Agenda

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

October 4, 2022
4:00 to 5:30 p.m.
In-person and via Zoom

Welcome and approval of minutes.	Tab 1	Simón Cantarero, presiding
Review of comments to Rule 1.16.	Tab 2	Subcommittee: Dane Thorley (chair), Alex Natt, Adam Bondy, Billy Walker, Doug Thompson, and Stacy Haacke Guest: Richard Mauro, Salt Lake Legal Defenders
Review of comments to Rule 8.4(c).	Tab 3	Joni Jones
Projects in the pipeline: • Rule 1.2(d) (cannabis industry lawyers): Subcommittee will return with recommendation in November. • Rule 8.3: Recommended to Supreme Court; Court proposed minor edits; will circulate for comment shortly (Tab 4). • Rules 8.4 and 14-301: Assigned to Judicial Council's Fairness and Accountability Committee (*historical memo attached to August materials*). • LPP updates. • Rule 5.8 and referral fee fees: on hold (awaiting Supreme Court to take up again)	Tab 4	--

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

Meetings: (In-person unless otherwise indicated) November 1, December 6

Tab 1

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

[Draft] Meeting Minutes
August 23, 2022

Utah Law and Justice Center & Zoom
16:00 Mountain Time

J. Simon Cantarero, Chair

Attendees:
J. Simon Cantarero, Chair

Joni J. Jones
Alyson McAllister
Cory Talbot
Adam Bondy
Steve Johnson (Emeritus)
Jurhee Rice
Billy Walker
Austin Riter
Robert Gibbons
Hon. Amy Oliver
Hon. Mike Edwards
Phillip Lowry
Ian Quiel
Mark Hales

M. Alex Natt, Recording Secretary

Excused – Hon. Trent Nelson, Julie J. Nelson, Dane Thorley, Gary Sackett

Staff:
Nancy Sylvester

Guests:
Hannah Follender
Christine Greenwood
Jacqueline Carlton
Hon. Matthew B. Durrant
J.D. Lauritzen
Scotti Hill

1. **Welcome and approval of the June 7, 2022 meeting minutes (Chair Cantarero)**

Chair Cantarero recognized the existence of a quorum and called the meeting to order at 16:06.

The Chair welcomed new committee members Ian Quiel and Mark Hales. The Chairman welcomed Chief Justice Durrant who thanked the committee for their service and thanked emeritus member Steve Johnson for his many years of service and excellent counsel to the Utah Supreme Court and to the Utah Bar. Chair Cantarero then asked the members of the committee to introduce themselves and gave a brief overview of the workings of the Committee.

Mr. Riter moved to accept the June 7, 2022 minutes. Mr. Walker seconded the Motion. The Motion passed by acclamation.

2. Rule 1.2(d) (Mr. Riter)

Subcommittee Chair Riter presented the subcommittee's work on Rule 1.2(d) and the cannabis industry. The subcommittee asked for clarification on what precisely it was being asked to do as it seems to be a policy-laden issue that may be outside the scope of the Committee's work. The subcommittee recommended that this question be sent to the Utah Supreme Court for its consideration and comment. Mr. Walker provided background from discussions held at the ABA level and concurred.

Mr. Lauritzen asked that this matter be dealt with as an access to justice issue insofar as the conflict between state and federal law means many attorneys are reticent to counsel companies in this industry.

Mr. Johnson wondered if this issue should be broadened beyond the cannabis industry providing a safe harbor for attorneys in issues where the state and federal laws conflict.

Mr. Walker said he didn't believe that an ethics advisory opinion would be the correct vehicle to try and clarify this as it's largely a policy issue. Mr. Riter concurs. Ms. Jones noted that the legislature has legalized medical cannabis and suggested that the approach of reminding the Court of this decision by the Legislature requires that the conflict between state and federal law be resolved if possible.

The subcommittee is asked to review and revise the revisions to Rule 1.2(d) to provide the Court with options for proposed language and bring it back to the full Committee at a future meeting.

3. Projects in the Pipeline (Chair Cantarero)

Chair Cantarero discussed items in the Committee's "pipeline" and upcoming meetings.

The meeting adjourned at 17:16. The next meeting will be held on October 4, 2022 at the Law and Justice Center.

