Utah Supreme Court
Advisory Committee on the Rules of Professional Conduct
Meeting Agenda
Cory Talbot, Chair

Location: Virtually via Webex Link

Date: April 1, 2025

Time: 4:00 – 6:00 p.m.

Welcome and approval of minutes	Tab 1	Cory Talbot
Rule 1.8(e) – humanitarian exception (*Discussion*)	Tab 2	Cory Talbot
Historical amendments to ABA Model Rules (*Discussion*)		Cory Talbot
Rule 11 – 567 – Disciplinary opinion and possible amendments (*Discussion)*	Tab 3	Stacy Haacke

Reminder: Check style guide for conformity before rules are sent to the Supreme Court.

Upcoming Items:
Rule 8.4
Rules back from Public Comment

Rules of Professional Conduct Committee Website: Link

2025 Meeting Schedule:
Jan 7 • Feb 4 • Mar 4 • April 1 • May 6 • June 3 • Aug 5 • Sept 2 • Oct 7 • Nov 4 • Dec 2

Tab 1

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

[Draft] Meeting Minutes
January 7, 2025

Via Webex
4:00 pm Mountain Time

Cory Talbot, Chair

Attendees:

Cory Talbot (Chair)
Jurhee Rice (Vice Chair)
Ian Quiel
Robert Gibbons
Alyson McAllister
Hon. Amy Oliver
Hon. Matthew Bates
Hon. Craig Hall
Mark Hales
Kent Davis
Lakshmi Vanderwerf
Robert Harrison
Ashley Gregson
Hon. Trent Nelson (emeritus)
Beth Kennedy (ex officio)
Christine Greenwood (ex officio)

Excused: Adam Bondy, Mark Nickel, Robert Harrison, Linda Viti

Staff:

Stacy Haacke

Guests:

Eric Weeks

1. **Welcome, Approval of the December 3, 2024 meeting minutes (Chair Talbot)**

   Vice Chair Rice recognized the existence of a quorum and called the meeting to order at 4:01 p.m. He noted the recording secretary has resigned and will be looking for a new one to appoint.

   Chair Talbot asked for a Motion to approve the December 3, 2024 meeting minutes. Kent Davis moved for approval. Mark Hales seconded. The Motion passed unanimously.

2. **Rule 8.4 (Ashley Gregson)**

   Ashley Gregson reviews the history of the discussion with rule 8.1, and the work of the subcommittee. The subcommittee is not in a position to propose specific language at this point, but have made progress and wanted to give an update to the Committee members. The materials also show the history of rule 8.4. Ms. Gregson notes she has not been on the Committee for the entirety of this history, but the rule has been considered for many years in many forms.

   The latest request from the Supreme Court was to craft language that would identify conduct that is professional misconduct instead of citing the statutes about discrimination. The latest proposal cited rule 7 and the anti-discrimination act.

   Judge Nelson mentions this has been going on for many years and surveys have been done with specifics on discrimination, harms, and issues in the employment context. He believes the Committee was directed to flush out the statutes and spell out the categories. Ms. Gregson indicates the subcommittee has discussed whether to keep the language of the rule within the employment context or to expand the rule to other areas. Questions have arisen on how to define the conduct and figuring out if the scope is to be broadened. Judge Nelson mentions putting people notice. Judge Oliver mentions referring to the statute may have been for simplicity as the statutes are always being amended and questions whether an individual would need to be found liable for violating a specific statute to be held accountable under these rules. Judge Nelson notes some states do require accountability, but the intention here is to have independent action.

   Judge Oliver and Christine Greenwood mention the movement in this are of the law, what other states are doing, and the amount of feedback when this rule goes out for public comment. Beth Kennedy mentions this topic comes up frequently at the ethics hotline and that there is a true need for direction in the rule here.

Ms. Gregson is taking a lot away from this discussion and the subcommittee will continue to work on proposed language with a focus on the employment context and amending subparagraph (g).

3. **Referral Fees – Rules 1.0, 1.5, 5.4 and 5.8 (Alyson McAllister)**

   Alyson McAllister reviews these rules for the Committee. There were a few definitions in Rule 1.0 that were adjusted and the rest of the rules were already approved by the Committee to go to the Supreme Court with a request to submit the rules for public comment. The Committee reviews the definitions and comments for lawyer, fee sharing, and legal fees. These rules will all go out together. Robert Gibbons motions for the rule to go to the Supreme Court with a request to go out for public comment. Kent Davis seconds the motion. Motion carries unanimously.

4. **Upcoming Items**

   Nothing for this month.

The next meeting of the Committee is May 6, 2025.

The meeting adjourned at 5:07 p.m.

Tab 2

Ann. Mod. Rules Prof. Cond. § 1.8

Annotated Model Rules of Professional Conduct, 10th Edition | 2023

Ellen J. Bennett, Helen W. Gunnarsson and Nancy G. Kisicki, Center for Professional Responsibility

American Bar Association

CLIENT-LAWYER RELATIONSHIP

1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a

law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:
(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.
Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:
(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

COMMENT

Business Transactions between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift,

paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

Person Paying for a Lawyer's Services

[14] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[15] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[16] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[17] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[18] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[19] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[20] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[21] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[22] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[23] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Definitional Cross-References

"Firm" *See* Rule 1.0(c)

"Informed consent" *See* Rule 1.0(e)

"Knowingly" *See* Rule 1.0(f)

"Substantial" *See* Rule 1.0(l)

"Writing" and "Signed" *See* Rule 1.0(n)

State Rules Comparison

http://ambar.org/MRPCStateCharts

ANNOTATION

Rule 1.8 addresses ten specific situations in which a lawyer's interests could compromise a client's representation or otherwise harm the client. In most such situations, the conflict cannot be cured by informed client consent. The lawyer must either avoid the situation or comply with specific conditions designed to protect the client.

• 2002 Amendments

Several paragraphs and related comments were amended in 2002 as part of the Ethics 2000 Commission's recommended revisions. Paragraph (c) was amended to expand the relationships exempt from the rule regulating gifts to lawyers to include an "other relative or individual" with whom the lawyer or client maintains a close relationship. Treatment of conflicts arising from family relationships among lawyers was moved from former paragraph (i) to Comment [11] to Rule 1.7. Former paragraph (j) (acquiring a proprietary interest in litigation) was renumbered as paragraph (i). Two new paragraphs were adopted: paragraph (j) (prohibiting most client-lawyer sexual relationships), and paragraph (k) (imputing the prohibitions of **Rule 1.8**, except paragraph (j), to all associated lawyers). Previously, only the prohibition of paragraph (c) on substantial gifts to lawyers was imputed. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 207-21 (2013).

• 2020 Amendment

Paragraph (e)(3) was adopted in August 2020 to permit a lawyer representing an indigent client pro bono to make modest gifts to the client for basic living expenses. Comments [11], [12], and [13] that explain paragraph (e)(3) were added, and former Comments [11] though [20] were renumbered as Comments [14] to [23], respectively.

Paragraph (a): Business Transactions with Clients

Rule 1.8(a) prohibits business transactions between a lawyer and a client unless the lawyer complies with specific conditions designed to protect the client. These protections are consistent with the common law governing the client-lawyer relationship as well as the law of agency. *See In re Haley*, 138 P.3d 1044 (Wash. 2006) (burden on lawyer dealing with client to show conduct ethical); *Restatement (Third) of Agency* § 8.03 (2006) (agent has duty not to deal with principal as or on behalf of adverse party in transaction connected with agency relationship); *Restatement (Third) of the Law Governing Lawyers* § 126 (2000) (lawyer has burden to show transaction with client fair and reasonable and client adequately informed).

As explained in Comment [1], **Rule 1.8**(a) does not apply to ordinary client-lawyer fee arrangements, which are governed by Rule 1.5, or to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others. It does apply, however, to any transaction in which lawyers sell existing clients goods or services related to the practice of law, such as title insurance or investment services, even if the transaction is not closely related to the subject matter of a representation. *See In re Spencer*, 330 P.3d 538 (Or. 2014) (lawyer acted as real estate broker for bankruptcy client). The rule also applies if the lawyer refers a client to a business in which the lawyer has an interest. *See, e.g.*, ABA Formal Ethics Op. 484 (2018) (referring client to litigation funder in which lawyer has interest requires compliance with **Rule 1.8**(a)); N.Y. State Ethics Op. 1231 (2021) (lawyer with interest in financial management company must follow **Rule 1.8**(a) to refer clients).

If **Rule 1.8**(a) applies, paragraph (a)(1) requires that the transaction be objectively fair and reasonable to the client. *See In re Hodge*, 407 P.3d 613 (Kan. 2017) (lawyer bought client's ranch for one-fourth its value); *In re Miller*, 66 P.3d 1069 (Wash. 2003) (rejected "sophisticated client" defense); ABA Formal Ethics Op. 00-416 (2000) (lawyer may purchase accounts receivable from client and pursue collection for lawyer's benefit if **Rule 1.8** conditions met). Paragraph (a)(1) also requires that the terms of the transaction be fully disclosed in a manner reasonably understandable to the client. *See Fla. Bar v. Ticktin*, 14 So. 3d 928 (Fla. 2009) (press release stating lawyer would assume management of indicted client's business insufficient disclosure). Paragraph (a)(2) requires that the client be advised in writing of the desirability of seeking the advice of independent counsel and be given a reasonable opportunity to do so. The fact that a client is independently represented in a transaction will be relevant in determining whether the transaction was fair and reasonable. *See also In re Wollrab*, 420 P.3d 960 (Colo. 2018) (compliance with rule necessary even though client separately represented). Paragraph (a)(3) requires informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. *See In re Trewin*, 684 N.W.2d 121 (Wis. 2004) (clients' signatures on loan documents not sufficient).

