Agenda

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

September 15, 2014
5:00 to 7:00 p.m.

Law and Justice Center
645 South 200 East
Board Room

Welcome and approval of minutes: May 19, 2014 meeting	Tab 1	Steve Johnson
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Tab 1

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

May 19, 2014

Draft. Subject to Approval.

The meeting commenced at 5:02 pm.

Attending

Diane Abegglen, John H. Bogart, Thomas B. Brunker, J. Simon Cantarero, Gary L. Chrystler, Nayer H. Honarvar, Steven G. Johnson, Chair, Judge Darold J. McDade, Trent D. Nelson, Vanessa M. Ramos, Kent Roche, Gary G. Sackett, Stuart Schultz, Paula K. Smith, Judge Vernice S. Trease, Leslie Van Frank, Paul Veasy, Billy L. Walker

Staff

Phillip Lowry, Tim Shea

Approval of Minutes

There are a variety of corrections made to the March minutes as the first item of business. These are noted and the March minutes are approved as amended. There is also a discussion of whether abstentions should be noted, or whether there should be a notation of the vote count.

Mr. Sackett has drafted some amendments to the April 21 minutes. The paragraphs being proposed would replace the paragraphs on page 9. There is a motion to incorporate the changes, it is seconded, and passes with one abstention.

There is also a suggestion that the present or past tense be used consistently. Present tense will be used hereafter.

1. Consideration of Rule 7.2.

Mr. Sackett has authored a new draft of the seven boxes in the advisory committee's rules of procedure that were discussed in the last meeting. This has been circulated previously, and is presented to the committee for consideration. A motion to approve the redrafted section is made and seconded.

Mr. Walker points out lines 65 and 100 where there appears to be a missing number of days.

The discussion turns back to the motion regarding the seven boxes. Mr. Sackett points out that the boxes are not to be definitive, but are a guide to public filing. This is underscored by Mr. Johnson. Mr. Walker points out that one of the options refers to an "improper" endorsement, but this is not defined.

Ms. Smith suggests including the word "unsubstantiated." Mr. Sackett points out that the public would not likely understand this term. Mr. Johnson asks what would help the public. Incorrectly? Or should a normative term be removed completely?

Mr. Brunker raises the issue of whether a member of the public would initiate the process unless they had already concluded that something improper has occurred. Mr. Walker suggests that in the interest of consistency that the term "improper" would be better. A motion is made to keep this word. Motion carries 12-4.

Now the motion on the seven boxes arises. Motion carries 12-4 to insert them as drafted.

Mr. Shea addresses the omission of the number of days in line 65. The number of days in line 65 should be 30 days, in line 66, 30 days, in line 100, 30 days, and in line 111, 60 days.

2. Discussion of Advertising Rules with Ms. Fox and Bar Commission.

Mr. Johnson reports on the meeting with Katherine Fox about the committee's advertising rules. Ms. Fox spoke to Mr. Baldwin of the Bar Commission regarding the issue. Today Mr. Baldwin went with the bar president and president elect to meet with the Chief Justice on the issue.

Ms. Fox has suggested that this committee file an amended petition jointly with thebBar Commission consistent with this committee's recommendations. This will be considered by the Bar Commission.

Ms. Van Frank notes that this will be separate from the recommendations on the ABA rules. Mr. Johnson concurs.

The committee would like to move quickly on this in order to complete it before Ms. Fox retires as a professional courtesy to her.

3. Discussion of Rule 1.1.

Mr. Bunker reports that he had originally recommended that Rule 1.1 be adopted as drafted. Two concerns were raised, however, with comment six. The bracketed "see also" phrase at lines 41-43 is recommended by Mr. Bunker's subcommittee to be stricken. Mr. Walker also notes a typographic error.

The question arises as to whether the rule applies to contract attorneys. The consensus is that it does.

There is a motion to adopt Rule 1.1 with the changes noted. The motion is seconded and carries unanimously.

4. Discussion of Rule 4.4.

Ms. Van Frank reports that her committee has recommended adoption of Rule 4.4 as drafted. Ms. Smith raised some concerns about return of documents and confidentiality or privilege (unauthorized disclosure). However, this issue is deemed difficult to address in this rule. Mr. Walker echoes this concern.

Ms. Smith notes that Page 20 Line 21 has a missing "or", and Line 22 should read "information", Line 23 should read "electronically stored information", Line 27 "electronically stored information".

Ms. Van Frank notes that the ABA's version be adopted with the corrections noted. The Motion carries unanimously.

5. Discussion of Rule 8.5.

Ms. Van Frank reports on the activity of her subcommittee. She discusses multi-jurisdictional practices, and choice of law. There is a suggestion that with informed consent one can choose the "predominant" jurisdiction, and that the comment be changed to reflect this.

Motion is made by Ms. Van Frank that the changes consistent with the ABA draft be adopted. It carries unanimously.

6. Discussion of Rule 5.5.

Mr. Johnson reports on the two drafts of Rule 5.5, one being based on the model rule and the other as recommended by the subcommittee. Most of the changes adopted by the ABA deal with foreign attorneys. There are also references to ABA model rules that Utah has not adopted. Utah has a variety of other rules it has adopted, such as dealing with law students, pro hac vice, and foreign legal consultants. There does not appear to be much interest in changing the existing Utah rules.

Mr. Johnson is not aware of any concerns arising over international business surrounding the more strict foreign practice of law rules in Utah. The subcommittee recommends against most of the ABA model rules.

