Agenda

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

January 23, 2017
5:00 to 7:00 p.m.

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

Welcome and approval of minutes.	Tab 1	Steve Johnson, Chair
Report and recommendation of Rule 3.3 Subcommittee.	Tab 2	Tom Brunker (subcommittee chair), John Bogart, Phillip Lowry, Padma Veeru-Collings
Report and recommendation of ABA Model Rule 8.4(g) subcommittee.	Tab 3	Simón Cantarero (subcommittee chair), Billy Walker, Vanessa Ramos, Joni Jones, and Trent Nelson
Rule 14-802 and paralegal practitioners.	Tab 4	Steve Johnson
Paralegal Practioner Rule Review: Rules 3.3, 4.2, 4.3, 5.1, 5.3, 5.4.	Tab 5	Gary Chrystler
Next meeting.		Steve Johnson

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

Tab 1

MINUTES OF THE SUPREME COURT'S
ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

November 28, 2016
DRAFT

The meeting commenced at 5 p.m.

Committee Members Attending:

Steven G. Johnson (chair)
John H. Bogart
Daniel Brough (phone)
Thomas B. Brunker
J. Simon Cantarero (phone)
Gary L. Chrystler
Joni Jones
Phillip E. Lowry
Hon. Darold J. McDade
Vanessa M. Ramos
Christie Roach
Gary G. Sackett
Billy L. Walker
Donald Winder

Excused:

Trent Nelson
Hon. Vernice Trease
Padma Veeru-Collings
Timothy Conde (recording secretary)

Staff:

Nancy Sylvester

Approval of Minutes

Chairman Steven Johnson proposed that Christie Roach, Judge Vernice Trease, and Padma Veeru-Collings be listed as "excused" in the minutes from the last meeting. He also suggested additional changes to clarify two points addressed in the minutes. Those changes were adopted and incorporated. The committee adopted the meeting minutes, as revised.

ABA Model Rule 8.4(g) Proposed Amendment

Simon Cantarero, chairman of the subcommittee appointed to review the proposed changes to the existing Rule 8.4, provided a report on the subcommittee's work. The subcommittee met two times to discuss questions that were raised during the committee's October meeting. The subcommittee also reviewed the materials Nancy Sylvester circulated in October that included comments and letters that were submitted in support and in opposition to Rule 8.4(g). The subcommittee reviewed and considered them, but was unable to reach conclusions about important questions that arose from those materials.

Mr. Cantarero reported that the subcommittee's discussions were ongoing and that it was not yet prepared to recommend a proposed change to the rule. Among the questions the subcommittee had been discussing was the scope of that rule, *i.e.*, the scope of 8.4(g) as it applies to attorneys who are merely conducting the business of practicing law. The subcommittee was also concerned with the notion of elevating attorneys to some sort of public status or quasi-state actor by making misconduct *professional misconduct* in any harassment or discriminatory practices they may have. That concern led to questions about whether the proposed change to the rules would lead to better and less discriminatory behavior. The subcommittee could not reach a consensus on these and other issues and questions.

The committee continued to discuss the proposed changes. Specifically, the committee focused on how other states have approached the issue and whether the Utah State Bar had seen complaints filed based on discrimination. Billy Walker responded by acknowledging that he had seen substantial evidence of females being treated differently, whether it be clothing styles or other issues. The committee also discussed the subcommittee's concern about holding attorneys to higher non-discrimination standards.

After the committee discussion, Mr. Cantarero informed the committee that the subcommittee planned to meet again in December to draft a revision to Utah's current Rule 8.4 that could be presented to this committee for discussion and consideration. The subcommittee also offered to provide the committee with guidance regarding enforceability at its next meeting.

Report of Rule 3.3 Subcommittee

A subcommittee had been formed to work with the Utah Supreme Court to determine what changes, if any, should be made to Rule 3.3 in light of the Court's decision in *Larsen v. Utah State Bar*, 2016 UT 26. In *Larsen*, the Court found that Larsen had recklessly misrepresented to the court, but that he had not done so knowingly. Thus, there was no violation of Rule 3.3. *Larsen* dealt only with Rule 3.3(a)(1), which provides that a lawyer shall, among other things, not make a false statement to a tribunal. The Utah Supreme Court has since requested that this committee draft a version of the Rule 3.3 that allows a violation for a recklessly false statement of fact or law made to the tribunal. As the subcommittee began drafting a proposed Rule 3.3(a)(1), it discovered that Rule 3.3(a)(1) and (a)(2) were similar in many respects, *i.e.*, (a)(1) relates to false statements made to a tribunal, while (a)(2) relates to an attorney's failure to disclose to the court legal authority that is directly adverse to the position of her client. However, the subcommittee viewed Rule 3.3(a)(3) as being different in that it

prohibited a lawyer from offering evidence he *knows* to be false. In other words, while (a)(1) and (a)(2) may apply a reckless standard, (a)(3) already applies a knowingly standard

Based on these differences, the subcommittee considered proposing two different versions of Rule 3.3 to the Court: (i) one version incorporating a reckless standard for (a)(1), (a)(2), and (a)(3), and (ii) another version incorporating a reckless standard for (a)(1) and (a)(2), but applying a knowingly standard to (a)(3). The larger committee discussed which of the two versions the committee preferred. The committee preferred the second version. The committee also suggested that Rule 1.0 be amended to include a definition for "reckless" or "recklessly," and that a new comment 3(a) be added that provides that Rule 3.3 is different form the ABA Model Rule. The new comment should also cite *Larsen* and the amended Rule 1.0, which includes the definition of "reckless." The subcommittee will draft the proposed changes and present them at the committee's next meeting.

Update on Licensed Paralegal Practitioners and the Effects on the Rules of Professional Conduct.

Chairman Johnson asked committee members to divide up the Rules of Professional Conduct to determine whether there are rules, in addition to those the committee previously identified, that require change due to the licensed paralegal practitioner developments. Ms. Roach volunteered and was assigned to review Rule 1. Gary Chrystler was assigned to review Rule 2-5. Judge McDade was assigned to review Rules 6-8. These three volunteers agreed to provide a report of their review at the next meeting. \

NEXT MEETING: January 23, 2017 @ 5 p.m.

The meeting adjourned at 6:15 p.m.

Tab 2

Rule 3.3. Candor toward the Tribunal.

(a) A lawyer shall not knowingly or recklessly:

(a)(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; or

(a)(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel~~; or~~.

~~(a)(3)~~(b) A lawyer shall not offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(~~b~~c) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(~~c~~d) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(~~d~~e) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(~~n~~o) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false or is reckless with respect to its truth.

Representations by a Lawyer

~~[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).~~

[3a]The Utah rule is different from the ABA Model Rule. In *In re Larsen*, 2016 UT 26, 379 P.3d 1209, the Utah Supreme Court held that the rule's plain language required finding actual knowledge before an attorney could be found to have violated the rule, and that language in Comment 3 permitted finding a

violation on something less than actual knowledge. The amendments to Rule 3.3(a) and to Comments 2, 4, 5, and 9, permit finding a violation of the rule if an attorney recklessly, as defined in Rule 1.0(l), makes a false statement of law or fact or fails to disclose controlling authority. Comment 3 is stricken because the Utah Supreme Court disavowed it in *Larsen* and because it conflicts with the amendments to 3.3(a).

Legal Argument

[4] Legal argument based on a knowingly or recklessly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph ~~(a)(3)~~(b) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph ~~(a)(3)~~(b) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially,

advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done-making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

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," "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) “Reckless” or “recklessly” denotes the conscious disregard of a duty that a lawyer is or reasonably should be aware of, or a conscious indifference to the truth.

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

(~~n~~o) "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~~p) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and 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 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 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 definitions of “consult” and “consultation,” while deleted from the ABA Model Rule 1.0, have 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.

