

Agenda

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

November 1, 2022

4:00 to 6:00 p.m.

In-person and via Zoom

Welcome and approval of minutes.	Tab 1	Simón Cantarero, presiding
<p>Review proposals regarding Rule 1.2(d) (lawyers practicing cannabis law).</p> <ul style="list-style-type: none">The first proposal is narrowly focused on clarifying that advising and assisting with respect to Utah's cannabis-related statutes is allowed by Rule 1.2(d). It does so by adding language to Cmt. 12 to Rule 1.2(d) and certain revisions to Rule 8.4 and its Cmt. 2.The alternative proposal incorporates, with certain modifications, the proposed changes to Model Rules 1.2 and 8.4 that were considered but ultimately abandoned by an ABA Standing Committee on Ethics in 2019. The alternative proposal broadly addresses permitted advising and assisting under Rule 1.2(d) and 8.4 with respect to any states laws that may conflict with federal law.	Tab 2	Subcommittee: Autin Riter (chair), Billy Walker, Cory Talbot, Judge Trent Nelson
Review proposal to address comments to Rule 8.4(c) (lawful, covert operations).	Tab 3	Subcommittee: Joni Jones (chair), Gary Sackett, Mark Hales, Julie Nelson, Alyson McAllister, Judge Michael Edwards
<p>Projects in the pipeline:</p> <ul style="list-style-type: none">Rule 8.3: Recommended to Supreme Court; Court proposed minor edits; will circulate for comment shortly.Rules 8.4 and 14-301: Assigned to Judicial Council's Fairness and		--

Accountability Committee (<i>historical memo attached to August materials</i>). <ul style="list-style-type: none">• LPP updates.• Rule 5.8 and referral fee fees: on hold (awaiting Supreme Court to take up again)		
--	--	--

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

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

Tab 1



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

[Draft] Meeting Minutes
October 4, 2022

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

J. Simon Cantarero, Chair

Attendees:

J. Simon Cantarero, Chair

Joni J. Jones
Gary Sackett
Dane Thorley
Alyson McAllister
Cory Talbot
Adam Bondy
Billy Walker
Austin Riter
Robert Gibbons
Mark Hales
Hon. Mike Edwards
Hon. Trent Nelson
Hon. Amy Oliver
Ian Quiel
Julie Nelson

Christine Greenwood (ex officio)

Hon. M. Alex Natt, Recording
Secretary

Excused: Phillip Lowry, Jurhee Rice

Staff:

Nancy Sylvester
Scotti Hill

Guests:

Richard Mauro
Jacqueline Carlton
Douglas Thompson

1. Welcome and approval of the September 32, 2022 meeting minutes (Chair Cantarero)

Chair Cantarero recognized the existence of a quorum, called the meeting to order at 16:08 and asked for a Motion to Approve the September 23, 2022 Meeting Minutes.

Ms. Nelson moved to accept the September 23, 2022 minutes. Mr. Hales seconded the Motion. The Motion passed by acclamation.

2. Rule 1.6 (Mr. Thorley)

Subcommittee Chair Thorley presented the subcommittee's work on Rule 1.16. He recapped the work of the Committee to date. Mr. Mauro was asked to provide his comments on the proposed Rule. His comments together with those from the public had previously been shared in more detail with the Committee in advance of the meeting. He expressed concern that creating a new ethical rule is unnecessary as Utah Rule of Criminal Procedure 11 already provides sufficient protection to address the issue raised. He further warned that incarcerated individuals would likely be incentivized to file ethical complaints against public defenders in bad faith or in a mistaken attempt to overturn their convictions.

Committee member Mr. Quiel disclosed his role as a public defender then echoed Mr. Mauro's concerns that this will be a sword used by clients against the public defender's office and will not lead to any better outcomes for clients while straining the resources of the public defender's office, which is already resource-constrained.

Professor Thorley educated that the subcommittee's goal was not to create new obligations that didn't already exist in the law and if the Committee wanted to re-consider its position then he believes it's entirely appropriate to do so.

