Part 11 **THE TEN MAIN ISSUES UNDER THE UTAH RULES OF PROFESSIONAL CONDUCT IN FORMING LLCs UNDER THE NEW ACT**[1]

OVERVIEW

A. INTRODUCTION

B. DISCUSSION—THE TEN ISSUES

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[1] I am indebted to John Snow and Todd Wahlquist of the Utah bar for their comments on earlier versions of this part of the Outline. However, I alone am responsible for any errors this part may contain.

EXHIBIT 11-1 Areas of Law in Which "Miscellaneous" Legal Issues May Arise That Are Potentially Relevant in LLC Formations

A. INTRODUCTION

1) The Utah Rules of Professional conduct. As all of you know, the Rules of Professional Conduct that govern members of the Utah bar are based primarily on the Model Rules of Professional Conduct as developed and promulgated by the American Bar Association and by the comments on those Rules (the "Comments"), as these Comments have been amended by the Utah Supreme Court. (I will generally refer to the Utah Rules of Professional Conduct in this part of the Outline simply as the "Rules.")

2) The importance of the Rules in LLC formation practice; ethical pitfalls in LLC formation practice.

   a) Obviously, before you ever engage in LLC formation practice under the New Act, you should be aware of all of the Rules of Professional Conduct potentially applicable to LLC formations under that Act and of how to ensure your compliance with these Rules. Otherwise, you may incur ethical sanctions or even a malpractice claim. However, there are certain types of Professional Conduct issues in forming LLCs that may not be evident to lawyers not experienced in LLC formation practice. These may include, for example, issues with respect to the duty of competence under Rule 1.1 (discussed earlier in this seminar), the duty with respect to scope of representation under Rule 1.2, and the duty under Rule 1.7 to avoid conflicts of interest.

1) The 56 Rules; the nine relevant Rules.

   a) By my count there are no fewer than 56 Rules potentially relevant to LLC formation practice. In particular circumstances, practically any of these Rules can be relevant to Utah LLC formation practice.

   b) However, in my view, only nine Rules are likely to be relevant to this practice in any normal circumstance, and, under these Rules, there are, as indicated in the above table of contents, only 10 main issues likely to be relevant. As a Utah LLC formation lawyer, you should be familiar with all of these issues and with how to address them under the relevant Rules.

   c) In the paragraphs below:

      i) I will briefly outline each of these 10 issues; and

      ii) In the case of each issue, I'll briefly identify the most common factual situations in which the issue is likely to arise in LLC formations and how I think the issue should be handled under the applicable Rules.

2) This Part merely provides an *overview*. Each of the above nine Rules is inherently complex. Obviously, a detailed treatment of any of them as applicable to LLC formations would require many hours. My purpose in this part of the seminar is merely to provide a reasonably comprehensive *overview* of the relevant Rules and issues.

3) The relationship between professional misconduct and malpractice. There is a growing body of case law holding that breaches of the Rules of Professional Conduct such as those discussed below may also be cited as evidence in malpractice claims. Thus, the discussion below may be useful to you not only in avoiding breaches of legal ethics but also in avoiding malpractice claims.

4) Professional Conduct Rules as *minimum* standards. The Rules of Professional Conduct normally define only *minimum standards of conduct*, and *not* best practices, and the discussion below is not meant to define best practices. However, the line between a minimum standard for ethical purposes and a best practices standard is often hard to determine.

5) To understand a Rule, you must understand its purpose. In order to know how to comply with any of the Rules of Professional Conduct, you must know its purpose. The preamble to the Rules makes clear that the purposes of the Rules varies widely from one Rule to another and that to determine the purpose of any particular Rule, you have to read the comments on it. However, in general, it seems safe to say that the purpose of the Rules is to ensure optimal client service.

6) Utah advisory opinions. This part of the Outline reflects my study of the Comments, but a detailed review of any Utah Professional Conduct advisory opinions that may shed light on the issues addressed here is beyond the scope of this Outline. However, my quick review of these opinions suggests to me that, as yet, there are no advisory opinions relevant to LLC formation practice.

B. THE TEN ISSUES

ISSUE 1. WHEN DO ATTORNEY-CLIENT RELATIONSHIPS EXIST IN LLC FORMATIONS?