Tab 2

September 30, 2022

Rules of Professional Conduct Committee
c/o Simón Cantarero and Nancy Sylvester
via email

Members of the committee,

The Utah Supreme Court approved the committee's proposal for Rule 1.16 to be published for public comment. Seven comments were received.

- Ann Taliaferro was generally in favor of the idea that defendants should be informed about appellate rights, but she suggested making the rule more specific, spelling precisely what kinds of information that should be provided given the nature of the case. Ms. Taliaferro proposed specific language.
- "Angela" commented that she opposed the proposal as an infringement of the lawyer and client's ability to contract for services. She fears that it will require attorneys who have no interest or capacity to "do appellate work" to give advice on "matters outside their area of knowledge and expertise". She recommends limiting the requirement to giving advice about the "right to appeal".
- David Ferguson's comment is generally in favor of the proposed change and also in support of the additional specific language in Ms. Taliaferro's comment.
- I wrote a comment in response to Mr. Taliaferro and "Angela". I opined that although the specific suggestions by Ms. Taliaferro may be correct, the purpose of the rule is not to define exactly how to give competent advice in every instance, because to do so for every case would be impossible, but instead to

require defense counsel to engage in the consultation appropriate for each case. I responded to "Angela" that I did not believe attorneys were allowed ethically to contract away their obligation to give competent advice.

- Richard Mauro wrote a comment on behalf of SLLDA. Mr. Mauro opposed the proposal for 3 reasons. First, he asserts that the existing procedural rules already require courts to inform defendants of the right to appeal, limitations to an appeal from a guilty, and the right and time to appeal following sentencing. He claims that when a judge fails to follow those "errors of law" there is no ethical violation, and thus a similar error by an attorney should not be an ethical violation. Second, Mr. Mauro is concerned that the proposal creates an unreasonable burden on trial attorneys by requiring them to also know appellate law. He emphasizes that because appeals often involve ineffective assistance of counsel claims, putting the burden on counsel to advise a client regarding an appeal regarding its own performance could lead to waiving appellate rights. Third, Mr. Mauro addresses the "preserved issues" language of the comment, expressing concern that it requires trial attorneys to have appellate expertise, and adequate appellate counsel consultation cannot occur until after the appeal has been filed and the record is prepared.
- Sarah Carlquist comments a concern that creation of an ethical rule would create a disincentive for defense attorneys to cooperate, or own up to, a failure to advise the client regarding appellate rights.
- Lori Seppi agreed with Mr. Mauro and Ms. Carlquist.

I look forward to the committee's discussion of these comments.

Sincerely,

Doug Thompson

Comments to Rule 1.16

Ann Taliaferro

July 14, 2022 at 8:59 am

With regard to RPC 1.16

It is great regarding advising the client of the right to appeal — but you need to add advisements when the conviction is based on a guilty plea— because when a defendant enters a plea, they cannot "appeal" their conviction, they must raise all challenges to their plea in post conviction proceedings under Utah's Post Conviction Remedies Act. Accord Utah Code § 77-13-6 (2)(c); State v. Badikyan, 2020 UT 3, ¶ 34, 459 P.3d 967.

So I propose you add language specific to entry of a plea, advising that the defendant does not have the right to appeal from the conviction, that they do not have a right to an attorney in post-conviction proceedings, that they generally have one year from sentencing to raise challenges to their plea, and they should seek the advice of an attorney immediately if they wish to file a post-conviction petition.

For example:

> (e) In the event of a conviction or a guilty plea in a criminal case, a lawyer shall take steps to protect a client's interests securing a review of the conviction or plea.
>
> (1) in the event of a conviction from a trial, the lawyer shall take steps to protect the client's interests in a possible appeal, including informing the client of the right to take an appeal, the time within which any appeal must be filed, the potential grounds for appeal, and filing a
>
> notice of appeal on behalf of the client if requested or if the client has conveyed a desire to appeal, whether or not the lawyer believes there are grounds for an appeal.
>
> (2) in the event of a conviction based upon an unconditional plea, the lawyer shall take steps to protect the client's interests in a possible review of the plea, including informing the client of the requirement to make any challenges to the plea in a motion to withdraw the plea prior to the time sentence is announced; informing the client that if they do not raise all challenges to the plea in a timely motion to withdraw the plea, that they are jurisdictionally barred from appealing their plea; that any challenges to their plea must be raised under Utah's Post Conviction Remedies Act; that they have no right to an attorney to help them file a petition under the Post Conviction Remedies Act but should consult with a lawyer to aid them; and the time limit for filing a petition under the Post Conviction Remedies Act when challenging the plea.

