Agenda

Supreme Court's Advisory Committee on the Rules of Professional Conduct

April 27, 2015
5:00 to 7:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Salt Lake City
Judicial Council Room, Suite N31

Welcome and approval of minutes from February 23, 2015 meeting.	Tab 1	Steve Johnson, Chair
Report from the Professionalism Subcommittee on the overlap between the Standards of Professionalism and Civility and the Rules of Professional Conduct	Tab 2	Leslie Van Frank
Proposal to amend rule 1.8(h)	Tab 3	Steve Johnson and Nancy Sylvester
Next meeting		Steve Johnson

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

Tab 1

MINUTES OF THE MEETING OF THE
COMMITTEE ON RULES OF PROFESSIONAL CONDUCT

February 23, 2015
Draft. Subject to Approval.

The Meeting commenced at 5:02 pm.

Committee Members Attending:
Steve Johnson (chair)
Trent Nelson
Simon Cantarero
John Bogart
Vanessa Ramos
Daniel Brough
Gary Chrystler
Paul Veasy
Leslie Van Frank
Kent Roche
Paula K. Smith
Nayer Honarvar
Billy Walker
Thomas Brunker

Visitors Attending:
Robert Clark

Staff
Nancy Sylvester

Secretary
Phillip Lowry

Approval of Minutes

Corrections to the minutes of the February 2, 2015 meeting of the Committee were made and noted. A motion was made and seconded to adopt the minutes as corrected, and the motion carried unanimously.

General Business Items

Proposed Rule 7.3.

With respect to the changes being proposed to Rule 7.3 and the comments thereto, the discussion commenced with the existence of the word "presence" in Comment [2]. Leslie Van Frank moved to remove this word, and John Bogart seconded. The motion carried unanimously.

Report on Standards of Professionalism and Civility

Leslie Van Frank reported on her subcommittee's proceedings. She expressed concern about mentioning every single rule, lest by omission certain rules are deemed not promulgating any kind of standard. So, the committee concluded, they could put something in the preamble with respect to the seriousness of their meaning. This is how the "egregious" language was inserted into the preamble. Robert Clark then was asked to comment on the subcommittee's report. He thought it was brilliant because it matched the work his entity had already done. He then noted that the advisory committee on professionalism has still not yet been sunseted. That would not happen until this current task is complete. He also noted that there are two separate entities responsive to conduct inquiries: the advisory committee on professionalism, and the professionalism advisory board. The latter will continue.

Mr. Clark stated that the fact that the subcommittee came up with a similar approach seems more than coincidental. He also stated that it seemed to be the sense of the Utah Supreme Court that civility standards should find themselves in the Rules of Professional Conduct. The standards talk about obligations that lawyers have to represent their clients. These standards are cross-referenced in the rules. There is no linkage, actual or intended, between violating the standards and a breach of the rules of professional conduct. The only rule in his judgment that is implicated is Rule 8.4(d).
There is a fair amount of authority in other states that addresses violations of Rule 8.4(d) in connection with standards of civility.

Mr. Walker stated that Justice Lee and the committee had some concerns about putting the proposal in the standards. They are aspirational, and not intended to be enforceable. The court is serious about the standards, but they are not a basis for discipline. So, the solution would be to actually make the standards' language part of the actual rules. With respect to the rules, he noted that they tend to be very narrow. On the other hand, the standards are far broader. So, the notion is to put a little more specific guidance in crafting enforceable standards.

Ms. Van Frank noted that there appears to be a contradiction between aspirational and mandatory goals. Simon Cantarero noted that the standards were promulgated by an order. Mr. Walker stated that the standards are Supreme Court Rules, as opposed to the Rules of Professional Conduct, which are enforceable guidance. The Rules are made a part of the oath; the standards are not.

Mr. Bogart stated that he was at a loss as to what the task or request was before the committee. Mr. Clark did not necessarily agree that the standards are not enforceable, but rather that they are not self-executing. Ms. Van Frank responded that there needs to be notice of enforceability, and that there now is not such notice. Mr. Clark stated that the question is whether OPC wants to enforce them. Mr. Bogart asked which ones. Mr. Clark responded that it is whether a lawyer is abusive or engaging in conduct prejudicial to the administration of justice. Chairman Steve Johnson noted that a violation needs to be egregious. Comments might assist with this analysis. Ms. Van Frank was concerned

about why a comment or preamble should be used rather than the text itself of an individual rule.

Kent Roche suggested putting the language in one of the rules, such as Rule 8.4(d). Mr. Johnson noted that the Court is hesitant about putting new law in the comments. Ms. Van Frank noted that the Court could just create a standing order to create the standard. Mr. Walker noted that the Court is not wedded to 8.4(d) as the conduit to impose the standards. There might be a better conduit.

