Agenda

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

June 17, 2019
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 fond farewell to departing members		Steve Johnson, Chair
Approval of minutes	Tab 1	Steve Johnson
Rule 8.4 and 14-301 comments: Report from subcommittee	Tab 2	Simón Cantarero (subcommittee chair), Billy Walker, Vanessa Ramos, Joni Jones, and Hon. Trent Nelson
Multidisciplinary Practice Subcommittee discussion of Rule 5.4 (looking at 1.5(e) in conjunction with Rule 5.4(a)).	Tab 3	Tom Brunker (chair), Hon. James Gardner, Cory Talbot, Simon Cantarero, Gary Sackett, Tim Conde
Other business		Steve Johnson

2019 Meeting Schedule:

August 19, 2019

September 16, 2019

October 21, 2019

November 18, 2019

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

Tab 1

MINUTES OF THE SUPREME COURT'S

ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

May 20, 2019

The meeting commenced at 5:01 p.m.

Committee Members Attending:
Steven G. Johnson, Chair
Daniel Brough (by telephone)
Tom Brunker
Simón Cantarero (by telephone)
Hon. James Gardner
Joni Jones
Phillip Lowry (by telephone)
Vanessa Ramos (by telephone)
Cristie Roach (by telephone)
Gary Sackett (emeritus)
Cory Talbot
Katherine Venti
Billy Walker

Guests:
Jacqueline Carlton, Office of Legislative Counsel

Members Excused:
Tim Conde
Hon. Trent Nelson (emeritus)
Amy Oliver
Padme Veeru-Collings
Hon. Darold McDade
Austin Riter

Staff:
Nancy Sylvester

Recording Secretary:
Adam Bondy

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

I. Welcome and Approval of Minutes

Mr. Johnson determined quorum and welcomed the committee.

Motion:
Ms. Venti moved to approve the minutes from the April 15 meeting. Ms. Jones seconded the motion. The motion passed unanimously.

II. Update: Report on Supreme Court Conference

Mr. Johnson discussed his recent report to the Supreme Court. The Supreme Court has appointed Simon Cantarero to replace Mr. Johnson after the next meeting and has asked Mr. Johnson to remain on the committee on emeritus status. The Supreme Court approved the codification of Standing Order 7 as rules 14-302, -303, and -510, with an effective date of May 15, 2019. The Supreme Court also asked the committee to review for possible elimination or reduction Rules 7.2, 7.3, cmt. 5 regarding specialists, and cmt. 6. The Supreme Court asked the committee to package any proposed amendments to those rules with a proposed revision of Rule 5.4 for consideration by the Supreme Court.

III. Update: Rule 8.4 and 14-301 comments

Rule 8.4 subcommittee, chaired by Mr. Cantarero, will review comments submitted regarding Rule 8.4 and 14-301 proposed amendments and report at the June meeting. Everyone else should read the comments to prepare for the meeting.

IV. Report: Multidisciplinary Practice Subcommittee

The subcommittee discussed the apparent lack of enforcement mechanisms against non-lawyer members of an MDP entity. The courts may retain the ability to sanction the entire entity by revoking its license to engage in any law practice. However, there is no explicit language currently, so this would have to fall under the Utah Supreme Court's general authority to regulate the practice of law. The committee discussed possible solutions and noted that it would be helpful to have concrete examples of entities interested in this area to guide the development of the governing rules and enforcement mechanisms. The MDP subcommittee, chaired by Mr. Brunker, will review Rule 1.5(e) and develop recommendations for fee-sharing entities for the next meeting.

V. Report: Multi-Jurisdiction Practice Subcommittee

The subcommittee, chaired by Ms. Roach, recommended no further action on Rule 5.5 until we have a clearer idea of the problems that a rule amendment needs to address. The committee noted that subsection (d)(2) allows the Supreme Court to create a rule or standing order for specific instances rather than amending the overall general rule. Mr. Johnson mentioned that a standing order may be in the works.

VI. New Business: Bar Journal Article & Rule 6.5

Mr. Johnson brought to the committee's attention an article in the most recent bar journal, regarding easing conflict rules for brief pro bono legal advice. The committee discussed the proposed rule changes forwarded by the Bar Commission related to Rule 6.5, proposed by the Innovation in Law Practice Committee. The committee asked the MJP subcommittee, chaired by Ms. Roach, to review the issue and report back to the committee with a recommendation and any concerns.

VII. Other Business

No other business.

VIII. Scheduling of Future Meetings

June 17, 2019 at 5:00 p.m.
August 19, 2019 at 5:00 p.m.
September 16, 2019 at 5:00 p.m.
October 21, 2019 at 5:00 p.m.
November 18, 2019 at 5:00 p.m.

IX. Adjournment

The meeting adjourned at 6:13 p.m.

Tab 2

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Review of Public Comments to Rule 8.4(g) and (h)

Simón Cantarero <cantarero.law@gmail.com> Mon, Jun 10, 2019 at 12:42 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>, "Steven G. Johnson" <stevejohnson5336@comcast.net>

Nancy,

The majority of the subcommittee on rule 8.4(g) met last week and discussed the most recent public comments. We focused on the comments addressing subsection (g), but we also discussed the comments as they relate to subsection (h).

The constitutionality of these subsections remains a cause for concern to the commenters, particularly with respect to subsection (h). Consequently the subcommittee reviewed, analyzed and discussed the comments, and also reviewed the material and sources cited by the Christian Legal Society, Professors Blackman and Volockh, as well as legal memos from a few Attorneys General, law review articles and other material referenced by the commenters. In the final analysis, the subcommittee supports the adoption of subsection (g) as drafted and published, and also its explanatory comments.

As for subsection (h), it would be helpful for the committee as a whole to discuss the comments and issues raised in them, particularly as they pertain to First Amendment concerns before reporting to the Supreme Court. There appears to be some misunderstanding among the commenters that the Standards of Professionalism and Civility are aspirational and non-binding, and their enforcement, which colors the nature and essence of the comments. Nothwithstanding, there remains some questions of constitutionality that should be addressed by our committee.

I hope this helps. Let me know if you have any questions.

Simón

ETHICS

Second state adopts ABA model rule barring discrimination and harassment by lawyers

BY DEBRA CASSENS WEISS (HTTP://WWW.ABAJOURNAL.COM/AUTHORS/4/)

JUNE 13, 2019, 11:39 AM CDT

Maine has adopted an ABA model rule that bars discrimination and harassment by lawyers.

Maine is the second state to adopt Rule 8.4(g) of the ABA Model Rules of Professional Conduct, according to Bloomberg Law (https://biglawbusiness.com/maine-second-state-to-adopt-aba-anti-harassment-ethics-rule). Vermont was the first (http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct).

Maine's Supreme Judicial Court adopted the new rule (https://www.courts.maine.gov/rules_adminorders/rules/amendments/2019_mr_05_prof_conduct.pdf), which takes effect June 1. It differs slightly from the ABA model rule, according to Bloomberg Law.

The ABA rule (https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/) says it is professional misconduct to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of

race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socio-economic status in conduct related to the practice of law."

The Maine ethics rule does not bar discrimination based on marital and socio-economic status.

A comment to the ABA rule (https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4/)says conduct related to the practice of law includes participation in bar association, business or social activities in connection with the practice of law.

The Maine rule does not define law practice to include bar, business and social activities.

The ABA House of Delegates adopted the model rule barring discrimination in August 2016 (http://www.abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass). Critics have argued (http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct) that the rule chills speech and interferes with religious freedom.

About half the states already had (http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct) an anti-discrimination provision in their rules before the ABA adopted its model rule. Many of those state rules were more narrowly drafted, however.

Josh Blackman, a professor of constitutional law at the South Texas College of Law, said in a 2016 law review article that ABA Model Rule 8.4(g) fails to require that the harassment or discrimination be severe or pervasive, a key component of federal and state anti-discrimination laws.

Blackman told Bloomberg Law that the rule "is well-intentioned," but it could suppress lawyer speech on matters of public concern if it is viewed as demeaning to others.

Stephen Gillers, a legal ethics professor at the New York University School of Law, has another view. "The preposterous claim that the First Amendment entitles lawyers to make racist, sexist and homophobic statements in connection with law practice is an embarrassment," Gillers told Bloomberg Law in an email.

Give us feedback, share a story tip or update, or report an error.

COMMENTS TO UTAH STATE BAR RULE 14-301
(STANDARDS OF PROFESSIONALISM AND CIVILITY) AND
RULE OF PROFESSIONAL CONDUCT 8.4
28 COMMENTS TOTAL

USB14-0301. Standards of Professionalism and Civility. Amend. Provides that a lawyer shall avoid hostile, demeaning, humiliating, intimidating, harassing, or discriminatory conduct with all other counsel, parties, judges, witnesses, and other participants in the proceedings.

