# Agenda

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

March 6, 2017
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 approval of minutes. | Tab 1 | Steve Johnson, Chair |
| Report and recommendation of ABA Model Rule 8.4(g) subcommittee | Tab 2 | Simón Cantarero (subcommittee chair), Billy Walker, Vanessa Ramos, Joni Jones, and Trent Nelson |
| Paralegal Practitioner Rule Review: Rules 1.0, 1.1, 1.2, 1.3, 1.4, 1.5, 1.18, 3.3, 4.2, 4.3, 5.1, 5.3, 5.4 | Tab 3 | Cristie Roach, Gary Chrystler |
| Next meeting. | | Steve Johnson |

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

# Tab 1

**MINUTES OF THE SUPREME COURT'S**
**ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT**

*January 23, 2017*
DRAFT

The meeting commenced at 5 p.m.

**Committee Members Attending:**

**Steven G. Johnson (chair)**
**John H. Bogart**
**Daniel Brough (phone)**
**Thomas B. Brunker**
**J. Simon Cantarero**
**Vanessa M. Ramos**
**Christie Roach**
**Gary G. Sackett**
**Billy L. Walker**
**Tim Merrill (phone)**
**Timothy Conde (recording secretary)**
**Christie Roach**
**Padma Veeru-Collings (phone)**
**Donald Winder**

**Excused:**

**Trent Nelson**
**Joni Jones**
**Hon. Darold J. McDade**
**Phillip Lowry**
**Gary Chrystler**

**Staff:**

**Nancy Sylvester**

**Approval of Minutes**

Ms. Sylvester noted that she had corrected the spelling to Billy Walker's name in the November minutes. The minutes were then approved unanimously.

**Annual Introduction of Committee Members**

Because it was the first meeting of 2017, Chairman Johnson had each committee member introduce himself or herself.

**Report of Rule 3.3 Subcommittee**

The committee reviewed the report and recommendations authored by the Rule 3.3 subcommittee. The committee recommended and adopted, through motion, the following changes:

- Regarding Comment "3a," the "a" should be removed.
- "former" should be inserted into Comment 3 between "the" and "rule's."
- All comment numbers should be bracketed.
- The last sentence of Comment 3 should be deleted.
- In Rule 3.3(a)(2), the phrase "known to the lawyer to be" should be deleted.

As amended, the revised rule was adopted by motion. The committee also voted to remove the definition of reckless and recklessly from Rule 1.0.

**ABA Model Rule 8.4(g) Proposed Amendment**

The ABA Model Rule 8.4(g) subcommittee issued and discussed its report and recommendation, as set forth in the committee's memorandum dated January 16, 2017 (the "Rule 8.4(g) Report"). The subcommittee chair, Simòn Cantarero, emphasized to the committee that the subcommittee took into account the *Larsen* decision and worked to include any comment-type language in the rule itself.

Several committee members expressed concerns and questions regarding the Rule 8.4(g) Report. Among the concerns were whether a change was necessary in light of the existing rules regarding whether an attorney is fit to practice law. Members also were concerned that the rule is not direct enough and creates significant uncertainty. Specific questions or issues that were raised include the following:

- Does the proposed rule delegate rulemaking to governmental entities? For example, are Salt Lake City attorneys required to comply with Logan City's ordinances?
- Does the proposed rule force attorneys to be responsible for standards of all states and municipalities? The committee favored limiting its reach to only Utah.
- Among the factors to consider in determining the severity of the misconduct is "whether the conduct was committed in connection with the lawyer's professional activities." This language appears to suggest that connection to professional activity is not a necessary condition. If so, the rule likely reaches throughout a lawyer's private life, which many members of the committee did not favor.
- What is the preclusive effect of disciplinary proceedings? This may be relevant since there is no requirement that there be an adjudicatory finding of harassment or discrimination before disciplinary proceedings.
- Regarding the second sentence of Comment 3, it is unclear whether that sentence prohibits *any* discussion of sex, gender, race, etc. For example, would a firm be prohibited from discussing increasing diversity within the firm?
- Committee members were troubled by the statement in Comment 4 that "a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a)."

In light of the significant discussion regarding whether the subcommittee should include comment-type language in the rule itself, Chairman Johnson recommended that a few representatives from the committee schedule time to visit with the Utah Supreme Court to gain further insight on how to address *Larsen* in future rulemaking. Before ending the discussion due to time, Chairman Johnson, after seeking input from the committee, determined that there was too much concern about the ABA model rule and the subcommittee's proposed rule for the committee to act. The subcommittee agreed to reconvene to discuss the matter further and to propose various options to the committee.