Comment 21(a) on page 33 explains the committee's rationale.

Mr. Sackett asks why the Utah rules are more stringent. Mr. Johnson summarizes some of the requirements imposed by the Utah rules. A discussion ensues comparing the Utah rules with those of the ABA.

Ms. Smith raises the issue of hiring research lawyers at lower rates in other countries. Mr. Walker mentions that those individuals could be treated as research clerks under lawyer supervision.

Mr. Walker moves to adopt the subcommittee's recommendation. The motion carries unanimously.

7. Discussion of Judicial Evaluations.

Mr. Shea raises the issue that the judiciary is considering whether lawyers are fully aware of the judicial nominating commission surveys and evaluations. There is the discussion of whether there should be a professional conduct standard regarding lawyers' full participation. There is also a concern over lawyers' exercising independent judgment without consulting other lawyers.

Mr. Sackett voices the thought that it is not a rule of "conduct" as to whether one evaluates a judge. Ms. Honarvar also makes this point. Professional conduct is limited to attorney-client interaction, not answering judicial surveys.

8. Final Discussion on Implementation.

The discussion then turns to when the rules will be promulgated. The schedule is roughed out, with anticipation of September as a likely date for final promulgation.

The meeting is adjourned at 6:24 pm.

Tab 2

Advertising Rules

Here are the Advertising Rules sections that the justices found to be problematic:

Rule 7.1

- Rule 7.1(b):They would add the word "achieve" after "expectation about the results the lawyer can..."
- Rule 7.1(c): Justice Lee asked, "What about puffing?" I have in my notes that we may want to be more specific here, but that that could be problematic, too.
- (From Tim's notes) Rule 7.1(d): substitute "which" with "that".
- (From Tim's notes) Rule 7.1, Comment [4a]: Definition of "false or misleading": private vs. public context, puffing exception.

Rule 7.2

- Rule 7.2: They suggested that the definition of "advertisement" may be overly broad. They suggested reconsidering the breadth of the definition and to give thought to whether private statements could be considered to be "advertisements." A distinction may need to be drawn between broadcasting and personal communications.
- Comment 5 to Rule 7.2, line 67: They said that rule 1.5(e) only applies to attorneys. They asked, does the committee want non-lawyer client referrals to continue? Justice Lee and other justices said they assume that the committee doesn't want to foreclose this business model by completely keeping out all non-lawyers (who are not subject to rule 1.5(e)) from offering referrals, so it will need to be re-worded.
- Comment 6 to Rule 7.2, lines 78-80: The justices understood that this section addressed the concern about attorneys potentially profiting from the referral process and getting, essentially, double fees. They suggested changing "a" to "the" where it reads, "or who is employed by a legal referral service...."

The justices requested that the advertising rules come back to them in an amended version rather than a petition.

Rule 7.1. Communications Concerning a Lawyer's Services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.;

(b) is likely to create an unjustified or unreasonable expectation about results the lawyer can or has achieved;

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(d) contains a testimonial or endorsement which violates any portion of this Rule.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead ~~a prospective client~~the public.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[4a] The Utah Rule is different from the ABA Model Rule. Subsections (b), (c), and (d) are added to the Rule to give further guidance as to which communications are false or misleading.

Rule 7.2. Advertising.

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written~~,~~ recorded or electronic communication, including public media. As used in these Rules, "advertisement" shall mean any communication made to induce persons to use a lawyer's services.

(b) If the advertisement uses any actors to portray a lawyer, members of the law firm, or clients or utilizes depictions of fictionalized events or scenes, the same must be disclosed.

(c) All advertisements disseminated pursuant to these Rules shall include the name and office address of at least one lawyer or law firm responsible for their content.

(d) Every advertisement indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall set forth clearly the client's responsibility for the payment of costs and other expenses.

(e) A lawyer who advertises a specific fee or range of fees shall include all relevant charges and fees, and the duration such fees are in effect.

(f) A lawyer shall not give anything of value to a person for recommending the lawyer's services~~;~~, except that a lawyer may~~:~~ pay the reasonable cost of advertising permitted by these Rules and may pay the usual charges of a lawyer referral service or other legal service plan.

~~(b)(1) pay the reasonable costs of advertisements or communications permitted by this Rule;~~

~~(b)(2) pay the usual charges of a legal service plan or a lawyer referral service.~~

~~(b)(3) pay for a law practice in accordance with Rule 1.17; or~~

~~(b)(4) divide a fee with another lawyer as permitted by Rule 1.5(e).~~

~~(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer of the firm responsible for its content.~~

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent,

names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer or against "undignified" advertising. Television ~~is~~, the Internet and other forms of electronic communication are now ~~one of~~among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the Bar can accurately forecast the kind of information that the public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.~~ But see Rule 7.3(a) for the prohibition against ~~the~~a solicitation ~~of a prospective client~~ through a real-time electronic exchange ~~that is not~~ initiated by the ~~prospective client~~lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] ~~Lawyers~~Except as permitted by Paragraph (f), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work~~. Paragraph (b)(1~~ in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (f), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads~~Internet-based advertisements and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. ~~See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.~~Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See

Rule 5.3 (duties of lawyers and law firms with respect to the conduct of non-lawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is an organization that holds itself out to the public to provide referrals to lawyers with appropriate experience in the subject matter of the representation. No fee generating referral may be made to any lawyer or firm that has an ownership interest in, or who operates or is employed by, a legal referral service, or who is associated with a firm that has an ownership interest in, or operates or is employed by, a lawyer referral service.

