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2012 UT 53

IN THE

SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Discipline of FRANKLIN RICHARD BRUSSOW

FRANKLIN RICHARD BRUSSOW,
Petitioner,

v.

UTAH STATE BAR,
Respondent.

No. 20100206
Filed August 28, 2012

Attorneys:
Franklin Richard Brussow, Salt Lake City, pro se

Billy L. Walker, Adam C. Bevis, Salt Lake City, for respondent

CHIEF JUSTICE DURRANT authored the opinion of the Court, in which ASSOCIATE CHIEF JUSTICE NEHRING, JUSTICE DURHAM, JUSTICE PARRISH, and JUSTICE LEE joined.

CHIEF JUSTICE DURRANT, opinion of the Court:

INTRODUCTION

¶1 Attorney Franklin Brussow appeals from the decision of the Utah State Bar Ethics and Discipline Committee (Committee) to sanction him by public reprimand for violating rules 1.15(d) and 1.16(d) of the Utah Rules of Professional Conduct.[1] After conducting

[1] The Committee also concluded that Mr. Brussow should be publicly reprimanded for violating rule 8.4(a) of the Utah Rules of Professional Conduct. Rule 8.4(a) states that "[i]t is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct." Although Mr. Brussow does not specifically challenge the Committee's conclusions that he violated rule 8.4(a) and should be publicly sanctioned for this violation, we note that we are troubled by the practice of sanctioning attorneys for violating rule 8.4(a) based solely on their violations of other rules. In this application of rule 8.4(a), it seems that the rule amounts to no more than a "piling on," in that an attorney will never be sanctioned for

(continued...)

a hearing, a screening panel of the Ethics and Discipline Committee (Screening Panel) concluded that Mr. Brussow had violated these rules and recommended that he be publicly reprimanded. Mr. Brussow filed an exception and requested a hearing to challenge the Screening Panel's conclusion. After holding a hearing, the Chair of the Ethics and Discipline Committee (Chair) denied the exception and sustained the recommendation of the Screening Panel.

¶2 We uphold the Committee's conclusion that Mr. Brussow violated rule 1.15(d) by failing to provide his client with an accounting of the fees she had paid in advance. But because there is no indication that his failure to provide the accounting caused any injury or interference with a legal proceeding, we conclude that an admonition was the appropriate sanction for this violation. We also uphold the Committee's conclusion that Mr. Brussow violated rule 1.16(d) by failing to provide his client's file upon her request. Because his client was injured by being forced to spend time and money attempting to retrieve or re-create her file, we agree that a public reprimand was an appropriate sanction for this violation.

BACKGROUND

¶3 Mr. Brussow represented Anita Langley in a domestic relations proceeding involving disputes with her ex-husband over child support, child custody, and parent time. On August 2, 2007, Mr. Brussow executed a fee agreement with Ms. Langley, stating that she would pay him a retainer of $3,750.00 toward twenty-five hours of service billed at the rate of $150.00 per hour. Following the execution of the fee agreement, Mr. Brussow represented Ms. Langley for about a year. But during this time, Mr. Brussow sent Ms. Langley only one billing statement totaling $337.50 for the services he performed. After sending this billing statement, he periodically requested and received and received additional payments from Ms. Langley in order to continue his services.

¶4 Mr. Brussow's representation of Ms. Langley culminated in a four-day trial in May and June of 2008. After the trial, Ms. Langley's current husband visited Mr. Brussow's office and requested transcripts of depositions taken in the course of the

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[1] (...continued)
only one rule violation. We question the fairness of sanctioning attorneys for violating rule 8.4(a) every time they violate any other Rule of Professional Conduct. Accordingly, by this footnote we direct our rules committee to consider this issue, and in this case, we decline to impose any sanction based on a violation of rule 8.4(a).

representation. Mr. Brussow gave Ms. Langley's husband the transcripts, and he maintains that her husband agreed to pay the court reporter's fees for the transcripts. But neither Ms. Langley nor her husband paid the fees, and Mr. Brussow eventually paid them himself.

¶5 Ms. Langley reports that she terminated Mr. Brussow's representation in August 2008, and subsequently hired a new attorney to replace him. Ms. Langley further states that she requested her file in September, but that Mr. Brussow ignored her request. Accordingly, her new attorney called Mr. Brussow to request the file. The new attorney also wrote to Mr. Brussow in early September, stating that Mr. Brussow was no longer Ms. Langley's attorney, requesting that Mr. Brussow produce Ms. Langley's file, and reporting that he (the new attorney) had a "desperate need" of the file in order to proceed with the case. Nonetheless, Mr. Brussow refused to provide the file until Ms. Langley paid the fees for the deposition transcripts.

¶6 In October 2008, Ms. Langley filed a complaint with the Utah State Bar Office of Professional Conduct (OPC), claiming that Mr. Brussow had refused to provide her client file and that he had not provided regular billing statements or an accounting of the fees that she had paid. Ms. Langley also submitted an application to the Utah State Bar's Fee Arbitration and Mediation program with her complaint. In response, Mr. Brussow ultimately provided Ms. Langley with her file, but not until December 29, 2008.

¶7 In September 2009, the Screening Panel held a hearing regarding Ms. Langley's complaint, at which both Mr. Brussow and Ms. Langley testified. Ms. Langley reported that Mr. Brussow did not provide regular billing statements, but that she had paid him $17,500 in legal fees over the course of the year that he had represented her.[2] Additionally, she claimed that she had requested an accounting of the fees she had paid Mr. Brussow on multiple occasions, but that he had never provided her with such an accounting.

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[2] In her informal complaint, Ms. Langley initially stated that she had paid Mr. Brussow $14,500, but at the hearing before the Screening Panel she testified that she had paid $17,500 in legal fees and expenses. At any rate, Mr. Brussow did not put forth any evidence to refute her claims, and the Screening Panel found that "Mr. Brussow could not account for $17,500 in fees and did not know how much Ms. Langley had paid."

¶8 Mr. Brussow testified that, after sending Ms. Langley an initial billing statement, he "got swamped with her case and the other ones" and had not sent any other billing statements. Nonetheless, he denied that Ms. Langley had requested an accounting, and he maintained that Ms. Langley had paid less than she claimed to have paid, although he was unable to provide records of her payments to support his claim. He also indicated that Ms. Langley owed him additional payments for his services, but said that when it became obvious that she would not be cooperative about paying, he had not bothered calculating what she had paid or the total hours of work he had performed on her behalf.

¶9 Mr. Brussow acknowledged that he had received requests for Ms. Langley's file from Ms. Langley and her new attorney, but he argued that he was entitled to retain the file because Ms. Langley had failed to pay the fees for the deposition transcripts. He also argued that he had functionally provided the file to Ms. Langley by sending her copies of his work as he performed it. Finally, he claimed that retaining the file did not cause any harm to Ms. Langley.

¶10 After the hearing, the Screening Panel issued a written recommendation, which concluded that Mr. Brussow had violated rule 1.15(d),[3] 1.16(d),[4] and 8.4(a)[5] of the Rules of Professional Conduct and recommended that he be publicly reprimanded for these violations. Mr. Brussow filed an exception to this recommendation and requested a hearing before the Chair.[6]

¶11 The Chair held a hearing on Mr. Brussow's exception in January 2010. Mr. Brussow and an attorney from the OPC were present at the hearing, but Ms. Langley was not. At that hearing, Mr. Brussow conceded that Ms. Langley had requested an accounting "when the Bar got involved." The OPC claims that "[t]he Bar's

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[3] UTAH R. PROF'L CONDUCT 1.15(d) ("[A] lawyer shall promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive and, upon request by the client . . . shall promptly render a full accounting regarding such property.").

[4] *Id.* 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests . . . .").

[5] *Id.* 8.4(a) ("It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct . . . .").

[6] *See* SUP. CT. R. PROF'L PRACTICE 14-510(c).

involvement that [Mr.] Brussow references was [Ms.] Langley's application to the Utah State Bar's Fee Arbitration and Mediation program, which she contacted in addition to her complaint with the OPC." The OPC explains that this means that Mr. Brussow admitted that he had been asked for an accounting no later than December 4, 2008, and by the date of the [e]xception [h]earing on January 19, 2010 he still had not provided an accounting to his former client."

