Agenda

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

October 22, 2018
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
Supreme Court Standing Order 7: Rules 14-302 and 14-303	Tab 2	Tim Conde (subcommittee chair), Gary Sackett, Nancy Sylvester
Licensed Paralegal Practitioner Rule updates: 1.0, 4.2, 5.1, 8.3,	Tab 3	Steve Johnson
In Re Discipline of Steffensen and Rule 8.4, Comment [1a]	Tab 4	Gary Sackett
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

September 17, 2018

DRAFT

Committee Members Attending:
Steven G. Johnson, Chair
Don Winder
Gary Sackett
Hon. Trent Nelson
Phil Lowry
Vanessa Ramos
Cristie Roach
Amy Oliver
Timothy Conde
Billy Walker
Tom Brunker
Dan Brough
Simon Cantarero
Hon. James Gardner (via telephone)
Hon. Darold McDade (via telephone)
Katherine Veni (via telephone)

Guests:
Patricia Owen

Members Excused:
Austin Riter
Joni Jones
Padma Veeru-Collings
Adam Bondy
Tim Merrill

Staff:
Nancy Sylvester

I. Welcome and Approval of Minutes

Quorum was announced and the meeting commenced at 5:05 p.m. Mr. Johnson welcomed the committee.

Motion on the Minutes:
Tim Conde moved to approve the minutes from the August 2018 meeting with several changes suggested by Mr. Johnson. Judge Trent Nelson seconded the motion. The motion passed unanimously.

II. Rule 8.4 and Christian Legal Society Feedback

The committee discussed a letter from the Christian Legal Society. The committee determined that the letter discussed things already addressed by a subsequent version of the rule. Mr. Johnson proposed removing the comma after "lawyer's firm" before "as defined in Rule 1.0." Mr. Johnsons said he'd been contacted by a former committee member about the word "local" in the rule to refer to ordinances addressing discrimination. The suggestion was to remove the term. The committee unanimously adopted the removal of the comma, but did not adopt the suggestion to remove the term "local." The committee did not take a vote because the comma change was stylistic.

III. Supreme Court Standing Order 7 Update

This agenda item relates to the conversion of Standing Order 7 to a new Rule 14-302.
The subcommittee received feedback from the new Counseling Board, which is Addenda 3 online. Mr. Johnson suggested an edit to remove "standing order" references from the new rule. "OPC" will need to be changed due to the changes to the structure of the Office of OPC. Mr. Sackett suggested updating the rule for style consistent with the rest of Chapter 14. A consistency subcommittee consisting of Tim Conde, Gary Sackett, and Nancy Sylvester will work on bringing the rule in line with the rest of the chapter. Billy Walker pointed out that the subcommittee should look at the 300 series.

Billy Walker moved to approve Rule 14-302 subject to a consistency review; Cristie Roach seconded the motion and it passed unanimously.

Don Winder announced his retirement from the practice of law and from the committee. Mr. Winder then discussed his presentation to the Conference of Chief Justices on civility. He said he encouraged the chief justices to put civility in the attorney oath in every state. He told the group that Utah is looking at adding (h) to Rule 8.4, which deals with civility.

IV. Military Spouse Admissions Rules

Mr. Lowry noted that Missouri, the 31st state to adopt a military spouse rule, just adopted the subcommittee's version of the rule. He said the Admissions Committee's proposal is not in the nature of a reciprocal admission:

- It requires at the point of application that the military spouse be in Utah.
    - Committee commentary: as soon as you get military orders, you should be able to apply because the military person gets these about 6 months in advance.
- Test scores: attorneys admitted in other states would not be able to practice here if their state required lower scores for admission.
    - Question from Ms. Venti: is there a minimum requirement for waiving in? Committee commentary: No, because you have established yourself in another legal community. The difficulty is that these are often times junior lawyers. Pro hac vice attorneys don't have these requirements. The committee discussed that the test scores likely wouldn't make much difference on competency.

The committee discussed how long someone would conceivably be here: the average is 3 years. If their spouse deploys, it may be longer. The committee also discussed the requirements for waiving in. Mr. Johnson reminded the committee that all DOPL licenses now transfer from other states under new legislation introduced last year to benefit military families.

Mr. Lowry noted that the subcommittee added malpractice insurance as a safety net. The lawyer also has to have supervision by local counsel.

The following are the Admissions Committee's comments regarding their edits to the rule:

> 1) Although the Admissions Committee does not object to removing the repeated use of "provisional" when referring to the license, it is important to retain at least one reference to it to call attention to the fact that this is not a typical license. It is provisional based on the spouse's military orders.
> 2) Admissions believes this change is advisable because some active military with orders to be stationed in Utah may not actually be serving in this state but the military spouse will still be residing here.
> 3) This paragraph has simply been moved from (a)(10) because it is a defining requirement of this rule and therefore it is logical to state it up front. Several other requirements in this list have been reordered in a manner that seems to flow more logically (for example, (a)(8) is now (a)(5)). Likewise, internal references within the rule have been altered to reflect these changes.
> 4) This statement was removed by the subcommittee, but it is in fact necessary based on experience. The subcommittee assumed it was a burden of proof requirement, but it is in fact a timing requirement. Without it, applicants will try to file applications explaining that they plan to eventually meet the qualifications, and then they will never do so. For example, if an applicant will not pay the application fees up front, a large amount of time and resources is spent on the application that may never be recompensed if the applicant decides not to pursue admission. Another example would be an applicant who claims they will eventually return to good standing in the jurisdiction where they are licensed but they are not willing to do so right now. When applicants make these assurances, we find they never follow through. On the other side, we have to make it clear

that they must continue to meet the requirements through admission. This might come up if an applicant is in good standing in all jurisdictions when the application is filed but then stops paying their bar dues in the other states (applicants have actually asked Admissions for permission to do this.)

5) The Admissions Committee moved the reference to the applicant's relocation and when it must be complete. It has also been reworded it so that it is less stringent: instead of requiring the applicants to have relocated before they can practice, the new wording will allow them to start accepting work as soon as they have a supervisor and have received the Certificate from the Bar. They only need to have finished moving here before they will be admitted to the Bar.

6) The Admissions Committee continues to object to the fairness and logic of waiving the standard competency requirement for Military Spouse Attorneys. The rule has been revised to return to Admissions' initial proposal, which explains that the exceptions provided are only for those who have met the same competency requirements of all attorneys who are admitted to practice in this state. See (a)(8).

The committee discussed the physical presence issue. Committee members thought it wasn't a bad idea to not be able to have the practice certificate until the military spouse is physically present and has a mentor.

Mr. Johnson noted a case from Georgia in which the Bar arbitrarily denied a military spouse lawyer admission.

The committee continued to discuss the Bar admission score. The subcommittee's version provides that the military spouse lawyer must either have the minimum Utah score or be supervised while practicing here. Ms. Oliver noted that if an attorney is moving every three years, they will never be able to waive in to a jurisdiction. The committee discussed an earlier fairness discussion about lower scores versus higher scores. Attorneys who sit for the Bar here choose to be here. Military spouses don't get to choose to be here.

Mr. Johnson said he preferred that the definitional term in the subcommittee's (a)(10) be moved up to the beginning of the rule as (a)(1). The committee agreed with that change.

Mr. Lowry noted that one version has two types of admission and the other one doesn't. Mr. Cantarero said his understanding is that once the person has an application that is pending, then they can practice anywhere. The Admissions Committee changed this so that this rule was not conflated with the practice pending admission rule.

Ms. Roach and Ms. Oliver questioned why if a person has Utah's minimum UBE score of 270 they would have to have supervision, too. The committee discussed the need for supervision if the lawyer applies and is able to practice before getting here.

Mr. Walker asked if the subcommittee had discussed the "practice privilege" or "diploma" states. Mr. Brunker noted that if they don't have the Bar score, they will have supervision.

Motion by Cristie Roach, Mr. Lowry will make the following changes and circulate it by email: Move (a)(10) definition to (a)(1); change verbiage on provisional practice rule to Admission's Committee's verbiage, "practice while the application is pending;" and clarify that when a military spouse attorney has a practice while the application is pending certificate and they do not have a physical presence in Utah, they must have a supervising attorney in good standing here in Utah (changing paragraph (b)). For final ratification by email or at the next meeting with those changes. Second by Tom Brunker. The motion passed unanimously.

V. ADA Issue

Billy Walker said his office would do some follow up based on the recording about the ADA issues circulated to the committee. The recording was from the last legislative session. Mr. Walker noted that the ADA does not require a real injury in terms of the ADA violations. The committee then discussed some of the concerns about the ADA. The committee discussed the impression that these cases are not meant to be litigated. Mr. Conde said he has settled these cases before but has advised his clients that they still need to make the fix because a settlement doesn't mean another plaintiff won't come by and sue them next week.

The committee noted that an attorney recruiting an ADA investigator may not be doing something that sits well with people, but it probably doesn't violate an ethical rule. The solution for the concerns the states have about ADA abuse likely lies at the federal level. The committee discussed several potential issues: 1) inappropriate advertisements, 2) solicitation, and 3) deceit.