[7] A lawyer who accepts assignments or referral from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with ~~prospective clients~~the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead ~~prospective clients~~the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

~~[7a]~~ [8] For the disciplinary authority and choice of law provisions applicable to advertising, see Rule 8.5.

[8a] This Rule differs from the ABA Model Rule in that it defines "advertisement" and places some limitations on advertisements. Utah Rule 7.2(b)(2) also differs from the ABA Model Rule by permitting a lawyer to pay the usual charges of any lawyer referral service. This is not limited to not-for-profit services. Comment [6] to the Utah rule is modified accordingly.

Rule 7.3. ~~Direct Contact with Prospective~~ Solicitation of Clients.

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact ~~or other real-time communication~~ solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(a)(1) is a lawyer; or

(a)(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment ~~from a prospective client~~ by written, recorded or electronic communication or by in-person, live telephone or real-time electronic contact ~~or other real-time communication~~ even when not otherwise prohibited by paragraph (a), if:

(b)(1) the ~~prospective client~~ target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(b)(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from ~~a prospective client~~ anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2). For the purposes of this subsection, "written communication" does not include advertisement through public media, including but not limited to a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio, ~~or~~ television or webpage.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or other real-time communication to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

~~[1]~~ [2] There is a potential for abuse ~~inherent in~~ when a solicitation involves direct in-person, ~~or other real-time communication~~ live telephone or real-time electronic contact by a lawyer with ~~a prospective client~~ someone known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject ~~the layperson~~ a person to the private importuning of the trained advocate in a direct interpersonal encounter. The ~~prospective client~~ person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and

insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

~~[1a] "Real-time communication" means telephonic, electronic, radio, wire, wireless or other similar communication directed to a specific recipient and characterized by the immediacy and interactivity of response between individuals, such as that provided through standard telephone connections and Internet "chat rooms." This Comment is not included in the ABA Model Rule 7.3, and is added to clarify that the definition of real-time communication is broad enough to cover real-time communication of all types.~~

~~[2] The~~ [3] This potential for abuse inherent in direct in-person, ~~and other real-time~~ live telephone or real-time electronic solicitation ~~of prospective clients~~ justifies its prohibition, particularly since lawyers ~~advertising and written and recorded communication permitted under Rule 7.2 offer~~ have alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded~~ In particular, communications ~~that may~~ can be mailed or ~~autodialed~~ transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for ~~a prospective client~~ the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the ~~prospective client~~ public to direct in-person, ~~or other real-time~~ live telephone or real-time electronic persuasion that may overwhelm ~~the client's~~ a person's judgment.

~~[3]~~ [4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to ~~prospective client~~ the public, rather than direct in-person or other real-time communications, will help to ensure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of direct in-person, ~~or other real-time communication between a lawyer and a prospective client~~ live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

~~[4]~~ [5] There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or *bona fide* political,

social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~its~~ their members or beneficiaries.

~~[5]~~ [6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information that is false or misleading within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or that involves contact with ~~a prospective client~~ someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the ~~prospective client~~ recipient of the communication may violate the provisions of Rule 7.3(b).

~~[6]~~ [7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and the details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to ~~a prospective client~~ people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

~~[7]~~ [8] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

~~[7a]~~ [8a] Utah Rule 7.3(c) requires the words "Advertising Material" to be marked on the outside of an envelope, if any, and at the beginning of any recorded or electronic communication, but not at the end as the ABA Model Rule requires. Lawyer solicitations in public media that regularly contain advertisements do not need the " Advertising Material" notice because persons who view or hear such media usually recognize the nature of the communications.

~~[8]~~ [9] Paragraph (d) of this Rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone, live person-to-person contacts or other real-time electronic solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these

organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule 8.4(a).

Advertising Advisory Committee Enabling Authority

I. ENABLING AUTHORITY AND GENERAL RESPONSIBILITY.

(a) The Advertising Advisory Committee ("the Committee") shall be a standing committee of the Utah State Bar ("the Bar").

(b) The Committee is the body designated by the Board of Bar Commissioners of the Utah State Bar ("the Board") to respond to:

(b)(1) Requests for advisory approval of specific lawyer advertising submitted by Utah lawyers; and

(b)(2) Inquiries from Utah lawyers and members of public concerning existing specific lawyer advertising that is currently in use.

(c) The Committee's duties and procedures are specifically set forth in the Rules of Procedure of the Advertising Advisory Committee ("the Rules"), as approved and amended from time to time by the Board.

II. MEMBERSHIP.

(a) Number of Voting Members. The Committee shall consist of seven members.

(b) Qualifications of Voting Members. Committee members shall be active members of the Bar in good standing. Members shall be willing to perform Committee obligations in a timely way.

(c) Term of Appointments. Appointments shall be for three-year terms running concurrently with the Bar's fiscal year beginning July 1, with approximately one-third of the terms to expire on each June 30.

(d) Manner of Appointment. Appointment to the Committee will be by written application to the Utah State Bar. An applicant shall indicate the reasons for and interest in applying for membership in the Committee, including a commitment to be available at reasonable times to consider requests made to the Committee for advisory approvals. The Utah State Bar President shall appoint Committee members from the list of applicants.

