Agenda

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

March 1, 2021
5:00 to 7:00 p.m.

Via Webex

Welcome, introductions, and approval of minutes	Tab 1	Simón Cantarero, Chair
Bare referral fees	Tab 2	Alyson McAllister, Gary Sackett, Dan Brough, Shelley Miller, Angela Allen, Tim Conde, Steve. Johnson, Lucy Ricca, Jeffrey Eisenberg, Simón Cantarero
Online reviews	Tab 3	Amy Oliver, Billy Walker, Gary Sackett, Alyson McAllister, Katherine Venti
Rule-like comments	Tab 4	Steve Johnson, Phil Lowry, Vanessa Ramos
Rule 1.0	Tab 5	Steve Johnson
Rules 8.4 and 14-301		Adam Bondy
Rule 5.5		Billy Walker
Remote work: American Bar Association Formal Opinion 495		Joni Jones
Projects in the pipeline: • Client fees issue from Bar Foundation		

2021 Meeting Schedule: 1st Monday of the month at 5pm.

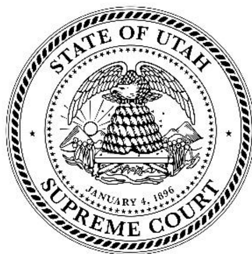
Next meeting: April 5, 2021.

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

Tab 1

Draft Minutes

The draft January 2021 minutes are attached for review and vote.



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

Meeting Minutes

January 4, 2021
Via WebEx
5:01 p.m.

Simón Cantarero, Chair

Attendees:
Simón Cantarero, Chair
Angie Allen
Adam Bondy
Daniel Brough
Tim Conde
Hon. Michael Edwards
Hon. James Gardner
Steven G. Johnson (Emeritus)
Joni Jones
Philip Lowry
Alyson Carter McAllister
Amy Oliver
Vanessa Ramos
Jurhee Rice
Austin Riter*
Gary Sackett (Emeritus)
Cory Talbot
Katherine Venti
Billy Walker*
801-5****74

Not Present
Hon. Trent Nelson*
Dane Thorley*

Staff:
Nancy Sylvester
Recording Secretary-vacant

Guests
Michael Drechsel
Shelley Miller
Lucy Ricca

1. **Welcome and approval of the December 7, 2020 meeting minutes:** Simón Cantarero, Chair

   Simón Cantarero, Chair welcomed everyone to the meeting and asked for approval of the minutes.

   Alyson McCallister moved to approve the December 7, 2020 minutes with changes. Judge Edwards seconded the motion, and it passed unanimously.

2. **Bare referral fees: Referral Fee Statement**: Lucy Ricca, Simón Cantarero, Shelley Miller, Nancy Sylvester, Steve Johnson

   On September 1, 2020, the Court authorized the sharing of reasonable fees with nonlawyers within the oversight of the regulatory reform sandbox. On December 8, 2020, the Court halted its consideration and authorization of bare referral fee arrangements. The Committee will consider and recommend ethical guidance for lawyers entering into referral fee arrangements with nonlawyers and whether and how to regulate those arrangements, including whether the collection of data from lawyers in referral fee arrangements will be necessary.

   The Committee will first evaluate whether to amend Rule 1.5(a) to clarify that the percentage of a fee paid as a referral to a nonlawyer is a factor to be considered in the reasonableness of the fee.

   Rule 1.5(a) states:

   A LAWYER SHALL NOT MAKE AN AGREEMENT FOR, CHARGE, OR COLLECT AN UNREASONABLE FEE OR AN UNREASONABLE AMOUNT FOR EXPENSES. THE FACTORS TO BE CONSIDERED IN DETERMINING THE REASONABLENESS OF A FEE INCLUDE THE FOLLOWING:

   (1) THE TIME AND LABOR REQUIRED, THE NOVELTY AND DIFFICULTY OF THE QUESTIONS INVOLVED AND THE SKILL REQUISITE TO PERFORM THE LEGAL SERVICE PROPERLY;
   (2) THE LIKELIHOOD, IF APPARENT TO THE CLIENT, THAT THE ACCEPTANCE OF THE PARTICULAR EMPLOYMENT WILL PRECLUDE OTHER EMPLOYMENT BY THE LAWYER;
   (3) THE FEE CUSTOMARILY CHARGED IN THE LOCALITY FOR SIMILAR LEGAL SERVICES;
   (4) THE AMOUNT INVOLVED AND THE RESULTS OBTAINED;
   (5) THE TIME LIMITATIONS IMPOSED BY THE CLIENT OR BY THE CIRCUMSTANCES;
   (6) THE NATURE AND LENGTH OF THE PROFESSIONAL RELATIONSHIP WITH THE CLIENT;
   (7) THE EXPERIENCE, REPUTATION AND ABILITY OF THE LAWYER OR LAWYERS PERFORMING THE SERVICES; AND
   (8) WHETHER THE FEE IS FIXED OR CONTINGENT.

   A subcommittee chaired by Alyson McAllister and joined by Angie Allen, Dan Brough, Simón Cantarero, Tim Conde, Steve Johnson, Shelley Miller, Jurhee Rice, and Gary Sackett will review Rule 1.5 and report back at the next RPC meeting.