Tom Brunker moved to advise the Supreme Court that the committee has studied this issue and does not see a need to amend the current rules. The existing rules already address, for example, inappropriate advertisements, solicitation, and deceit. The committee would also advise the Court of potential solutions, such as advising the business community of their rights and responsibilities and working with Congress on a fix to the ADA. Vanessa Ramos seconded the motion and it carried unanimously.

VI. Next Meeting

The next meeting is scheduled for October 22 at 5:00 p.m.

VII. Adjournment

The meeting adjourned at 6:50 p.m.

Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Advisory Committee on the Utah Rules of Professional Conduct
From: Nancy Sylvester
Date: October 18, 2018
Re: Standing Order 7 and Rules 14-302 and 14-303

At our last meeting, the Standing Order 7 subcommittee presented a new Rule 14-302 that the committee approved for recommendation to the Supreme Court, subject to a consistency review. Gary Sackett and I have reviewed the rule for consistency with the rest of Chapter 14 and attached are two proposals:

1) A definition section in new Rule 14-302; and
2) The Counseling Board's charge in new Rule 14-303.

Both Gary and I raised questions for discussion throughout Rule 14-303, so the committee should look at those and resolve them.

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Rule 14-302. Definitions.

As used in this article:

(a) “Bar” means the Utah State Bar;

(b) “Bar member” means a lawyer who has been admitted to the Bar and who holds a current license;

(c) “Board” means the Professionalism and Civility Counseling Board;

(d) “complainant” means a person, judge or OPC counsel who files a complaint with the Board;

(e) “complaint” means any written allegation of one or more violations of the Code of Civility and Professionalism;

(f) “judge” means a government official with authority to decide matters of law and questions of fact brought before the courts and governmental agencies.

(g) “OPC counsel” means the Office of Professional Conduct of the Utah State Bar;

(h) “referral” means a communication to the Board by a judge or OPC counsel concerning one or more Bar members whose conduct may be in violation of the Code of Civility and Professionalism.

(i) “respondent” means a lawyer who is the subject of a complaint or a referral;

(j) “Standards” means the Standards of Civility and Professionalism, as set forth in Rule 14-301; and

(k) “Supreme Court” means the Utah Supreme Court.

Rule 14-303. Professionalism and Civility Counseling.

(a) **Submission of Complaints and Questions Regarding Professionalism and Civility.**

(a)(1) A Bar member, a judge, or OPC counsel may submit a complaint to the Professionalism and Civility Counseling Board concerning the professionalism or civility of Bar members. Members of the public may submit a complaint under this provision only through a referral from a judge or OPC counsel.

(a)(2) To submit a complaint to the Board concerning the conduct of another Bar member, the complainant shall deliver a letter or email to the Board that contains:

(a)(2)(A) the name of and contact information for the respondent and complainant;

(a)(2)(B) a description of the conduct that is the subject of the complainant; and

(a)(2)(C) complainant's signature.

(a)(3) The Board shall not consider anonymous complaints or referrals about Bar members.

(a)(4) Bar members may submit questions or requests for counseling concerning the member's own conduct. These need not be in writing, but may be made by telephone or personal visit with members of the Board.

(a)(5) Referrals from a judge may be made by telephone.

(a)(6) Lawyers filing complaints or seeking the assistance of the Board shall do so only in good faith and not for the purposes of harassment or to attain a strategic or tactical advantage.

(b) **Professionalism and Civility Counseling Board.**

(b)(1) **Composition**. Members of the Board shall be appointed by the Supreme Court. The Board shall consist of seven Bar members. Appointments shall be based on stature in the legal community and experience in legal professionalism and civility matters.

(b)(1)(A) At least one of the appointees shall have transactional experience, and at least one shall have small-firm or sole-practitioner experience.

(b)(1)(B) Board members shall serve on a volunteer basis for staggered terms of no fewer than three years for continuity so that each Board member has the opportunity to develop expertise on the Standards.

(b)(1)(C) The Utah Supreme Court will appoint one of the Board members as chair.

(b)(2) **Authority and Responsibility.** The Board shall have authority to:

(b)(2)(A) receive, evaluate, address, and resolve complaints made by Bar members and judges concerning Bar members' professionalism and civility;

(b)(2)(B) counsel Bar members in response to complaints by other Bar members, referrals from judges, or OPC counsel;

(b)(2)(C) counsel Bar members who request advice on their own obligations under the Standards;

(b)(2)(D) provide CLE and otherwise educate Bar members on the Standards; and

(b)(2)(E) publish advice and information relating to the work of the Board.

(c) **Procedure**.

(c)(1) The Board may develop its own procedures based on the purposes of this Rule and the Board's experience. Adherence to formal rules of procedure or evidence is not required. The Board may address a complaint or referral by whatever means it determines to be best.

(c)(2) When the Board deems it appropriate, matters may be addressed by panels of three Board members.

(c)(3) Within 30 days of receipt of a complaint or referral, the Board may notify the complainant, judge, or OPC counsel that the complaint or referral has been received and indicate the manner in which the Board intends to address the issue and the general timing that is anticipated.

(c)(4) Except as authorized by this rule or Rule 14-515(a)(4), the contents of statements, communications or opinions made by any participant shall be kept confidential.

(c)(5) Board members may freely communicate with a referring judge or with OPC counsel in connection with any matter referred to the Board.

(c)(6)The Board may inform the respondent of relevant factual assertions that the Board may address and include a copy of the complaint or written referral. The Board may also investigate underlying facts or counsel lawyers by reference to facts or assertions learned in the process of its efforts.

(c)(7) Board members may communicate directly with lawyers, judges, or clients involved in the matter concerning the relevant facts and the application or interpretation of the Standards.

(c)(8) Any failure or refusal by the respondent to respond to a request or instruction from the Board may result in the Board reporting such failure or refusal to OPC counsel, which may result in a referral to OPC for possible violations of the Rules ~~Governing the Utah State Bar.~~of Professional Conduct.

(d) **Resolution and Written Advisories.**

(d)(1) The Board may resolve a matter as it deems appropriate, including by:

(d)(1)(A) ~~by~~ issuing a written advisory to the lawyers involved, with reference to applicable Standards and a copy of the written advisory, including identifying information, provided to the lawyers involved in the matter and, at the Board's discretion, to OPC counsel. The Board may also provide a copy of the written advisory to supervisors, employers, or agencies whose lawyers have been the subject of a complaint;

(d)(1)(B) ~~by~~ conducting a personal meeting with the lawyer or lawyers and the Board;

(d)(1)(C) ~~by~~ counseling the Board provides by telephone or other means; or

(d)(1)(D) ~~by~~ terminating a proceeding it believes has been initiated or utilized in bad faith or for an improper purpose.

(d)(2) When a matter has come to the Board from a judicial referral, the Board shall, upon resolution of the matter, report to the judge the manner in which the matter was resolved, including, where applicable, a copy of the written advisory.

(e) **Publication and Reporting.**

Comment [NS1]: I don't know why this isn't mandatory.

Comment [NS2]: Is the complainant different from the judge? Should we just say complainant Bar member since a member of the public can't complain to the Board?

Comment [NS3]: Gary Sackett questioned whether the term "any" should be used.

Comment [NS4]: Is this redundant to (c)(5)?

Comment [NS5]: Or commissioner? If we mean commissioner when we say judge, we'll need to make adjustments throughout the rule.

(e)(1) The Board may disclose the general nature of matters that come before it for the benefit of Bar members and the public, but may not identify names or uniquely identifying facts. A disclosure may be made through publication or other means of public dissemination, including CLE presentations or posting to a webpage, and should include a sufficient description of the conduct at issue to convey the basis for the Board's advice.

(e)(2) The Board shall report annually to the Supreme Court its operations for the year, the Standards it has interpreted, the advice and counseling it has given and any trends it believes important for the Supreme Court to be informed about. It should also make suggestions to the Supreme Court as to possible changes to the Standards.

(e)(3) The Board shall periodically publish summaries or selected portions of its written advisories in the Utah Bar Journal for the benefit of Bar members. Published written advisories shall not include the names or uniquely identifying facts such as the parties to a proceeding. The Board shall also maintain a public webpage under the auspices of the Supreme Court or the Bar that provides a database of the advisories transmitted to the Utah Bar Journal for publication.

Comment [NS6]: Gary wondered if this sentence was redundant to the first one.

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 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 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.

(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 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) “Licensed Paralegal Practitioner” is a person licensed by the Utah State Bar as described in Rule 14-802(c) of the Supreme Court Rules of Professional Practice.

Or

(h) “Legal Professional” includes a lawyer and a licensed paralegal practitioner.

~~(h)~~ (i) "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)~~ (j) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

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

~~(l)~~ (m) “Reckless” or “recklessly” denotes the conscious disregard of a duty that a lawyer is or reasonably should be aware of, or a conscious indifference to the truth.