(e) Committee Chair. The Bar President for the fiscal year of the Bar shall appoint one of the Committee members as Committee Chair for that year.

(f) Committee Vice-Chair. The Committee Chair shall appoint a Vice-Chair from among the members of the Committee, who will assume the duties of the Chair when the Chair is not available or otherwise designates the Vice-Chair to act in his stead.

(g) Committee Secretary. The Committee Chair shall appoint a Secretary from among the members of the Committee, who shall take and maintain minutes of the meetings of the full Committee.

(h) Unexpired Terms. The Bar President shall fill vacancies created by resignation, death, incapacity or removal that occurs prior to scheduled expiration of a member's appointment. Such an appointment will be for the remainder of the unexpired term. The Bar President may suspend the provisions of § II(d) for such an appointment.

(i) Absences. If a Committee member fails to attend three meetings of the full Committee during a Bar fiscal year or has repeatedly declined to accept assignments to serve on advisory panels of the Committee, the Chair may notify the Bar President of the circumstances and request that the Bar President replace that member.

III. RELATION TO OFFICE OF PROFESSIONAL CONDUCT.

The Committee shall be independent from the Office of Professional Conduct of the Utah State Bar ("OPC").

IV. EFFECT OF ADVISORY OPINIONS.

(a) Opinions issued by the Committee are advisory only.

(b) Notwithstanding § IV(a), the OPC shall not prosecute a Utah lawyer for advertising for which the Committee has issued an advisory opinion that the advertising is in compliance with applicable provisions of the Utah Rules of Professional Conduct unless it subsequently successfully petitions and obtains from the Ethics Advisory Opinion Committee ("EAOC") or the Utah Supreme Court an opinion finding the advertising to be in violation of the Utah Rules of Professional Conduct.

(c) No court is bound by an advisory approval issued by the Committee.

V. OPINION REVIEW PROCEDURE.

The Committee's Rules shall provide procedures under which a person who receives a Committee advisory opinion disapproving of a lawyer advertisement may seek review of that opinion by the Ethics Advisory Opinion Committee of the Utah State Bar ("EOAC"). An opinion of the EAOC on review shall be controlling as to the effects set forth in Part IV above.

VI. ANNUAL REPORT.

The Chair of the Committee shall submit a written annual report to the Board by July of each year, summarizing the actions taken by the Committee in the previous calendar year. The report should include information concerning the number of requests for approval or opinion submitted to the Committee and the disposition of those requests.

Advertising Advisory Committee Rules of Procedure

PART I. DUTIES AND AUTHORITY.

(a) Duties. The Advertising Advisory Committee of the Utah State Bar (the "Committee") shall:

(a)(1) Respond to requests by members of the Utah State Bar and Utah law firms for an advisory opinion that specific legal advertising, which the requesting party is using or intends to use, is in compliance with Rules 7.1 through 7.5 of the Utah Rules of Professional Conduct ("Advertising Rules");

(a)(2) Respond to complaints and requests by members of the Utah State Bar, Utah law firms and members of the public who raise issues about whether a specific, current lawyer advertisement is in violation of the Advertising Rules;

(a)(3) Make recommendations to the Office of Professional Conduct ("OPC") of the Utah State Bar for possible prosecution of lawyers whose advertising is subject to a request under § I(a)(2) and for which the Committee finds probable cause that the advertising is in violation of the Advertising Rules; and

(a)(4) Compile and deliver to the President of the Board of Bar Commissioners an annual report of the Committee's activities.

(b) Authority.

(b)(1) In responding to requests under § I(a), the Committee shall interpret the Advertising Rules and, except as may be necessary to the opinion, shall not interpret any other of the Utah Rules of Professional Conduct or other law.

(b)(2) The following requests are outside the Committee's authority:

(b)(2)(i) Requests that require interpretation of the Utah Rules of Professional Conduct other than the Advertising Rules.

(b)(2)(ii) Requests for opinions on advertising that has been used in the past but is no longer in use and for which there is no evidence it will be used in the foreseeable future.

PART II. GENERAL COMMITTEE PROCEDURES

(a) Meetings.

(a)(1) The Committee shall hold scheduled meetings every month except July and at such other times as the Chair may designate.

(a)(2) The Committee shall meet at the Utah Law and Justice Center or such other places as the Chair may designate.

(a)(3) To conduct official business at a Committee meeting, more than 50% of the members must be present, either in person or by telephone or audio-visual conference connection.

(a)(4) The Secretary or other member of the Committee designated by the Chair shall prepare and the Committee shall approve minutes of Committee meetings.

(b) Complaints and Requests.

(b)(1) Requests and complaints shall be in writing and filed with the Committee or OPC. Requests filed with the OPC shall be forwarded to the Committee.

(b)(2) Unless the Chair determines there is good cause that a request or complaint be considered by the Committee en banc, the Chair will assign each request or complaint filed with the Committee to a panel of three members of the Committee and will designate a member as panel chair.

(b)(3) Three-member panels will be chosen in a manner that distributes cases among Committee members as uniformly as practicable.

(b)(4) A Committee panel's determination of a request or complaint will be deemed a final disposition by the Committee.

PART III. PROCEDURE—REQUESTS FOR ADVISORY APPROVAL.

(a) Any member of the Utah State Bar in good standing or a representative of a Utah law firm may submit to the Committee a specific advertisement for legal services and seek Committee approval that the advertisement complies with the Advertising Rules.

