

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

34       (g) A lawyer who represents two or more clients shall not participate in making an aggregate  
35 settlement of the claims of or against the clients or in a criminal case an aggregated agreement as to  
36 guilty or nolo contendere pleas, unless each client gives informed consent, in writing signed by the client.

37 The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of  
38 the participation of each person in the settlement.

39 (h) A lawyer shall not:

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

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

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

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

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

49 (j) A lawyer shall not engage in sexual relations with a client that exploit the lawyer-client relationship.

50 For the purposes of this Rule:

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

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

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

58 Comment

59 Business Transactions Between Client and Lawyer

60 [1] A lawyer's legal skill and training, together with the relationship of trust and confidence between  
61 lawyer and client, create the possibility of overreaching when the lawyer participates in a business,  
62 property or financial transaction with a client, for example, a loan or sales transaction or a lawyer  
63 investment on behalf of a client. The requirements of paragraph (a) must be met even when the  
64 transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a  
65 will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the  
66 client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law,  
67 for example, the sale of title insurance or investment services to existing clients of the lawyer's legal  
68 practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does  
69 not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5,  
70 although its requirements must be met when the lawyer accepts an interest in the client's business or  
71 other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to  
72 standard commercial transactions between the lawyer and the client for products or services that the  
73 client generally markets to others, for example, banking or brokerage services, medical services, products

74 manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no  
75 advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and  
76 impracticable.

77 [2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms  
78 be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph  
79 (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of  
80 independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain  
81 such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing  
82 signed by the client, both to the essential terms of the transaction and to the lawyer's role. When  
83 necessary, the lawyer should discuss both the material risks of the proposed transaction, including any  
84 risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and  
85 should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of  
86 informed consent).

87 [3] The risk to a client is greatest when the client expects the lawyer to represent the client in the  
88 transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's  
89 representation of the client will be materially limited by the lawyer's financial interest in the transaction.  
90 Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph  
91 (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks  
92 associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the  
93 risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's  
94 interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In  
95 some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the  
96 client's consent to the transaction.

97 [4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is  
98 inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written  
99 disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that  
100 the client was independently represented in the transaction is relevant in determining whether the  
101 agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

#### 102 Use of Information Related to Representation

103 [5] Use of information relating to the representation to the disadvantage of the client violates the  
104 lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or  
105 a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns  
106 that a client intends to purchase and develop several parcels of land, the lawyer may not use that  
107 information to purchase one of the parcels in competition with the client or to recommend that another  
108 client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For  
109 example, a lawyer who learns a government agency's interpretation of trade legislation during the  
110 representation of one client may properly use that information to benefit other clients. Paragraph (b)

111 prohibits disadvantageous use of client information unless the client gives informed consent, except as  
112 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.

#### 113 Gifts to Lawyers

114 [6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For  
115 example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a  
116 client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting  
117 it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats  
118 client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition  
119 on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's  
120 benefit, except where the lawyer is related to the client as set forth in paragraph (c).

121 [7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or  
122 conveyance the client should have the detached advice that another lawyer can provide. The sole  
123 exception to this Rule is where the client is a relative of the donee.

124 [8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of  
125 the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position.  
126 Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7  
127 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit  
128 the lawyer's independent professional judgment in advising the client concerning the choice of an  
129 executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should  
130 advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as  
131 well as the availability of alternative candidates for the position.

#### 132 Literary Rights

133 [9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the  
134 representation creates a conflict between the interests of the client and the personal interests of the  
135 lawyer. Measures suitable in the representation of the client may detract from the publication value of an  
136 account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a  
137 transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in  
138 ownership in the property, if the arrangement conforms to Rule 1.5.

#### 139 Financial Assistance

140 [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their  
141 clients, including making or guaranteeing loans to their clients for living expenses, because to do so  
142 would encourage clients to pursue lawsuits that might not otherwise be brought and because such  
143 assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a  
144 prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of  
145 medical examination and the costs of obtaining and presenting evidence, because these advances are  
146 virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an  
147 exception allowing lawyers representing indigent clients to pay court costs and litigation expenses and

148 minor sums reasonably connected to the litigation, such as the cost of maintaining nominal basic local  
149 telephone service or providing bus passes to enable the indigent client to have means of contact with the  
150 lawyer during litigation, regardless of whether these funds will be repaid, is warranted.

151 [10a] Relative to the ABA Model Rule, Utah Rule 1.8(e)(2) broadens the scope of direct support that a  
152 lawyer may provide to indigent clients to cover minor expenses reasonably connected to the litigation.  
153 This would include, for example, financial assistance in providing transportation, communications or  
154 lodging that would be required or desirable to assist the indigent client in the course of the litigation.