Judge Nelson warned the Committee that pleas and jury convictions are still "convictions" under the law and the language to the proposed Rule should be reviewed to ensure those terms are accurately employed.

Chair Cantarero thanked those who presented comments and asked Mr. Thompson to respond to the comments raised by Mr. Mauro and Mr. Quiel. Mr. Thompson acknowledged the comments and expressed his concern regarding providing a new avenue for abusive bar complaints but weighed that concern against a client's right to due process in criminal cases.

Mr. Sackett expressed his concern that the Rules are intended to be rules of general applicability to all areas of the practice of law rather than to specific practices, in this case criminal procedure. He also questioned whether there is an actual audience who had been disadvantaged in the past that this Rule would remedy.

Professor Thorley suggested that the subcommittee review the language and consider the comments provided and bring the matter back to the Committee.

Chair Cantarero asked the subcommittee to undertake an examination of the costs/benefits of bringing the Rule forward and provide the Committee with its analysis and options before the Committee's next meeting.

3. Rule 8.4(c) (Ms. Jones)

Ms. Jones discussed that the intention behind the Rule 8.4(c) amendments was to clarify that government attorneys who engage in clandestine operations are not violating 8.4 (dishonesty) prohibitions when performing their functions in good faith.

Ms. Jones discussed the comments received and speculated that perhaps some of the language in the proposed Rule could be overly broad. Ms. Jones introduced the analogous Colorado rule which limits the rule specifically to those attorneys who are supervising the operations. Ms. Jones educated that the Colorado rule was amended in response to a bar complaint filed in an ICAC case where the accused filed a complaint against the Colorado AG's office conducting the undercover operation. The Colorado ethics panel submitted its clarification as it felt that under the existing rule it was compelled to pursue the Complaint. The Committee asked questions and discussion ensued.

Mr. Jones proposed not adopting the Colorado rule but perhaps explicitly limiting the amendments to government lawyers supervising the covert conduct rather than participating themselves in the covert operation.

Chair Cantarero asked that Ms. Jones, Judge Edwards, Allison McAllister, Julie Nelson, Gary Sackett and Mark Hales form a subcommittee with Ms. Jones as Chair to discuss this matter further and advise the committee in an upcoming meeting.

4. Adjournment.

The meeting adjourned at 17:37. The next meeting will be held on November 1, 2022 at the Law and Justice Center and via Zoom.

Tab 2

**Rule 1.2. Scope of representation and allocation of authority between client and lawyer.
Licensed paralegal practitioner notice to be displayed.**

Effective: 5/1/2021

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by [Rule 1.4](#), shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) A licensed paralegal practitioner shall conspicuously display in the licensed paralegal practitioner's office a notice that shall be at least 12 by 20 inches with boldface type or print with each character at least one inch in height and width that contains a statement that the licensed paralegal practitioner is not a lawyer licensed to provide legal services without limitation.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See [Rule 1.4\(a\)\(1\)](#) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by [Rule 1.4\(a\)\(2\)](#) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See [Rule 1.16\(b\)\(4\)](#). Conversely, the client may resolve the disagreement by discharging the lawyer. See [Rule 1.16\(a\)\(3\)](#).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to [Rule 1.4](#), a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to [Rule 1.14](#).

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See [Rule 1.1](#).

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., [Rules 1.1](#), [1.8](#) and [5.6](#).

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The

lawyer must, therefore, withdraw from the representation of the client in the matter. See [Rule 1.16\(a\)](#). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See [Rule 4.1](#).

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. Under paragraph (d), a lawyer may also counsel a client regarding the validity, scope, and meaning of Utah's cannabis-related statutes, and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, and other state or local provisions implementing the statutes. In these circumstances, the lawyer shall also advise the client regarding the potential consequences of the client's conduct under related federal law and policy.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See [Rule 1.4\(a\)\(5\)](#).

[14] Lawyers are encouraged to advise their clients that their representations are guided by the Utah Standards of Professionalism and Civility and to provide a copy to their clients.