COMMON SITUATIONS

Loans involving lawyers and clients are among the most common situations where **Rule 1.8**(a) has been applied. *See, e.g., Calvert v. Mayberry*, 440 P.3d 424 (Colo. 2019) (loan agreement with client presumptively void); *In re Torre*, 127 A.3d 690 (N.J. 2015) (lawyer solicited unsecured loan from long-time client). Also typical are sales and investment transactions that unfairly favor the lawyer or in which the lawyer provides inadequate disclosure. *See, e.g., Att'y Grievance Comm'n v. Dailey*, 225 A.3d 1032 (Md. 2020) (client persuaded to invest settlement proceeds to finance lawyer's other litigation); *In re Lupo*, 851 N.E.2d 404 (Mass. 2006) (lawyer bought real estate from elderly clients for less than fair market value).

Rule 1.8(a) also applies to the use of client funds for a lawyer's own purposes. *See, e.g., In re Severson*, 860 N.W.2d 658 (Minn. 2015) (lawyer used client funds for business investments); *In re Viehe*, 762 A.2d 542 (D.C. 2000) (lawyer entrusted with blank checks for real estate purchase wrote checks for personal use). A lawyer's agreement to serve as a fiduciary under a client's will or trust drafted by the lawyer is not a business transaction under **Rule 1.8**(a), although the lawyer must comply with Rules 1.4(b) and 1.7(a)(2). *See* ABA Formal Ethics Op. 02-426 (2002).

Other common situations are nonmonetary fee arrangements. Comment [1] explains that **Rule 1.8**(a) applies when a lawyer accepts an interest in a client's business or other nonmonetary property as payment of all or part of a fee. *See In re Snyder*, 35 S.W.3d 380 (Mo. 2000) (accepting real estate interest in lieu of cash fee); *Disciplinary Couns. v. Bucio*, 93 N.E.3d 951 (Ohio 2017) (took land worth more than hourly fee). *See also* N.H. Ethics Op. 2017-18/01 (2017) (rule applies to any agreement, including barter transaction, to exchange goods or services for legal services). Because crypto-currency, such as Bitcoin, is considered property rather than currency by the Internal Revenue Service (*see* IRS Notice 2014-21 (2014)), accepting cryptocurrency for legal fees may implicate **Rule 1.8**(a). *See, e.g.,* D.C. Ethics Op. 378 (2020) (rule not applicable to cryptocurrency payment for services already rendered; but applies to advance payment for services to be performed).

When a lawyer acquires stock of a client in lieu of or in addition to a cash fee, a determination that the fee may be reasonable under the factors enumerated in Rule 1.5(a) does not resolve whether the transaction is also ""fair and reasonable to the client" under **Rule 1.8**(a). *See* ABA Formal Ethics Op. 00-418 (2000) (must consider additional factors, including risk of enterprise failing and stock's marketability); *accord* D.C. Ethics Op. 300 (2000); N.Y. City Ethics Op. 2000-3 (2000); *see also In re Richmond*, 904 A.2d 684 (N.H. 2006) (rejecting argument that Rules 1.5 and 1.8(a) are inconsistent); *cf. Buechel v. Bain*, 766 N.E.2d 914 (N.Y. 2001) (although federal law permits fee agreement granting lawyer interest in client's patent, lawyer must comply with state ethics rules). *See generally* John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 Tex. L. Rev. 405 (Dec. 2002).

Rule 1.8(i), discussed below, specifically excepts contingent-fee agreements and liens authorized by law (statute, common law, or contract) to secure legal fees from **Rule 1.8**(a). Comment [19] explains, however, that when a lawyer acquires a security interest in property other than that recovered through the litigation, **Rule 1.8**(a) applies. *See Lawrence v. Bingham Greenbaum Doll, L.L.P.*, 599 S.W.3d 813 (Ky. 2019) (lawyer took lien to secure fee); *Petit-Clair v. Nelson*, 782 A.2d 960 (N.J. Super. Ct. App. Div. 2001) (mortgages to secure fees void for failure to comply with rule); ABA Formal Ethics Op. 02-427 (2002) (lawyer acquiring contractual security interest in client property to secure fees must comply with rule).

CHANGING FEE AGREEMENTS

Although **Rule 1.8**(a) does not apply to ordinary client-lawyer fee agreements, it may be relevant to modifications during a representation. *See, e.g., In re Corcella*, 994 N.E.2d 1127 (Ind. 2013) (lawyer switched from hourly to contingent fee without complying with rule); *In re Curry*, 16 So. 3d 1139 (La. 2009) (lawyer inserted more favorable terms into original fee agreement); *see also* ABA Formal Ethics Op. 11-458 (2011) (changing existing fee agreement permissible if reasonable and accepted by client; modification that involves lawyer acquiring interest in client's business or property subject to **Rule 1.8**(a)); *cf. Restatement (Third) of the Law Governing Lawyers* § 18(1)(a) (2000) (client may avoid fee agreement modification unless lawyer shows modification fair and reasonable to client).

REFERRAL ARRANGEMENTS

Most jurisdictions consider **Rule 1.8**(a) applicable when a lawyer receives compensation for referrals to nonlawyer professionals such as investment advisors. *See, e.g., In re Phillips*, 107 P.3d 615 (Or. 2005) (lawyer advised clients to consult insurance agents without disclosing shared commissions); D.C. Ethics Op. 361 (2011); N.J. Ethics Op. 696 (2005); *see also* Rule 5.7 cmt. [5] (lawyer must comply with **Rule 1.8**(a) to refer clients to law-related entity in which lawyer has interest); Rule 7.2(b)(4) (lawyer may refer clients to another lawyer or nonlawyer professional if reciprocal referral agreement not exclusive and clients informed of its existence and nature). *Cf.* Rule 7.2(b)(5) (lawyer may give "nominal" gifts as expression of appreciation not intended or expected as compensation for referral). Some opinions have concluded that compensated referrals are improper even with full disclosure and consent. *See, e.g.,* Me. Ethics Op. 184 (2004); Tex. Ethics Op. 536 (2001).

Paragraph (b): Use of Information Related to Representation

Rule 1.8(b) governs the use (in contrast to disclosure, which is governed by Rule 1.6) of information relating to the representation of a current client. Once the client-lawyer relationship has ended, Rule 1.9 governs both the disclosure and use of protected client information.

Rule 1.8(b) prohibits a lawyer from using information relating to the representation of a client to the client's disadvantage without the client's informed consent, unless permitted or required by other rules. Comment [5] explains, for example, that if a lawyer knows a client intends to develop several parcels of land, the lawyer may not use that information to buy one of the parcels in competition with the client or to recommend that another client make such a purchase. *See* ABA Formal Ethics Op. 05-435 (2005) (lawyer who simultaneously represents liability insurer and claimant against one of its insureds in unrelated matter may not use information relating to representation of insurer for claimant's benefit); ABA Formal Ethics Op. 02-426 (2002) (lawyer acting as fiduciary may have conflict using information gained in representation of beneficiary in unrelated matter); ABA Formal Ethics Op. 00-417, n.13 (2000) (rule applies even if information has become generally known); ABA Formal Ethics Op. 92-367 (1992) (seeking third-party discovery of client may involve information within contemplation of **Rule 1.8**(b)). Client information that may otherwise be publicly available is nevertheless subject to the rule. *See In re Anonymous*, 654 N.E.2d 1128 (Ind. 1995) (lawyer disclosed client's welfare debt that was matter of public record and used it to her disadvantage).

Comment [5] notes that **Rule 1.8**(b) does not prohibit a lawyer from using client information in a way that does not disadvantage the client. In this respect, **Rule 1.8**(b) differs from general fiduciary and agency law. *See Restatement (Third) of Agency* § 8.05 (2006) (agent may not use principal's confidential information for own purposes); *Restatement (Third) of the Law Governing Lawyers* § 60(2) (2000) (lawyer who uses client's confidential information for pecuniary gain must account to client for any profit).

Paragraph (c): Client Gifts to Lawyers

Rule 1.8(c) prohibits a lawyer from soliciting a substantial gift from a client or preparing an instrument by which a client gives a substantial gift to the lawyer or a person related to the lawyer unless the recipient is related to the client. Small gifts, as well as gifts from clients who are related to the lawyer, are permitted. The rule defines "related persons" to include relatives or others with whom the lawyer or client maintains a "close, familial relationship." *See In re Devaney*, 870 A.2d 53 (D.C. 2005) (lawyer prepared instrument conveying property to lawyer and lawyer's family); *In re Boulger*, 637 N.W.2d 710 (N.D. 2001) (lawyer drafted codicil giving lawyer large contingent gift); *see also In re Colman*, 885 N.E.2d 1238 (Ind. 2008) (lawyer who "actively

participated" in drafting will naming lawyer and lawyer's child beneficiaries violated rule although will prepared by another lawyer); *In re Mulrow*, 670 N.Y.S.2d 441 (App. Div. 1998) (lawyer who named himself as beneficiary advised clients to consult inexperienced lawyer). The prohibition is imputed by paragraph (k) to all lawyers in a firm. *See In re Klima*, 854 N.W.2d 243 (Minn. 2014) (respondent had another firm lawyer draft will giving respondent substantial gift).