RPC.0804. Misconduct. Amend. Provides that it is professional misconduct for a lawyer to engage in conduct that is an unlawful, discriminatory, or retaliatory employment practice under Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act. "Employer" means any person or entity that employs one or more persons. The amendments also provide that it is professional misconduct for a lawyer to egregiously violate, or engage in a pattern of repeated violations, of the Standards of Professionalism and Civility if such violations harm the lawyer's client or another lawyer's client or are prejudicial to the administration of justice.

SUMMARY:

The vast majority of comments oppose the amendments for being overbroad and difficult to apply fairly. A number of first amendment concerns were raised, and several concerns were raised about OPC being in the difficult situation of investigating employment law violations. Many attorneys noted a chilling effect on the ability of the lawyer to zealously advocate for their client. Only a few commenters were in favor of the amendments, noting the difficulty of dealing with uncivil attorneys. Multiple national groups weighed in on the amendments, and in so doing specifically analyzed the new amendments rather than rehashing the same concerns raised during the last comment period. Multiple commenters suggested amendments, including Utah's Office of Legislative Research and General Counsel.

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COMMENTS

(1) C. ROBERT COLLINS. AGAINST (OVERBROAD)

We have this rule in Arizona and have for a number of years. I represent a number of lawyers who have been accused of violating this rule in Arizona. The problem I see with the rule is that there are no standards as to what the terms Professionalism and Civility mean. I know that some lawyers believe it is like the famous quote by the U.S. Supreme Court on pornography; i.e. "I can't define it, but I know it when I see it".

What is unprofessional to one (1) lawyer may not be to another. What is civil to one (1) may not be to another. I have taken many professional civility CLE courses and still don't know the standard. I feel that in Arizona, it has come to mean whatever the State Bar of Arizona feels it means. The Bar prosecutes discipline here with the use of a special judge who handles the charges.

Just my feeling from an old, now retired in Utah, war horse. (I am 76 years old and started my practice in Washington State in 1980.) I am still actively practicing law in Arizona.

C. Robert Collins Utah Bar Number 5455 and Arizona Bar Number 015405.

(2) ERIC K. JOHNSON. AGAINST (FREE SPEECH CONCERNS)

Amen, C. Robert Collins.

I wrote in an objection to to a domestic relations commissioner's recommendations that her erroneous actions were "inexcusable and inexcusably prejudicial" and was sanctioned for writing such a thing. It's getting to the point that "hostile, demeaning, humiliating, intimidating, harassing, or discriminatory conduct" is in the eye of the self-proclaimed victim. Say or write something I find offensive and YOU have engaged in "hostile, demeaning, humiliating, intimidating, harassing, or discriminatory conduct" whether YOU meant to or not.

This has to end.

Lawyers take on controversial subjects. If we cannot call a spade a spade (see, already one could argue that I'm a racist, if one really wanted to), we cannot communicate clearly. If we cannot communicate clearly–and take the risk of possibly offending someone, somehow–then the facts and law cannot be articulated correctly. If we cannot articulate the facts and law correctly, they cannot be analyzed correctly, and if they cannot be understood and analyzed correctly, there can be no justice or equity, or if there can be, it's only accidental.

If Cohen v. California is what lawyers stand for, we've got to be given more latitude in making our own arguments as lawyers ourselves.

Infringe free speech (even the icky kind), and liberty and freedom themselves are infringed. Restrict one's speech and one's ability to think and act are restricted. We cannot deal with the thorny issues of law if we cannot freely discuss and debate them without fear that the tools of the discuss and debate will be used against us.

(3) JOSHUA JEWKES. IN FAVOR

The change is urgently need by making is misconduct to repeatedly violate the rules of civility. It is critical to our justice system that counsel act professionally at all times towards opposing counsel and parties. Uncivil conduct causes emotional damage, unnecessarily enlarges and delays proceedings and reflects poorly on our profession. It is sad that we are at a point where civility needs to be described and enforced in this manner, but that is, nonetheless, the current state of affairs. While the vast majority of practitioners act professionally at all times, there is a growing number of "loud" practitioners who feel that harassment, hostility, dishonesty, abuse, prejudicial behavior, and other uncivil conduct outside the direct view of the court are warranted as long as a legal objective is sought. The ends DO NOT justify the means, and it is critical to the functioning of the state bar that these individuals be stopped and held accountable.

(4) DAVID C. WRIGHT. SUGGESTS EDITS (NOT NECESSARILY AGAINST.)

I propose the following change: At the end of the last sentence of paragraph 3 of rule 14-0301, add the following:

", the rules of evidence, or the rules of civil procedure."

Even this proposed change may be insufficient, for the following reasons:

As currently drafted, the rule could be read to mean that trial counsel is prohibited from arguing that a party or witness lied on the stand or in deposition. Such statements may humiliate or even intimidate, but witness demeanor, conduct, and truthfulness are fair game at trial. In other words, a successful cross-examination may establish that a party or witness is a liar and should not be believed. Counsel must be free to make such arguments, pointedly. Witness demeanor is always "in evidence," and jurors are instructed on demeanor and credibility. URCP 52(a)(4) provides that witness credibility is an important element when factual findings are reviewed on appeal. Counsel must be free to argue those matters, and bluntly. I am not talking about yelling or name-calling. But parties and witnesses lie. A good cross-x will expose that, however "humilating" or "intimidating" it may be. The committee should at least include a comment to assure trial counsel that they do not risk a rule violation because they exposed, and then argued, false or unreliable testimony. That is a chief purpose of cross-examination.

(5) ERIC K. JOHNSON. AGAINST (CONCERNS WITH HOSTILE, DEMEANING, ETC.)

Correct.

Good grief (and no, I am not sorry if this interjection offends anyone), the way the revisions to this "Standard" (which is effectively now a rule of professional conduct: remember when we were conned into believing the Standards of Professionalism and Civility would not be merely "aspirational" and not used as the basis for attorney discipline?) is so broadly drafted, it will make the cure worse than any perceived disease.

I've already been chastised in and by courts for describing people whom I assert are lying of being liars. This is court! This is criminal and civil litigation. The point is to ferret out and find the truth.

If we must "avoid hostile, demeaning, humiliating, intimidating, harassing, or discriminatory conduct," good luck with successfully prosecuting those who are guilty of any crime or tort that involves questions of moral infractions, questions of intent, of negligence, etc.

Can you think of:

– almost any crime that, if proven committed, does not have the inherent effect of being demeaning and/or humiliating?

– any high stakes or tense case that is not intimidating?

– anyone who loses a case who may NOT claim to feel (whether the claim is sincere or just opportunistic) he/she was the object of hostility, intimidation, harassment, and of demeaning and humiliating allegations?

(6) CHARLES SCHULTZ. AGAINST (ARBITRARY)

Who decides what "intimidating, harassing, or discriminatory conduct" is?

How is it determined what "intimidating, harassing, or discriminatory conduct" is?

Enforcement of "Political Correctness" has become insane!

(7) ERIC K. JOHNSON. AGAINST (ARBITRARY)

Could one claim to feel demeaned, humiliated, and intimidated by Charles's ostensibly hostile and discriminating words and tone? If so, what do we do with him? Fortunately, George Orwell gave us the answer: http://orwell.ru/library/novels/1984/english/en_app

(8) CRAIG MCCULLOUGH. AGAINST (OVERLYBROAD)

The terms hostile, intimidating and harassing are too broad. An Attorney who is zealously representing a client by its very nature is adversarial. These terms can be interpreted in ways which are not intended but can leave an attorney open to rule violation

(9) TIMOTHY WILLARDSON. AGAINST (AFFECTS ZEALOUS ADVOCACY)

This is a bad idea for at least all the reasons mentioned above. Lawyers would be required to reduce the 'zeal' of their representation to the absolute lowest common denominator. If this passes you will need to change DR1.3[1] to read:

[1] A lawyer should pursue a matter on behalf of a client UNLESS THERE IS opposition, obstruction or personal inconvenience to the lawyer OR ANYONE ELSE and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor UNLESS SOMEONE COULD POSSIBLY BE OFFENDED THEREBY. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf UNLESS SOMEONE COULD POSSIBLY BE OFFENDED THEREBY. A lawyer is not bound, however, to press for every advantage that might be realized for a client EPECIALLY IF SOMEONE'S FEELINGS OCULD BE HURT. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not ALLOW the use of tactics THAT COULD POSSIBLY BE offensive or preclude the treating of all persons involved in the legal process with courtesy and respect.

(10) SCOTT H CLARK. AGAINST (OVERBROAD)

The sweeping breadth of this proposed rule change will undermine its application. While it is a laudable goal to canonize the permissible scope of legal behavior & discourse, the meaning of "hostile, humiliating, demeaning, intimidating, harassing.." is more than vague in the context of cross examination & in the context of negotiations between adverse parties. While it is not my style or habit to utilize language which might offend others, the use of "hostile" questions, or drawing conclusions which expose deceit (& thus "intimidate" or "humiliate") another party are the stock in trade of many respected attorneys. Not to "demean" another is an especially pernicious standard in a world where "micro-offense" warnings are now in play. What may be "demeaning" to one is but the naked truth to another. As for the prohibition of "harassment," we must all acknowledge that much of what goes on in our judicial system is, to put it bluntly, designed to "harass" our adversaries (hopefully in a polite manner). The use of such broad words, however well intentioned may be the goal, will only put a sword into the hands of the adversary. It will become a standard strategy to threaten the opponent's counsel with disciplinary retribution when all other defenses fail. This attempt to formalize the structures of "civility" will be the undoing of the term.

