Agenda

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

August 22, 2016
5:00 to 7:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Salt Lake City
Judicial Council Room, Suite N31

Welcome and introduction of new committee members : Joni Jones, Phillip Lowry, Timothy Merrill, Cristie Roach, Padma Veeru-Collings, and Timothy Conde (recording secretary). Honoring Nayer Honarvar for her service.		Steve Johnson, Chair
Rule 11-101(4).	Tab 1	Steve Johnson
Note on Rule 8.4.	Tab 2	Steve Johnson
Discussion of *Larsen v. Utah State Bar*, 2016 UT 26, and Comment 3 to Rule 3.3.	Tab 3	Steve Johnson
Update on Licensed Paralegal Practitioners and the effects on the Rules of Professional Conduct (Rule 14-802, Rule 4.2, Rule 5.1).	Tab 4	Steve Johnson
Next meeting.		Steve Johnson

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

Tab 1

Rule 11-101. Creation and Composition of Advisory Committees.

Intent:

To establish advisory committees and procedures to govern those committees.

Applicability:

This rule shall apply to the Supreme Court, the Administrative Office of the Courts, and the Supreme Court advisory committees.

Statement of the Rule:

(1) Establishment of committees. There is hereby established a Supreme Court advisory committee in each of the following areas: civil procedure, criminal procedure, juvenile court procedure, appellate procedure, evidence, and the rules of professional conduct. The Supreme Court shall designate a liaison to each advisory committee.

(2) Composition of committees. The Supreme Court shall determine the size of each committee based upon the workload of the individual committees. The committees should be broadly representative of the legal community and should include practicing lawyers, academicians, and judges. Members should possess expertise within the committee's jurisdiction.

(3) Application and recruitment of committee members. Vacancies on the committees shall be announced in a manner reasonably calculated to reach members of the Utah State Bar. The notice shall specify the name of the committee which has the vacancy, a brief description of the committee's responsibilities, the method for submitting an application or letter of interest and the application deadline. Members of the committees or the Supreme Court may solicit applications for membership on the committees. Applications and letters of interest shall be submitted to the Supreme Court.

(4) Appointment of committee members and chair. Upon expiration of the application deadline, the Supreme Court shall review the applications and letters of interest and appoint those individuals who are best suited to serve on the committee. Members shall be appointed to serve staggered four-year terms. In the event of a mid-term vacancy the Supreme Court shall appoint a new member to serve for the remainder of the term. The Supreme Court shall select a chair from among the committee's members. No lawyer may serve more than two full consecutive terms on the committee unless appointed by the Supreme Court as the committee chair or when justified by special circumstances, such as an academician or court staff attorney. Judges who serve as members of the committees generally shall not be selected as chairs. Committee members shall serve as officers of the court and not as representatives of any client, employer, or other organization or interest group. At the first meeting of a committee in any calendar year, and at every meeting at which a new member of the committee first attends, each committee member shall briefly disclose the general nature of his or her legal practice.

(5) Absences. In the event that a committee member fails to attend three committee meetings during a calendar year, the chair may notify the Supreme Court of those absences and may request that the Supreme Court replace that committee member.

(6) Administrative assistance. The Administrative Office of the Courts shall coordinate staff support to each committee, including the assistance of the Office of General Counsel in research and drafting and the coordination of secretarial support and publication activities.

(7) Recording secretaries. A committee chair may appoint a third-year law student, a member of the Bar in good standing, or a legal secretary to serve as a recording secretary for the committee. The recording secretary, shall attend and take minutes at committee meetings, provide research and drafting assistance to committee members and perform other assignments as requested by the chair.

Tab 2

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

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

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

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

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

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

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

Comment

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

[1a] A violation of paragraph (a) based solely on the lawyer’s violation of another Rule of Professional Conduct shall not be charged as a separate violation. However, this rule defines professional misconduct as a violation of the Rules of Professional Conduct as the term professional misconduct is used in the Supreme Court Rules of Professional Practice, including the Standards for Imposing Lawyer Sanctions. In this respect, if a lawyer violates any of the Rules of Professional Conduct, the appropriate discipline may be imposed pursuant to Rule 14-605.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).

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

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

Tab 3

This opinion is subject to revision before final publication in the Pacific Reporter

2016 UT 26

IN THE

SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Discipline of TYLER JAMES LARSEN

TYLER JAMES LARSEN,
Appellant and Cross-Appellee,

v.

UTAH STATE BAR,
Appellee and Cross-Appellant.

No. 20140535
Filed June 16, 2016

On Direct Appeal

Third District, Salt Lake
The Honorable Andrew H. Stone
No. 130901067

Attorneys:

Tyler James Larsen, pro se, Coalville, appellant and cross-appellee

Todd Wahlquist, Salt Lake City, for appellee and cross-appellant

ASSOCIATE CHIEF JUSTICE LEE authored the opinion of the Court, in which CHIEF JUSTICE DURRANT, JUSTICE DURHAM, and JUSTICE HIMONAS joined.

JUSTICE JOHN A. PEARCE became a member of the Court on December 17, 2015, after oral argument in this matter, and accordingly did not participate.

ASSOCIATE CHIEF JUSTICE LEE, opinion of the Court:

¶1 Tyler James Larsen was suspended from the practice of law for seven months for violating two rules of professional conduct. We reverse in part and affirm in part.

I

¶2 Tyler James Larsen was a prosecutor with the Davis County Attorney's Office from 2007 to 2010. He was charged with two sets of violations of the Utah Rules of Professional Conduct in 2012. One charge alleged a misstatement of fact in violation of rule 3.3. The other alleged a failure of a prosecutor to make a timely disclosure of exculpatory evidence to the defense under rule 3.8. In the proceedings reviewed on this appeal, the district court found that Larsen had violated both rules. And it imposed a sanction of suspension for seven months—thirty days for the rule 3.3 violation and six months for the rule 3.8 violation.

¶3 The rule 3.3 charge arose out of a 2009 proceeding involving a woman on probation for a DUI conviction. At a hearing on that case defense counsel asserted that his client had been charged probation fines that were excessive. The trial judge then set a hearing for the next month to look into the matter further.