¶12 Ultimately, the Chair concluded that Mr. Brussow had failed to satisfy his burden of showing that the Screening Panel's recommendation should be overturned. Accordingly, the Chair issued a ruling denying the exception and sustaining the recommendation of the Screening Panel, and Mr. Brussow appealed to this court. We have jurisdiction to hear this appeal under article VIII, section 4 of the Utah Constitution[7] and rule 14-510(f)(1) of the Supreme Court Rules of Professional Practice.[8]

STANDARD OF REVIEW

¶13 When an attorney appeals a final committee determination "[of admonition or public reprimand," the attorney "shall have the burden of demonstrating that the Committee action was . . . not supported by substantial evidence," or that the action was "[a]n abuse of discretion" . . . "[a]rbitrary or capricious," or" contrary to the Rules of Professional Practice.[9] In matters of attorney discipline, we review "findings of facts under the clearly erroneous standard" while "reserv[ing] the right to draw different inferences."[10] But when we review the sanction imposed, "our constitutional responsibility requires us to make an independent determination as to its correctness."[11]

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[7] UTAH CONST. art VIII, § 4 ("The Supreme Court by rule shall govern the practice of law, including . . . the conduct and discipline of persons admitted to practice law.").

[8] SUP. CT. R. PROF'L PRACTICE 14-510(f)(1) ("Within 30 days after service by OPC of a final, written determination of the Committee chair [of an admonition or a public reprimand in a matter for which exceptions have been filed], . . . respondent may file a request for review with the Supreme Court seeking reversal or modification of the final determination by the Committee.").

[9] SUP. CT. R. PROF'L PRACTICE 14-510(f)(5)(1), (5)(A) - (D).

[10] *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998).

[11] *Id.*

ANALYSIS

¶14 Mr. Brussow objects to the Committee's conclusions that he violated rules 1.15(d) and 1.16(d) of the Utah Rules of Professional Conduct and that he should be publicly reprimanded for these violations. We first consider whether Mr. Brussow violated rule 1.15(d) by failing to provide, upon Ms. Langley's request, an accounting of the fees she had paid, and whether a public reprimand was the appropriate sanction for this violation. We then consider whether Mr. Brussow violated rule 1.16(d) by failing to provide Ms. Langley with her file upon her request, and whether a public reprimand was the appropriate sanction for this violation. In conducting this analysis, "we interpret a court rule in accordance with its plain meaning," and "[o]ur objective in interpreting a court rule is to give effect to the intent of the body that promulgated it."[12]

I. BECAUSE MS. LANGLEY PAID FEES IN ADVANCE AND MR. BRUSSOW FAILED TO PROVIDE HER WITH AN ACCOUNTING OF THOSE FEES, THE COMMITTEE PROPERLY FOUND THAT HE VIOLATED RULE 1.15(d), BUT BECAUSE HIS CONDUCT DID NOT CAUSE ANY INJURY, ADMONITION IS THE APPROPRIATE SANCTION

A. Because Mr. Brussow Had an Obligation to Comply with Ms. Langley's Request for an Accounting of the Fees She Paid Him in Advance, the Committee Correctly Concluded that He Violated Rule 1.15(d)

¶15 Rule 1.15(d) of the Utah Rules of Professional Conduct states that "a lawyer shall promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive and, upon request by the client . . . shall promptly render a full accounting regarding such property." This rule applies to funds or property that the attorney is holding on behalf of the client and that the client would be entitled to receive upon the termination of the representation. For instance, a client would be entitled to receive a settlement paid by a third party to an attorney on the client's behalf or unearned fees paid by the client in advance of an attorney's services. And under the plain language of rule 1.15(d), "a lawyer shall

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[12] *State v. Rothlisberger*, 2006 UT 49, ¶ 15, 147 P.3d 1176. We note that we are, of course, the body that promulgated the Utah Rules of Professional Practice. *See* UTAH CONST. art. VIII, § 4 ("The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.").

promptly deliver [such funds or property] to the client," and "shall promptly render a full accounting" of such funds or property upon the client's request.

¶16 Despite this language, the OPC claims that this rule requires attorneys to account for "any funds or property relating to the client." Thus, the OPC contends that after Ms. Langley "paid him *any* amount," Mr. Brussow was in violation of the rule when Ms. Langley requested an accounting and Mr. Brussow failed to provide her with one. But the language of rule 1.15(d) does not support the OPC's broad interpretation of this rule. The rule refers only to "any funds or other property that the client . . . is *entitled to receive*."[13] Rule 1.15(d) does not require an attorney to provide an accounting of property and funds the client is *not* entitled to receive. Thus, rule 1.15(d) does not require an attorney to provide an accounting of payments made by a client for services after they were performed because the attorney has already earned these fees. Therefore, the client would not be entitled to receive any portion of such funds from the attorney upon the termination of the representation.

¶17 Accordingly, rule 1.15(d) would not apply if Ms. Langley was seeking an accounting for fees that she had paid Mr. Brussow *after* he had performed services on her behalf because her request for an accounting would not concern funds that she would be entitled to receive.[14] Rule 1.15(d) could apply, however, if Ms. Langley was seeking an accounting for funds she had paid Mr. Brussow *prior* to his performance of services on her behalf because, upon termination of the representation, Ms. Langley would be entitled to receive funds that she had paid but that Mr. Brussow had not yet earned.

¶18 But Mr. Brussow does not argue that Ms. Langley is only seeking an accounting for funds that she paid after services were rendered. Indeed, Mr. Brussow concedes that Ms. Langley paid him prior to his performance of services. She paid Mr. Brussow an initial retainer of $3,750. And Mr. Brussow sent Ms. Langley only one bill,

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[13] UTAH R. PROF'L CONDUCT 1.15(d) (emphasis added).

[14] Regardless of whether a client paid following the performance of services or in advance, if a client requests an accounting, rule 1.4(a) of the Utah Rules of Professional Conduct provides that an attorney must "promptly comply with reasonable requests for information." UTAH R. PROF'L CONDUCT 1.4(a)(4). But in this case, Mr. Brussow was never charged with a violation of rule 1.4(a), so we do not consider whether his conduct might have violated this rule.

which was for $337.50. Thus, Mr. Brussow has not accounted for the remainder of the retainer. Further, because Mr. Brussow periodically demanded payments from Ms. Langley without providing Ms. Langley with billing statements, it is not clear whether the fees Ms. Langley paid over time had been earned by Mr. Brussow at the time they were paid or if they were paid in advance of further services. If these were advance payments and any portion was unearned by Mr. Brussow upon the termination of his representation of Ms. Langley, she would be entitled to have such funds returned to her. But Mr. Brussow has not accounted for these funds either. And in his brief and at oral argument, Mr. Brussow admits that he should have provided Ms. Langley with an accounting upon her request.

¶19 Although Mr. Brussow asserts that Ms. Langley still owes him for services performed on her behalf, because Mr. Brussow received an advance retainer and subsequent payments from Ms. Langley and did not send billing statements showing whether these payments had been earned, it is not clear whether Mr. Brussow has earned all the fees that he received from Ms. Langley. Accordingly, rule 1.15(d) applies to Ms. Langley's request for an accounting. And because Mr. Brussow did not provide Ms. Langley with an accounting upon her request, we conclude that he violated rule 1.15(d).

B. Because Mr. Brussow's Failure to Provide an Accounting Did Not Cause Any Injury or Interference with a Legal Proceeding, the Proper Sanction for His Violation of Rule 1.15(d) Was an Admonition

¶20 Rule 14-604 of the Supreme Court Rules of Professional Practice provides standards for imposing lawyer sanctions. The presumptive sanction for negligent attorney misconduct is either a reprimand or an admonition. A reprimand is the presumptive sanction if the conduct "cause[d] injury . . . [or] interference with a legal proceeding,"[15] while an admonition is the presumptive sanction if the attorney's conduct "cause[d] little or no injury" but "expose[d] a party, the public, or the legal system to potential injury or cause[d] potential interference with a legal proceeding."[16]

¶21 In its brief, the OPC does not contend that Mr. Brussow harmed Ms. Langley by failing to provide an accounting. Further, the Screening Panel's written recommendation explained only that Mr. Brussow violated rule 1.15(d) by failing to provide Ms. Langley

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[15] SUP. CT. R. PROF'L PRACTICE 14-605(c)(1).