(11) JON WOODARD. AGAINST (OVERBROAD)

This rule goes too far in making conduct that is necessary in performing our job as advocates and problems solvers a violation of professional conduct. As civil litigants, it is part of our role to prove when the other side has lied about relevant issues, is prejudiced about relevant issues, or has engaged in

inappropriate or unlawful conduct relevant to the subject of the litigation. In demonstrating these things, lawyers tend to be perceived as being hostile, demeaning, humiliating, intimidating, harassing, and could be viewed as being discriminatory. By nature these civil cases usually involve parties and persons that disagree with each other so deeply they are willing to invest great time and money into proving they are right, and the other side is wrong, and people will often feel they are being wronged in a manner that they would consider a violation of this rule.

Similarly, in criminal work we are proving to a jury or a judge things that are often demeaning, humiliating, and harassing. I recall once in a criminal trial I proved that a witness was lying, and the father of the witness stood up in court and threatened me. Certainly, he thought I was treating his adult son in a humiliating, hostile, and discriminatory manner, but it was necessary to do this to prove to the jury the elements of the crime beyond a reasonable doubt.

I believe the old rule encouraged us to act in an appropriate manner without preventing us from doing our jobs. I encourage the old rule to be left in place un-amended.

(12) CONFUSED… AGAINST (COURT HAS ABILITY TO SANCTION ALREADY)

Wow this is incredible! What is really trying to be done here? As a litigating attorney, my overall experience in dealing with attorneys is great. For any instance in which the court believes that an attorney is out of line, it already has the power to address the same (e.g. it can make a referral and/or sanction an attorney). As such, I am having a hard time understanding why this rule is necessary. What is clear though, is that this rule's attempt at correcting a perceived problem is simply going to cause many more problems.

For example, by the very nature of litigation, opposing parties feel like the other attorney is hostile, demeaning, humiliating, intimidating, harassing, and engaging in discriminatory conduct. As such, rule 14-0301, if promulgated, will become a commonly used tool in litigation by many opposing parties against their opposing attorneys so as to harass and cause problems for the other side.

Moreover, it will result in increased complaints to the bar that will need to be ferreted out, and thus drive up the Bar's overhead (and then bar fees). It is not unimaginable that every litigator will be caught up with such complaints several times a year, and will have to spend her/his own time and resources in defending frivolous complaints without any such recompense, and will certainly drive up malpractice costs for everyone.

It is worth noting that the rules don't apply to pro se litigants or the parties themselves, so there will not be any negative repercussions to submitting a frivolous bar complaint.

(13) MARK MORRIS. AGAINST (BUT SOME WORDS OK)

I agree with the comments showing concern that this rule could inhibit, in particular, cross examination of witnesses at trial. There are a lot of adjectives here, and some of them are so vague that they provide no real guidance. Worse, this becomes a weapon that will be abused to discourage zealous advocacy. I would agree that "hostile", "harassing" and "discriminatory" should remain, as those are more easily and objectively identifiable, and detract from what should always be civil proceedings. But if a witness on the stand is "humiliated", "intimidated" or "demeaned" if they are shown to be lying, for example, or to have conducted themselves in a way that the law bars or discourages, the cross-examining lawyer should be applauded for bringing the truth out, and not held in violation of rules of professional conduct by embarrassing a wrong doer with the truth. And is it possible that a judge could feel "demeaned" or "humiliated" if counsel points out an erroneous ruling, even nicely? I suppose so. In negotiating a settlement, won't both sides of the dispute be "intimidated" by threats from the other side that expensive and trying litigation will result if they don't capitulate to demands? Everyone wants the process to be civil, but it is an adversarial process that by its nature involves strong disagreements and feelings. Lawyers should not be restrained in zealously representing their clients by fear of hurting the feelings of the people involved in the process, and facing a bar complaint if they do.

(14) MARK MORRIS. SUGGESTED AMENDMENT (BASED ON LAWYER'S INTENT)

Sorry, I have another thought. This occurred to me overnight. Shouldn't the focus be on intent, rather than effect? Lawyers shouldn't intend to do all these bad things, but they should not be held in violation of the rule if the unintended effect is an inference that might be unavoidable in the circumstances, e.g. my perjuring witness example above. Thus, I suggest the following: "Provides that a lawyer shall avoid conduct the sole purpose of which is to be hostile, demeaning, humiliating, intimidating, harassing or discriminatory towards other counsel, parties, judges, witnesses, and other participants in the proceedings."

(15) KIM COLBY: CHRISTIAN LEGAL SOCIETY. AGAINST (THE REVISED PROPOSAL IS AN AMALGAMATION OF ELEMENTS OF ABA MODEL RULE 8.4(G), AN ILLINOIS-TYPE RULE, AND THE UTAH STANDARDS OF PROFESSIONALISM AND CIVILITY THAT SUFFERS FROM BOTH CONSTITUTIONAL AND PRACTICAL SHORTCOMINGS…. [I]T IS SO COMPLICATED AND CONFUSING THAT LAWYERS CANNOT BE SURE WHETHER OR NOT ANY PARTICULAR SPEECH WOULD TRIGGER DISCIPLINARY ACTION.)

Christian Legal Society ("CLS") is an interdenominational association of Christian attorneys, law students, and law professors, founded in 1961, to network lawyers and law students nationwide, including members in Utah.

2017 Proposal: In the previous comment period, which closed July 28, 2017, CLS filed its comment letter on July 18, 2017. Those comments addressed the proposed addition of Utah Rules of Professional Conduct Rule 8.4(g) that would essentially have adopted ABA Model Rule 8.4(g). Those comments continue to be applicable to several parts of the second proposed rule that are the subject of the current second comment period. The comments can be read at https://www.utcourts.gov/utc/rules-comment/2017/06/13/rules-of-professional-conduct-comment-period-closes-july-28-2017/.

In its July 2017 comments, CLS explained that it opposed adoption of ABA Model Rule 8.4(g) because, if adopted, Model Rule 8.4(g) would have a chilling effect on lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues. If adopted, Model Rule 8.4(g) would create ethical concerns for attorneys who serve on nonprofit boards, speak publicly on legal topics, teach at law schools, advocate for legislation, or otherwise discuss current political, social, or religious issues. Because lawyers often serve as spokespersons for political, social, or religious movements, a rule that could be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief in a diverse society.

United States Supreme Court Decisions in 2017 and 2018: On August 17, 2018, CLS filed with the Utah Supreme Court a supplemental comment letter in order to bring to the Court's attention the United States Supreme Court's decision in National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) ("NIFLA").
https://www.clsreligiousfreedom.org/sites/default/files/site_files/Christian%20Legal%20Society%20Supplemental%20Comment%20Letter%20Submitted%202018-08-17%20UT.pdf

Basically, since the ABA adopted Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued two major free speech decisions that demonstrate the unconstitutionality of ABA Model Rule 8.4(g). First, under the Court's analysis in NIFLA, ABA Model Rule 8.4(g) is an unconstitutional content-based restriction on lawyers' speech. The NIFLA Court held that state restrictions on "professional speech" are presumptively unconstitutional and subject to strict scrutiny. Second, under the Court's analysis in Matal v. Tam, 137 S. Ct. 1744 (2017), ABA Model Rule 8.4(g) is an unconstitutional viewpoint-based restriction on lawyers' speech that cannot survive the strict scrutiny triggered by viewpoint discrimination.

Recently, the ABA Section of Litigation published an article confirming that several section members see the Court's NIFLA decision as raising serious concerns about the overall constitutionality of ABA Model Rule 8.4(g):

Model Rule 8.4(g) "is intended to combat discrimination and harassment and to ensure equal treatment under the law," notes Cassandra Burke Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section's Civil Rights Litigation Committee. While it serves important goals, "the biggest question about Rule 8.4(g) has been whether it unconstitutionally infringes on lawyers' speech rights—and after the Court's decision in Becerra, it increasingly looks like the answer is yes," Robertson concludes.

Thea Pitzen, First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g) Constitutional?, ABA Section of Litigation Top Story, Apr. 3, 2019, https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond/.

Utah 2019 Revised Proposal: A second comment period is now open to consider a complicated revised proposal that would:

1. Add new Utah Rules of Professional Conduct Rule 8.4(g) that is a confusing hybrid of elements of ABA Model Rule 8.4(g) with Title VII and the Utah Antidiscrimination Act;

2. Add new Utah Rules of Professional Conduct Rule 8.4(h) that would make it professional misconduct to violate the Utah Standards of Professionalism and Civility in certain instances; and

3. Amend the Utah Standards of Professionalism and Civility to regulate attorneys' speech in ways that violate the First Amendment as analyzed by the United States Supreme Court in NIFLA and Matal.

