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IN THE SUPREME COURT OF THE STATE OF UTAH

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IN RE:	)	
	)	
UTAH STATE BAR	)	PETITION TO AMEND
	)	RULE 14-808 NEW LAWYER
Petitioner.	)	TRAINING PROGRAM
	)	

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THE UTAH STATE BAR ("Bar") by and through its General Counsel hereby files this Petition to Amend Rule 14-808 New Lawyer Training Program ("NLTP") to clarify various conflict and confidentiality ethical issues related to outside mentoring activities. The initial petition to adopt the new lawyer mentoring rule was approved by the Court on December 18, 2008. As with any new program sometimes there are concerns raised after the fact and the proposed amendments are designed to help address newly raised issues related to the potential of conflicts and confidentiality ethical violations. The Bar anticipates that in addition to providing more clarification, the proposed revisions will help maximize the pool of available mentors as well as facilitate the goals and purposes of the NLTP. These revisions were approved at a regularly scheduled Commission meeting on April 24, 2009. A redlined copy of Rule 14-808 reflecting the proposed revisions is attached as Exhibit "A" and a clean copy with the changes incorporated is attached as Exhibit "B".

As stated in the NLTP Manual the goal of the NLTP is to *“train new lawyers during their first year of practice in professionalism, ethics, and civility; to assist new lawyer in acquiring the practical skills and judgment necessary to practice in a highly competent manner; and to provide a means for all Utah attorneys to learn the importance of organizational mentoring, including the building of developmental networks and long-term, multiple mentoring relationships.”* In order to accomplish these goals, different types of mentoring may be more suitable for set of particular circumstances. There are three primary categories of mentoring: inside mentoring, outside mentoring and the mentoring circle alternative.<sup>1</sup> Because the inside mentoring model typically occurs within one law office, the potential for conflicts and violations of confidentiality are minimized because internal checks are easily run. Circle mentoring involves new lawyers who do not yet have any clients or who are not engaged in the practice of law (but are on active status), and thus, the potential for conflicts and violations of confidentiality are also minimal. It is in the outside mentoring context that potential problems with conflicts and confidentiality are most likely to occur. This is not to say that the likelihood of ethical violations are great, but only that the potential is greater than with the other two mentoring models.

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<sup>1</sup> (1) “Inside mentoring”: A mentor from within the new lawyer’s own office is preferred; (2) “outside mentoring”: A mentor who is not in the same office as the new lawyer, e.g., from small firms or solo practice, will aim to provide mentoring experiences as would be available for a new lawyer within the mentor’s office; and (3) a “mentoring circle alternative”: Designed to accommodate special circumstances such as new lawyers who are not actively representing clients or engaged in the practice of law. A mentoring circle consists of four or five new lawyers and two or three mentors. The circle agrees to meet regularly – preferably two hours each month. Any meeting of the circle must include at least two new lawyers and one mentor. Mentors and new lawyers may work together in different combinations to complete the requirements of the new lawyers’ mentoring plans.

In recognizing the potential in outside mentoring situations for certain ethics violations, the NLTP Manual provides the following:

- Outside mentoring is not intended to create any business relationships.
- New lawyers and mentors are encouraged not to co-counsel together on cases or engage in specific work together for clients.
- Outside mentors should not render professional advice for the new lawyer's clients.
- All discussions should be limited to hypothetical situations. Actual cases should not be referred to each other.
- In the event a mentor and a new lawyer choose to develop a professional relationship for a particular case(s), they must satisfy the Rules of Professional Conduct and standard processes for clearing conflicts and disclosure to the client.

The NLTP Manual also takes special note that, "Care should be taken in outside mentoring situations to reduce problems associated with conflicts of interest, confidentiality, and liability limitations. For example, the mentor will not be responsible for work performed for the new lawyer's client unless the mentor has a written agreement with the new lawyer's client."

There were no comments submitted related to conflicts and confidentiality when Rule 14-808 was published. Since that time, however, several lawyers have expressed concerns regarding potential ethical violations which may arise in outside mentoring relationships. The Bar believes that carefully delineated clarifications would more fully address these concerns. Moreover, because the Bar wants to maximize the number of available, qualified and willing mentors, we believe it prudent to provide more concrete ethical guidelines to further encourage participation. As a consequence, revisions to Rule 14-808 have been proposed.<sup>2</sup>

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<sup>2</sup> There are a number of reasons why revisions to the Utah Rules of Professional Conduct (URPC) are not appropriate to address these concerns. First, Utah attempts to follow the general format of the ABA Model

## PROPOSED AMENDMENTS TO RULE 14-808

A redline copy containing proposed revisions to Rule 14-808 is attached as Exhibit “A”. The changes make clear that carefully tailored ethical accommodations apply only in the NLTP in an outside mentoring context. New section (h)(1) states that neither the lawyers nor the new lawyer’s clients should expect that representation is being provided by the mentor in short term and limited relationships within the program. New section (h)(2) emphasizes that mentoring discussions shall be limited to hypotheticals as a general rule. If hypothetical terms are not practical under the circumstances, however, the lawyers are not subject to the URPC concerning confidentiality of information because “the disclosure is impliedly authorized under the circumstances and is necessary to carry out the purposes of the NLTP.” New section (h)(3) provides that the mentor is not required to run a conflict check when guidance relating to the new lawyer’s client is being provided on a short term, limited basis to the new lawyer. Finally, new section (h)(4) expressly states that none of the new revisions apply to outside mentors or the new lawyer when there is an on-going, regular relationship regarding a specific client and further, that the URPC apply in such

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Rules of Professional Conduct (“Model Rules”). This is the reason why URPC are numbered differently than other “Bar rules” such as the Rules for Lawyer Discipline and Disability or even the Standards of Professionalism. In fact, the Court expressly decided several years ago to keep the current format system when faced with the choice of re-numbering the URPC. We also attempt to generally follow the substance of the Model Rules in order to help standardize acceptable lawyer conduct throughout the United States. This is particularly important as multijurisdictional practice continues to grow. And while there are some differences among the states’ professional conduct rules, no jurisdiction has adopted revisions in the conflicts and confidentiality provisions to accommodate mentoring programs. Finally, in modifying the URPC to accommodate unique concerns, there may be unintended or other consequences that flow from such revisions which the Bar would like to avoid. Making changes to the mentoring rule itself insures that any leeway (such as not requiring that the mentor’s clients routinely sign conflict or confidentiality waivers) is clearly limited to the mentor program only.

circumstances. This provision ensures that current existing ethical rules apply to situations where they should.

#### CONCLUSION

For the reasons outlined above, the Bar respectfully requests that the Court grant this petition.

Dated this \_\_\_\_ day of April, 2009.

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Utah State Bar General Counsel