[16] *Id.* 14-605(d)(1).

with an accounting; it did not discuss any way in which this failure caused injury or interference with a legal proceeding. Similarly, in his ruling, the Chair notes only that "[t]here is substantial evidence to support the Screening Panel's determination that [Mr.] Brussow violated [r]ule 1.15(d)," without discussing whether there is any evidence of injury or interference with a legal proceeding as a result of this violation.

¶22 We see no way in which Mr. Brussow caused any injury or interference with a legal proceeding by failing to provide Ms. Langley with an accounting upon her request. Indeed, if Mr. Brussow's assertion that Ms. Langley still owes him for services rendered on her behalf is correct,[17] his failure to provide an accounting only delayed Ms. Langley's obligation to pay additional fees. Accordingly, we conclude that an admonition, rather than a reprimand, is the proper sanction for Mr. Brussow's violation of rule 1.15(d).

II. BECAUSE RULE 1.16(d) REQUIRES AN ATTORNEY TO PROVIDE A CLIENT'S FILE UPON THE CLIENT'S REQUEST, THE COMMITTEE CORRECTLY FOUND THAT MR. BRUSSOW VIOLATED THIS RULE, AND BECAUSE MS. LANGLEY WAS HARMED BY MR. BRUSSOW'S CONDUCT, A PUBLIC REPRIMAND IS THE APPROPRIATE SANCTION

A. Because Rule 1.16(d) Requires Attorneys to Provide Clients with Their Files upon Request, Mr. Brussow's Failure to Provide Ms. Langley with Her File Violated the Rule

¶23 Rule 1.16(d) requires that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled." Specifically, rule 1.16(d) states that "[t]he lawyer must provide, upon request, the client's file

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[17] For instance, at the hearing before the Screening Panel, Mr. Brussow indicated that Ms. Langley still owed him payments for his services, and at the hearing before the Chair, he testified that Ms. Langley had "filed a verified petition to arbitrate [a] fee dispute, where she admitted she owed . . . $25,500." Similarly, in his brief on appeal, Mr. Brussow argues that the docket entry sheets that he presented at the hearings before the Screening Panel and the Chair "tended to corroborate that extensive legal services were rendered which at the $150 hourly billing rate totaled well in excess" of the amount that Ms. Langley claimed she had paid.

to the client."[18] The official comments clarify that "a lawyer shall provide . . . the client's file to the client *notwithstanding any other law, including attorney lien laws*."[19] Further, the comments state that "[t]he Utah rule differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client *notwithstanding any other laws or fees or expenses owing to the lawyer*."[20]

¶24 In spite of the clear language contained in rule 1.16(d) and the official comments to the rule, Mr. Brussow argues that he was justified in refusing to provide Ms. Langley with her file. Specifically, he argues that he did not violate the rule because (1) Ms. Langley engaged in fraudulent behavior and was therefore not entitled to her file, (2) he had an attorney's lien on the file, (3) he functionally provided Ms. Langley with her file by emailing her copies of his work as he performed it, and (4) he did not injure Ms. Langley by withholding the file. We reject each of these arguments.

¶25 First, Mr. Brussow claims that he was not required to give Ms. Langley her file because she engaged in fraudulent behavior. Specifically, he contends that Ms. Langley committed fraud by promising to pay for the transcripts of the depositions and then refusing to do so. Thus, Mr. Brussow argues that Ms. Langley was not entitled to receive her file and that his refusal to provide her with the file therefore did not violate rule 1.16(d).

¶26 But Mr. Brussow misunderstands rule 1.16(d). In the context of the rule's requirement that attorneys "must provide, upon request, the client's file to the client," the rule's reference to the "papers . . . to which the client is entitled" relates to the *type of materials* a client is entitled to receive. And the official comments to the rule clarify that a client is entitled to receive, as part of the client file, "all papers and property the client provides to the lawyer; litigation materials such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements."[21] On the other hand, the client is *not* entitled to receive "the lawyer's work product such as recorded mental impressions;

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[18] UTAH R. PROF'L CONDUCT 1.16(d).

[19] *Id.* cmt. 9 (emphasis added).

[20] *Id.* (emphasis added).

[21] *Id.*

research notes; legal theories; internal memoranda; and unfiled pleadings."[22] In sum, rule 1.16(d) requires the attorney to surrender the documents that a client is entitled to receive, as opposed to other documents, which the attorney may have generated on behalf of the client but which the client is not entitled to receive. Thus, under rule 1.16(d), Mr. Brussow should have provided Ms. Langley with all the materials she was entitled to receive as part of her client file.

¶27 Second, Mr. Brussow claims that he retained Ms. Langley's file in order to assert a lien on the file to secure payments that he believes Ms. Langley owes him for a bill that he paid on her behalf. But the plain language of rule 1.16(d) does not allow attorneys to assert a lien on client files to secure payments from a client.[23] As discussed, rule 1.16(d) requires that an attorney "must provide, upon request, the client's file to the client."[24] And the official comments explicitly state that "[u]pon termination of representation, a lawyer shall provide, upon request, the client's file to the client notwithstanding any other law, including attorney lien laws" and "notwithstanding any . . . fees or expenses owing to the lawyer."[25]

¶28 Further, in *Jones, Waldo, Holbrook & McDonough v. Dawson*, we criticized the practice of attorneys retaining client files to assert liens for unpaid fees.[26] Under a former version of the Utah Rules of Professional Conduct, we explained that, although the rules permitted an attorney to withdraw from representation for nonpay-

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[22] *Id.*

[23] Section 38-2-7 of the Utah Code does recognize attorney liens. But even when it is permissible for an attorney to assert a lien against the money or property of a client, section 38-2-7 prescribes the proper procedure for enforcing a lien, and Mr. Brussow did not follow the requisite procedure. *See* UTAH CODE § 38-2-7(4); *id.* § 38-2-7(5); *id.* § 38-2-7(6). Further, section 38-2-7 does not list the client file as one of the types of money or property upon which an attorney may assert a lien for unpaid fees or expenses. *See id* § 38-2-7(2). And to the extent that section 38-2-7 leaves open the possibility of a lien on a client file, the official comments to rule 1.16(d) make it clear that it is a violation of the Utah Rules of Professional Conduct to retain a client's file following a request from the client, even if such a course of action would be permissible under section 38-2-7 of the Utah Code. UTAH R. PROF'L CONDUCT 1.16(d) cmt. 9.

[24] UTAH R. PROF'L CONDUCT 1.16(d).

[25] *Id.* cmt. 9.

[26] 923 P.2d 1366, 1375–76 (Utah 1996).

ment after giving a client adequate warning, the rules required attorneys to take steps to protect clients' interests, including "surrendering papers and property to which the client is entitled."[27] Accordingly, we noted that the attorney in *Jones, Waldo, Holbrook & McDonough* "failed to protect [the client's] best interest when it refused to surrender her file in derogation of that rule."[28] We concluded by saying that "when disputes [regarding fees] . . . arise, attorneys should settle them without resorting to . . . retaining files to coerce payment."[29]

¶29 Although we did not categorically prohibit attorneys from asserting a lien against clients' files under any circumstances in *Jones, Waldo, Holbrook & McDonough*, the applicable rule in force at the time was rule 1.14(d), which provided that "[t]he lawyer may retain papers relating to the client to the extent permitted by other law."[30] The official comment similarly stated that "[t]he lawyer may retain papers as security for a fee only to the extent permitted by law."[31] This rule may have left open the possibility of an attorney retaining a client's file to assert a lien for unpaid fees. But rule 1.16(d) replaced the then-applicable rule 1.14(d), and as discussed, the language of rule 1.16(d) and its official comments expressly rejects such a possibility.[32]

¶30 Third, Mr. Brussow argues that he functionally provided Ms. Langley with her file by emailing her copies of his work as he

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[27] *Id.* at 1376 (internal quotation marks omitted).

[28] *Id.*

[29] *Id.*

[30] UTAH R. PROF'L CONDUCT 1.14(d) (1995).

[31] *Id.* cmt.