[14a] This rule differs from the ABA Model Rule by adding section (e) which requires licensed paralegal practitioners to post a conspicuous notice of their limited licensure status.

***Explanatory Notes:**

These proposed revisions to Comment 12 to Rule 1.2(d) reflect an approach whereby attorneys can both advise and assist cannabis businesses. If the Utah Legislature has decided that cannabis companies can conduct medical marijuana business in Utah, then, in our subcommittee's view, Utah lawyers need to be able not only to advise such businesses on the law but also actively assist them with organizing and operating their businesses, including such matters as establishing and licensing businesses that meet the requirements of the statutes, adopting operating policies and procedures, and representing clients in state court and state agency proceedings regarding compliance with the statutes and licensing and certification issues. Such assistance is necessary to the practical functioning of the businesses, which are not illegal, whereas the intent of Rule 1.2 is to prohibit lawyers from assisting with criminal activity like money laundering. If lawyers can only advise but not assist, then both cannabis lawyers and cannabis business are hamstrung in their ability to take practical action steps to enforce the rights provided by the statutes and comply with the obligations required by the statutes.

The term "Utah's cannabis-related statutes" is meant to encompass:

[58-37-3.7. Utah Controlled Substances Act](#)

[58-37-3.7. Medical cannabis decriminalization](#)

[58-37-3.8. Enforcement](#)

[58-37-3.9. Exemption for possession or use of cannabis to treat a qualifying illness](#)

[4-41a. Cannabis Production Establishments](#)

[26-61. Cannabinoid Research Act](#)

The proposed language is drawn from the following sources:

- Cmt. 14 to Vermont's Rule 1.2(d)
https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDComment%20to%20V.R.Pr._C.%201.2.pdf

"With respect to paragraph (d), a lawyer may counsel a client regarding the validity, scope, and meaning of Title 18, chapters 84, 84A, and 86 of the Vermont Statutes Annotated, and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, other state and local provisions implementing the statutes. In these circumstances, the lawyer shall also advise the client regarding the potential consequences of the client's conduct under related federal law and policy."

- Cmt. 1 to Nevada's Rule 1.2
<https://www.leg.state.nv.us/courtrules/rpc.html>

"A lawyer may counsel a client regarding the validity, scope, and meaning of Nevada Constitution Article 4, Section 38, and NRS Chapter 453A, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, including regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy."

- Alaska's Rule 1.2(f):
<https://public.courts.alaska.gov/web/rules/docs/prof.pdf>

"A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy."

Rule 8.4. Misconduct.
Effective: 12/19/2018

Except as provided in Rule 1.2(d), it is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; 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

[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(b), (c), (d), (e), or (f) cannot be counted as a separate violation of Rule 8.4(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(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, but actions taken in compliance with Rule 1.2(d) do not constitute professional misconduct. 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, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, violates 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.

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

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

***Explanatory Notes:**

These proposed revisions to Rule 8.4 and its Comment 2 are intended to underscore that the conduct allowed by Rule 1.2(d), including the cannabis-related advising and assisting now referenced in Comment 12 to Rule 1.2(d), cannot be misconduct under related Rule 8.4.

**Rule 1.2. Scope of representation and allocation of authority between client and lawyer.
Licensed paralegal practitioner notice to be displayed.**

Effective: 5/1/2021

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by [Rule 1.4](#), shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (i) discuss the legal consequences of any proposed course of conduct with a client; and may (ii) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; and (iii) advise and assist a client in complying with and taking actions consistent with state laws, and rules, regulations, orders, and other state or local provisions implementing state laws, while at the same time advising the client of the existence and consequences of federal law that may impose criminal penalties for actions or matters permitted by state law.