¶4 Craig Webb, an investigator with the Davis County Attorney's Office, investigated the matter. Webb collected receipts from the probation agent and recorded data in a spreadsheet. Webb's spreadsheet showed that the probationer had paid $3,797. At the hearing Larsen requested a sidebar with Judge Allphin, where he indicated that he had a spreadsheet showing that the probationer had paid $6,000. When questioned further, Larsen also stated that his boss, the Davis County Attorney, did not want that information to be disclosed.

¶5 Larsen was subsequently charged with misstating the facts to the court in connection with the above proceedings. In the disciplinary proceedings below, the district court found that Larsen had misstated the facts in claiming he had a spreadsheet showing that the probationer had paid $6,000 to the probation agent and in stating that the Davis County Attorney preferred not to have that information disclosed. Specifically, the court concluded that there was no spreadsheet reflecting a payment of $6,000 at the time of the underlying hearing. In so doing, however, the court found that the OPC had not established "intentional misrepresentation." Instead it concluded that "Larsen's statement was a misstatement that a reasonably diligent inquiry would have avoided." *Findings of Fact and Conclusions of Law* at 4.

¶6 This point was clarified in an exchange between Larsen and the court toward the end of the hearing. That exchange was as follows:

> **Mr. Larsen**: Can I just ask one clarification? So, on the first [count], you did not find intent?
>
> **The Court**: I did not find intentional misrepresentation; I found reckless misrepresentation.

Original Transcript (Partial) of Trial, May 21, 2014 at 9.

¶7 The district court made further findings in an Order of Sanction it entered against Larsen. In the Order the district court found that Larsen had made a separate untrue statement to the trial judge in the underlying hearing in 2009. And although the court acknowledged that OPC had not asserted a separate charge on the basis of that statement, the district court found that "it [was] probative" of Larsen's state of mind—that his "actions were knowing *or reckless* at the time" of the underlying hearing. *Findings of Fact and Conclusions of Law* at 4.

¶8 On these grounds the district court found that Larsen had violated rule 3.3. It also imposed a thirty-day suspension based on that violation.

¶9 The rule 3.8 charge arose out of a 2010 felony robbery case. The defendant in that case was accused of robbing two stores, Kim's Fashions and Baskin-Robbins, in 2006. A key issue at trial concerned identification of the perpetrator. No physical evidence connected the defendant to the robberies, but two eyewitnesses from each robbery were called to identify the defendant as the robber.

¶10 The rule 3.8 charge centered around Larsen's interactions with the eyewitnesses. About ten days before trial Larsen and a police officer met with the Kim's Fashions witnesses and then the Baskin-Robbins witnesses to discuss the upcoming trial. At the end of both meetings Larsen showed the witnesses a single photograph of the defendant and asked the witnesses if they would be able to identify him as the robber at trial. No other photographs were shown. All of the witnesses indicated that they would be able to make the identification.

¶11 About a week before the trial, Larsen met with Mark Arrington, the defendant's attorney. Larsen told Arrington that the prosecution's "witnesses had ID'd [the defendant]." *Original Transcript (Partial) of Trial*, May 20, 2014 at 39. Arrington did not ask

Larsen any more questions about the identification. And Larsen did not disclose that he had shown a photograph of the defendant to the witnesses.

¶12 At trial the husband and wife owners of Kim's Fashions were the first witnesses. The husband testified on cross-examination that he had not seen a photograph of the defendant. Larsen did not correct this false testimony on redirect.

¶13 The wife was then called to the witness stand. On cross-examination, she admitted that Larsen had shown her and her husband a single photograph of the defendant about ten days before trial. Arrington then moved for a mistrial.

¶14 The record is a bit unclear as to the precise sequence of events following the motion for mistrial. At oral argument before this court, Larsen said that after Arrington moved for a mistrial, the judge and attorneys had a sidebar conversation in which the judge inquired into the possibility of salvaging the Baskin-Robbins robbery charges if those witnesses had not been shown the photograph. Larsen said he did not fully understand what the judge was talking about; so he said that at that time he did not disclose that he had also shown the Baskin-Robbins witnesses the photo.

¶15 During the recess that followed the sidebar, however, Larsen claims that he told Arrington that he had shown the photo to the Baskin-Robbins witnesses. At that point, Arrington notified the judge, who then declared a mistrial.[1]

¶16 OPC advanced a somewhat different sequence at oral argument. It said that Larsen allowed the Baskin-Robbins trial to go forward even though he knew the witnesses were tainted. That is a

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[1] The precise chronology is a bit unclear on the record, however. At his disciplinary trial Larsen stated that the first Baskin-Robbins witness had begun to testify about what was occurring in a surveillance video, but the video machine wouldn't function properly. The court then took a recess. It is unclear whether this is the break in which Larsen claimed he told defense counsel about the problem with the two Baskin-Robbins witnesses. It is also unclear whether the witness went back on the stand. After the recess the second Baskin-Robbins witness took the stand and Larsen asked her questions that elicited a statement that Larsen had shown her a photo of the defendant before trial. *See also infra* ¶ 33 n.3.

plausible inference to be drawn from the record. But there is nothing in the record that clearly indicates the Baskin-Robbins part of the trial went forward in any meaningful sense before Larsen's admission. At oral argument we asked OPC whether Larsen told Arrington that he had shown the picture to the Baskin-Robbins witnesses before or after the sidebar meeting with the judge. And OPC acknowledged that the trial record is not clear on the precise sequence of the relevant events.

¶17 In the disciplinary proceedings below, the district court found that "[w]hen Judge Allphin indicated a willingness to proceed on the second charge if the victims had not seen the photographs, Mr. Larsen did not volunteer at the time that he had shown the photos to the other victims." *Findings of Fact and Conclusions of Law* at 6. And on that basis the court concluded that "Mr. Larsen intentionally concealed the fact of the photo show from the defense." That finding led to the imposition of a six-month suspension against Larsen.