(b) Requests under this rule shall include:

(b)(1) Exact copies of the advertising for which approval is sought and any variations that are anticipated;

(b)(2) A statement of what advertising media the applicant intends to employ for the advertising;

(b)(3) A brief statement indicating why the Committee should issue an advisory approval; and

(b)(4) Citations to any relevant ethics opinions, judicial decisions and statutes.

(c) For each request or complaint submitted under this Part, the Committee shall:

(c)(1) Determine that the advertising is in compliance with the Advertising Rules;

(c)(2) Determine that, with certain modifications specified by the Committee, the advertising would be in compliance with the Advertising Rules; or

(c)(3) Determine that the advertising violates one or more of the Advertising Rules.

(d) Upon the Committee's determination under this Part, the Chair shall inform the requesting party of the Committee's advisory opinion. Except for any suggestions for making the submitted advertising compliant with the Advertising Rules under § IV(d)(2), the advisory opinion will only state whether the advertising does or does not have advisory approval of the Committee. The Committee is not required to issue findings, conclusions or discussion in connection with an advisory opinion.

(e) The Committee shall, to the maximum extent practicable, endeavor to respond to requests under this Part within 30 days of receipt of the request by the Committee.

(f) If the Committee has not responded to a request under this Part within 30 days of the Committee's receipt of the request, the advertising may be used without exposure to prosecution by OPC for violations of the Advertising rules until such time as the Committee issues an advisory opinion finding the advertising not to be in compliance with the Advertising Rules. After the issuance of such an advisory opinion, the requesting party may be subject to prosecution by OPC if the unapproved advertising is not removed from advertising media within seven calendar days of the issuance of such an opinion.

PART IV. PROCEDURE—REQUESTS FOR EVALUATION OF ADVERTISING CURRENTLY IN USE

(a) Any person may submit to the Committee a signed statement complaining of, or requesting that the Committee determine whether, an advertisement currently in use through one or more media violates the Advertising Rules.

(b) A statement submitted under this rule need not be notarized or otherwise attested to and shall be substantially similar to:

I believe the advertisement (check one)

[ ] specifically described below,

[ ] a copy of which is attached

may violate lawyer advertising rules because it (check all that may apply):

[ ] is false

[ ] is misleading

[ ] contains a material misrepresentation of fact or law

[ ] creates an unjustified or unreasonable expectation

[ ] improperly compares the lawyer's services with other lawyers' services

[ ] contains an improper testimonial or endorsement

[ ] other: _____,

and should be evaluated or investigated for compliance with applicable rules.

(c) For each request or complaint submitted under this Part, the Committee shall either:

(c)(1) Determine there is no probable violation of the Advertising rules; or

(c)(2) Determine there is a probable violation of the Advertising Rules, and refer the matter to OPC with a recommendation that OPC initiate an investigation pursuant to its authority under the Rules of Lawyer Discipline and Disability § 14-504(b)(2).

(d) The Chair shall inform the requesting party of the Committee's determination.

PART V. OPINION REVIEW.

(a) An advisory opinion issued by the Committee is subject to review by the original requesting party or OPC by filing a petition with the Ethics Advisory Opinion Committee of the Utah State Bar ("EAOC") within 30 days after the date of the Committee's final disposition of a request for advisory approval.

(b) A petition for review under this Part shall be in writing and shall state the bases in fact, law or policy in support of the request.

(c) Any person filing a petition for EAOC review under this Part shall serve a copy of the petition on the Committee Chair.

(d) Notwithstanding the filing of a petition for review of Committee action pursuant to these provisions, the action of the Committee shall be effective for the period during which EAOC review is pending.

(e) Upon receipt of a timely petition for review of Committee action, the EAOC, or a subcommittee of the EAOC specifically designated, shall review the action of the Committee. The EAOC or subcommittee may affirm, affirm with modifications or overrule the action of the Committee after conducting such procedures as it deems appropriate.

(f) If the EAOC has not responded to a request under this Part within 60 days of the EAOC's receipt of the request, the advertising may be used without exposure to prosecution by OPC for violations of the Advertising Rules until such time as the EAOC issues an advisory opinion finding the advertising not to be in compliance with the Advertising Rules. After the issuance of such an advisory opinion, the requesting party may be subject to prosecution by OPC if the unapproved advertising is not removed from advertising media within seven calendar days of the issuance of such an opinion.

PART VI. CONFIDENTIALITY.

Committee members may not disclose the particulars of pending issues to persons outside the Committee; provided, however, that: (a) members may be assisted by their partners, colleagues, employees, associates or law student volunteers in researching issues raised by a request for an advisory opinion; and (b) members may discuss general principles of the Advertising Rules as they relate to a pending issue with non-Committee members. Those assisting a Committee member and members of the Office of Professional Conduct must also observe the confidentiality requirements of this section.

Rule 14-504. OPC counsel.

(a) Appointment and qualifications. The Board shall appoint a lawyer admitted to practice in Utah to serve as senior counsel. Neither the senior counsel nor any full-time assistant counsel shall engage in the private practice of law for payment.

