Agenda

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

December 6, 2021
5:00 to 7:00 p.m.

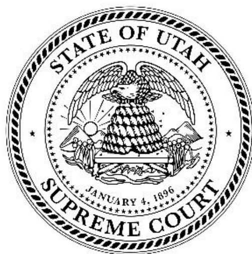
Via Zoom

Welcome and approval of minutes	Tab 1	Simón Cantarero, Chair
Rule 3.8 • Petition to amend Rule 3.8 regarding special responsibilities of prosecutors	Tab 2	Curtis Larson
Rules 1.0, 5.8. and 5.4: • Referral fees, fee sharing, and solicitation	Tab 3	Alyson McAlister (subcommittee chair), Angie Allen, Dan Brough, Simón Cantarero, Robert Gibbons, Jurhee Rice, Gary Sackett Sue Crismon (Innovation Office)
Rule 8.3 • Mediation, arbitration, and confidentiality	Tab 4	Steve Johnson, Nancy Sylvester
Rule 8.4(c) • Application to prosecutors involved in lawful, covert operations	Tab 5	Joni Jones
Projects in the pipeline: • Client fees issue from Bar Foundation (Kim Paulding) • Rules 8.4, 14-301 (recommended to Supreme Court)		--

2022 Meeting Schedule: 1st Tuesday of the month from 4 to 6 p.m.

Next meeting: January 4, 2021

Tab 1



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

[Draft] Meeting Minutes
October 4, 2021

ZOOM

17:00 Mountain Time

J. Simon Cantarero, Chair

Attendees:
J. Simon Cantarero, Chair
Angie Allen
Dan Brough
Hon. Mike Edwards
Hon. James Gardner
Robert Gibbons
Steve Johnson (Emeritus)
Joni Jones
Phil Lowry
Alyson McAllister
Julie J. Nelson
Hon. Trent Nelson (Emeritus)
Hon. Amy Oliver
Jurhee Rice
Austin Riter
Gary Sackett (Emeritus)
Cory Talbot
Dane Thorley
Katherine Venti
Billy Walker

Staff:
Nancy Sylvester
Scotti Hill

Guests:
Sue Crismon, Jacqueline Carlton

Absent:
Adam Bondy
M. Alex Natt, Recording Secretary

1. **Welcome and approval of the September 13, 2021 meeting minutes:** Mr. Canterero

   Chair Cantarero recognized the existence of a quorum, welcomed everyone to the meeting, and it commenced at 17:07.

   Mr. Cantarero asked for a Motion to approve the September 13, 2021 meeting minutes.

   Scotti Hill indicated a needed change that corrects the misspelling of her name from "Scottie" to "Scotti" in the September minutes.

   Alyson McAllister moved and Katherine Venti seconded the Motion. The minutes were adopted unanimously with the noted corrections.

   Utah State Bar's General Counsel, Nancy Sylvester, explained that the Bar will now staff the RPC Committee. She explained that the committee remains a Supreme Court advisory committee, and as such appointments still require confirmation by the Supreme Court. The predominant change is that the Bar will send invites and rule drafts, but the rest of the Committee's work will remain the same.

2. **Referral Fees (New Rule 5.8, Existing Rules 5.4, 1.5, and 1.0):** (Chair Cantarero)

   Mr. Cantarero acknowledged a miscommunication regarding **Rule 5.4** and bare referral fees, stating that there are additional considerations the Committee did not discuss before voting on amendments to the rule last month.

   Mr. Cantarero suggested amending **Rule 5.4(c)** to state:

   (c) A lawyer or law firm may pay a referral fee to a nonlawyer only if the referral fee complies with Rule 5.8.

   In conjunction with the above amendment, comment [3] should also be amended as follows:

   Paragraph (c) permits individual lawyers or law firms to pay nonlawyers for client referrals in accordance with Rule *5.8*. Other fee sharing arrangements with nonlawyers, *besides referral fees as defined in Rule 1.0*, are governed by Supreme Court Standing Order No. 15. Whether accepting or paying for referrals, or fee-sharing, the lawyer must protect the lawyer's professional judgment, ensure the lawyer's loyalty to the client, and protect client confidences.

   Sue Crismon, Executive Director of the Office of Legal Service Innovation, joined the meeting and stated that the Innovation Office is currently working on a rule that would remove Alternative Business Structures (ABS) from the Sandbox. She stated this move may impact Rule 5.4(d). For now, fee sharing and fee sharing

with nonlawyers stays within the purview of the Office of Legal Service Innovation.

Regarding **Rule 5.8**, Mr. Cantarero proposed the addition of a comment [3], to clarify which actions are strictly outside the scope of the rule. Mr. Cantarero asked the Committee if the amendment provides a good explanation of actions not included in the rule. He explained that law firms often pay advance fees for lead generation--fees they would pay regardless of whether the referral results in a client or not.

The proposed comment [3] reads:

> [3] Fees paid for generating consumer interest for legal services with the goal of converting the interests into clients, such as lead generation service providers, online banner advertising, pay-per-click marketing, and similar marketing fees, are not subject to the requirements of this rule.

Mr. Cantarero also suggested the following language be pulled from Rule 5.8(c), and added to the end of comment [2]:

> Even if the lawyer does not intend to call the person as a witness, if it is foreseeable that an opposing party or third party may do so, a referral fee violates this rule. Potential witnesses may include treating providers, eyewitnesses, and family and friends of the client.

Alyson McAllister agreed that this is comment language, not rule language. Ms. Sylvester stated that explanatory language is perfect for comments, as opposed to rule language that includes words like "should," that impose a duty.

The Committee also discussed an addition to the definitions section in **Rule 1.0(p)**, which would define referral fees as:

> "Referral fee" or "referral fees" is any exchange in value, whether in cash or in kind, bestowing an economic benefit to the referring party beyond what would be considered marginal or of minimal value for accounting and tax purposes under applicable law. *A referring party does not include a lawyer who continues to represent the client in the referred matter*."

The Committee acknowledged the importance of clearly stating *what* the referral fee was compensating the lawyer *for*. Ultimately, the referral fee is for the referral of a client, whether the lawyer ends up representing the client or not.