II

¶18 Larsen challenges the suspensions imposed against him under both rules 3.3 and 3.8. He alleges error in the legal conclusions and findings supporting both of the rules violations and asks us to reverse. OPC defends the district court's legal and factual analysis. It also cross-appeals, claiming error in the length of the sanction and the imposition of separate sanctions for each rule violation, and asking us to require a single, overarching sanction instead of separate ones.

¶19 We review the district court's decision under standards of review that account for our constitutional responsibility 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. Thus, we will "not overturn a district court's findings of fact unless they are 'arbitrary, capricious, or plainly in error.'" *Utah State Bar v. Lundgren (In re Discipline of Lundgren),* 2015 UT 58, ¶ 9, 355 P.3d 984 (citation omitted). Yet "'in light of our constitutional mandate and the unique nature of disciplinary actions,' we review district court findings in attorney discipline matters with less deference" than we would afford in other cases. *Id.* (citation omitted). We "retain '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." *Id.* (citation omitted).

¶20 Applying these standards, we reverse in part (as to the rule 3.3 charge) and affirm in part (as to the rule 3.8 charge) on Larsen's appeal. As to OPC's cross-appeal, we affirm the district court; we reject the notion that district courts are required to impose a single, overarching sanction on multiple ethics charges.

A

¶21 Rule 3.3 of the Utah Rules of Professional Conduct governs candor to our tribunals. It provides that "[a] lawyer shall not knowingly: (a)(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." UTAH R. PROF'L CONDUCT 3.3(a)(1).

¶22 Larsen challenges the district court's determination that he violated this rule. His principal argument concerns the relevant state of mind. Larsen views rule 3.3(a)(1) as requiring a finding of a knowing false statement and contends that the district court did not find that his misstatement was a knowing one.

¶23 OPC asks us to interpret the rule to encompass reckless misstatements made without any plausible basis in fact. Citing cases in other jurisdictions, OPC insists that "under certain circumstances, an attorney's conduct can be so careless or reckless that it must be deemed to be knowing." *People v. Rader*, 822 P.2d 950, 953 (Colo. 1992).

¶24 We reverse. Rule 3.3(a)(1) plainly requires that any misstatement be made "knowingly." UTAH R. PROF'L CONDUCT 3.3(a)(1). And the district court never found actual knowledge. In the findings of fact in the sanction order, the district court found that OPC had not established "intentional misrepresentation." *Findings of Fact and Conclusions of Law* at 4. Instead it concluded that "Larsen's statement was a misstatement that a reasonably diligent inquiry would have avoided." *Id.* The court's conclusions of law, moreover, state that Larsen's misstatement was "knowing *or* reckless." *Id.* (emphasis added). And when pressed by Larsen in open court, the district court indicated that he had found only "reckless misrepresentation." *Original Transcript (Partial) of Trial*, May 21, 2014 at 9.

¶25 The district court accordingly did not find that Larsen's misstatement was knowing. And rule 3.3(a)(1) requires proof that a misstatement was made knowingly. So it was error for the district

court to conclude that there was a violation of rule 3.3 in the absence of a finding of a knowing misstatement.

¶26 Alternatively, the district court erred in implicitly treating a reckless misstatement as the legal equivalent of a knowing one. It did so in concluding that Larsen's misstatement was "knowing *or* reckless," and in basing its determination of a violation of rule 3.3 on the finding that Larsen could have avoided making a misstatement if he had undertaken a "reasonably diligent inquiry." This too was error. Our rules do not treat *knowledge* and *recklessness* as equivalents. They state that "'[k]nowingly,' 'known' or 'knows' denotes *actual knowledge* of the fact in question." UTAH R. PROF'L CONDUCT 1.0(g) (emphasis added).

¶27 We reverse on the basis of this definition. *Actual knowledge* is distinct from *recklessness*. And our rules require actual knowledge to sustain a charge under rule 3.3. So we reverse on the ground that the district court conflated knowledge and recklessness and did not find that Larsen made a knowing misstatement.[2]

¶28 In so holding, we acknowledge a plausible basis for the district court's analysis in Comment 3 in the Advisory Committee Notes to rule 3.3. That comment states that "an assertion purporting to be on the lawyer's own knowledge . . . in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a *reasonably diligent inquiry*." (Emphasis added). The comment is correct as a statement of best practices. A lawyer who makes a statement in court can be confident that the statement is "proper[]" "only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." But the comment is not just a statement of best practices; it is an elaboration of the requirements of rule 3.3. And that rule, as written, does not lend itself to the

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[2] To be clear, we do not foreclose the possibility of a determination of a knowing misstatement on the basis of circumstantial evidence. *See* UTAH R. PROF'L CONDUCT 1.0(g) ("A person's knowledge may be inferred from circumstances."). OPC need not present direct evidence of knowledge—e.g., an admission—to sustain a charge of a violation of rule 3.3(a)(1). But the rule requires a finding that the false statement was a knowing one. Constructive knowledge is insufficient.

interpretation that a false statement made without a "reasonably diligent inquiry" is a *knowing* misstatement in violation of the rule.

¶29 In other areas, the law sometimes "charges [a] person with *notice of facts* which a *reasonably diligent inquiry* would have disclosed." *Hottinger v. Jensen*, 684 P.2d 1271, 1274 (Utah 1984) (emphasis added). And that principle at least sometimes treats a false statement made in the absence of a reasonably diligent inquiry as one made with *constructive* knowledge.[3] But that is not the concept of knowledge incorporated in the Utah Rules of Professional Conduct. As noted above, our rules require proof of *actual knowledge*. That concept is distinct from constructive knowledge or recklessness.

¶30 We accordingly repudiate Comment 3 in the Advisory Committee Notes to rule 3.3. We do so to avoid confusion going forward in cases like this one, in which the district court understandably appears to have relied on this comment.