#### 155 Person Paying for a Lawyer's Services

156 [11] Lawyers are frequently asked to represent a client under circumstances in which a third person  
157 will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an  
158 indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with  
159 one or more of its employees). Because third-party payers frequently have interests that differ from those  
160 of the client, including interests in minimizing the amount spent on the representation and in learning how  
161 the representation is progressing, lawyers are prohibited from accepting or continuing such  
162 representations unless the lawyer determines that there will be no interference with the lawyer's  
163 independent professional judgment and there is informed consent from the client. See also Rule 5.4(c)  
164 (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays  
165 the lawyer to render legal services for another).

166 [12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the  
167 fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a  
168 conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also  
169 conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of  
170 interest exists if there is significant risk that the lawyer's representation of the client will be materially  
171 limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-  
172 party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may  
173 accept or continue the representation with the informed consent of each affected client, unless the conflict  
174 is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in  
175 writing.

#### 176 Aggregate Settlements

177 [13] Differences in willingness to make or accept an offer of settlement are among the risks of  
178 common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that  
179 should be discussed before undertaking the representation, as part of the process of obtaining the clients'  
180 informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding  
181 whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo  
182 contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules  
183 and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple  
184 clients, the lawyer must inform each of them about all the material terms of the settlement, including what

185 | the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e)(f)  
186 (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those  
187 proceeding derivatively, may not have a full client-lawyer relationship with each member of the class;  
188 nevertheless, such lawyers must comply with applicable rules regulating notification of class members  
189 and other procedural requirements designed to ensure adequate protection of the entire class.

#### 190 Limiting Liability and Settling Malpractice Claims

191 [14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the  
192 client is independently represented in making the agreement because they are likely to undermine  
193 competent and diligent representation. Also, many clients are unable to evaluate the desirability of  
194 making such an agreement before a dispute has arisen, particularly if they are then represented by the  
195 lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an  
196 agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable  
197 and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the  
198 ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that  
199 each lawyer remains personally liable to the client for his or her own conduct and the firm complies with  
200 any conditions required by law, such as provisions requiring client notification or maintenance of  
201 adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines  
202 the scope of the representation, although a definition of scope that makes the obligations of  
203 representation illusory will amount to an attempt to limit liability.

204 [15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule.  
205 Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or  
206 former client, the lawyer must first advise such a person in writing of the appropriateness of independent  
207 representation in connection with such a settlement. In addition, the lawyer must give the client or former  
208 client a reasonable opportunity to find and consult independent counsel.

#### 209 Acquiring Proprietary Interest in Litigation

210 [16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a  
211 proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law  
212 champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the  
213 representation. In addition, when the lawyer acquires an ownership interest in the subject of the  
214 representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule  
215 is subject to specific exceptions developed in decisional law and continued in these Rules. The exception  
216 for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets  
217 forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for  
218 reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law.  
219 These may include liens granted by statute, liens originating in common law and liens acquired by  
220 contract with the client. When a lawyer acquires by contract a security interest in property other than that  
221 recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial

222 transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent  
223 fees in civil cases are governed by Rule 1.5.

#### 224 Client-Lawyer Sexual Relationships

225 [17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the  
226 highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual  
227 relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in  
228 violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's  
229 disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's  
230 emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise  
231 of independent professional judgment. Moreover, a blurred line between the professional and personal  
232 relationships may make it difficult to predict to what extent client confidences will be protected by the  
233 attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are  
234 imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to  
235 client interests and because the client's own emotional involvement renders it unlikely that the client could  
236 give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client  
237 regardless of whether the relationship is consensual and regardless of the absence of prejudice to the  
238 client.

239 [18] Spousal relationships and sexual relationships that predate the client-lawyer relationship are not  
240 prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are  
241 diminished when the sexual relationship existed prior to the commencement of the client-lawyer  
242 relationship. However, before proceeding with the representation in these circumstances, the lawyer  
243 should consider whether the lawyer's ability to represent the client will be materially limited by the  
244 relationship. See Rule 1.7(a)(2).

245 [19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the  
246 organization (whether inside counsel or outside counsel) from having a sexual relationship with a  
247 constituent of the organization who supervises, directs or regularly consults with that lawyer concerning  
248 the organization's legal matters.

249 [19a] Utah Rule 1.8(j) is different from the ABA Model Rule. It follows the language from former Utah  
250 Rule 8.4(g) regarding the prohibition of sexual relations with a client. This Rule defines "sexual relations"  
251 and clarifies the presumption that sexual relations with a client are exploitive of the client.

#### 252 Imputation of Prohibitions

253 [20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through  
254 (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one  
255 lawyer in a firm may not enter into a business transaction with a client of another member of the firm  
256 without complying with paragraph (a), even if the first lawyer is not personally involved in the  
257 representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to  
258 associated lawyers.