This revised proposal should be rejected if for no other reason than it is so complicated and confusing that lawyers cannot be sure which speech triggers disciplinary action. In addition to serious constitutional concerns, numerous other practical reasons for rejecting the revised proposal exist as well.

I. This Court Should Not Subject Utah Attorneys to a Complicated and Confusing Set of Rules That Have Not Been Adopted by Any Other State Supreme Court.

A. Utah Already has Rule of Professional Conduct 8.4(d) and Its Comment 3.

Utah Rule of Professional Conduct 8.4(d) currently provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Utah has adopted Comment 3 to that rule, which provides:

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

Utah R. Prof'l Conduct 8.4 cmt.3. Comment 3 is a verbatim adoption of Comment 3 that accompanied ABA Model Rule 8.4 from 1998 to 2016.

Utah attorneys should not be made the subjects of the novel experiment that the revised proposal represents. This is particularly true when the Utah Supreme Court has the prudent option of waiting to see what other jurisdictions decide to do and then observing the real-world consequences for attorneys in those states. There is no need for haste because current Utah Rule 8.4(d) already prohibits a lawyer from engaging in conduct prejudicial to the administration of justice, and current Comment [3] to Rule 8.4 already deems bias and prejudice in the course of representing a client to be professional misconduct if the conduct is prejudicial to the administration of justice.

B. No Jurisdiction has Adopted the Revised Proposal, and Only One Jurisdiction, Vermont, has Adopted ABA Model Rule 8.4(g).

To the best of our knowledge, no state has adopted a rule like the revised proposal, which is a complex combination of elements of ABA Model Rule 8.4(g) with elements of some other states' rules that require conduct be unlawful before it is subject to discipline. But as explained below, the revised proposal fails to track those other states' rules in important ways. To add to the confusion, the revised proposal also amends the Utah Standards of Professionalism and Civility in troubling ways and subjects some violations

of those standards to discipline for professional misconduct. The result is a set of rules, which if adopted, greatly expands the grounds upon which Utah lawyers may be subject to discipline.

The Utah Supreme Court was wise to reject the 2017 proposal, which essentially called for adoption of ABA Model Rule 8.4(g). After nearly three years of deliberations in many states across the country, Vermont remains the only state to have adopted ABA Model Rule 8.4(g). In contrast, at least eleven states have concluded, after careful study, that ABA Model Rule 8.4(g) is both unconstitutional and unworkable.

II. Official Entities in Arizona, Idaho, Illinois, Montana, North Dakota, South Carolina, Tennessee, and Texas Have Rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada Have Abandoned Efforts to Impose It on Their Attorneys.

One of federalism's great advantages is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see whether other states adopt ABA Model Rule 8.4(g) and then observing the effects of its real-life implementation on attorneys in those states. This is particularly true when ABA Model Rule 8.4(g) has failed close scrutiny by official entities in many states. Michael S. McGinniss, Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession, 42 Harv. J. L. & Pub. Pol'y 173, 213-217 (2019).

A. Several State Supreme Courts Have Rejected ABA Model Rule 8.4(g).

The Supreme Courts of Arizona, Idaho, Tennessee, South Carolina, and Montana have officially rejected adoption of ABA Model Rule 8.4(g). On August 30, 2018, after a public comment period, the Arizona Supreme Court rejected a petition from the Central Arizona Chapter of the National Lawyer Guild urging adoption of ABA Model Rule 8.4(g). A week later, on September 6, 2018, the Idaho Supreme Court rejected a resolution by the Idaho State Bar Association to adopt a modified version of ABA Model Rule 8.4(g).

On April 23, 2018, after a public comment period, the Supreme Court of Tennessee denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g). The petition had been filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility. The Tennessee Attorney General filed a comment letter, explaining that a black letter rule based on ABA Model Rule 8.4(g) "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."

On October 26, 2016, the Montana Supreme Court announced a public comment period through December 9, 2016, to consider adoption of ABA Model Rule 8.4(g), but then announced an extension of the comment period until April 21, 2017. In a memorandum dated March 1, 2019, the court noted that it "chose not to adopt the ABA's Model Rule 8.4(g)."

On September 25, 2017, the Supreme Court of Nevada granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g). In a letter to the Court, dated September 6, 2017, the State Bar President explained that "the language used in other jurisdictions was inconsistent and changing," and, therefore, "the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions."

In June 2017, the Supreme Court of South Carolina rejected adoption of ABA Model Rule 8.4(g). The Court acted after the state bar's House of Delegates, as well as the state attorney general, recommended against its adoption.

On January 23, 2019, the ABA published a summary of the states' consideration of ABA Model Rule 8.4(g) to date. By the ABA's own count, nine states have declined to adopt Model Rule 8.4(g): Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina, and Tennessee. (We add Texas and North Dakota to that list.) The ABA lists Vermont as the only state to have adopted 8.4(g).

B. State Attorneys General Have Identified Core Constitutional Issues with ABA Model Rule 8.4(g).

On March 16, 2018, the Attorney General of Tennessee filed Opinion 18-11, American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g), attaching his office's comment letter to the Supreme Court of Tennessee, opposing adoption of a proposed rule closely modeled on ABA Model

Rule 8.4(g). The Attorney General concluded that the proposed rule "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."

In December 2016, the Texas Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent." The Attorney General declared that "[c]ontrary to . . . basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues."

In September 2017, the Louisiana Attorney General concluded that "[t]he regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid." Because of the "expansive definition of 'conduct related to the practice of law' and its "countless implications for a lawyer's personal life," the Attorney General found the Rule to be "unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct."

Agreeing with the Texas Attorney General's assessment of the unconstitutionality of ABA Model Rule 8.4(g), the Attorney General of South Carolina determined that "a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of Religion and is void for vagueness."

On May 21, 2018, the Arizona Attorney General filed a comment letter urging the Arizona Supreme Court to heed the opposition of other states, state attorneys general, and state bar associations to adoption of ABA Model Rule 8.4(g). He also noted the constitutional concerns that ABA Model Rule 8.4(g) raises as to free speech, association, and expressive association. (Links to referenced documents can be found in CLS' comment letter dated April 11, 2019, to the New Hampshire Supreme Court at 10-13, https://www.clsreligiousfreedom.org/sites/default/files/site_files/Christian%20Legal%20Society%20Comment%20Letter%202019.pdf).

C. The Montana Legislature Recognized the Problems That ABA Model Rule 8.4(g) Might Create for Legislators, Witnesses, Staff, and Citizens.

On April 12, 2017, the Montana Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g). The impact of Model Rule 8.4(g) on "the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees" greatly concerned the Montana Legislature.

D. Several State Bar Associations Have Rejected ABA Model Rule 8.4(g).

On December 10, 2016, the Illinois State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois." On October 30, 2017, the Louisiana Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of ABA Model Rule 8.4(g), voted "not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court."

On September 15, 2017, the North Dakota Joint Committee on Attorney Standards voted not to recommend adoption of ABA Model Rule 8.4(g), expressing concerns that it was "overbroad, vague, and imposes viewpoint discrimination" and that it might "have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views."

III. Scholars Continue to Critique ABA Model Rule 8.4(g).

Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has summarized his view that ABA Model Rule 8.4(g) is a speech code that will have a serious impact on attorneys' speech in a short video for the Federalist Society at https://www.youtube.com/watch?v=AfpdWmlOXbA. Professor Volokh expanded on the many problems of ABA Model Rule 8.4(g) in a debate at the Federalist Society National Student Symposium at https://www.youtube.com/watch?v=b074xW5kvB8&t=50s.

The late Professor Ronald Rotunda, a highly-respected scholar in both constitutional law and legal ethics, early warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights. Ronald D. Rotunda, The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought, The Heritage Foundation (Oct. 6, 2016), http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf. Professor Rotunda and Texas Attorney General Ken Paxton debated two proponents of Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention at https://www.youtube.com/watch?v=V6rDPjqBcQg.

Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of Legal Ethics: The Lawyer's Deskbook on Professional Responsibility, "[t]he ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment." Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility, ed. April 2017, "§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech" & "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" in "§ 8.4-2 Categories of Disciplinable Conduct."

Dean Michael S. McGinniss, who teaches professional responsibility, recently "examine[d] multiple aspects of the ongoing ABA Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions." Michael S. McGinniss, Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession, 42 Harv. J. L. & Pub. Pol'y 173, 173 (2019). Professor Josh Blackman has explained that ABA Model "Rule 8.4(g) is unprecedented, as it extends a disciplinary committee's jurisdiction to conduct merely 'related to the practice of law,' with only the most tenuous connection to representation of clients, a lawyer's fitness, or the administration of justice." Josh Blackman, Reply: A Pause for State Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 241, 243 (2017).

In a thoughtful examination of the rule's legislative history, practitioners Andrew Halaby and Brianna Long concluded that ABA Model Rule 8.4(g) "is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities." They recommend that "jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all." And they conclude that "the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected." Andrew F. Halaby & Brianna L. Long, New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship, 41 J. Legal. Prof. 201, 204, 257 (2017).