(e) A licensed paralegal practitioner shall conspicuously display in the licensed paralegal practitioner's office a notice that shall be at least 12 by 20 inches with boldface type or print with each character at least one inch in height and width that contains a statement that the licensed paralegal practitioner is not a lawyer licensed to provide legal services without limitation.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See [Rule 1.4\(a\)\(1\)](#) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by [Rule 1.4\(a\)\(2\)](#) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult

with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See [Rule 1.16\(b\)\(4\)](#). Conversely, the client may resolve the disagreement by discharging the lawyer. See [Rule 1.16\(a\)\(3\)](#).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to [Rule 1.4](#), a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to [Rule 1.14](#).

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See [Rule 1.1](#).

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., [Rules 1.1](#), [1.8](#) and [5.6](#).

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. **Not does** the fact that a client uses advice in a course of action that is criminal or fraudulent of itself **does not** make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. **There are times when state laws and federal laws may diverge. In such instances, lawyers may advise and assist a client in complying with and taking actions consistent with states laws that may conflict with federal laws, but must advise the client**

both of the conflict between state and federal law and of any potential criminal penalties for violation of federal law.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See [Rule 1.16\(a\)](#). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See [Rule 4.1](#). If state law and federal law conflict, however, Rule 1.2(d) permits the lawyer to advise and assist the client in complying with and taking actions consistent with state law subject to the limitations set forth in that rule.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes not only that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities, but also that if state law and federal law conflict, a lawyer may advise and assist the client in complying with and taking actions consistent with state law as long as the lawyer also advises the client both of the conflict between state and federal law and of any potential criminal penalties for violation of federal law.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See [Rule 1.4\(a\)\(5\)](#).

[14] Lawyers are encouraged to advise their clients that their representations are guided by the Utah Standards of Professionalism and Civility and to provide a copy to their clients.

[14a] This rule differs from the ABA Model Rule by adding section (e) which requires licensed paralegal practitioners to post a conspicuous notice of their limited licensure status.

Rule 8.4. Misconduct.
Effective: 12/19/2018

Except as provided in Rule 1.2(d), it is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; 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

[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(b), (c), (d), (e), or (f) cannot be counted as a separate violation of Rule 8.4(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(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, but actions taken in compliance with Rule 1.2(d) do not constitute professional misconduct. 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, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, violates 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.

[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] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law. If state law and federal law conflict, Rule 1.2(d) also permits a lawyer to advise and assist the client in complying with and taking actions consistent with state law if the lawyer also advises the client both of the conflict between state and federal law and of any potential criminal penalties for violation of federal law.

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

1 **PROPOSED CHANGES TO MODEL RULES 1.2 and 8.4**

2
3 **Client-Lawyer Relationship**

4
5 **Rule 1.2 Scope Of Representation And Allocation Of Authority Between**
6 **Client And Lawyer**

7
8 (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions
9 concerning the objectives of representation and, as required by Rule 1.4, shall consult with
10 the client as to the means by which they are to be pursued. A lawyer may take such action
11 on behalf of the client as is impliedly authorized to carry out the representation. A lawyer
12 shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer
13 shall abide by the client's decision, after consultation with the lawyer, as to a plea to be
14 entered, whether to waive jury trial and whether the client will testify.

15
16 (b) A lawyer's representation of a client, including representation by appointment, does
17 not constitute an endorsement of the client's political, economic, social or moral views or
18 activities.

19
20 (c) A lawyer may limit the scope of the representation if the limitation is reasonable under
21 the circumstances and the client gives informed consent.

22
23 (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the
24 lawyer knows is criminal or fraudulent, but a lawyer may (i) discuss the legal
25 consequences of any proposed course of conduct with a client and may, (ii) counsel or
26 assist a client to make a good faith effort to determine the validity, scope, meaning or
27 application of the law, and (iii) advise and assist a client in complying with and taking
28 actions consistent with state laws while at the same time advising the client of the
29 existence and consequences of federal law that may impose criminal penalties for actions
30 or matters permitted by state law.