Tab 3

MEMORANDUM

TO: Steven Johnson, Committee Chair

FROM: Simón Cantarero, Proposed Rule 8.4(g) Subcommittee[1] Chair

DATE: January 16, 2017

SUBJECT: Review of ABA Model Rule 8.4(g) and Proposed Adoption into Utah Rules of Professional Conduct

The subcommittee was asked to consider the ABA's new Model Rule 8.4(g) and whether the Utah Rules of Professional Conduct should be amended to incorporate or adopt the new model rule. Model Rule 8.4(g) creates an anti-harassment, anti-discrimination rule for "conduct related to the practice of law." In addition, it contains three comments that clarify the scope and type of discrimination, harassment, and prohibited conduct, and the context for applying the rule to govern and discipline attorneys.

While the objectives and aspiration of the ABA's new Model Rule 8.4(g) are admirable and meritorious, the subcommittee does not recommend adopting the ABA's new Model Rule 8.4(g) as currently drafted. Instead, the subcommittee recommends amending Rule 8.4 of the Utah Rules of Professional Conduct in such a way as to incorporate the essence of the new Model Rule by adopting language and structure similar to what is currently used in other jurisdictions – some of which implemented prohibitions on discrimination and harassment prior to the ABA's adoption of its new Model Rule 8.4(g).

This memorandum is outlined in three parts. The first part briefly describes the materials reviewed and discussed by the subcommittee as well as the issues and concerns that were presented from the reading and from comments submitted by committee members. The second part discusses the rationale and deliberation of the subcommittee behind the recommended changes. The final part provides the revised and proposed Rule 8.4 of the Utah Rules of Professional Conduct.

PART I. BACKGROUND MATERIAL AND ISSUES PRESENTED

A. Materials Reviewed and Discussed by Subcommittee

The subcommittee reviewed and considered a large amount of information regarding the new ABA Model Rule, in its various iterations during the drafting process, including (i) the Adopted Revised Resolution 109 and accompanying Report, (ii) a presentation by the ABA's Center for Professional Responsibility Policy Implementation Committee, (iii) a research document comparing Rule 8.4(g) with anti-discrimination and anti-harassment rules from several jurisdictions (some of which predate the new model rule), (iv) the Utah Report: The Initiative for Advancement and Retention of Women in Law Firms

[1] The subcommittee consisted of Joni Jones, Vanessa Ramos, Trent Nelson, Billy Walker, and Simón Cantarero, as chair.

(2010), (v) *Why Can't We Stop Sexual Harassment at Work?* Bloomberg Businessweek, November 28, 2016, and (vi) dozens of letters and comments submitted in support of and in opposition to the new Model Rule.

The subcommittee also reviewed Utah Rule 8.4 and advisory committee comments, and relevant Utah rules and comments. Members of the subcommittee also conducted independent reviews and analyses of antidiscrimination and anti-harassment rules from other States and prepared an internal memorandum summarizing their findings. See *Memo Dated December 6, 2016 and Accompanying Table*, attached as Exhibit 1.

B. Issues, Questions and Concerns

The ABA's new Model Rule 8.4(g) raises many issues and concerns that, in the opinion of the subcommittee, are not adequately addressed in the text of the rule, its comments, and supplemental materials. The subcommittee's first concern was whether a rule prohibiting discrimination and harassment was needed; and the second concern was whether the proposed rule was too vague, too broad, and potentially violated the Constitutional rights of Bar members. The subcommittee also considered whether Rule 8.4(g) would limit an attorney's right to limit her practice to certain types of cases or clients. In addition, the subcommittee considered whether the proposed rule should be limited to activities before a tribunal or activities related to representing a client or whether it should include conduct "related to" the practice of law, such as attending CLEs or firm social functions.

PART II. SUMMARY OF SUBCOMMITTEE'S DELIBERATIONS REGARDING CHANGES

A. NEED FOR AN ANTI-HARASSMENT AND ANTI-DISCRIMINATION RULE

The subcommittee deliberated whether a need existed for new Model Rule 8.4(g) and if the new rule would benefit Utah lawyers in their business and professional practice. The subcommittee is of the opinion that the aspirations prescribed in Model Rule 8.4(g) prohibiting discriminatory and harassing conduct warrant implementation in the Utah Rules in order to advance professionalism, civility, inclusion, and diversity, and to discourage harassment and discrimination in the legal profession. It is the subcommittee's view that attorneys hold a particular, and special, place in society and also enjoy an important and valuable position in the legal system, in perpetuating the respect for the rule of law, and in the administration of justice for all. Proposed Rule 8.4(g) would reflect lawyers' obligation to interact with colleagues and the public in a respectful, fair, and unbiased way.

The preamble to the Utah Rules of Professional Conduct states that "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." Utah R. Prof'l Conduct Preamble ¶ 5. Also, "a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers." *Id*. at ¶ 7. This general reference to "substantive and procedural law" can be more particularly proscribed in antidiscrimination and anti-harassment laws in the proposed Rule 8.4(g).

The public policy rationale for proposed rule 8.4(g) can be found in the revised advisory comment 3: "Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system." Likewise, when adopting its rule prohibiting discrimination and harassment, the Maryland State Bar Association articulated its compelling interest as follows:

> [The Rule] reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in [the Rule] and by doing so prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession.[2]

The subcommittee agrees with this rationale in support of amending Utah Rule 8.4.

In addition, the subcommittee determined that there is a need for an anti-harassment and anti-discrimination rule to discourage and punish harmful discrimination that often goes unreported. Two sources were particularly important in the subcommittee's determination that there is a need for the rule, The Utah Report of 2010, and the Bloomberg Businessweek article on sexual harassment. Importantly, the Utah Report found that 37 percent of women lawyers experienced harassment, primarily because of gender, but also because of race, religion, disability, and caretaker status. The Utah Report at 10.) The Bloomberg article included a 2001 study in which women reported that they would be angry and not put up with harassment at work, but when they later were subjected to harassment they smiled and did nothing. *Why Can't We Stop Sexual Harassment at Work, https://www.bloomberg.com/features/2016-sexual-harassment-policy/#/?cmpid=BBD112816_BIZ*.

B. Concerns About and Shortcoming of the ABA's Proposed Model Rule

The subcommittee considered various concerns and issues raised by its members, and members of the greater committee, with respect to the language, interpretation, and application of Model Rule 8.4(g). In particular, the subcommittee identified three general areas of concern that appeared to be serious shortcomings in the Model Rule: (1) vagueness and ambiguity, (2) issues with Constitutional protection, and (3) over-breadth and overreach.

Notwithstanding the amount of literature in support of Model Rule 8.4(g), and the diversity of its supporters and proponents, the subcommittee identified various unanswered questions and issues with respect to the language, potential interpretation, and future application and enforcement of the Model Rule. The subcommittee considered that the language of the Model Rule is vague and ambiguous in an important respect – identifying the type of prohibited conduct, and the setting or context in which the misconduct could occur. The subcommittee was not satisfied that the Model Rule offered a clear distinction between punishable discriminatory and harassing misconduct on the one hand, and socially objectionable or reprehensible misbehavior that may or may not be subject to discipline. It seemed that the standard or definition of professional misconduct under Model Rule 8.4(g) was that OPC or the Courts will know it when they see it. The subcommittee is of the opinion that the Model Rule lacks clearly defined parameters for it to be predictable and consistent to give Bar members, OPC, and the Courts sufficiently acceptable guidance. Furthermore, even if the misconduct is clearly defined and predictable, the phrases "related to" and the "practice of law" are ambiguous in their definition and application. Particularly troublesome to the subcommittee is the vague concept of what may constitute professional misconduct

[2] See Maryland Attorneys' Rules of Professional Conduct, Rule 8.4(e), comment. 4, available at https://govt.westlaw.com/mdc/Document/N37E367703C0211E69147B51246646F09?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default) (last visited December 29, 2016).

when the behavior is punishable simply because the actor is a licensed lawyer, or occurs in a setting that may be generally associated with practicing law.