The basic First Amendment concerns with the impact of a rule incorporating significant parts of ABA Model Rule 8.4(g) were explained in CLS' 2017 comments and will not be repeated here. But there are at least four reasons the revised proposal exacerbates the already existing concerns about the chilling effect that proposed Rule 8.4(g) will have on attorneys' speech.

First, it is a major problem that the revised proposal retains many elements of ABA Model Rule 8.4(g)'s Comments [3], [4], and [5] in the revised proposal's Comments [4] and [5]. Those comments are the source of many of the First Amendment concerns highlighted in CLS' 2017 comments.

Second, the proposed Rule 8.4(h) introduces a whole new set of concerns as to the chilling effect of the revised proposal on attorneys' speech. By explicitly incorporating the Standards of Professionalism and Civility as a fertile source of professional misconduct claims, the revised proposal transforms a long list of largely aspirational standards into a breeding ground for professional misconduct claims.

Third, the proposed Rule 8.4(h) would make it professional misconduct for a lawyer to fail to "avoid hostile, demeaning, humiliating . . . conduct" (Standards of Professionalism and Civility, Std. 3), which its comment makes clear includes "communications." The same comment directs that lawyers "should refrain from expressing scorn, superiority, or disrespect." This standard would seem to be unconstitutional under the Matal and NIFLA analyses. Other standards that apply to attorneys' speech would seem to raise the same First Amendment concerns. For example, Standard 1 states that "[l]awyers are expected to refrain from inappropriate language . . . in telephone calls, email, and other exchanges."

Fourth, Comment [4a] applies only to proposed Rule 8.4(g) and not to proposed Rule 8.4(h). Even if it applied to both, however, its mere assertion that these new proposed rules "do[] not apply to expression or conduct protected by the First Amendment" is not enough to ameliorate the chilling effect of the revised proposal on lawyers' speech. For all of these reasons, as well as those below, the revised proposal should be rejected.

IV. Proposed Rule 8.4(g) Introduces Several New Problems.

The revised proposal would adopt two new black letter rules. At first glance, the proposed Rule 8.4(g) seems to be like state rules, such as Illinois, that require that conduct be found to be "unlawful" before it can trigger a charge of professional misconduct. But on closer examination that is not the case, and the revised proposal lacks key elements of the Illinois rule.

First, the proposed Rule 8.4(g) would make it professional misconduct for a lawyer to "engage in conduct that is an unlawful, discriminatory, or retaliatory employment practice under Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act." Confusion is created by the fact that the proposed rule seems to punish more than an "unlawful" employment practice, but seems also to punish "discriminatory, or retaliatory" employment practices. The use of the disjunctive "or" reinforces that it is not limited to "unlawful" employment practices. Yet a superficial reading of the revised proposal sounds as if it is intended to be limited solely to "unlawful" employment practices. If the revised proposal is intended to be so limited, then the modifiers "discriminatory, or retaliatory" need to be deleted. If it is not intended to be so limited, then there needs to be more explanation regarding which "discriminatory, or retaliatory employment practice[s]" that are not "unlawful" will be considered professional misconduct.

Second, relatedly, proposed Comment [4] states that the "substantive law of antidiscrimination and anti-harassment statutes and case law guides the application" of proposed Rule 8.4(g). This adds to the confusion because if the purpose is to limit proposed Rule 8.4(g) to conduct that is "unlawful" under Title VII and the Utah Antidiscrimination Act, the substantive law should govern, not guide, the application. Otherwise, the limitation to "unlawful" conduct is meaningless.

Third, and perhaps most importantly, the Illinois rule requires a judicial or administrative tribunal, other than a state bar tribunal, find that an attorney committed unlawful discrimination before the state bar may entertain a disciplinary complaint against the attorney. This requirement ensures that the attorney has been found to have engaged in unlawful conduct in a tribunal that provides the attorney with greater due process rights, access to discovery, and evidentiary protections than may typically be found in the bar disciplinary process. Any black letter rule should include the requirement that any conduct found to be professional misconduct have been first adjudicated to be "unlawful" by a tribunal other than the screening panel of the Ethics and Discipline Committee. Proposed Rule 8.4(g) lacks this requirement.

Fourth, the re-definition of "employer" means that solo practitioners and small firms will be particularly vulnerable to complaints of professional misconduct. A person who wishes to complain regarding the conduct of a firm of 15 or more lawyers will have a choice to pursue a remedy in federal court under Title VII, in state court under the Utah Antidiscrimination Act, or lodge a disciplinary complaint. But if the subject of a complaint is a solo practitioner or a small firm, the new – but only – option is to lodge a disciplinary complaint.

Fifth, additional confusion is created by the attempt to meld an Illinois-type rule with comments based on ABA Model Rule 8.4(g). If the proposed Rule 8.4(g) is not ABA Model Rule 8.4(g), then why attach comments that accompany the ABA Model Rule 8.4(g) to a black letter rule that is not ABA Model Rule 8.4(g)?

V. Proposed Rule of Professional Conduct 8.4(g) Could Limit Utah Lawyers' Ability to Accept, Decline, or Withdraw from a Representation.

The proponents of ABA Rule 8.4(g) generally claim that it will not affect a lawyer's ability to refuse to represent a client. They point to the language in the Rule that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16." (The revised proposal states that proposed Rule 8.4(g) "does not limit the ability of a lawyer to accept, decline, or in accordance with Rule 1.16, withdraw from a representation.")

But in the one state to have adopted ABA Model Rule 8.4(g), the Vermont Supreme Court explained in its accompanying Comment [4] that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." The Vermont Supreme Court further explained that, under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)."

Professional ethics experts agree that this is a genuine concern with ABA Model Rule 8.4(g) despite its inclusion of reassuring language. As Professor Rotunda and Professor Dzienkowski explain, Rule 1.16 actually "deals with when a lawyer must or may reject a client or withdraw from representation." Rotunda & Dzienkowski, supra, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis in original). Rule 1.16 does not address accepting clients. Moreover, as Professor Rotunda and Professor Dzienkowski have observed, Comment [5] to ABA Model Rule 8.4(g) would seem to limit any right to decline representation, if permitted at all, to "limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations."

Dean Michael McGinniss agrees that "[d]espite its ostensible nod of non-limitation, Model Rule 8.4(g) offers lawyers no actual protection against charges of 'discrimination' based on their discretionary decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer." McGinniss, supra, at 207-209. Because Model Rule 1.16 "addresses only when lawyers must decline representation, or when they may or must withdraw from representation" but not when they "are permitted to decline client representation," Model Rule 8.4(g) seems to only allow what was already required, not declinations that are discretionary. Professor McGinniss warns that "if state bar authorities consider a lawyer's declining representation . . . as 'manifest[ing] bias or prejudice,' they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g)." Id. at 207-208 & n.146.

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that "[a] lawyer is under no obligation to accept every person who may wish to become a client unless the refusal to accept a person amounts to unlawful discrimination." N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.). The facts before the Committee were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of "unlawful discrimination" for purposes of New York's Rule 8.4(g) a question of law beyond its jurisdiction, the Committee declined to "opine on whether a lawyer's refusal to represent a prospective client in a suit against the lawyer's own religious institution constitutes 'unlawful discrimination'" for purposes of New York's Rule 8.4(g).

In Stropnicky v. Nathanson, the Massachusetts Commission Against Discrimination found a law firm that specialized in representing women in divorce cases had violated state nondiscrimination law when it refused to represent a man. 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, Nathanson v. MCAD, No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003). As these examples demonstrate, reasonable doubt exists that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation.

Conclusion

The revised proposal is an amalgamation of elements of ABA Model Rule 8.4(g), an Illinois-type rule, and the Utah Standards of Professionalism and Civility that suffers from both constitutional and practical shortcomings.

The revised proposal should be rejected because it is so complicated and confusing that lawyers cannot be sure whether or not any particular speech would trigger disciplinary action. In addition to serious constitutional concerns, numerous other practical reasons exist for rejecting the revised proposal. CLS urges the Utah Supreme Court to reject the revised proposal and thanks the Court for considering its comments.

(16) PROFESSORS JOSH BLACKMAN AND EUGENE VOLOKH. AGAINST WITH SUGGESTIONS (1. REJECT THE CHANGES TO RULE 14-301. ALTERNATIVELY, MAINTAIN THIS PROVISION AS OPTIONAL, RATHER THAN MANDATORY. A LAWYER "SHOULD," BUT NOT "SHALL" AVOID "HOSTILE, DEMEANING, OR HUMILIATING WORDS IN WRITTEN AND ORAL COMMUNICATIONS WITH ADVERSARIES." AT A MINIMUM, THE WORD "HARASSING," SHOULD BE STRUCK, BECAUSE THAT TERM IS NOT DEFINED. 2. RULE 8.4(G), AS DRAFTED, IS NOT PROBLEMATIC. HOWEVER, THE COURT SHOULD STRIKE THE LAST TWO SENTENCES FROM COMMENT [4]. 3. REJECT RULE 8.4(H).)