A. BASIC DOCTRINE

1) The importance of the issue as to whether an attorney-client relation exists. Obviously, if there is no attorney-client relation between you as an attorney and a particular person with whom you communicate regarding a prospective or ongoing LLC formation, you will not be subject to any Rules of Professional Conduct in dealing with that person with respect to that formation. Thus, the first question you must ask yourself in contacts with persons forming or contemplating the formation of LLCs is whether an attorney-client relation exists between you and any of these persons.

2) When does an attorney-client relation exist?

   a) In general, a person has an attorney-client relationship with an attorney if:

      i) The person *seeks* legal advice from an attorney; and

      ii) The attorney *agrees to provide* the advice.

      Thus, the issue of whether an attorney-client relationship exists is essentially a matter of contract law.

   b) However, under the governing case law, whether a person is your client in an LLC

formation is ultimately a question of fact that may depend heavily on the *reasonable subjective perception* of the relevant purported client.

3) Determining whether an attorney-client relationship exists; disclaimers to non-clients. Thus, it is critical that, before you begin forming an LLC for parties to an LLC formation:

   a) You determine in advance in your own mind whether you are willing to enter into an attorney-client relation with one or more of the parties to the formation; and

   b) You make reasonably clear to the parties which of them *is* and which *is not* your client.

   The best way to do this is often through an engagement letter or equivalent *written* communication.

B. AVOIDING UNWANTED ATTORNEY-CLIENT RELATIONSHIPS IN LLC FORMATIONS

1) Call from a potential LLC formation.

   a) You receive a call from John Doe, a potential LLC client who says his accountant said he needs to restructure his sole proprietorship as an LLC and has referred him to you.

   b) Upon receiving the above call, you should normally ask John for basic facts about his business and you should give him basic guidelines about whether he can in fact benefit from forming an LLC. As you will recall from Part 7, these guidelines can be complex. However, you should expressly advise your interlocutor:

      i) That these are *mere* guidelines, not legal advice;

      ii) That you are not advising him as his lawyer;

      iii) That he is not your client; and

      iv) That in order to provide him with legal advice, you'll need to meet with him personally and to ascertain the relevant facts comprehensively.

   c) In some situations, you may even want to write a short memo to the file about the above conversation.

2) You meet at your office A, B and C, three individuals who are starting a new business.

   a) All three individuals are likely to think you're representing them as a group or as attorney to each of them.

   b) Generally,

      i) You should make it clear to them that (i) you are representing only a specified one of them or (ii) you are only representing their LLC as an "entity in formation."

      ii) You should tell the non-clients that they are non-clients.

See further discussion below with respect to common representations under Rule 1.7.

ISSUE 2. WHAT CONSTITUTES "COMPETENCE" UNDER RULE 1.1 IN LLC FORMATIONS?

A. BASIC DOCTRINE

1) Rule 1.1—the four components of competence. Rule 1.1 provides that in handling legal matters for clients, lawyers must be competent. The rule provides that to be competent in a matter, a lawyer must have the necessary (i) knowledge, (ii) skill, (iii) diligence and (iv) thoroughness.

2) Definitions. The comments under Rule 1.1 suggest that:

   a) *Knowledge* appears to mean *theoretical* knowledge—e.g., knowledge of the statutes and cases relevant to the matter in question.

   b) *Skill* appears to mean *know-how*—i.e., practical knowledge of how to perform the tasks necessary in handling the matter.

      i) You cannot be expected to have all of the practical knowledge necessary to handle an LLC formation at your finger tips. However, you should have checklists that will remind you of all basic elements of this knowledge.

   c) *Diligence* means, above all, due preparation. Preparation means two things—it means (i) general study of the law relevant to the matter; and (ii) study of the law and facts specifically relevant to the matter.

   d) *Thoroughness* means (i) identifying all of the tasks relevant to the matter and (ii) performing each of these tasks diligently.

B. WHAT CONSTITUTES COMPETENCE IN FORMING LLCS?

This issue is addressed in Part 3 of this Outline.

ISSUE 3. UNDER RULE 1.2, HOW SHOULD YOU DEFINE THE SCOPE OF YOUR REPRESENTATION IN LLC FORMATIONS?