Therefore, the Committee suggested Rule 1.0(p) be amended to say:

> "Referral fee" means any exchange of value, whether in cash or in kind and beyond marginal or of minimal value, *that is paid for the referral of a client*. A fee shared with a lawyer who continues to represent the client in the matter referred is not considered a referral fee for the purposes of these rules."

Ms. McAllister moved to amend 1.0(h) to replace *includes* with *means*, as well as the amended definition of "referral fee" noted above in 1.0(p). Robert Gibbons seconded the Motion. Billy Walker opposed. The yay votes prevailed. The changes were adopted.

Mr. Cantarero recommended removing the last two sentences of Rule 5.8(c), which read: "relative to the total attorney fees that may ultimately be earned, considering any applicable factors in Rule 1.5(a)" to a new comment [2]. The previous comment numbers will be reordered, such that comment [3] will now become comment [4].

The last line of comment (a)(2) referencing "referral fees" will also be amended to say, "referral *fee*."

Ms. McAllister moved to accept the changes. Mr. Givens seconded the Motion. The changes were accepted.

3. **Antidiscrimination and Professionalism and Civility rules (Rules 8.4 and 14-301)**. (Simon Cantarero)

Rule 8.4. Misconduct.

Mr. Johnson and Mr. Cantarero updated the Committee on the sub-committee's recommendation.

The first proposed amendment was the addition to Rule 8.4 of Comment [6], which will read:

> [6] Participants in the legal process include lawyers, clients, witnesses, judges, clerks, court reporters, translators, bailiffs, arbitrators, and mediators.

Ms. Sylvester suggested that, as per the Supreme Court's style guide, the Committee should use lower case lettering instead of numbering to start the rule. The materials showed the rule starting with (1) instead of (a). Mr. Cantarero said that given how ingrained the current numbering system was in case law, that perhaps the Court would make an exception for Rule 8.4.

The Committee then discussed section (d) which prohibits lawyers from "engag[ing] in conduct that is prejudicial to the administration of justice." The Committee added paragraph (2) to clarify that (d) is no longer deemed professional misconduct if actions are otherwise protected by the First Amendment. The paragraph (2) would read:

> (2) Paragraphs (1)(d), (1)(g) and (1)(h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article 1 of the Utah Constitution.

Mr. Walker noted that there is no case law in Utah as to what constitutes "conduct prejudicial to the administration of justice," which is in (1)(d). Other jurisdictions, however, discuss conduct that constitutes an "unnecessary waste of judiciary resources." Mr. Walker acknowledged that (d) is a very broad category of misconduct, while agreeing with Joni Jones that the prohibition may be tempered by the fact that the First Amendment is always a defense to the purported behavior.

The committee then discussed that 8.4(g) prohibits employment discrimination within a firm, and is given further substance through comment [4], which states, in part:

> [4] The substantive law of antidiscrimination and anti-harassment statutes and case law governs the application of paragraph (1)(g), except that for the purposes of determining a violation of paragraph (1)(g), the size of the law firm or number of employees is not a defense.

Comment [9] states:

> [9] This rule differs from ABA Model Rule 8.4 to the extent that it renumbers the rule and adds two "safe harbor" paragraphs, changes paragraph (1)(g), adds paragraph (1)(h), and modifies the comments accordingly.

The Committee agrees that it makes sense to clarify the precise ways in which this rule differs from the ABA rule because the amendments are numerous.

Judge Trent Nelson suggested the Committee omit the safe harbor" language.

Rule 14-301. Professionalism and Civility

Regarding the proposed additions to the preamble of Rule 14-301, Mr. Cantarero stated this language aims to inform attorneys as to why they should abide by the standards.

Mr. Walker asked if the language aims to be aspirational (to provide context) or to create language that renders the standards enforceable. He explained that the preamble to the Rules of Professional Conduct establishes what the rules are supposed to do and what they are not.

Mr. Cantarero stated that the preamble provides the Court an affirmative defense in the event of a constitutional challenge.

Nancy Sylvester noted that the inclusion of "shall" language denotes enforceability, while "should" language is aspirational. As such, the Committee should make clear in the preamble what is enforceable and what is not.

The Committee recommended adding the following to the end of the proposed language to affirm what the Court deems to be enforceable:

> "As such, the Court has determined that these standards are enforceable consistent with the Rules of Professional Conduct."

The amended language will also be placed at the beginning of the preamble, and will read:

> The fair and equal administration of justice is an important function of a civil society. The Court has a compelling interest to ensure and promote the fair administration of justice, to ensure all participants in the judicial system or legal process are treated fairly and respectfully, and to provide remedial measures when lawyers and legal professionals face discrimination in their employment. Unlawful discrimination or harassment in legal proceedings or in the operation of a law practice is inappropriate and damages the perception that the administration of justice is based on fairness. *As such, the Court has determined that these standards are enforceable consistent with the Rules of Professional Conduct*.

The Committee recommended an additional amendment to the second paragraph under subsection 3.

> "Lawyers *acting in the practice of law* ~~*or in the administration of a firm, or other entity providing legal services*~~… shall avoid unlawful discrimination…"

Ms. Venti moved to include an additional sentence to the preamble, to place the paragraph with the added sentence to the top of the preamble, and to amend the second paragraph under subsection 3 as noted. Angie Allen seconded the Motion. The changes were adopted unanimously with the noted corrections.

4. Rules to Supreme Court.

Mr. Cantarero noted that he will prepare a letter to the Supreme Court with a recommendation to circulate for comment the following rules: Rule 1.0, Rule 5.4, and Rule 5.8 (referral fee rules); and Rule 8.4 and Rule 14-301 (anti-discrimination rules).

5. Adjournment.

The meeting adjourned at 18:50.

The next meeting will be held on December 6, 2021.