31
32
33 **Comment on Rule 1.2**

34 **Client-Lawyer Relationship**

35 **Rule 1.2 Scope Of Representation And Allocation Of Authority Between**
36 **Client And Lawyer - Comment**

37
38 **Allocation of Authority between Client and Lawyer**

39
40 [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes
41 to be served by legal representation, within the limits imposed by law and the lawyer's
42 professional obligations. The decisions specified in paragraph (a), such as whether to
43 settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's
44 duty to communicate with the client about such decisions. With respect to the means by
45 which the client's objectives are to be pursued, the lawyer shall consult with the client as
46 required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry
47 out the representation.

48
49 [2] On occasion, however, a lawyer and a client may disagree about the means to be used
50 to accomplish the client's objectives. Clients normally defer to the special knowledge and
51 skill of their lawyer with respect to the means to be used to accomplish their objectives,
52 particularly with respect to technical, legal and tactical matters. Conversely, lawyers
53 usually defer to the client regarding such questions as the expense to be incurred and
54 concern for third persons who might be adversely affected. Because of the varied nature
55 of the matters about which a lawyer and client might disagree and because the actions in
56 question may implicate the interests of a tribunal or other persons, this Rule does not
57 prescribe how such disagreements are to be resolved. Other law, however, may be
58 applicable and should be consulted by the lawyer. The lawyer should also consult with the
59 client and seek a mutually acceptable resolution of the disagreement. If such efforts are
60 unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may
61 withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve
62 the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

63
64 [3] At the outset of a representation, the client may authorize the lawyer to take specific
65 action on the client's behalf without further consultation. Absent a material change in
66 circumstances and subject to Rule 1.4, a lawyer may rely on such an advance
67 authorization. The client may, however, revoke such authority at any time.

68
69 [4] In a case in which the client appears to be suffering diminished capacity, the lawyer's
70 duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

71
72 Independence from Client's Views or Activities

73
74 [5] Legal representation should not be denied to people who are unable to afford legal
75 services, or whose cause is controversial or the subject of popular disapproval. By the
76 same token, representing a client does not constitute approval of the client's views or
77 activities.

78
79 Agreements Limiting Scope of Representation

80
81 [6] The scope of services to be provided by a lawyer may be limited by agreement with the
82 client or by the terms under which the lawyer's services are made available to the client.
83 When a lawyer has been retained by an insurer to represent an insured, for example, the
84 representation may be limited to matters related to the insurance coverage. A limited
85 representation may be appropriate because the client has limited objectives for the
86 representation. In addition, the terms upon which representation is undertaken may
87 exclude specific means that might otherwise be used to accomplish the client's objectives.
88 Such limitations may exclude actions that the client thinks are too costly or that the lawyer
89 regards as repugnant or imprudent.

90
91 [7] Although this Rule affords the lawyer and client substantial latitude to limit the
92 representation, the limitation must be reasonable under the circumstances. If, for
93 example, a client's objective is limited to securing general information about the law the
94 client needs in order to handle a common and typically uncomplicated legal problem, the

95 lawyer and client may agree that the lawyer's services will be limited to a brief telephone
96 consultation. Such a limitation, however, would not be reasonable if the time allotted was
97 not sufficient to yield advice upon which the client could rely. Although an agreement for
98 a limited representation does not exempt a lawyer from the duty to provide competent
99 representation, the limitation is a factor to be considered when determining the legal
100 knowledge, skill, thoroughness and preparation reasonably necessary for the
101 representation. See Rule 1.1.

102
103 [8] All agreements concerning a lawyer's representation of a client must accord with the
104 Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

105 Criminal, Fraudulent and Prohibited Transactions

106
107
108 [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to
109 commit a crime or fraud. This prohibition, however, does not preclude the lawyer from
110 giving an honest opinion about the actual consequences that appear likely to result from
111 a client's conduct. ~~Not does the~~ The fact that a client uses advice in a course of action that
112 is criminal or fraudulent of itself does not make a lawyer a party to the course of action.
113 There is a critical distinction between presenting an analysis of legal aspects of
114 questionable conduct and recommending the means by which a crime or fraud might be
115 committed with impunity. There are times when state laws and federal laws may diverge.
116 In such instances, lawyers may advise and assist a client in complying with state laws,
117 even if these laws may conflict with federal criminal laws. That advice and counsel
118 includes negotiating contracts and writing documents that depend upon state law for
119 their validity, but a lawyer in all instances must advise the client both of the conflict
120 between state and federal law and of the potential criminal penalties for violation of
121 federal law.