A. BASIC DOCTRINE

1) Rule 1.2—basic meaning. Rule 1.2 requires that, in handling legal matters for their clients, lawyers obtain agreements with their clients about the scope of their representation.

2) The ambiguous focus of Rule 1.2 in LLC formations

   a) The terms of Rule 1.2 and the Comments on it address almost exclusively the issue of when lawyers have authority to handle particular matters for their clients.

   b) However, the very title of the Rule suggests that it also requires that lawyers make clear to their clients which legal issues they will handle for them and which they will not in the formation in question.

c) Since, as discussed in various other Parts of this Outline, LLC formations often involve a wide variety of legal and tax issues, this clarity as to which issues a lawyer will and will not handle is of particular importance, since, in many cases, clients for whom you agree to handle LLC formations may reasonably assume that you are agreeing to handle *all* of the relevant issues.

3) Indeed, assuming that Rule 1.2 does *not* apply to the process, the process is implicitly governed at least implicitly by Rule 1.1 (concerning competence), Rule 1.3 (concerning diligence), and Rule 1.4 (concerning communication).

B. DEFINING YOUR SCOPE OF REPRESENTATION IN LLC FORMATIONS

1) Tax disclaimer. For business lawyers who are competent in LLC business organization law but who lack LLC tax expertise, this means disclaiming any responsibility as to the tax issues of their LLC formation clients and any responsibility for the tax provisions in the LLC's operating agreement.

2) Other disclaimers. LLC formations often raise issues in fields of law other than LLC business organization law and LLC tax. Exhibit 11-1 reflects my efforts to date to list these other areas of law with reasonable comprehensiveness. Among the most commonly relevant of these issues are those in the areas of estate planning and securities law.

3) Dealing with "miscellaneous" issues with LLC formation clients. In my view, you can't simply be silent about these "miscellaneous" issues with your LLC formation clients, and you can't simply tell them that you don't know what these issues are. Instead, you must make a reasonable effort to identify them; if you lack competence in any of them that you are able to identify, you must so advise your clients; and you must make reasonable efforts to help them find lawyers or other professionals who possess the necessary expertise.

ISSUE 4. WHAT CONSTITUTES DILIGENCE UNDER RULE 1.3 IN LLC FORMATIONS?

A. BASIC DOCTRINE

1) Rule 1.3. Rule 1.3 requires that in handling legal matters for clients, lawyers must be diligent. The duty of diligence is also imposed by Rule 1.1, and is briefly discussed above.

2) Commitment, etc. Under Rule 1.3, a duty of diligence means a duty to act with:

   a) "Commitment and dedication to the interests of the [client]"; and

   b) "Zeal in advocacy upon the [client's] behalf."

B. ACTING "DILIGENTLY" IN LLC FORMATIONS

1) The key notion of Rule 1.3 is, in my view, that law isn't just a job; it's a calling, and lawyers must devote themselves to their clients in a spirit of service that is almost religious in its zeal.

2) Obviously, however, in order to act diligently for your LLC formation clients, you must provide them with your work product in accordance with the necessary deadlines. Thus,

when you first start working with an LLC formation client, you should determine the applicable time frame for your work and you should agree with the client on workable target dates.

3) Is there a greater need for zeal in forming LLCs than in other jobs—say, repairing automobiles or selling insurance? If the answer is yes, this is so, one might argue, because the personal stakes of parties to LLC formations are so often so high. A car is just a car, but an LLC is often the central setting of the members' professional lives, a major source of personal meaning, and a key means of supporting their families.

ISSUE 5. WHAT CONSTITUTES ADEQUATE COMMUNICATION WITH YOUR CLIENTS UNDER RULE 1.4 IN LLC FORMATIONS?

A. BASIC DOCTRINE

Rule 1.4 provides in effect that, in order to meet Professional Conduct standards for effective communication with clients in handling an LLC formation, you must:

1) Keep your clients reasonably informed about the status of the formation;

2) Promptly respond to their requests for information about it; and

3) Explain all relevant issues to the extent necessary to enable them to make informed decisions regarding them.

B. COMPLYING WITH RULE 1.4 IN LLC FORMATIONS

1) In order to comply with Rule 1.4 in LLC formations, you have to be a good teacher. In *Drafting Limited Liability Company Operating Agreements*, I've written a lengthy chapter on the role of lawyers as teachers in LLC formations. Skill in teaching depends to some extent on your genes. However, it is a skill that, by hard work, you can master even if you lack the teacher gene.