**All other items on the agenda were continued to the committee's next meeting.**

Next meeting: March 6, 2017 @ 5 pm

The meeting adjourned at 7:15 pm.

# Tab 2

**MEMORANDUM**

TO: Steve Johnson, Committee Chair

FROM: Simón Cantarero, Proposed Rule 8.4(g) Subcommittee Chair

DATE: March 2, 2017

SUBJECT: Alternative Drafts of Proposed Rule 8.4(g)

This memorandum follows the discussion and feedback from the Committee regarding Proposed Rule 8.4(g), and offers several alternative drafts for amending Rule 8.4 for consideration by the Committee, from which the Committee can submit to the Utah Supreme Court for public notice and comment. It should be noted that the subcommittee received a draft of a forthcoming law review article which is a partial defense of the ABA Model Rule from a First Amendment perspective, which the subcommittee found instructive and helpful.[1] Whether the law review article is persuasive remains to be determined.

Following the last Committee meeting, the subcommittee was asked to present choices that can be discussed regarding Rule 8.4. The choices before the Committee are as follows:

1) Status Quo. Leave as is, Rule 8.4 and its comments.
2) Amend Comment 3 to Rule 8.4 to include additional protected classes referenced in the ABA Model Rule.
3) Amend Rule 8.4 by adopting ABA Model Rule 8.4(g) and its comments.
4) Amend Rule 8.4 by adopting the Proposed Rule 8.4(g) presented in this subcommittee's memorandum dated January 16, 1017.
5) Amend Rule 8.4 by revising the Proposed Rule 8.4(g) presented in the January 2017 memo.

Because option 1 would not require amending Rule 8.4, no proposed language is included in this memorandum. Also, because the language of the ABA Model Rule and its comments have already been published in materials before the Committee, those amendments are not replicated here as Option 3. The Proposed Rule 8.4(g) originally presented in the January 2017 Committee meeting is contained in Appendix A to this memo.

What follows are the proposed revisions to Comment 3 to Rule 8.4 (option 2 above), and a couple of iterations or alternatives to Proposed Rule 8.4(g) presented and discussed in the January 2017 Committee meeting (option 5 above).

[1] *See* Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, 19 U. Pa. J. Const. L. Online ___ (forthcoming 2017). Also available online at https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2911219 (last visited March 1, 2017).

**Rule 8.4 and Amended Comment 3**

The subcommittee submits that any changes to Comment 3 to Rule 8.4 would read as follows:

> [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, ethnicity, disability, age, sexual orientation, gender identity, marital status, 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.

The changes shown above add three protected classes that appear in the ABA Model Rule: ethnicity, gender identity, and marital status. The Comment does not expand the course of objectionable conduct beyond "the course of representing a client" and does not include "conduct related to the practice of law," as the ABA Model Rule proposes.

**Alternative Drafts of Proposed Rule 8.4(g)**

There was considerable discussion on the language of Proposed Rule 8.4(g) presented in the January 2017 memo. In particular, the subcommittee received feedback regarding the definition and interpretation of what would constitute a "violation," what was meant by "state, or local statute or ordinance" that would be the underlying principles for which an attorney could be disciplined, and the definition of "professional activities" referenced in the Proposed Rule.

In particular, is a "violation" simply presumed to have occurred, without any presentation or verification of any facts beyond the allegations of the wrongful conduct? Also, would a member of the Utah State Bar who may be practicing law somewhere other than in Utah, be subject to discipline even though similar anti-discrimination and anti-harassment laws may not exist there? Or, would an attorney practicing in one Utah municipality violate the ordinance of another, remote Utah municipality with a statute or ordinance that is unbeknown to the attorney? There were other similar questions, some of which are included in the Minutes from the January 2017 Committee meeting.

There was further discussion about the need to include in the black letter rule any language regarding the definition, application, interpretation, and exemption of the wrongful conduct, or whether such language is best included in the Comments. The alternative drafts of Proposed Rule 8.4(g) that follow seek to address the feedback, comments, and concerns raised by Committee members in the January 2017 Committee meeting.