~~(m)~~ (n) "Screened" denotes the isolation of a lawyer 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 is obligated to protect under these Rules or other law.

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

~~(o)~~ (p) "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.

~~(p)~~ (q) "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 must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer 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 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 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 could be regarded as a firm for purposes of the rule that the same lawyer 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 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 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 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 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 to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer 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 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 should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers 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 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 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 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 relating to the matter, denial of access by the screened lawyer 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 and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer 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 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 legal professional in the matter, unless the lawyer has the consent of the other lawyer or legal professional. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another’s client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this Rule.

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

person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

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

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

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

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

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

(d) Organizations as Represented Persons.

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

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

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

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

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

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

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

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

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

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

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

Comment

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

[2] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer or other legal 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-legal 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 other legal 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 two organizations, between individuals or between an organization and an individual does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate

matter. Nor does the Rule prohibit government lawyers from communicating with a represented person about a matter that does not pertain to the subject matter of the representation but is related to the investigation, undercover or overt, of ongoing unlawful conduct. Moreover, this Rule does not prohibit a lawyer from communicating with a person to determine if the person in fact is represented by counsel concerning the subject matter that the lawyer wishes to discuss with that person.

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

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

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

[9] A communication is authorized under paragraph (a) if the lawyer is assisting the client to exercise a constitutional right to petition the government for redress of grievances in a policy dispute with the

government and if the lawyer notifies the government's lawyer in advance of the intended communication. This would include, for example, a communication by a lawyer with a governmental official with authority to take or recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including the possibility of resolving a disagreement about a policy position taken by the government. If, on the other hand, the matter does not relate solely to a policy issue, the communicating lawyer must comply with this Rule.

[10] In the event the person with whom the lawyer communicates is not known to be represented by counsel or other legal 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 to enforce public law. Nevertheless, where the lawyer is representing the government in any other role or litigation (such as a contract or tort claim, for example) the same rules apply to government lawyers as are applicable to lawyers for private parties.

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

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

[14] Under subparagraph (c)(2), a government lawyer may engage in limited communications to protect against an imminent risk of serious bodily harm or substantial property damage. The imminence and gravity of the risk will be determined from the totality of the circumstances. Generally, a risk would be imminent if it is likely to occur before the government lawyer could obtain court approval or take other reasonable measures. An imminent risk of substantial property damage might exist if there is a bomb threat directed at a public building. The Rule also makes clear that a government attorney may

communicate directly with a represented party A at the time of arrest of the represented party" without the consent of the party= s counsel, provided that the represented party has been fully informed of his or her constitutional rights at that time and has waived them. A government lawyer must be very careful to follow Rule 4.2(d) and would have a significant burden to establish that the waiver of right to counsel was knowing and voluntary. The better practice would include a written or recorded waiver. Nothing in this Rule, however, prevents law enforcement officers, even if acting under the general supervision of a government lawyer, from questioning a represented person. The actions of the officers will not be imputed to the government lawyer unless the conversation has been " scripted" by the government lawyer.

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

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

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

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

[19] Also included in the control group are other current employees known to be "participating as principal decision makers" in the determination of the organization= s legal position in the proceeding or

investigation of the matter. In this context, "employee" could also encompass former employees who return to the company's payroll or are specifically retained for compensation by the organization to participate as principal decision makers for a particular matter. In general, however, a lawyer may, consistent with this Rule, interview a former employee of an organization without consent of the organization's lawyer.

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

[21] This Rule does prohibit communications with any person who is known by the lawyer making the communication to be represented by counsel or other legal 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 is relevant, but not conclusive, on the issue of knowledge. Lawyers should ensure that written notice of representation is distributed to all attorneys working on a matter.

[22] Paragraph (e) is intended to regulate a lawyer's communications with a represented person, which might otherwise be permitted under the Rule, by prohibiting any lawyer from taking unfair advantage of the absence of the represented person's counsel or other legal 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 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in

effect measures giving reasonable assurance that all lawyers and other legal professionals in the firm conform to the Rules of Professional Conduct.

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

(c) A lawyer shall be responsible for another lawyer's or other legal professional's violation of the applicable 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 or other legal professional practices or has direct supervisory authority over the other lawyer or other legal professional, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. This includes members of a partnership, the shareholders in a law firm organized as a professional corporation and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers or other legal professionals 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 and other legal professionals in the firm will conform to the applicable Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers and other legal 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 Comment [2]. The Model Rule Comment [2] might suggest the possibility that a firm could be in violation of the Rule without an individual or group of individuals also being in violation. Utah's Comment [2] makes clear that even though the concept of firm discipline is possible, a firm should not be responsible in the absence of individual culpability for a rule violation.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers or other legal professionals, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems

frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers or other legal professionals can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers and other legal professional associated with the firm will inevitably conform to the Rules.

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

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer or other legal 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 or other legal 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 other legal 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, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's or other legal professional's conduct is a question of law beyond the scope of these Rules.

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

Rule 8.3. Reporting Professional Misconduct.

(a) A lawyer who knows that another lawyer or other legal professional has committed a violation of the applicable Rules of Professional Conduct that raises a substantial question as to that lawyer's or other legal professional's honesty, trustworthiness or fitness as a lawyer or other legal professional in other respects shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable Rules of Judicial Conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the applicable Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[5] Information about a lawyer’s or judge’s misconduct or fitness may be received by a lawyer in the course of that lawyer’s participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

Tab 4

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Advisory Committee on the Utah Rules of Professional Conduct
From: Nancy Sylvester
Date: October 18, 2018
Re: *In re Discipline of Steffensen* and Rule 8.4 Comment [1a]

The Supreme Court, in *In re Discipline of Steffensen*, 2018 UT 53, assigned this committee to review Rule 8.4 Comment [1a]: "We recognize the lack of clarity in comment [1a] for rule 8.4 of the Utah Rules of Professional Conduct regarding the imposition of sanctions and refer these issues to the rules committee for further consideration. *See infra* ¶ 51."*Id.* Note 7. In paragraph 51, the Supreme Court expounded on the lack of clarity it noted in footnote 7:

> We recognize that the language of comment [1a] is confusing and could be read to incorporate all violations of the Utah Rules of Professional Conduct, including rule 8(b) through (f), into its grasp. But we believe a fairer reading of the comment limits its scope to violations of rules other than rule 8.4. If a violation of any of the Utah Rules of Professional Conduct could also be a violation of rule 8.4(a), rule 14-605(a)(1), (b)(1), (c)(1), and (d)(1) would encompass the entirety of rule 8.4, including rule 8.4(b) and (c), rendering the rest of rule 14-605 superfluous. Indeed, rule 8.4(a) would subsume every other rule in the Utah Rules of Professional Conduct, including rule 8.4(d), (e), and (f). We do not believe that comment [1a] intended such a result.

Comment [1a] refers to Rule 8.4(a), which reads as follows: "It is professional misconduct for a lawyer to 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…." Comment [1a] reads as follows and my suggested amendment in response to the Court's opinion is in red:

> 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 of Rule 8.4(a). However, this rule defines professional misconduct as a violation of the Rules of Professional Conduct as the term

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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.

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

2018 UT 53

IN THE

SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE DISCIPLINE OF BRIAN W. STEFFENSEN

BRIAN W. STEFFENSEN,
Appellant,

v.

OFFICE OF PROFESSIONAL CONDUCT,
Appellee.

No. 20170058
Filed September 24, 2018

On Direct Appeal

Third District, Salt Lake
The Honorable Todd M. Shaughnessy
No. 110917794

Attorneys:

Billy L. Walker, Barbara Townsend, Adam C. Bevis, Salt Lake City, for appellee

Brian W. Steffensen, Salt Lake City, for appellant

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

JUSTICE HIMONAS, opinion of the Court:

INTRODUCTION

¶1 Brian Steffensen appeals the judgment of the district court disbarring him from practicing law for violations of the Utah Rules of Professional Conduct involving, *inter alia*, failure to file taxes. Mr. Steffensen asks this court to reverse the district court's findings of misconduct, direct that the case against him be dismissed, and vacate the sanction of disbarment. We affirm the district court's

findings of misconduct, reverse the district court's imposition of sanctions, and remand to the district court for a new sanctions determination.

BACKGROUND

¶2 After graduating from Stanford Law School in 1980, Mr. Steffensen became a member of the bar and began working as a lawyer in a large firm.[1] He primarily represented a major bank focused on transactional work and real estate development. He left the firm approximately seven years later, continuing to work as a lawyer in a sole proprietorship. Then, in 1995, Mr. Steffensen incorporated the first of his many professional law firms.

¶3 Mr. Steffensen repeatedly failed to maintain accounting practices that would keep his law firms viable. Mr. Steffensen acknowledges his "gross[] negligen[ce]" in "failing to file . . . employee withholding tax returns." Additionally, Mr. Steffensen opened a new law firm each time the previous one financially floundered. To date, Mr. Steffensen has incorporated five firms subsequent to his sole proprietorship. Financial trouble led to the demise of at least three previous firms,[2] with taxes left unpaid. The law firm currently in operation is AAA Law, PC.

