Agenda

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

September 16, 2019
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, discussion of recently approved Report on Regulatory Reform, and expectations for the advisory committee	Tab 1	Chief Justice Durrant
Approval of minutes	Tab 2	Simon Cantarero, Chair
Rule 6.5: Review of Bar Commission recommendations and Subcommittee proposal	Tab 3	Cristie Roach (subcommittee chair), Phil Lowry, Vanessa Ramos, Padma Veeru-Collings, and Katherine Venti
Rule 8.4 and 14-301: Report from Subcommittee	Tab 4	Adam Bondy (Chair), Steve Johnson, Dan Brough, Cristie Roach, Alyson McAllister
Rule 5.4 (informed consent versus disclosure)	Tab 5	Cory Talbot (Chair), Judge Gardner, Simon Cantarero, Gary Sackett, Tim Conde, and Steve Johnson
Other business		Simón Cantarero, Chair

2019 Meeting Schedule:

October 21, 2019

November 18, 2019

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

Tab 1

Utah State Courts

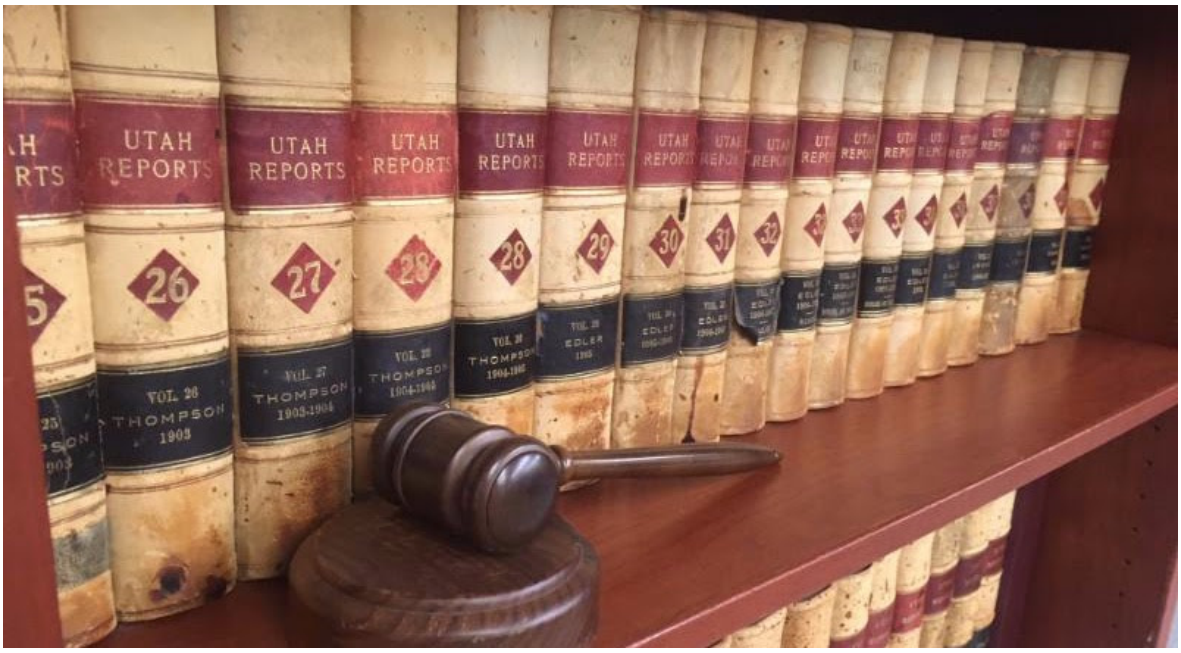
Nancy Sylvester <nancyjs@utcourts.gov>

Fwd: Workgroup on Regulatory Reform Releases Report

Simón Cantarero <cantarero.law@gmail.com> Mon, Aug 26, 2019 at 3:35 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Let's include an agenda item on this report, with special attention to pages 10-22

---------- Forwarded message ---------
From: **Herm Olsen** <holsen.barpresident@utahbar.org>
Date: Mon, Aug 26, 2019 at 2:31 PM
Subject: Workgroup on Regulatory Reform Releases Report
To: <cantarerolaw@gmail.com>



Task Force Releases Report on Narrowing the Access to Justice Gap by Changing Regulatory Structure for Legal Services

Lawyers play a unique and important role in our democracy. We have been at the forefront of protecting the rights and liberties of the underdog throughout history. Our Bar has worked tirelessly to provide pro bono legal services and to promote and support programs to serve the legal needs of our community within the framework we have. However, more needs to be done. Chronic access to justice issues in Utah and across the country remain. People can't afford lawyers and go it alone. The courts are clogged with unrepresented litigants. People perceive lawyers as being too expensive or unnecessary and are not getting the legal help they need.