Comment [6] notes that a lawyer may accept a substantial gift that was not solicited, but it cautions that the gift must meet "general standards of fairness" and may be voidable under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. *See, e.g., Olson v. Estate of Watson*, 52 S.W.3d 865 (Tex. App. 2001) (will leaving testator's entire estate to lawyer's family unenforceable); *cf. Restatement (Third) of the Law Governing Lawyers* § 127(2) (2000) (lawyer may not accept substantial gift from client unless lawyer related to client or client has received or been encouraged to seek independent advice). *But see In re Mardigian Estate*, 917 N.W.2d 325 (Mich. 2018) (presumption of undue influence rebuttable; rule violation "merely constitutes grounds for invoking attorney disciplinary process").

Comment [8] further notes that the rule permits a lawyer to seek appointment to a fiduciary position, including that of a client's executor, but cautions that the arrangement may create a conflict of interest within the meaning of Rule 1.7. *See also* ABA Formal Ethics Op. 02-426 (2002) (lawyer may act as fiduciary under will or trust prepared by lawyer; absent special circumstances, lawyer acting as fiduciary may appoint self or other firm lawyer to represent lawyer in that capacity if compensation reasonable).

Paragraph (d): Literary Rights

Rule 1.8(d) prohibits a lawyer, while representing a client, from making or negotiating an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part upon information relating to the representation. *See also Restatement (Third) of the Law Governing Lawyers* § 36(3) (2000) (similar prohibition). Comment [9] explains that a lawyer's acquisition of such rights creates a conflict between the interests of the client and the personal interests of the lawyer. *See In re Henderson*, 78 N.E.3d 1092 (Ind. 2017) (prosecutor disciplined for book deal about notorious murder case); *Commonwealth v. Downey*, 842 N.E.2d 955 (Mass. App. Ct. 2006) (defense counsel's agreement to wear concealed microphone during murder trial required new trial); *Harrison v. Miss. Bar*, 637 So. 2d 204 (Miss. 1994) (agreement with film producer for rights to lawyer's life story, including representation of current client, violated rule); *cf.* D.C. Ethics Op. 334 (2006) (rule not applicable to lawyer's agreement to sell own story about pending case). Comment [9] also notes that a lawyer's fee may consist of an interest in literary property that is the subject of a representation if the fee arrangement conforms to Rules 1.5, 1.8(a), and 1.8(i). *Cf. People v. Peterson*, 106 N.E.3d 944, 975 (Ill. 2017) (state disciplinary agency proper forum to decide defense lawyer's alleged conflict from media contract).

Paragraph (e): Financial Assistance to Clients

With the exceptions discussed below, **Rule 1.8**(e) generally prohibits a lawyer from providing financial assistance, including loans or guarantees of third-party loans, to a client in connection with pending or contemplated litigation. The prohibition is designed to avoid encouraging clients to pursue litigation that might not otherwise be brought, as well as avoid giving lawyers too great a financial stake in the litigation. *See Restatement (Third) of the Law Governing Lawyers* § 36(2) (2000) (similar prohibitions); *see also* N.M. Ethics Op. 2017-01 (2017) (plaintiff's lawyer may not agree to indemnify opposing party from third-party claims to settlement funds); *cf.* ABA Formal Ethics Op. 04-432 (2004) (no per se prohibition on posting bail for client but must be no significant risk that representation will be materially limited by lawyer's personal interest in recovering advance).

Paragraph (e)(1) permits a lawyer to advance court costs and litigation expenses and to condition repayment upon recovery, which Comment [10] analogizes to a contingent fee. Paragraph (e)(2) permits a lawyer for an indigent client to pay court costs and litigation expenses outright. *See, e.g.,* Pa. Ethics Op. 2000-14 (2000) (lawyer may post appeal bond for indigent client); *cf.* Wash. Informal Ethics Op. 2149 (2007) (lawyer for nonprofit group providing guardianship services to indigents may not pay costs of proceedings because client is organization rather than indigent person).

LIVING EXPENSES FOR INDIGENT CLIENTS

Paragraph (e)(3), adopted in August 2020, permits lawyers representing indigent clients pro bono to make modest gifts to such clients for basic living expenses. Comment [11] explains that the permitted gifts include contributions for food, rent, transportation, medicine, and "similar basic necessities of life." Comment [12] states that the exception is narrow; a lawyer

may not promise or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship; nor may a lawyer publicize a willingness to provide such gifts to prospective clients. Comment [13] notes that such gifts may be made even if the representation is eligible for fees under a fee-shifting statute; however, paragraph (e)(3) does not permit assistance where the lawyer may eventually recover a fee, such as contingent-fee personal injury matters or cases where fees may be available under a contractual fee-shifting provision. Some states have adopted revised versions of paragraph (e)(3). *See, e.g.,* Colo. **Rule 1.8**(e)(3); Conn. **Rule 1.8**(e)(3).

Most jurisdictions, however, continue to prohibit financial assistance to clients. *See, e.g., In re Kratina*, 746 N.W.2d 378 (Neb. 2008) (improper to pay travel expenses for client medical treatment); *Lawyer Disciplinary Bd. v. Nessel*, 769 S.E.2d 484 (W. Va. 2015) (prohibition absolute; no exception for "altruistic intent"). *But see Fla. Bar v. Taylor*, 648 So. 2d 1190 (Fla. 1994) (no violation to give indigent client used clothing for child and $200 for necessities as "act of humanitarianism"); *cf.* Va. Ethics Op. 1830 (2006) (public defender may give indigent client nominal amount to buy personal items at jail commissary; gift not "in connection with" client's case).

A few states expressly permit financial assistance to litigation clients. *See, e.g.,* La. Rule Prof. Conduct 1.8(e)(4) (lawyer may provide financial assistance to enable client "in necessitous circumstances" to maintain cause for which lawyer was engaged); Minn. Rule Prof. Conduct 1.8(e)(3) (lawyer may guarantee loan to enable indigent client to withstand litigation delay); Tex. Rule Prof. Conduct 1.08(d)(1) (lawyer may advance or guarantee client's "reasonably necessary" medical and living expenses; no requirement that client be indigent).

LOANS FOR LITIGATION EXPENSES

Some jurisdictions have concluded that although there are risks, a lawyer in a contingent-fee matter may borrow funds from a lending institution to defray litigation expenses. *See, e.g., Chittenden v. State Farm Mut. Auto. Ins. Co.*, 788 So. 2d 1140 (La. 2001) (with adequate disclosure and consent, lawyer may make agreement obligating client to repay interest on loan obtained by lawyer for litigation and living expenses); Ky. Ethics Op. E-420 (2002) (lawyer may borrow to finance litigation expenses in contingent-fee case and deduct interest from proceeds of action but may not grant lender security interest in contingent fee, collecting opinions). A lawyer may also assist a client seeking nonrecourse funding from an alternative litigation finance provider in exchange for an interest in the proceeds from the litigation, but the lawyer must advise the client of the risks, including waiver of the attorney-client privilege. *See, e.g.,* Cal. Ethics Op. 2020-204 (2020); Ohio Bd. of Prof. Conduct Ethics Op. 2012-3 (2012); *see also Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235 (Minn. 2020) (abolishing common law champerty). *See generally* Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 Mercer L. Rev. 649 (Winter 2005).

Paragraph (f): Person Paying for a Lawyer's Services

Rule 1.8(f) imposes conditions for a lawyer's acceptance of compensation from someone other than the client. Comment [14] observes that third-party payors frequently have interests that differ from those of the client, including interests in minimizing the lawyer's fee and learning how a representation is progressing. The rule therefore requires: (1) informed client consent; (2) no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) protection of information relating to the representation. The second condition is similar to Rule 5.4(c), which provides that a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services to another to direct or regulate the lawyer's professional judgment in rendering such services; and both rules may apply in some situations. *See, e.g.,* ABA Formal Ethics Op. 02-428 (2002) (lawyer may draft will for testator at request of existing client who pays lawyer and is potential beneficiary, provided testator gives informed consent and **Rules 1.8**(f) and 5.4(c) followed); *Restatement (Third) of the Law Governing Lawyers* § 134 (2000) (conditions similar to **Rule 1.8**(f)); *see also* ABA Formal Ethics Op. 484 (2018) (rule does not apply where client borrows to finance lawyer's fee); ABA Formal Ethics Op. 07-448 (2007) (defendant who refuses representation by appointed lawyer has no basis to contend lawyer must avoid conflicts). *See generally* Nancy J. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 Rev. Litig. 585 (Summer 1997).

Comment [15] explains that Rule 1.7 also applies if the fee arrangement creates a conflict of interest for the lawyer. Although the two rules express the criteria differently ("materially limited" in Rule 1.7 and "interference with the lawyer's independence of professional judgment or with the client-lawyer relationship" in **Rule 1.8**(f)), no different substantive standard was apparently intended. *See* Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering* § 13.21 (4th ed. 2015); *see*

also D.C. Ethics Op. 375 (2018) (lawyer may accept legal fees raised through crowdfunding, but must follow rules governing lawyer's receipt of money from third parties if lawyer directs crowdfunding); Neb. Ethics Op. 17-03 (2017) (lawyer may accept digital currencies from third-party payors if no interference with lawyer's relationship with client).

INSURANCE DEFENSE

Under a typical liability insurance policy, the insurer appoints and pays a lawyer to defend a claim made against the insured. This tripartite relationship among insurer, insured, and defense counsel is often characterized by commentators as the "eternal triangle." *See* Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 Geo. J. Legal Ethics 475 (Winter 1996) (conflicts inevitable in eternal triangle; defense counsel should embrace principle that insured is sole client); *see also Restatement (Third) of the Law Governing Lawyers* § 134 cmt. f (2000) (representing an insured). *See generally Restatement of the Law, Liability Insurance* §§ 10-12 (2019) (discussing duties of liability insurer).