3. **Conflict between GAL statute and Rule 1.6:** Michael Drechsel, Nancy Sylvester

   As part of the juvenile recodification bill, Mike Drechsel presented an exception to Rule 1.6 of the Rules of Professional Conduct found in statute 78A-6-902(12) regarding the disclosure of GAL records.

STATUTE 78A-6-902(12) PROVIDES A STATUTORY EXCEPTION TO RULE 1.6 OF THE RULES OF PROFESSIONAL CONDUCT AND STATES:

A. EXCEPT AS PROVIDED IN SUBSECTION 12(B), ALL RECORDS OF AN ATTORNEY GUARDIAN AD LITEM ARE CONFIDENTIAL AND MAY NOT BE RELEASED OR MADE PUBLIC UPON SUBPOENA, SEARCH WARRANT, DISCOVERY PROCEEDINGS, OR OTHERWISE. THIS SUBSECTION SUPERSEDES TITLE 63 G, CHAPTER 2, GOVERNMENT RECORDS ACCESS AND MANAGEMENT ACT.
B. CONSISTENT WITH SUBSECTION 12(D), ALL RECORDS OF AN ATTORNEY GUARDIAN AD LITEM:
    I) ARE SUBJECT TO LEGISLATIVE SUBPOENA, UNDER TITLE 36, CHAPTER 14, LEGISLATIVE SUBPOENA POWERS; AND
    II) SHALL BE RELEASED TO THE LEGISLATURE.
C. EXCEPT AS PROVIDED IN SUBSECTION 12(C)(II):
    I) RECORDS RELEASED IN ACCORDANCE WITH SUBSECTION 12(B) SHALL BE MAINTAINED AS CONFIDENTIAL BY THE LEGISLATURE.
    II) NOTWITHSTANDING SUBSECTION 12(C)(I), THE OFFICE OF THE LEGISLATIVE AUDITOR GENERAL MAY INCLUDE SUMMARY DATA AND NONIDENTIFYING INFORMATION IN ITS AUDITS AND REPORTS TO THE LEGISLATURE.
D. SUBSECTION 12(B) CONSTITUTES AN EXCEPTION TO RULES OF PROFESSIONAL CONDUCT, RULE 1.6, AS PROVIDED BY RULE 1.6(B)(4), BECAUSE OF:
    a. THE UNIQUE ROLE OF AN ATTORNEY GUARDIAN AD LITEM DESCRIBED IN SUBSECTION (8);AND
    b. THE STATE'S ROLE AND RESPONSIBILITY;
        I) TO PROVIDE A GUARDIAN AD LITEM PROGRAM; AND
        II) AS PARENS PATRIAE, TO PROTECT MINORS.

    A CLAIM OF ATTORNEY-CLIENT PRIVILEGE DOES NOT BAR ACCESS TO THE RECORDS OF AN ATTORNEY GUARDIAN AD LITEM BY THE LEGISLATURE THROUGH LEGISLATIVE SUBPOENA.

RULE 1.6(B)(4) STATES:
A LAWYER MAY REVEAL INFORMATION RELATING TO THE REPRESENTATION OF A CLIENT TO THE EXTENT THE LAWYER REASONABLY BELIEVES NECESSARY TO SECURE LEGAL ADVICE ABOUT THE LAWYER'S COMPLIANCE WITH THESE RULES.

The discussion was tabled pending final legislation.

4. **Meeting Schedule:** (all)
February 1, 2021 at 5:00 p.m.
March 1, 2021 at 5:00 p.m.
April 5, 2021 at 5:00 p.m.
May 3, 2021 at 5:00 p.m.
June 7, 2021 at 5:00 p.m.
July 2021: No meeting
August 2, 2021 at 5:00 p.m.
August 30, 2021 at 5:00 p.m.
September 2021: No meeting
October 4, 2021 at 5:00 p.m.
November 1, 2021 at 5:00 p.m.
December 6, 2021 at 5:00 p.m.-Tentative

The meeting adjourned at 6:16 p.m. The next meeting will be held on February 1, 2021 at 5p.m. via WebEx.

Tab 2

The referral fee subcommittee's draft Rule 1.5 is attached for review.

Rule 1.5. Fees.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a

contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A ~~R~~referral fee~~s~~ paid to a lawyer who does not represent the client in the referred matter shall:

(1) not be paid up-front to the referring lawyer;

(2) not be paid until such time as a fee for legal services is payable to the lawyer representing the client in the referred matter;

(3) not be passed directly or indirectly to the client;

(4) be subject to the client's giving informed consent, confirmed in writing, to the terms of the referral fee agreement; and

(5) comply with Rule 1.5(a) requirement that the total fee not be unreasonable. [*or* the total fee be reasonable.]

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (a)(1) through (a)(8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee but is obligated to return any unearned portion. See Rule1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount

when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Referral Fees

[7] Paragraph (e) applies only to referral fees paid by one lawyer to another lawyer. For referral fees paid by a lawyer to a nonlawyer, see Rule 5.4. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter diligently. See Rules 1.1 and 1.3. Paragraph (e)(3) prohibits passing along the referral fee to the client either as a cost or an increase of the total fee.