In the latter part of 2018, the Supreme Court charged Justice Deno Himonas and former Bar President John Lund with organizing a task force to study and make recommendations to the Court about optimizing the regulatory structure for legal services. The task force includes local and national experts on the regulation of legal services.

It was charged with exploring ways to optimize regulation in a manner that fosters innovation and promotes other market forces to increase access to and affordability of legal services.

Many of you heard Justice Himonas and John Lund present at the Bar's Summer Convention in Park City. For those of you who did not, the task force is proposing sweeping changes to the way lawyers and legal services are regulated in Utah. The task force hopes its proposed changes will solve some of the issues facing the public and the courts. Utah is not alone. California and Arizona are considering changes similar to those being proposed in Utah. The Report and Recommendation from the Utah Work Group on Regulatory Reform was released today and can be found here.

The reforms proposed by the task force include loosening restrictions on lawyer advertising, solicitation, and fee arrangements, including referrals and fee sharing, and providing for broad-based investment and participation in business models that provide legal services to the public, including non-lawyer investment and ownership of these entities. It is hoped that these changes will allow lawyers to partner with non-lawyers to offer expanded or innovative services to clients.

Importantly, the task force also proposes creating a "regulatory sandbox" in which participants can temporarily test innovative legal products or services on a limited basis without otherwise being permanently licensed or authorized to act under the rules which have traditionally governed the practice of law in Utah. If the products or services tested in the sandbox prove to solve or ease some of the problems with our current legal system, without undue risk to the public, the product or service may get the go ahead to operate on a permanent basis.

The Bar looks forward to partnering with the Court to develop an innovative and forward-looking regulatory system for legal services that will foster more access to the courts and streamline legal processes while still appropriately protecting the public, and at the same time, preserving a meaningful role for the Utah State Bar.

Tab 2

MINUTES OF THE SUPREME COURT'S
ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT
August 19, 2019

The meeting commenced at 5:02 p.m.

Committee Members Attending:
J. Simón Cantarero, Chair
Adam Bondy
Daniel Brough
Thomas Brunker
Steven Johnson (Emeritus)
Joni Jones
Phillip Lowry (by telephone)
Allison McAllister
Hon. Darold McDade
Amy Oliver
Vanessa Ramos
Austin Riter
Cristie Roach
Cory Talbot
Katherine Venti

Guests:
Justice Deno Himonas

Members Excused:
Tim Conde
Hon. Jim Gardner
Hon. Trent Nelson
Emeritus Gary Sacketts (Emeritus)
Billy Walker
Padma Veeru-Collings

Staff:
Nancy Sylvester

Recording Secretary:
Jurhee Rice

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

I. Welcome, Farewell, and New Members

Mr. Cantarero determined quorum and welcomed the committee.

II. Regulatory Reform and LPP's

Justice Himonas updated the committed on the work of the regulatory reform task and the pending release of the 70-page report to the Supreme Court. Justice Himonas requested that this committee continue to move its rules forward. Justice Himonas requested volunteers to assist with evaluating the ethics portion of the LPP exam. Volunteers will be tasked with determining the cut off passing score for the ethics portion of the LPP exam. Interested persons should contact Steven Johnson.

Justine Himonas gave an update on the joint task force and Utah State Bar on reimagining regulation. Justice Himonas stated that a discussion will begin next week with the Court regarding two main points and recommendations for changes: (1) lawyer advertising and solicitation; and (2) lawyer referral fees (relaxing restrictions on sharing fees).

Justice Himonas discussed how Arizona has abolished Rule 5.4 but how this abolition caused them to look at creating replacement rules for regulation. Justice Himonas believes that the Court is going to ask for something like what Arizona has created. Justice Himonas believes that the creation of a regulator will allow people to practice law but still be regulated by an algorithm so that the risks to the community vs. the effectiveness of the program can be reviewed and assessed. The LSA in England found a 25% error rate in non-lawyers but when compared to lawyers, the error rate was similar.