Comments to Rule 1.16

Angela

July 14, 2022 at 9:01 am

RPC01.16 codified pursuant to ABA 4-9.1 is absurd. This appears, as I presume it will be applied, to interfere with both parties right to contract and limit representation up to a trial conviction, and worse sets up a malpractice claim. Not all trial lawyers have the knowledge or desire to do appellate work. This rule forces trial attorneys to advise on matters outside their area of knowledge and expertise, and potentially forces the attorney to have to consult (for a fee) with an appellate attorney to give said advice. Further, by forcing a notice of appeal to be filed by trial counsel it leaves them on the hook with the appellate court (which has happened to me). Notice of a Defendant's right to appeal should be sufficient, or else the Court should automatically address this at sentencing as to whether an appellate attorney should be appointed and how to go about that if needed within the time for appeal.

David Ferguson

July 20, 2022 at 9:32 am

I support rule RPC 1.16. It's important to hold criminal defense attorneys to an appropriate standard, and this rule involves a right that is so significant that attorneys should feel some concern about not following it. That is a positive.

If it hasn't been said elsewhere, it should be said here, the short time period following a conviction is often a messy, complicated, and emotional time for both attorneys and their clients. The relationship between the attorney and their client may be at its worst. In many cases, clients are having to internalize the reality that they may spend much or all of their remaining life in prison. Attorneys have to grapple with the emotional fallout of having so much prep and trial work amount to the same outcome as if they put no effort into the case. It can be a really, really hard time on folks. Both the attorney and the client take days-to-weeks digesting what happened in a case. One can easily find themselves asking, "I remember this happening. Did I preserve the issue? What if I didn't?" I can't think of any other anticipated situation in litigation—civil or criminal—as difficult as that time-period can be. There are some significant temptations and incentives to not inform a client about their appellate options at that stage. Unfortunately, even when an attorney does make a passing comment, it can often fall on the deaf ears of a person who just found out thy may serve the rest of their life in prison.

I agree with Ann Taliaferro's suggestion of making sure that attorneys have pressure to correctly advise about the entry of a plea and support an amendment that incorporates her suggestion. That goes to an equally, if not more, important discussion that attorneys should have with their clients.

And not to take focus away from tightening the ethical responsibilities of criminal defense attorneys, but if the committee is looking at ensuring ethical conduct is done in the criminal arena, it should take another hard look at the ABA standards governing prosecutors which it has previously declined to adopt. The shield of absolute immunity, coupled with minimal ethical standards, allows for some abysmal behavior among the most powerful attorneys in the state.

Doug Thompson

August 18, 2022 at 12:28 pm

Regarding 1.16

I appreciate Anne Marie Taliaferro's suggestions, though I think her proposal might be too specific for a rule of professional conduct. The proposed rule, as it is drafted, gives a general requirement that trial level counsel must adequately consult with the client about the right to and grounds for an appeal in order to protect those rights. More detail than that may run the risk of emphasizing one scenario at the risk of obscuring others. Instead, I think it is incumbent upon competent defense attorneys to know the details described by Anne Marie (and others) and make sure the client is apprised of the applicable options and limitations.

It's true that scope of an appeal for a defendant who pleads guilty is very different than for a defendant who is convicted at trial. It is also true that a conditional plea will preserve certain issues and not others. I just don't think those details can or should be spelled out in the rule. The specific details about what issues can or should be appealed for each defendant will be different for each defendant. Rather than describe every different scenario and what must be disclosed to the client, the rule puts the burden of competence on the lawyer and generally creates the obligation of consultation with the on the issue of appeal and the obligation to protect that constitutional right.

In response to Angela, I would just say that many or most of the ethical obligations created by the rules of professional conduct "interfere" with the right to contract. Attorneys are not free to make any agreement they can convince their clients to sign. Attorneys cannot contract away their duty to provide competent representation, to confidentiality or privilege, an attorney cannot contract away their duty to loyalty. I don't see this additional ethical obligation any differently, especially where it concerns such a critical constitutional right.