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[1] While we may "draw different inferences from the facts in order to make an independent determination of the correctness of the discipline the district court imposed," *In re Discipline of Lundgren*, 2015 UT 58, ¶ 9, 355 P.3d 984 (citation omitted) (internal quotation marks omitted), "we always give serious consideration to the findings and [rulings] of the [district court]," *In re Discipline of Babilis*, 951 P.2d 207, 213 (Utah 1997) (alterations in original) (citation omitted). As not all of the evidence afforded to the district court is before us, we establish a background that is culled from the district court's findings of fact and conclusions of law, Steffensen's own testimony in the portion of the record we do have, and the briefing before us unless otherwise noted.

[2] At the time of Mr. Steffensen's deposition in August 2013, he had bank accounts for both his fourth law firm, SB Law, PC, and his fifth, AAA Law, PC. There is little other information about SB Law, PC in the record.

¶4 Mr. Steffensen's first incorporated law firm—Brian W. Steffensen, a Professional Law Corporation (Firm #1)—operated from 1995 to 2001 and closed, resulting in an Internal Revenue Service (IRS) seizure of all assets "because of his failure to pay withholding taxes." Mr. Steffensen also had problems with the Utah State Tax Commission with Firm #1. Mr. Steffensen admits having someone apply for a withholding account number for Firm #1 in 1995. So he has known since at least 1995 that he had a responsibility to withhold money from the employees' paychecks and pay that money to the Tax Commission. He also admits to knowing that filing a return was required even if no taxes were due and claims that he filed all returns for Firm #1. And, although he filed returns, he never remitted the taxes.

¶5 Upon the heels of the IRS seizure, Mr. Steffensen established Steffensen Law, PC (Firm #2), which operated from 2002 to 2003. Operations under this firm ended due to "the exact same problems with payroll and the Tax Commission" as the first. In the same year, 2003, Mr. Steffensen started his third law firm, S Law, P.C. (Firm #3), which ceased operation in 2007 "because the financial and tax irregularities continued to exist." When Firm #3 closed, Mr. Steffensen established his next firm, SB Law, PC (Firm #4), which remained in operation until 2013. When that firm was in financial jeopardy, he established AAA Law, PC (Firm #5), Mr. Steffensen's currently operating law firm.

¶6 The Tax Commission began to scrutinize Mr. Steffensen's employee tax withholding practices in 2006 when the filing process of one of his employees was suspended and came under review by the Tax Commission because her W2 from Firm #3 did not have a state withholding tax number. The Tax Commission investigated both Mr. Steffensen's business and personal taxes. While the Tax Commission started with investigating only Mr. Steffensen's law firm listed on the questionable W2, it soon discovered several withholding accounts for other businesses and began investigating those as well.

¶7 In September 2008, the Tax Commission completed an investigation of Mr. Steffensen and recommended he be criminally charged with violating: (1) Utah Code section 76-8-1101(1)(c)(i),

Failure to File; (2) Utah Code section 76-8-1101(1)(d)(i), Willful Evasion; and (3) Utah Code section 76-6-513(2), Unlawful Dealings of Property by a Fiduciary.[3]

¶8 The Tax Commission's investigation uncovered a number of potential violations of tax law on Mr. Steffensen's part. As of July 2008, Firm #1 had an unpaid outstanding withholding tax account balance of $44,395.46. Mr. Steffensen broke seven payment arrangements regarding this balance. Regarding Firm #2, Mr. Steffensen perpetuated the same problems he had with the first firm. Additionally, Mr. Steffensen used invalid state withholding tax identification numbers, and the W2s he distributed to employees falsely declared that money had been withheld and remitted. And, as of September 2008, he still owed $48,895.17 for withholding taxes, penalties, and interest for tax years 2002–2006. Moreover, in operating Firm #3, Mr. Steffensen failed to file withholding returns for 2003 through 2006. He failed to remit withholdings for this firm's entire existence.

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[3] It is unclear both which versions of these statutes the Tax Commission recommended Mr. Steffensen be charged under and which versions of these statutes Mr. Steffensen was ultimately charged under in May 2009. *See infra* ¶ 9. This is immaterial, however, for purposes of this appeal because the parties seem to have chosen to litigate this case under the current versions of these statutes—especially with respect to Utah Code section 76-8-1101(c)(i).

Although Mr. Steffensen was charged in 2009 for acts that occurred between 2003 and 2008, the parties chose to frame the issue both here and below in terms of the current version of Utah Code section 76-8-1101(c)(i), which was amended in May 2014. In May 2014, the Legislature changed the *mens rea* element from "intent," the *mens rea* element in the statute since at least 2001 and before any of the crimes Mr. Steffensen was charged with allegedly took place, to "knowingly and intentionally." In light of the parties' choice to consistently litigate this issue under the current version of the statute, we, too, choose to analyze the parties' claims under the current version of the statute.

¶9 In May 2009, Mr. Steffensen was charged with one count each of Failing to Render a Proper Tax Return (for tax years 2003–2008), Intent to Evade (for tax years 2003–2008), and Unlawful Dealing of Property by a Fiduciary (for years 2003–2006). On March 1, 2010, Mr. Steffensen entered into a diversion agreement with the State in which he did not admit to guilt but did admit there was probable cause for the charges against him. In that agreement, the charges were amended to an "attempt to commit a crime," UTAH CODE § 76-4-101,[4] namely "knowingly and intentionally, and without a reasonable good faith basis, fail[ing] to make, render, sign or verify any return within the time required by law," *id*. § 76-8-1101(1)(c)(i). Mr. Steffensen in turn paid all taxes along with penalties.

¶10 After receiving notice of Mr. Steffensen's criminal charges in September 2009, the Office of Professional Conduct (OPC) alleged three violations in its case against Mr. Steffensen. The first claim under rule 8.4(b) of the Utah Rules of Professional Conduct is that Mr. Steffensen engaged in criminal conduct that reflects adversely on his fitness to practice law. The second claim under rule 8.4(c) is that he engaged in dishonest conduct. And the third claim under rule 8.4(a) is that he engaged in misconduct by violating or attempting to violate the Utah Rules of Professional Conduct.[5]

¶11 The district court concluded that Mr. Steffensen violated rule 8.4(b) and (c) of the Utah Rules of Professional Conduct. The court found professional misconduct under rule 8.4(b) for "committ[ing] the criminal act [under Utah Code section 76-8-1101(1)(c)(i)] of Failing to Render a Proper Tax Return [and] . . . committ[ing] the criminal act [under Utah Code section 76-4-101] of Attempted Failing to Render a Proper Tax Return." The district

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[4] It is likewise unclear which version of this statute Mr. Steffensen was charged with. In any event, it does not bear on our resolution of this case.

[5] The parties cite to no particular version of the Rules of Professional Conduct or the Rules Governing the Utah State Bar in their briefs here or their filings below. Accordingly, we evaluate the parties' arguments under the current rules, which contain the same language as the rules offered by the parties in their briefing.

court concluded that these "committed criminal acts," established "[b]y a preponderance of the evidence," "reflect adversely on [Mr. Steffensen's] honesty, truthfulness or fitness as a lawyer [i]n other respects."

¶12 The district court concluded that Mr. Steffensen committed professional misconduct under rule 8.4(c) because he "engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation."[6] In addition to the criminal acts under rule 8.4(b), the district court found (1) that Mr. Steffensen, "in the context of operating the law firm," failed "to remit to the Tax Commission the amounts that [his] employees were ultimately obligated to pay in their taxes," which was "dishonest;" (2) that he distributed "W2s to [his] employees stating that the tax monies had been withheld and remitted" when they had not, which constituted a misrepresentation; and (3) "that he presented [financial statements] to his bank in order to get a loan" that were in conflict with "forms he presented to the Tax Commission to obtain a financial hardship exemption" and therefore that "Mr. Steffensen's statements about his income and finances [that] he presented to the Tax Commission to receive a financial hardship exemption contained material misrepresentations."

¶13 The district court held a sanctions hearing and concluded that the violations of the Utah Rules of Professional Conduct justified the disbarment of Mr. Steffensen under Rule Governing the Utah State Bar 14-605(a)(1) and (a)(2). Mr. Steffensen appeals. We have jurisdiction pursuant to article VIII, section 4 of the Utah Constitution and Utah Code section 78A-3-102(3)(c).

STANDARD OF REVIEW

¶14 The Utah Supreme Court has a constitutional mandate to "govern the practice of law, including . . . the conduct and discipline of persons admitted to practice law." UTAH CONST. art. VIII, § 4. Because of this mandate, professional discipline cases form a unique subset of the cases we hear and have a unique standard of review.

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[6] Because we find some ambiguity in the district court's written order regarding its rule 8.4(c) findings, we have turned to the court's oral ruling to resolve that ambiguity.