Justice Himonas stated that Utah is the third state to adopt the Sandbox model and will be the first jurisdiction to use a Legal Regulatory Sandbox if it passes. There are national organizations (such as Rand and PEW) with Block grant money interested in funding the program and using Utah as a pilot site. Justice Himonas stated that the long-term goal of a legal regulatory sandbox is to ease the transition to a multi-state certification program that allows the expansion of legal services-a kind of reciprocity.

III. Review of Committee Procedures:

New members Alyson, Jurhee (recording secretary replacing Adam Bondy, who is now a full member), and Judge Edwards introduced themselves to the committee and the committee bid a fond farewell to Tom Brunker, who has served for 8 years. A discussion regarding drafting rules, editing, and adding comments ensued. Mr. Johnson reminded everyone to make sure that when amending a rule that it did not alter another rule. Mr. Cantarero walked the committee through CJA Rule 11-101 and asked that the committee's rules consistency checklist be circulated.

IV. Approval of Minutes

Motion:

Cristie Roach moved to approve the minutes from the July 17 meeting. Joni Jones seconded the motion. The motion passed unanimously.

V. Report: Meeting with Supreme Court re: Rule 8.4 and 14-301

Rules 8.4 and 14-301: Mr. Cantarero and Mr. Johnson updated the committee on the Court's discussion of Rules 8.4 and 14-301. The Court's primary concern involved the infringement of constitutionally-protected speech, which should be balanced against (1) discrimination among members of the Bar; and (2) egregious violations of the standards of professionalism and civility.

Hostile, demeaning, and humiliating conduct

If speech is going to be regulated, it must be done carefully. The committee focused on the language of Standard 3 and its comment in Rule 14-301. The discussion involved defining "hostile, demeaning, and humiliating conduct" either separately from discriminatory conduct or in conjunction with it (broad vs. narrow).

The committee made numerous edits and modifications to the documents throughout the meeting (sent out in an email by Ms. Sylvester). The Court had a concern that "in all proceedings" only dealt with formal proceedings before the court and so the Court wanted this to be changed to encompass all other interactions that an attorney may have with clients and others. The Committee had concerns regarding the over-broad application of comment 4 as application of this idea of "intimidating and harassing" to all proceedings could chill the ability of an attorney to do their job appropriately, such as in trial, and there could be a misinterpretation of how an attorney is perceived making them susceptible to unjustifiable

Mr. Cantarero stated that the Court likely just wants a guideline for lawyers to abide by. Mr. Brough stated that the reasons why a person is acting hostile should not matter. If a person is acting in a hostile way, the fact that the party receiving the hostility is a protected class should not matter-it should be enough that the lawyer is acting in an inappropriate way.

It was decided that the rules needed further investigation and discussion. The subcommittee will review the application of the standards to proceedings as well as the definitions as they apply to diversity as separate concepts from hostility since the committee concluded they likely should remain associated but separate. It was recommended to review the GAL statute which provides a good definition of all proceedings. The subcommittee will provide an update at the September 2019 meeting.

Subcommittee:
Adam Bondy (chair), Dan Brough, Steve Johnson, Cristie Roach, Alyson McAllister.

VI. Report: MDP subcommittee re: Rule 5.4(a) & 1.5(e)

Mr. Steven Johnson reviewed the suggested amendments to Rule 5.4. Mr. Johnson explained that the recent amendments to the advertising rules say an attorney may advertise any way he or she wants as long as the attorney doesn't misrepresent the facts. Under Rule 5.4, you may share fees so long as it does not interfere with the basic core values of the lawyer. Mr. Jonson reiterated that Arizona is abolishing Rule 5.4 but states

that this will require a new rule to protect hybrid business and believes that a new rule is not necessary when revising the current rule could provide for such safeguards.

The Committee discussed ways in which a client may be informed of the structure of the lawyer's employment with an organization in which a financial interest is held or managerial authority is exercised by one or more non-lawyers. It was discussed whether the use of consent, notification, or disclosure would provide the client with the necessary information to make an informed decision. While most clients may not care, commercial clients may have more of an interest and may need the information. Informed consent was thought to create too high of a standard, while some form of disclosure or notice was thought to be slightly low but likely to suffice with the needs of the clients. The committee decided the issue should be further reviewed by the subcommittee. The subcommittee will review the rule and discuss informed consent and disclosure/notice requirements. The subcommittee will recommend an appropriate procedure based upon their review and assessment.