This proposal is not an obligation to perform appellate services, only a duty to make sure the client is correctly informed about and given access to the exercising of appellate rights following a conviction. The expressed concern in Angela's comment would be similar to the argument that attorneys who don't like or don't feel qualified to take criminal cases to trial might make. If those attorneys wanted to limit their work to handling entry of guilty pleas, they could attempt to limit their contract with their client to pretrial work. But that would not excuse the attorney from adequately and

competently advising the client about the rights associated with trial, about possible defenses, etc., nor would it excuse the attorney from taking steps to ensure the defendant was provided a trial if the client made that wish known. Of course that attorney, or any attorney who will not or cannot perform appellate services, is not required by the rules to do the trial or the appeal, only to ensure that the defendant is competently informed of the rights and to take steps necessary to protect the defendant's rights.

Richard Mauro

August 24, 2022 at 8:10 am

I am writing on behalf of the Salt Lake Legal Defender Association. LDA is Salt Lake County's public defender office. Approximately 100 attorneys strong, LDA works in justice court, district court, the Utah Court of Appeals, and the Utah Supreme Court, representing adults who have been charged with criminal offenses and declared indigent. Our mission is to provide client-centered services, protect our clients' rights, and promote social justice.

We are writing in response to the proposed amendment to rule 1.16. It is important that people convicted of offenses in the criminal system be informed of their constitutional right to appeal. However, the notion that trial counsel's failure to inform a client of her appellate rights would constitute an ethical violation goes too far and is unnecessary.

First, existing rules already ensure that the trial court informs a defendant of her right to appeal. Thus, elevating trial counsel's failure to inform a client of her appellate rights to an ethical violation is unnecessary to protect defendants' right to appeal and goes too far. In plea cases, rule 11 of the Utah Rules of Criminal Procedure states that a court may not accept a guilty plea "until the court has found . . . the defendant has been advised that the right to appeal is limited." Utah R. Crim. P. 11(e)(8). And rule 22 of the Utah Rules of Criminal Procedure requires that after a conviction at trial or after a plea, and "[f]ollowing imposition of sentence, the court must advise the defendant of the defendant's right to appeal, the time within which any appeal must be filed and the right to retain counsel or have counsel appointed by the court if indigent." Utah R. Crim. P. 22(c)(1). And as the court of appeals has explained, "It is worth emphasizing at the outset that rule 22(c) mandates that the district court notify a defendant of his appeal right following the imposition of sentence because it is the most reliable way to ensure that defendants are made of aware of the important constitutional right to appeal a conviction or sentence." State v. Kabor, 2013 UT App 12, ¶ 13, 295 P.3d 193. Where the rules of criminal procedure—based on sound public policy—already require district courts to inform defendants of their appellate rights, it doesn't make sense to render a trial attorney's failure to also inform the client of her right to appeal an ethical violation. Indeed, if a district court failed to inform a defendant of her appellate rights, such failure would likely constitute an error of law. And "[m]ere errors of law . . . usually do not constitute violations of the [Judicial] Code of Conduct." Utah Code of

Judicial Conduct Ann. § 1.2, at 4, (citing In re Stoney, 2012 UT 64, 289 P.3d 497), available at: https://www.utcourts.gov/resources/ethadv/Code_of_Judicial_Conduct_Annotated.pdf. In short, it doesn't make sense to transform an attorney's mere error of law into an ethical violation.

Second, the proposed rule places an unreasonable burden on trial attorneys by requiring them to explain "the potential grounds for appeal." To begin, because appellate practice is vastly different from trial practice, the trial attorney may not be in the best position to assess the grounds for appeal. Often, an ineffective assistance of counsel claim provides the grounds for appeal. It is unreasonable to expect trial counsel to not only recognize but then explain their own ineffectiveness to their client. In addition, ineffective-assistance-of-counsel-claims aside, a trial attorney might be too close to the case to objectively assess its potential grounds for appeal. Accordingly, a trial attorney may, in an effort to comply with the proposed rule, represent to the client that they see no grounds for appeal. And the client, relying on her attorney's representation may forgo her right to appeal even though she may have at least one appealable issue. This creates the potential for a client to make an unknowing waiver of her appellate rights.