122
123 [10] When the client's course of action has already begun and is continuing, the lawyer's
124 responsibility is especially delicate. The lawyer is required to avoid assisting the client, for
125 example, by drafting or delivering documents that the lawyer knows are fraudulent or by
126 suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting
127 a client in conduct that the lawyer originally supposed was legally proper but then
128 discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the
129 representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal
130 alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of
131 withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.
132 If state law and federal law conflict, however, Rule 1.2(d) permits the lawyer to advise and
133 assist the client in complying with state law. See Comment (9), above.

134
135 [11] Where the client is a fiduciary, the lawyer may be charged with special obligations in
136 dealings with a beneficiary.

137
138 [12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction.
139 Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent
140 avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense
141 incident to a general retainer for legal services to a lawful enterprise. ~~The last clause of~~

142 Paragraph (d) recognizes not only that determining the validity or interpretation of a
143 statute or regulation may require a course of action involving disobedience of the statute
144 or regulation or of the interpretation placed upon it by governmental authorities, but that
145 when state law and federal law conflict, a lawyer may properly give advice so that the
146 client complies with state law as long as the lawyer also advises the client about federal
147 law that may provide for criminal penalties for actions or matters permitted by state law.
148

149 [13] If a lawyer comes to know or reasonably should know that a client expects assistance
150 not permitted by the Rules of Professional Conduct or other law or if the lawyer intends
151 to act contrary to the client's instructions, the lawyer must consult with the client
152 regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).
153

154
155
156
157 ****
158

159 **Maintaining The Integrity Of The Profession**

160
161 **Rule 8.4 Misconduct**

162
163 ~~#~~ Except as provided in Rule 1.2(d), it is professional misconduct for a lawyer to:

164
165 (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or
166 induce another to do so, or do so through the acts of another;

167
168 (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness
169 or fitness as a lawyer in other respects;

170
171 (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

172
173 (d) engage in conduct that is prejudicial to the administration of justice;

174
175 (e) state or imply an ability to influence improperly a government agency or official or to
176 achieve results by means that violate the Rules of Professional Conduct or other law;

177
178 (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable
179 rules of judicial conduct or other law; or

180
181 (g) engage in conduct that the lawyer knows or reasonably should know is harassment or
182 discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age,
183 sexual orientation, gender identity, marital status or socioeconomic status in conduct
184 related to the practice of law. This paragraph does not limit the ability of a lawyer to
185 accept, decline or withdraw from a representation in accordance with Rule 1.16. This
186 paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

187
188 **Maintaining The Integrity Of The Profession**

189 **Rule 8.4 Misconduct - Comment**

190
191 [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of
192 Professional Conduct, knowingly assist or induce another to do so or do so through the
193 acts of another, as when they request or instruct an agent to do so on the lawyer's behalf.
194 Paragraph (a), however, does not prohibit a lawyer from advising a client concerning
195 action the client is legally entitled to take.

196
197 [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as
198 offenses involving fraud and the offense of willful failure to file an income tax return.
199 However, some kinds of offenses carry no such implication. Traditionally, the distinction
200 was drawn in terms of offenses involving "moral turpitude." That concept can be
201 construed to include offenses concerning some matters of personal morality, such as
202 adultery and comparable offenses that have no specific connection to fitness for the
203 practice of law. Although a lawyer is personally answerable to the entire criminal law, a
204 lawyer should be professionally answerable only for offenses that indicate lack of those
205 characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of

206 trust, or serious interference with the administration of justice are in that category, but
207 actions taken in compliance with Rule 1.2(d) do not constitute professional misconduct.