(b) Powers and duties. The senior counsel shall perform all prosecutorial functions and have the following powers and duties, which may be delegated to other staff:

(b)(1) screen all information coming to the attention of the OPC to determine whether it is within the jurisdiction of the OPC in that it relates to misconduct by a lawyer or to the incapacity of a lawyer;

(b)(2) investigate all information coming to the attention of the OPC which, if true, would be grounds for discipline or transfer to disability status, and investigate all facts pertaining to petitions for reinstatement or readmission;

(b)(3) for each matter not covered in Rule 14-510 brought to the attention of the OPC:

(b)(3)(A) dismiss;

(b)(3)(B) decline to prosecute;

(b)(3)(C) refer non-frivolous and substantial informal complaints to the Committee for hearing; or

(b)(3)(D) petition to the district court for transfer to disability status;

(b)(4) prosecute before the screening panels, the district courts, the Supreme Court, and any other courts, including but not limited to, any court of the United States all disciplinary cases and proceedings for transfer to or from disability status;

(b)(5) attend the Character and Fitness Committee proceedings in all cases for readmission, and represent the OPC before the district courts, Supreme Court, and any other courts including, but not limited to, any court of the United States in all cases for reinstatement and readmission;

(b)(6) employ or appoint and supervise staff needed for the performance of prosecutorial functions and delegate such responsibilities as may be reasonably necessary to perform prosecutorial functions, including supervising attorneys who provide pro bono services to the Bar, by supervising the practice of respondents

who have been placed on probation;

(b)(7) notify promptly the complainant, the respondent, and any counsel of record of the disposition of each matter;

(b)(8) notify each jurisdiction in which a respondent is admitted of a transfer to disability status or any public discipline imposed in Utah;

(b)(9) seek reciprocal discipline where appropriate when informed of any public discipline imposed by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction;

(b)(10) forward a certified copy of the judgment of conviction to the disciplinary agency in each jurisdiction in which a lawyer is admitted when the lawyer is convicted of a crime in Utah which reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(b)(11) maintain permanent records of discipline and disability matters subject to any expungement requirements and compile statistics to aid in the administration of the system, including but not limited to, a log of all informal complaints received, investigative files, statistical summaries of rules violated and dispositions, any transcripts of proceedings, and other records as the Supreme Court requires to be maintained;

(b)(12) expunge after seven years all records or other evidence of the existence of any informal complaint terminated by dismissal or a declination to prosecute;

(b)(12)(A) Notice to respondent. If the respondent was contacted by the OPC concerning the informal complaint, or the OPC otherwise knows that the respondent is aware of the existence of the informal complaint, the respondent shall be given prompt written notice of the expungement.

(b)(12)(B) Effect of expungement. After a file has been expunged, any OPC response to an inquiry requiring a reference to the matter shall state that there is no record of such matter. The respondent may answer any inquiry requiring a reference to an expunged matter by stating that no informal complaint was made.

(b)(13) provide informal guidance concerning professional conduct to members of the Bar requesting guidance, participate in seminars which will promote ethical conduct by the Bar, formulate diversionary programs, monitor probations, and disseminate disciplinary results to the Bar and the public through the Utah Bar Journal and otherwise as appropriate, maintaining the confidentiality of respondents subject to private discipline; and

(b)(14) along with the executive director annually formulate the budget for the OPC and submit the budget to the Board for approval. OPC counsel may petition the Supreme Court for review of modifications to the budget imposed by the Board.

(c) Disqualification. In addition to complying with the Rules of Professional Conduct regarding successive government and private employment (Rule 1.11 of the Rules of Professional Conduct), a former OPC counsel shall not personally represent a lawyer following completion of the OPC counsel's service in any proceeding as provided in these rules which former OPC counsel investigated or prosecuted during his or her employment by OPC.

(d) Effect of ~~ethics~~ advisory opinions.

(d)(1) The OPC shall not prosecute a Utah lawyer for conduct that is in compliance with an ~~ethics~~ advisory opinion issued by:

(d)(1)(A) the Ethics Advisory Opinion Committee that has not been withdrawn at the time of the conduct in question~~. No court is bound by an ethics opinion's interpretation of the Utah Rules of Professional Conduct.~~; or

(d)(1)(B) the Advertising Advisory Committee.

~~(d)(1)~~ (d)(2) The OPC may at any time request the Bar's Ethics Advisory Opinion Committee to review, modify or withdraw an ethics advisory or advertising opinion and if so, any OPC investigation or prosecution is suspended pending the final outcome of the request. The Ethics Advisory Opinion

Committee may issue a modified opinion, withdraw the opinion or decline to take any action but shall report its action or recommendation to the Board of Bar Commissioners and the Board will take such final action as it deems appropriate.

~~(d)(2)~~ (d)(3) The OPC may also request the Supreme Court to review, affirm, reverse or otherwise modify an ethics advisory opinion.

(d)(4) No court is bound by the interpretation of the Utah Rules of Professional Conduct by the Ethics Advisory Opinion Committee or the Advertising Advisory Committee.

Model Rules

With respect to the Model Rules, the justices had just a couple of edits, and these do not need to go back before the Supreme Court:

Rule 1.6

- Rule 1.6(b)(7): add "To the limited extent necessary to resolve conflicts of interest," and take out "to detect and resolve conflicts of interest."
- Rule 1.6(b)(2): Justice Durham had a concern with the language "and in furtherance of which the client has used or is using the lawyer's services" but no one else seemed to share her concern. This can probably be left as is.

Rule 1.17

- Rule 1.17, comment [2], line 33: change "Judiciary" to "judicial."

Rule 1.0. Terminology.