Subcommittee:
Cory Talbot-chair, Judge Gardner, Simon Cantarero, Gary Sackett, Tim Conde, and Steve Johnson (on call only). Tony is released from service.

VII. Report: Rule 6.5 & Bar Commission Recommendations

Deferred until September 2019 Meeting.

VIII. Other Business

Cristie Roach's subcommittee on Rule 6.5 will be first on the agenda at September 2019 meeting.

IX. Scheduling of Future Meetings

September 16, 2019 at 5:00 p.m.
October 21, 2019 at 5:00 p.m.
November 18, 2019 at 5:00 p.m.

X. Adjournment

The meeting adjourned at 6:58 p.m.

Tab 3

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

RULE 6.5 SUBCOMMITTEE

Cristie Roach <cristier@utcourts.gov> Wed, Sep 11, 2019 at 2:11 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Nancy,
This is what our committee has come up with for the Rule 6.5 issue and should be included in the Agenda. Thanks.

1. The proposed change to Rule 6..5 as presented by the Utah State Bar Innovation in Law Rules Committee is appropriate.
2. We prefer adding paragraph C, rather than changing (a)(2).
3. After reviewing the RPC Consistency and Public Record Checklist to make sure that the proposed changes are consistent, we would recommend adding a comment regarding how this rule is different than the ABA Rule 6.5.

[6] This rule differs from ABA Model Rule 6.5 to the extent that it changes the title, changes paragraph (a), adds new paragraph (c), and contains comment [6].

Also, instead of the word "free" in paragraph c, we would suggest the term "non-compensated" to be consistent with with the changes in paragraph a.

I have attached an edited version to be included in the Agenda.

Also, in doing some research of other states that have changed Rule 6.5, I came across this article - http://www.cpbo.org/wp-content/uploads/2018/09/Limited-Scope-Rules-Guide.pdf - and found that most states follow ABA rule to the letter. However, Georgia did add a "definition" of short-term limited legal serves that might be helpful. They added ", normally through a one-time consultation," after the term in paragraph a.

This is something the whole committee might want to discuss, so if you could include the article in the Agenda that would be appreciated.

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Cristie M. Roach, JD, CWLS
Managing Attorney
4th District - Provo
Office of Guardian ad Litem and CASA
137 N. Freedom Blvd., Suite 200
Provo, Utah 84601
Phone (801) 429-8501

Rule 6.5: Short-term Limited Legal Services ~~Nonprofit & Court-Annexed Limited Legal Services Programs~~

(a) A lawyer who~~, under the auspices of a program sponsored by a nonprofit organization or court,~~ provides short-term limited legal services, normally through a one-time consultation, to a client without expectation by either the lawyer or the client that the lawyer will receive compensation or provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) Notwithstanding the above, other lawyers in a firm are not disqualified from representing clients adverse to a client who received ~~free~~ non-compensated short-term limited legal advice from a lawyer in the firm, if the lawyer who provided the ~~free~~ non-compensated short-term limited legal advice is timely screened from any participation in the adverse clients' matters and is apportioned no part of the fees therefrom.

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the

representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

[6] This rule differs from ABA Model Rule 6.5 to the extent that it changes the title, changes paragraph (a), adds new paragraph (c), and contains comment [6].

Tab 4

Rule 8.4(h) and 14-301, Standard No. 3 Subcommittee Recommendations

Rule 8.4(h)

The committee was split on which Standards from 14-301 should be included in the rule. All subcommittee members agreed that Standards 1, 3, 4, 5, 6, and 7 should be included. Two of five agreed that Standard 18 should be included. Three of five agreed that Standards 9, 11, 13, 15, 17, and 19 should be included. Four of five agreed that Standard 8 should be included.

The only time that Rule 8.4(h) comes into play is when a lawyer really misbehaves or does so repeatedly ("egregiously violate, or engage in a pattern of repeated violations . . . if such violations harm the lawyer's client or another lawyer's client or are prejudicial to the administration of justice"). An isolated technical violation of the Standards is not misconduct under 8.4(h). Consequently, there is no harm in listing as many possible varieties of misbehavior as possible. If we don't list certain Standards in 8.4(h), lawyers may believe that they may openly violate those Standards.