Tab 2

Petition for Amendment of Utah Rule of Professional Conduct 3.8, Special Duties of a Prosecutor

Mr. Cantarero,

Thank you for taking time to speak with me yesterday. I appreciated your understanding and assistance in how to proceed with a proposal of this type. As I mentioned to you, the foundation of my proposal stems from my service as a Deputy Utah County Attorney in the office's Criminal Division, for nearly 27 years. I recently retired from public service and am now on inactive status with the Utah State Bar. For some time I have felt that Rule 3.8 should be amended in two ways to update a prosecutor's ethical duties to victims of criminal offenses, and to assure equal application of the law to all persons to be charged and prosecuted for violation of a criminal law. I proposed the following amendments to Rule of Professional Conduct 3.8:

> Rule 3.8. Special Responsibilities of a Prosecutor.
>
> The prosecutor in a criminal case shall:
> (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
> (b) Make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
> (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
> (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; ~~and~~
> (e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6~~.~~;
> (f) Assure that the constitutional and statutory rights of persons who suffer the consequences of another's criminal acts are protected and effectuated; and
> (g) Assure that criminal statutes and ordinances, any element or provision of a statute or ordinance, including the level of the offense, or any combination of statutes or ordinances, sentencing enhancements or similar provisions of law, are applied in equal fashion to all persons who are similarly situated in relation to those laws by personal circumstance or criminal history, and without regard to race, color, sex, national origin, sexual orientation, gender identity, age, religion or creed, in charging an offense, and during the prosecution thereof.

I offer the following comments pursuant to Judicial Council Code of Judicial Administration

Rule 11-102, regarding the need for and anticipated effect of the proposal.

Paragraph (f).
Prosecutors have a special duty that is spread across many fields, specifically, enforce the law, protect society, bring justice under the law to victims, make victims whole through restitution, and be a general minister of justice for the defendant. It's not uncommon for a prosecutor to be so busy focusing attention in one of these fields to loss track of the responsibilities in one of the others. Under current laws, victims possess a right to intervene in a case when they sense that their rights have been, or are being, impinged, yet most hesitate to do so due to personality, fear, or financial cost for representation. The court can correct issues when raised, yet, shouldn't there be some consequence for a dilatory prosecutor? To my knowledge, currently there isn't a rule of professional conduct which allows victims of criminal violations to file a complaint with the bar as victims are not seen as clients of a prosecutor. The amendment corrects that deficiency in the rules. It's anticipated that the effect of this proposal will be prosecutors paying greater attention to the victim's constitutional and statutory rights in a case, modify their approach or case management procedures in relation to them if necessary, and more fully effectuate and empower the victim's interest in their case.

Paragraph (g):
Prosecutors have a constitutional requirement upon them to treat all person equally under the law. They take an Oath to support, obey and defend two constitutions. The question is how to assure a prosecutor is fulfilling that requirement. Though a federal lawsuit can be filed for a violation of an established constitutional right, little will be accomplished by doing so as a prosecutor possesses "absolute immunity" from such. It's very difficult to pierce this mantle of immunity. Rule 3.8 lags behind the societal trend of today regarding equal treatment of persons under the law and accountability for a prosecutor not doing so. My proposal gives greater strength and foundation to the Oath to which a prosecutor subscribes, and their constitutional requirements. It also presents an alternative avenue of review to those who believe they have been injured by a prosecutor's unequal application of the law towards them and in their case. It's anticipated that the effect of this amendment will be that prosecutors will be more watchful of their constitutional duties of equal treatment to all persons, seek to assure with greater vigilance the equal application of laws in charging decisions and the equitable charging of offense levels as established by the law, prosecute offenses with an enhanced sensitivity to their obligation to be ministers of justice, better understand the application of law to individual circumstances, eliminate personal bias, and monitor the justice system for any appearance of inequitable application of the law.

Thank you for this opportunity,

Curtis L. Larson

Curtis L. Larson
Bar #6598
801-831-1804

1 **Rule 3.8. Special Responsibilities of a Prosecutor.**

2 The prosecutor in a criminal case shall:

3 (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by
4 probable cause;

5 (b) Make reasonable efforts to ensure that the accused has been advised of the right to,
6 and the procedure for obtaining, counsel and has been given reasonable opportunity to
7 obtain counsel;

8 (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial
9 rights, such as the right to a preliminary hearing;

10 (d) Make timely disclosure to the defense of all evidence or information known to the
11 prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in
12 connection with sentencing, disclose to the defense all unprivileged mitigating
13 information known to the prosecutor, except when the prosecutor is relieved of this
14 responsibility by a protective order of the tribunal; and

15 (e) Exercise reasonable care to prevent investigators, law enforcement personnel,
16 employees or other persons assisting or associated with the prosecutor in a criminal
17 case from making an extrajudicial statement that the prosecutor would be prohibited
18 from making under Rule 3.6.

19 (f) Assure that the constitutional and statutory rights of persons who suffer the
20 consequences of another's criminal acts are protected and effectuated; and

21 (g) Assure that criminal statutes and ordinances, any element or provision of a statute
22 or ordinance, including the level of the offense, or any combination of statutes or
23 ordinances, sentencing enhancements or similar provisions of law, are applied in equal
24 fashion to all persons who are similarly situated in relation to those laws by personal
25 circumstance or criminal history, and without regard to race, color, sex, national origin,
26 sexual orientation, gender identity, age, religion, or creed, in charging an offense, and

27 during the prosecution thereof.

28 Comment

29 [1] A prosecutor has the responsibility of a minister of justice and not simply that of an
30 advocate. This responsibility carries with it specific obligations to see that the defendant
31 is accorded procedural justice and that guilt is decided upon the basis of sufficient
32 evidence. Precisely how far the prosecutor is required to go in this direction is a matter
33 of debate and varies in different jurisdictions. See Rule 3.3(d), governing ex parte
34 proceedings, among which grand jury proceedings are included. Applicable law may
35 require other measures by the prosecutor and knowing disregard of those obligations or
36 systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

37 [2] Paragraph (c) does not apply to an accused appearing pro se with the approval of
38 the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly
39 waived the rights to counsel and silence.

40 [3] The exception in paragraph (d) recognizes that a prosecutor may seek an
41 appropriate protective order from the tribunal if disclosure of information to the
42 defense could result in substantial harm to an individual or to the public interest.

43 [3a] Utah has not adopted the ABA version of Rule 3.8. ABA Model Rule 3.8(d),
44 requiring the prosecution to inform the tribunal of mitigating information related to
45 sentencing, creates an unreasonable burden and is not deemed workable where the
46 same information is required to be disclosed to the defense counsel who should be in
47 the best position to decide what to present to the tribunal. The ABA's paragraph (e)
48 regarding limitations on subpoenaing lawyers to grand juries or other legal proceedings
49 is viewed as unnecessary, as there are adequate safeguards in place for federal
50 prosecutors, and the Utah criminal justice system does not typically use the grand jury
51 procedure. Utah has not adopted the ABA's proposed paragraph (f), because the
52 changes are either unnecessary because of, or are potentially inconsistent with, the
53 provisions of Rule 3.6.