¶31 The Advisory Committee Notes are not law. They are not governing rules voted on and promulgated by this court. They set forth only the advisory committee's views of our rules. And although they may provide helpful guidance, they cannot override the terms of the rules themselves. Because the note in question here does that, we rescind it and direct that it be stricken. We accordingly reverse the conclusion that Larsen violated rule 3.3, while

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[3] *See, e.g., Musk v. Burk*, 58 F.2d 77, 79 (7th Cir. 1932) (holding that a person involved in a transaction is "charged with notice of all the facts which a reasonably diligent inquiry would develop"); *Rader v. Star Mill & Elevator Co.*, 258 F. 599, 604 (8th Cir. 1919) (determining that "all [of] the facts which a *reasonably diligent inquiry* would disclose" is "in the eyes of the law *equivalent to a knowledge* of [those facts]" (emphasis added)); *Idaho State Bar v. Dodge (In re Dodge)*, 108 P.3d 362, 367 (Idaho 2005) (concluding that "a person's knowledge may be inferred from circumstances," and thus if an attorney "cannot point to a reasonably diligent inquiry to ascertain the truth of the statement," the attorney violates the rules of professional conduct if he "remain[s] silent, profess[es] no knowledge, or couch[es] the assertion in equivocal terms so the court can assess the assertion's probative value"); *Casa del Rey v. Hart*, 750 P.2d 261, 264 (Wash. 1988) ("It is a well-settled rule that . . . [a person] will be held chargeable with knowledge" if that person could have made an inquiry "with reasonable diligence." (citation omitted)).

acknowledging an apparent basis for that conclusion in our advisory committee's commentary.

B

¶32 Rule 3.8 of the Utah Rules of Professional Conduct prescribes duties specific to the unique role of a prosecutor. It requires a prosecutor in a criminal case to "[m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." UTAH R. PROF'L CONDUCT 3.8(d).

¶33 Larsen first challenges the district court's determination that he violated this rule by not disclosing to defense counsel that he had shown a photograph of the defendant to eyewitnesses in the underlying robbery cases (without showing any other photographs). He claims that the evidence showed that he made a timely disclosure by acknowledging that he had shown a photograph to the witnesses *during trial*. Second, Larsen challenges the district court's determination that his violation of rule 3.8 was made knowingly. Finally, Larsen also contests the imposition of the sanction of a six-month suspension for this alleged violation, claiming that it was disproportionate. We affirm.

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¶34 The threshold question presented is whether Larsen fulfilled his duty under rule 3.8(d). Larsen says he complied with the rule by admitting at trial that he had shown a photograph of the defendant to the eyewitnesses. OPC says Larsen made no disclosure, or at least that it came too late to be timely.

¶35 The precise timing of Larsen's admission is not clear from the record. *See supra* ¶¶ 14–16 & n.1. But we see no way to characterize the admission he made at trial as a "timely disclosure" under rule 3.8(d).

¶36 The timeliness of a prosecutor's disclosure of exculpatory evidence is a matter governed in Utah by our rules of criminal procedure. By rule, a prosecutor must "make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead." UTAH R. CRIM. P. 16(a)(5)(b). Our rule also implicitly recognizes that some exculpatory material may not be known before the time for a plea; for such material, the prosecutor "has a continuing duty to make disclosure," and an obligation to do so "as soon as practicable." *Id*.

¶37 The requirement of timely disclosure is important. It is aimed at allowing the "defendant to adequately prepare his defense." *Id.* 16(a)(5). And our ethics rule has the same evident focus. Rule 3.8(d) of the Utah Rules of Professional Conduct requires more than just disclosure; it requires "timely disclosure."

¶38 Larsen's admission at trial cannot be viewed as a "timely disclosure." He knew before trial that he had shown the defendant's photograph (and no other photographs) to the eyewitnesses of the two robberies. And he failed to disclose that fact "as soon as practicable" thereafter—in advance of trial, at a time necessary to allow "the defendant to adequately prepare his defense." UTAH R. CRIM. P. 16(a)(5) & (b).

¶39 If the prosecutor's possession of exculpatory evidence is uncovered at trial, a subsequent admission of that fact may be somewhat mitigating at the sanction phase. But the admission is not itself a fulfillment of the rule 3.8(d) duty of disclosure. If that were enough, the rule would be rendered practically toothless, as any savvy prosecutor could avoid an ethics violation by the simple expedient of an after-the-fact admission of a prior failure of disclosure once it is exposed by someone else.

¶40 Larsen cites *State v. Bisner*, 2001 UT 99, 37 P.3d 1073, and *United States v. Bagley*, 473 U.S. 667 (1985), for the proposition that there is no violation of the duty to disclose exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963) unless the prosecution "suppresses information that (1) remains unknown to the defense both before and throughout trial and (2) is material and exculpatory, meaning its disclosure would have created a 'reasonable probability' that 'the result of the proceeding would have been different.'" *Bisner*, 2001 UT 99, ¶ 33 (citation omitted). And because Larsen's act of showing photographs to the eyewitnesses became known during trial, Larsen insists that he also fulfilled his duties under rule 3.8(d).

¶41 We see the matter differently. Larsen's argument conflates the *Brady* standard with the prosecutor's ethical duty under rule 3.8(d). But the two standards are distinct. The question under *Brady* is a matter of due process—of whether the prosecution's failure to disclose exculpatory material so undermines our confidence in the verdict that we should order a new trial. If the exculpatory evidence in question is disclosed *during trial*, there may be no prejudice and thus no need for a new trial. *See Bagley*, 473 U.S. at 682 (indicating that the prejudice analysis requires an assessment of whether there is a "reasonable probability" of a different outcome if disclosure had

been made). But rule 3.8(d)'s focus is different. It is aimed not only at assuring a fair trial—by articulating a standard for a motion for a new one—but also at establishing an ethical duty that will avoid the problem in the first place. In stating that duty, our rule requires "timely disclosure" by the prosecution. That duty cannot be fulfilled by a prosecutor's mere admission of the existence of exculpatory evidence made *after* a witness first uncovers it.

¶42 We affirm on that basis. The district court found that Larsen failed to make a timely disclosure as to all four witnesses—the two witnesses on the Kim's Fashions count and the two witnesses on the Baskin-Robbins count. We affirm because we conclude that Larsen's admission at trial cannot count as a "timely disclosure" under the rules.