Jurisdictions differ on whether defense counsel represents the insured, the insurer, or both. Some hold that the insured is the defense lawyer's only client. *See, e.g., Higgins v. Karp*, 687 A.2d 539 (Conn. 1997); *In re Rules of Prof'l Conduct*, 2 P.3d 806 (Mont. 2000); Ky. Ethics Op. 452 (2020); *cf. Hornberger v. Wendel*, 764 N.W.2d 371 (Minn. Ct. App. 2009) (attorney-client relationship between lawyer and insured created as matter of law when insurer retained defense counsel). Others suggest a "dual client" relationship with both the insured and the insurer absent a conflict of interest, although the insured is usually considered the "primary" client. *See, e.g., Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 152 P.3d 737 (Nev. 2007) (adopting "majority view" that defense lawyer represents insurer and insured, but insured is primary client); *see also* ABA Formal Ethics Op. 08-450 (2008) (lawyer representing multiple clients, as in insurance defense, must protect confidential information of each and may be need to withdraw from representing one or both clients if conflict arises); ABA Formal Ethics Op. 96-403 (1996) (Model Rules offer no guidance on whether lawyer retained by insurer represents insured, insurer, or both; if insured objects to settlement insurer is authorized to make, lawyer must give insured opportunity to reject insurer's defense and assume defense at insured's expense). Some states require insurance defense lawyers to provide insureds with written a statement of the terms and scope of the representation. *See* Fla. Rule 4-1.8(j); Ohio **Rule 1.8**(f)(4); Wis. Rule 1.2(e); *see also* Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 Conn. Ins. L.J. 1 (1997-1998).

Many insurers in the 1990s sought to control defense costs by imposing billing guidelines that required defense counsel to submit fee and expense statements to third-party auditors. Numerous state opinions concluded this practice violated **Rule 1.8**(f) and other ethics rules. *See* ABA Formal Ethics Op. 01-421 (2001) (reviewing state opinions and concluding lawyers must obtain informed client consent to disclose statements to third-party auditors). *See generally* Susan Randall, *Managed Litigation and the Professional Obligations of Insurance Defense Lawyers*, 51 Syracuse L. Rev. 1 (2001).

Insurers have also sought to reduce defense costs by establishing "captive" law firms, lawyers employed directly by insurers, to represent insureds in claims defense. Such arrangements are permitted in most states but found to violate **Rule 1.8**(f) as well as Rules 1.7 and 5.5 in others. *See, e.g., Brown v. Kelton*, 380 S.W.3d 361 (Ark. 2011) (defense by employee lawyers presents conflicts of interest and constitutes unauthorized practice of law); *Unauthorized Practice of Law Comm'n v. Am. Home Ins. Co.*, 261 S.W.3d 24 (Tex. 2008) (staff lawyer may defend insured if insurer's and insured's interests congruent and affiliation fully disclosed). ABA Formal Ethics Opinion 03-430 (2003) concluded that insurance staff counsel may ethically represent insureds as long as the lawyers (1) exercise independent professional judgment in the representations, and (2) inform all insureds that the lawyers are employed by the insurer at the earliest opportunity practicable. *See also Golden v. State Farm Mut. Auto. Ins. Co.*, 745 F.3d 252 (7th Cir. 2014) (insurer need not disclose staff defense counsel to insured when policy issued).

CRIMINAL DEFENSE

In criminal cases, third-party payment of a defendant's legal fees may raise due process and Sixth Amendment concerns. *See, e.g., Wood v. Georgia*, 450 U.S. 261 (1981) ("inherent dangers" when defense counsel paid by third party; trial court on notice must inquire further to protect defendant's rights); *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002) (conviction reversed because large retainer paid by union to defend two officers created nonconsentable conflict); Ariz. Ethics Op. 2001-06 (2001) (lawyer may not contract with county to represent indigent defendants if authorizations required from nonlawyer third parties that could induce lawyer to act contrary to clients' interests); *cf. Devaney v. United States*, 47 F. Supp. 2d 130 (D. Mass. 1999) (rejecting claim that lawyer pursued plea bargain to minimize fees paid by defendant's brother-in-law; no violation by mere third-party fee payment).

Paragraph (g): Aggregate Settlements and Plea Agreements

Rule 1.8(g) prohibits a lawyer who represents two or more clients from participating in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent in a writing signed by the client. The required disclosure must include the existence and nature of all claims or pleas involved and the participation of each person in the settlement. *See In re Gatti*, 333 P.3d 994 (Or. 2014) (lawyer failed to obtain each client's informed written consent to allocation of lumpsum settlement); ABA Formal Ethics Op. 06-438 (2006) (lawyer must advise each client of total settlement amount, nature and amount of each client's participation, fees and costs to be paid to lawyer, and how costs will be apportioned to each client; rule does not apply to class actions); *Restatement (Third) of the Law Governing Lawyers* § 128 cmt. (d)(i) (2000) (lawyer must inform each client of all settlement terms, including what other claimants will receive). *See generally* American Law Institute, *Principles of the Law of Aggregate Litigation* (2010).

The requirement of informed consent cannot be met by obtaining advance consent to a decision that will be made by the lawyer or a majority of the claimant group. *See, e.g., Abbott v. Kidder Peabody & Co.*, 42 F. Supp. 2d 1046 (D. Colo. 1999) (engagement agreement permitting steering committee to control settlement created nonconsentable conflict); *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512 (N.J. 2006) (lawyer may not obtain advance consent to accept majority vote on settlement). *Cf.* Colo. Ethics Op. 134 (2018) (lawyer may prepare advance agreement providing majority rule, but agreement not binding when settlement proposal considered; lawyer may need to withdraw if dispute arises among clients). *See generally* Carol A. Needham, *Advance Consent to Aggregate Settlements: Reflections on Attorneys' Fiduciary Obligations and Professional Responsibility Duties*, 44 Loy. U. Chi. L.J. 511 (Winter 2012).

Paragraph (h): Limiting Liability and Settling Malpractice Claims

Rule 1.8(h) addresses two types of agreements concerning lawyer malpractice. Paragraph (h)(1) prohibits agreements that prospectively limit a lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement. A 2002 amendment deleted a former additional condition "unless permitted by law" because, as the drafters explained, they were unaware of any such law. Ethics 2000 Commission Reporter's Explanation of Changes, American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 217 (2013). *Cf. Restatement (Third) of the Law Governing Lawyers* § 54(2) (2000) (agreements prospectively limiting lawyer's malpractice liability unenforceable).

Comment [17] resolves three significant issues concerning the application of paragraph (h)(1). First, it does not prohibit pre-dispute agreements to arbitrate legal malpractice claims. *See* ABA Formal Ethics Op. 02-425 (2002) (retainer agreement may require binding arbitration of fee disputes and malpractice claims if client fully apprised of advantages and disadvantages of arbitration and gives informed consent; agreement must not limit liability to which lawyer would otherwise be exposed); D.C. Ethics Op. 376 (2019) (mandatory arbitration provisions in fee agreements permitted). Some courts have enforced mandatory arbitration clauses, but others have declined. *See, e.g., Bezio v. Draeger*, 737 F.3d 819 (1st Cir. 2013) (arbitration enforced despite failure to specify malpractice claims or advise of consequences); *Delaney v. Dickey*, 242 A.3d 257 (N.J. 2020) (law firm did not adequately explain arbitration provision); *Inman v. Grimmer*, 485 P.3d 396 (Wyo. 2021) (arbitration clause enforced in malpractice claim); *see also* Mich. Rule 1.19 (client must be independently represented or "reasonably informed in writing" of advantages and disadvantages of arbitration); Ohio **Rule 1.8**(h)(1) (client must be independently represented in making arbitration agreement). Second, paragraph (h)(1) does not prohibit lawyers from practicing in limited-liability entities. *See* ABA Formal Ethics Op. 96-401 (1996) (lawyers may practice in limited-liability entities if remain personally liable for own acts or omissions). Third, paragraph (h)(1) does not prohibit agreements limiting the scope of the representation in accordance with Rule 1.2. *See, e.g.,* N.Y. City Ethics Op. 2001-3 (2001) (lawyer may limit scope of representation to avoid conflicts of interest if client consents and limitation does not render lawyer's advice inadequate).

Paragraph (h)(2) prohibits a lawyer from settling an existing or potential claim with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking independent counsel and is given a reasonable opportunity to do so. *See In re Braun*, 734 N.E.2d 535 (Ind. 2000) (lawyer did not advise client to consult independent counsel before releasing lawyer from liability and withdrawing disciplinary complaint in exchange for fee refund); *see also* N.J. Ethics Op. 721 (2011) (request that client withdraw or not file disciplinary charge as part of settlement violated Rule 8.4(d)). The phrase "or potential claim" was added in 2002 to make clear that the prohibition applies to unasserted possible claims as well as actual

claims. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 218 (2013). *See also In re Greenlee*, 143 P.3d 807 (Wash. 2006) (interpreting prior version of rule to cover potential claims).

Paragraph (i): Acquiring Proprietary Interest in Litigation

Rule 1.8(i) restricts a lawyer's ability to acquire a proprietary interest in a client's cause of action or the subject matter of litigation. Paragraph (i) was renumbered in 2002; it was formerly paragraph (j). This rule, like **Rule 1.8**(e), is derived from common-law doctrines of champerty and maintenance, and it is designed to avoid giving the lawyer too great a stake in the representation. Comment [19] notes the additional concern that a client may find it more difficult to discharge a lawyer who has an ownership interest in the litigation. *See* ABA Formal Ethics Op. 00-416 (2000) (lawyer may purchase accounts receivable from client if transaction complies with **Rule 1.8**(a), but if accounts are subject of litigation conducted by lawyer, lawyer must either acquire entire claim or withdraw from representation).