Professor Eugene Volokh and I submit this comment: https://drive.google.com/open?id=1i1F7TPQyC1XwViML4Lij8OqwdoGqAScX

(17) KENNETH LOUGEE. IN FAVOR WITH EDITS

Why does the proposed amendment to 8.4 contain the qualifier about course of representing a client? Lawyers should always obey the law, whether or not their actions concern their practice. I would strike that language and hold lawyers ethically accountable to the law.

(18) CHARLES SCHULTZ. AGAINST (LEGISLATING POLITICAL CORRECTINESS)

If the specified conduct is already unlawful under the provisions of Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act and Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act, why does the Bar feel the need to enact this Rule?

Soon the Bar will make looking at someone in what is determined to be politically incorrect a violation of the Rules of Professional Conduct. Then thinking in a politically incorrect way will become violation of the Rules of Professional Conduct.

Is breathing in politically correct way next?

(19) T M WILLARDSON. AGAINST (TOO MUCH REGULATION)

Why not really pile on and make it so that multiple traffic tickets is an ethical violation. Noise complaints, failure to obtain 100% refunds of rental deposits, and similar nefandous conduct should also be penalized by the bar.

(20) J. DAVID MILLINER. IN FAVOR IN PART AND AGAINST IN PART (CONCERNED THAT THE RULE OPENS THE DOOR FOR ABUSE BY EMPLOYEES AND CLIENTS)

Although I personally find the proscribed conduct to be reprehensible, I am concerned that the amendments to the rule open the door for abuse by employees of law firms, and apparently by clients as well, who have been reasonably disciplined, admonished or dropped by an attorney. As most attorneys know, dealing with a bar complaint is time consuming and, therefore, expensive. And, at least in my experience, most bar complaints are without merit. I would support the amendment if it required an appropriate due process finding of a violation by a court or administrative agency before a bar complaint could be filed, but as presently drafted it feels too much like a double jeopardy situation that is susceptible to abuse by employees or clients who may be looking for an inexpensive form of leverage or revenge.

(21) DAVE DUNCAN. WANTS CLARIFICATION ON SEVERAL DELETIONS

I'm confused by a few of the deletions.

Is it now ok to discriminate against a veteran? If not, why was that deleted?

Is "casting aspersions on physical traits or appearance" no longer discouraged? Why delete the provision discouraging it?

(22) RANDALL EDWARDS. IN FAVOR (BUT DOESN'T THINK IT WILL BE EFFECTIVE IF COURTS DON'T PUNISH BEHAVIOR)

While I welcome this rule, I must say that I am actually skeptical that it will make much of a difference so long as the district courts show the same reluctance that they always have to find the offending counsel either in contempt of court or to have engaged in sanctionable behavior. A case in point: A year ago I finally wrapped up a case in which opposing counsel accused me, on the record, of being part of an illegal conspiracy, accused counsel for another defendant of fraud and conspiracy as well as being dishonest (ultimately naming that lawyer as a party in the case), tried to pass off as genuine documents that he ultimately had to admit had been forged, abused the system by filing 14 motions for enlargement of time to respond to motions he didn't want to respond to, filed a meritless bankruptcy filing to delay the case, accused one judge of "taint" and "bias" because the judge had ruled against him, and brought claims against non-existent parties. These actions were brought before the court numerous times, but in each instance the court seemed extremely reluctant to levy sanctions, (at one point, the judge said, "I'm very concerned about these forgeries," and then did nothing to actually punish counsel for defrauding the court), and in the instance that it did finally get fed up with the shenanigans (after years of abuse by my opposing counsel), the sanction was minimal.

I wish I could say that this case was an exception, but from my experience as a member of the Utah bar now for 36 years, I can say that it's not. Despicable behavior in depositions goes undeterred; outright lies to the court go unpunished (as if an outright falsehood under oath is simply part of "advocacy" or "a conflict in the evidence"), and lawyers, well known for breaking the rules, continue to get away with it. (Ask any member of the bar for the names of misbehaving lawyers and you'll notice that the same names keep cropping up).

So ... the bottom line for me is that it's nice to have rules that define and condemn bad behavior on the part of lawyers, but unless and until the courts actually punish such behavior, these rules are simply eyewash.

(23) ALEX LEEMAN. IN FAVOR IN PART AND AGAINST IN PART

I agree with the portion of the amendment relating to repeat violations of the Standards of Professionalism and Civility.

I do not agree with the suggested amendments regarding Title VII employment claims. Do we really want OPC investigating employment discrimination claims? If you want to cover this concept in the rules of professional conduct, create a sort of "reciprocal discipline" rule that imposes a sanction if a lawyer or law firm is held liable by a court or administrative agency for a violation of Title VII. Then you can leave actual investigation and adjudication of the claims to the EEOC, UALD, and civil courts. OPC should not be tasked with investigating employment discrimination claims.

(24) SAM GOBLE. AGAINST (OPC SHOULD NOT BE INVESTIGATING EMPLOYMENT CLAIMS)

I agree with Mr. Leeman's opinion. The OPC can and does weigh in when other authorities find–after due process–attorneys engaged in behavior that violated the law, including discrimination claims. Formalizing that the OPC may act upon adverse adjudications for Title VII employment claims against an attorney seems appropriate. Anything more seems redundant and burdensome because it saps bar resources, raises issues of collateral estoppel, burdens of proof and risks conflicting outcomes amongst tribunals.

The repeated misconduct Rule also seems too be redundant:

"it is professional misconduct for a lawyer to egregiously violate, or engage in a pattern of repeated violations, of the Standards of Professionalism and Civility if such violations harm the lawyer's client or another lawyer's client or are prejudicial to the administration of justice."

This creates a new violation solely by recognizing other violations of existing rules. That seems unnecessary. If it is not the case already, I would consider the "repeated" and "harm to counsel or client"

behavior merely as a aggravators that may be formally considered by OPC in the context of sanctioning a violation of an existing rule.

I also agree with Randall's point, that if attorney behavior toward opposing counsel or opposing client is a growing problem, a more active enforcement of existing rules is equipped to deal with it.

(25) JUDY BARKING. AGAINST (AGREES WITH CLS COMMENT)

The comment by Kim Colby and Christian Legal Society outlines serious concerns with this proposed change which I think must be given serious consideration. This change is not necessary and may create problems for practitioners who are genuinely trying to practice appropriately, while no action is taken under the currently-existing rules for egregious offenders. Please do not adopt the proposed changes.

(26) OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL SUGGESTED EDITS (REVISIONS MIGHT INCLUDE: (1) DEFINING WHAT IS A STANDARD FOR PURPOSES OF RULE 8.4(H), (2) EVALUATING WHETHER CERTAIN STANDARDS SHOULD BE REMOVED, AND (3) AMENDING THE STANDARDS TO ELIMINATE VAGUE PROVISIONS AND TO ADD DEFINITIONS OR MORE SPECIFIC DIRECTIVES, INCLUDING EXAMPLES, ON THE CIVIL AND PROFESSIONAL CONDUCT REQUIRED UNDER EACH STANDARD. THIS WOULD GIVE LAWYERS A BETTER UNDERSTANDING OF THE TYPE OF MISCONDUCT UNDER RULE 8.4(H) THAT IS SUBJECT TO ENFORCEMENT AND THAT MUST BE REPORTED TO THE OFFICE OF PROFESSIONAL CONDUCT.)

We comment as members of the Utah Bar and do not speak for, or represent the views of, the Utah Legislature or any of its individual members. We support efforts by the Utah Supreme Court's Advisory Committee on the Rules of Professional Conduct to foster civility and professionalism in the practice of law, but we are concerned with how the Standards of Professionalism and Civility (Standards) will be enforced under proposed Rule 8.4(h) of the Rules of Professional Conduct, which provides that it is "professional misconduct for a lawyer to egregiously violate, or engage in a pattern of repeated violations" of the Standards.

First, there is no definition for the Standards in Rule 8.4(h). Because an "egregious" violation, or a "pattern of repeated violations," of the Standards is misconduct under Rule 8.4(h), lawyers need to know whether the Standards include the preamble, numbered provisions, comments, and cross-references, or only the numbered provisions. Rule 8.4(h) would be clearer if the Utah Supreme Court provided a definition for the Standards in the definitions section of the Rules or in the comment for Rule 8.4.

Second, our understanding is that the Standards are aspirational, as indicated by the preamble and comments of the Standards. If the Standards were drafted with aspirational intent, how can the Standards now be interpreted as enforceable? Certain Standards could be subject to a variety of interpretations and cover a broad range of conduct, including conduct beyond the practice of law. See, e.g., Utah Standards of Prof'l & Civility 14-301, Preamble ("A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms.").