2) LLC issues memos like the one in Exhibit 9-2 of this outline and planning memos like the one in Exhibit 10-1 can be powerful tools for complying with Rule 1.4.

ISSUE 6. UNDER RULE 1.5, HOW MUCH CAN YOU CHARGE CLIENTS FOR ASSISTING THEM IN LLC FORMATIONS?

A. BASIC DOCTRINE

1) <u>The "reasonableness" rule</u>. Rule 1.5 provides that in order to meet Professional Conduct requirements concerning fees in handling LLC formations, you must charge your clients fees that are "reasonable."

2) <u>The ten non-exclusive factors determining reasonableness</u>. Rule 1.5(a)(1) through (8) purport to provide eight factors that lawyers can apply in deciding the amount of the fees they will charge to their clients. However, since Rule 1.5(a)(1) covers three quite distinct factors, Rule 1(a) in fact contains 10 factors. They are as follows:

    i) The time and labor required [for the task in question] (Rule 1.5(a)(1));

    ii) The novelty and difficulty [of the task] (Rule 1.5(a)(1));

iii) The skill requisite to perform [the task] (Rule 1.5(a)(1));

iv) The likelihood. . . that the [performance of the task] will preclude other employment by the lawyer (Rule 1.5(1)(2));

v) The fee customarily charged in the locality for similar legal services (Rule 1.5(1)(3));

vi) The amount involved [i.e., the financial risk of the clients] and the results obtained [i.e., the results potentially available to the client] (Rule 1.5(1)(4));

vii) The time limitations imposed by the client or by the circumstances (Rule 1.5(1)(5));

viii) The nature and length of the [lawyer's] professional relationship with the client (Rule 1.5(1)(6));

ix) The experience, reputation and ability of the lawyer or lawyers performing the services (Rule 1.5(1)(7)); and

x) Whether the fee is fixed or contingent (Rule 1.5(1)(8)).

b) Non-exclusivity of the factors; a missing factor. However:

i) According to the Comments, these factors are expressly non-exclusive.

ii) Perhaps anomalously, they do not include the sometimes critical factor of the client's ability to pay.

3) Custom. The factor in the above list that is perhaps the most practical is "the [amount of the] fee customarily charged in the locality for similar legal services."

B. COMPLYING WITH RULE 1.5 IN CHARGING FEES FOR LLC FORMATIONS

1) Hourly rates are generally preferable. In my view, fees for LLC formations should usually be based on hourly rates, not flat or capped rates, since you never know what complications may arise in these formations until you undertake them. However, if it's clear to you that a particular LLC formation will require little more than filling in a form—a situation which, in my view, occurs only rarely—you may want to consider offering the client a flat rate deal.

2) My personal experience. For what it's worth:

a) My hourly rate is $350;

b) On average, the formation of single-member LLCs whose members are individuals takes me around two hours (and a little more if I draft a planning memo for the client) and my fee is about $700.

c) On average, the formation of relatively simple multi-member LLCs takes me around 4.5 hours (including meeting with the clients, drafting planning memos, and drafting operating agreements, obtaining comments on them and preparing final drafts), and my fee is around $1,600.

My discussions with Utah lawyers suggest to me that at least in larger Utah towns, the above fees are generally fairly typical.

3) "Big-deal" LLCs. Legal fees for LLC formations involving significant stakes can often amount quite reasonably to tens of thousands of dollars even in friendly deals, and these fees are likely to be far greater in LLC deals involving high financial stakes and extensive negotiation among the parties.

4) "No surprises."

   a) In my experience, fee disputes can be among the most unpleasant experiences in the practice of law. The way to avoid them in LLC formations is to provide clients with rough estimates of your fees before you begin work on them; to advise them about the current amount of your billing from time to time as you proceed; and to advise them about any need you perceive to go beyond your original fee estimate.

   b) In short, your billing for your LLC formation clients should involve no surprises for your clients, and your clients should never feel that their fees have become runaway trains. In my view, any other approach to billing is "unreasonable" under Rule 1.5.

   c) The above views are generally consistent with the requirement of Rule 1.5 that, before undertaking engagements or soon after beginning them, lawyers disclose to their clients, preferably in writing, the "basis or rate" of their legal services. However, the Rule does not seem to require lawyers to provide clients with an advance estimate of their likely total fees..