¶15 While we generally "presume that the [lower tribunal's] findings of fact are correct" unless clearly erroneous, in attorney discipline cases we "reserve the right to draw inferences from basic facts which may differ from the inferences drawn by the [lower tribunal]." *In re Discipline of Babilis*, 951 P.2d 207, 213 (Utah 1997) (alterations in original) (citations omitted). Additionally, although "we always give serious consideration to the findings and [rulings] of the [district court]," "we must treat the ultimate determination of discipline as our responsibility." *Id.* (alterations in original) (citations omitted). We therefore must "make an independent determination of the correctness of the discipline the district court imposed." *In re Discipline of Lundgren*, 2015 UT 58, ¶ 9, 355 P.3d 984 (citation omitted) (internal quotation marks omitted); *see also In re Discipline of Crawley*, 2007 UT 44, ¶ 17, 164 P.3d 1232.

ANALYSIS

¶16 In our analysis, we first clarify the interpretation and application of rule 8.4(b) and (c) of the Utah Rules of Professional Conduct discussing violations of professional misconduct. And, finding that Mr. Steffensen did commit professional misconduct, we then turn to the imposition of sanctions for those violations to determine whether the court applied the proper standard in its sanctioning of him. On the record before us, we find that the district court erred in its imposition of sanctions for Mr. Steffensen's violations, but understandably so given the inconsistencies in the comment section of rule 8.4.[7]

I. THE VIOLATIONS OF THE UTAH RULES OF PROFESSIONAL CONDUCT

¶17 This court regulates members of the bar both by constitutional mandate and inherent authority. UTAH CONST. art. VIII, § 4 ("The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law."); *Barnard v. Utah*

[7] We recognize the lack of clarity in comment [1a] for rule 8.4 of the Utah Rules of Professional Conduct regarding the imposition of sanctions and refer these issues to the rules committee for further consideration. *See infra* ¶ 51.

State Bar, 804 P.2d 526, 528 (Utah 1991) ("[T]he authority of this Court to regulate the admission and discipline of attorneys existed as an inherent power of the judiciary from the beginning." (citation omitted)). In order to maintain the integrity of the profession, we promulgate the Rules of Professional Practice to guide lawyers and judges in matters of discipline. In Utah,

> [a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Every lawyer is responsible to observe the law and the Rules of Professional Conduct, shall take the Attorney's Oath upon admission to the practice of law, and shall be subject to the Rules of Lawyer Discipline and Disability.

UTAH R. PROF'L CONDUCT pmbl. 1. Chapter 13 of the Supreme Court Rules of Professional Practice establishes the Utah Rules of Professional Conduct.

¶18 To assist with our regulatory responsibility, we have authorized and designated the Utah Bar Association (Bar) to administer the rules and regulations which govern the practice of law in Utah. R. GOVERNING UTAH STATE BAR 14-102. Responsibilities of the Bar include, but are not limited to, advancing "the administration of justice according to law;" "regulat[ing] and disciplin[ing] . . . persons practicing law;" "maintain[ing] integrity . . . and high standards of conduct among those practicing law;" and "promot[ing] professionalism, competence and excellence in those practicing law." *Id*. 14-202; *see also id*. 14-102. The OPC aids the Bar in performing the duties related to violations of the Utah Rules of Professional Conduct. *Id*. 14-504.

¶19 Under the Rules Governing the Utah State Bar, the OPC can bring a formal complaint charging an attorney with professional misconduct before the district court with the permission of a screening panel. *Id.* 14-511(a). When "[f]ormal disciplinary and disability proceedings" are convened, they "are civil in nature." *Id.* 14-501(c). This remains true even when, as here, questions of criminal conduct arise in finding a violation of the Utah Rules of Professional Conduct. *Id.*; *see also In re Discipline of Steffensen*, 2016 UT 18, ¶ 12, 373 P.3d 186. Such cases are also bifurcated, meaning that they are conducted in two phases: adjudication of the allegations of misconduct and, if necessary, a determination of the appropriate sanction. R. GOVERNING UTAH STATE BAR 14-511.

¶20 In these proceedings brought before the district court by the OPC, the court concluded Mr. Steffensen violated both rule 8.4(b) and (c). Mr. Steffensen challenges the admissibility of evidence that the court allowed in his adjudication hearing as well as the court's determination of his mental state. He argues that the evidence was irrelevant and prejudicial. We hold that the evidence was relevant and admissible. Mr. Steffensen also argues that the district court's determination that his actions were "knowing and intentional" was not supported by the evidence. We disagree and affirm the district court's findings of fact and conclusions of law at the adjudication hearing.

A. Admission of Evidence and Expert Witness Challenge

¶21 At each stage of the trial, Mr. Steffensen objected with regularity to the relevance, unfair prejudice, and admissibility of the evidence. On appeal, Mr. Steffensen challenges the admission of evidence regarding (1) his failure to file personal tax returns, (2) his failure to file corporate tax returns, (3) his personal banking records, and (4) his personal estate planning. In less than one page, he summarily claims that the admission of this evidence violated Utah Rules of Evidence 401, 403, and 404(b)(1). But Mr. Steffensen fails to expound on his arguments—he does not discuss the challenged evidence (beyond listing broad categories) or explain why that evidence was irrelevant under rule 401, unfairly prejudicial under rule 403, or admitted in violation of rule 404(b)(1).

¶22 These arguments are inadequately briefed. "Appellants have the burden to clearly set forth the issues . . . and to provide reasoned argument and [valid] legal authority." *Espenschied Transp. Corp. v. Fleetwood Servs., Inc.*, 2018 UT 32, ¶ 19, 422 P.3d 829 (alterations in original) (citation omitted). "[W]e are not a depository in which [a party] may dump the burden of argument and research." *Id.* (second alteration in original) (citation omitted) (internal quotation marks omitted).

¶23 Mr. Steffensen fails to meet these requirements. And Mr. Steffensen further does not address the district court's response to his objections—that the objections would go to the weight of the evidence, not the admissibility. The court also noted that it would "give those documents the weight that they deserve[d]," and further conceded that the court would "give counsel an opportunity to argue that [the court] should give them no weight."

¶24 With the exception of one reference to a loan application,[8] the court appears to have given very little, if any, weight to the objected-to evidence in coming to its conclusions. Based on the nature of the proceeding as a bench trial, we have little doubt that the district court only considered appropriate relevant and nonprejudicial evidence, and there is nothing in the district court's findings to indicate otherwise. *See State v. Park*, 404 P.2d 677, 679 (Utah 1965) ("[B]ecause . . . the [district] court will be somewhat more discriminating in appraising both the competency and the rulings properly to be given evidence, the rulings on evidence are looked upon with a greater degree of indulgence when the trial is to the court than when it is to the jury.").

¶25 Mr. Steffensen makes two additional challenges to the testimony of Heather Gamon, a special agent or criminal investigator for the Tax Commission. Mr. Steffensen's first challenge is that Ms. Gamon was either (1) testifying as an undisclosed expert, or, in the alternative, (2) not testifying as an expert and thereby providing testimony that violated Utah Rule of Evidence 701. Second, Mr. Steffensen argues that if Ms. Gamon were testifying as an expert, her testimony violated Utah Rule of Evidence 704(b).[9]

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[8] We ultimately find the district court's factual finding based on this evidence deficient and reject it as a basis for finding a violation of Utah Rule of Professional Conduct 8.4(c). *See infra* ¶¶ 38–45. Thus we do not rely on it to advance the district court's conclusion that Mr. Steffensen committed professional misconduct under rule 8.4(c). And, therefore, any error concerning the loan application is harmless.

[9] Utah Rule of Evidence 704(b) provides that, "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Lawyer discipline cases "are civil in nature," not criminal, a point we highlighted in Mr. Steffensen's previous appeal in this case. R. GOVERNING UTAH STATE BAR 14-501(c); *see also In re Discipline of Steffensen*, 2016 UT 18, ¶ 12, 373 P.3d 186 ("[A]ttorney discipline cases . . . are not criminal. They are civil." (citations omitted)).

These challenges are unpreserved.[10] We will not consider unpreserved objections on appeal absent plain error or exceptional circumstances. *State v. Larrabee*, 2013 UT 70, ¶ 15, 321 P.3d 1136. Because no argument for plain error or exceptional circumstances exists here, we decline to consider these challenges.

¶26 We find no error in the district court's determination on the relevance, unfair prejudice, and admissibility of the evidence and we will not consider the unpreserved challenges regarding expert witness opinion testimony. Therefore, we must next turn to whether the district court erred in concluding that Mr. Steffensen violated the Utah Rules of Professional Conduct.