[7a] Utah Rule 1.5(e) differs substantially from the ABA Model Rule.

[8] Omitted.

Disputes over Fees

[~~7~~9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law

may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

[~~8~~10] This rule differs from the ABA model rule.

Press Release
December 8, 2020

Allowing lawyers to enter into new and varied business arrangements to increase innovation and efficiency in Utah's legal market and thereby increase access to justice is a central goal of the Court's regulatory reform efforts. Permitting lawyers to share fees with nonlawyers is an aspect of these efforts. Thus, the Court, on September 1, 2020, authorized the sharing of reasonable fees with nonlawyers within the oversight of the regulatory reform Sandbox. It has become apparent, however, that the payment of referral fees—compensation paid to nonlawyers for the sole purpose of ensuring the referral of legal work—presents potential ethical challenges for lawyers and needs further informed consideration by the Court.

In light of this need for further study, as of today the Court is halting the consideration and authorization of bare referral fee arrangements paid by lawyers to nonlawyers. Bare referral fee arrangements are those in which payment is made by the lawyer to the nonlawyer solely to compensate the nonlawyer for referring a potential client to the lawyer; there is no other business relationship between the lawyer and nonlawyer.

The Court will ask its advisory committee on the rules of professional responsibility to undertake further study of the issue of referral fees paid to nonlawyers. The committee's mandate in this regard will be to consider and recommend any further ethical guidance to be given to lawyers entering into referral fee arrangements with nonlawyers and to consider whether and how to oversee those arrangements, including whether the collection of data from lawyers in referral fee arrangements will be necessary. One of the committee's first items of business will be evaluating whether to amend Rule 1.5(a) to

clarify that the percentage of a fee paid as a referral to a nonlawyer is a factor to be considered in the reasonableness of the fee.

Applications to the Office solely proposing referral fee arrangements without any other non-traditional services or models will be tabled until further notice from the Court. The Court will, however, continue to consider and, as appropriate, authorize, other innovative business arrangements and service models involving lawyers and nonlawyers that incorporate innovations beyond bare referral fee arrangements. Such arrangements and services will be processed through the Sandbox via the Innovation Office's regulatory framework.

Tab 3

The online reviews subcommittee report is attached.

Online Reviews Subcommittee Report

Question: Should Rule 7.1 be amended to regulate the information contained on websites such as Avvo, that purport to rank attorneys?

Response: The subcommittee does not recommend making any of the suggested changes to the rules. The group felt the Rules of Professional Conduct had no ability to govern the websites themselves and the changes to the lawyer advertising rules eliminated most restrictions on advertising, so the Subcommittee felt that it didn't make sense to regulate the conduct of the lawyers using those websites.

Question: Should Rules 1.6 be amended to permit lawyers to reveal confidential information about a client in response to an online client review?

Response: The Subcommittee felt that explicitly permitting attorneys to disclose confidential client communications to respond to online client reviews was ill-advised and created the potential for a very slippery slope, particularly in trying to draw a line as to how much of the confidential information was necessary to respond to a criticism versus how much information was too much.

Question: Should Rule 7.1 be amended to permit lawyers to compensate former clients for reviews?

Response: The Subcommittee felt the issue of compensating clients for providing reviews was more appropriately addressed by the subcommittee formed in January to address the bare referral issue and Rule 1.5. We therefore referred the issue to that subcommittee chaired by Alyson.

Tab 4

Rule-like Comments

In November when Elizabeth Wright and Steve Johnson recommended to the Supreme Court that the Lawyer and Licensed Paralegal Practitioner Rules of Professional Conduct be combined, the Court expressed concern with Comment 6 in Rule 1.0 . The comment contained mandatory rule-like language. The Court asked that it be fixed. The subcommittee's recommendation for fixing the language is attached.

Rule 1.0
COMMENTS
*****

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), 1.8, 1.9(b), 1.12(a), and 1.18(d). 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~~ Other rules require the lawyer to make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. See, e.g., Rules 1.4(b) and 1.8. 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.

Tab 5

From Steve Johnson:
John Bogart raised a concern that Rule 1.0 defines government lawyers as a firm, but Rule 1.10 says that for conflicts they aren't a firm. Comment [1a] to Rule 1.10 explains the distinction, but in the interest of usefulness andunderstanding, we should perhaps also state in the comments to Rule 1.0 that the rules apply to government lawyer firms, except when it comes to conflicts of interest.

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) “Legal Professional” includes a lawyer and a licensed paralegal practitioner.

(i) “Licensed Paralegal Practitioner” denotes a person authorized by the Utah Supreme Court to provide legal representation under Rule 15-701 of the Supreme Court Rules of Professional Practice.

(j) "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.

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

(l) "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.

(m) "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.

(n) “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.

(o) "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.

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

(q) "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.

(r) "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.

The general rule that government law departments constitute a firm for the purposes of these rules does not apply to conflicts of interest questions. See Rules 1.10(f) and 1.11.

[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 (r) 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 (r).

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.

Effective May 1, 2019