ISSUE 7. HOW CAN YOU AVOID BREACHES OF CLIENT CONFIDENTIALITY UNDER RULE 1.6 IN LLC FORMATIONS?

A. BASIC DOCTRINE

1) Rule 1.6. Under Rule 1.6, you must maintain the confidentiality of confidential information of which you become aware in an LLC formation.

2) Trust is the essence of every attorney-client relationship, and compliance with Rule 1.6 is essential in order to maintain that trust.

3) As I read the comments on Rule 1.6, the rule covers:

   a) Information provided by clients to their lawyers in confidence;

   b) Information that could enable other parties to obtain confidential information about your clients; and, more generally,

   c) Information about your client that you know or ought to know they would not want you to reveal, such as the fact that you are their lawyer.

B. AVOIDING BREACHES OF CLIENT CONFIDENTIALITY IN LLC FORMATIONS

The LLC formation situation that normally involves the greatest risk of breaching Rule 1.6 is the handling of common representations in LLC formations. See discussion below concerning common representations.

ISSUE 8. WHEN MIGHT "CONCURRENT" CONFLICTS OF INTEREST EXIST FOR YOU UNDER RULE 1.7 IN LLC FORMATIONS?

A. BASIC DOCTRINE

1) "Concurrent" vs. "non-concurrent" conflicts. Rule 1.7 provides that "a lawyer shall not represent a client if the representation involves a *concurrent* conflict of interest." As Rules 1.7 and 1.9 make clear, conflicts of interest may be either:

   a) "Concurrent"—i.e., involving a current client; or

   b) Non-concurrent—i.e., involving a former client.

   Concurrent conflicts are covered by Rule 1.7 and non-concurrent conflicts by Rule 1.9. Since non-concurrent conflicts arise rarely in LLC formations, I will not address them here.

2) What is a "conflict of interest"? The term "conflict of interest" is a bit misleading. What Rule 1.7 really addresses is conflicts between:

   a) On the one hand, the *duty* of lawyers under Rule 1.4 to represent each client zealously; and

   b) On the other:

      i) Their *duty* toward their other clients; and

      ii) Their *personal self-interest*.

3) Definition of concurrent conflict. Under Rule 1.7(a), a lawyer has a *concurrent* conflict of interest in representing a client in a legal matter if:

   a) Direct adversity. The representation will be *directly adverse to another current client*; or

   b) Material limitation. There is a significant risk that the representation of a current client will be *materially limited* by:

      i) The lawyer's duty to:

         (1) Another client,

         (2) A former client; or

         (3) A third person; or

      ii) *A personal interest* of the lawyer (such as an interest in a competing business or an interest arising from a friendship or family relationship).

4) Waivers. Under Rule 1.7(b), lawyers may engage in representations involving informed consents if, in general,

   a) They reasonably believe they can provide competent and diligent representation to the affected clients; and

   b) Each affected client gives informed consent, confirmed in writing.

5) Rule 1.9. Non-concurrent conflicts of interest are governed by Rule 1.9. Rule 1.9 is complex, and detailed discussion of it is beyond the scope of this Outline. However, in LLC formation practice, my own experience suggests that the main relevance of the Rule

occurs when lawyers represent current clients in situations in which these lawyers may be in a position to use information about past clients to the disadvantage of these past clients. Rule 1.9 prohibits this use.

B. AVOIDING CONCURRENT CONFLICTS OF INTEREST IN LLC FORMATIONS

In my view, it is unlikely that in an LLC formation, you will be involved in a concurrent conflict of interest. The following are some examples of when you may face a concurrent conflict of interest in an LLC formation:

1) Common representation in forming a multi-member LLC. Two or more parties to the formation of a multi-member LLC want you to represent all of them in the formation. I will address this "common representation" situation below.

2) Representation of clients with adverse interests in forming single-member LLC. You are forming a single-member LLC for John Jones. You advise John that, for continuity of management, his operating agreement should appoint an assistant manager for his LLC. John wants to appoint Sam Smith, a close friend, as his assistant manager. In this situation, John's fiduciary rights as a principal and Sam's as John's agent will probably constitute a direct concurrent conflict. Thus, you cannot represent both of them in the formation without a written waiver.