B. Violations of Rule 8.4(b) and (c)

1. Violation of Rule 8.4(b)

¶27 Rule 8.4(b) states that "[i]t is professional misconduct for a lawyer to . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." UTAH R. PROF'L CONDUCT 8.4(b). To qualify as professional misconduct a criminal act alone is insufficient. It must also reflect poorly on the qualities required of a practicing attorney (i.e., "honesty, trustworthiness or fitness as a lawyer in other respects"). *Id.* Here, the court concluded, by a preponderance of the evidence, that Mr. Steffensen committed the criminal acts of Failure to Render a Proper Tax Return and Attempted Failure to Render a Proper Tax Return. It further concluded that these "criminal acts reflect adversely on his honesty, truthfulness or fitness as a lawyer [i]n other respects[]" in violation of rule 8.4(b).

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[10] "[I]n order to preserve an issue for appeal[,] the issue must be presented to the [district] court in such a way that the [district] court has an opportunity to rule on that issue." *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968 (citation omitted). Mr. Steffensen argues that he preserved these issues for our review. But the portion of the transcript he cites as preserving challenges to expert and opinion testimony were objections to an exhibit on those grounds, not the testimony of Ms. Gamon. This is insufficient to preserve an objection to Ms. Gamon's testimony on the expert testimony grounds Mr. Steffensen now raises.

¶28 Finding that Mr. Steffensen failed to render a proper tax return, a violation of Utah Code section 76–8–1101(1)(c)(i), required finding that Mr. Steffensen "knowingly and intentionally, and without a reasonable good faith basis, fail[ed] to . . . render . . . any return within the time required by law."[11] Mr. Steffensen does not dispute that during the four-year period in question his law firm did not render tax returns. And the district court found no evidence of a good faith basis for the failure. Therefore, the main issue before the district court was whether Mr. Steffensen acted knowingly and intentionally.

¶29 Mr. Steffensen argues that *he* did not "knowingly and intentionally" fail to file, but rather that his employees failed to file. On the other hand, the OPC presented circumstantial evidence of Mr. Steffensen's state of mind, requiring the district court to make a credibility determination by weighing the evidence before it. Here the court determined that the criminal acts were committed "knowingly or intentionally." Circumstantial evidence before the district court supported its findings of fact, which in turn support the determination that Mr. Steffensen met the *mens rea* required by statute in failing to file the tax returns.[12] When making determinations based on circumstantial evidence, the district court does not do this in a vacuum. Rather, the court uses common sense to make inferences and find facts. And while we recognize that attorney discipline cases have a unique standard of review in which we might draw different inferences than the district court, *see supra* ¶¶ 14–15, we do not do this indiscriminately. In general, we adhere to our standard level of deference, and "[s]o long as there is some evidence, including reasonable inferences, from which findings . . .

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[11] There are three other ways of proving a violation of Utah Code section 76–8–1101(1)(c)(i): (1) failing to supply timely information, (2) rendering a false or fraudulent return or statement, or (3) supplying false or fraudulent information. Because the district court does not rely on these violations for his criminal acts, we do not address them.

[12] Holding that evidence is sufficient to support the finding of failure to file necessarily includes finding that the evidence supports the attempted failure to file charge.

can reasonably be made, our inquiry stops." *State v. Booker*, 709 P.2d 342, 345 (Utah 1985); *see also In re Discipline of Reneer*, 2014 UT 18, ¶ 11, 325 P.3d 104 ("Under this less deferential . . . standard of review, *we still 'presume that the [district court's] finds of fact are correct*, although we may set those findings aside if they are not supported by the evidence.'" (emphasis added) (citation omitted)).

¶30 The district court's findings regarding Mr. Steffensen's mental state were certainly not clearly erroneous. Mr. Steffensen has had a lengthy career as a practicing lawyer. "Mr. Steffensen is a bright and accomplished lawyer, not someone with ignorance of the laws." He has worked for large firms, as a solo practitioner, and at small law firms he owned and operated. Mr. Steffensen testified that he knew about the requirements surrounding withholding taxes. Mr. Steffensen had dealt with the ramifications of failing to pay federal taxes and as a result "would have been acutely aware of his obligations going forward." "There were numerous offenses" and "numerous occasions of his failure to remit." Mr. Steffensen also testified that because he failed to remit withholding taxes, he has paid penalties and fines (totaling about $100,000), approximately double what he would have paid had he remitted the taxes timely.

¶31 Mr. Steffensen offered only his own testimony to the district court as a defense. He offers the same testimony to us to challenge the district court's order.[13] He claims that he delegated all financial responsibilities to his staff and that the tax problems arose from incompetence. Mr. Steffensen argues that, during the period in question, stressful and difficult problems at home impaired his functions at work.[14] Mr. Steffensen claims that, as a "bright and

[13] It is unclear in his brief whether Mr. Steffensen is challenging the sufficiency of the evidence to support the district court's factual findings or whether he is arguing that the factual findings do not support the conclusion that he violated rule 8.4(b). Regardless of which challenge Mr. Steffensen is lodging, we conclude that the district court's factual findings and ultimate rule 8.4(b) determination are adequately supported.

[14] The district court considered this as a mitigating factor for the sanctions but did not make any factual findings regarding these circumstances during the adjudication proceedings.

accomplished lawyer," he would not operate against his own self-interest when he knew that criminal liability would only attach to his failure to render the tax returns, with only financial liability attaching to his failure to pay.

¶32 In balancing the weight of the circumstantial evidence of Mr. Steffensen's mental state on the one hand and Mr. Steffensen's personal testimony to the contrary on the other, the question turns on his credibility.[15] On this matter, we defer to the district court.[16] It was reasonable for the district court to conclude that Mr. Steffensen was fully aware of his tax obligations. Indeed, at oral argument, Mr. Steffensen candidly admitted that even those closest to him with the best ability to judge his character found his story hard to swallow. Moreover, considering this admission in addition to all the other factual findings before us, we choose to defer to the district court's determination and find that the evidence supports the district court's findings, which in turn support its legal conclusion that, by a preponderance of the evidence, Mr. Steffensen violated Utah Code sections 76-8-1101(1)(c)(i) and 76-4-101 by knowingly and intentionally failing to render a tax return and attempting to do so.

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[15] At oral arguments, Steffensen conceded that the district court necessarily made a credibility determination in finding that he had violated the Utah Rules of Professional Conduct.

[16] This is the quintessential type of a district court finding to which we give deference. *See supra* ¶ 15. "We defer to the [district] court's ability and opportunity to evaluate credibility and demeanor." *Am. Fork City v. Thayne*, 2012 UT App 130, ¶ 4, 279 P.3d 840 (internal quotation marks omitted) (citing *State v. Goodman*, 763 P.2d 786, 787 (Utah 1988)). "[W]e defer to [the district court's] findings unless the record demonstrates clear error. Thus, a challenge to the district court's credibility determination fails if [the challenging party] has provided no reason for this court to depart from the deference we grant the [district] court to make credibility determinations." *Id.* (citation omitted) (internal quotation marks omitted).

¶33 Having agreed with the district court that Mr. Steffensen's conduct satisfies the "criminal acts" element of professional misconduct under rule 8.4(b), we also agree that these acts reflect negatively "on a lawyer's honesty, trustworthiness or fitness . . . in other respects." UTAH R. PROF'L CONDUCT 8.4(b). "Attorneys occupy a position of trust because their clients rely on their honesty, skill, and good judgment." *In re Discipline of Bates*, 2017 UT 11, ¶ 19, 391 P.3d 1039. When a lawyer intentionally fails to file and render taxes, his "honesty" and "trustworthiness" are unquestionably called into doubt. Knowingly and intentionally avoiding one's employee withholding tax obligations as owner of a law firm also undermines the public's trust in the legal profession. *See* UTAH R. PROF'L CONDUCT 8.4 cmt. 2 ("Many kinds of illegal conduct reflect adversely on fitness to practice law, such as . . . the offense of willful failure to file an income tax return.").

¶34 Taxes generally fail to provide the payer with a warm and fuzzy feeling. "Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes." 10 Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789), *in* THE WRITINGS OF BENJAMIN FRANKLIN 68, 69 (Albert Henry Smyth ed. 1907). Certain or not, "knowingly and intentionally" failing to file taxes is a crime that reflects adversely on a lawyer's fitness to practice law.

2. Violation of Rule 8.4(c)

¶35 Rule 8.4(c) defines "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation" as professional misconduct. UTAH R. PROF'L CONDUCT 8.4(c). Unlike rule 8.4(b), which requires criminal conduct, rule 8.4(c) looks at professional misconduct irrespective of criminality. The district court concluded that "Mr. Steffensen engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and his conduct violated Rule 8.4(c) of the Utah Rules of Professional Conduct." We agree.

¶36 The district court concluded that Mr. Steffensen had committed three violations of rule 8.4(c). First, the district court concluded that Mr. Steffensen's failure to remit money that was not owned by his firm was dishonest conduct. Specifically, in addition to failing to render proper tax returns, Mr. Steffensen also failed to remit withholding taxes. By his own testimony, the money was never withheld because there was only enough money to cover the net income of his employees. The district court found that

"Mr. Steffensen acknowledged that funds that were to be withheld from employee's checks were not withheld. Instead, [he] calculated his payroll obligations on the net amount and in doing so underpaid his employees." Despite maintaining a "client trust account," Mr. Steffensen failed to maintain the similar "Tax Commission trust account" for his employees' tax funds. The court acknowledged that "[t]he tax monies Mr. Steffensen failed to remit were not owned by him or his law firm," and this "had the potential for causing substantial damage to his employees."