2

¶43 The next question concerns Larsen's state of mind in violating rule 3.8(d). In the district court's view Larsen's failure to make a timely disclosure was knowing—even intentional. It found that Larsen had an "intent to conceal the fact of showing the photos to the victims," *Findings of Fact and Conclusions of Law* at 6, or in other words that he "intentionally concealed the fact of the photo show from the defense." *Id.* The district court thought that the evidence "showed a deceptive intent on the part of Mr. Larsen." *Id*.

¶44 Larsen challenges this finding on appeal. He argues that the second count in the formal complaint "omits any factual allegation that [he] acted intentionally." *Appellant's Brief* 31. He further states that "no one testified that [he] acted intentionally," *id.,* and posits that "[e]ven the defense attorney said that he did not think that [Larsen] acted 'maliciously.'"[4] *Id.*

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[4] At oral argument on this appeal, Larsen sought to defend his failure to disclose—and to rebut the finding of a knowing and intentional violation of the rule—by asserting that he was supposed to be second chair at the trial on these two robbery counts, and that his conduct is explained by the fact that he was flustered when the first chair failed to show for trial. But we can find nothing in the record to support that assertion. So we do not consider it on this appeal.

¶45 We affirm. There is ample evidence in the record to support the district court's findings as to Larsen's state of mind in failing to make timely disclosures under rule 3.8(d). State of mind, moreover, is the kind of factual question that the district court is in the best position to assess. We will not reverse a decision on state of mind absent clear error, and we see none here.

3

¶46 That leaves the question of the propriety of the sanction—a six-month suspension—imposed by the district court. By rule, a finding of a *knowing* violation of rule 3.8(d) would "generally" sustain a sanction of suspension if it "causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding." UTAH CODE OF JUD. ADMIN. art. 14-605(b)(1). And a suspension is "[g]enerally . . . imposed for a specific period of time equal to or greater than six months," but no "more than three years." *Id.* 14-603(c). In "deciding what sanction to impose," our rules also identify "aggravating and mitigating circumstances" that "may be considered." *Id.* 14-607.

¶47 The district court determined that a six-month suspension was appropriate for this count. In so deciding, it first concluded that Larsen's violation of rule 3.8(d) was "knowing" and that "the potential harm to the defendant was significant." *Order of Sanction* at 8-9. We see no basis for quarreling with these determinations. They are amply supported by the record.

¶48 With these premises established, our rules call "generally" for the imposition of the sanction of suspension. But that leaves the question whether this is a "general" case or an unusual one. And it still requires a decision as to the appropriate length of any suspension.

¶49 In evaluating the question whether the "generally" appropriate sanction is proper here, our rules call for an evaluation of aggravating and mitigating circumstances. UTAH CODE OF JUD. ADMIN. art. 14-607. On this point, the district court found both aggravating and mitigating circumstances. It noted, on one hand, that Larsen had no prior record of discipline, lacked a dishonest or selfish motive, and was inexperienced in the practice of law. On the other hand, the court also noted that Larsen faced multiple charges, showed an unwillingness to acknowledge the wrongfulness of his misconduct, and harmed a particularly vulnerable victim.

¶50 Again we see no reason to disagree with this analysis. Ultimately, we think it fair to say that the mitigating and aggravating factors largely cancel each other out in this case. And we accordingly agree with the district court's determination that a six-month suspension is appropriate.

¶51 In so doing we reject Larsen's plea for a reduced sanction. The prosecution's duty of disclosure under rule 3.8(d) is an important one. And the district court found that Larsen's violation of this rule was not only knowing but intentional. That strikes us as a sufficient reason to sustain a suspension and to reject Larsen's request for a lesser sanction such as a public reprimand.

¶52 Yet we also reject OPC's—and amicus Utah Association of Criminal Defense Lawyers'—request for more serious sanctions. OPC has asked for the imposition of a three-year suspension in this case. And amicus seeks an outright disbarment. Both requests are based on the same essential point—that the prosecutor plays an important role in our system of justice, and that a failure to disclose exculpatory evidence can do substantial harm to the administration of justice. We do not disagree with these premises. But we nonetheless affirm the six-month suspension imposed in this case. We do so on three grounds: (1) a suspension from the practice of law, even for six months, is a serious penalty for a practicing lawyer; (2) there are at least some mitigating circumstances in this case; and (3) the precedents involving sanctions against prosecutors under rule 3.8(d) include a few suspensions for six months but none for any greater period, and no disbarments.[5]

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[5] We are aware of no Utah cases under rule 3.8(d). But cases in other jurisdictions seem to generally sustain the proportionality of the sanction imposed in this case. *See, e.g., Comm. on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. Ramey*, 512 N.W.2d 569, 572 (Iowa 1994) (indefinite suspension, but with possibility of reinstatement after three months); *Disciplinary Counsel v. Wrenn*, 790 N.E.2d 1195, 1198 (Ohio 2003) (six-month suspension); *Disciplinary Counsel v. Jones*, 613 N.E.2d 178, 180 (Ohio 1993) (six-month suspension) *State ex rel. Okla. Bar Ass'n v. Miller*, 309 P.3d 108 (Okla. 2013) (six-month suspension, but for numerous other counts as well). *But see In re Jordan*, 913 So. 2d 775, 784 (La. 2005) (three-month suspension, but deferred due to mitigating factors). We have found cases in which prosecutors have been given a lighter sanction. *See In*

(continued …)

¶53 The cited precedents are by no means binding. But they are helpful in assessing the appropriate sanction under a scheme that yields substantial discretion for the court. And in light of these precedents and the other circumstances identified above, we conclude that a six-month sanction is appropriate for Mr. Larsen's violation of rule 3.8(d).

C

¶54 The American Bar Association's "Standards for Imposing Lawyer Sanctions" expressly "do not account for multiple charges of misconduct." AMERICAN BAR ASSOCIATION, STANDARDS FOR IMPOSING LAWYER SANCTIONS 8 (1992). Instead they provide that "[t]he ultimate sanction imposed should at least be consistent with the sanction for the most serious instances of misconduct among a number of violations," and note that "it might well be and generally should be greater than the sanction for the most serious misconduct." *Id.* at 78.