208 A pattern of repeated offenses, even ones of minor significance when considered
209 separately, can indicate indifference to legal obligation.

210
211 [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine
212 confidence in the legal profession and the legal system. Such discrimination includes
213 harmful verbal or physical conduct that manifests bias or prejudice towards others.
214 Harassment includes sexual harassment and derogatory or demeaning verbal or physical
215 conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual
216 favors, and other unwelcome verbal or physical conduct of a sexual nature. The
217 substantive law of antidiscrimination and anti-harassment statutes and case law may
218 guide application of paragraph (g).

219
220 [4] Conduct related to the practice of law includes representing clients; interacting with
221 witnesses, coworkers, court personnel, lawyers and others while engaged in the practice
222 of law; operating or managing a law firm or law practice; and participating in bar
223 association, business or social activities in connection with the practice of law. Lawyers
224 may engage in conduct undertaken to promote diversity and inclusion without violating
225 this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining
226 and advancing diverse employees or sponsoring diverse law student organizations.

227
228 [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory
229 basis does not alone establish a violation of paragraph (g). A lawyer does not violate
230 paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting
231 the lawyer's practice to members of underserved populations in accordance with these
232 Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a
233 representation. Rule 1.5(a). Lawyers also should be mindful of their professional
234 obligations under Rule 6.1 to provide legal services to those who are unable to pay, and
235 their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good
236 cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute
237 an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

238
239 [6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith
240 belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith
241 challenge to the validity, scope, meaning or application of the law apply to challenges of
242 legal regulation of the practice of law as well as to advising clients when state law is in
243 conflict with federal criminal law.

244
245 [7] Lawyers holding public office assume legal responsibilities going beyond those of
246 other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the
247 professional role of lawyers. The same is true of abuse of positions of private trust such as
248 trustee, executor, administrator, guardian, agent and officer, director or manager of a
249 corporation or other organization.

Tab 3

Rule 8.4(c) Subcommittee's Recommended Revision to Rule in Response to Public Comments

Revision that Went Out for Comment:

(2) Paragraph (1)(c) does not apply to a government 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.

Recommended Proposal:

It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may participate in investigative activities **employing deceit, dishonesty or misrepresentation** that are **conducted** pursuant to established law.

Comment: Subsection (c) provides a safe harbor for attorneys who engage in lawful covert operations, often in criminal investigations or investigations involving suspected violations of constitutional rights or civil law. Whether a covert operation is lawful would be determined by reference to the definition of “law” in [Rule 14-802\(b\)\(2\)](#).

Examples covered by this rule are governmental “sting” operations; use of testers in fair-housing cases to determine whether renters discriminate against protected classes of applicants, and gathering evidence of copyright violations. These are legitimate activities that benefit the common good and that courts and commentators have long recognized do not violate ethics rules.

The safe harbor does not apply when a lawyer uses deception to violate others’ constitutional rights or directs others to do so, and it does not change the lawyer’s obligations for candor and fairness under Rule 3.3 and 3.4.

Rationale for Suggested Changes

1. While reviewing articles and case law on this issue and discussing with the subcommittee, we recognized (as is reflected in the comment) that there are legitimate reasons for non-government lawyers to participate in investigations involving misrepresentation—usually of identity or purpose. The classic example is “discrimination testers” who pretend to be a person trying to rent an apartment to determine if the owner is discriminating against protected classes.
2. In our discussion, we also recognized that there is not an obvious reason for preventing lawyers to actually participate in undercover investigations. Gary authored Ethics Opinion 02-05, which recognized that government lawyers can participate in undercover investigations. That specific case involved an attorney

who worked for the federal government, but his position was as an investigator in covert operations.

Alternative Revision to Rule

It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may participate in investigative activities **employing deception** that are **conducted** pursuant to established law.

Rationale

“Deception” covers both dishonesty and misrepresentation, so it seems to be a broad enough term to include the other two, and thus the terms don’t have to be repeated.