Mr. Walker, reading from a variety of the standards by a commentator, emphasized the need to identify a pattern. Ms. Honarvar raised concerns over the subjectivity of the standards. A second issue she raised is that there are already standards that govern egregious misconduct.

Chairman Johnson referred the matter back to the subcommittee after a lively discussion. The subcommittee can amend the preamble to the standards, or amend 8.4(d), or create a new Rule 8.6. Mr. Cantarero suggested that perhaps the preamble to the RPC could be amended, but the problem in his view is that no one reads the preamble.

Discussion of Advertising Rules

The subcommittee's analysis focused on the former rules and revised rule on solicitation (prior relationship). Comments had been received, and were discussed as follows.

Comment by Michael Jensen. He was concerned about communications from a referee, and whether the referring attorney needs to be present. He was also concerned about referral within a family, such as a mother referring a daughter. Initially there were few concerns with what was raised, but upon reflection, incarceration and incapacity situations came to mind. Hence the draft that was prepared. A draft was circulated. Blue text showed ABA changes, red showed the subcommittee changes. Chairman Johnson also made some small changes.

The changes add a third exception concerning inability of the potential client to contact the lawyer when a third party has referred the client to the lawyer. Chairman Johnson raised the issue of internal consistency of rule language and cross-reference.

Gary Chrystler raised the issue distinguishing "at the request of" the client rather than "on behalf." The referred client may not be aware they need an attorney. Nancy Sylvester raised the issue of whether inability to contact is material.

It was proposed to change the language in Comment 5(a) to remove reference to the "version"; instead the comment would just refer to Utah's Rule 7.3 and reference to the ABA model rule. Ms. Van Frank moved to adopt the version with these changes. Discussion ensued. Ms. Sylvester felt that new comment 5 did not flow well and so she circulated a version with highlighted language that was hers. She also added language "Nor is there a serious potential for abuse." Paula Smith made some suggestions

regarding comma placement. There was additional discussion of allowing pro bono assistance to a pro se defendant.

Ms. Van Frank moved to adopt the changes (all of them), Mr. Brunker seconded, the motion carried unanimously.

The meeting adjourned at 6:22 p.m. The next meeting is set for 27 April 2015 in the Judicial Conference Room at the Matheson Courthouse, to commence at 5:00 p.m.

Tab 2

Overlap Between the Standards of Professionalism and Civility And the Rules of Professional Conduct

April 1, 2015

Subcommittee:

John Bogart
Tom Brunker
Simón Cantarero
Trent Nelson
Leslie Van Frank, chair

Follow-up Assignment:

At the February 23, 2015 meeting, the Advisory Committee rejected the subcommittee's February 23, 2015 recommendation to amend the preamble to the Standards of Professionalism and Civility (SPC) to make reference to the Rules of Professional Conduct.

We were then asked to consider language amending Rule 8.4 of the RPC or adding a comment to make it clear that a violation of Rule 8.4 occurs if the administration of justice is prejudiced by an egregious violation or repeated violations of the SPC.

Discussion:

The subcommittee met on April 1, 2015. Mr. Cantarero was excused, though he later reviewed and agreed with this report.

Some concern was expressed that any new language was necessary, as the RPC Rule 8.4 already provides that conduct prejudicial to the administration of justice is sanctionable. To accomplish the assigned task, however, the subcommittee first discussed amending Rule 8.4.

A proposal was made and rejected to add a phrase to Rule 8.4(d), so that it would read: "It is professional misconduct for a lawyer to… (d) engage in conduct that is prejudicial to the administration of justice, which may include egregious violations or a pattern of repeated violations of the [SPC]." The proposal was rejected because the phrase or anything similar could be construed as defining the prohibited conduct, or perhaps limiting the conduct that would be prohibited by (d). Much conduct could be prejudicial to the administration of justice without violating the SPC. For example, providing an incorrect courthouse address to a pro se opponent could be prejudicial to the administration of justice, but the SPC does not address such conduct.

Another proposal was made and rejected to add a subparagraph (g) that would read: "It is professional misconduct for a lawyer to…(g) egregiously violate or engage in a pattern of repeated violations of the [SPC] that is prejudicial to the administration of justice." This was

rejected as being repetitive of paragraph (d) in that it just sets forth a subset of conduct prejudicial to the administration of justice, which is already broadly prohibited by paragraph (d).

We then noted that the comments section to the specific rules is where examples of prohibited conduct are usually provided. *See e.g.,* Rule 1.2, comments [6] and [7]; Rule 4.2, comments [22] and [23]. We therefore concluded a new comment would be an appropriate way to ensure that attorneys know that certain violations of the SPC could lead to sanctions. Here is our recommended language for a new comment:

> [3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).

