RRC2 – Rule 1-300 [5.5]
E-mails, etc. – Revised (5/26/15)
Drafting Team: Tuft (Lead), Bleich, Clopton

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Intra-Commission Emails Following Agenda Mailing:

May 20, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr & Lee:

1) I wonder what the consequences might be of limiting proposed paragraph (a) to lawyers "admitted to practice in California", as is proposed. Does that include only active members of the California Bar? I'm not certain that phrase has any established meaning. Might paragraph (a) be more inclusive if it were to use the "authorized" language in Comment [1]?

2) I also wonder whether the current version of paragraph (B) already is broad enough to cover out of state lawyers who commit UPL in California, so that the proposed new paragraph (B) is not needed unless the Commission thinks it valuable to include in a Rule a description of what amounts to UPL. I would be interested in knowing what OCTC and disciplinary defense lawyers have to say about the application of the current rule.

3) Comment [1] does not seem to do more than repeat what is in the Rule. If so, it could be removed in light of the Court's desire for fewer Comments.

4) In Comment [2], "sections" should be "§§" according to the Style Guide for Rules of the State Bar at p. 28.

5) I wonder what the reason was for not including in Comment [2] the following from the first Commission's Comment [2]" See, e.g., 28 U.S.C. sections 515-519, 530C(c)(1); 35 U.S.C. section 32(b)(2)(D) and Sperry v. Florida ex rel. Florida Bar (1963) 373 U.S. 379 [83 S.Ct. 1322]; Augustine v. Dept. of Veteran Affairs (Fed. Cir. 2005) 429 F.3d 1334." This seems as applicable and as valuable as the citations that are included in proposed Comment [2].

May 20, 2015 Cardona Email to Drafting Team, cc Difuntorum, Mohr & Lee:

I agree with the changes proposed for the rule, but have two concerns and resulting suggestions for modifications:

1. I believe that Section (A)(2) as drafted leaves ambiguous whether it prohibits assisting in the unauthorized practice of law only in a jurisdiction other than California (as referenced in (A)(1)) or also in California. On the assumption that it is intended to apply to assisting the unauthorized practice of law in California or any other jurisdiction, I would propose modifying (A)(2) to read as follows: "assist a person or entity in the unauthorized practice of law in California or any other jurisdiction."

2. I would also favor adding "knowingly" before "assist" in (A)(2). I recognize the cons identified by the drafting team, but given the purpose of these rules as defining the circumstances in which discipline is appropriate, I believe requiring knowledge is appropriate. For example, I do not think it would be appropriate to impose discipline on a California lawyer who assisted another lawyer in practicing in California out of a mistaken but honestly held belief (after suitable inquiry) that the out of state lawyer was authorized to practice in California, particularly given the many rules (cited in Comment 2) under which an out of state lawyer might appropriately engage in practice in California. I think it significant that RRC1 included "knowingly" in its version of the rule, which OCTC approved and the Board adopted. Finally, I note that including "knowingly" would be consistent with Rule 1-120, which (both in its current form and in the modified form proposed by the drafting team

assigned that rule), modifies its more general prohibition on assisting in violations of the Rules with "knowingly."

May 25, 2015 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

We should confer prior to the meeting on May 29-30 on our responses to the comments received from Robert Kehr and George Cardona. Below are my responses to the comments for your consideration. If we need to have a telephone conference to discuss any of these issues, I am available Wednesday afternoon and late on Thursday afternoon.

Bob Kehr's comments (per his email dated May 19):

1) I wonder what the consequences might be of limiting proposed paragraph (a) to lawyers "admitted to practice in California", as is proposed. Does that include only active members of the California Bar? I'm not certain that phrase has any established meaning. Might paragraph (a) be more inclusive if it were to use the "authorized" language in Comment [1]?

   No change is recommended. As explained in Section VIII of the report, the rule is not limited to engaging in or assisting UPL by California lawyers and has been expanded to separately address multijurisdictional practice by non-admitted lawyers in paragraph (b). The need for paragraph (b) is demonstrated by the increase in lawyer mobility and cross boarder practice and the adoption of the Supreme Court's MJP rules since Rule 1-300 was adopted in 1989. The rule tracks Model Rule 5.5 (a) and (b) which has been adopted in a substantial majority of the states. The phrase "admitted to practice" has had an established meaning since the Model Rule was revised in 2003 to address MJP.

2) I also wonder whether the current version of paragraph (B) already is broad enough to cover out of state lawyers who commit UPL in California, so that the proposed new paragraph (B) is not needed unless the Commission thinks it valuable to include in a Rule a description of what amounts to UPL. I would be interested in knowing what OCTC and disciplinary defense lawyers have to say about the application of the current rule.

   No change is recommended for the same reason. Proposed paragraph (b) goes beyond the provisions of current paragraph (B) and is more descriptive of the prohibitions of out-of-state lawyers practicing law in California and conforms to the requirements of the MJP rules in the CRC.

3) Comment [1] does not seem to do more than repeat what is in the Rule. If so, it could be removed in light of the Court's desire for fewer Comments.

   No change recommended. The first sentence tracks the first sentence in comment [1] to Model Rule 5.5 and is a clear statement of the purpose of the rule.