Tab 3

Referral Fee Rules:
At its last conference, the Supreme Court requested that the committee look at
1) the "indirect" passing along of referral fees to clients;
2) spelling out the reasonableness factors in paragraph (c) rather than referring to Rule 1.5(a); and
3) placing comment [3], which feels like a substantive definition, in Rule 1.0.

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) “Lawyer” ~~includes~~ denotes lawyers licensed to practice law in any jurisdiction of the United States, foreign legal consultants, and licensed paralegal practitioners, insofar as the licensed paralegal practitioner is authorized in Utah Special Practice Rule 14-802, unless provided otherwise.

(i) “Legal Professional” ~~includes~~ denotes a lawyer and a licensed paralegal practitioner.

28 (j) “Licensed Paralegal Practitioner” denotes a person authorized by the Utah Supreme Court
29 to provide legal representation under Rule 15-701 of the Supreme Court Rules of Professional
30 Practice.
31 (k) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a
32 professional corporation, or a member of an association authorized to practice law.
33 (l) “Public-facing office” means an office that is open to the public and provides a service that
34 is available to the population in that location.
35 (~~l~~m) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the
36 conduct of a reasonably prudent and competent lawyer.
37 (~~m~~n) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes
38 that the lawyer believes the matter in question and that the circumstances are such that the
39 belief is reasonable.
40 (~~n~~o) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of
41 reasonable prudence and competence would ascertain the matter in question.
42 (~~o~~p) “Reckless” or “recklessly” denotes the conscious disregard of a duty that a lawyer is or
43 reasonably should be aware of, or a conscious indifference to the truth.
44 (q) “Referral fee” means any exchange of value, whether in cash or in kind and beyond
45 marginal or of minimal value, that is paid for the referral of a client. A fee shared with a
46 lawyer who continues to represent the client in the matter referred is not considered a referral
47 fee for the purposes of these rules. Fees paid for generating consumer interest for legal services
48 with the goal of converting the interests into clients, such as lead generation service providers,
49 online banner advertising, pay-per-click marketing, and similar marketing fees, are not referral
50 fees.
51 (~~p~~r) "Screened" denotes the isolation of a lawyer from any participation in a matter through the
52 timely imposition of procedures within a firm that are reasonably adequate under the
53 circumstances to protect information that the isolated lawyer is obligated to protect under
54 these Rules or other law.
55 (~~q~~s) "Substantial" when used in reference to degree or extent denotes a material matter of clear
56 and weighty importance.

(~~r~~t) "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.

(~~s~~u) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording 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), 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. Other rules require a 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

115 discussion of the client's or other person's options and alternatives. In some circumstances it
116 may be appropriate for a lawyer to advise a client or other person to seek the advice of other
117 counsel. A lawyer need not inform a client or other person of facts or implications already
118 known to the client or other person; nevertheless, a lawyer who does not personally inform the
119 client or other person assumes the risk that the client or other person is inadequately informed
120 and the consent is invalid. In determining whether the information and explanation provided
121 are reasonably adequate, relevant factors include whether the client or other person is
122 experienced in legal matters generally and in making decisions of the type involved, and
123 whether the client or other person is independently represented by other counsel in giving the
124 consent. Normally, such persons need less information and explanation than others, and
125 generally a client or other person who is independently represented by other counsel in giving
126 the consent should be assumed to have given informed consent.
127 [7] Obtaining informed consent will usually require an affirmative response by the client or
128 other person. In general, a lawyer may not assume consent from a client's or other person's
129 silence. Consent may be inferred, however, from the conduct of a client or other person who
130 has reasonably adequate information about the matter. A number of rules require that a
131 person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of
132 "writing" and "confirmed in writing," see paragraphs (r) and (b). Other rules require that a
133 client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For
134 a definition of "signed," see paragraph (r).
135 **Screened**
136 [8] This definition applies to situations where screening of a personally disqualified lawyer is
137 permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.
138 [9] The purpose of screening is to assure the affected parties that confidential information
139 known by the personally disqualified lawyer remains protected. The personally disqualified
140 lawyer should acknowledge the obligation not to communicate with any of the other lawyers
141 in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on
142 the matter should be informed that the screening is in place and that they may not
143 communicate with the personally disqualified lawyer with respect to the matter. Additional

144 screening measures that are appropriate for the particular matter will depend on the
145 circumstances. To implement, reinforce and remind all affected lawyers of the presence of the
146 screening, it may be appropriate for the firm to undertake such procedures as a written
147 undertaking by the screened lawyer to avoid any communication with other firm personnel
148 and any contact with any firm files or other information, including information in electronic
149 form, relating to the matter, written notice and instructions to all other firm personnel
150 forbidding any communication with the screened lawyer relating to the matter, denial of
151 access by the screened lawyer to firm files or other information, including information in
152 electronic form, relating to the matter and periodic reminders of the screen to the screened
153 lawyer and all other firm personnel.
154 [10] In order to be effective, screening measures must be implemented as soon as practical
155 after a lawyer or law firm knows or reasonably should know that there is a need for screening.
156 [10a] The definitions of "consult" and "consultation," while deleted from the ABA Model Rule
157 1.0, have been retained in the Utah Rule because "consult" and "consultation" are used in the
158 rules. See, e.g., Rules 1.2, 1.4, 1.14, and 1.18.

Rule 5.8. Referral Fee.

(a) **Referral fee restrictions.** A referral fee paid to a non-lawyer or paid to a lawyer who does not represent the client in the referred matter must:

(1) not be paid until an attorney fee is payable to the lawyer representing the client in the referred matter;

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

(3) be subject to the client's giving informed consent confirmed in writing to the terms of the referral fee arrangement.

A referring party is not prohibited from charging reasonable fees directly to the client for services actually provided by the referring party, whether related to the claim or not.

(b) **No referral fee to potential witnesses.** No referral fee may be paid, directly or indirectly, to a potential witness in the referred case.

(c) **Reasonableness of referral fee.** Any referral fee payable in the case must be reasonable relative to the total attorney fees that may ultimately be earned, considering ~~any applicable factors in Rule 1.5(a)~~ the following factors:

(1) the referral fee customarily paid in the locality for similar referrals;

(2) the amounts involved and the results obtained; and

(3) the nature and length of referrer's professional relationship with the client.