The general prohibition is subject to three significant exceptions. First, paragraph (e) permits certain advances for litigation costs. Second, paragraph (i)(1) exempts liens "authorized by law." A 2002 amendment substituted ""authorized" for "granted" to clarify that the exemption included contractual liens. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 219 (2013). Third, paragraph (i)(2) recognizes contingent fees in civil matters. *See also Restatement (Third) of the Law Governing Lawyers* § 43 (2000) (general discussion of lawyer liens).

Paragraph (j): Client-Lawyer Sexual Relationships

Rule 1.8(j) prohibits all client-lawyer sexual relationships, including consensual relationships, except those that predate the formation of the client-lawyer relationship. The per se prohibition was adopted in 2002, after several jurisdictions had enacted similar rules, because "having a specific Rule has the advantage not only of alerting lawyers more effectively to the dangers of sexual relationships with clients but also of alerting clients that the lawyer may have violated ethical obligations in engaging in such conduct." *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 219 (2013).

Jurisdictions without specific rules typically address client-lawyer sexual relationships under rules dealing with conflicts of interest or misconduct. *See, e.g., In re Fuerst*, 157 So. 3d 569 (La. 2014) (sexual relations with current divorce client violated Rules 1.7(a)(2) and 8.4(d)); *see also* ABA Formal Op. 92-364 (1992) (lawyer's fiduciary obligation to client implies lawyer should not abuse client's trust by taking sexual or emotional advantage); *Restatement (Third) of the Law Governing Lawyers* § 16 cmt. e (2000) (lawyer may not enter sexual relationship that would undermine client's matter, abuse client's dependence, or create risk to lawyer's independent judgment).

Comment [20] cites the fiduciary nature of the client-lawyer relationship and explains that the client's own emotional involvement renders adequate informed consent unlikely. *See, e.g., Lawyer Disciplinary Bd. v. White*, 811 S.E.2d 893 (W.Va. 2018) (lawyer disbarred for sexual relations with vulnerable client). Comment [21] observes that sexual relationships that predate the client-lawyer relationship are exempt from the rule because concerns for exploitation and client dependency may be diminished in such situations but cautions that the lawyer must consider whether the relationship will pose a material limitation on the representation within the meaning of Rule 1.7(a)(2).

When the client is an organization, Comment [22] explains that the prohibition is limited to relationships with constituents of the organization who supervise, direct, or regularly consult with the lawyer about the organization's legal matters. *See, e.g., In re Bergman*, 382 P.3d 455 (Kan. 2016) (indefinite suspension for secret affair with company president).

This topic is also addressed in the annotation to Rule 1.7(a)(2).

Paragraph (k): Imputation of Prohibitions

Prior to 2002, imputation under **Rule 1.8** was determined by the general imputation rule, Rule 1.10(a); and only the prohibition of **Rule 1.8**(c) (gifts to lawyers) was imputed to associated lawyers. American Bar Association, *A Legislative History: The*

Development of the ABA Model Rules of Professional Conduct, 1982-2013, at 220 (2013). **Rule 1.8**(k) now imputes all but one of the **Rule 1.8** prohibitions to every lawyer associated in a firm. Only the prohibition of **Rule 1.8**(j) (client-lawyer sexual relationships) is deemed personal and exempt from imputation.

End of Document

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules.

Effective: 11/1/2017

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(a)(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(a)(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(a)(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purpose of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or an account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(e)(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(e)(2) a lawyer representing an indigent client may pay court costs and expenses of litigation, and minor expenses reasonably connected to the litigation, on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(f)(1) the client gives informed consent;

(f)(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(f)(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(h)(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(h)(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking

and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(i)(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(i)(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not engage in sexual relations with a client that exploit the lawyer-client relationship. For the purposes of this Rule:

(j)(1) "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse; and

(j)(2) except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitive. This presumption is rebuttable.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related

to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(f) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated

with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of

appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5.

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses and minor sums reasonably connected to the litigation, such as the cost of maintaining nominal basic local telephone service or providing bus passes to enable the indigent client to have means of contact with the lawyer during litigation, regardless of whether these funds will be repaid, is warranted.

[10a] Relative to the ABA Model Rule, Utah Rule 1.8(e)(2) broadens the scope of direct support that a lawyer may provide to indigent clients to cover minor expenses reasonably connected to the litigation. This would include, for example, financial assistance in providing transportation, communications or lodging that would be required or desirable to assist the indigent client in the course of the litigation.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the

lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(f) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not

have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context

of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Spousal relationships and sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

[19a] Utah Rule 1.8(j) is different from the ABA Model Rule. It follows the language from former Utah Rule 8.4(g) regarding the prohibition of sexual relations with a client. This Rule defines "sexual relations" and clarifies the presumption that sexual relations with a client are exploitive of the client.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of

the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Tab 3

Matter of Discipline of Bernacchi, 2022 UT 25
Rule 11-567

The Court flags some ambiguity for an advisory committee to review in paragraphs 19-21. The chapter 14 rules that are cited have also been repealed and placed elsewhere in the rules, and in this instance the language is seen in Rule 11-567. While these are not Rules of Professional Conduct, it could bear some discussion even if it is decided to send these rules to another Committee to review.

513 P.3d 669
Supreme Court of Utah.

In the MATTER OF the DISCIPLINE
OF Doug BERNACCHI, #10336
Office of Professional Conduct, Appellee,
v.
Doug Bernacchi, Appellant.

No. 20210034
|
Heard: June 6, 2022
|
Filed June 23, 2022

Synopsis

Background: Reciprocal disciplinary proceeding was brought against attorney based upon his suspension in both Indiana and Illinois. The Third District Court, Salt Lake City, Patrick W. Corum, J., imposed one-year reciprocal suspension, and attorney appealed.

Holdings: The Supreme Court, Lee, Associate C.J., held that:

[1] statute providing district courts with jurisdiction over matters of lawyer discipline did not run afoul of Supreme Court constitutional duty to govern the practice of law;

[2] district court had subject-matter jurisdiction over the reciprocal disciplinary proceeding;

[3] Office of Professional Conduct (OPC) had authority over attorney even though attorney had resigned his status as a Utah lawyer;

[4] attorney did not establish that his due process rights were infringed in Indiana disciplinary proceedings;

[5] attorney failed to preserve his claim that the reciprocal disciplinary proceeding was time-barred; and

[6] any error by district court in entering default judgment based on attorney's intemperate, uncivil behavior was harmless.

Affirmed.

Procedural Posture(s): On Appeal; Proceeding on Attorney Discipline.

West Headnotes (9)

[1] **Attorneys and Legal Services** Standards of professional conduct; enforcement; discipline

Constitutional Law Encroachment on Executive

Legislature's enactment of statute providing that district courts had jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court did not run afoul of provision of state constitution that conferred on the Supreme Court the duty to govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law; the legislature did not abrogate Supreme Court's constitutional jurisdiction over attorney discipline cases, but rather it just acknowledged Supreme Court's rules designating the district court as an initial forum for fact-finding and imposition of discipline, if necessary, and no constitutional or statutory provision excluded attorney discipline matters from district courts' original jurisdiction. Utah Const. art. 8, §§ 4, 5; Utah Code Ann. § 78A-5-102(3).

[2] **Attorneys and Legal Services** Effect of Foreign Enforcement; Reciprocal Discipline

District court had subject-matter jurisdiction over reciprocal disciplinary proceeding brought against attorney, notwithstanding his claim that he was no longer an attorney admitted to practice in Utah as he resigned from the practice of law in the state. Utah Code Ann. § 78A-5-102(3); Utah R. Prof. Conduct 14-522 (2019).

More cases on this issue

[3] **Courts** Determination of questions of jurisdiction in general

A court always has jurisdiction to determine its jurisdiction.

[4] **Attorneys and Legal Services** Effect of Foreign Enforcement; Reciprocal Discipline

Office of Professional Conduct (OPC) had authority over attorney subject to reciprocal disciplinary proceeding, even though attorney had effectively resigned his status as a Utah lawyer and was no longer actively licensed to practice law in the state, since attorney was formerly admitted to practice law and was licensed to practice or was practicing law in Utah at the time of his alleged violation of the Rules of Professional Practice. Utah R. Prof. Conduct 14-506(a), 14-522 (2019).

[5] **Attorneys and Legal Services** Suspension

Constitutional Law Conduct and discipline

Attorney identified no basis for a determination that it was clear upon the face of the record in Indiana disciplinary proceedings, which gave rise to reciprocal discipline of suspension in Utah, that his due process right to notice and an opportunity to be heard was infringed, notwithstanding that four separate state and federal courts had determined that attorney was provided due process in Indiana; the record included at least two documents indicating attorney had notice and opportunity to be heard, namely Indiana Supreme Court order that imposed a suspension and a hearing officer's findings of fact and conclusions of law, which outlined that attorney participated in disciplinary process in Indiana, that he admitted to the allegations against him, and that he agreed to a sanctions hearing. U.S. Const. Amend. 14; Utah R. Prof. Conduct 14-522 (2019).

[6] **Attorneys and Legal Services** Effect of Foreign Enforcement; Reciprocal Discipline

An action for reciprocal discipline against an attorney under Rules of Professional Practice is not a forum for a collateral attack on another state's disciplinary proceedings that led to the reciprocal proceeding. Utah R. Prof. Conduct 11-567.