[32] Mr. Brussow argues that courts in other jurisdictions have permitted attorney retaining liens on clients' files. *See Lucky Goldstar Int'l (America) v. Int'l Mfg. Sales Co.*, 636 F. Supp. 1059, 1061–65 (N.D. Ill. 1986); *Marsh, Day, & Calhoun v. Salomon*, 529 A.2d 702, 706 n.4 (Conn. 1987); *Vogelhut v. Kandel*, 502 A.2d 1120, 1123–24 (Md. Ct. Spec. App. 1986). But none of these cases interpret a professional rule or requirement with language similar to our rule 1.16(d). Thus, while other jurisdictions may permit an attorney to assert a lien on a client's file, rule 1.16(d) and its official comments make it clear that there is no exception to an attorney's duty to provide a client's file that would allow an attorney to hold a retaining lien on the file for unpaid fees or expenses.

performed it. This argument finds no support in the plain language of rule 1.16(d). Rule 1.16(d) states that the attorney "must provide . . . the client's *file* to the client."[33] And, as mentioned previously, the official comments to rule 1.16(d) state that "the client file generally would include . . . all papers and property the client provides the lawyer; litigation materials such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements."[34]

¶31 And although Mr. Brussow may have sent Ms. Langley copies of his work as he performed it, her client file likely contained more than the documents that he drafted, such as documents submitted by the opposing party in the proceeding, discovery materials, depositions, or witness statements. Further, Ms. Langley testified at the hearing before the Screening Panel that she and her new lawyer had to "try to catch up on what was going on without the file by getting copies of the court records." This testimony indicates that Ms. Langley did not have the information that she needed from her client file to move forward with her case. Thus, regardless of whether Mr. Brussow sent Ms. Langley copies of his work as he performed it, rule 1.16(d) required him to provide her file to her upon her request.

¶32 Finally, Mr. Brussow argues that his failure to provide Ms. Langley with her file did not injure her and that he therefore did not violate rule 1.16(d). But we do not consider whether the client has been injured by an attorney's failure to provide the file in determining if the rule has been violated. When Mr. Brussow failed to provide the file to Ms. Langley upon her request, he violated the rule, regardless of whether that failure injured her. In any case, as discussed below, we conclude that Ms. Langley was injured by Mr. Brussow's failure to provide her with her file.

¶33 In sum, rule 1.16(d) requires an attorney to provide a client with the client's file upon the client's request. Because Mr. Brussow did not provide Ms. Langley with her file when she requested it, we conclude that the Committee was correct in determining that Mr. Brussow violated rule 1.16(d).

B. Because Mr. Brussow's Failure to Provide the File Harmed Ms. Langley, a Public Reprimand Was the Proper Sanction

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[33] UTAH R. PROF'L CONDUCT 1.16(d) (emphasis added).

[34] *Id.* cmt. 9.

¶34 As discussed above, the presumptive sanction for attorney misconduct depends on whether the attorney "cause[d] injury to a party, the public, or the legal system, or cause[d] interference with a legal proceeding."[35] Where the conduct has caused injury or interference with a legal proceeding, the presumptive sanction is a reprimand,[36] and where the conduct has not caused injury or interference with a legal proceeding, the proper presumptive sanction is an admonition.[37] Mr. Brussow argues that his failure to provide the file did not injure Ms. Langley or cause interference with a legal proceeding because there was no action pending in her case at the time of her request. We reject this argument.

¶35 Although there may have been no action pending in her case, Ms. Langley may not have known this without access to her file. Further, because Mr. Brussow refused to provide her file, Ms. Langley had to pay her new attorney to draft a letter and obtain the file from Mr. Brussow. Indeed, Ms. Langley stated in her informal complaint that "without my file, my current attorney is duplicating the file by requesting documents directly from the [c]ourt," resulting in her "losing valuable time that should be spent on litigating my case, wasting money to have my attorney argue with Mr. Brussow on the ethics of returning the file, and wasting money on re-creating a copy from the Court files at an outrageous expense." Ms. Langley would not have spent money and time on her new attorney's attempt to re-create the file or retrieve the file from Mr. Brussow if he had provided the file to Ms. Langley when she requested it. Thus, because Mr. Brussow's violation of rule 1.16(d) injured Ms. Langley, a reprimand is the appropriate presumptive sanction.

¶36 On appeal, Mr. Brussow argues that we should consider mitigating circumstances that would warrant a lesser sanction than the presumptive sanction of a public reprimand.[38] On the other

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[35] SUP. CT. R. PROF'L PRACTICE 14-605(c)(1).

[36] *Id.* 14-605(c).

[37] *Id.* 14-605(d).

[38] Mr. Brussow attempted to present evidence of mitigating circumstances for the first time at the exception hearing before the Chair. The Chair declined to consider Mr. Brussow's evidence and arguments regarding mitigating circumstances, stating that, because Mr. Brussow had not presented "the factual basis for these arguments to the Screening Panel . . . [, he] may not properly do so for the (continued...)

hand, the OPC asserts that there are aggravating circumstances that would justify a greater sanction. In accordance with our general preservation rule,[39] we decline to consider evidence of mitigating or aggravating circumstances that was not presented before the Screening Panel.[40] "The two primary considerations underlying the [preservation] rule are judicial economy and fairness."[41] These policy considerations apply to our decision not to consider evidence of mitigating and aggravating circumstances for the first time on appeal.

¶37 First, requiring parties to present their evidence and arguments to the Screening Panel promotes judicial economy. "[A]ttorney discipline proceedings, being the exclusive province of this court, are conducted under the rules and directions we give."[42] Although we have the authority to "govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law,"[43] under our court rules, it is the responsibility of the Screening Panel to make recommendations concerning whether attorneys should be disciplined for the conduct alleged in an informal complaint.[44]

¶38 Accordingly, our rules provide that "[i]nformal complaints shall be randomly assigned to screening panels," which "shall review, investigate, and hear all informal complaints charging unethical and/or unprofessional conduct against members of the Bar."[45] And after a "review, investigation, hearing and analysis, the screening panels shall determine the action to be taken on any

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[38] (...continued)
first time at the [e]xception [h]earing."

[39] *See Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828 ("We generally will not consider an issue unless it has been preserved for appeal.").

[40] *Cf. In re Discipline of Stubbs*, 1999 UT 15, ¶ 29, 974 P.2d 296 (declining to consider an attorney's argument that the district court should have held a separate sanctions hearing because he had not requested that the court hold such a hearing and he therefore "failed to preserve that issue for appellate review").

[41] *Patterson*, 2011 UT 68, ¶ 15.

[42] *In re Discipline of Harding*, 2004 UT 100, ¶ 18, 104 P.3d 1220.

[43] UTAH CONST. art. VIII, § 4.

[44] SUP. CT. R. PROF'L PRACTICE 14-503(f).

[45] *Id.*

informal complaint which, based upon the facts of the particular case, is most consistent with the public interest and the Rules of Professional Conduct."[46] Thus, it promotes judicial economy for the parties to bring their arguments and evidence before the Screening Panel for its consideration when making its initial recommendation.

¶39 Second, requiring parties to present their evidence and arguments to the Screening Panel promotes fairness. Our rules provide that both the respondent and the complainant have the opportunity to appear before the Screening Panel, and during the hearing, they may testify, present witnesses, be present for the presentation of evidence, and seek responses from the other party to questions.[47] Because both the respondent and the complainant have the right to be present individually and participate during the hearing before the Screening Panel, such a hearing provides a fair setting to raise claims and present evidence. But on appeal, the respondent and the complainant may not have such opportunities. Thus, it promotes fairness to require parties to raise their arguments and present evidence in the first instance before the Screening Panel.

¶40 Accordingly, we do not consider evidence of mitigating and aggravating circumstances that was not brought before the Screening Panel, and we uphold the Committee's determination that a public reprimand is the appropriate sanction for Mr. Brussow's violation of rule 1.16(d).

CONCLUSION

¶41 For the foregoing reasons, we affirm the Committee's conclusion that Mr. Brussow violated rule 1.15(d) by failing to provide Ms. Langley with an accounting of the fees she paid, and that he violated rule 1.16(d) by failing to provide Ms. Langley with her file. Because Mr. Brussow's failure to provide an accounting did not harm Ms. Langley, we conclude that the appropriate sanction for Mr. Brussow's violation of rule 1.15(d) was an admonition. But because Mr. Brussow's failure to provide the file did harm Ms. Langley, we affirm the Committee's conclusion that a public reprimand is the appropriate sanction for Mr. Brussow's violation of rule 1.16(d).