***Alternative 1 – Revising the January 2017 version of the Proposed Rule***

> **Rule 8.4. Misconduct.**
>
> It is professional misconduct for a lawyer to:
> …
> (g) ~~-~~engage in conduct that the lawyer knows or reasonably should know would constitute ~~violates a federal, state, or local statute or ordinance that prohibits~~ harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status as described in Federal and Utah State law and jurisprudence, ~~by conduct~~and that reflects adversely on the lawyer's fitness as a lawyer. Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; ~~whether the lawyer knew or should have known the conduct was prohibited by statute or ordinance;~~ whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in ~~connection with~~ the lawyer's professional ~~activities~~capacity. This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client. ~~For purposes of determining the violation of a statute or ordinance under this Rule, number of employees is not a defense.~~

The revised version of Comment 3 and the addition of new Comment 4 that appear in the January 2017 memo would remain largely unchanged, with the exception of the following changes to Revised Comment 3:

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Lawyers may engage in conduct undertaken to discuss diversity, including discussing any benefits or challenges, ~~and inclusion~~ without violating this rule. ~~by, for example, i~~Implementing initiatives aimed at recruiting, hiring, retaining, and advancing ~~diverse~~ employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

"Clean" versions of the Alternative drafts of Proposed Rule 8.4(g), without markups, appear in Appendix B and C to this memorandum.

***Alternative 2 – Revised Alternative 1 Without Definition, Interpretation, and Exemption Clauses***

**Rule 8.4. Misconduct.**

It is professional misconduct for a lawyer to:

…

(g) ~~-~~engage in conduct that the lawyer knows or reasonably should know would constitute ~~violates a federal, state, or local statute or ordinance that prohibits~~ harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status as described in Federal and Utah State law and jurisprudence, ~~by conduct~~and that reflects adversely on the lawyer's fitness as a lawyer. ~~Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the lawyer knew or should have known the conduct was prohibited by statute or ordinance; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in connection with the lawyer's professional activities. This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client. For purposes of determining the violation of a statute or ordinance under this Rule, number of employees is not a defense.~~

Alternative 2 would require revisions to the Comments section. Comment 3 would be revised as follows, and would include a new Comment 4:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the lawyer knew or should have known the conduct was prohibited by law; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in the lawyer's professional capacity.

[4] Paragraph (g) does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. Paragraph (g) does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client. Lawyers may engage in conduct undertaken to

discuss diversity, including discussing any benefits or challenges, ~~and inclusion~~ without violating this rule. ~~by, for example, i~~Implementing initiatives aimed at recruiting, hiring, retaining, and advancing ~~diverse~~ employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

In light of these changes, Comment 4 that appears in the January 2017 memo will become new Comment 5, and the other comments will be renumbered accordingly.

Appendix A

Proposed Rule 8.4(g) and Comments – January 2017 Version

**Rule 8.4. Misconduct.**

It is professional misconduct for a lawyer to:

…

(g) engage in conduct that violates a federal, state, or local statute or ordinance that prohibits harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the lawyer knew or should have known the conduct was prohibited by statute or ordinance; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in connection with the lawyer's professional activities. This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client. For purposes of determining the violation of a statute or ordinance under this Rule, number of employees is not a defense.

*Comments*

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Lawyers may engage in conduct undertaken to discuss diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations.

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

Appendix B

Alternative 1 to Proposed Rule 8.4(g) and Comments

**Rule 8.4. Misconduct.**

It is professional misconduct for a lawyer to:

…

(g) engage in conduct that the lawyer knows or reasonably should know would constitute harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status as described in Federal and Utah State law and jurisprudence, and that reflects adversely on the lawyer's fitness as a lawyer. Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in the lawyer's professional capacity. This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client.

*Comments*

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Lawyers may engage in conduct undertaken to discuss diversity, including discussing any benefits or challenges, without violating this rule. Implementing initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

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

Appendix C

Alternative 2 to Proposed Rule 8.4(g) and Comments

**Rule 8.4. Misconduct.**

It is professional misconduct for a lawyer to:

…

(g) engage in conduct that the lawyer knows or reasonably should know would constitute harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status as described in Federal and Utah State law and jurisprudence, and that reflects adversely on the lawyer's fitness as a lawyer.

*Comments*

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the lawyer knew or should have known the conduct was prohibited by law; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in the lawyer's professional capacity.

[4] Paragraph (g) does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. Paragraph (g) does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client. Lawyers may engage in conduct undertaken to discuss diversity, including discussing any benefits or challenges, without violating this rule. Implementing initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

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

6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's view or activities. See Rule 1.2(b).

# ABA Model Rule 8.4(g) in Utah's Rule 8.4

**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.

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

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.~~

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

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

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

~~[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]~~ [6] 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]~~ [7] 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

**Rule 1.0. Terminology.**

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer or licensed paralegal practitioner promptly transmits to the person confirming an oral informed consent. See paragraph (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer or licensed paralegal practitioner must obtain or transmit it within a reasonable time thereafter.