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(g) "Knowingly," "~~know~~known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(m) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(n) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of

evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and ~~e-mail.~~electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another

of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g, Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (b). Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the

screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other ~~materials~~information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~materials~~information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

[10a] The definition of “consult” and “consultation,” while deleted from the ABA Model Rule 1.0, has been retained in the Utah Rule because “consult” and “consultation” are used in the rules. See, e.g., Rules 1.2, 1.4, 1.14, and 1.18.

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

<u>Retaining or Contracting With Other Lawyers</u>

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[~~6~~8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.4. Communication.

(a) A lawyer shall:

(a)(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(a)(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(a)(3) keep the client reasonably informed about the status of the matter;

(a)(4) promptly comply with reasonable requests for information; and

(a)(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the

request and advise the client when a response may be expected. ~~Client telephone calls~~A lawyer should ~~be~~ promptly ~~returned~~respond to or ~~acknowledged~~acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(b)(1) to prevent reasonably certain death or substantial bodily harm;

(b)(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial ~~interest~~interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(b)(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud ~~and~~ in furtherance of which the client has used the lawyer's services;

(b)(4) to secure legal advice about the lawyer's compliance with these Rules;

(b)(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ~~or~~

(b)(6) to comply with other law or a court order~~.~~; or

(b)(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

~~(c)~~ (d) For purposes of this rule, representation of a client includes counseling a lawyer about the need for or availability of treatment for substance abuse or psychological or emotional problems by members of the Utah State Bar serving on an Utah State Bar endorsed lawyer assistance program.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(l) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer

relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work- product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work- product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to ~~the~~a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged

toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal , disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by

responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17. Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent to any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

~~[13]~~ [15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

~~[14]~~ [16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

~~[15]~~ [17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

~~[16] A~~ [18] Paragraph (c) requires a lawyer ~~must~~to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability

to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see rule 5.3. Comments [3]-[4].

[~~17~~19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[~~18~~20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

[~~19~~20a] Paragraph (~~c~~d) is an addition to ABA Model Rule 1.6 and provides for confidentiality of information between lawyers providing assistance to other lawyers under an Utah State Bar endorsed lawyer assistance program.

Rule 1.17. Sale of Law Practice.

A lawyer or a law firm may sell or purchase a law practice or an area of practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold in the geographic area in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(c)(1) the proposed sale and the identity of the purchaser;

(c)(2) the client's right to retain other counsel or to take possession of the file; and

(c)(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of ~~mailing of the~~sending written notice; and

(d) The fees charged clients are not increased by reason of the sale.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities who can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Notification

In complying with this Rule, a seller must undertake reasonable steps in locating the clients who would be subject to the sale of the practice or area of practice. Typically, this would require attempts to contact the client at the last known address.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice or the area of practice available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a ~~judiciary~~Judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law in the geographic area does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the geographic area. The remaining language of the Model Rule Comment [4] has been intentionally omitted as unnecessary.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold, the law firm or the lawyer remaining in the active practice of law must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). Selling a law practice or an area of practice is distinct from selling an ownership interest in a law firm, and nothing in this Rule prohibits the latter even when the divesting lawyer remains active in the practice of law as a non-owning associate or in an of counsel capacity. For example, a lawyer or law firm with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner or law firm may not thereafter accept any estate planning matters. Although a lawyer who leaves a geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] ~~This~~The Rule requires that the seller's entire practice or an entire area of practice be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale.

[8] Intentionally omitted as unnecessary.

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged ~~to~~the clients of the practice. Existing ~~agreements~~arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); to charge reasonable fees (see Rule 1.5); to protect client confidences (see Rule 1.6); to ~~resolve conflict situations~~avoid disqualifying conflicts and secure the client's informed consent for those conflicts for which there is agreement (see Rules 1.7; 1.9 and Rule 1.0(e) for the definition of informed consent); to releases of liability (see Rule 1.8(h); and to withdrawal of representation (see Rule 1.16)).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the ~~transfer~~transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

[15a] This Rule does not prohibit a lawyer from selling an interest in a law firm and thereafter continuing association with the firm or in an of-counsel capacity.

[15b] The body of the ABA Model Rule 1.17 does not provide for inclusion of the identity of the purchaser in the written notice; however, Comment [7] to the ABA Model Rule does indicate that the identity of the purchaser should be given in writing to clients. Utah's Rule 1.17 departs from the ABA Model Rule by requiring only one written notice and enumerating in the body of the rule all required content of the notice.

[15c] Section (c)(3) of Utah's Rule 1.17 deviates from the ABA Model Rule by providing that the 90-day client objection period begins to run from the mailing of the notice rather than from receipt of the notice. The only practical way to prove receipt would be by commercial courier or certified/registered mail. Proving receipt of notice could therefore be cost-prohibitive, especially to the small sole practitioner. Often

when a lawyer does not have a viable address for a client, it is because the subject-matter of the representation has become stale or the client has failed to keep in touch with the lawyer presumably due to a loss of interest in the matter. Both the Utah Rules of Civil Procedure and the Utah Rules of Criminal Procedure allow for notices to be given by regular U.S. mail at the last-known address for the client and provide a presumption of service upon deposit of the notice in the mail, postage pre-paid. There does not appear to be good reason to place a more onerous burden upon a lawyer selling a law practice or area of practice. Whether the client received actual notice of the proposed sale of a practice or area of practice, the client is not abandoned; there is new counsel to protect the client's existing rights. The last paragraph of Model Rule 1.17(c)(3) has been intentionally omitted as unnecessary.