The subcommittee was concerned about the constitutional protections that may be infringed by Model Rule 8.4(g). The subcommittee was conscientious about the First Amendment rights of Bar members, particularly their freedom of speech, association, and exercise of religion. The subcommittee applied various scenarios and hypotheticals (not far-fetched) that would be subject to the Model Rule and found the rule would have a chilling effect. Worse still, the subcommittee concluded that the Model Rule could potentially punish otherwise permissible constitutional expression. The subcommittee took great pains in the recommended rule to protect the expression of conscientious advocacy or objections by Bar members, regardless if such expression is made by attorneys in their individual capacity as citizens or as advocates on behalf of clients or causes they represent or espouse.

Finally, the subcommittee was troubled by the expansive breadth and reach of the ABA Model Rule. The subcommittee found that the general application of the idea of "conduct related to the practice of law" as professional misconduct, for which an attorney could be disciplined, reached far and deep into the lives of Bar members. As mentioned above, without clearly defined parameters, the ABA Model Rule could reach into private settings – like an attorney's social gathering at her office or home, and apply to an attorney's public conduct like affiliating himself with a cause, movement, or group that may be considered a "counterculture" or outside the mainstream, simply because he is admitted to the Utah State Bar. The reach and breadth of the Model Rule would unnecessarily capture and sanction conduct that would otherwise be protected.

PART III. PROPOSED AMENDED UTAH RULE 8.4

The subcommittee recommends adding section (g) to Utah Rule 8.4, such that it reads as follows:

> **Rule 8.4. Misconduct.**
>
> It is professional misconduct for a lawyer to:
> …
> (g) engage in conduct that violates a federal, state, or local statute or ordinance that prohibits harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the lawyer knew or should have known the conduct was prohibited by statute or ordinance; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in connection with the lawyer's professional activities. This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client. For purposes of determining the violation of a statute or ordinance under this Rule, number of employees is not a defense.

The subcommittee also recommends revising Comment 3 in its entirety and adding a new Comment 4, as follows:

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Lawyers may engage in conduct undertaken to discuss diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations.
>
> [4] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers should also be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's view or activities. See Rule 1.2(b).

The revisions to the black letter rule and the addition of comments would also necessitate renumbering other comments to Rule 8.4. For the revised and proposed Rule 8.4 in its entirety, see Exhibit 2 to this memorandum.

The subcommittee acknowledges that the recommended rule 8.4(g) is unique, but it is not novel or unprecedented. The recommended Utah rule 8.4(g) is an amalgamation of other rules, using Rule 8.4(j) of the Illinois Rules of Professional Conduct, adopted in July 2009, as a template and starting point. Using the Illinois rule and rules from other States, the subcommittee used language of the recommended rule that set procedural and substantive standards in the black letter rule and also offered an acceptable degree of predictability and consistency.

With respect to structure, the black letter rule of proposed rule 8.4(g) contains (i) the general rule of the prohibited misconduct, (ii) its interpretation and definition, and (iii) the exclusions to the rule.

The general rule under proposed 8.4(g) is that an attorney commits professional misconduct if he or she "violate[s] a federal, state, or local statute or ordinance that prohibits harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer." Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of Rule 8.4(g). In this sense, a lawyer would commit professional misconduct subject to discipline without a final or any adjudication from another tribunal. The subcommittee believes requiring a prior finding of discrimination or harassment would mean that discrimination or harassment within a firm would virtually never be reported; few attorneys or legal assistants in the State who wanted to continue to work in the legal field would not bring a discrimination or harassment suit because of the implications it would likely have on

their career. Additionally, the size of a lawyer's law firm is not an affirmative defense to a finding of professional misconduct as it would be if such a lawyer, as an employer, would be exempt and protected under the substantive federal employment laws because of the size of his or her law firm or number of employees of record might be. To be sure, the rule for professional misconduct is more expansive than what is applicable to the public in general, and to licensed professionals in particular.

Proposed Rule 8.4(g) also includes the following interpretation and definition in order to provide clarity, consistency, and assistance to attorneys, the Office of Professional Conduct, and the Courts: "Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the lawyer knew or should have known the conduct was prohibited by statute or ordinance; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in connection with the lawyer's professional activities." The corollary to this definitional clause is that isolated conduct that is socially unacceptable and objectionable by itself does not rise to the level of misconduct that warrants discipline under the Rule. Proposed Comment 3 also provides guidance on conduct lawyers may undertake, which may be considered discriminatory on its face, without running afoul of Rule 8.4(g): "Lawyers may engage in conduct undertaken to discuss diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations."

In addition to containing the statement of the rule, and providing an interpretation and definition for its application, the black letter rule of 8.4(g) also provides exclusions and exemptions: "This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client." Further clarification can be found in proposed Comment 4: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance of these rules and other law. ... A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's view or activities. See Rule 1.2(b)."

EXHIBIT 1

(Attached Memo Dated December 6, 2016)

EXHIBIT 2

(Proposed New Utah Rule 8.4)

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply 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;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that violates a federal, state, or local statute or ordinance that prohibits harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the lawyer knew or should have known the conduct was prohibited by statute or ordinance; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in connection with the lawyer's professional activities. This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client. For purposes of determining the violation of a statute or ordinance under this Rule, number of employees is not a defense.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct or knowingly assist or induce another to do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[1a] A violation of paragraph (a) based solely on the lawyer's violation of another Rule of Professional Conduct shall not be charged as a separate violation. However, this rule defines professional misconduct as a violation of the Rules of Professional Conduct as the term professional misconduct is used in the Supreme Court Rules of Professional Practice, including the Standards for Imposing Lawyer Sanctions. In this respect, if a lawyer violates any of the Rules of Professional Conduct, the appropriate discipline may be imposed pursuant to Rule 14-605.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Lawyers may engage in conduct undertaken to discuss diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations.

[4] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance of these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5a). Lawyers should also be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's view or activities. See Rule 1.2(b).

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

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

MEMORANDUM

TO: RPC Subcommittee on ABA Proposed Rule 8(g), Members Simón, Billy Walker, and Trent

FROM: Subcommittee Members Joni Jones and Vanessa Ramos

DATE: December 6, 2016

RE: Review of other States' Antidiscrimination/Harassment Rules Similar to ABA Model 8.4(g) and Recommendations

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We reviewed all of the state rules identified by the ABA in its Revised 109 Report to the House of Delegates as having adopted Antidiscrimination/Harassment provisions. Included with this Memorandum is a chart which identifies the state rule, key language from the rule, and important comments. We found some common themes in the rules, in terms of how they addressed some of the concerns that have been expressed by the Utah Rules of Professional Conduct committee (RPC Committee), and by the comments made to the ABA in response to the original proposed 8.4(g). As a subcommittee, we have reviewed and discussed those comments, and we were tasked, as a "sub-sub" committee, to identify some of the ways in which other states have addressed these perceived problems with the ABA model Rule 8.4(g).

Limitations on Scope of Rule

Many on the RPC Committee have expressed concern that the ABA rule is too broad. Specifically, it is the language that captures conduct "related to the practice of law." Members of the RPC have expressed discomfort that the Rule may reach into private conduct, such as social activities tangentially related to the practice of law (for example socializing with attorney friends after business hours). There have also been concerns that the Rule would reach activities related to setting up a firm (seeking only wealthy colleagues to start a firm) and limiting a practice (such as serving only non-English speaking immigrants). A number of rules included language that would likely eliminate or minimize these concerns.

The most common limitations were prohibiting **only conduct engaged in when appearing before a tribunal**, or **conduct in the representation of a client**. We agreed that capturing only acts before a tribunal was too limited, since probably 70 to 90 percent of what a lawyer does is outside a courtroom (or hearing room). Most activities of lawyering, on the other hand, are related to representing a client. Yet social activities and professional activities, such as attending firm parties or cle conferences, would fall outside of conduct engaged in while representing a client. That would address concerns many on the RPC Committee expressed. We therefore recommend adopting **the "in representing a client"** limitation.