¶55 OPC urges us to adopt these standards. And it interprets them as mandating a single, overarching sanction for a range of violations of the rules of professional conduct, or in other words as prohibiting separate sanctions for each of a list of separate charges. Because the district court imposed two separate sanctions in this case (a 30-day sanction for the rule 3.3 violation and a six-month sanction for the rule 3.8(d) violation), moreover, OPC claims error in the sanctions imposed here.

¶56 We see no error. We see little upside and plenty of downside in the proposed requirement of a single, overarching sanction proposed by OPC. The downsides are apparent in our review of the decision below. If the district court had imposed a single, overarching sanction, our review on appeal would have been hampered in a couple of respects: We could not have identified the

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(continued …)
re Kline, 113 A.3d 202 (D.C. 2015) (no sanction due to confusion over the meaning of the rule); *In re Jordan*, 91 P.3d 1168, 1175 (Kan. 2004) (public censure for two counts of not making timely disclosure and for another professional conduct violation); *Cuyahoga Cty. Bar Ass'n v. Gerstenslager*, 543 N.E.2d 491, 491 (Ohio 1989) (public censure); *In re Grant*, 541 S.E.2d 540, 540 (S.C. 2001) (public reprimand). But to our knowledge none of these cases involved a prosecutor deemed to have *intentionally* failed to make a timely disclosure.

separate sanction imposed for the count on which we reverse and remand, and we could not have evaluated the propriety of the sanction imposed on the count on which we affirm. The latter point seems especially significant. Our review as to the propriety of a sanction imposed for a violation of one of our rules of professional conduct would be substantially impaired if we had before us only a single, overarching sanction in a case involving multiple ethics charges.

¶57 For these reasons we reject the OPC's cross-appeal. We affirm the district court's decision to impose separate sanctions for the separate charges at issue in this case—and, indeed, urge future courts to follow the pattern that was followed here, as it will aid our review of attorney discipline cases on appeal.

Rule 3.3. Candor toward the Tribunal.

(a) A lawyer shall not knowingly:

(a)(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(a)(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(a)(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer

continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done-making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the

correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Tab 4

Rule 14-802. Authorization to practice law.

(a) Except as set forth in subsection (c) of this rule, only persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah.

(b) For purposes of this rule:

(b)(1) The “practice of law” is the representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person’s facts and circumstances.

(b)(2) The “law” is the collective body of declarations by governmental authorities that establish a person’s rights, duties, constraints and freedoms and consists primarily of:

(b)(2)(A) constitutional provisions, treaties, statutes, ordinances, rules, regulations and similarly enacted declarations; and

(b)(2)(B) decisions, orders and deliberations of adjudicative, legislative and executive bodies of government that have authority to interpret, prescribe and determine a person’s rights, duties, constraints and freedoms.

(b)(3) “Person” includes the plural as well as the singular and legal entities as well as natural persons.

(c) Whether or not it constitutes the practice of law, the following activity by a non-lawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted:

(c)(1) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(c)(2) Providing general legal information, opinions or recommendations about possible legal rights, remedies, defenses, procedures, options or strategies, but not specific advice related to another person’s facts or circumstances.

(c)(3) Providing clerical assistance to another to complete a form provided by a municipal, state, or federal court located in the State of Utah when no fee is charged to do so.

(c)(4) When expressly permitted by the court after having found it clearly to be in the best interests of the child or ward, assisting one’s minor child or ward in a juvenile court proceeding.

(c)(5) Representing a party in small claims court as permitted by Rule of Small Claims Procedure 13.

(c)(6) Representing without compensation a natural person or representing a legal entity as an employee representative of that entity in an arbitration proceeding, where the amount in controversy does not exceed the jurisdictional limit of the small claims court set by the Utah Legislature.

(c)(7) Representing a party in any mediation proceeding.

(c)(8) Acting as a representative before administrative tribunals or agencies as authorized by tribunal or agency rule or practice.

(c)(9) Serving in a neutral capacity as a mediator, arbitrator or conciliator.

(c)(10) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements or as otherwise allowed by law.

(c)(11) Lobbying governmental bodies as an agent or representative of others.

(c)(12) Advising or preparing documents for others in the following described circumstances and by the following described persons:

(c)(12)(A) a real estate agent or broker licensed by the state of Utah may complete State-approved forms including sales and associated contracts directly related to the sale of real estate and personal property for their customers.

(c)(12)(B) an abstractor or title insurance agent licensed by the state of Utah may issue real estate title opinions and title reports and prepare deeds for customers.

(c)(12)(C) financial institutions and securities brokers and dealers licensed by Utah may inform customers with respect to their options for titles of securities, bank accounts, annuities and other investments.

(c)(12)(D) insurance companies and agents licensed by the state of Utah may recommend coverage, inform customers with respect to their options for titling of ownership of insurance and annuity contracts, the naming of beneficiaries, and the adjustment of claims under the company's insurance coverage outside of litigation.

(c)(12)(E) health care providers may provide clerical assistance to patients in completing and executing durable powers of attorney for health care and natural death declarations when no fee is charged to do so.

(c)(12)(F) Certified Public Accountants, enrolled IRS agents, public accountants, public bookkeepers, and tax preparers may prepare tax returns.

Advisory Committee Notes

Rule 4.2. Communication with Persons Represented by Counsel.

(a) General Rule. In representing a client , a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.

(b) Rules Relating to Unbundling of Legal Services. A lawyer may consider a person whose representation by counsel in a matter does not encompass all aspects of the matter to be unrepresented for purposes of this Rule and Rule 4.3, unless that person's counsel has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

(c) Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction in the matter, may communicate with a person known to be represented by a lawyer if:

(c)(1) the communication is in the course of, and limited to, an investigation of a different matter unrelated to the representation or any ongoing, unlawful conduct; or

(c)(2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or

(c)(3) the communication is made at the time of the arrest of the represented person and after that person is advised of the right to remain silent and the right to counsel and voluntarily and knowingly waives these rights; or

(c)(4) the communication is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication.

(d) Organizations as Represented Persons.