[15d] The Utah version of Rule 1.17 deletes the provision of the ABA Model Rule (c)(3) relating to obtaining court order for transfer of representation in those instances where the lawyer cannot give and prove actual notice of the proposed sale of a law practice or area of practice to a client. As discussed above, Utah's version of Rule 1.17 does not require proof of actual notice of the sale of a law practice or area of practice before the 90-day client objection period begins to run; therefore, it is impossible to know which clients received actual notice and which did not.

[15e] The Utah version of Rule 1.17 changes the context of the ABA Model Rule 1.17(d) regarding fees from "shall not" to "are" because the ABA wording seemed to be in the nature of a mandate and out of place with the conditional language of the Rule.

Rule 1.18. Duties to Prospective Client.

(a) A person who ~~discusses~~consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(d)(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or;

(d)(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(d)(2)(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(d)(2)(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

~~[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).~~

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential

representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client". Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial ~~interview~~consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition ~~conversations~~a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(l)(requirements for screening

procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent..

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 4.4. Respect for Rights of Third Persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive ~~documents~~ a document or electronically stored information that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidently transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning or deleting the ~~original~~ document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information " includes in addition to paper documents, e-mail ~~or other electronic modes of transmission~~ and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving ~~the document~~ it that it was inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Rule 5.3. Responsibilities Regarding Nonlawyer ~~Assistants~~Assistance.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers ~~possess~~possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(c)(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(c)(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer. The firm’s compliance with paragraph (a) resides with each partner or other lawyer in the firm with comparable authority.

[1a] Utah’s Comment [1] differs from the ABA Model Rule’s Comment [1]. The Model Rule Comment suggests the possibility that a firm could be in violation of this Rule without an individual or group of individuals also being in violation. Utah’s Comment [1] makes clear that, even though the concept of firm discipline is possible, a firm should not be responsible in the absence of individual culpability for a rule violation.

Nonlawyers Within the Firm

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be

responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

~~[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.~~Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a)(professional independence of the lawyer), and 5.5(a)(unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

~~The firm's compliance with paragraph (a) resides with each partner or other lawyer in the firm with comparable authority.~~

~~[2a] Utah's Comment [2] differs from the ABA Model Rule's Comment [2]. The Model Rule Comment suggests the possibility that a firm could be in violation of this Rule without an individual or group of individuals also being in violation. Utah's Comment [2] makes clear that, even though the concept of firm discipline is possible, a firm should not be responsible in the absence of individual culpability for a rule violation.~~

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(b)(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(b)(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(c)(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(c)(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(c)(3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(c)(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(d)(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(d)(2) are services that the lawyer is authorized to provide by federal law or other law or rule of this jurisdiction.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer's assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. The "practice of law" in Utah is defined in ~~Chapter 13A, Rule 1.0~~ Rule 14-802(b)(1),

Authorization to Practice Law, of the Supreme Court Rules of Professional Practice. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in ~~paragraph~~paragraphs (c) and (d) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3).

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of

the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See Rule 14-718 of the Supreme Court Rules of Professional Practice, *Licensing of Foreign Legal Consultants*, and 14-719 of the Supreme Court Rules of Professional Practice, *Qualifications for Admission of House Counsel Applicants*.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., Rule 14-804 of the Supreme Court Rules of Professional Practice, *Special Admission Exception for Military Lawyers*.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction are governed by Rules 7.1 to 7.5.

[21a] Utah Rule 5.5 differs from the ABA Model Rule 5.5 in Comment [2], where the second sentence has been modified to reflect and be consistent with ~~Chapter 13A,~~ Rule 14-802(b)(1~~.0,~~), Authorization to Practice Law~~, or~~ of the Supreme Court Rules of Professional Practice, which both defines the "practice of law" and expressly authorizes nonlawyers to engage in some aspects of the practice of law as long as their activities are confined to the categories of services specified in that rule. Similarly, the last sentence in ABA Model Rule 5.5 Comment [13] has been omitted to comport with Utah's definition of the "practice of law". Utah's Rule also differs from the ABA Model Rule 5.5 in that Utah has not adopted the ABA's provisions dealing with foreign lawyers. Utah has its own Rule 14-718 of the Supreme Court Rules of Professional Practice, *Licensing of Foreign Legal Consultants*, covering this matter.

Rule 8.5. Disciplinary Authority; Choice of Law.

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(b)(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(b)(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct ~~occur~~ occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See Rules 6 and 22, Utah Rules of Lawyer Discipline and Disability.

[1a] Utah has declined to adopt the portion of ABA Model Rule 8.5 Comment [1] providing that a lawyer who is subject to Utah disciplinary authority under Rule 8.5(a) is deemed to have appointed a court-designated official to receive service of process. This would be a substantive procedural rule that is not appropriate for these Rules. The last sentence of ABA Comment [1] is an unnecessary comment on jurisdiction in civil matters, and Utah has declined to adopt it.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct ~~that~~ which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best ~~interests~~ interest of both clients and the profession (as well as the bodies having authority to regulate the profession).

Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that, as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct ~~occurs~~ occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct ~~occurs~~ occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this Rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct and in all events should avoid proceeding against a lawyer on the basis of ~~now~~ two inconsistent rules.

[7] The choice-of-law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.