The majority of the rules also included a provision that the conduct be **"prejudicial to the administration of justice."** We did not discuss in our meeting the merit or lack of merit in including this phrase. The obvious problem is that the phrase is not well defined. What does "prejudicial to the administration of justice" mean? Does that mean there has to be some outcome that impacted a judicial event? A person? We did not reach a firm conclusion on this limitation, although other than the fact that it is ill-defined, it does not seem problematic—and is, or course, in Utah's current rule.

Intent Requirement

In order to ensure that attorneys are not disciplined for unintentional conduct, many states have included a fairly high intent requirement. Some of the common provisions are "knowingly" or "knowingly manifest with words or actions" and with "intent to harm." We believe **"knowingly manifest by words or conduct"** is a good standard because it requires intent (knowledge that the action is improper) that is demonstrated by words or

conduct. A higher standard would be "intent to harm" which may be preferable for those with concerns about the rule capturing unintended acts, but "intent to harm" would likely be harder to prove.

Exclusions

Many rules excluded **"legitimate advocacy"** from their scope. The idea, as explained in comments, is that if race, ethnicity, socioeconomic status, etc., is a legitimate issue in litigation, an attorney should not be found to violate the rule. Also, at least one rule expressly excluded confidential advice given to a client. And at least one comment noted that the rule would not apply to representing a client accused of discrimination, and another comment noted that engaging and terminating clients would not be covered by the rule. We believe the **"legitimate advocacy"** exclusion makes sense. In addition, the comments that clarify representing a client in a discrimination case and selecting and terminating clients would not be covered would probably also be helpful.

Rationale for the Rule

Although only two rules included a rationale in the comment section, we believe that including the rationale would be beneficial. Several have asked the question, "Why do we need this rule?" The answer almost certainly involves a statement that the judicial system is founded on the notion of equality and fairness to all, regardless of their race, gender, or socioeconomic status; and when confidence that the system operates in such a fashion is undermined—when people on the outside and parties believe that justice is *not* blind, then the system and its lawyers suffer. We therefore believe it is important to include a rationale to remind everyone of how important the concepts of fairness and equality are in our legal system.

Maryland had a particularly good articulation of the rationale for the rule:

> [The Rule] reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in [the Rule] and by doing so prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession.

Conclusion

We felt it would be most helpful to the subcommittee to not only identify the limitations placed on the scope of a lawyer's discriminatory conduct , but also to recommend those we found most effective. Of course, we look forward to discussing these rules with the entire subcommittee and recognize that other members' experience and expertise may guide us in a different direction.

RULES OF PROFESSIONAL CONDUCT - SUMMARY OF STATES DEALING WITH NEW ABA RULE 8.4
STATES WITH SIMILAR PROVISION IN THEIR RULES

STATE	LANGUAGE & LIMITATIONS OF RULE	LANGUAGE OF COMMENT	DATE ADOPTED
California 2-400	includes conduct "in the management of a law practice" and applies to employment action as well as hiring/firing clients; but requires a finding of discrimination in another tribunal first.		
Colorado 8.4(h)	conduct "that directly intentionally, and wrongfully harms others and adversely reflects on a lawyer's fitness to practice law"	legitimate advocacy excluded	
Colorado 8.4(g)	limited to "representation of client"; conduct that "exhibits or is intended to appeal to or engender bias against a person" because of classification, and directed at "any persons involved in the legal process		
D.C. 8.4(d)	**"seriously** interferes with" admin of justice *** also has separate Rule 9.1 that prohibits discrimination in conditions of employment because of person's race, etc. adds family responsibility and physical handicap	lawyer violates rule if engages in "offensive, abusive, or harassing conduct that seriously interferes with the administration of justice" including "words or actions that manifest bias or prejudice" based on classifications	
Florida 4-8.4(d)	"in connection with the practice of law" that is "prejudicial to admin or justice" including "knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel or other lawyers on any basis, including, but not limited to" classifications adding physical characteristics and employment	Rule extends to "any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute." Conduct prohibited by rule "subverts the administration of justice and undermines the publics' confidence in our system of justice, as well as notions of equality." Rules allows lawyer to represent client as allowed by law, including client accused of discrimination.	
Idaho 4.4(a)	limited to representing client; lawyer shall not "use means that have no substantial purpose other than to embarrass, delay, or burden a third person, including conduct intended to appeal to or engender bias" based on classifications, which do not include socioeconomic. Limits to conduct aimed at persons directly involved in legal process, such as witnesses, jurors, etc.	rule requires lawyers to "refrain from pejorative conduct that serves no purpose other than to exploit differences based on the listed categories"; rule "not intended to limit a lawyer's full advocacy on behalf of a client"	

RULES OF PROFESSIONAL CONDUCT - SUMMARY OF STATES DEALING WITH NEW ABA RULE 8.4
STATES WITH SIMILAR PROVISION IN THEIR RULES

Illinois 8.4(d)	same as Utah's rule	same comment as Utah	
Indiana 8.4(g)	conduct "in a professional capacity" "manifesting by words or conduct" bias/prejudice based on classifications; excludes legitimate advocacy		
Iowa 32:8.4(g)	limited to "sexual harassment or other unlawful discrimination in the practice of law" or knowingly permit those who lawyer supervises to do so	Lawyer violates rule if "knowingly manifests, by words or conduct" bias/prejudice based on classifications if acts are "prejudicial to administration of justice" Excludes legitimate advocacy	
Maryland 8.4(e)	"knowingly manifest by words or conduct" when acting in professional capacity bias or prejudice based on classifications	Good rationale for rule" : rule reflects a idea that "commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise un lawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in paragraph (e) and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession."	
Massachusetts 3.4(i)	limited to appearing in a professional capacity before tribunal; prohibits "conduct manifesting bias or prejudice" based on classifications, but does not include socioeconomic status; excludes legitimate advocacy when race, sexual orientation, etc. is an issue in proceeding		
Missouri 8.4(g)	"manifest by words or conduct" bias or prejudice based on classes, does not include socioeconomic; limited to representing client; excludes legitimate advocacy	defines "manifest by words or conduct" as conduct lawyer knows or should know discriminates against, harasses, threatens, intimidates, or denigrates an individual or group	
Nebraska 3-508.4(d)	limited to conduct prejudicial to administration of justice; allows legitimate advocacy	"knowingly manifests by words or conduct"	

RULES OF PROFESSIONAL CONDUCT - SUMMARY OF STATES DEALING WITH NEW ABA RULE 8.4
STATES WITH SIMILAR PROVISION IN THEIR RULES

New Jersey 8.4(g)	conduct "in professional capacity" involving "discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap"; requires conduct "intended or likely to cause harm"	includes activities related to practice of law, such as bar association and similar activities and firm and activities in law office or firm; purely private activity excluded; employment discrimination not included because addressed better in other forums and because of resources required for investigation, etc.	
New Mexico 16-300	judicial or quasi-judicial proceedings ; requires intentional conduct "manifesting, by words or conduct" bias or prejudice based on ….	includes administrative proceedings	
New York 8.4(g)	"Unlawfully discriminate" must be brought first in tribunal that has jurisdiction over conduct		
North Dakota 8.4(f)	"prejudicial to administration of justice" limited to course of representing a client, "knowingly manifest through words or conduct bias or prejudice based on race, sex religion, national origin, disability, age, or sexual orientation		
Ohio 8.4(g)	limits to acts in "professional capacity" "conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability"	does not apply to privileged atty/client communications; excludes legitimate advocacy if race, etc. is relevant to proceeding where advocacy is made	
Oregon	limits to "course of representing client" and requires lawyer "knowingly intimidate or harass" because of "race, color, national origin, religion, age, sex gender identity, gender expression, sexual orientation, marital status, or disability"	excludes legitimate advocacy	
RHODE ISLAND 8.4(d)	"prejudicial to the administration of justice" including "harmful or discriminatory treatment of litigants, jurors … others" based on race, national origin, gender, religion, disability, age, sexual orientation or socioeconomic status"	limited to representing client, requires "knowingly manifests by words or conduct;" legitimate advocacy excluded	