Third, proposed comment 10 states that in discussing potential grounds for appeal the trial attorney should also advise the client about any "preserved issues." While the rules regarding preservation seem simple and straightforward, they can become exceedingly complicated. It seems unreasonable to expect a trial attorney to understand the nuances of preservation. And the comment is ambiguous as to whether the obligation to inform the client of "preserved issues" also requires the trial attorney to explain unpreserved issues. The ambiguity gives rise to an implication that only preserved issues may be raised on appeal, but exceptions to the rule of preservation exist. But the proposed rule and comment do not appear to require the trial attorney to explain that unpreserved issues may still be raised on appeal if raised under an applicable exception. And while the comment explains that "[t]he obligations under paragraph (e) can be fulfilled by timely ensuring the client has secured representation for appeal[,]" an appellate attorney cannot adequately advise a client about her case until she has reviewed the record on appeal. The record on appeal is not available absent the filing of a timely notice of appeal. In other words, the client first must file a timely appeal before an appellate attorney can adequately advise the client on the appeal.

In short, appellate practice is very different from trial practice, and this rule appears to impose an obligation on trial attorneys to advise clients on matters in which the trial attorney may not be able to competently render advice. And while well intentioned, for the reasons explained above, the proposed amendment unnecessarily creates an ethical minefield for trial attorneys working in criminal defense.

Finally, in the event that a criminal defendant has been deprived of her constitutional right to appeal, she is not without remedy. "Upon a showing that a criminal defendant

was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal." Utah R. App. P. 4(f). "The point of 4(f) . . . is to provide criminal defendants who have been deprived of an appeal through no fault of their own with an avenue for relief." State v. Brown, 2021 UT 11, ¶ 16, 489 P.3d 152. At least three circumstances exist, that if shown, warrant reinstatement of the right to appeal. See Manning v. State, 2005 UT 61, ¶ 31, 122 P.3d 628. In relevant part, one of those circumstances exists where "the court or the defendant's attorney failed to properly advise defendant of the right to appeal[.]" Id. (citations omitted). Accordingly, the proposed amendment is not necessary to protect a criminal defendant's constitutional right to appeal because a mechanism exists by which that right may be reinstated if the trial attorney failed to inform the client of that right.

Sarah Carlquist

August 24, 2022 at 4:13 pm

I am an appellate public defender at the Salt Lake Legal Defenders. I echo and share each of the concerns Rich Mauro raised in his comment. I write separately to voice my concern that the proposed amendment to rule 1.16 may, contrary to its intention, have an adverse effect on the attorney-client relationship in criminal defense cases. Before I became an attorney, I had a boss whose motto was: "If you're willing to admit you're wrong, when you are wrong, then you're all right." I have always remembered that and it's a credo that I think most public defenders have because if we screw up, we don't think our clients should have to pay the steep price for that—loss of life or liberty. As David Ferguson points out, the time during which an appeal can be filed can be one of the most fraught in the attorney-client relationship. I think it is a time ripe for things to fall through the cracks. And ordinarily, if an attorney forgot to tell their client about their appellate rights, or simply can't remember whether they did or not, I think at a hearing to reinstate the client's right to appeal, the client's former trial attorney would own up to their failure (only if they had actually committed such a failure) so that their client might have their appellate rights reinstated. Without the proposed amendment to rule 1.16 owning up to such a failure like would cause some embarrassment and perhaps some shame—both of which may be overcome and softened by the notion that in admitting their mistake they acted in the client's best interests. If rule 1.16 is adopted as proposed, owning up to the mistake might be at the cost of their very careers, which seems a steep price to pay. All of this is to reiterate Rich Mauro's point that if a judicial error of the same nature were to occur, it wouldn't give rise to a violation of the Judicial Code of Conduct, so I'm not sure it makes sense that the same mistake, if made by a defense attorney, should constitute a violation of the Rules of Professional Conduct.

Lori Seppi

August 26, 2022 at 3:23 pm

Comments to Rule 1.16

I am an appellate public defender at the Salt Lake Legal Defender Association, and I agree with Rich Mauro's and Sarah Carlquist's concerns.