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[46] *Id.*

[47] *Id.* 14-510(b)(2).

Tab 3

The "Government Law Firm" Problem. An issue that is unresolved, but deserves resolution, is the issue of conflicts of interest in government lawyer offices such as the Attorney General, County Attorney offices, etc. We recently addressed a single Complainant's complaint against multiple lawyers in the Utah State Attorney General's office (the "AG"). The essence of the complaint was that different attorneys affiliated with the AG's office represented (i) the State in pursuing an investigation of Weber State University's allegedly improperly rigging a bid and (ii) represented Weber State in responding to a subpoena and GRAMA request in connection with the same investigation. The Complainant asserted that the lawyers associated with the AG's office violated Rule 1.7, which generally provides that a lawyer shall not represent a client if that representation involves a concurrent conflict of interest. I have enclosed as Exhibit I our Ruling on Appeal of Dismissal of the Complainant's Complaint against the AG. It outlines the procedural background and addresses the claim that the AG violated Rule 1.7.

That aspect of the Ruling on Appeal of Dismissal is found there at pp. 10-14, to which I refer the Court. I concluded that Rule 1.10 of the Rules of Professional Conduct (which precludes different lawyers in a firm from representing a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7) did not in this case apply to the AG in large part because the AG has since 1994 been relying upon the Ethics Advisory Committee's Opinion 142 (the "Advisory Opinion"), which concluded that Rule 1.10 does not apply "as broadly" to the AG as to "firms" generally. The Advisory Opinion is attached to my Ruling, which is included as Exhibit I. I noted that, although the Advisory Opinion does not explain the basis in Rule 1.10 for such a distinction (and there is nothing in the Rule itself supporting such a distinction), the apparent need for treatment of government law offices differently than private law offices and the AG's reliance upon that Advisory Opinion since 1994 dictated that it would be unfair to advance a completely different interpretation of those Rules now and subject the AG to discipline based thereon.

This Ruling presents the quandary that exists with a government law office representing different entities and agencies affiliated with government which sometimes have differing interests. If government law organizations are subject to the same rules as private law firms (i.e., Rule 1.10 applies to them), then lawyers within the government law office cannot engage in representations prohibited by Rule 1.7 or 1.9. The Advisory Opinion does not, in the opinion of the undersigned, directly or fairly address these issues:

(1) Does Rule 1.10 apply to government law offices?

(2) If so, is Rule 1.10 interpreted differently as applied to government law offices as compared to private or corporate law organizations?

(3) If not, are there any restrictions limiting permitted conflicts of interest presented where different lawyers in government law offices represent different agencies or parties with divergent interests?

As you can see from our Ruling, we deferred to the Advisory Opinion because of the practical need for government law offices sometimes to represent different governmental entities when their interests may diverge and because it would be unfair to advance a completely different interpretation of the Rule now after the AG has acted in reliance upon the Advisory Opinion for the past 17-odd years. Nevertheless, in our view, the Advisory Opinion cannot be justified in the language of the Rules of Professional Conduct. And some body, presumably this Court, should address the circumstances, if any, under which lawyers functioning within a government law office may concurrently represent different departments, agencies, employees, etc. with divergent interests. The Advisory Opinion does not, except in the vaguest way, answer this important question. Perhaps there should exist a rule or something like Rule 1.10 that addresses the same issue but for government law firms, assuming that the Court believes that Rule 1.10 should not apply to government law firms in its present form. It seems to us that the issue is of sufficient importance to warrant this Court's attention at some point.

BEFORE THE ETHICS AND DISCIPLINE COMMITTEE

OF THE UTAH SUPREME COURT

In the Matter of the Complaint of: [redacted] Complainant, Against [redacted] Respondent.	RULING ON APPEAL OF DISMISSAL

Pursuant to Rule 14-510(a)(6) of the Utah Rules of Lawyer Discipline and Disability, Complainant's appeal of the dismissal of the Informal Complaint against [redacted] ("Respondent") by the Office of Professional Conduct ("OPC") is before the Chair of the Ethics and Discipline Committee of the Utah Supreme Court.

THE RECORD

The Chair has reviewed all of the materials contained in the file of the OPC concerning this matter, including Complainant's Informal Complaint, OPC's dismissal of the Informal Complaint, Complainant's Appeal, and all other materials.

PROCEDURAL BACKGROUND

[redacted] by Complaint dated March 17, 2011 initiated a disciplinary complaint against various members of the Utah Attorney General's office ("AG") and counsel to Weber State University ("Weber"). By letter dated June 20, 2011, [redacted] notarized his original un-notarized Complaint and added three additional attorneys against whom he complained.

The history from which these disciplinary complaints arise began in 2010, when Weber solicited bids for certain lecture capture equipment. [redacted] himself, had developed certain lecture capture technology and was apparently interested in submitting a bid. [redacted] suspected that Weber's bid specifications were designed so that only one supplier could submit a successful bid. [redacted] therefore submitted a request for information and documents to Weber pursuant to the Government Records Access and Management Act ("GRAMA") in February, 2010. Believing that what he received from Weber was incomplete, [redacted] submitted a second GRAMA request in March, 2010 seeking missing documents. A few days later, [redacted] contacted the AG and communicated his belief that Weber had rigged the bid, thereby violating antitrust laws. The AG shortly thereafter began an investigation, which developed into a formal criminal investigation. As a part of that investigation, the AG subpoenaed both [redacted] and Weber and obtained secrecy orders prohibiting [redacted] and Weber from disclosing the substance of their testimony and the evidence they produced.

After learning of the criminal investigation, Weber denied [redacted]'s second GRAMA request pursuant to Utah Code Ann., § 63G-2-305(9). After [redacted] filed a motion with the court to narrow the secrecy orders and unseal some of the documents, [redacted] and the AG stipulated to lifting the secrecy order with respect to all but three documents in the file.[1]

[redacted]'s disciplinary complaint arises from his assertion that various AGs and Weber's counsel had impermissible conflicts of interest in their interactions with respect to the facts outlined above. Since some AGs were not themselves directly involved in the activities giving

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[1]The foregoing procedural history is in large part paraphrased and sometimes quoted from the background section of the Memorandum Decision and Order of the Honorable [redacted] in a case captioned "In the Matter of Criminal Investigation," [redacted]

rise to the complaints, they are apparently included through either their association with the AG or their tangential involvement with the issues. As will be seen, with exceptions to be noted, whether Respondent did or did not directly participate in the relevant fact pattern does not matter; what matters most is a correct interpretation of the governing ethical rules.

[redacted] states that Rules 1.13 and 1.7 of the Rules of Professional Conduct ("RPC") have been violated by Respondent either directly or by association.

Rule 1.13, RPC, addresses the responsibilities of a lawyer retained by an organization in addressing the interests of the organization's constituents and representatives. [redacted] argues that [redacted], who represented Weber, in effect represented the interests of Weber employees who may have been the subject of the AG's criminal investigation by inadequately responding to document requests and judicially resisting the requirement to respond to document requests rather than representing their true client, Weber, whose interest [redacted] claims required full disclosure to ferret out any criminal wrongdoing.

Rule 1.7, RPC, generally provides that a lawyer shall not represent a client if that representation involves a concurrent conflict of interest (i.e., when the representation of one client will be directly adverse to another client). [redacted] asserts that, while [redacted] (an Assistant AG) was pursuing a criminal investigation of Weber and its employees, [redacted], who also had some relationship with the AG,[2] were concurrently

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[redacted] directly asserts that [redacted] and [redacted] are Assistant AGs, but [redacted] claims to be employed by Weber. [redacted] who is apparently General Counsel of Weber, is painted with the same conflict brush. It is unclear in the documents in the file why [redacted] are asserted also to be so related to the AG's office as to have been guilty of the same conflict. Even if [redacted] are not associated with the AG, it appears that [redacted], admittedly an Assistant AG, represented Weber as against the AG's investigation of Weber.

opposing that investigation, resulting in an impermissible conflict.