RULES OF PROFESSIONAL CONDUCT - SUMMARY OF STATES DEALING WITH NEW ABA RULE 8.4

STATES WITH SIMILAR PROVISION IN THEIR RULES

TEXAS RULE 5.08	"in connection with an adjudication proceeding" . . . Manifest by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation	must be "willful" conduct	unknown
VERMONT RULE 8.4(g)	misconduct to "discriminate . . . Because of race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual in hiring, promoting, or otherwise determining conditions of employment	"in the course of representing a client"	2009
WASHINGTON 8.4(g)	(g) misconduct to "commit a discriminatory act . . . On basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where act of discrimination is committed in connection with the lawyer's professional activities"	legitimate advocacy exception	2015 was latest amendment
	(h) in representing client, conduct that is prejudicial to the administration of justice toward judges, lawyers, LLLT's, other parties, witnesses, jurors or court personnel, that a reasonable person would interpret as manifesting bias or prejudice . . . (in same listed parties as g)		
WISCONSIN 8.4(i)	misconduct to: harass a person on basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status, in connection with the lawyer's professional activities . . . Legitimate advocacy exception does not violate the above	"in the course of representing a client, knowingly manifest by words or conduct . . . Bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status . . . Violates rule when prejudicial to the administration of justice	2007
DISTRICT OF COLUMBIA RULE 9.1	lawyer shall not discriminate against any individual in conditions of employment because of race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility or physical handicap	not intended to exceed current employment discrimination law or other ethical rules . . . If there are proceedings before EEOC or similar agency, disciplinary action may be deferred	2007
STATES WITH NO BLACK LETTER PROVISION IN THEIR RULES			

RULES OF PROFESSIONAL CONDUCT - SUMMARY OF STATES DEALING WITH NEW ABA RULE 8.4
STATES WITH SIMILAR PROVISION IN THEIR RULES

ARIZONA		no bias or prejudice in "representing a client"	
ARKANSAS		prohibits "discriminatory conduct while performing duties in connection with the practice of law . . . On basis of race, religion, sex, national origin or any similar factor	
CONNECTICUT	no engage in conduct prejudicial to the administration of justice	no comment	
DELAWARE	no engage in conduct prejudicial to the administration of justice	no comment	
IDAHO	no engage in conduct prejudicial to the administration of justice	"in the course of representing a client" . . . No words or conduct that suggest bias or prejudice . . . When prejudicial to the administration of justice	
MAINE	no engage in conduct prejudicial to the administration of justice	no bias or prejudice in "representing a client" . . . Based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status	
NEW HAMPSHIRE		no bias or prejudice . . .	
NORTH CAROLINA	no engage in conduct prejudicial to the administration of justice	threats, bullying, harassment with no purpose other than to intimidate harass, etc. "associated with the judicial process"	
SOUTH CAROLINA	no engage in conduct prejudicial to the administration of justice	bias or prejudice "in the course of representing a client" when prejudicial to the administration of justice . . . Based upon race, sex religion, national origin	
SOUTH DAKOTA	no engage in conduct prejudicial to the administration of justice	couldn't find comments	
TENNESSEE	no engage in conduct prejudicial to the administration of justice	in the course of representing a client, manifests bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status	

RULES OF PROFESSIONAL CONDUCT - SUMMARY OF STATES DEALING WITH NEW ABA RULE 8.4
STATES WITH SIMILAR PROVISION IN THEIR RULES

WYOMING	no engage in conduct prejudicial to the administration of justice	in the course of representing a client, manifests bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status	
STATES THAT DO NOT ADDRESS AT ALL			
ALABAMA			
ALASKA			
GEORGIA			
HAWAII			
KANSAS			
KENTUCKY			
LOUISIANA			
MISSISSIPPI			
MONTANA			
NEVADA			
OKLAHOMA			
PENNSYLVANIA			
VIRGINIA			

Tab 4

Rule 14-802. Authorization to practice law.

(a) Except as set forth in subsections (c) and (d) of this rule, only persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah.

(b) For purposes of this rule:

(b)(1) The "practice of law" is the representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person's facts and circumstances.

(b)(2) The "law" is the collective body of declarations by governmental authorities that establish a person's rights, duties, constraints and freedoms and consists primarily of:

(b)(2)(A) constitutional provisions, treaties, statutes, ordinances, rules, regulations and similarly enacted declarations; and

(b)(2)(B) decisions, orders and deliberations of adjudicative, legislative and executive bodies of government that have authority to interpret, prescribe and determine a person's rights, duties, constraints and freedoms.

(b)(3) "Person" includes the plural as well as the singular and legal entities as well as natural persons.

(c) Exceptions and Exclusions for Licensed Paralegal Practitioners. A person may be licensed to engage in the limited practice of law in the area or areas of (1) temporary separation, divorce, paternity, cohabitant abuse, civil stalking, custody and support, and name change; (2) forcible entry and detainer; or (3) debt collection.

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(c)(1)(A) Within a practice area or areas in which a Licensed Paralegal Practitioner is licensed, a Licensed Paralegal Practitioner who is in good standing may represent the interests of a natural person who is not represented by a lawyer unaffiliated with the Licensed Paralegal Practitioner by:

(c)(1)(B) establishing a contractual relationship with the client;

(c)(1)(C) interviewing the client to understand the client's objectives and obtaining facts relevant to achieving that objective;

(c)(1)(D) completing a form approved by the Judicial Council or board of district court judges;

(c)(1)(E) informing, counseling, advising, and assisting in determining which form to use and giving advice on how to complete the form;

(c)(1)(F) signing, filing, and completing service of the form;

(c)(1)(G) obtaining, explaining, and filing any document needed to support the form;

(c)(1)(H) reviewing documents of another party and explaining them;

(c)(1)(I) informing, counseling, assisting and advocating for a client in mediated negotiations;

(c)(1)(J) filing in, signing, filing and completing service of a written settlement agreement form in conformity with the negotiated agreement;

(c)(1)(K) communicating with another party or the party's representative; and

(c)(1)(L) explaining a court order that affects the client's rights and obligations.

(d) Other Exceptions and Exclusions. Whether or not it constitutes the practice of law, the following activity by a non-lawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted:

(~~c~~d)(1) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(~~c~~d)(2) Providing general legal information, opinions or recommendations about possible legal rights, remedies, defenses, procedures, options or strategies, but not specific advice related to another person's facts or circumstances.

(~~c~~d)(3) Providing clerical assistance to another to complete a form provided by a municipal, state, or federal court located in the State of Utah when no fee is charged to do so.

(~~c~~d)(4) When expressly permitted by the court after having found it clearly to be in the best interests of the child or ward, assisting one's minor child or ward in a juvenile court proceeding.

(~~c~~d)(5) Representing a party in small claims court as permitted by Rule of Small Claims Procedure 13.

(~~c~~d)(6) Representing without compensation a natural person or representing a legal entity as an employee representative of that entity in an arbitration proceeding, where the amount in controversy does not exceed the jurisdictional limit of the small claims court set by the Utah Legislature.

(~~c~~d)(7) Representing a party in any mediation proceeding.

(~~c~~d)(8) Acting as a representative before administrative tribunals or agencies as authorized by tribunal or agency rule or practice.

(~~c~~d)(9) Serving in a neutral capacity as a mediator, arbitrator or conciliator.

(~~c~~d)(10) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements or as otherwise allowed by law.

(~~c~~d)(11) Lobbying governmental bodies as an agent or representative of others.

(~~c~~d)(12) Advising or preparing documents for others in the following described circumstances and by the following described persons:

(~~c~~d)(12)(A) a real estate agent or broker licensed by the state of Utah may complete State-approved forms including sales and associated contracts directly related to the sale of real estate and personal property for their customers.