Subcommittee recommendation:

8.4(h) [It is professional misconduct for a lawyer to] egregiously violate, or engage in a pattern of repeated violations, of Standards 1, 3, 4, 5, 6, 7, 8, 9, 11, 13, 15, 17, 18, or 19 of the Standards of Professionalism and Civility if such violations harm the lawyer's client or another lawyer's client or are prejudicial to the administration of justice.

Rule 8.4 Comments

Subcommittee recommendation for Comment 3 (the same as the Committee discussed after receiving public comments):

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, color, sex, pregnancy, childbirth or pregnancy-related conditions, age, if the individual is 40 years of age or older, religion, national origin, disability, sexual orientation, or genetic information, may violate paragraph (d) when such actions are prejudicial to the administration of justice. The protected classes listed in this Comment are consistent with those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec, 34A-5-106(1)(a) (2016) and in federal statutes, and is not meant to be an exhaustive list, as the statutes may be amended from time to time. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Subcommittee recommendations for Comment 4 (the same as the Committee discussed after receiving public comments and Supreme Court comments):

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law ~~guides~~ governs the application of paragraph (g), except that for purposes of determining a violation of paragraph (g), the size of a law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer to accept, decline, or in accordance with Rule 1.16, withdraw from a representation, nor does paragraph (g) preclude legitimate advice or

advocacy consistent with these rules. 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 paragraph (g). Lawyers may ~~engage in conduct undertaken to~~ discuss the benefits and challenges of diversity and inclusion~~, including any benefits and challenges,~~ without violating paragraph (g). Unless otherwise prohibited by law, implementing ~~Implementing~~ or declining to implement initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations are not violations of paragraph (g).

Subcommittee recommendations for Comment 4a (the same as discussed in our last Committee meeting):

[4a] Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

Subcommittee recommendations for Standard 3 if Rule 14-301:

The subcommittee recommends that a few minor changes be made to paragraph 1 of the Standard. Because the "participant" language has been removed with the second sentence, it should be deleted from the third (and now, the new second) sentence so that it reads, "Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of any ~~such participant~~ person unless such matters are directly relevant under controlling substantive law.

The new second paragraph also needs some modifications. We recommend that "court personnel" be added to the list of people who are protected by the Standard, as there are several anecdotal stories of court clerks and other court personnel being abused by attorneys.
In order to eliminate the question as to whether this Standard applies only to in-court actions, we eliminated "in all proceedings." The subcommittee believes that the Standard should apply whenever lawyers are interacting with others. We recommend that the concept of "in any venue" (adapted from the GAL statutes at Nancy's suggestion) be adopted so that the Standard applies in all situations and not just in court, including depositions, negotiations, arbitrations, mediations, and inter-office conduct.
It is felt that although there are statues regulating the employment situation, they only apply to firms with at least 15 employees. The Standard with this change applies to all law offices, irrespective of size.
Question: do we need to include this list of activities in the Standard, or should it be placed in a comment? Or do we just say "in any venue"?
We recommend that the "hostile, demeaning or humiliating" paragraph be separated from "discriminatory" paragraph.
With these changes, the Standard should read as follows (redlined changes are changes from our last committee meeting):

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Neither written submissions nor oral presentations

should disparage the integrity, intelligence, morals, ethics, or personal behavior of any ~~such participant~~ person unless such matters are directly relevant under controlling substantive law.