Although the Respondent has not responded to the Informal Complaint, the file does contain Weber's Memorandum in Opposition to [redacted]'s Motion (the "Weber Memo") in the case (the "Investigative Action") in which Judge [redacted] issued his ruling identified in footnote 1 above, which may set forth the substance of what Respondent would likely say if required to respond to [redacted]s disciplinary complaint. [redacted] claims that, by virtue of the conflicts noted above, those representing Weber acted improperly in (i) incompletely responding to the GRAMA requests, (ii) attempting to shield information developed through the criminal investigation from disclosure, and (iii) seeking to limit production of documents in response to the AG's investigative subpoena. Each of those activities was undertaken by those representing Weber (either directly or by association) in the representation of the AG's respective clients. [redacted] states or infers that those activities were improper and were influenced by the conflicts generally described above. In the absence of some unusual circumstances (such as perpetrating a fraud or pursuit of criminal activity), the advice of a lawyer to his or her client may be the basis for a disciplinary complaint from the client (based upon, for example, a lack of diligence or competence) but is rarely the basis for a disciplinary complaint from a non-client, which is [redacted]s position here. But [redacted]s complaint seems essentially to be that the actual behaviors of those representing Weber were improper because of the impermissible conflict. For this reason, this Ruling will address the issues whether Respondent may, on [redacted]s alleged facts,

have violated Rules 1.7 and 1.13 of RPC.[3]

OPC'S DISMISSAL

OPC did not request a response from the Respondent to [redacted]'s Complaint, as amended.[4] By letter dated November 14, 2011, OPC dismissed [redacted]'s Complaint against Respondent. OPC's response generally rejected [redacted]'s claims based both upon (1) [redacted]'s failure or inability to advance facts that would establish violations and (2) interpretations of the applicable disciplinary rules different from those advocated by [redacted].

By letter to the Chair dated November 21, 2011, [redacted] timely appealed the dismissal of his complaint against Respondent.

STANDARD OF REVIEW

Rule 14-510(a)(6) of the Utah Rules of Lawyer Discipline and Disability provides that the OPC may dismiss an Informal Complaint that "upon consideration of all factors, is determined by OPC counsel to be frivolous, unintelligible, barred by the statute of limitations, more adequately addressed in another forum, unsupported by fact or which does not raise probable cause of any unprofessional conduct, or which OPC declines to prosecute . . . ." The same Rule provides that the Complainant may appeal a dismissal by OPC to the Committee Chair and that upon appeal, "the Committee Chair shall conduct a de novo review of the file, either affirm the

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[3]Whether Weber incompletely responded to a GRAMA request is an issue more appropriately addressed in another forum -- there exists a judicial procedure for addressing inadequate responses to GRAMA requests. Utah Code Ann. § 63G-2-401, et seq. Addressing the propriety of secrecy orders and responses to criminal subpoenas are best addressed in the judicial proceedings in connection with which those things occur. In fact, those issues have been, and are being, addressed in such proceedings. *In Re Criminal Investigation*, Third Judicial District Court of Salt Lake County, Civil Nos. 100916743 and 100920932.

[4]As noted, however, the Weber Memo filed by [redacted], and [redacted] contains the substance of what Respondent might be expected to advance in response to [redacted]'s Complaint.

dismissal or require OPC counsel to prepare a Notice of Informal Complaint, and set the matter for hearing by a Screening Panel."

DISCUSSION

What is Before the Chair. What is before the Chair is the issue whether OPC properly dismissed [redacted]'s Complaint. That subject is addressed below. [redacted]'s Complaint, and particularly his appeal, suggests that the Chair should address a spectrum of wrongs far beyond that issue (which is the only issue that the Chair may properly address). [redacted]'s appeal suggests that both Respondent and Judge [redacted] have violated Utah's investigative subpoena law and that "to avoid dealing with those facts" Judge [redacted] ruled that a non-lawyer ([redacted]) does not have the right to bring such alleged violations to the court's attention. To suggest that Judge [redacted] motivation was not evenhandedly to adjudicate the issues before him, but rather that he had some nefarious agenda to avoid having to deal with the facts raised by [redacted], is a disturbing charge, and one with respect to which the record contains absolutely no support. [redacted] candidly indicates that he has appealed from that ruling, which is his right and which he should do if he disagrees with it. Regrettably, [redacted] has employed the same baseless criticism with respect to this disciplinary process. It is one thing to question the propriety of a party's decisions in connection with a process (be it disciplinary or adjudicative); it is quite another to impugn the integrity of the participants. [redacted]'s suggestion that this process is inherently unfair ("that's what you get when lawyers and judges oversee their own conduct")[5] is baseless, offensive, and wrong.

The Chair takes seriously his responsibilities prescribed by the Rules of Lawyer

[5]An examination of lawyer discipline in Utah demonstrates a very active disciplinary process with a significant number of lawyers receiving discipline every year.

Discipline and Disability, which are promulgated by the Utah Supreme Court. Those Rules govern the Chair's de novo review of [redacted]'s Informal Complaint. If [redacted] is unsatisfied with those Rules, which is surely his right, he should address his complaints in a constructive manner to the appropriate body, which most assuredly is not the undersigned, who has absolutely no authority to address [redacted]'s complaints about this disciplinary procedure.

Did Respondent Violate Rule 1.13, RPC? [redacted] claims Respondent violated the following provisions of Rule 1.13:[6]

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a manner related to the representation that is a violation of the legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
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> * * *
>
> (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the duel representation is required by Rule 1.7, the consent shall be given by an appropriate official in the organization other than the individual who is to be represented by, or by the shareholders.
>
> (h) A lawyer elected, appointed, retained or employed to represent a governmental entity shall be considered for the purpose of this

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[6]Because [redacted] claims that Respondent violated this Rule by virtue of the conflict discussed below, we will address whether anyone (on either side of the investigation) violated this Rule.

rule as representing an organization. The government lawyer's client is the governmental entity except as the representation or duties are otherwise required by law. The responsibilities of the lawyer in paragraphs (b) and (c) may be modified by the duties required by law for the governmental lawyer.

[redacted] also refers to Comment 13a to that Rule, which states in part:

> In addition, a lawyer for the government may have a legal duty to question the conduct of government officials and perform additional remedial or corrective actions, including investigations and prosecution. The lawyer may also have an obligation to divulge information to persons outside the government to respond to illegal or improper conduct of the organizational client or its constituents. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and insuring that the wrongful act is prevented or rectified, where public business is involved. The obligation of the government lawyer may require representation of the public interest as that duty is specified by law.

[redacted] argues that "[redacted] and [redacted] should have aided their AG colleague [redacted] in his investigation, not fought him." [[redacted] Memorandum in Support of Motions to Require Compliance in the Investigative Actions ("[redacted] Memo")]. [redacted] suggests in essence that in responding to GRAMA requests from [redacted] (a person who was asserting that Weber rigged the bid) and subpoenas from the AG (which initiated an investigation of presumably illegal behavior proscribed by the antitrust laws, among others), the lawyers representing Weber, are obligated to "aid" the AG and [redacted] in their efforts to charge Weber with civil and/or criminal liability. [redacted] nterprets the applicable ethical rules to require an entity's attorney to "aid" those seeking to charge the entity-client with civil or criminal liability in their quest. Most entities, when charged with civil or criminal liability, engage attorneys to limit their exposure to

such liability consistent with other applicable law.[7] Most entities charged with civil or criminal liability do not engage attorneys to "aid" the opposition in that process. Indeed, in our adversary system of justice, a lawyer is obligated diligently and competently to represent the interests of the client.

With respect to Comment 13a, concededly a lawyer for a government entity "may" have a duty to question the conduct of government officials and perform additional "remedial or corrective actions" including investigation and prosecution. And a government lawyer may, as that Comment suggests, have a duty to ensure "that the wrongful act is prevented or rectified . . . ." That Comment and the Rule itself, however, do not require a government lawyer to abandon his/her duties to represent the best interests of the government entity consistent with his/her and its other duties under the law. To conclude otherwise would be to completely alter the balance in civil and criminal litigations in which governments are involved and to require governments, unlike their private counterparts, to assist the opposition in establishing their own civil and/or criminal liability.