Tab 3

September 29, 2022

Rules of Professional Conduct Committee
c/o Simón Cantarero and Nancy Sylvester
via email

Committee members,

I do believe we need to push for an amendment to 8.4(c). The reason is that government attorneys *are* participating in covert operations and their participation is useful. For example, attorneys from the Utah Attorney General's Office supervise the Internet Crimes Against Children (ICAC) investigators. In that capacity, AAGs may advise investigators, for example, of the lawfulness, or unlawfulness, s of certain practices, such as what communications could venture into entrapment. Investigators might also brief AAGs on what evidence they have obtained thus far so that AAGs can help evaluate whether the evidence is sufficient to support probable cause for a search warrant. Technically, under the current Rule 8.4(c), these attorneys would be violating the rule because they would be facilitating deception. I am aware of at least on instance, in Colorado, of a disciplinary action being brought against prosecutors for merely supervising a covert investigation (child internet sex crime where the criminal defense attorney of the suspect filed the ethics complaint).

The focus of the comments was on concerns that the amendment, as written, could be interpreted to give free rein to government attorneys to violate suspects' rights and otherwise violate the law. That, of course, is not our intention. I believe the way to remedy this is to revise the rule. Below is my suggested revision, which the Colorado

Supreme Court adopted in the face of a petition challenging the State Bar's prosecution of the government attorneys who supervised the internet child porn investigation.

Proposed Revision (Colorado RPC; specifically only applies to lawyers supervising deceptive practices)

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

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

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

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation~~;~~ except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, and investigators, who participate in lawful investigative activities;

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

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

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

Comment: Subsection (c) provides for a safe harbor for government attorneys who supervise covert operations, mostly in criminal activities. Courts and commentators have long recognized that lawyers who participate in covert operations for the purpose of identifying unlawful activity do not violate ethics rules. *Apple Corps. Ltd. v. International Collectors Society* 15 F. Supp. 2d 456, 475-76 (D.N.J. 1998) ("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.")The safe

harbor would not apply to a lawyer who knowingly directed an investigator to violate a suspect's constitutional rights, or who otherwise directed or coached investigators or others directly involved in covert activities to engage in unlawful conduct, such as destroying exculpatory evidence.

Sincerely,

Joni Jones

Comments to Rule 8.4(c)

Rule 8.4(c) comments

Matt Robar

July 14, 2022 at 8:08 am

This change is unacceptable. Either conduct is unethical or it is not. It is absurd to carve out a special exemption for a lawyer to be dishonest, fraudulent, deceitful, or deceptive just because they are employed by a government agency. The Rules of Professional Conduct should apply equally to everyone. Allowing government to do something of this nature when a private lawyer cannot authorizes the exact kind of government corruption we should be fighting against not codifying. Unequal application of the disciplinary process is itself unethical.

Blake Young

July 14, 2022 at 8:45 am

RPC08.04(c) is a badly overdue but welcome change. Ethics Opinion 2002-05 already clarified this issue, and is already relied upon in government work. It makes sense to put that opinion into the rules. Undercover operations are part of enforcement work, and it is in everyone's best interest to have the attorneys monitor and supervise those operations rather than keep them at arm's length for fear of triggering an ethics case.

David Ferguson

July 20, 2022 at 9:32 am

RPC08.04(c) should not be adopted as it is currently presented. It is overly broad. It makes sense that a government attorney can lie during an undercover operation because the government attorney is wearing the hat of an investigator rather than, say, a prosecutorial role. In that sense the prosecutor is conducting ministerial rather than discretionary tasks (an important distinction in possible civil rights violations).

This rule, as stated, is so broad that it could easily be understood to cover the attorney's discretionary (judicial) duties. This is a problem. This rule could be interpreted to affect an attorney's duty of candor to a tribunal, suggesting that the lawyer could lie to a judge while proffering certain information.

A more probable scenario is that it also could be interpreted to allow the lawyer to create false documents/conceal important government records that are important in discovery.

One can easily imagine that a circumspect government attorney would recognize those limitations to the role. But basic social experience shows that once you tell someone that it's okay to lie, that changes the way that person thinks about their job and what obligations they owe to others.

This can have dramatic effects. Concealing evidence from a criminal defendant is already one of the leading causes of wrongful convictions. By adding a "license to lie" as broad as this rule permits Utah may very easily see an increase the number of innocent people in Utah sent to prison with no way of proving their innocence because the information would have been concealed or destroyed by an attorney who has discretionary power to alter or conceal evidence gathered under the attorney's ministerial role. Surely that's not the intent of the rule, but it is an easily gathered inference based on its plain construction. I encourage the committee to look more closely at this rule and narrow its scope.