(~~c~~d)(12)(B) an abstractor or title insurance agent licensed by the state of Utah may issue real estate title opinions and title reports and prepare deeds for customers.

(~~c~~d)(12)(C) financial institutions and securities brokers and dealers licensed by Utah may inform customers with respect to their options for titles of securities, bank accounts, annuities and other investments.

(~~c~~d)(12)(D) insurance companies and agents licensed by the state of Utah may recommend coverage, inform customers with respect to their options for titling of ownership of insurance and annuity contracts, the naming of beneficiaries, and the adjustment of claims under the company's insurance coverage outside of litigation.

(~~c~~d)(12)(E) health care providers may provide clerical assistance to patients in completing and executing durable powers of attorney for health care and natural death declarations when no fee is charged to do so.

(~~c~~d)(12)(F) Certified Public Accountants, enrolled IRS agents, public accountants, public bookkeepers, and tax preparers may prepare tax returns.

Advisory Committee Comment:

Subsection (a).

"Active" in this paragraph refers to the formal status of a lawyer, as determined by the Bar. Among other things, an active lawyer must comply with the Bar's requirements for continuing legal education.

Subsection (b).

The practice of law defined in Subparagraph (b)(1) includes: giving advice or counsel to another person as to that person's legal rights or responsibilities with respect to that person's facts and circumstances; selecting, drafting or completing legal documents that affect the legal rights or responsibilities of another person; representing another person before an adjudicative, legislative or executive body, including the preparation or filing of documents and conducting discovery; negotiating legal rights or responsibilities on behalf of another person.

Because representing oneself does not involve another person, it is not technically the "practice of law." Thus, any natural person may represent oneself as an individual in any legal context. To the same effect is Article 1, Rule 14-111 Integration and Management: "Nothing in this article shall prohibit a person who is unlicensed as an attorney at law or a foreign legal consultant from personally representing that person's own interests in a cause to which the person is a party in his or her own right and not as assignee."

Similarly, an employee of a business entity is not engaged in "the representation of the interest of another person" when activities involving the law are a part of the employee's duties solely in connection with the internal business operations of the entity and do not involve providing legal advice to another person. Further, a person acting in an official capacity as an employee of a government agency that has administrative authority to determine the rights of persons under the law is also not representing the interests of another person.

As defined in subparagraph (b)(2), "the law" is a comprehensive term that includes not only the black-letter law set forth in constitutions, treaties, statutes, ordinances, administrative and court rules and regulations, and similar enactments of governmental authorities, but the entire fabric of its development, enforcement, application and interpretation.

Laws duly enacted by the electorate by initiative and referendum under constitutional authority would be included under subparagraph (b)(2)(A).

Subparagraph (b)(2)(B) is intended to incorporate the breadth of decisional law, as well as the background, such as committee hearings, floor discussions and other legislative history, that often accompanies the written law of legislatures and other law- and rule-making bodies. Reference to adjudicative bodies in this subparagraph includes courts and similar tribunals, arbitrators, administrative agencies and other bodies that render judgments or opinions involving a person's interests.

Subsection (c).

The exceptions for Licensed Paralegal Practitioners arise from the November 18, 2015 Report and Recommendation of the Utah Supreme Court Task Force to Examine Limited Legal Licensing. The Task Force was created to make recommendations to address the large number of litigants who are self represented within or forego access to the Utah judicial system because of the high cost of retaining a lawyer. The Task Force recommended that the Utah Supreme Court exercise its constitutional authority to govern the practice of law to create a subset of discreet legal services in the practice areas of: (1) temporary separation, divorce, paternity, cohabitant abuse, civil stalking, custody and support, and name change; (2) forcible entry and detainer; and (3) debt collection. The Task Force determined that these three practice areas have the most unrepresented litigants in need of low cost legal assistance. Based on the Task Force's recommendations, the Utah Supreme Court authorized Licensed Paralegal Practitioners to provide limited legal services as prescribed in this Rule and in accordance with the Supreme Court Rules of Professional Practice.

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Subsection (~~c~~d).

To the extent not already addressed by the requirement that the practice of law involves the representation of others, subparagraph (~~e~~d)(2) permits the direct and indirect dissemination of legal information in an educational context, such as legal teaching and lectures.

Subparagraph (~~e~~d)(3) permits assistance provided by employees of the courts and legal-aid and similar organizations that do not charge for providing these services.

Subparagraph (~~e~~d)(7) applies only to the procedures directly related to parties' involvement before a neutral third-party mediator; it does not extend to any related judicial proceedings unless otherwise provided for under this rule (e.g., under subparagraph (~~e~~d)(5)).

Tab 5

3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer:

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel or licensed paralegal profession; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Note:

Comment

(1) This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

(2) This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as a advocate in an adjudicative proceeding has an obligation to present the client's case with

persuasive force. Performance of that duty while maintaining confidences of a client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

(3) An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge or matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), See the Comment to that Rule. See also Comment to Rule 8.4(b).

Legal Argument

(4) Legal argument based on a knowingly false representation of law constitutes dishonest toward the tribunal. A lawyer is not required to made a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

(5) Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

(6) If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

(7) The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment (9).

(8) The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that the evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence if false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

(9) Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as a advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment (7).

Remedial Measures

(10) Having offered evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer, may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony that lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer or licensed paralegal professional. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done-making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

(11) The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the

court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. This the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

(12) Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

(13) A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

(14) Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for temporary restraining order, there is no balance of presentation by opposing advocates. The object of the an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to the informed decision.

Rule 4.2. Communication with Persons Represented by Counsel

(a) **General Rule.** In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer or licensed paralegal practitioner in the matter, unless the lawyer has the consent of the other lawyer or licensed paralegal practitioner. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.

(b) **Rules Relating to Unbundling of Legal Services.** A lawyer may consider a person whose representation by counsel or a licensed paralegal practitioner in a matter does not encompass all aspects of the matter to be unrepresented for purposes of this Rule and rule 4.3, unless that person's counsel or licensed paralegal practitioner has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

(c) **Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement.** A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction in the matter, may communicate with a person known to be represented by a lawyer or licensed paralegal practitioner if:

(1) the communication is in the course of, and limited to, an investigation or a different matter unrelated to the representation or any ongoing, unlawful conduct; or

(2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or

(3) the communication is made at the time of the arrest of the represented person and after that person is advised of the right to remain silent and the right to counsel and voluntarily and knowingly waives these rights; or

(4) the communication is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver fo counsel, including the right to have substitute counsel, for that communication.

(d) **Organizations as Represented Persons.**

(1) When the represented person is an organization, an individual is represented

by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communication, and

(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(i) a current member of the control group of the represented organization; or

(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.

(2) The term "control group" means the following persons:

(A) the chief executive officer, chief operating officer, chief financial officer, and the chief legal office of the organization; and

(B) to the extent not encompassed by Subsection (A), the chair of the organization's governing body, president, treasurer, secretary and a vice-president or vice-chair who is in charge of the principal business unit, division or function (such as sales, administration or finance) or performs a major policy-making function for the organization; and

(C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

(3) This Rule does not apply to communications with government parties, employees or officials unless litigation about the subject of the representation is pending or imminent. Communications with elected officials on policy matters are permissible when litigation is pending or imminent after disclosure of the representation to the official.

(e) **Limitations of Communications.** When communicating with a represented person pursuant to this Rule, no lawyer may

(1) inquire about privileged communications between the person and counsel or licensed paralegal professional or about information regarding litigation strategy or legal arguments of counsel or licensed paralegal professional or seek to induce the person to forgo representation or disregard the advise of the person's counsel or licensed paralegal professional; or

(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement or other disposition of actual or potential criminal charges or civil enforcement claims or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by law, rule or court order.