Comment

[1] Paragraph (a) prohibits lawyers from paying a referral fee to a person making a referral to them until the lawyer who represents the client in the matter is entitled to be paid attorney fees. In the case of a contingent fee matter, the lawyer may not pay the referral fee to the referring person until the lawyer who actually represents the client in the matter is entitled to receive the contingent fee, which may be at the conclusion of the matter. 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.

Commented [NS1]: Justice Lee: All fees get passed on indirectly from an economic standpoint. Perhaps this should be removed or further clarified?

Follow up: added clarification to Comment [1].

Commented [NS2]: Justice Lee noted that he didn't think this was clear enough. We need to give more guidance. Drop in some factors here. Don't refer to Rule 1.5(a).

Commented [NS3]: Didn't include these factors from 1.5(a):
(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;
(5) the time limitations imposed by the client or by the circumstances;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) whether the fee is fixed or contingent.

Modified these factors:
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(6) the nature and length of the professional relationship with the client;

27 Paragraph (a)(2) prohibits passing along the referral fee to the client either as a cost
28 ("directly") or as an increase ("indirectly") of the total fee. For the definitions of
29 "informed consent," "confirmed in writing," and "referral fees," see Rule 1.0.

30 [2] Referral fees to a non-lawyer who is a potential witness may create a conflict of interest
31 between the client and the potential witness referring party. Additionally, the payment
32 of a referral fee to a witness may create such a pervasive and serious appearance of
33 impropriety to the trier of fact that a client's case may be significantly compromised.
34 Before entering into an agreement to pay a referral fee, the lawyer should evaluate
35 whether the person requesting the referral fee could potentially testify to facts or issues
36 that might be relevant if the anticipated claim should proceed to trial. Even if the lawyer
37 does not intend to call the person as a witness, if it is foreseeable that an opposing party or third
38 party may do so, a referral fee violates this rule. Potential witnesses may include treating
39 providers, eyewitnesses, and family and friends of the client.

40 ~~[3] Fees paid for generating consumer interest for legal services with the goal of~~
41 ~~converting the interests into clients, such as lead generation service providers, online~~
42 ~~banner advertising, pay-per-click marketing, and similar marketing fees, are not subject~~
43 ~~to the requirements of this rule.~~

44 [4] This rule is not part of the ABA Model Rules.

45

Commented [NS4]: This is more substantive. Should be in the rule. For ex, in Rule 1.0.
Follow up: moved to referral fees definition in 1.0.

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer may provide legal services pursuant to this Rule only if there is at all times no interference with the lawyer's:

(1) professional independence of judgment,

(2) duty of loyalty to a client, and

(3) protection of client confidences.

(b) A lawyer may permit a person to recommend, retain, or pay the lawyer to render legal services for another.

(c) A lawyer or law firm may pay a referral fee to a nonlawyer only if the referral fee complies with Rule 5.8. ~~A lawyer or law firm may share legal fees with a nonlawyer if:~~

~~(1) the fee to be shared is reasonable and the fee-sharing arrangement has been authorized as required by Utah Supreme Court Standing Order No. 15;~~

~~(2) the lawyer or law firm provides written notice to the affected client and, if applicable, to any other person paying the legal fees;~~

~~(3) the written notice describes the relationship with the nonlawyer, including the fact of the fee-sharing arrangement; and~~

~~(4) the lawyer or law firm provides the written notice before accepting representation or before sharing fees from an existing client.~~

(d) A lawyer may practice law with nonlawyers, or in an organization, including a partnership, in which a financial interest is held or managerial authority is exercised by one or more persons who are nonlawyers, provided that the nonlawyers or the organization has been authorized as required by Utah Supreme Court Standing Order No. 15 and provided the lawyer shall:

(1) before accepting a representation, provide written notice to a prospective client that one or more nonlawyers holds a financial interest in the organization in which

the lawyer practices or that one or more nonlawyers exercises managerial authority over the lawyer; and

(2) set forth in writing to a client the financial and managerial structure of the organization in which the lawyer practices.

Comments

[1] The provisions of this Rule 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 retention of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (a), such arrangements must not interfere with the lawyer's professional judgment. 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 lessen a lawyer's obligation to adhere to the Rules of Professional Conduct and does not authorize a nonlawyer to practice law by virtue of being in a business relationship with a lawyer. 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.

[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).

[3] Paragraph (c) permits individual lawyers or law firms to pay non lawyers for client referrals~~, share fees with nonlawyers, or allow third party retention.~~ in accordance with Rule 5.8. ~~In each of these instances, the financial arrangement must be reasonable,~~

53 ~~authorized as required under Supreme Court Standing Order No. 15, and disclosed in~~
54 ~~writing to the client before engagement and before fees are shared.~~ Other fee sharing
55 arrangements with non-lawyers, besides referral fees as defined in Rule 1.0, are governed
56 by Supreme Court Standing Order No. 15. Whether in accepting or paying for referrals,
57 or fee-sharing, the lawyer must protect the lawyer's professional judgment, ensure the
58 lawyer's loyalty to the client, and protect client confidences.

59 [4] Paragraph (d) permits individual lawyers or law firms to enter into business or
60 employment relationships with nonlawyers, whether through nonlawyer ownership or
61 investment in a law practice, joint venture, or through employment by a nonlawyer
62 owned entity. In each instance, the nonlawyer owned entity must be approved by the
63 Utah Supreme Court for authorization under Standing Order No. 15.

64 [5] This ~~Rule~~ rule differs from the ABA model rule.