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization; or licensed paralegal practitioner or practitioners in a partnership, professional corporation, sole proprietorship or other association authorized to practice law.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer or licensed paralegal practitioner has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(g) "Knowingly," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer or licensed paralegal practitioner denotes the conduct of a reasonably prudent and competent lawyer or licensed paralegal practitioner.

(j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer or licensed paralegal practitioner denotes that the lawyer or licensed paralegal practitioner believes the matter in question and that the circumstances are such that the belief is reasonable.

(k) "Reasonably should know" when used in reference to a lawyer or licensed paralegal practitioner denotes that a lawyer or licensed paralegal practitioner of reasonable prudence and competence would ascertain the matter in question.

(l) "Screened" denotes the isolation of a lawyer or licensed paralegal practitioner from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or licensed paralegal practitioner is obligated to protect under these Rules or other law.

(m) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(n) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A

legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer or licensed paralegal practitioner must obtain or transmit it within a reasonable time thereafter. If a lawyer or licensed paralegal practitioner has obtained a client's informed consent, the lawyer or licensed paralegal practitioner may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers or licensed paralegal practitioner constitute a firm within paragraph (d) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of these Rules. The terms of any formal agreement between associated lawyers or licensed paralegal practitioner are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers or licensed paralegal practitioner could be regarded as a firm for purposes of the rule that the same lawyer or licensed paralegal practitioner should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer or licensed paralegal practitioner is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers or licensed paralegal practitioner in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and

has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer or licensed paralegal practitioner to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g, Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer or licensed paralegal practitioner must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer or licensed paralegal practitioner to advise a client or other person to seek the advice of other counsel. A lawyer or licensed paralegal practitioner need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer or licensed paralegal practitioner who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer or licensed paralegal practitioner may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (b). Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer or licensed paralegal practitioner should acknowledge the obligation not to communicate with any of the other lawyers or licensed paralegal practitioners in the firm with respect to the

matter. Similarly, other lawyers or licensed paralegal practitioners in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer or licensed paralegal practitioner with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers or licensed paralegal practitioners of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer or licensed paralegal practitioner to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer or licensed paralegal practitioner relating to the matter, denial of access by the screened lawyer or licensed paralegal practitioner to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer or licensed paralegal practitioner and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer, licensed paralegal practitioner or law firm knows or reasonably should know that there is a need for screening.

[10a] The definitions of “consult” and “consultation,” while deleted from the ABA Model Rule 1.0, have been retained in the Utah Rule because “consult” and “consultation” are used in the rules. See, e.g., Rules 1.2, 1.4, 1.14, and 1.18.

**Rule 1.1. Competence.**

A lawyer or licensed paralegal practitioner shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer or licensed paralegal practitioner employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's or licensed paralegal practitioner's general experience, the lawyer's or licensed paralegal practitioner's training and experience in the field in question, the preparation and study the lawyer or licensed paralegal practitioner is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer or licensed paralegal practitioner of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer or licensed paralegal practitioner need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer or licensed paralegal practitioner is unfamiliar. A newly admitted lawyer or licensed paralegal practitioner can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer or licensed paralegal practitioner can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer or licensed paralegal practitioner of established competence in the field in question.

[3] In an emergency a lawyer or licensed paralegal practitioner may give advice or assistance in a matter in which the lawyer or licensed paralegal practitioner does not have the skill ordinarily required where referral to or consultation or association with another lawyer or licensed paralegal practitioner would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer or licensed paralegal practitioner may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer or licensed paralegal practitioner who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer or licensed paralegal practitioner and the client regarding the

scope of the representation may limit the matters for which the lawyer or licensed paralegal practitioner is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer or licensed paralegal practitioner retains or contracts with other lawyers or licensed paralegal practitioner outside the lawyer or licensed paralegal practitioner's own firm to provide or assist in the provision of legal services to a client, the lawyer or licensed paralegal practitioner should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' or licensed paralegal practitioners' services will contribute to the competent and ethical representation of the client. The reasonableness of the decision to retain or contract with other lawyers or licensed paralegal practitioners outside the lawyer's or licensed paralegal practitioner's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers or licensed paralegal practitioners; the nature of the services assigned to the nonfirm lawyers or licensed paralegal practitioners; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers or licensed paralegal practitioners from more than one law firm are providing legal services to the client on a particular matter, the lawyers or licensed paralegal practitioners ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers, licensed paralegal practitioner, and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer or licensed paralegal practitioner should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer or licensed paralegal practitioner is subject.

**Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.**

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

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

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

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

Comment

Allocation of Authority between Client and Lawyer

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

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

practitioner should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer or licensed paralegal practitioner has a fundamental disagreement with the client, the lawyer or licensed paralegal practitioner may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer or licensed paralegal practitioner. See Rule 1.16(a)(3).

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

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

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

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

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

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

Criminal, Fraudulent and Prohibited Transactions

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

[10] When the client's course of action has already begun and is continuing, the lawyer's or licensed paralegal practitioner's responsibility is especially delicate. The lawyer or licensed paralegal practitioner is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer or licensed paralegal practitioner knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer or licensed paralegal practitioner may not continue assisting a client in conduct that the lawyer or licensed paralegal practitioner originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer or licensed paralegal practitioner must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer or licensed paralegal practitioner to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

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

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer or licensed paralegal practitioner must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

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

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

**Rule 1.3. Diligence.**

A lawyer or licensed paralegal practitioner shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer or licensed paralegal practitioner should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer or licensed paralegal practitioner and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer or licensed paralegal practitioner must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer or licensed paralegal practitioner is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer or licensed paralegal practitioner may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's or licensed paralegal practitioner's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's or licensed paralegal practitioner's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer or licensed paralegal practitioner overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's or licensed paralegal practitioner's trustworthiness. A lawyer's or licensed paralegal practitioner's duty to act with reasonable promptness, however, does not preclude the lawyer or licensed paralegal practitioner from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's or licensed paralegal practitioner's client.

[4] Unless the relationship is terminated as provided in Rule1.16, a lawyer or licensed paralegal practitioner should carry through to conclusion all matters undertaken for a client. If a lawyer's or licensed paralegal practitioner's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer or licensed paralegal practitioner has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer or licensed paralegal practitioner will continue to serve on a continuing basis unless the lawyer or licensed paralegal practitioner gives notice of withdrawal. Doubt about whether a client-lawyer or client-licensed paralegal practitioner relationship still exists should be clarified by the lawyer or licensed paralegal practitioner, preferably in writing, so that the client will not mistakenly suppose the lawyer or licensed paralegal practitioner is looking after the client's affairs when the lawyer or licensed paralegal practitioner has ceased to do so. For example, if a lawyer or licensed paralegal practitioner has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer or licensed paralegal practitioner and the client have not agreed that the lawyer or licensed paralegal practitioner will handle the matter on appeal, the lawyer or licensed paralegal practitioner must consult with the

client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer or licensed paralegal practitioner is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer or licensed paralegal practitioner has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer or licensed paralegal practitioner to review client files, notify each client of the lawyer's or licensed paralegal practitioner's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 27 of the Utah Rules for Lawyer Discipline and Disability (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

**Rule 1.4. Communication.**

(a) A lawyer or licensed paralegal practitioner shall:

(a)(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(a)(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(a)(3) keep the client reasonably informed about the status of the matter;

(a)(4) promptly comply with reasonable requests for information; and

(a)(5) consult with the client about any relevant limitation on the lawyer's or licensed paralegal practitioner's conduct when the lawyer or licensed paralegal practitioner knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer or licensed paralegal practitioner shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer or licensed paralegal practitioner and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer or licensed paralegal practitioner promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer or licensed paralegal practitioner to take. For example, a lawyer or licensed paralegal practitioner who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer or licensed paralegal practitioner to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer or licensed paralegal practitioner to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer or licensed paralegal practitioner to act without prior consultation. In such cases the lawyer or licensed paralegal practitioner must nonetheless act reasonably to inform the client of actions the lawyer or licensed paralegal practitioner has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer or licensed paralegal practitioner keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's or licensed paralegal practitioner's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or licensed paralegal practitioner, or a member of the lawyer's or licensed paralegal practitioner's staff, acknowledge receipt of the request and advise the client when a response

may be expected. A lawyer or licensed paralegal practitioner should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer or licensed paralegal practitioner should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer or licensed paralegal practitioner ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer or licensed paralegal practitioner should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer or licensed paralegal practitioner asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer or licensed paralegal practitioner should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer or licensed paralegal practitioner may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer or licensed paralegal practitioner might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer or licensed paralegal practitioner may not withhold information to serve the lawyer's or licensed paralegal practitioner’s own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer or licensed paralegal practitioner may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

**Rule 1.5. Fees.**

(a) A lawyer or licensed paralegal practitioner shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(a)(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

(a)(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer or licensed paralegal practitioner;

(a)(3) the fee customarily charged in the locality for similar legal services;

(a)(4) the amount involved and the results obtained;