We recognize that "civility" and "professionalism" are needed in the practice of law, but how should they be enforced? By incorporating the Standards into the Rules of Professional Conduct, lawyers will have an obligation to report violations of the Standards under Rule 8.3. See Utah R. of Prof'l Conduct 8.3 cmt. 1 ("Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct."). But the Standards themselves do not offer much guidance on what should be reported. For example, Standard #1 directs lawyers to "treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner." The comment explains that dignity and professionalism are not limited to the courtroom, but extend to telephone calls, emails, meetings, and other exchanges and that lawyers must refrain from "inappropriate language, maliciousness, or insulting behavior" in those interactions. Similarly, Standard #3 states that "[l]awyers shall avoid hostile, demeaning, humiliating, intimidating, harassing, or discriminatory conduct with all other counsel, parties, judges, witnesses, and other participants in all proceedings." The comment for Standard #3 incorporates communications and expressions by lawyers, including expressions of "scorn, superiority, or

disrespect." Yet, terms such as "dignity," "inappropriate," "insulting," "intimidating," "scorn," "superiority," and "disrespect" are vague and subjective, leaving lawyers to guess the Standards' meaning and application.

The following scenarios highlight the potential effects of the ambiguities in the Standards:

1. During a trial, a defense lawyer criticizes how the police and the prosecutor handled the case, suggesting that the police and prosecutor acted dishonestly. As the defense lawyer cross-examines police officers, the defense lawyer's statements and questions attempt to demonstrate that the police and prosecutor have engaged in questionable behavior. This is a frequent strategy used by the defense lawyer when defending the defense lawyer's clients, although there is a lack of evidence of any dishonesty or mishandling of a case. Has the defense lawyer violated Standard #3 by attributing improper conduct to the prosecutor, or by disparaging the ethics or integrity of the prosecutor and police officers who were participants in the proceedings?

2. A client calls Lawyer 1 multiple times a week at work and home, leaving malicious messages for Lawyer 1. Lawyer 1 contacts Lawyer 2 who represents the client. Lawyer 2 admits that Lawyer 2 has not advised the client not to engage in uncivil behavior. Lawyer 2 also admits that it is Lawyer 2's practice to advise clients about engaging in civil and appropriate conduct only when there is evidence that the client has engaged in uncivil or inappropriate conduct. Has Lawyer 2 violated the obligation to advise clients on civility, courtesy, and fair dealing under Standard #2 because it is not Lawyer 2's practice to advise clients beforehand? Should Lawyer 1 report Lawyer 2 for misconduct?

3. In city council meetings, Lawyer 1, a city attorney, observes Lawyer 2, a city council member, openly criticize other city council members and launch into tirades about individuals or groups protesting decisions made by the City Council. When Lawyer 2 disagrees with a participant in a meeting, Lawyer 2 aggressively questions the participant. Would the Standards apply to Lawyer 2 in Lawyer 2's capacity as an elected official, and if so, does Lawyer 1 have an obligation to report Lawyer 2 for violations of Standards #1 and #3?

4. Lawyer 1 frequently works opposite Lawyer 2. Lawyer 2 makes abrasive and spiteful statements about Lawyer 1 in the presence of Lawyer 1's clients during settlements and depositions. Lawyer 1 finally lashes out in a settlement, making negative statements, including the use of profanity, about Lawyer 2. Lawyer 1 tells Lawyer 2 that Lawyer 1 is going to report Lawyer 2 to the Office of Professional Conduct for Lawyer 2's repeated uncivil and unprofessional conduct. Lawyer 2 responds that Lawyer 2 is also going to report Lawyer 1 to the Office of Professional Conduct for Lawyer 1's negative and obscene statements during the settlement. Have Lawyer 1 and Lawyer 2 violated Standards #1 and #3?

Because the proposed rule would modify the Standards from aspirational to enforceable, we recommend that, before enacting the rule, the Utah Supreme Court and its Advisory Committee consider revising the Standards to address the concerns we have raised. Those revisions might include: (1) defining what is a Standard for purposes of Rule 8.4(h), (2) evaluating whether certain Standards should be removed, and (3) amending the Standards to eliminate vague provisions and to add definitions or more specific directives, including examples, on the civil and professional conduct required under each Standard. This would give lawyers a better understanding of the type of misconduct under Rule 8.4(h) that is subject to enforcement and that must be reported to the Office of Professional Conduct. Thank you for considering our comments regarding the proposed Rule 8.4(h).

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(27) MATTHEW HILTON. AGAINST (RELIGIOUS LIBERTY CONCERNS)

In 2017 I joined in the excellent comments made by the Christian Legal Society. I do so again now regarding their 2019 comments that have been filed. My comments are being addressed in the form of 2 questions regarding areas that I see have the potential of preventing me from continuing certain aspects of my practice, religious beliefs and motivation in the law # 1. I have included the following language in my retainer agreements for many years.

At no time shall Attorney be required to pursue a claim or proceed on any aspects of the case in, which in the sole discretion of the Attorney, could result in the imposition of sanctions under applicable court rules, or, violate the personal conscience, religion, moral or ethical perspective of Attorney. In the event such a condition arises in the course of litigation, upon proper notice to Client, Attorney is obligated to cooperate with new counsel or Client in effectuating the withdrawal in such a manner as minimizes inconvenience to Client. As a matter of conscience, unless it is a bona fide emergency, legal work shall not be performed on Sunday.

With the anti-discrimination clauses being proposed, and the academic commentators pointing out an apparent inability to protect an attorney from refusing a client – or their cause – in the first place, do the proposed rules preclude me from retaining these provisions in my retainer agreements?

#2. Some of the most rewarding cases and causes with which I have been affiliated have arisen from situations or both the attorney and the client have exercised the privilege of praying regarding all courses of action to pursue, seeking individual inspiration to work with the limited budgets and time constraints, as well as achieving an outcome that benefits many more than the client and attorney involved. Believing that the personal faith that accompanies these prayers and sacrifices may have a direct impact on what is achieved, having those involved in a small practice need to be committed to these actions and desires. This includes clients and employees, including attorneys.

34A-5-112 Religious liberty protections -- Expressing beliefs and commitments in workplace -- Prohibition on employment actions against certain employee speech.

(1) An employee may express the employee's religious or moral beliefs and commitments in the workplace in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression of beliefs or commitments allowed by the employer in the workplace, unless the expression is in direct conflict with the essential business-related interests of the employer.

(2) An employer may not discharge, demote, terminate, or refuse to hire any person, or retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified, for lawful expression or expressive activity outside of the workplace regarding the person's religious, political, or personal convictions, including convictions about marriage, family, or sexuality, unless the expression or expressive activity is in direct conflict with the essential business-related interests of the employer.

Do the practices in # 1 and # 2 rise to this level highlighted in the statutes?

IF THEY DO NOT, I BELIEVE THE RELIGIOUS FREEDOMS OF THE UTAH CONSTITUTION WOULD BE VIOLATED BY THE PROPOSED RULE.

Thank you for considering these concerns.

(28) JB. QUESTIONS AND THOUGHTS ON DRAFTS

Re 14-301, the Comment to 3 is puzzling. Why have the categories veteran status, national origin, handicap, been removed from the discussion list? They are certainly part of the antidiscrimination statutes referred to, and not plausibly encompassed by the categories listed. I can see political reasons for doing so, but none persuasive. It seems an unnecessary to delete those categories. It is not like there is a word limit.

The last sentence of the first paragraph is ungrammatical "The protected classes listed in this Comment are ... and is not meant to an exhaustive list..." 'Protected classes listed' are plural and are what 'is not meant to be' refers to. Perhaps "The list of protected classes..."

As there is no enforcement of 14-301, why bother amending it?

There is an interesting set of essays on the ABA version in the Georgetown J. Of Legal Ethics, in case the Committee does any more work on the proposal.

Below are some thoughts about the draft. They are directed at improving the writing. They are not intended as substantive changes.

The phrase "except for the purposes of this paragraph and in applying those statutes, 'employer' shall mean any person or entity that employs one or more persons" does not work. The statutes are applied in a court or administrative proceeding. The Utah Supreme Court does not have the power to change the terms of the statutes, which pretty clearly do not define 'employer' in this way. Is the idea that screening committees are applying the statutes? So we will have expert testimony on the application and meaning of the statutes before the Panels? Or is it that a district court judge will now alter the law? Exactly what is meant by "applying those statutes" – will discipline under 8.4 have preclusive effect on an action under the statute? Finding a violation of the statutes is not a predicate for discipline, and, I think no preclusion is sought, what does "applying" mean?

"and in applying those statutes" can be elided without loss – it is confusing, does no work, and the remainder will work well with Comment [4]

This proposal also has an ungrammatical sentence in Comment [3]: 'classes' is plural, not singular and a class is not a list. It should read "and are not meant to be an exhaustive list".

"Lawyers may engage in conduct undertaken to discuss diversity and inclusion, including any benefits and challenges, without violating paragraph (g)." This is poor writing. What does 'engage in conduct undertaken to discuss' mean? Apparently not "discussing diversity and inclusion" or all those preceding words would not be there. And discussing is not 'engaging in conduct undertaken to discuss'. That refers to conduct leading up to and enabling a discussion. Is there some reason not to say 'lawyers can discuss diversity and inclusion'?