Note:

Comment

(1) Rule 4.2 of the Utah Rules of Professional Conduct deviates substantially from ABA Model Rule 4.2 by the addition of paragraphs (b), (c), (d) and (e) and reference to licensed paralegal professionals who are permitted limited authority to represent parties in certain areas of legal services by Rule 14-802 (c), Utah Supreme Court Rules of Professional Practice (as amended through November 14, 2016). Paragraphs (c), (d) and (e) are substantially the same as the former Utah Rules 4.2(b), (c) and (d), adopted in 1999, as are most of the corresponding comments that address these three paragraphs of this Rule. There is also a variation from the Model Rule in paragraph (a), where the body of judicially created rules are added as a source to which the lawyer may look for general exceptions to the prohibition of communication with persons represented by counsel or licensed paralegal professional. (Because of these major differences, the comments to this Rule do not correspond numerically to the comments in ABA Model Rule 4.2.)

(2) This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer or a licensed paralegal professional in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer or client-licensed paralegal professional relationship and the uncounselled disclosure of information relating to the representation.

(3) This Rule applies to communications with any person who is represented by counsel or a licensed paralegal professional concerning the matter to which the communication relates.

(4) This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

(5) This Rule does not prohibit communication with a represented person or an employee

or agent of such a person where the subject of the communication is outside the scope of the representation. For example, the existence of a controversy between a government agency and a private party, between to organizations, between individuals or between an organization and an individual does not prohibit a lawyer for either from communication with nonlawyer representatives of the other regarding a separate matter. Nor does the Rule prohibit government lawyers from communicating with a represented person about a matter that does not pertain to the subject matter of the representation but is related to the investigation, undercover or overt, of ongoing unlawful conduct. Moreover, this Rule does not prohibit a lawyer from communicating with a person to determine if the person in fact is represented by counsel or a licensed paralegal professional concerning the subject matter that the lawyer wishes to discuss with that person.

(6) This Rule does not preclude communication with a represented person who is seeking a second opinion from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

(7) A lawyer may communicate with a person who is known to be represented by counsel or a licensed paralegal professional in the matter to which the communication relates only if the communicating lawyer obtains the consent of the represented person's lawyer or a licensed paralegal professional, or if the communication is otherwise permitted by paragraphs (a), (b) or (c). Paragraph (a) permits a lawyer to communicate with a person known to be represented by counsel or a licensed paralegal professional in a matter without first securing the consent of the represented person's lawyer or a licensed paralegal professional if the communicating lawyer is authorized to do so by law, rule or court order. Paragraph (b) recognizes that the scope representation of a person by counsel or a licensed paralegal professional may, under Rule 1.2, be limited by mutual agreement. Because a lawyer for another party cannot know which of Rule 4.2 or 4.3 applies under these circumstances, the lawyer who has undertaken a limited representation must assume the responsibility for informing another party's lawyer or licensed paralegal professional of the limitations. This ensures that such a limited representation will not improperly or unfairly induce an adversary's lawyer or licensed paralegal professional to avoid contacting the person on those aspects of a matter for which the person is not represented by counsel or a licensed paralegal professional . Note that this responsibility on the lawyer undertaking limited-scope representation also relates to the ability of another party's lawyer to make certain ex parte contacts without violating Rule 4.3. Utah Rule of Professional Conduct 4.2(b) and related sections of this Comment are part of the additions to the ABA Model Rules clarifying that a lawyer may undertake limited representation of a client under the provisions of Rule 1.2. Paragraph (c) specifies the circumstances in which government lawyers engaged in criminal and civil law enforcement matters may communicate with persons known to be represented by a lawyer or licensed paralegal professional in such matters without first securing consent of that lawyer or licensed paralegal professional.

(8) A communication with a represented person is authorized by paragraph (a) if permitted by law, rule or court order. This recognizes constitutional and statutory authority as well as the well-established role of the state judiciary in regulating the practice of the legal profession. Direct communications are also permitted if they are made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal before which a matter is pending.

(9) A communication is authorized under paragraph (a) if the lawyer is assisting the client to exercise a constitutional right to petition the government for redress of grievances in a policy dispute with the government and if the lawyer notifies the government's lawyer or a licensed paralegal professional in advance of the intended communication. This would include, for example, a communication by a lawyer provided that the sole purpose of the lawyer's communication is to address a policy issue, including the possibility of resolving a disagreement about a policy position taken by the government. If, on the other hand, the matter does not relate solely to a policy issue, the communicating lawyer must comply with this Rule.

(10) In the event the person with whom the lawyer communicates is not known to be represented by counsel or licensed paralegal professional in the matter, the lawyer's communication is subject to Rule 4.3.

(11) Paragraph (c) of this Rule makes clear that this Rule does not prohibit all communications with represented persons by state or federal government lawyers (including law enforcement agents and cooperating witnesses acting at their direction) when the communications occur during the course of civil or criminal law enforcement. The exemptions for government lawyers contained in paragraph (c) of this Rule recognize the unique responsibilities of government lawyers and licensed paralegal professional to enforce public law. Nevertheless, where the lawyer or licensed paralegal professional is representing the government in any other role or litigation (such as a contract or tort claim, for example) the same rules apply to government lawyers as are applicable to lawyers for private parties.

(12) A "civil law enforcement proceeding" means a civil action or proceeding before any court or other tribunal brought by the governmental agency that seeks to engage in the communication under relevant statutory or regulatory provisions, or under the government's police or regulatory powers to enforce the law. Civil law enforcement proceedings do not include proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand; nor do they include enforcement actions brought by an agency other than the one that seeks to make the communication.

(13) Under paragraph (c) of this Rule, communications are permitted in a number of circumstances. For instance, subparagraph (c)(1) permits the investigation of a different matter unrelated to the representation or any ongoing unlawful conduct. (Unlawful conduct involves criminal activity and conduct subject to a civil law enforcement proceeding.) Such violations include, but are not limited to, conduct that is intended to evade the administration of justice including in the proceeding in which the represented person is a

defendant, such as obstruction of justice, subornation of perjury, jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution. Also, permitted are undercover activities directed at ongoing criminal activity, even if it is related to past criminal activity for which the person is represented by counsel or a licensed paralegal professional.

(14) Under subparagraph (c)(2), a government lawyer may engage in limited communications to protect against an imminent risk of serious bodily harm or substantial property damage. The imminence and gravity of the risk will be determined from the totality of the circumstances. Generally, a risk would be imminent if it is likely to occur before the government lawyer could obtain court approval or take other reasonable measures. An imminent risk of substantial property damage might exist if there is a bomb threat directed at a public building. The Rule also makes clear that a government attorney may communicate directly with a represented party ~~A~~ at the time of arrest of the represented party" without the consent of the party's counsel or licensed paralegal professional, provided that the represented party has been fully informed of his or her constitutional rights at that time and has waived them. A government lawyer must be very careful to follow Rule 4.2(d) and would have a significant burden to establish that the waiver of right to counsel was knowing and voluntary. The better practice would include a written or recorded waiver. Nothing in this Rule however, prevents law enforcement officers, even if acting under the general supervision of a government lawyer, from questioning a represented person. The actions of the officers will not be imputed to the government lawyer unless the conversation has been "scripted" by the government lawyer.

(15) If government lawyers have any concerns about the applicability of any of the provisions of paragraph (c) or are confronted with other situations in which communications with represented persons may be warranted, they may seek court approval for the ex parte communication.

(16) Any lawyer desiring to engage in a communication with a represented person that is not otherwise permitted under this Rule must apply in good faith to a court of competent jurisdiction, either ex parte or upon notice, for an order authorizing the communication. This means, depending on the context: (1) a district judge or magistrate of a United States District Court; (2) a judge or commissioner of a court of general jurisdiction of a state having jurisdiction over the matter to which the communication relates; or to a military judge.