(d)(1) When the represented person is an organization, an individual is represented by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communication, and

(d)(1)(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(d)(1)(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(d)(1)(B)(i) a current member of the control group of the represented organization; or

(d)(1)(B)(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(d)(1)(B)(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.

(d)(2) The term " control group" means the following persons: (A) the chief executive officer, chief operating officer, chief financial officer, and the chief legal officer of the organization; and (B) to the extent not encompassed by Subsection (A), the chair of the organization's governing body, president, treasurer, secretary and a vice-president or vice-chair who is in charge of a principal business unit, division or function (such as sales, administration or finance) or performs a major policy-making function for the organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization= s legal position in the matter.

(d)(3) This Rule does not apply to communications with government parties, employees or officials unless litigation about the subject of the representation is pending or imminent. Communications with elected officials on policy matters are permissible when litigation is pending or imminent after disclosure of the representation to the official.

(e) Limitations on Communications. When communicating with a represented person pursuant to this Rule, no lawyer may

(e)(1) inquire about privileged communications between the person and counsel or about information regarding litigation strategy or legal arguments of counsel or seek to induce the person to forgo representation or disregard the advice of the person= s counsel; or

(e)(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement or other disposition of actual or potential criminal charges or civil enforcement claims or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by law, rule or court order.

Comment

[1] Rule 4.2 of the Utah Rules of Professional Conduct deviates substantially from ABA Model Rule 4.2 by the addition of paragraphs (b), (c), (d) and (e). Paragraphs (c), (d) and (e) are substantially the same as the former Utah Rules 4.2(b), (c) and (d), adopted in 1999, as are most of the corresponding comments that address these three paragraphs of this Rule. There is also a variation from the Model Rule in paragraph (a), where the body of judicially created rules are added as a source to which the lawyer may look for general exceptions to the prohibition of communication with persons represented by counsel. (Because of these major differences, the comments to this Rule do not correspond numerically to the comments in ABA Model Rule 4.2.

[2] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[3] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[4] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[5] This Rule does not prohibit communication with a represented person or an employee or agent of such a person where the subject of the communication is outside the scope of the representation. For example, the existence of a controversy between a government agency and a privateparty, between two organizations, between individuals or between an organization and an individual does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does the Rule prohibit government lawyers from communicating with a represented person about a matter that does not pertain to the subject matter of the representation but is related to the investigation, undercover or overt, of ongoing unlawful conduct. Moreover, this Rule does not prohibit a lawyer from communicating with a person to determine if the person in fact is represented by counsel concerning the subject matter that the lawyer wishes to discuss with that person.

[6] This Rule does not preclude communication with a represented person who is seeking a second opinion from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

[7] A lawyer may communicate with a person who is known to be represented by counsel in the matter to which the communication relates only if the communicating lawyer obtains the consent of the represented person's lawyer, or if the communication is otherwise permitted by paragraphs (a), (b) or (c). Paragraph (a) permits a lawyer to communicate with a person known to be represented by counsel in a matter without first securing the consent of the represented person= s lawyer if the communicating lawyer is authorized to do so by law, rule or court order. Paragraph (b) recognizes that the scope of representation of a person by counsel may, under Rule 1.2, be limited by mutual agreement. Because a lawyer for another party cannot know which of Rule 4.2 or 4.3 applies under these circumstances, the lawyer who has undertaken a limited representation must assume the responsibility for informing another party’s lawyer of the limitations. This ensures that such a limited representation will not improperly or unfairly induce an adversary’s lawyer to avoid contacting the person on those aspects of a matter for which the person is not represented by counsel. Note that this responsibility on the lawyer undertaking limited-scope representation also relates to the ability of another party’s lawyer to make certain *ex parte* contacts without violating Rule 4.3. Utah Rule of Professional Conduct 4.2(b) and related sections of this Comment are part of the additions to the ABA Model Rules clarifying that a lawyer may undertake limited representation of a client under the provisions of Rule 1.2. Paragraph (c) specifies the circumstances in which government lawyers engaged in criminal and civil law enforcement matters may communicate with persons known to be represented by a lawyer in such matters without first securing consent of that lawyer.

[8] A communication with a represented person is authorized by paragraph (a) if permitted by law, rule or court order. This recognizes constitutional and statutory authority as well as the well-established role of the state judiciary in regulating the practice of the legal profession. Direct communications are also permitted if they are made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal before which a matter is pending.

[9] A communication is authorized under paragraph (a) if the lawyer is assisting the client to exercise a constitutional right to petition the government for redress of grievances in a policy dispute with the government and if the lawyer notifies the government's lawyer in advance of the intended communication. This would include, for example, a communication by a lawyer with a governmental official with authority to take or recommend action in the matter, provided that the sole purpose of the lawyer= s communication is to address a policy issue, including the possibility of resolving a disagreement about a policy position taken by the government. If, on the other hand, the matter does not relate solely to a policy issue, the communicating lawyer must comply with this Rule.

[10] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communication is subject to Rule 4.3.

[11] Paragraph (c) of this Rule makes clear that this Rule does not prohibit all communications with represented persons by state or federal government lawyers (including law enforcement agents and cooperating witnesses acting at their direction) when the communications occur during the course of civil or criminal law enforcement. The exemptions for government lawyers contained in paragraph (c) of this Rule recognize the unique responsibilities of government lawyers to enforce public law. Nevertheless, where the lawyer is representing the government in any other role or litigation (such as a contract or tort claim, for example) the same rules apply to government lawyers as are applicable to lawyers for private parties.

[12] A "civil law enforcement proceeding" means a civil action or proceeding before any court or other tribunal brought by the governmental agency that seeks to engage in the communication under relevant statutory or regulatory provisions, or under the government's police or regulatory powers to enforce the law. Civil law enforcement proceedings do not include proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand; nor do they include enforcement actions brought by an agency other than the one that seeks to make the communication.