(a)(5) the time limitations imposed by the client or by the circumstances;

(a)(6) the nature and length of the professional relationship with the client;

(a)(7) the experience, reputation and ability of the lawyer or lawyers or licensed paralegal practitioner performing the services; and

(a)(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer or licensed paralegal practitioner will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer or licensed paralegal practitioner in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer or licensed paralegal practitioner shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer or licensed paralegal practitioner shall not enter into an arrangement for, charge or collect:

(d)(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(d)(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers or licensed paralegal practitioners who are not in the same firm may be made only if:

(e)(1) the division is in proportion to the services performed by each lawyer or licensed paralegal practitioner or each lawyer or licensed paralegal practitioner assumes joint responsibility for the representation;

(e)(2) the client agrees to the arrangement, including the share each lawyer or licensed paralegal practitioner will receive, and the agreement is confirmed in writing; and(e)(3) the total fee is reasonable.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers or licensed paralegal practitioner charge fees that are reasonable under the circumstances. The factors specified in (a)(1) through (a)(8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer or licensed paralegal practitioner may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer or licensed paralegal practitioner.

Basis or Rate of Fee

[2] When the lawyer or licensed paralegal practitioner has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship or client-licensed paralegal practitioner, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's or licensed paralegal practitioner's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer or licensed paralegal practitioner to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer or licensed paralegal practitioner may require advance payment of a fee but is obligated to return any unearned portion. See Rule1.16(d). A lawyer or licensed paralegal practitioner may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer or licensed paralegal practitioner improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer or licensed paralegal practitioner should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer or licensed paralegal practitioner should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer or licensed paralegal practitioner from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fees

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers or licensed paralegal practitioner who are not in the same firm. A division of fee facilitates association of more than one lawyer or licensed paralegal practitioner in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer or licensed paralegal practitioner and a trial specialist. Paragraph (e) permits the lawyers or licensed paralegal practitioners to divide a fee either on the basis of the proportion of services they render or if each lawyer or licensed paralegal practitioner assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer or licensed paralegal practitioner is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers or licensed paralegal practitioner were associated in a partnership. A lawyer or licensed paralegal practitioner should only refer a matter to a lawyer whom the referring lawyer or licensed paralegal practitioner reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers or licensed paralegal practitioners were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer or licensed paralegal practitioner must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer or licensed paralegal practitioner should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's or licensed paralegal practitioner's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer or licensed paralegal practitioner entitled to such a fee and a lawyer or licensed paralegal practitioner representing another party concerned with the fee should comply with the prescribed procedure.

**Rule 1.18. Duties to Prospective Client.**

(a) A person who consults with a lawyer or licensed paralegal practitioner about the possibility of forming a client-lawyer or client/licensed paralegal practitioner relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer or client/licensed paralegal practitioner relationship ensues, a lawyer or licensed paralegal practitioner who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer or licensed paralegal practitioner subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer or licensed paralegal practitioner received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer or licensed paralegal practitioner is disqualified from representation under this paragraph, no lawyer or licensed paralegal practitioner in a firm with which that lawyer or licensed paralegal practitioner is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer or licensed paralegal practitioner has received disqualifying information as defined in paragraph (c), representation is permissible if:

(d)(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or;

(d)(2) the lawyer or licensed paralegal practitioner who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(d)(2)(i) the disqualified lawyer or licensed paralegal practitioner is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(d)(2)(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer or licensed paralegal practitioner, place documents or other property in the lawyer's or licensed paralegal practitioner's custody, or rely on the lawyer's or licensed paralegal practitioner's advice. A lawyer's or licensed paralegal practitioner's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer or licensed paralegal practitioner free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer or licensed paralegal practitioner about the possibility of forming a client-lawyer relationship or client/licensed

paralegal practitioner with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer or licensed paralegal practitioner, either in person or through the lawyer's or licensed paralegal practitioner's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's or licensed paralegal practitioner's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer or licensed paralegal practitioner in response to advertising that merely describes the lawyer's or licensed paralegal practitioner's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer or licensed paralegal practitioner, without any reasonable expectation that the lawyer or licensed paralegal practitioner is willing to discuss the possibility of forming a client-lawyer or client/licensed paralegal practitioner relationship, and is thus not a "prospective client". Moreover, a person who communicates with a lawyer or licensed paralegal practitioner for the purpose of disqualifying the lawyer or licensed paralegal practitioner is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer or licensed paralegal practitioner during an initial consultation prior to the decision about formation of a client-lawyer or client/licensed paralegal practitioner relationship. The lawyer or licensed paralegal practitioner often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer or licensed paralegal practitioner is willing to undertake. Paragraph (b) prohibits the lawyer or licensed paralegal practitioner from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer or licensed paralegal practitioner decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer or licensed paralegal practitioner considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer or licensed paralegal practitioner should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer or licensed paralegal practitioner, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer or licensed paralegal practitioner may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the