Tab 4

During a Fee Dispute Committee CLE and discussion, a question arose as to whether Rule 8.3 of the Rules of Professional Conduct requires an arbitrator or mediator to disclose a violation of Rules 1.5, 1.15, or 1.8 of the RPC if the violation is discovered during a fee arbitration or mediation. The rules are a bit muddled regarding disclosure in such cases. Rule 8.3(a) of the RPC requires a lawyer who becomes aware that another legal professional has violated the RPC in such a manner that the violation raises a substantial question as to that legal professional's honesty, trustworthiness, or fitness as a legal professional shall inform the appropriate professional authority (the OPC in most cases). Subsection (c) of this rule contains exceptions for client confidences under Rule 1.6 and for information gained by a lawyer or judge while participating in an approved lawyers' assistance program. There is no exception for a lawyer or judge participating in a fee dispute arbitration or mediation. The arbitration and mediation rules in the Rules Governing the Utah State Bar ("RGUSB") may conflict with Rule 8.3:

Rule 14-1111 provides that a committee member participating in a fee dispute arbitration or mediation shall not be called as a witness in any subsequent legal proceeding related to the fee dispute. The "subsequent legal proceeding related to the fee dispute" can include a proceeding looking at a violation of RPC 1.5, 1.15, or 1.8. This rule also provides that information and documentation submitted in a fee dispute proceeding shall be deemed confidential and shall not be disclosed.

Rule 14-1117 provides that all mediation communications are confidential.

Rule 14-1119 provides that fee dispute communications are not subject to discovery or admissible in evidence in a proceeding.

There is an exception to these non-disclosure rules in 14-1111 where, if a request is made to the Bar, confidential information may be disclosed. But this exception does not make disclosure mandatory, and this exception seems to apply only to the Bar and not to any arbitrator or mediator.

Another interesting twist to these confidentiality rules is that a judge in a court proceeding who discovers a violation of the RPC can disclose that violation pursuant to Rule 8.3. But a judge participating on a fee arbitration panel cannot disclose any arbitration information or documents. Why is there a distinction?

The RPC and the RGUSB need to be consistent. An additional exception to Rule 8.3(c) for arbitrators and mediators in fee disputes might help to solve the problem. Or a provision in the RGUSB that excludes from the confidentiality provisions a discovery of information or documents showing a violation of the RPC sufficient that 8.3(c) applies might also be helpful. Perhaps the waiver of confidentiality in such cases should not apply to fee arbitrations, but only to fee mediations, since parties often disclose confidential information to mediators and such disclosures should maybe continue to be protected.

1 **Rule 8.3. Reporting Professional Misconduct.**

2 (a) A lawyer who knows that another legal professional has committed a violation of
3 the applicable Rules of Professional Conduct that raises a substantial question as to that
4 legal professional's honesty, trustworthiness or fitness as a legal professional in other
5 respects shall inform the appropriate professional authority.

6 (b) A lawyer who knows that a judge has committed a violation of applicable Rules of
7 Judicial Conduct that raises a substantial question as to the judge's fitness for office
8 shall inform the appropriate authority.

9 (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6
10 or information gained by a lawyer or judge while participating in an approved lawyers
11 assistance program or a Utah State Bar-sponsored fee dispute resolution program.

12 Comment

13 [1] Self-regulation of the legal profession requires that members of the profession
14 initiate disciplinary investigation when they know of a violation of the applicable Rules
15 of Professional Conduct. Lawyers have a similar obligation with respect to judicial
16 misconduct. An apparently isolated violation may indicate a pattern of misconduct that
17 only a disciplinary investigation can uncover. Reporting a violation is especially
18 important where the victim is unlikely to discover the offense.

19 [2] A report about misconduct is not required where it would involve violation of Rule
20 1.6. However, a lawyer should encourage a client to consent to disclosure where
21 prosecution would not substantially prejudice the client's interests.

22 [3] If a lawyer were obliged to report every violation of the Rules, the failure to report
23 any violation would itself be a professional offense. Such a requirement existed in many
24 jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to
25 those offenses that a self-regulating profession must vigorously endeavor to prevent. A
26 measure of judgment is, therefore, required in complying with the provisions of this
27 Rule. The term "substantial" refers to the seriousness of the possible offense and not the

28 quantum of evidence of which the lawyer is aware. A report should be made to the bar
29 disciplinary agency unless some other agency, such as a peer review agency, is more
30 appropriate in the circumstances. Similar considerations apply to the reporting of
31 judicial misconduct.

32 [4] The duty to report professional misconduct does not apply to a lawyer retained to
33 represent a legal professional whose professional conduct is in question. Such a
34 situation is governed by the rules applicable to the client-lawyer relationship.

35 [5] Information about a lawyer’s or judge’s misconduct or fitness may be received by a
36 lawyer in the course of that lawyer’s participation in an approved lawyers or judges
37 assistance program. In that circumstance, providing for an exception to the reporting
38 requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to
39 seek treatment through such a program. Conversely, without such an exception,
40 lawyers and judges may hesitate to seek assistance from these programs, which may
41 then result in additional harm to their professional careers and additional injury to the
42 welfare of clients and the public.

Tab 5

Rule 8.4(c)'s provision has been interpreted by some courts to prevent attorneys from supervising undercover criminal investigations. The Utah State Bar's Ethics Advisory Opinion Committee issued an ethics opinion on this topic and opined that the rule does not apply to government attorneys overseeing an otherwise legal undercover criminal investigation. But, as with the rule on remote work, it may be appropriate to change the rule rather than rely upon an ethics opinion when, on its face, Rule 8.4(c) appears to strictly prohibit prosecutors from overseeing or assisting in undercover activities. This is an issue that has been raised in a couple of National Association of Attorneys General (NAAG) conferences.

A copy of Ethics Opinion 02-05 is attached. It gives a good summary of the issue, including an Oregon Supreme Court decision upholding discipline against an attorney under 8.4(c), saying that the court could not allow an exception for lawful covert activities when Rule 8.4(c) expressly prohibits dishonest conduct. Colorado likewise had a decision that found government lawyers supervising covert investigation violated 8.4(c).

Given a recent Supreme Court opinion (*OPC v. Bowen*), an ethics opinion should be explicitly overruled by the Court. So there could be a couple of "remedies" - by amendment to the rule or by overruling. Paragraph (2) has been added to address this issue. The paragraphs addressing the 8.4(g) and (h) amendments have been renumbered to (3) and (4).

1 **Rule 8.4. Misconduct.**

2 (1) It is professional misconduct for a lawyer to:

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

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

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

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

9 (e) state or imply an ability to influence improperly a government agency or official
10 or to achieve results by means that violate the Rules of Professional Conduct or
11 other law; ~~or~~

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

14 (g) notwithstanding the number of employees in the lawyer's firm, engage in any
15 conduct that is listed as a discriminatory or prohibited employment practice under
16 Sec 2000e-2 [Section 703] of Title VII of the Civil Rights Act of 1964, as amended, or
17 under Section 34A-5-106 of the Utah Antidiscrimination Act, as amended, or
18 pursuant to applicable court cases; or

19 (h) egregiously violate, or engage in a pattern of repeated violations of, Rule 14-301
20 if such violations harm a participant in the process and are prejudicial to the
21 administration of justice.