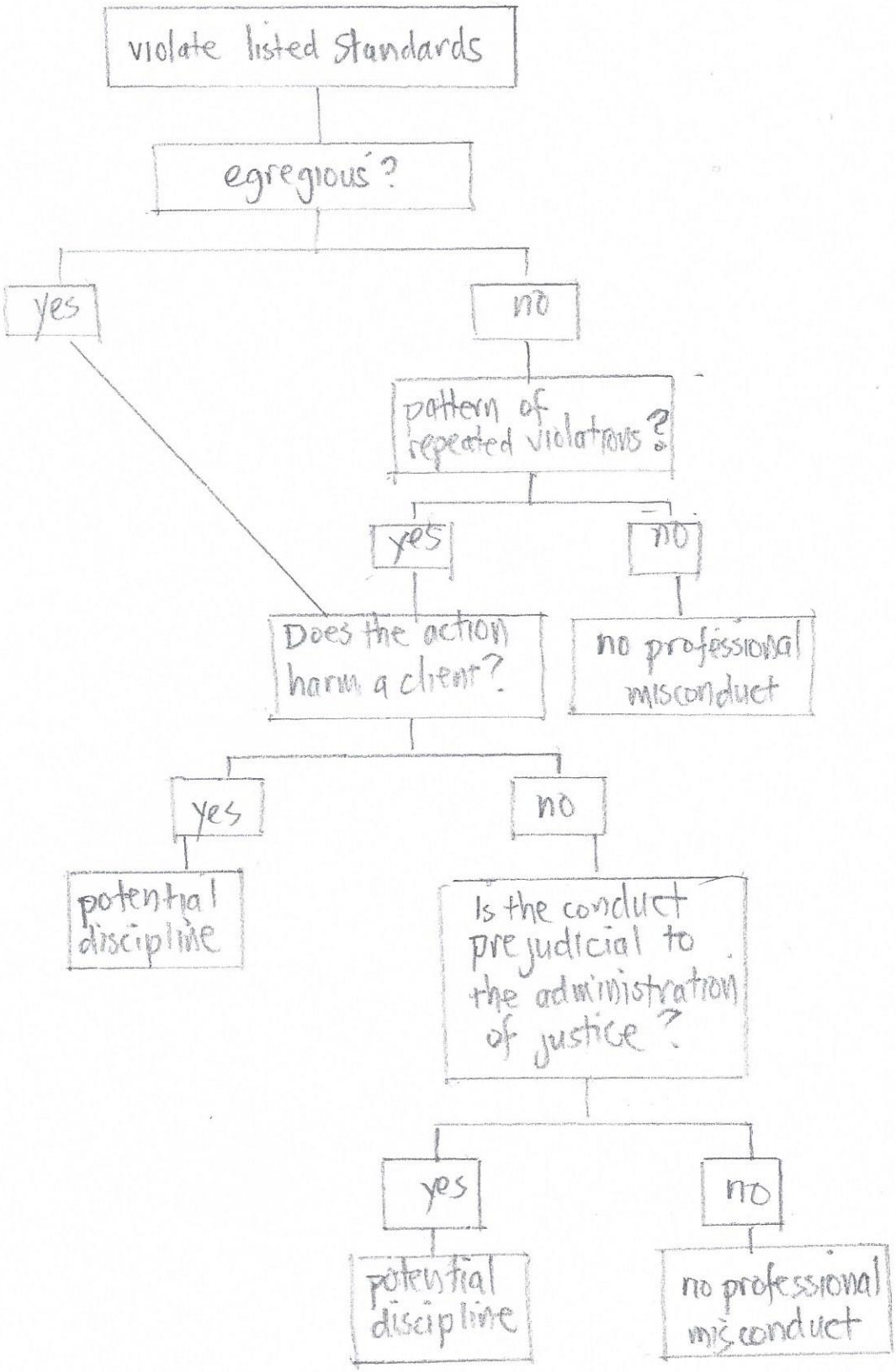
Lawyers shall avoid hostile, demeaning, or humiliating, conduct with all other counsel, parties, judges, court personnel, witnesses, and ~~other participants in all proceedings~~ others in any venue.

Discriminatory conduct includes all expressions of discrimination against protected classes as enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a), and federal statutes, as amended from time to time.

Comment: Hostile, demeaning, and humiliating communications include all expressions of discrimination on the basis of race; color; sex; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion; national origin; disability; gender, sexual orientation gender identity; or genetic information. The protected classes listed in this Comment are consistent with those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a) (2016), and in federal statutes, and is not meant to be an exhaustive list as the statutes may be amended from time to time.

Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 3.1; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).


violate listed standards
egregious?
yes
no
pattern of repeated violations?
yes
no
Does the action harm a client?
no professional misconduct
yes
no
potential discipline
Is the conduct prejudicial to the administration of justice?
yes
no
potential discipline
no professional misconduct

- Rule 8.4(h)

Tab 5

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Rule 5.4 subcommittee

Cory Talbot <CATalbot@hollandhart.com> Thu, Sep 12, 2019 at 11:09 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>
Cc: Simón Cantarero <cantarero.law@gmail.com>, STEVE JOHNSON <stevejohnson5336@comcast.net>

Hi Nancy,

I've attached the draft revised rule 5.4 for Monday's meeting.