Allen Turner

August 13, 2022 at 4:13 pm

I am writing to voice my opposition to the proposed changes to Rule 8.4(c) of the Rule of Professional Conduct, which changes would condone "dishonesty, fraud, misrepresentation, or deceit" by a "government lawyer who participates in a lawful, covert governmental operation" to "gather relevant information."

As noted early on by Louis Brandeis in the "famous dissent," "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipotent, teacher. For good or for ill it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself, it invites anarchy." Olmstead v. United States, 277 U.S. 438 (1928).

The same rationale applies to the Rules of Professional Conduct. We should not just change the Rules, so that even "a government lawyer participating in a lawful, covert governmental operation," can escape the consequences of his or her dishonest, fraudulent, misrepresentative, and deceitful behavior. We all have to suffer the consequences of our misconduct in life and in the practice of law.

The press is already full of reports of government lawyers being less than truthful, for example:

https://www.techdirt.com/2022/05/25/government-lawyer-facing-sanctions-for-lying-about-a-jail-search-he-swore-he-had-nothing-to-do-with/

https://reason.com/2016/05/19/congress-should-subpoena-ben-rhodes/

Comments to Rule 8.4(c)

https://www.judicialwatch.org/fed-judge-blasts-doj-lawyers-lying-court-defend-obama-amnesty/

https://www.nationalreview.com/news/fbi-lawyer-found-guilty-of-forgery-in-trump-russia-probe-restored-to-good-standing-by-d-c-bar/

Let's not excuse such behavior. The public image of lawyers with respect to honesty is already bad enough. We should not encourage more attorney misbehavior by giving government attorneys a "get out of jail free card" with respect to their ethical obligations — obligations all the rest of us are expected and required to meet.

Tab 4

Rule 8.3. Reporting Professional Misconduct.

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

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

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

Comment

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

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

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule.

The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

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

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

[6] Information about a lawyer's misconduct or fitness may also be received during a fee dispute arbitration or mediation. Providing an exception to the reporting requirements in such cases encourages lawyers to use the Bar's fee dispute resolution process and helps lawyers and clients resolve such matters without litigation.

Justice Pohlman's suggestion: to clarify it is "a Bar sponsored fee dispute" in line 44. There is a reference in line 11, but rule 8.3 is a broad rule and the she would prefer to make that clear.

Rule 14-1111. Exemption from future testimony and confidentiality of records and information.

Justice Pohlman suggestion: eliminate the word "proceeding" as she doesn't think mediation is typically referred to as a proceeding.

(a) **Exemption from future testimony.** No Fee Dispute Resolution Committee member participating in a fee dispute ~~decision~~ arbitration or mediation proceeding ~~shall~~ may be called as a witness in any subsequent legal proceeding related to the fee dispute.

Justice Pohlman identified the superfluous "and" in line 56

(b) **Confidentiality of records and information.** Records and ~~I~~information and ~~documentation~~ submitted in a fee dispute proceeding shall be deemed confidential and ~~shall~~ may not be disclosed other than to enforce a written decision or as provided in paragraph (c).

(c) ~~Notwithstanding the above, c~~**Disclosure of confidential information.** Confidential information in the Utah State Bar's possession may be disclosed if the request is made to the Bar by:

(~~a~~1) an agency authorized to investigate the qualifications of persons for admission to practice law;

(~~b~~2) an agency authorized to investigate the qualifications of persons for government employment;

(~~c~~3) a lawyer discipline enforcement agency; or

(~~d~~4) an agency authorized to investigate the qualifications of judicial candidates.

Rule 14-1116. Conduct of the mediation.

(a) **Scheduling the mediation.** The designated mediator shall set the time and place for the mediation and shall cause written notice of the mediation to be served personally or by mail or email on all parties to the mediation.

(b) **Right to be represented by counsel.** In the notice of the mediation, the mediator shall inform the parties of their right to be represented by their own legal counsel at their own cost at any stage of the mediation process. Failure to be represented by legal counsel at any stage of the mediation is a waiver of this right at that stage of the mediation, although a party may use legal counsel later in the mediation process.

(c) **Right to be assisted at mediation.** A party may designate an individual to accompany that party to the mediation and to participate with the party in the mediation process.

(d) **Procedure.** The mediator may use joint or private caucuses during the mediation process. The process may be adjourned from time to time in the discretion of the mediator or at the request of the parties.