This language is different from that proposed by Robert Clark, which is:

> [3a] The Standards of Professionalism and Civility (the "Standards") are intended to improve the administration of justice through this State. A lawyer who engages in conduct that is an egregious violation of the Standards, or who engages in a pattern of repeated violations of the Standards, even actions of minor significance when considered separately, violates paragraph (d) when such actions are prejudicial to the administration of justice.

Our proposal redlined against Mr. Clark's is:

> [3a] The Standards of Professionalism and Civility ~~(the "Standards")~~ approved by the Utah Supreme Court are intended to improve the administration of justice ~~through this State~~. ~~A lawyer who engages in conduct that is an~~ An egregious violation ~~of the Standards, or who engages in~~ or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d)~~, even actions of minor significance when considered separately, violates paragraph (d) when such actions are prejudicial to the administration of justice~~.

We added "approved by the Utah Supreme Court" as a reminder of the importance of the SPC. To make the remaining language more concise, we deleted "even actions of minor significance when considered separately" because it is covered by "a pattern of repeated violations". We also deleted "prejudicial to the administration of justice" as it is inherent in paragraph (d), and "through this State" because it is unnecessary. We were concerned that the automatic violation mandate dictated by the last clause of the last sentence may not be precisely correct. We changed it to "may support a finding" that paragraph (d) is violated.

Tab 3

March 8, 2015

Utah Supreme Court
450 South State St
P.O. Box 140210
Salt Lake City, UT 84114-0210
Main: (801) 578-3900

Re: Prohibition against Waiving Right to File Bar Complaint in Settlement Agreements.

Dear Honorable Justices of the Utah Supreme Court:

May I please propose a change to the Utah Rules of Professional Conduct to prohibit attorneys from negotiating, draft, or entering into settlement agreements with current clients, or former clients ("Clients") expressly or constructively prohibiting the Clients' ability to file a bar complaint to the Office of Professional Conduct ("OPC"), the violation of which the attorney and his or her co-parties may deem a breach of the settlement agreement, reopens the lawsuit, and litigate additional breach of contract claims and penalties against Clients. Although these actions may be deemed as unethical and unenforceable by the OPC, they may be used as a constructive deterrent against Clients from filing a bar complaint because of the additional onerous economic and personal costs associated the attorney could wage against Clients with litigation and silences the matter before it reaches the OPC's hands, for example hypothetically: the offending attorney's usurping of corporate opportunity, conflict of interest violations, self-dealing, disadvantaging the client through misuse of confidential information, slander, libel, and misrepresentations to other potential adversaries, all done with the air of authenticity, among other violations.

Please also provide sufficient remedy for a violation to this prohibition, for example deeming the provision void and if the attorney or adverse parties reopens litigation, requiring a bond from Plaintiff's, grounds for summary judgment, attorney's fees, costs, and punitive damages to Clients.

Without removing this current window of opportunity, the unethical practitioner is constructively insulated from the ethical prohibitions contemplated in the Utah Rules of Professional Conduct, is allowed to continue on damaging new clients, while adding onto the distain heaped upon the profession.

Most Respectfully,

Elaine M. Cochran
692 Cherapple Circle
Orem, Utah 84097
(801) 221-7066
Elainecochran@comcast.net

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(a)(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(a)(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(a)(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purpose of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or an account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(e)(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(e)(2) a lawyer representing an indigent client may pay court costs and expenses of litigation, and minor expenses reasonably connected to the litigation, on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(f)(1) the client gives informed consent;

(f)(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(f)(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(h)(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(h)(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(i)(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(i)(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not engage in sexual relations with a client that exploit the lawyer-client relationship. For the purposes of this Rule:

(j)(1) "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse; and

(j)(2) except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitive. This presumption is rebuttable.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5.

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses and minor sums reasonably connected to the litigation, such as the cost of maintaining nominal basic local telephone service or providing bus passes to enable the indigent client to have means of contact with the lawyer during litigation, regardless of whether these funds will be repaid, is warranted.

[10a] Relative to the ABA Model Rule, Utah Rule 1.8(e)(2) broadens the scope of direct support that a lawyer may provide to indigent clients to cover minor expenses reasonably connected to the litigation. This would include, for example, financial assistance in providing transportation, communications or lodging that would be required or desirable to assist the indigent client in the course of the litigation.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and

maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Spousal relationships and sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

[19a] Utah Rule 1.8(j) is different from the ABA Model Rule. It follows the language from former Utah Rule 8.4(g) regarding the prohibition of sexual relations with a client. This Rule defines "sexual relations" and clarifies the presumption that sexual relations with a client are exploitive of the client.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.