[7] **Appeal and Error** Presumptions and Burdens on Review

Threshold burden of appellant is to identify and challenge basis for lower court decision on appeal.

[8] **Attorneys and Legal Services** Preservation of error; waiver and estoppel; record

Attorney failed to preserve for appeal to the Supreme Court his claim that reciprocal disciplinary proceeding brought against him was time-barred, where attorney did not raise this defense in his answer or in any other pleadings in the district court, but instead he raised it for the first time on appeal, and he did not identify or argue in favor of any exception to the rules of preservation. Utah R. Prof. Conduct 14-522 (2019).

[9] **Attorneys and Legal Services** Harmless and reversible error

Any error by district court, in entering a default judgment imposing reciprocal suspension on attorney due to his intemperate, uncivil behavior and his decision to abruptly leave the summary judgment hearing, was harmless, given that the district court proceeded to provide an independent, adequate basis for imposition of a reciprocal sanction against attorney on the merits. Utah R. Civ. P. 10(h), 55(c); Utah R. Prof. Conduct 14-522 (2019).

More cases on this issue

***671** Third District, Salt Lake City, The Honorable Patrick W. Corum, No. 190907101

Attorneys and Law Firms

Billy L. Walker, Emily A. Lee, and Barbara Townsend, Salt Lake City, for appellee

Doug Bernacchi, Charlottesville, Virginia, pro se appellant

Associate Chief Justice Lee authored the opinion of the Court, in which Justice Pearce, Justice Petersen, Judge Pohlman, and Judge Harris joined.
Having recused himself, Chief Justice Durrant does not participate herein; Court of Appeals Judge Ryan Harris sat.
Justice Diana Hagen became a member of the Court on May 18, 2022, after the oral argument panel was assigned, and accordingly did not participate; Court of Appeals Judge Jill Pohlman sat.

Opinion

Associate Chief Justice Lee, opinion of the Court:

¶1 This is an appeal in an attorney discipline matter involving Doug Bernacchi. Bernacchi was suspended by the Indiana Supreme Court in October 2017. The Illinois Bar subsequently suspended him in a reciprocal disciplinary proceeding. It then notified the Utah Office of Professional Conduct (OPC) of the disciplinary actions against Bernacchi in Illinois and Indiana. And OPC initiated its own disciplinary action in response to the notice, asserting that Bernacchi was subject to reciprocal sanctions in Utah under rule 14-522 of the rules governing the State Bar. SUP. CT. R. PRO. PRAC. 14-522 (2019). [1]

¶2 The district court entered a one-year reciprocal suspension against Bernacchi on two alternative grounds. It first concluded that Bernacchi had "defaulted" when he abruptly withdrew from a hearing on the parties' cross-motions for summary judgment—striking Bernacchi's answer and pleadings and entering default judgment. In the alternative, it concluded that a reciprocal suspension was appropriate on the merits—upholding the basis of OPC's charges and rejecting a series of Bernacchi's grounds for opposing them.

¶3 On this appeal, Bernacchi challenges the district court's judgment in a rambling diatribe [2] that fails to engage with the district ***672** court's analysis on a number of points. [3] The legal basis for Bernacchi's appeal is often lost in the mire of his caustic rhetoric, much of which is directed at relitigating the Indiana proceeding or at maligning various actors in the judicial system. These flourishes are hardly helpful to our task of rendering an evenhanded assessment of the legal issues presented for our decision. Yet that is still our job, and one we take seriously even when litigants sling mud at the court and call judges names [4] instead of engaging in measured legal analysis.

¶4 As best we can tell, Bernacchi advances five grounds for challenging the imposition of a reciprocal sanction against him. He asserts: (1) that the district court lacked subject-matter jurisdiction; (2) that OPC lacked power to suspend him because he had already "resigned" his status as an attorney; (3) that reciprocal sanctions are improper due to an alleged failure of "due process" in the underlying Indiana proceedings; (4) that OPC's charges are time-barred; and (5) that the district court had no basis for entering default judgment, particularly in the absence of an opportunity for Bernacchi to brief that question.

¶5 OPC vaguely asserts that the district court "was correct in entering reciprocal discipline against Mr. Bernacchi." But it presents no legal analysis of a basis for default judgment under our rules of civil procedure, and offers no response to Bernacchi's assertion that the court erred in entering default without first giving Bernacchi an opportunity to be heard on the matter. Instead, OPC defends the district court's judgment on the merits—offering its position on each of the first four grounds listed above.

¶6 We affirm under the standard of review that governs our decisions in attorney discipline cases. *See Utah State Bar v. Lundgren (In re Discipline of Lundgren)*, 2015 UT 58, ¶ 9, 355 P.3d 984 (declaring that this court "review[s] district court findings in attorney discipline matters with less deference" than it affords in other cases, and "retain[s] the right to draw different inferences from the facts in order to make an independent determination of the correctness of the discipline the district court imposed" (citations and internal quotation marks omitted)). We uphold the jurisdiction of the district court and the OPC, conclude that Bernacchi has failed to show that there was a due process problem sufficient to defeat the imposition of a reciprocal ***673** sanction, and hold that his time-bar defense was forfeited because he did not preserve it in the district court. In so doing, we identify potential concerns with the imposition of a default judgment on this record, but conclude that any error was harmless in light of our agreement with the district court's analysis of the merits.

I

¶7 Bernacchi asserts that the district court lacked subject-matter jurisdiction over an attorney discipline matter that is committed to the jurisdiction of this court under the Utah Constitution. He then argues that OPC lacked the authority to prosecute him under rule 14-506 of our rules of professional practice. He also contends that the Indiana proceeding was an improper basis for a reciprocal sanction under rule 14-522(d) in light of certain "due process" defects in the Indiana action. And he claims that OPC's charges against him are time-barred under rule 14-529 (2019). We reject each of these challenges to the district court's order.

A

¶8 Bernacchi's challenge to the district court's jurisdiction is rambling and confusing. But it seems to start with the assertion that this court has constitutionally established jurisdiction to "govern the practice of law." UTAH CONST. art. VIII, § 4. And it appears to pivot to the proposition that neither the legislature nor this court is "permitted" to confer jurisdiction on the district court. Among other assertions, Bernacchi claims that the legislature ran afoul of article VIII, section 4 when it enacted Utah Code section 78A-5-102(3)—a provision that recognizes that "[t]he district court has jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court."

¶9 Bernacchi cites *Barnard v. Utah State Bar*, 857 P.2d 917 (Utah 1993), for the proposition that this court's jurisdiction over attorney discipline matters is exclusive—and preclusive of the jurisdiction of the district court. And because he claims that he had resigned or was administratively suspended by the Utah Bar before OPC sought a reciprocal sanction against him, he also asserts that there is no jurisdiction in an attorney discipline matter over a non-attorney.

[1] ¶10 None of these arguments holds water. First, article VIII, section 4 admittedly confers on this court the duty to "govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law." UTAH CONST. art. VIII, § 4. But the *legislature* has not stripped this court of jurisdiction, or in any way run afoul of this provision. In enacting Utah Code section 78A-5-102(3), the legislature was not abrogating the supreme court's constitutional jurisdiction over attorney discipline cases. It was just acknowledging *this court's rules* designating the district court as an initial forum for fact-finding and imposition of discipline, if necessary. *See* UTAH CODE § 78A-5-102(3) (stating that "[t]he district court has jurisdiction over matters of lawyer discipline *consistent with the rules of the Supreme Court*" (emphasis added)); SUP. CT. R. PRO. PRAC. 14-511(a), (g) (2019), *amended and renumbered as* 11-536 (December 15, 2020) (providing for initial district court jurisdiction over attorney discipline matters, subject to our appellate review).

¶11 The *Barnard* case is not to the contrary. In *Barnard*, we were asked to decide whether the district courts had jurisdiction over a declaratory judgment action aimed at establishing that an attorney's use of paralegals did not constitute the unauthorized practice of law. *Barnard*, 857 P.2d at 918. The case arose prior to our adoption of a rule delegating authority to the district courts. *Id.* at 919 n.5. And the majority in *Barnard* held that the district courts lacked subject-matter jurisdiction to decide a matter that was committed to the exclusive jurisdiction of the supreme court at the time that case was filed. *Id.*

¶12 Our court adopted the new rule during the pendency of the *Barnard* case. *Id.* at 919 n.5. And that development defeats Bernacchi's reliance on this decision. The holding in *Barnard* is distinguishable on its face. It is based on a legal regime that prevailed prior to our adoption of a rule designating the district courts as an initial forum for attorney discipline matters. Bernacchi fails to address ***674** or even acknowledge that point. And his reliance on *Barnard* fails on this basis.

¶13 Bernacchi invokes the dissent in *Barnard* in support of an assertion that this court lacks the power to involve the district courts in attorney discipline. In dissent, Justice Stewart asserted that the "language" of article VIII did not "confer[ ]" on this court "the power either to control the jurisdiction of district courts or to confer jurisdiction on district courts." *Barnard*, 857 P.2d at 921 (Stewart, J., dissenting). "That power," in Stewart's view, "lies within the province of the Legislature," *id.*—a point the majority addressed only by noting that the rule delegating authority to the district courts was not in effect at the time the case was filed, and thus "ha[d] no bearing on the outcome." *See id.* at 919 n.5.