¶37 Second, and relatedly, Mr. Steffensen provided W2s to his employees that reflected that money was withheld and remitted to the state government. The district court concluded that representing to his employees that money was withheld and remitted to the state when it was not clearly fell within the bounds of misrepresentation.

¶38 Finally, the district court concluded that Mr. Steffensen violated rule 8.4(c) because he presented financial statements "to his bank in order to get a loan [that] conflicted with forms he presented to the Tax Commission to obtain a financial hardship exemption." The statements contained in his financial hardship application "contained material misrepresentations."

¶39 Mr. Steffensen makes only two challenges to the district court's conclusion that he violated rule 8.4(c). The first is that for the same reasons the OPC could not show he acted "knowingly and intentionally" for purposes of rule 8.4(b), it could not show that he "knowingly and intentionally engaged in conduct involving dishonesty, deceit or misrepresentation in violation of Rule 8.4(c)." We have already affirmed the district court's determination that Mr. Steffensen acted knowingly and intentionally.[17]

[17] The district court determined that "Mr. Steffensen did knowingly and intentionally fail to render the tax returns and fail to pay the withholding taxes." Although we only considered the district court's determination of whether Mr. Steffensen acted knowingly and intentionally with regards to failing to render the return when evaluating the district court's determination that Mr. Steffensen violated rule 8.4(b), the district court's conclusion on failing to pay the taxes was based upon the exact same

¶40 The second challenge is with regard to the discrepancies between the bank loan application and the information and records given to the Tax Commission when he applied for a hardship exemption. Mr. Steffensen argues that the finding that the discrepancies in his information given to the bank and the Tax Commission constituted a misrepresentation was erroneous. According to Mr. Steffensen, the district court's finding was based on the following discrepancy: in 2005, he listed shares of restricted stock as part of his financial assets on a loan application but then did not list them as part of his 2008 hardship exemption application to the Tax Commission. Mr. Steffensen admits that the documents contained "substantially different financial information," but contends that it was because the restricted stock had no value by 2008, a fact to which he testified at trial.

¶41 In response, the OPC argues that "[n]o evidence was introduced to corroborate Mr. Steffensen's testimony regarding the stated loss of value." Additionally, the OPC agrees that the discrepancy discussed by Mr. Steffensen was one of the misrepresentations found by the district court, but contends that "there were other discrepancies that the district court found to be misleading when Mr. Steffensen provided information to the Tax Commission."

¶42 The OPC does not provide any record support for its assertion that the district court found other material misrepresentations and we cannot find any support for this contention in the district court's order.[18] Therefore, we focus on

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circumstantial evidence. For the exact same reasons discussed above, *see supra* ¶¶ 28–32, we will not disrupt the district court's determination of "knowingly and intentionally" with respect to failing to pay the taxes.

[18] The district court's order on the specific factual basis for the misrepresentations is unclear. The district court makes two relevant findings in its order, which read, in full: (1) "Mr. Steffensen's financial statements that he presented to his bank in order to get a loan conflicted with forms he presented to the Tax Commission to obtain a financial hardship exemption" and (2) "Mr. Steffensen's statements about his income and finances which he presented to the Tax Commission to receive a financial hardship exemption contained material misrepresentations."

whether the district court erred in determining that the discrepancies in the stock assets listed on the 2005 loan application and 2008 hardship exemption application constituted a material misrepresentation. We conclude that it did.

¶43 Mr. Steffensen testified at trial that the stock had no value by the time he submitted his hardship exemption application in 2008. The OPC offers us no evidence, direct or circumstantial, to contradict Mr. Steffensen's testimony. Instead, the OPC hangs its hat on the fact that Mr. Steffensen never presented evidence of the stocks' decrease in value.[19] This is insufficient.

¶44 The OPC has the burden of proving that Mr. Steffensen committed each violation of the Utah Rules of Professional Conduct by a preponderance of the evidence. *See* R. GOVERNING UTAH STATE BAR 14-517; *In re Discipline of Steffensen*, 2016 UT 18, ¶ 5, 373 P.3d 186. The OPC cannot meet this burden of proving that Mr. Steffensen's hardship application contained a misrepresentation by merely highlighting that he did not provide additional support to his uncontradicted testimony explaining the discrepancy. Because the OPC fails to provide any evidentiary support that undermines Mr. Steffensen's explanation for the discrepancy, we conclude that the district court erred in determining that the hardship exemption application contained a misrepresentation.

¶45 Therefore, we reject the district court's third finding of a violation of rule 8.4(c), but leave the other two findings—the dishonest conduct in failing to remit the tax monies and the misrepresentations on the W2s—untouched. Therefore, in determining the appropriate sanctions for Mr. Steffensen's violations of rule 8.4(c), only the two remaining violations should be considered.

II. DISBARMENT IS AN INAPPROPRIATE SANCTION UNDER RULE 14-605(a)(1) OR (a)(2)

¶46 We typically defer to the district court's findings in attorney discipline cases in circumstances like this where the district court

[19] Mr. Steffensen claims that he did not submit evidence at trial on the 2008 value of the stocks because he "did not know that this would be an issue at trial."

has to make a credibility determination of a witness. However, when the analysis involves "the discipline actually imposed," this task invokes "our constitutional responsibility" and "requires us to make an independent determination as to its correctness." *In re Discipline of Grimes*, 2012 UT 87, ¶ 12, 297 P.3d 564 (citation omitted). In doing so, we are conscious of the serious consequences that can result. "Disbarment is the harshest sanction available for attorney misconduct. It . . . result[s] in the complete loss of [the attorney's] career and reputation." *In re Discipline of Bates*, 2017 UT 11, ¶ 20, 391 P.3d 1039 (third alteration in original) (citations omitted) (internal quotation marks omitted). Because disbarment is so harmful to an attorney, we do not take its imposition lightly. And, in this case, we find disbarment under rule 14-605(a)(1) or (a)(2) of the Rules Governing the Utah State Bar unsubstantiated, and we remand for a new determination of the appropriate sanction.

A. Disbarment Under Rule 14-605(a)(1)

¶47 Rule 14-605(a)(1) states, in relevant part, that disbarment is appropriate when a lawyer "knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Utah Rules of Professional Conduct." R. GOVERNING UTAH STATE BAR 14-605(a)(1). Notably, rule 8.4(b) and (c) are absent in rule 14-605(a)(1), which governs sanctions for the other sections of Utah Rule of Professional Conduct 8.4. We presume this omission was intentional. Further, the structure of the rule confirms that this omission was no mistake.

¶48 Rule 14-605 distinguishes between behavior that qualifies for disbarment, suspension, reprimand, and admonition. Not all professional misconduct defined in rule 8.4(a), (d), (e), or (f) results in presumptive disbarment, and it is therefore graded using specific criteria as shown in rule 14-605(a)(1), (b)(1), (c)(1), and (d)(1). Violations of rule 8.4(b) or (c) are notably absent from 14-605(a)(1), (b)(1), (c)(1), and (d)(1). Instead, the appropriate sanctions for violations of rule 8.4(b) or (c) appear in other subsections of rule 14-605.

¶49 The language of subsections (a)(2) and (b)(2) mirror the criminal conduct requirements of rule 8.4(b), providing for sanctions when an attorney "engages in serious criminal conduct," R. GOVERNING UTAH STATE BAR 14-605(a)(2), or "engages in criminal conduct" that does not meet the requirements of subsection (a)(2), *id.* 14-605(b)(2). Similarly, the language of subsections (a)(3) and (c)(2) provide for sanctions for "dishonesty, fraud, deceit, or

misrepresentation," mirroring the misconduct in rule 8.4(c). This structure and the nature of the language of rule 14-605 confirm that the omission of rule 8.4 sections (b) and (c) from rule 14-605(a)(1) is not only intentional, but also significant.

¶50 The OPC argues that by virtue of comment [1a] of rule 8.4, any violation of the Utah Rules of Professional Conduct falls under the umbrella of rule 8.4(a) when the time for sanctions arrives.[20] This cannot be the case. To begin, "[t]he comments are intended as guides to interpretation, but [only] the text of each rule is authoritative." UTAH R. PROF'L. COND. pmbl. 21. Although comment [1a] is not authoritative, it does "explain[] and illustrate[] the meaning and purpose of the rule." *Id.* As to rule 8.4(a), comment [1a] explains that a violation of another Utah Rule of Professional Conduct may not be the sole basis for charging 8.4(a) as a separate violation. Vitally, however, comment [1a] "defines professional misconduct as a violation of the Rules of Professional Conduct," thus bringing any violation of the Utah Rules of Professional Conduct under the imposition of sanctions standards found in rule 14-605.[21] UTAH R. PROF'L. COND. 8.4(a) cmt. [1a].