In summary, that counsel representing Weber did not aid [redacted] and the AG in their pursuit of civil and criminal investigations against Weber does not constitute a violation of Rule

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[7]Naturally, an attorney representing an entity has a duty to respond appropriately to legal process and to be truthful, but those duties do not include maximizing disclosure of damaging information and documents potentially protected from disclosure and ignoring protections afforded by the law to his/her entity client. Faced with [redacted]'s potential individual claims and the AG's potential criminal claims, a lawyer employed or retained by Weber, in considering exclusively the interest of Weber, would be expected, consistent with his/her and Weber's other duties under the law and to the system, to protect against unnecessary and unrequired disclosure of adverse information. That this legal position might have incidentally benefitted employees or representatives of Weber who might themselves have had criminal or civil exposure does not undermine this fact. Parenthetically, it should be noted that there is no evidence in the record suggesting that any AG represented or acted as counsel to any individual employee or representative of Weber in contrast to Weber itself.

1.13. It cannot be said, based on the record before the Chair, that any actions of Respondent in responding to the GRAMA requests and subpoenas and in obtaining secrecy orders were against the interest of Weber. Whether the responses to the GRAMA requests, subpoena, and activities in connection with the secrecy order were otherwise inappropriate (i.e., perhaps consistent with Weber's interest but contrary to its legal obligations) is a matter that is more properly and effectively addressed in another forum.[8]

Did Respondent violate Rule 1.7, RPC? [redacted] asserts that Respondent violated the following provisions of Rule 1.7:

> (a) Except as provided in Paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) The representation of one client will be directly adverse to another client . . . .

In this case, [redacted] argues that because the lawyers representing the State in the criminal investigation ([redacted]) and the lawyers representing Weber in responding to the subpoena ([redacted]t) had the same employer -- the AG -- an impermissible conflict existed. It seems clear that if the same lawyer were demanding compliance with a subpoena for the State and resisting compliance for Weber, an impermissible conflict would exist under Rule 1.7(a). Yet more so, an impermissible conflict would exist if the same lawyer were to pursue a criminal investigation of a client and defend the same client against such an investigation and possible resultant prosecution.[9]

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[8]Evidently [redacted] is pursuing an appeal of Judge [redacted] Order at this very moment.

[9]It also seems clear that in such a situation the conflict could not be cured by waiver. Obviously the same lawyer would be unable to provide competent and diligent representation to the two clients whose interests were irreconcilably adverse, and the concurrent representation does involve the assertion by one client against the other client of a claim in the same proceeding. See Rule 1.7(b)(1) (3), RPC.

[redacted]'s Complaint raises the issue whether separate lawyers in the same organization (the AG) may permissibly do what one lawyer cannot do under Rule 1.7(a). That issue implicates Rule 1.10, RPC, which provides in part as follows:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

"Firm" is defined as "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." Rule 1.0, RPC.

The AG is not a "law partnership," "professional corporation," or "sole proprietorship." Although not entirely free from doubt, the AG may literally constitute a "legal department of a . . . organization." Rule 1.13(h), RPC, for example, states that "[a] lawyer . . . employed to represent a governmental entity shall be considered for the purpose of this rule as representing an organization." "This rule," however, is not Rule 1.7, a rule with a different purpose. If Rule 1.10(a), RPC, does not apply to government law departments like the AG, it would follow that two lawyers at the AG could always take squarely adverse representations of governmental entities as to any matter whatsoever without even any collateral protection (such as "screening,"[10] which is discussed below) -- a peculiar result indeed.

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[10]RPC addresses "screening" as a mechanism to mitigate the potential for conflicts when a lawyer who previously represented an adverse client becomes involved with a firm representing another client. Rule 1.10(c), RPC. RPC does not expressly allow "screening" to allow concurrent representation of adverse clients, which is proscribed by Rule 1.7(a) -- the situation presented here.

Assuming that the AG constitutes a "firm" within the meaning of Rule 1.10, different lawyers associated with the AG may not represent two clients when a single lawyer would be prohibited from doing so by Rule 1.7. As noted above, a single lawyer could not have engaged in the concurrent representation of the State and Weber in this instance.

To summarize the foregoing analysis: A single lawyer could not represent both Weber and the State on the facts presented here without running afoul of Rule 1.7. If Rule 1.10 applies to the AG, different lawyers at the AG cannot represent both Weber and the State on the facts presented here. If Rule 1.10 does not apply to the AG, different lawyers at the AG can represent both Weber and the State on the facts presented here. There is a logical infirmity in not applying Rule 1.10 (or something like it) to the AG. The foregoing analysis by the Chair is based solely upon RPC.

Perhaps because of the ambiguity in Rule 1.10 and the practical need for the AG sometimes to represent different governmental entities when their interests may diverge, the AG sought an advisory opinion on this issue in 1994, which resulted in EAOC 142 (the "Advisory Opinion"), a copy of which is attached. The Advisory Opinion concludes that Rule 1.10 does not apply "as broadly" to the AG as to "firms" generally.[11] The Advisory Opinion based its interpretation on these factors: (i) the AG is charged with representing the State and its entities and the AG could not effectively do so if Rule 1.10 were in all its rigor applied to the AG and (ii) ethics advisory committees outside Utah have reached a similar conclusion. Like the Chair, the Ethics Advisory Committee was apparently unable in RPC itself to find a basis for the position taken in the Advisory Opinion. Concededly, however, the Advisory Opinion does pragmatically

[11]The Advisory Opinion does not explain the basis in Rule 1.10 for such a distinction. Indeed, there is nothing in the Rule itself supporting such a distinction.

resolve a problem that RPC does not expressly address, and plainly the problem needed a solution.

The Committee of which the undersigned is Chair is not (as an extension of the Utah Supreme Court itself) absolutely bound by the Advisory Opinion, and as noted, one could persuasively argue that there is no basis in RPC for the conclusions reached in the Advisory Opinion.[12] But we are not here writing on a clean slate. Seventeen years ago the AG asked for clarification on this very issue and in response received the Advisory Opinion. The AG has presumably and justifiably relied upon the Advisory Opinion ever since.[13] It would be palpably unfair for the Committee to advance a completely different interpretation of the RPC now[14] and subject the AG to retroactive discipline based thereon. The Chair declines to do so.

Under the Advisory Opinion, the AG's office may still run afoul of the rules if either of the following are present: (i) the conflict presented is "so pervasive or severe that the only course of action is to have outside counsel" or (ii) the AG's office did not properly screen its lawyers from the other lawyers involved in the subject representation. [Advisory Opinion]. On the first point, the conflict here, although clear, is not necessarily so "severe" as necessarily to

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[12]Ideally the Utah Supreme Court should clarify the issue and if necessary promulgate a clarifying rule or amendment on the point in RPC.

[13]The Advisory Opinion also finds support in other quarters. The Utah Court of Appeals quoted approvingly from the Advisory Opinion in the related context. *State v. McClellan*, 2008 UT App. 48, ¶ 21, 179 P.3d 825, aff'd in part, rev'd in part, 2009 UT 50, 216 P.3d 956. The United States District Court for the District of Utah concluded that the term "firm" in Rule 1.10(b) "is not one that envisions a public prosecution office," and seemingly approved the logic underpinning the Advisory Opinion without fully embracing the Advisory Opinion itself. *Bullock v. Carver*, 910 F.Supp 551, 558 (D. Utah 1995).

[14]This is not to state that the Chair would necessarily advance a completely different interpretation than the Advisory Opinion.

require outside counsel at this stage of the proceedings,[15] although one could reasonably argue otherwise. As to screening, the file reflects that the AG did through multiple efforts screen the attorneys on the two sides of the controversy. The file contains no evidence that the screening was ineffective or a sham.

The Chair concludes that under the interpretation of RPC embraced by the Advisory Opinion, which should apply in this case, [redacted]s Complaint does not advance facts raising probable cause of a violation of Rule 1.7, RPC.

RULING

The Chair has conducted a de novo review of the file in this matter. Based upon that review, the Chair determines that OPC's decision to dismiss the Informal Complaint was appropriate. Accordingly, OPC's dismissal of the Complaint is affirmed.

DATED this 15 day of December, 2011.

ETHICS AND DISCIPLINE COMMITTEE
OF THE UTAH SUPREME COURT

By _____
Bruce A. Maak, Chair
185 South State Street, Suite 800
Salt Lake City, UT 84111

[15]The extent of the conflict is not thoroughly revealed in the record. A very different case would be presented if the State determines actually to prosecute Weber, rather than just investigate.