¶14 Bernacchi does not develop Justice Stewart's point in his briefing. And the point is difficult to reconcile with the text

of the Utah Constitution. Article VIII, section 4 confers broad power on this court to "govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law." UTAH CONST. art. VIII, § 4. That greater power may encompass the lesser power to involve the district courts in our process of governing the practice of law and of resolving disciplinary proceedings. And our rule, in any event, does not appear to "confer jurisdiction on district courts" that they do not otherwise possess.

¶15 Our district courts have "original jurisdiction in all matters except as limited by this constitution or by statute." UTAH CONST. art. VIII, § 5. No constitutional or statutory provision excludes attorney discipline matters from the district courts' original jurisdiction. To the contrary, as noted above, the legislature has confirmed that the district courts have "jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court." UTAH CODE § 78A-5-102(3). And Bernacchi's argument fails on that basis.

¶16 Under our law as it now stands, this court cannot be viewed as intruding on the prerogative of the legislature "to control the jurisdiction of district courts or to confer jurisdiction on district courts." *Barnard*, 857 P.2d at 921 (Stewart, J., dissenting). And Bernacchi's reliance on the *Barnard* dissent accordingly fails.

[2] **[3]** ¶17 That leaves only Bernacchi's assertion that there can be no subject-matter jurisdiction here because he is not an attorney admitted to practice in Utah. This argument is simply mistaken. It confuses the merits with jurisdiction. And it misses the well-settled point that a court always has jurisdiction to determine its jurisdiction. *See Union Pac. R.R. v. Utah Dep't of Transp.*, 2013 UT 39, ¶ 13, 310 P.3d 1204. [5]

B

[4] ¶18 Bernacchi's next argument is a challenge to the authority of OPC over a person who is no longer actively licensed to practice law in Utah. The focus of this argument is on the language of rule 14-506—which speaks generally to the "disciplinary jurisdiction of the Supreme Court and the OPC." SUP. CT. R. PRO. PRAC. 14-506(a) (2019). By rule, such jurisdiction extends broadly to "any lawyer admitted to practice law in Utah," to "any lawyer admitted but currently not properly licensed to practice in Utah," and to "any formerly admitted lawyer" who violates a rule of professional conduct "where the attorney was licensed to practice or was practicing law at the time of the alleged violation." *Id.* In both the district court and ***675** on appeal, Bernacchi was focused solely on the language of this rule. And the district court followed suit. It concluded that "14-506 does apply to Mr. Bernacchi and his status as a once-admitted lawyer" since the rule covers persons "formerly admitted" to practice who violate a rule of professional conduct "where the attorney was licensed to practice or was practicing law at the time of the alleged violation."

¶19 Both the parties and the district court proceeded on the premise that the reciprocal sanction rule—rule 14-522—covers any and all persons subject to rule 14-506. And we can see a plausible basis for that view. Rule 14-522(a) requires OPC to "obtain a certified copy" of a disciplinary order entered by another regulatory body "having disciplinary jurisdiction" over any "lawyer within the jurisdiction of the Supreme Court." *Id.* 14-522(a). And that language could be viewed as a cross-reference to the jurisdictional coverage provided in rule 14-506—indicating that rule 14-522 likewise extends not just to a "lawyer admitted to practice in Utah" but also to a "lawyer admitted but currently not properly licensed to practice in Utah" and to a "formerly admitted lawyer" who violates a rule of professional conduct "where the attorney was licensed to practice or was practicing law at the time of the alleged violation." *Id.* 14-506(a).

¶20 Elsewhere, rule 14-522 seems to provide for reciprocal sanctions only for a "lawyer admitted to practice in Utah." *Id.* 14-522(a). And that language could be read as limiting the availability of reciprocal sanctions to a subset of all persons subject to the general jurisdiction of this court and OPC under rule 14-506. A "lawyer admitted to practice," on this reading, could be viewed as encompassing only those who are currently admitted *to practice*—those with an active license. That reading could be reinforced by the distinct categories of persons set forth in the coverage of rule 14-506, in language that seems to describe a "lawyer admitted to practice in Utah" in contrast to a "formerly admitted lawyer."

¶21 We flag this ambiguity for our advisory committee, since we see enough ambiguity here to merit some clarification or cleanup of the language of our rules. [6] And frankly, we can see arguable policy grounds for a clarification in either direction—for reinforcing the view that the coverage of both rules is coextensive, or for establishing that only currently admitted lawyers are subject to reciprocal sanctions. With that in mind, we reserve the policy decision for resolution on another day, after studied input from our advisory committee.

¶22 We need not and do not resolve any possible mismatch between the coverage of rules 14-506 and 14-522 here because Bernacchi has not preserved or argued that there is any such mismatch, and there is at least a plausible argument that the two rules are coextensive. For that reason, we need only review the district court's determination that Bernacchi is subject to rule 14-506 because he is at least a lawyer "formerly admitted" to practice who violated a rule of professional conduct "where the attorney was licensed to practice or was practicing law at the time of the alleged violation." *Id.* 14-506(a). And we can easily affirm that conclusion. Bernacchi has not addressed or refuted the district court's analysis. So we can accept his factual assertions about his status—as a lawyer who had effectively resigned his status as a Utah lawyer at all relevant times—while still affirming the district court. We thus affirm on the basis of the district court's decision.

C

[5] **[6]** ¶23 Bernacchi's due process argument is also rather hard to follow. A threshold point is clear: Bernacchi is not pleased with the imposition of the sanction against him in Indiana, as he rails at great length about alleged injustices and errors in the Indiana proceedings. *See, e.g.*, Brief of Appellant ***676** at 22–23 (asserting that "liability [in Indiana] was based on a perjury trap and duress" and the "process [was] flawed Constitutionally"); Reply Brief of Appellant at 5–11 (calling the Indiana process "a case of rigged justice" that "targeted" him "for so called 'death' without due process"). But this is not a forum for a collateral attack on the Indiana proceedings. It is an action for reciprocal discipline under our Rules of Professional Practice. To prevail on appeal, Bernacchi bears the burden of demonstrating error in the district court's imposition of a reciprocal sanction.

¶24 Bernacchi takes a step in the direction of our rules when he paints the cited problems in the Indiana case with the broad brush of an infringement of his right to "due process." Rule 14-522, after all, establishes an exception to the requirement of imposing "equivalent discipline" in Utah where "it clearly appears upon the face of the record from which the discipline is predicated that ... the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process." SUP. CT. R. PRO. PRAC. 14-522(d)(1) (2020).

[7] ¶25 Yet Bernacchi has fallen far short of carrying his burden of persuasion under the rule. A threshold burden of an appellant is to identify and challenge the basis for the lower court decision on appeal. *Supra* ¶ 3 n.3. Bernacchi has failed to even acknowledge the basis for the district court's disposition of this claim—its conclusion that "four separate courts" (the Seventh Circuit Court of Appeals, the Indiana Supreme Court, a federal district court in Indiana, and the Illinois Supreme Court) had "already determined that Mr. Bernacchi was provided due process" in Indiana. And he has identified no basis for a determination that it was clear "upon the face of the record" in Indiana that Bernacchi's due process right to "notice" and an "opportunity to be heard" was infringed. SUP. CT. R. PRO. PRAC. 14-522(d)(1) (2020). The district court record includes at least two documents indicating that Bernacchi had notice and an opportunity to be heard—the Indiana Supreme Court Order, which imposed a suspension on Bernacchi; and the Hearing Officer's Findings of Fact and Conclusions of Law, which outlined that Bernacchi participated in the disciplinary process in Indiana, that he admitted to the allegations against him, and that he agreed to a sanctions hearing. Bernacchi does not address these documents, or present any argument rooted in the language of the operative rule. Besides his angry rants and vague complaints about an infringement of due process, he presents no reasoned basis for a conclusion that the alleged infringement of due process was clear "upon the face of the record" in Indiana. And his argument fails on that basis. [7]

D

[8] ¶26 Bernacchi's time-bar argument is easily disposed of. Bernacchi failed to preserve this defense in his answer or in any other pleadings in the district court. [8] He raised it for the first time on appeal. And he has not identified or argued in favor of any exception to our rules of preservation. We reject this argument on this basis. *See State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443 ***677** ("When a party fails to raise and argue an issue in the trial court, it has failed to preserve the issue, and [we] will not typically reach that issue absent a valid exception to preservation." (citation omitted)).

II

[9] ¶27 Bernacchi also questions the basis for the imposition of a default judgment against him, particularly in the absence

of a motion or an opportunity to be heard on the matter. He may have a point here. At a bare minimum, Bernacchi should have been afforded an opportunity to brief this issue before the court imposed a default judgment. And the district court entered no findings or conclusions on the basis for imposing a sanction of default. On such a record, it is not apparent that Bernacchi's admittedly intemperate, uncivil behavior and decision to abruptly leave the summary judgment hearing were an adequate basis for a default judgment. *See* UTAH R. CIV. P. 10(h) (stating that Utah courts are given authority to "strike and disregard all or any part of a pleading or other paper that contains redundant, immaterial, impertinent or scandalous matter"); *see also* UTAH R. CIV. P. 55(c) (permitting the court to set aside an entry of default "[f]or good cause").

¶28 We can assume (without deciding) that the district court may have erred in entering a default judgment on this record. That still would not be a basis for reversal. Any such error is harmless given that the district court proceeded to provide an independent, adequate basis for imposition of a reciprocal sanction against Bernacchi on the merits. For that reason, we affirm despite our misgivings with the manner in which the district court arrived at its alternative assertion that it was treating Bernacchi's misconduct as a basis for a default judgment.