4) In Comment [2], "sections" should be "§§" according to the Style Guide for Rules of the State Bar at p. 28.

   I defer to others on whether the style guide for state bar rules should govern rules of the Supreme Court.

5) I wonder what the reason was for not including in Comment [2] the following from the first Commission's Comment [2]" See, e.g., 28 U.S.C. sections 515-519, 530C(c)(1); 35 U.S.C. section 32(b)(2)(D) and Sperry v. Florida ex rel. Florida Bar (1963) 373 U.S. 379 [83 S.Ct.

1322]; Augustine v. Dept. of Veteran Affairs (Fed. Cir. 2005) 429 F.3d 1334." This seems as applicable and as valuable as the citations that are included in proposed Comment [2].

These authorities were removed in light of the Court's desire for fewer comments.

George Cardona's comments (per his May 20 email):

I agree with the changes proposed for the rule, but have two concerns and resulting suggestions for modifications:

1. I believe that Section (A)(2) as drafted leaves ambiguous whether it prohibits assisting in the unauthorized practice of law only in a jurisdiction other than California (as referenced in (A)(1)) or also in California. On the assumption that it is intended to apply to assisting the unauthorized practice of law in California or any other jurisdiction, I would propose modifying (A)(2) to read as follows: "assist a person or entity in the unauthorized practice of law in California or any other jurisdiction."

   I am agnostic about this change.

2. I would also favor adding "knowingly" before "assist" in (A)(2). I recognize the cons identified by the drafting team, but given the purpose of these rules as defining the circumstances in which discipline is appropriate, I believe requiring knowledge is appropriate. For example, I do not think it would be appropriate to impose discipline on a California lawyer who assisted another lawyer in practicing in California out of a mistaken but honestly held belief (after suitable inquiry) that the out of state lawyer was authorized to practice in California, particularly given the many rules (cited in Comment 2) under which an out of state lawyer might appropriately engage in practice in California. I think it significant that RRC1 included "knowingly" in its version of the rule, which OCTC approved and the Board adopted. Finally, I note that including "knowingly" would be consistent with Rule 1-120, which (both in its current form and in the modified form proposed by the drafting team assigned that rule), modifies its more general prohibition on assisting in violations of the Rules with "knowingly."

   I oppose this suggestion. A lawyer is subject discipline for a willful violation of the rules (Rule 1-100) and not for a good faith, mistaken or honesty held belief. No other jurisdiction narrows the application of its rule which would render it less enforceable. For California to add this unique qualifier would send the wrong message. I don't recall the vote to approve RRC-1's version of this rule, but I don't believe it was unanimous.

May 25, 2015 Bleich Email to Tuft, cc Clopton, Difuntorum, Mohr & A. Tuft:

I agree with your comments. In the Kehr comments, there is a typo "boarder" should be "border" and I would defer to Randy/Kevin regarding whether to use Section symbols. With regard to Cardonas, I would adopt his initial suggestion.

May 25, 2015 Mohr Email to Drafting Team, cc Difuntorum, Lee & A. Tuft:

I have nothing to add to Mark's responses to Bob Kehr's comments. I largely agree with them. As to George Cardona's comments, I have the following observations/queries:

1. Regarding revising (A)(2) to clarify that it prohibits assisting UPL in California and other jurisdictions, my question is whether a lawyer can "assist" UPL in a jurisdiction in which the lawyer is not admitted to practice. If a lawyer's conduct rises to the level of "assisting" UPL in a jurisdiction in which the lawyer is not admitted, wouldn't the lawyer be engaging in UPL in that jurisdiction? I admit that George's suggestion made perfect sense at first reading but I wondered why no other jurisdiction has felt the need to prohibit both UPL and assisting UPL in a non-admitted jurisdiction.

2. Concerning RRC1's vote re "knowingly," it was 8-1-0 (yes, no, abstain). 12/5/05 Meeting. Here is the explanation for using "knowingly" that RRC1 included in the Rule Comparison Chart:

> Subparagraph (a)(2) adds the *mens rea* requirement of "knowingly" assisting another in the unlicensed practice of law. A lawyer should not be subject to discipline for assisting another whom the lawyer, in good faith, believes to be an active member of the State Bar or otherwise authorized to practice by statute or court rule.
>
> Model Rule 5.5 does not have a *mens rea* requirement. Model Rule 8.4(a), which prohibits assisting or inducing another to commit a violation of the Rules, does have such a requirement. In this respect, they are inconsistent. We have been unable to discover any reason for that inconsistency. Adding "knowingly" to proposed Rule 5.5 makes it consistent with both Model Rule 8.4 and the Commission's proposed Rule 8.4. However, the addition of a *mens rea* requirement causes proposed Rule 5.5 to diverge from both Model Rule 5.5 and current rule 1-300.

Proposed rule 1-120, which is also on the 5/29-30/15 Agenda, retains the "knowingly" requirement found in current rule 1-120, which provides: "A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act." MR 8.4(a) also includes a "knowingly" requirement; it provides: "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."

May 25, 2015 Clopton Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I agree with Jeff's comments, except I think "knowingly" is appropriate in order to be consistent with the other rules.