consultation will prohibit the lawyer or licensed paralegal practitioner from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's or licensed paralegal practitioner's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer or licensed paralegal practitioner is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer or licensed paralegal practitioner has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers or licensed paralegal practitioner as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer or licensed paralegal practitioner obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers or licensed paralegal practitioner are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(l)(requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer or licensed paralegal practitioner from receiving a salary or partnership share established by prior independent agreement, but that lawyer or licensed paralegal practitioner may not receive compensation directly related to the matter in which the lawyer or licensed paralegal practitioner is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer or licensed paralegal practitioner was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent..

[9] For the duty of competence of a lawyer or licensed paralegal practitioner who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's or licensed paralegal practitioner's duties when a prospective client entrusts valuables or papers to the lawyer's or licensed paralegal practitioner's care, see Rule 1.15.

### 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(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:

(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 licensed paralegal profession; or

(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.

**Note:**

**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 a 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 a 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 or 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 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 Rule 1.2(d), See the Comment to that Rule. See also Comment to Rule 8.4(b).

**Legal Argument**

(4) Legal argument based on a knowingly false representation of law constitutes dishonest toward the tribunal. A lawyer is not required to made 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 the evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence if 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 a 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 that lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer or licensed paralegal professional. 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. This 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 an ex parte proceeding, such as an application for temporary restraining order, there is no balance of presentation by opposing advocates. The object of the 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 the informed decision.

**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 or licensed paralegal practitioner in the matter, unless the lawyer has the consent of the other lawyer or licensed paralegal practitioner. 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 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 or a licensed paralegal practitioner 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 or licensed paralegal practitioner 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 or licensed paralegal practitioner if:

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

(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

(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

(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 fo counsel, including the right to have substitute counsel, for that communication.

(d) **Organizations as Represented Persons.**

(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

(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

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

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

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

(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.

(2) The term "control group" means the following persons:

(A) the chief executive officer, chief operating officer, chief financial officer, and the chief legal office 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 the 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.

(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 of Communications.** When communicating with a represented person pursuant to this Rule, no lawyer may

(1) inquire about privileged communications between the person and counsel or licensed paralegal professional or about information regarding litigation strategy or legal arguments of counsel or licensed paralegal professional or seek to induce the person to forgo representation or disregard the advise of the person's counsel or licensed paralegal professional; or

(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.

**Note:**

**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) and reference to licensed paralegal professionals who are permitted limited authority to represent parties in certain areas of legal services by Rule 14-802 (c), Utah Supreme Court Rules of Professional Practice (as amended through November 14, 2016). 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 or licensed paralegal professional. (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 or a licensed paralegal professional in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer or client-licensed paralegal professional 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 or a licensed paralegal professional 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 private party, between to organizations, between individuals or between an organization and an individual does not prohibit a lawyer for either from communication 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 or a licensed paralegal professional 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 or a licensed paralegal professional in the matter to which the communication relates only if the communicating lawyer obtains the consent of the represented person's lawyer or a licensed paralegal professional, 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 or a licensed paralegal professional in a matter without first securing the consent of the represented person's lawyer or a licensed paralegal professional if the communicating lawyer is authorized to do so by law, rule or court order. Paragraph (b) recognizes that the scope representation of a person by counsel or a licensed paralegal professional 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 or licensed paralegal professional of the limitations. This ensures that such a limited representation will not improperly or unfairly induce an adversary's lawyer or licensed paralegal professional to avoid contacting the person on those aspects of a matter for which the person is not represented by counsel or a licensed paralegal professional . 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 or licensed paralegal professional in such matters without first securing consent of that lawyer or licensed paralegal professional.

(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 or a licensed paralegal professional in advance of the intended communication. This would include, for example, a communication by a lawyer 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 or licensed paralegal professional 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 and licensed paralegal professional to enforce public law. Nevertheless, where the lawyer or licensed paralegal professional 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 or a licensed paralegal professional.

(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 or licensed paralegal professional, 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 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 to 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 or licensed paralegal professional 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, 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 or licensed paralegal professional 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 know 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 or licensed paralegal professional.