[13] Under paragraph (c) of this Rule, communications are permitted in a number of circumstances. For instance, subparagraph (c)(1) permits the investigation of a different matter unrelated to the representation or any ongoing unlawful conduct. (Unlawful conduct involves criminal activity and conduct subject to a civil law enforcement proceeding.) Such violations include, but are not limited to, conduct that is intended to evade the administration of justice including in the proceeding in which the represented person is a defendant, such as obstruction of justice, subornation of perjury, jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution. Also, permitted are undercover activities directed at ongoing criminal activity, even if it is related to past criminal activity for which the person is represented by counsel.

[14] Under subparagraph (c)(2), a government lawyer may engage in limited communications to protect against an imminent risk of serious bodily harm or substantial property damage. The imminence and gravity of the risk will be determined from the totality of the circumstances. Generally, a risk would be imminent if it is likely to occur before the government lawyer could obtain court approval or take other reasonable measures. An imminent risk of substantial property damage might exist if there is a bomb threat directed at a public building. The Rule also makes clear that a government attorney may communicate directly with a represented party A at the time of arrest of the represented party" without the consent of the party= s counsel, provided that the represented party has been fully informed of his or her constitutional rights at that time and has waived them. A government lawyer must be very careful to follow Rule 4.2(d) and would have a significant burden to establish that the waiver of right to counsel was knowing and voluntary. The better practice would include a written or recorded waiver. Nothing in this Rule, however, prevents law enforcement officers, even if acting under the general supervision of a government lawyer, from questioning a represented person. The actions of the officers will not be imputed to the government lawyer unless the conversation has been " scripted" by the government lawyer.

[15] If government lawyers have any concerns about the applicability of any of the provisions of paragraph (c) or are confronted with other situations in which communications with represented persons may be warranted, they may seek court approval for the *ex parte* communication.

[16] Any lawyer desiring to engage in a communication with a represented person that is not otherwise permitted under this Rule must apply in good faith to a court of competent jurisdiction, either *ex parte* or upon notice, for an order authorizing the communication. This means, depending on the context: (1) a district judge or magistrate judge of a United States District Court; (2) a judge or commissioner of a court of general jurisdiction of a state having jurisdiction over the matter to which the communication relates; or (3) a military judge.

[17] In determining whether a communication is appropriate a lawyer may want to consider factors such as: (1) whether the communication with the represented person is intended to gain information that is relevant to the matter for which the communication is sought; (2) whether the communication is unreasonable or oppressive; (3) whether the purpose of the communication is not primarily to harass the represented person; and (4) whether good cause exists for not requesting the consent of the person's counsel prior to the communication. The lawyer should consider requesting the court to make a written record of the application, including the grounds for the application, the scope of the authorized communications, and the action of the judicial officer, absent exigent circumstances.

[18] Organizational clients are entitled to the protections of this Rule. Paragraph (d) specifies which individuals will be deemed for purposes of this Rule to be represented by the lawyer who is representing the organization in a matter. Included within the control group of an organizational client, for example, would be the designated high level officials identified in subparagraph(d)(2). Whether an officer performs a major policy function is to be determined by reference to the organization's business as a whole. Therefore, a vice-president who has policy making functions in connection with only a unit or division would not be a major policy maker for that reason alone, unless that unit or division represents a substantial part of the organization's total business. A staff member who gives advice on policy but does not have authority, alone or in combination with others, to make policy does not perform a major policy making function.

[19] Also included in the control group are other current employees known to be "participating as principal decision makers" in the determination of the organization= s legal position in the proceeding or investigation of the matter. In this context, "employee" could also encompass former employees who return to the company's payroll or are specifically retained for compensation by the organization to participate as principal decision makers for a particular matter. In general, however, a lawyer may, consistent with this Rule, interview a former employee of an organization without consent of the organization’s lawyer.

[20] In a criminal or civil law enforcement matter involving a represented organization, government lawyers may, without consent of the organization= s lawyer, communicate with any officer, employee, or director of the organization who is not a member of the control group. In all other matters involving organizational clients, however, the protection of this Rule is extended to two additional groups of individuals: individuals whose acts might be imputed to the organization for the purpose of subjecting the organization to civil or criminal liability and individuals whose statements might be binding upon the organization. A lawyer permitted by this Rule to communicate with an officer, employee, or director of an organization must abide by the limitations set forth in paragraph (e).

[21] This Rule does prohibit communications with any person who is known by the lawyer making the communication to be represented by counsel in the matter to which the communication relates. A person is "known" to be represented when the lawyer has actual knowledge of the representation. Knowledge is a question of fact to be resolved by reference to the totality of the circumstances, including reference to any written notice of the representation. See Rule 1.0(f) Written notice to a lawyer is relevant, but not conclusive, on the issue of knowledge. Lawyers should ensure that written notice of representation is distributed to all attorneys working on a matter.

[22] Paragraph (e) is intended to regulate a lawyer's communications with a represented person, which might otherwise be permitted under the Rule, by prohibiting any lawyer from taking unfair advantage of the absence of the represented person= s counsel. The prohibition contained in paragraph (e) is limited to inquiries concerning privileged communications and lawful defense strategies. The Rule does not prohibit inquiry into unlawful litigation strategies or communications involving, for example, perjury or obstruction of justice.

[23] The prohibition of paragraph (e) against the communicating lawyer= s negotiating with the represented person with respect to certain issues does not apply if negotiations are authorized by law, rule or court order. For example, a court of competent jurisdiction could authorize a lawyer to engage in direct negotiations with a represented person. Government lawyers may engage in such negotiations if a represented person who has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding initiates communications with the government lawyer and the communication is otherwise consistent with requirement of subparagraph (c)(4).

Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(c)(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(c)(2) The lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. This includes members of a partnership, the shareholders in a law firm organized as a professional corporation and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised. The responsibility for the firm’s compliance with paragraph (a) resides with each partner, or other lawyer in the firm with comparable authority.

[2a] Utah’s Comment [2] to this Rule differs from the ABA Model Rule’s Comment [2]. The Model Rule Comment [2] might suggest the possibility that a firm could be in violation of the Rule without an individual or group of individuals also being in violation. Utah’s Comment [2] makes clear that even though the concept of firm discipline is possible, a firm should not be responsible in the absence of individual culpability for a rule violation.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c)(1) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer’s involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).