EAOC 139 - May a law firm's non-lawyer office administrator be compensated solely on ıe basis of a percentage of the gross income of the firm? | Main | EAOC 145 - May a law firm accept a court appointment to represent an indigent defendant in a re-trial of a criminal case in which an investigator who had been involved in the State's investigation of the defendant and testified against the defendant a ..

EAOC 142 - Whether the rules of imputed disqualification apply to the Office of the Utah Attorney General when it is fulfilling its duty of representing all state agencies, some of which may be adverse to each other on certain terms.

(Approved March 10, 1994)

Issue:

The Office of the Utah Attorney General has requested an advisory opinion concerning whether the rules of imputed disqualification apply to that office when it is fulfilling its duty of representing all state agencies, some of which may be adverse to each other on certain issues.

Opinion: In these circumstances, the conflict of interest rules apply only on an attorney-specific basis, and conflicts in the Office of the Utah Attorney General should not be imputed to all attorneys in that office. Nevertheless, the conflicts rules must be fully satisfied on an individual lawyer basis, and the Attorney General must ensure that attorneys with conflict problems are removed and screened from the particular representation at issue.

Analysis: Typically, if one attorney in a firm or office has a conflict of interest, that conflict is ed to all attorneys in that office.1For two main reasons, we conclude that Rule 1.10 of the ; of Professional Conduct does not apply as broadly to lawyers working in the Office of the Utah Attorney General.

The Rules of Professional Conduct apparently make no explicit provision for imputed disqualification in this context. The comments to Rule 1.10 define "firm" as "lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization." This definition does not seem expressly to include or exclude lawyers in a governmental office such as the Utah Attorney General.2Therefore, we turn to a more general analysis.

First, there are constitutional as well as practical policy reasons for not applying the imputed disqualification rule to the Office of the Utah Attorney General. The Utah State Constitution gives the Attorney General the duty of representing the State.3Application of the imputed disqualification rule to the Attorney General could frustrate, if not completely preclude, the fulfillment of this constitutional mandate. Because of the large number of attorneys employed by the Attorney General, there could be numerous occasions where imputed disqualification would occur, requiring the retention of private counsel to represent the State. Additional expense to the taxpayer in these situations could be enormous.

Second, other ethics advisory committees facing a similar situation issue have reached the same basic conclusion.4Although some other jurisdictions have reached different results in arguably similar, but not identical contexts,5we believe our conclusion here is most appropriate for the circumstances in which this request for an opinion was raised. Nevertheless, the Office of the Attorney General may encounter conflicts so pervasive or severe that the only prudent course of action is to hire outside counsel. Such circumstances should be judged on a case-by-case basis.

Furthermore, the fact that Rule 1.10 does not apply to the Office of the Attorney General in these ıstances does not relax the independent application of Rules 1.7, 1.8, 1.9, and 1.11 to each ɛr in that office. Any lawyer or supervising lawyer in that office who cannot individually satisfy

the requirements of those rules should not engage in the representation in question. Moreover, despite being free from the imputed disqualification rule in these circumstances, the Office of the Attorney General must adopt procedures to ensure that individual lawyers with conflict problems are sufficiently removed and screened from those matters so as not to compromise client confidences or any other purposes related to the representation as promoted by the Utah Rules of Professional Conduct.

Footnotes

1.Utah Rules of Professional Conduct 1.7, 1.8, 1.9 and 1.10.

2.In the context of movement of lawyers between the government and the private sector, Rule 1.10 comments note that "the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government." The comments to Rule 1.11(c) suggest conflicts of a lawyer serving as a public officer or employee do not serve to disqualify "other lawyers in the agency with which the lawyer has become associated." See also Rule 1.7 cmt. ("government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party"). Nevertheless, we conclude that the comments are too unclear on this point to provide a basis for our opinion here.

3.Utah Const., Article VI, Section 16.

4.See, e.g., Opinions of Ethics Comm. of the Mass. Bar Ass'n, Op. 89-4 (1989), ABA/BNA Lawyers' Manual on Professional Conduct 901:4604 (city solicitor allowed to advise city employee about litigation by city against private party who has previously been represented by another lawyer in city solicitor's office if the lawyer with the conflict is sufficiently screened from involvement); Ethics Comm. of N. Car. State Bar Ass'n, Op. 55 (1989), ABA/BNA Lawyers' Manual on Professional Conduct 901:6610 (lawyer who is a member of the attorney general's staff and represents a state hospital may pursue appeals of Medicaid decisions even though opposition will be represented by another lawyer from attorney general's office.)

5.See, e.g., People v. Brown, 624 P.2d 1206 (Cal. 1981) (attorney general not allowed to bring suit in its own name on issue where it had previously given legal advice on same issue to party it was seeking to sue on that issue).

Posted by BlogStaff on December 16, 1995 4:52 AM | Permalink

Tab 4

JONES WALDO
Attorneys Est. 1875

TEL: 801-521-3200
FAX: 801-328-0537

170 SOUTH MAIN ST, SUITE 1500
SALT LAKE CITY, UTAH 84101

WWW.JONESWALDO.COM

AFFILIATED FIRM
LEAR & LEAR LLP

GARY G. SACKETT
Direct: (801) 534-7336
gsackett@joneswaldo.com

November 12, 2012

By e-mail: lherrara@tjsl.edu

Luz E. Herrera
Assistant Professor
Thomas Jefferson School of Law
1155 Island Avenue
San Diego, CA 92101

Re: Utah Rule of Professional Conduct 5.4(a)

Dear Professor Herrera,

Your e-mail to me has identified Rule 5.4(a) of the Utah Rules of Professional Conduct as an apparent oddity/singularity in the current version of the Utah Rules.

As background, the Rules are the general responsibility of the Utah Supreme Court's Advisory Committee on the Rules of Professional Conduct, with final approval of any changes by the Court. I have been on the Committee since 1993, longer than anyone other Committee member, and I served during the Committee's comprehensive review of the Rules in 2004-05.

As your inquiry suggests, Utah Rule 5.4(e) is not related to any similar provision in the current ABA Model Rules of Professional Conduct. Indeed, I did a Google search using a lengthy phrase from the rule, and no other document in the Google universe, except for references to the Utah Rule, appeared. It is, apparently, *sui generis*. The question is, Where did it come from?

When the Committee was asked by the Court in 2004 to study the new-and-improved version of the ABA's Model Rules, which was the product of the ABA's Ethics 2000 project, the Committee undertook to examine in considerable detail every nook and cranny of the new Model Rules and to recommend to the Court which to adopt, which to modify and which to eliminate. One of the guiding principles that we

adopted was to add a "Utah comment" wherever there was a material departure from the new Model Rules. Such a comment was usually (with intention to be always) designated in the form [2a], [6a], etc. to indicate it addressed a Utah variation from the Model Rules. (See, e.g., Utah Rule 2.4, cmt. [5a].)

There is no such Utah comment to account for the existence of Rule 5.4(e). I have tracked down the minutes and agendas of the Committee for the period when Rule 5.4 was being considered, and, although there was discussion about other aspects of the rule, there is no mention of paragraph (e).

As there seemed to be no recorded discussion in the Committee's comprehensive review and revision of the rules in connection with the Model Rules, I checked the Utah rules that were in place prior to the Court's adoption of the changes resulting from the Committee's 2004-05 revision project, effective November 1, 2005. Rule 5.4(e) was also in the previous version of the Utah rules, which suggests that the subcommittee designated to review Rule 5.4 did not find any reason to suggest a modification to it. That subcommittee apparently did not identify that it was not a provision in the new ABA Model Rules. The Committee's minutes suggest 5.4(e) was swept along as a "no change" provision. That there is no "Utah comment" appears to be an oversight and an inconsistency with the Committee's general intent to flag the differences from the Model Rules.

I have a call in to the only former Committee member from the days when Utah first adopted a version of the ABA Model Rules of Professional Conduct to replace the Code of Professional Responsibility who may have some insight into this mystery. I have not yet heard from him, but I will let you know if he can shed any further light on the subject.

As to what problem or issue Utah Rule 5.4(e) was intended to address, I have no direct insight. I intend to raise the issue with the Committee at our next meeting.

Stay tuned.

Sincerely,

Gary G. Sackett

Gary G. Sackett

cc: Steve Johnson,
Chair, Advisory Committee,
Rules of Professional Conduct
Dianne Abegglen,
Utah Supreme Court Administrator

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