All Citations

513 P.3d 669, 2022 UT 25

Footnotes

1 Our Rules of Professional Practice were amended and renumbered effective December 15, 2020. We cite to and apply the rules in effect at the time of the disciplinary proceedings in Indiana—that is, when Bernacchi was "publicly disciplined by another court" in October 2017 and the reciprocal discipline rule would have been triggered. SUP. CT. R. PRO. PRAC. 14-522(a), *amended and renumbered as* SUP. CT. R. PRO. PRAC. 11-567 (2020); *see also In re J.A.L.*, 2022 UT 12, ¶ 18 n.5, 506 P.3d 606 ("[W]e apply the law as it exists at the time of the event regulated by the law in question." (alteration in original) (citation omitted) (internal quotation marks omitted)).

2 Bernacchi's briefing repeatedly stoops to name-calling and motive-questioning. *See, e.g.*, Brief of Appellant at 40 (calling OPC staff "Nazis"); Reply Brief of Appellant at 22 ("[T]he leadership of the Utah State Bar and the OPC ... can't see or shoot straight out there in pioneer land."); Brief of Appellant at 16 (characterizing the OPC's efforts as "gaslighting the third district court judge, this Court, and [Bernacchi]"); *id.* at 26–27 (asserting that the Indiana disciplinary commission "tricked" and "entrapped" him and engaged in racial bias against him); *id.* at 28 (characterizing the December 2020 summary judgment hearing as a "sham"); *id.* at 29 (calling this disciplinary action "pure harassment"); *id.* at 30 (asserting that OPC "lied" to Judge Corum and engaged in "actual fraud"); *id.* at 32 (stating that Judge Corum "retaliated" against him for leaving the summary judgment hearing by entering default judgment); *id.* at 45 (asserting that Judge Corum was "over-focused on his agenda-driven, rigged-justice 'performance art' "); *id.* at 53 (stating that Judge Corum "acted[ ] above the law" and "had been improperly influenced by [OPC]").

And in so doing, Bernacchi's briefing runs afoul of our rules of procedure and standards of professionalism and civility. UTAH R. APP. PROC. 40(b)(1) (authorizing discipline and sanctions for submitting filings that are presented for "any improper purpose" including to "harass"); SUP. CT. R. PRO. PRAC. 14-301(3) (establishing that lawyers "should avoid hostile [or] demeaning" words and "shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct"). These and other moves by Bernacchi could call for an order striking offending portions of the brief. UTAH R. APP. PROC. 24(i) (establishing that the court "may strike or disregard a brief that contains burdensome, irrelevant, immaterial, or scandalous matters"). Or they could justify a referral to our Professionalism and Civility Counseling Board. SUP. CT. R. PRO. PRAC. 14-303(b)(1). But the former seems unnecessary now that we have called out the

bad behavior in a published opinion. And the latter is probably a moot point for Bernacchi, who is already resigned from the practice of law in Utah and proclaims that he is not "ever likely to practice law in Utah, has ... retired, and moved from Utah long ago" to which "he [is] never returning." Brief of Appellant at 33, 50; *see also* Appellant's Motion for Summary Disposition at 23 (describing himself as a "long-retired" lawyer); Reply Brief of Appellant at 22–23 (stating that he has not practiced law "anywhere" for "many years" and is "fully retired and ... not working").

3 *See Living Rivers v. Exec. Dir. of the Utah Dep't of Env't. Quality*, 2017 UT 64, ¶¶ 41–43, 50–51, 417 P.3d 57 (declining to reach the "important questions" of the appeal where the appellant "utterly fail[ed] to engage with the substance of the [lower tribunal's] ruling"); *Federated Cap. Corp. v. Shaw*, 2018 UT App 120, ¶ 20, 428 P.3d 12 (clarifying that an appellant who "does not meaningfully engage with the district court's reasoning ... falls short of demonstrating any error on the part of the district court" (citation omitted)); *see also* UTAH R. APP. PROC. 24(a)(8) (requiring the appellant to "explain, with reasoned analysis supported by citations to legal authority and the record, why the party should prevail on appeal").

4 Name-calling unfortunately abounds in our increasingly tribal culture. But for any who may be wondering, it won't help your cause in our justice system. You may privately question a judge's wisdom, sanity, or consistency. You may even be inclined to reduce your animus to an epithet aimed at a member of the court you are appearing in. *See* Appellant's letter to the Court (April 4, 2022) (calling one of us a "flip flopping Justice"). That might make you feel better in the moment. But we can assure you—it's not a best practice in appellate briefing.

5 In passing, Bernacchi also vaguely asserts that the district court lacked personal jurisdiction. But on appeal and in the district court, Bernacchi did little more than mouth the words "personal jurisdiction." He provided no substantive analysis—no identification of a governing legal principle, or application of such principle to the facts of this case. That is insufficient. *See* UTAH R. APP. PROC. 24(a)(8) ("[Briefs] must explain, with reasoned analysis supported by citations to legal authority and the record, why the party should prevail on appeal."); *see also Hill v. Superior Prop. Mgmt. Servs., Inc.*, 2013 UT 60, ¶ 47, 321 P.3d 1054 (holding that neither district nor appellate courts are "depositor[ies] in which [a party] may dump the burden of argument and research" and declining to reverse the district court "for failing to undertake that task" on behalf of a party (second alteration in original) (citations omitted) (internal quotation marks omitted)).

6 The text of the reciprocal sanction rule has been altered in a recent amendment to our rules. *See* SUP. CT. R. PRO. PRAC. 11-567 (2020). But the new language may provide an even stronger basis for a mismatch in coverage, as it speaks of reciprocal sanctions for "a Lawyer licensed to practice in Utah." *Id.* Perhaps both the old rule and the new one are impliedly meant to extend to anyone who was *ever* "admitted" or "licensed" to practice in Utah. But the text of the rule is at least confusing. And it at least merits some cleanup.

7 Bernacchi also seems to hint at a basis for an exception under rule 14-522(d)(3)—an exception that applies where "the misconduct established warrants substantially different discipline in Utah or is not misconduct in this jurisdiction." SUP. CT. R. PRO. PRAC. 14-522(d)(3). He seems to be attempting to invoke this exception when he asserts that "Utah has never found strict attorney misconduct for subcontracting staff, paralegal firms, or temps"—activity that, in Bernacchi's view, formed the basis for the Indiana sanction. But Bernacchi offers no reasoned, authority-rooted analysis in support of this assertion. And he has accordingly failed to carry his burden of persuasion on appeal. *See supra* ¶ 17 n.5 (discussing that the parties—not the court—carry the burden of argument and research on appeal under our rules and case law).

8 Bernacchi made bare assertions to the district court that the OPC disciplinary process was "untimely" and that there was a statute of limitations problem. But Bernacchi did not refer to the applicable statute of limitations rule or the relevant limitations period in the proceedings below. *See* SUP. CT. R. PRO. PRAC. 14-529. In so doing, he failed to present the substantive legal analysis required to preserve an issue for appeal. *See*

State v. Johnson, 2017 UT 76, ¶ 15, 416 P.3d 443 (holding that a party must "raise *and argue* an issue" to preserve the issue in the district court (emphasis added) (citation omitted)).

End of Document

Rule 11-567. Reciprocal discipline.

Effective: 12/15/2020

(a) **Duty to notify the OPC of discipline or transfer to disability inactive status**. When another court, jurisdiction, or regulatory body having disciplinary jurisdiction publicly disciplines or transfers to disability inactive status a Lawyer licensed to practice in Utah, such Lawyer must inform the OPC of the discipline or transfer within 28 days. If the OPC receives notification from any source that a Lawyer within the Supreme Court's jurisdiction has been publicly disciplined or transferred to disability inactive status by any other jurisdiction, the OPC must obtain a certified copy of the disciplinary order.

(b) **Serving notice on Lawyer**. On receiving a certified copy of an order demonstrating that a Lawyer licensed to practice in Utah has been publicly disciplined or transferred to disability inactive status by another court, jurisdiction, or regulatory body having disciplinary jurisdiction, the OPC will issue a notice directed to the Lawyer containing:

(1) a copy of the order from the other court, jurisdiction, or regulatory body; and

(2) a notice giving the Lawyer the right to inform the OPC, within 28 days from service of the notice, of any claim by the Lawyer predicated on the grounds set forth in paragraph (d), that imposing discipline or transfer in Utah would be unwarranted and stating the reasons for that claim.

(c) **Effect of stay of discipline in another jurisdiction**. If the discipline or transfer imposed in the other court, jurisdiction, or regulatory body has been stayed, any reciprocal discipline or transfer imposed in Utah will be deferred until the stay expires.

(d) **Discipline to be imposed**.

(1) After 28 days from service of the notice under paragraph (b), the district court will take such action as may be appropriate to cause the discipline or transfer to be imposed in this jurisdiction, unless it clearly appears on the face of the record from which the discipline or transfer is predicated that:

(A) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(B) imposing discipline would result in grave injustice;

(C) the misconduct warrants substantially different discipline in Utah or is not misconduct in this jurisdiction; or

(D) the reason for the original transfer to disability inactive status no longer exists.

(2) If the district court determines that any of these elements exist, it will enter such other order as it deems appropriate. The burden is on the Lawyer seeking different discipline or transfer to demonstrate that imposing discipline or transfer is not appropriate.

(e) **Other jurisdictions' final adjudications**. Except as provided in paragraphs (c) and (d) above, a Respondent who has been found guilty of misconduct or is transferred to disability inactive status in a final adjudication of another court, jurisdiction, or regulatory body will establish conclusively the misconduct or the disability for purposes of a disciplinary or disability proceeding in Utah.