Simón, I've included your comments below with a few other points for our discussion:

- We may want to add a comment to the rule about the reasonableness of fees in light of work by lawyers/nonlawyers together.
- We're concerned about differing professions having different rules of professional conduct/ethical standards. We addressed this in part in the comments, but this may be a blind spot.
- We opted to go with written notice for the disclosure standard.
- We should consider whether we need to redefine "firm" under Rule 1.0.
- We use "practice law" in (b) and in comment 1 and "render legal services" in (c). Should we be uniform or consistent in the language/phrasing?
    - The "practice of law" is defined in Rule 14-802, so that may be a good place to start. We have the last sentence in cmt 1 that addresses the unauthorized practice of law, and should make reference to 14-802.
- Paragraph (b) has the requirement of the legal entity or the arrangement between the lawyer and non-lawyer to be in writing, but I wonder if we can make this a little more clear. If a nonlawyer registers a partnership or forms a multi-member LLC or corporation with the Division of Corporations, would that be enough to meet this requirement? Or does the rule require a partnership agreement, operating agreement, or bylaws that sets out the managerial and financial arrangements? This can be fleshed out in a comment.
    - Also, in comment 2 we refer to a nonlawyer "owning" an interest in the firm. This should be expanded in scope and say the nonlawyer has a financial interest in the firm, and be consistent with the language in (b). One thing to consider is the possibility that we can have "firms" entirely owned by nonlawyers in the same way that private dental clinics are owned by non-dentists, and the dentists are on a salary with bonuses, and don't have to do any of the marketing and administrative work but also do not enjoy any profits or other economic benefits of being an owner.
- Simón raised another good point: "One worry I have is a lawyer may be disciplined for the malfeasance of the business owners in the way the business is run, while the business owners have no repercussions beyond those generally available at law. What I mean is, I fear a lawyer whose firm fails has more to lose than a businessman whose unscrupulous practices gets him off relatively easy. For example, think of the thousands of mortgage brokers, appraisers, realtors, home builders, and subcontractors with shady business practices who failed, put their companies in to bankruptcy, only to resurrect under a different name a few weeks later. May I suggest more input from the larger group. They may have more concerns I am not aware of, and more solutions I can offer."

Thanks,

Cory

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Rule 5.4. Professional Independence of a Lawyer.

(a) A lawyer or law firm ~~shall not~~may share legal fees with a nonlawyer~~, except that:~~ only if the sharing of fees does not interfere in any way with (1) the lawyer's professional independence of judgment, (2) the lawyer's duty of loyalty to a client, or (3) protection of client confidences.

~~(a)(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;~~

~~(a)(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 that lawyer the agreed-upon purchase price; and~~

~~(a)(2)(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~~

~~(a)(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.~~may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by one or more nonlawyers only if the financial and managerial structure of the partnership or other organization, which must be fully set forth in writing, does not interfere in any way with (1) the lawyer's professional independence of judgment, (2) the lawyer's duty of loyalty to a client, or (3) protection of client confidences. The lawyer shall provide written notice to a prospective client that one or more nonlawyers holds a financial interest in the organization to which the lawyer is subject or that one or more nonlawyers exercises managerial authority over the lawyer before accepting the representation.

(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:~~

~~(d)(l) 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;~~

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

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

(ed) 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.

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, to assure that the lawyer is loyal to the needs of the client, and to protect clients from the disclosure of their confidential information. Where someone other than the client pays the lawyer's fee or salary, manages the lawyer's work, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] The Rule 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). This Rule does not authorize a nonlawyer to practice law by virtue of partnering with a lawyer and does not lessen a lawyer's obligation to adhere to the Rules of Professional Conduct by virtue of partnering with a nonlawyer.

[2a] Paragraph (a)(4) of the ABA Model Rule was not adopted because it is inconsistent with the provisions of Rule 7.2(b), which prohibit the sharing of attorney's fees. Rule 5.4(e] Whether in accepting referrals, fee sharing, or working in a firm where nonlawyers own an interest in the firm or otherwise manage the firm, the lawyer must make certain that the professional core values of protecting the lawyer's professional judgment, ensuring the lawyer's loyalty to the client, and protecting client confidences are not compromised in any way. It may be impossible for a lawyer to work in a firm where a nonlawyer owner or manager has a duty to disclose client information to third parties, as the lawyer's duty to maintain client confidences would be compromised.

[2a] Rule 5.4(d) addresses a lawyer practicing in a non-profit corporation that serves the public interest. There is no similar provision in the ABA Model Rules.

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