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[20] This comment provides:

> 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.

UTAH R. PROF. COND. 8.4(a) cmt [1a].

[21] Professional misconduct that falls under rule 8.4(b), (c), (d), (e) or (f) cannot also fall under rule 8.4(a) for the purpose of sanctions. Conduct that violates other rules of professional conduct, however, falls under rule 8.4(a) for the purpose of sanctions.

¶51 We recognize that the language of comment [1a] is confusing and could be read to incorporate all violations of the Utah Rules of Professional Conduct, including rule 8(b) through (f), into its grasp. But we believe a fairer reading of the comment limits its scope to violations of rules other than rule 8.4. If a violation of any of the Utah Rules of Professional Conduct could also be a violation of rule 8.4(a), rule 14-605(a)(1), (b)(1), (c)(1), and (d)(1) would encompass the entirety of rule 8.4, including rule 8.4(b) and (c), rendering the rest of rule 14-605 superfluous. Indeed, rule 8.4(a) would subsume every other rule in the Utah Rules of Professional Conduct, including rule 8.4(d), (e), and (f). We do not believe that comment [1a] intended such a result.

¶52 Additionally, we must give meaning to the text of rule 14-605 as written, and that meaning is clear: Professional misconduct as defined by rule 8.4(b) and (c) is expressly and intentionally excluded from rule 14-605(a)(1), (b)(1), (c)(1), and (d)(1). Violations of rule 8.4(b) do not trigger disbarment under rule 14-605(a)(1) when violated but must be assessed under subsections (a)(2) and (b)(2) for the appropriateness of disbarment. Similarly, violations of rule 8.4(c) do not trigger disbarment under rule 14-605(a)(1) but must be assessed under subsections (a)(3) and (c)(2).

B. Disbarment Is Inappropriate Under Rule 14-605(a)(2)

¶53 Absent aggravating or mitigating factors, "serious criminal conduct" gives rise to a presumptive sanction of disbarment under rule 14-605(a)(2) when "a necessary element" of the crime "includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses." Otherwise, if one of these elements is not *necessarily* included, but the criminal act in question "nevertheless seriously adversely reflects on the lawyer's fitness to practice law," the presumptive sanction is suspension. R. GOVERNING UTAH STATE BAR 14-605(b)(2).

¶54 Mr. Steffensen argues that rule 14-605(a)(2) cannot apply to him because the district court did not enter a specific finding that his criminal conduct was "serious." In this case, we do not need to reach the seriousness issue because we find that neither of the criminal acts specifically found by the district court have one of the listed elements as a *necessary* element.

¶55 In order to determine the necessary elements of a crime, we follow a categorical approach. *See State v. Tulley*, 2018 UT 35, ¶ 59, __ P.3d __. Under a categorical approach, we "examine[] the ordinary case of [a] defendant's crime and not the particular conduct in which the defendant engaged." *Id.* (second alteration in original) (citation omitted) (internal quotation marks omitted). Therefore, we must "identify the minimum criminal conduct necessary for conviction under a particular statute and look only to the statutory definitions—*i.e.*, the elements of [the] . . . offense[], and *not* to the particular [underlying] facts." *Id.* (alterations in original) (citation omitted) (internal quotation marks omitted).

¶56 In its conclusions of law for the violation of rule 8.4(b) adjudication phase order, the district court specifically concluded that Mr. Steffensen committed the criminal acts of Failing to Render a Proper Tax Return and Attempted Failing to Render a Proper Tax Return. This required the district court to conclude that Mr. Steffensen "knowingly and intentionally, and without a reasonable good faith basis, fail[ed] to . . . render . . . any return within the time required by law" and that he also attempted to do so. *See* UTAH CODE §§ 76-8-1101(1)(c)(i); 76-4-101. But the district court was not required to find, as a necessary element, that Mr. Steffensen's criminal conduct included "intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses." R. GOVERNING UTAH STATE BAR 14-605(a)(2). Because neither of the criminal acts found by the district court have one of the necessary elements listed in rule 14-605(a)(2), we hold that disbarment is unwarranted under that subsection.

C. Appropriate Sanction Under Rule 14-605

¶57 We have rejected the appropriateness of disbarment as the presumptive[22] sanction under rule 14-605(a)(1) or (a)(2). The court

[22] The district court found "that the mitigating circumstances [did] not warrant a deviation from the presumptive sanction." Because we reject the district court's imposition of sanctions and

did not make any conclusions of law in the sanctions hearing about disbarment under rule 14-605(a)(3). Without specific findings that a violation of rule 8.4(c) falls under the requirements of rule 14-605(a)(3), including that it "seriously adversely reflects on the lawyer's fitness to practice law" and is "intentional misconduct" *other* than conduct that would fall under rule 14-605(a)(1) or (a)(2), we will not presume disbarment is the appropriate sanction under rule 14-605(a)(3). "[A]lthough we always give serious consideration to the findings and [rulings] of the [district court]," we will not hold that disbarment is appropriate without clear documentation of the rationale and reasoning for the court's conclusion. *In re Discipline of Bates*, 2017 UT 11, ¶ 17 (second and third alterations in original) (citation omitted); *see also In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998) ("With respect to the discipline actually imposed, our constitutional responsibility requires us to make an independent determination as to its correctness.").

¶58 This does not imply that Mr. Steffensen's conduct must go unsanctioned. Rule 14-605 leaves open several possibilities, including that his conduct for violating rule 8.4(c) falls under rule 14-605(a)(3) or (c)(2), and that his conduct for violating rule 8.4(b) "seriously adversely reflects on [Mr. Steffensen's] fitness to practice law," warranting suspension under rule 14-605(b)(2).

¶59 Here, the district court does find that "Mr. Steffensen's failure to remit tax monies [not owned by him or his law firm but belonging to the employees] affected his employees who were entitled to rely on him to remit their taxes." This "failure to remit" the money that should have been held in trust for his employees "had the potential for causing substantial damage to his employees"[23] and was dishonest conduct. And, "[t]he distribution

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remand for a new sanctions determination, we do not consider Mr. Steffensen's challenges to the district court's conclusion on the aggravating and mitigating factors.

[23] The district court also found that "Mr. Steffensen's violation of the Rules of Professional Conduct caused or at least potentially caused serious injury to Mr. Steffensen's former employees and to the public." For purposes of sanctions, this finding falls under rule 14-605(a)(1). To avoid any confusion, we take this opportunity to highlight that rule 14-605(a)(1) requires a finding that the lawyer's professional misconduct "*causes* serious or potentially serious

of W2s to the employees stating that the tax monies had been withheld and remitted" was dishonest conduct and a misrepresentation under rule 8.4(c). The "potential for causing substantial damage to his employees" is not the same as "seriously adversely reflect[ing] on the lawyer's fitness to practice law." In the orders before us, the district court did not make any determinations as to the appropriate sanctions that misconduct under rule 8.4(c) merits other than lumping this misconduct together with the misconduct found in rule 8.4(b) to reach disbarment under rule 14-605(a)(1). We have rejected rule 14-605(a)(1) as inappropriate for violations of rule 8.4(b) or (c). And we have further rejected rule 14-605(a)(2) as the appropriate sanction for violations of rule 8.4(b).

¶60 Without reopening the proceedings, we leave it to the district court to interpret its own order and encourage the court to include more detailed findings specific to each violation and the rationale behind the sanction imposed for each violation. In doing so, we implore all state district courts to be detailed in their findings and to be clear in tying the sanction imposed to the professional misconduct found. Therefore, having rejected disbarment under rule 14-605(a)(1) and (a)(2), we remand to the district court for clarification of its findings of fact and conclusions of law in its order regarding Mr. Steffensen's sanctions for professional misconduct under rule 8.4(b) and (c).

CONCLUSION

¶61 Having reviewed the findings and conclusions from both Mr. Steffensen's adjudication and sanction hearings, we hold that there was no clear error in concluding that Mr. Steffensen had violated rule 8.4(b) and (c) of the Utah Rules of Professional Conduct. However, upon analyzing and clarifying the interpretation and application of rule 14-605, we hold that disbarment is unwarranted under subsections (a)(1) and (a)(2).

¶62 While we could enter a final judgment in this case under our constitutional mandate, we deem it more prudent to remand to the district court for reconsideration of the appropriate sanctions.

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injury." R. GOVERNING UTAH STATE BAR 14-605(a)(1) (emphasis added). It is insufficient to find, as the district court did here, that the misconduct "*potentially caused* serious injury." (Emphasis added.)

With a cold record before us, we recognize that the district court is better situated, in the first instance, to make the necessary determinations under Rule Governing the Utah State Bar 14-605.

¶63 For this reason, we affirm the district court's finding of violations of the Utah Rules of Professional Conduct, reverse the ruling on Mr. Steffensen's disbarment, and remand to the district court for a new determination of the appropriate sanctions.