(20) In a criminal or civil law enforcement matter involving a represented organization, government lawyers may, without consent of the organization's lawyer or licensed paralegal professional, 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 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 or licensed paralegal professional 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 or licensed paralegal professional is relevant, but not conclusive, on the issue of knowledge. Lawyers should ensure that written notice of representation is distributed to all attorneys and licensed paralegal professionals 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 or licensed paralegal professional. 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 4.3. Dealing with Unrepresented Person**

(a) In dealing on behalf of a client with a person who is not represented by counsel or a licensed paralegal professional, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel or or a licensed paralegal professional, if the lawyer knows or reasonable should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

(b) A lawyer may consider a person, whose representation by counsel or a licensed paralegal professional in a matter does not encompass all aspects of the matter, to be unrepresented for purposes of this Rule and Rule 4.2, unless that person's counsel or licensed paralegal professional 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 or licensed paralegal professional.

**Note:**

**Comment**

(1) An unrepresented person, particularly one not experienced in dealing with legal matter, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

(2) This Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that this Rule prohibits the giving of any advice, apart from the advice to obtain counsel or a licensed paralegal professional. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

(3) 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 or another party cannot know which of Rule 4.2 or 4.3 applies under these circumstances, the lawyer who undertakes a limited representation must assume the responsibility for informing another party's lawyer or licensed paralegal professional of the limitations. This ensures that such a limited representation will not improperly or unfairly induce an adversary's lawyer or licensed paralegal professional to avoid contacting the person on those aspects of a matter for which the person is not represented by counsel or licensed paralegal professional. Note that this responsibility on the lawyer undertaking limited-scope representation also relates to the ability of another party's lawyer or licensed paralegal professional to make certain ex parte contacts without violating Rule 4.2.

(3a) Utah Rules of Professional Conduct 4.3(b) and related Comment (3) are additions to the ABA Model Rules clarifying that a lawyer may undertake limited representation of a client under the provisions of Rule 1.2.

## 5.1. Responsibility of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers or licensed paralegal professionals possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving a 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 other lawyers or licensed paralegal professionals, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**Note:**

**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 designated to detect and resolve conflicts of interest, identity dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers and licensed paralegal professionals 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 [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] make 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 it 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 firms, 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 it members and the partners may not assume that all lawyers or licensed paralegal professionals associated with the firm will inevitably conform to the Rules.

(4) Paragraph (c)(1) expresses a general principle of personal responsibility for act of others. 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 who has direct supervisory authority over performance of specific legal work by another lawyer or licensed paralegal professional. 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 and licensed paralegal professionals 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 or licensed paralegal professional 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, associated or subordinate. Whether a lawyer may be liable civilly or criminally for ~~another lawyer's~~ the conduct of another lawyer or licensed paralegal professional 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).

(9) For limitations on the managerial authority of nonlawyers, see Rule 5.4(d) and (e) (professional independence of a lawyer).

## Rule 5.3. Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, 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 the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

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

**Note:**

**Comment**

(1) Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment (6) to Rule 1.1 (retaining lawyers outside the firm) and Comment (1) to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer. The firm's compliance with paragraph (a) resides with each partner or other lawyer in the firm with comparable authority.

(1a) Utah's Comment (1) differs from the ABA Model Rule's Comment (1). The Model Rule Comment suggests that possibility that a firm could be in violation of this Rule without an individual or group of individuals also being in violation. Utah's Comment (1) 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.

**Nonlawyers Within the Firm**

(2) Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation or the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

(3) A lawyer may use nonlawyers outside the firm to assist the lawyer or licensed paralegal professional in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an ~~I~~internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See as Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer or licensed paralegal professional.

## Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) (i) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of the lawyer the agreed-upon purchase price; and

(ii) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law and are prohibited by Rule 14-802 , Utah Supreme Court Rules of Professional Practice (as amended through November 14, 2016) for nonlawyer to do.

(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form or association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer may practice in a non-profit corporation which is established to serve the public interest provided that the nonlawyer directors and officers of such corporation do not interfere with the independent professional judgment of the lawyer.

**Note:**

**Comment**

(1) The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fees or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangement should not interfere with the lawyer's professional judgment.

(2) The Rules also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

(2a) Paragraph (a)(4) of the ABA Model Rule was not adopted because it inconsistent with the provisions of Rule 7.2(b), which prohibit the sharing of attorney's fees. Rule 5.4(e) addresses a lawyer practicing in a non-profit corporation that serves the public interest. There is no similar provision in the ABA Model Rules.

*Note: paragraph (d) may need to be modified if licensed paralegal professionals are allowed ownership interest in a for-profit law firm or association.*