(17) In determining whether a communication is appropriate a lawyer may want to consider factors such as : (1) whether the communication with the represented person is intended to gain information that is relevant to the matter for which the communication is sought; (2) whether the communication is unreasonable or oppressive; (3) whether the purpose of the communication is not primarily to harass the represented person; and (4) whether good cause exists for not requesting the consent of the person's counsel or licensed paralegal professional prior to the communication. The lawyer should consider requesting the court to make a written record of the application, including the grounds for the application, scope of the authorized communications, and the action of the judicial officer, absent exigent

circumstances.

(18) Organizational clients are entitled to the protections of this Rule. Paragraph (d) specifies which individuals will be deemed for purposes of this Rule to be represented by the lawyer or licensed paralegal professional who is representing the organization in a matter. Included within the control group of an organizational client, for example, would be the designated high level officials identified in subparagraph (d)(2). Whether an officer performs a major policy function is to be determined by reference to the organization's business as a whole. Therefore, a vice-president who has policy making functions in connection with only a unit or division would not be a major policy maker for that reason alone, unless that unit or division represents a substantial part of the organization's total business. A staff member who gives advice on policy but does not have authority, alone or in combination with others, to make policy does not perform a major policy making function.

(19) Also included in the control group are other current employees know to be "participating as principal decision makers" in the determination of the organization's legal position in the proceeding or investigation of the matter. In this context, "employee" could also encompass former employees who return to the company's payroll or are specifically retained for compensation by the organization to participate as principal decision makers for a particular matter. In general, however, a lawyer may, consistent with this Rule, interview a former employee of an organization without consent of the organization's lawyer or licensed paralegal professional.

(20) In a criminal or civil law enforcement matter involving a represented organization, government lawyers may, without consent of the organization's lawyer or licensed paralegal professional, communicate with any officer, employee, or director of the organization who is not a member of the control group. In all other matters involving organizational clients, however, the protection of this Rule is extended to two additional groups of individuals: individuals whose acts might be imputed to the organization for purpose of subjecting the organization to civil or criminal liability and individuals whose statements might be binding upon the organization. A lawyer permitted by this Rule to communicate with an officer, employee, or director of an organization must abide by the limitations set forth in paragraph (e).

(21) This Rule does prohibit communications with any person who is known by the lawyer making the communication to be represented by counsel or licensed paralegal professional in the matter to which the communication relates. A person is "known" to be represented when the lawyer has actual knowledge of the representation. Knowledge is a question of fact to be resolved by reference to the totality of the circumstances, including reference to any written notice of the representation. See Rule 1.0(f). Written notice to a lawyer or licensed paralegal professional is relevant, but not conclusive, on the issue of knowledge. Lawyers should ensure that written notice of representation is distributed to all attorneys and licensed paralegal professionals working on a matter.

(22) Paragraph (e) is intended to regulate a lawyer's communications with a represented

person, which might otherwise be permitted under the rule, by prohibiting any lawyer from taking unfair advantage of the absence of the represented person's counsel or licensed paralegal professional. The prohibition contained in paragraph (e) is limited to inquiries concerning privileged communications and lawful defense strategies. The Rule does not prohibit inquiry into unlawful litigation strategies or communications involving, for example, perjury or obstruction of justice.

(23) The prohibition of paragraph (e) against the communicating lawyer's negotiating with the represented person with respect to certain issues does not apply if negotiations are authorized by law, rule or court order. For example, a court of competent jurisdiction could authorize a lawyer to engage in direct negotiations with a represented person. Government lawyers may engage in such negotiations if a represented person who has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding initiates communications with the government lawyer and the communication is otherwise consistent with requirement of subparagraph (c)(4).

Rule 4.3. Dealing with Unrepresented Person

(a) In dealing on behalf of a client with a person who is not represented by counsel or a licensed paralegal professional, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel or or a licensed paralegal professional, if the lawyer knows or reasonable should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

(b) A lawyer may consider a person, whose representation by counsel or a licensed paralegal professional in a matter does not encompass all aspects of the matter, to be unrepresented for purposes of this Rule and Rule 4.2, unless that person's counsel or licensed paralegal professional has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel or licensed paralegal professional.

Note:

Comment

(1) An unrepresented person, particularly one not experienced in dealing with legal matter, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

(2) This Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that this Rule prohibits the giving of any advice, apart from the advice to obtain counsel or a licensed paralegal professional. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

(3) Paragraph (b) recognizes that the scope of representation of a person by counsel may, under Rule 1.2, be limited by mutual agreement. Because a lawyer or another party cannot know which of Rule 4.2 or 4.3 applies under these circumstances, the lawyer who undertakes a limited representation must assume the responsibility for informing another party's lawyer or licensed paralegal professional of the limitations. This ensures that such a limited representation will not improperly or unfairly induce an adversary's lawyer or licensed paralegal professional to avoid contacting the person on those aspects of a matter for which the person is not represented by counsel or licensed paralegal professional. Note that this responsibility on the lawyer undertaking limited-scope representation also relates to the ability of another party's lawyer or licensed paralegal professional to make certain ex parte contacts without violating Rule 4.2.

(3a) Utah Rules of Professional Conduct 4.3(b) and related Comment (3) are additions to the ABA Model Rules clarifying that a lawyer may undertake limited representation of a client under the provisions of Rule 1.2.

5.1. Responsibility of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers or licensed paralegal professionals possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving a reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(c)(1) The lawyer orders or, with 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 other lawyer practices or has direct supervisory authority over other lawyers or licensed paralegal professionals, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Note:

Comment

(1) Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. This includes members of a partnership, the shareholders in a law firm organized as a professional corporation and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

(2) Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designated to detect and resolve conflicts of interest, identity dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers and licensed paralegal professionals are properly supervised. The responsibility for 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] to this Rule differs from the ABA Model Rule's [2]. The Model Rule comment [2] might suggest the possibility that a firm could be in violation of the Rule without an individual or group of individuals also being in violation. Utah's Comment [2] make 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.

(3) Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of it practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firms, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all it members and the partners may not assume that all lawyers or licensed paralegal professionals associated with the firm will inevitably conform to the Rules.

(4) Paragraph (c)(1) expresses a general principle of personal responsibility for act of others. See also Rule 8.4(a).

(5) Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a who has direct supervisory authority over performance of specific legal work by another lawyer or licensed paralegal professional. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers and licensed paralegal professionals engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

(6) Professional misconduct by a lawyer or licensed paralegal professional under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

(7) Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associated or subordinate. Whether a lawyer may be liable civilly or criminally for ~~another lawyer's~~ the conduct of another lawyer or licensed paralegal professional is a question of law beyond the scope of these Rules.

(8) The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

(9) For limitations on the managerial authority of nonlawyers, see Rule 5.4(d) and (e) (professional independence of a lawyer).

Rule 5.3. Responsibilities Regarding Nonlawyer 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 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:

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

(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 action.

Note:

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 that 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 or 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.

(3) A lawyer may use nonlawyers outside the firm to assist the lawyer or licensed paralegal professional 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 ~~I~~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 as 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 or licensed paralegal professional.

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) (i) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of the lawyer the agreed-upon purchase price; and

(ii) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law and are prohibited by Rule 14-802 , Utah Supreme Court Rules of Professional Practice (as amended through November 14, 2016) for nonlawyer to do.

(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form or association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer may practice in a non-profit corporation which is established to serve the public interest provided that the nonlawyer directors and officers of such corporation do not interfere with the independent professional judgment of the lawyer.

Note:

Comment

(1) The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fees or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangement should not interfere with the lawyer's professional judgment.

(2) The Rules also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

(2a) Paragraph (a)(4) of the ABA Model Rule was not adopted because it inconsistent with the provisions of Rule 7.2(b), which prohibit the sharing of attorney's fees. Rule 5.4(e) addresses a lawyer practicing in a non-profit corporation that serves the public interest. There is no similar provision in the ABA Model Rules.

Note: paragraph (d) may need to be modified if licensed paralegal professionals are allowed ownership interest in a for-profit law firm or association.