3) "Material limitation." Your representation of a particular LLC formation client may be "materially limited" under Rule 1.7 and thus may give rise to a concurrent conflict of interest and to the requirement of a written waiver if the client's LLC will compete against a business owned by a relative or close friend of yours.

ISSUE 9. WHAT MUST YOU DO IN ORDER TO AVOID CONCURRENT CONFLICTS OF INTEREST UNDER RULE 1.7 IN REPRESENTING TWO OR MORE PERSONS IN LLC FORMATIONS?

A. BASIC DOCTRINE

1) The statistics. As noted above, IRS filing statistics suggest that about 45% of all LLC formations involve two or more prospective members. In my experience:

   a) These prospective members usually want you to represent all of them jointly in the formation; and, indeed,

   b) They often take it for granted that you *are* representing them jointly.

2) The Comments under Rule 1.7. The principal authorities governing common representations are contained in Rule 1.7, Comments 28-32. The discussion that follows is intended to reflect all of these Comments.

3) Why parties to formations of multi-member LLCs want common representations. There are three main reasons why parties to LLC formations often want the same lawyer to represent all of them in the formation:

   a) Common representations save the parties legal fees.

   b) The parties believe that their interests are substantially aligned and thus that they

don't need their own lawyers.

c) They believe that if two or more lawyers are involved in the formation, there will be needless complexity and disharmony.

4) Disclosures.

a) Rule 1.7 requires that in order to conduct a common representation consistent with that Rule, lawyers must disclose to the relevant persons all the risks to them of the common representation and must obtain written consents from them.

b) In my view, it is unclear precisely what disclosures lawyers must make to potential clients before handling common representations in order to meet the above "informed consent" requirement. However, I suggest that these disclosures include at least the following:

i) No duty of loyalty to any individual client. The lawyer will have no duty of loyalty toward any individual client in the representation. Rather, the lawyer's task will be to reach accommodation among them about potentially contentious issues. Effectively, the lawyer will have a duty of loyalty to the clients as a group.

ii) Duty to disclose to all clients information obtained from any client. As indicated above, the lawyer will have to disclose to all clients any information disclosed to the lawyer about the formation by any of the clients.

iii) No attorney-client privilege. None of the clients will have an attorney-client privilege in any claims they may make against other clients after the formation. Rather, the lawyer may be called upon to disclose in testimony in any such claim all information relevant to the claim possessed by the lawyer.

iv) Attorney withdrawal. If conflicts arise among the clients in the course of the representation, the lawyer must withdraw (but the clients must pay the lawyer fees accrued to the date of the withdrawal).

5) "Substantial alignment"—doing mini-formations. In my view, lawyers cannot represent multiple clients in an LLC formation unless they first ascertain whether the interests of the potential clients are substantially aligned. This means doing a mini-formation in which you determine the views of the parties about all matters that may be contentious among them, including:

a) Issues concerning contributions, allocations and distributions;

b) Issues concerning member voting rights;

c) Fiduciary issues; and

d) Issues concerning the LLC's method of dispute resolution (generally, an issue of arbitration vs. litigation).

B. AVOIDING CONCURRENT CONFLICTS OF INTEREST IN LLC FORMATIONS

1) General guideline—avoid common representations.

a) Because of (i) the difficulty and complexity of the process of obtaining written informed consents from clients in a common representation and (ii) the risk of post-formation ethical or malpractice claims by irate clients (which may come years after

the formation), I generally try to avoid these representations.

b) Instead, I prefer to have only one client in the representation and to advise the other parties to the formation that they are not my clients and that, if they want to ensure the protection of their interests in the formation, they must hire their own lawyers. However, my client often wants me to structure the LLC so as to accommodate all of the parties to the formation.

2) Representing the "entity in formation."

a) Many lawyers seek to avoid common representations in formations of multi-member LLCs by advising the parties to these formations that they are representing the "entity in formation." However, in practice, this generally means forming a multi-member LLC on terms that compromise the interests of the various members. Seeking such a compromise is often a difficult and risky task.

b) Thus, even if you advise the parties to the formation that your client is the LLC in formation, you should also advise these parties expressly that you are not their lawyers and that if they wish to protect their interests in the formation, they must hire lawyers of their own.