22 (2) Paragraph (1)(c) does not apply to a government lawyer who participates in a
23 lawful, covert governmental operation that entails conduct employing dishonesty,
24 fraud, misrepresentation, or deceit for the purpose of gathering relevant information.

Commented [NS1]: Query whether this rule may contain a numbering convention that differs from the Style Guide. The Style Guide calls for rules to start with (a). But the numbering/lettering of these provisions is so ingrained in caselaw, it would be helpful to have the rule start with a (1) so that paragraph (d), for example, is not renumbered to (a)(4) but instead becomes (1)(d).

(3) Paragraphs (1)(d), (1)(g), and (1)(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.

(4) Legitimate advocacy does not violate this rule.

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] An act of professional misconduct under Rule 8.4(1)(b), (c), (d), (e), ~~or~~ (f), (g), or (h) cannot be counted as a separate violation of Rule 8.4(1)(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(1)(a) for the purpose of determining sanctions.

[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] 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~~,~~;~~ age~~, sexual orientation; gender identity~~,~~ or genetic information~~ socioeconomic status~~, violates may violate paragraph (d) when such actions are prejudicial to the administration of justice. 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. The protected classes listed in this comment are consistent with those enumerated in the Utah Antidiscrimination Act or 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.~~

~~[3a] 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).~~

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law governs the application of paragraph (g), except that for the purposes of determining a violation of paragraph (g), the size of the 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 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 discuss the benefits and challenges of diversity and inclusion without violating

79 paragraph (g). Unless otherwise prohibited by law, implementing or declining to
80 implement initiatives aimed at recruiting, hiring, retaining, and advancing employees
81 of diverse backgrounds or from historically underrepresented groups, or sponsoring
82 diverse law student organizations, are not violations of paragraph (g).

83 [5] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of
84 the lawyer's practice or by limiting the lawyer's practice to members of any particular
85 population in accordance with these Rules and other law. A lawyer may charge and
86 collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers should
87 also be mindful of their professional obligations under Rule 6.1 to provide legal services
88 to those who are unable to pay and their obligations under Rule 6.2 not to avoid
89 appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A
90 lawyer's representation of a client does not constitute an endorsement by the lawyer of
91 the client's views or activities. See Rule 1.2(b).

92 [6] Participants in the legal process include lawyers, clients, witnesses, judges, clerks,
93 court reporters, translators, bailiffs, arbitrators, and mediators.

94 ~~[4]~~ [7] A lawyer may refuse to comply with an obligation imposed by law upon a good
95 faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a
96 good faith challenge to the validity, scope, meaning or application of the law apply to
97 challenges of legal regulation of the practice of law.

98 ~~[5]~~ [8] Lawyers holding public office assume legal responsibilities going beyond those
99 of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the
100 professional role of lawyers. The same is true of abuse of positions of private trust such
101 as trustee, executor, administrator, guardian, agent and officer, director or manager of a
102 corporation or other organization.

103 [9] This rule differs from ABA Model Rule 8.4 to the extent that it changes paragraph
104 (g), adds paragraph (h), and modifies the comments accordingly.

Utah Ethics Opinions

2002.

02-05. USB EAOC Opinion No. 02-05

UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 02-05

Issued March 18, 2002

¶ 1 **Issue:** What are the ethical considerations for a governmental lawyer who participates in a lawful covert governmental operation, such as a law enforcement investigation of suspected illegal activity or an intelligence gathering activity, when the covert operation entails conduct employing dishonesty, fraud, misrepresentation or deceit?

¶ 2 **Conclusion:** A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct. (fn1)

¶ 3 **Background:** A bar member who works for a federal agency that routinely performs undercover investigative work and covert actions directed against criminal and terrorist groups asks whether supervision of or participation in those activities violates Utah Rules of Professional Conduct 8.4(c), which states that: "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Similar issues are raised by federal and state prosecutors' supervision of undercover criminal investigations.

¶ 4 **Analysis:** On its face, Rule 8.4(c) would seem to make it professional misconduct for a lawyer to engage in any kind of misrepresentation. However, the Official Comment to Rule 8.4 is read by some to restrict its range to a more limited scope of illegal conduct:

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.". . . 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, or breach of trust, or serious interference with the administration of justice are in that category.

Relying on the Comment, commentators David Isbell and Lucantonio Salvi have concluded that Rule 8.4(c) is intended to "apply only to conduct of so grave a character as to call into question the lawyer's fitness to practice law" and does not apply to deception by undercover investigators. (fn2) Furthermore, Congress, in its report on Abscam, indicated that "[i]n this era of increasingly powerful and sophisticated criminals, some use of the undercover technique is indispensable to the achievement of effective law enforcement." (fn3)

¶ 5 Surprisingly, there is little authority bearing directly on the issue of whether Rule 8.4(c) applies to lawyer participation in lawful government covert operations. We are aware of no bar ethics opinions that have faced this question squarely. (fn4) A recent ABA opinion does hold that a lawyer's recording of a conversation without the knowledge or consent of the other party does not necessarily violate the Model Rules. (fn5) It specifically reserves, however, the question presented here:

The Committee does not address in this opinion the application of the Model Rules to deceitful, but lawful conduct by lawyers, either directly or through supervision of the activities of agents and investigators, that often accompanies nonconsensual recording of conversations in investigations of criminal activity, discriminatory practices, and trademark infringement. We conclude that the mere act of secretly but lawfully recording a conversation inherently is not deceitful, and leave for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical. (fn6)

¶ 6 The ABA opinion does cite the Isbell and Salvi article as "discuss[ing the issue] thoughtfully." (fn7) It also cites the discussion in *Apple Corps. Ltd. v. International Collectors Society*. (fn8) In that case, the plaintiffs suspected that the defendants were violating a consent order limiting the marketing or distribution of stamps bearing the image of The Beatles. In order to investigate, the suspected violations, counsel for the plaintiffs and others under their direction made phone calls posing as consumers. (fn9) When plaintiffs moved for contempt based on alleged violation of the consent order, defendants asked for sanctions against plaintiffs' counsel, claiming, *inter alia*, a violation of New Jersey's Rule 8.4(c). (fn10) Relying largely on the Isbell and Salvi article, the court held that Rule "8.4(c) does not apply to misrepresentations solely as to identity of purpose and solely for evidence gathering

purposes." (fn11) It reasoned:

Undercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing. This conduct has not been condemned on ethical grounds by courts, ethics committees or grievance committees. This limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil rights law enforcement. The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means. (fn12)

¶ 7 The Oregon Supreme Court reached a different conclusion, however, in a recent opinion reviewing a disciplinary decision by the Oregon State Bar. (fn13) The defendant in that case was accused of violating Oregon's prohibition against dishonesty, fraud, deceit and misrepresentation (set forth in DR 1-102(A)(3)) by pretending to be a chiropractor in phone conversations for the purpose of gathering information about suspected fraud by a medical services review company. The accused (supported by the United States attorney, the Oregon Attorney General and others as amici curiae) argued that there should be an investigatory exception to the disciplinary rules for "'misrepresentations . . . limited only to identity or purpose . . . made solely for the purposes of discovering information.'" (fn14) Citing *Apple Corps Ltd.* and the Isbell and Salvi article, the court explained the rationale for an exception:

Those authorities assert that public policy favors an exception that, at the least, allows investigators and discrimination testers to misrepresent their identity and purpose when they are investigating persons who are suspected of engaging in unlawful conduct. The rationale for such an exception is that there may be no other way for investigators or discrimination testers to determine if a person who is suspected of unlawful conduct actually is engaged in unlawful conduct. Therefore, the argument goes, the public benefits more from allowing lawyers to use deception than allowing unlawful conduct to go unchecked. (fn15)

¶ 8 Relying on the plain language of its disciplinary rules, however, the Oregon court declined to find an exception. It concluded that it "should not create an exception to the rules by judicial decree" and that "any exception must await full debate that is contemplated by the process of adopting and amending the Code of Professional Responsibility." (fn16)

¶ 9 "The Rules of Professional Conduct are rules of reason," however, and "should be interpreted with reference to the purposes of legal representation and of the law itself." (fn17) In light of the Official Comment to Rule 8.4(c) and longestablished practice at the time of its adoption, we do not believe that rule was intended to prohibit prosecutors or other governmental lawyers from participating in lawful undercover investigations. (fn19) We hold that as long as a prosecutor's or other governmental lawyer's conduct employing dishonesty, fraud, deceit or misrepresentation is part of an otherwise lawful government operation, the prosecutor or other governmental lawyer does not violate Rule 8.4(c).

¶ 10 In our view, Rule 8.4(c) was intended to make subject to professional discipline only illegal conduct by a lawyer that brings into question the lawyer's fitness to practice law. It was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful, undercover investigations. We cannot, however, throw a cloak of approval over all lawyer conduct associated with an undercover investigation or "covert" operation. Further, a lawyer's illegal conduct or conduct that infringes the constitutional rights of suspects or targets of an investigation might also bring into question the lawyer's fitness to practice law in violation of Rule 8.4(c). The circumstances of such conduct would have to be considered on a case-by-case basis. Nor do we provide a license to ignore the Rules' other prohibitions on misleading conduct. (fn20) We do hold, however, that a state or federal prosecutor's or other governmental lawyer's otherwise lawful participation in a lawful government operation does not violate Rule 8.4(c) based upon any dishonesty, fraud, deceit or misrepresentation required in the successful furtherance of that government operation.

Footnotes

1. We do not address in this opinion and specifically reserve the issue of whether the analysis and result of this opinion apply to a private lawyer's investigative conduct that involves dishonesty, fraud, misrepresentation or deceit.

2. David B. Isbell and Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentations Under the Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791, 816 (1995).

3. *See* Select Committee to Study Undercover Activities of Components of the Department of Justice, 97th Cong., 2d Sess. 11 (1982), quoted in Shine, Note, Deception and Lawyers: Away From a Dogmatic Principle and Toward a Moral Understanding of Deception, 64 Notre Dame L. Rev. 722, 728-29 n. 26 (1989).

4. *But see* Ala. Bar Ass'n, Op. RO-89-31 (interpreting Model Code of Professional Responsibility DR 7-104(A)(1) and holding that it is permissible for a lawyer to direct an investigator to pose as a customer in order to determine whether the plaintiff lied about his injuries).

5. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 01-422 (2001).

6. *Id.See also* Utah Ethics Advisory Op. 69-04, 1996 WL 391435 (Utah St. Bar) (similar result).

7. *Id.*

8. 15 F. Supp. 2d 456, 475-76 (D.N.J. 1998)

9. *Id.* at 458-59, 461-62.

10. New Jersey's Rule 8.4(c) is parallel to Utah's Rule 8.4(c).

11. *Id.* at 475.

12. *Id.* (citations omitted); *see also Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir. 1983) (authorizing use of "testers" in housing discrimination cases); *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973) (same); Fred C. Zacharias and Bruce A. Green, *The Uniqueness of Federal Prosecutors* , 88 Geo. L.J. 107, 231-32 (2000) ("Except with respect to surreptitious tape recording of conversations with witnesses, the reported decisions have never questioned the use of deceit in criminal investigations.").

13. *In re Gatti*, 8 P.3d 966 (Ore. 2000).

14. *Id.* at 974.

15. *Id.* at 975 (citations omitted).

16. *Id.* at 976. In response to the decision in *In re Gatti*, the Oregon legislature passed HB 3857, signed into law on June 28, 2001, which authorizes prosecutors and other government lawyers to "participate in covert activities that are conducted by public bodies . . . for the purpose of enforcing laws, or in covert activities that are conducted by the federal government for the purpose of enforcing laws, even though the participation may require the use of deceit or misrepresentation."

17. Utah Rules of Professional Conduct, Scope.

18. *See also* Official Comment to Utah Rule 4.2 (making specific approving reference to government undercover investigations). ". . . 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."

19. Some investigators, including many FBI agents, may be active members of the Bar.

20. *See, e.g.,* Utah Rules of Professional Conduct 4.1(b) (prohibiting knowing failure "to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client"); Rule 4.3(b) ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply.

Rules Cited:

8.4(c)