we will go ahead and post the revised report after the holiday.

Attached:

RRC2 - [1-311] - Report & Recommendation - DFT4 (05-22-15).docx

May 22, 2015 Rothschild Email to Lee, cc Drafting Team, Difuntorum & Mohr:

Thanks, Mimi.