ISSUE 10. UNDER RULE 5.5, WHAT MUST YOU DO IN ORDER TO AVOID UNAUTHORIZED PRACTICE IN LLC FORMATIONS?

A. BASIC DOCTRINE

1) Unauthorized practice of law. The Rules concerning unauthorized practice of law are set forth in Rule 5.5. In general, Rule 5.5 provides that a lawyer will be deemed to be practicing law in Utah only if:

a) The lawyer establishes an office or other systematic and continuous presence in Utah for the practice of law; or

b) The lawyer holds out to the public that he or she is admitted to practice in Utah.

2) Rule 14-802. Rule 14-802 of the Rules of judicial administration of the Utah Supreme Court provides a highly sophisticated and very practical definition of the meaning of the term "practice of law." It also identifies numerous categories of activities that arguably constitute the practice of law but that, for policy reasons, it defines as *not* constituting the practice of law.

3) The purpose of unauthorized practice Rules. The primary purpose of Rule 5.5 is, obviously, to protect Utah residents from incompetent lawyering both by lawyers and by non-lawyers.

4) Rule 8.5. Rule 8.5 provides, in essence, as follows:

a) Lawyers admitted to practice in Utah are subject to Utah discipline regardless of where their conduct occurs.

b) Lawyers not admitted to practice in Utah are subject to Utah discipline if they provide or offer to provide legal services to residents of Utah.

c) The choice-of-law Rules that the OTC must apply are complex; discussion of them is beyond the scope of this Outline.

B. AVOIDING UNAUTHORIZED PRACTICE UNDER RULE 5.5 AS APPLIED BY UTAH AND BY OTHER JURISDICTIONS.

1) Under Rule 5.5, can lawyers licensed in Utah form an LLC for Utah residents under the LLC law of another state—e.g., that of Delaware?

   a) Competence is key. From the viewpoint of the Utah Office of Professional Conduct, the primary issue of Professional Conduct appears to me to be that of *competence*. In other words, it seems to me that Utah lawyers who have a solid basic knowledge of Delaware LLC statutory and case law (or that of any other relevant state) may, without risk of investigation and prosecution by the Utah Bar Office of Professional Conduct or the imposition of sanctions by the Ethics and Discipline Committee, form Delaware LLCs for Utah residents.

   b) Potential relevance of non-Utah unauthorized practice Rules. However, before they do so, Utah lawyers should ensure that their doing so will also be consistent with the unauthorized practice Rules of the relevant non-Utah state.

   2) *Sample v. Morgan*—Delaware long-arm jurisdiction.

      d) Lawyers not licensed to practice law in Delaware should be aware that in certain circumstances, they may be subject to the long-arm jurisdiction of the Delaware courts in malpractice suits, "aiding and abetting" suits and other suits on the basis of their advising clients who are non-Delaware resident about Delaware legal matters and retaining agents in Delaware to file documents relating to those specific matters, even those these lawyers have never set foot in Delaware. See generally, *Sample v. Morgan*, 935 A.2d 1046 (Del. Ch. 2007). It is possible that other states, including Utah, may apply *Sample v. Morgan* in unauthorized practice cases.

      e) However, *Sample v. Morgan* should probably be read to provide that lawyers will be subject to long-arm Delaware jurisdiction only if the documents they file through Delaware agents *relate directly to and implement* the alleged misconduct. It seems doubtful that merely filing a Delaware certificate of formation can constitute an element of malpractice in forming a Delaware LLC.

      f) The principles in Sample v. Morgan are arguably applicable not only in malpractice claims in Delaware but also in claims of violation of Professional Conduct Rules.

5) Under Rule 5.5, may Utah lawyers form Utah or non-Utah LLCs for non-Utah residents?

   a) Presumably, Rule 5.5 should be read to prohibit Utah lawyers from advertising their legal services to non-Utah residents.

   b) However, if Utah residents contact lawyers not licensed in Utah and ask them to form Utah LLCs for them, I am aware of no Utah rule of Professional Conduct that would prevent these non-Utah lawyers from forming Utah LLCs as long as they observe Utah Professional Conduct Rules.