The parenthetical "including any benefits and challenges" is still redolent of political commitment by the Bar to a particular range of views. It does not say that lawyers may express views about the defects or undesirability of "inclusion and diversity" in, e.g, hiring or promotion is anti-meritocratic and therefore wrong. Expressing such a view is not discussing a "challenge," it is saying the program should not be undertaken. When the Committee singles out expression supportive of, it suggests thereby that contrary views are subject to discipline. That can be avoided by just leaving out the preferential parenthetical.

Comment [4a] is otiose. I cannot think of what use this Comment could be. Conduct or expression protected by the First Amendment or Article I are protected whatever the Rules may say. And, really, if you have to tell OPC or Ethics Panels or courts that we don't mean to punish protected conduct and expression, then what does that say about those entities and the process? So it looks like Comment [4a] is there as a piece of ribbon.

Rule 14-301. Standards of Professionalism and Civility.

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

Lawyers should educate themselves on the potential impact of using digital communications and social media, including the possibility that communications intended to be private may be republished or misused. Lawyers should understand that digital communications in some circumstances may have a widespread and lasting impact on their clients, themselves, other lawyers, and the judicial system.

We expect judges and lawyers will make mutual and firm commitments to these standards. Adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this State. We further expect lawyers to educate their clients regarding these standards and judges to reinforce this whenever clients are present in the courtroom by making it clear that such tactics may hurt the client’s case.

Although for ease of usage the term “court” is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards. Nothing in these standards supersedes or detracts from existing disciplinary codes or standards of conduct.

Cross-References: R. Prof. Cond. Preamble [1], [13]; R. Civ. P. 1; R. Civ. P. 65B(b)(5); R. Crim. P. 1(b); R. Juv. P. 1(b); R. Third District Court 10-1-306; Fed. R. Civ. P. 1; DUCivR 83-1.1(g).

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

Comment: Lawyers should maintain the dignity and decorum of judicial and administrative proceedings, as well as the esteem of the legal profession. Respect for the court includes lawyers’ dress and conduct. When appearing in court, lawyers should dress professionally, use appropriate language,

and maintain a professional demeanor. In addition, lawyers should advise clients and witnesses about proper courtroom decorum, including proper dress and language, and should, to the best of their ability, prevent clients and witnesses from creating distractions or disruption in the courtroom.

The need for dignity and professionalism extends beyond the courtroom. Lawyers are expected to refrain from inappropriate language, maliciousness, or insulting behavior in depositions, meetings with opposing counsel and clients, telephone calls, email, and other exchanges. They should use their best efforts to instruct their clients and witnesses to do the same.

Cross-References: R. Prof. Cond. 1.4; R. Prof. Cond. 1.16(a)(1); R. Prof. Cond. 2.1; R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5(d); R. Prof. Cond. 3.8; R. Prof. Cond. 3.9; R. Prof. Cond. 4.1(a); R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 1.2(a); R. Prof. Cond. 1.2(d); R. Prof. Cond. 1.4(a)(5).

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers ~~should~~ shall avoid hostile, demeaning, ~~or~~ humiliating, intimidating, harassing, or discriminatory conduct ~~words in written and oral communications~~ with all other counsel, parties, judges, witnesses, and other participants in all proceedings~~adversaries~~. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of any such participant ~~adversary~~ unless such matters are directly relevant under controlling substantive law.

Comment: Hostile, demeaning, and humiliating communications include all expressions of discrimination on the basis of race~~,~~; color; sex; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion~~,~~; national origin; disability; ~~gender~~, sexual orientation~~,~~; gender identity; or genetic information. ~~age, handicap, veteran status, or national origin, or casting aspersions on physical traits or appearance.~~ Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it. The protected classes listed in this Comment are consistent with those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a) (2016), and in federal statutes, and is not meant to be an exhaustive list as the statutes may be amended from time to time.

Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 3.1; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.5(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. Civ. P. 11(c); R. Civ. P. 16(d); R. Civ. P. 37(a); Fed. R. Civ. P. 11(c)(2).

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

Cross-References: R. Prof. Cond. 1.1; R. Prof. Cond. 1.3; R. Prof. Cond. 1.4(a), (b); R. Prof. Cond. 1.6(a); R. Prof. Cond. 1.9; R. Prof. Cond. 1.13(a), (b); R. Prof. Cond. 1.14; R. Prof. Cond. 1.15; R. Prof. Cond. 1.16(d); R. Prof. Cond. 1.18(b), (c); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3; R. Prof. Cond. 3.4(c); R. Prof. Cond. 3.8; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.3(a), (b); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

Comment: When providing other counsel with a copy of any negotiated document for review, a lawyer should not make changes to the written document in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. Changes should be clearly and accurately identified in the draft or otherwise explicitly brought to the attention of other counsel. Lawyers should be sensitive to, and accommodating of, other lawyers' inability to make full use of technology and should provide hard copy drafts when requested and a redline copy, if available.

Cross-References: R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. App. P. 11(f).

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Civ. P. 7(f); R. Third District Court 10-1-306(6).

9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(d); R. Prof. Cond. 8.4(d); R. Third District Court 10-1-306 (1)(A); Fed. R. Civ. P. 16(2)(C).

11. Lawyers shall avoid impermissible ex parte communications.

Cross-References: R. Prof. Cond. 1.2; R. Prof. Cond. 2.2; R. Prof. Cond. 2.9; R. Prof. Cond. 3.5; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 77(b); R. Juv. P. 2.9(A); Fed. R. Civ. P. 77(b).

12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

Cross-References: R. Prof. Cond. 3.5(a); R. Prof. Cond. 3.5(b); R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d).

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

Cross-References: R. Prof. Cond. 8.4(c); R. Juv. P. 19.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

Comment: Lawyers should not evade communication with other counsel, should promptly acknowledge receipt of any communication, and should respond as soon as reasonably possible. Lawyers should only use data-transmission technologies as an efficient means of communication and not to obtain an unfair tactical advantage. Lawyers should be willing to grant accommodations where the use of technology is concerned, including honoring reasonable requests to retransmit materials or to provide hard copies.

Lawyers should not request inappropriate extensions of time or serve papers at times or places calculated to embarrass or take advantage of an adversary.

Cross-References: R. Prof. Cond. 1.2(a); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Juv. P. 54.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

Comment: When scheduling and attending depositions, hearings, or conferences, lawyers should be respectful and considerate of clients' and adversaries' time, schedules, and commitments to others. This includes arriving punctually for scheduled appointments. Lawyers should arrive sufficiently in advance of trials, hearings, meetings, depositions, and other scheduled events to be prepared to commence on time. Lawyers should also advise clients and witnesses concerning the need to be punctual and prepared. Lawyers who will be late for a scheduled appointment or are aware that another participant will be late, should notify the court, if applicable, and all other participants as soon as possible.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 5.1; R. Prof. Cond. 8.4(a); R. Juv. P. 20; R. Juv. P. 20A.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

Cross-References: R. Prof. Cond. 8.4; R. Civ. P. 55(a); Fed. R. Civ. P. 55(b)(2).

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 4.1; R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4; R. Civ. P. 26(b)(1); R. Civ. P. 26(b)(8)(A); R. Civ. P. 37(a)(1)(A), (D); R. Civ. P. 37(c); R. Crim. P. 16(b); R. Crim. P. 16(c); R. Crim. P. 16(d); R. Crim. P. 16(e); R. Juv. P. 20; R. Juv. P. 20A; R. Juv. P. 27(b); Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 26(g)(1)(B)(ii), (iii).

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 30(c)(2); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 30(c)(2); Fed. R. Civ. P. 30(d)(2); Fed. R. Civ. P. 30(d)(3)(A.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or

information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 8.4; R. Prof. Cond. 3.4; R. Civ. P. 26(b)(1; R. Civ. P. 37; R. Crim. P. 16(a); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 37(a)(4).

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

Adopted by Supreme Court order October 16, 2003.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

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

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

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

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

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

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

(g) engage in conduct that is an unlawful, discriminatory, or retaliatory employment practice under Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act, except that for the purposes of this paragraph and in applying those statutes, "employer" shall mean any person or entity that employs one or more persons; or

(h) egregiously violate, or engage in a pattern of repeated violations of, the Standards of Professionalism and Civility, if such violations harm the lawyer's client or another lawyer's client or are prejudicial to the administration of justice.

Comment

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

[1a] An act of professional misconduct under Rule 8.4(b), (c), (d), (e), (f), (g), or (h) cannot be counted as a separate violation of Rule 8.4(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(a) for the purpose of determining sanctions.

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

administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race~~,~~; color; sex~~,~~; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion~~,~~; national origin~~,~~; disability, ~~age~~, sexual orientation~~,~~; or genetic information ~~socioeconomic status,~~ may violate ~~violates~~ paragraph (d) when such actions are prejudicial to the administration of justice. The protected classes listed in this comment are consistent with those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a) (2016), and in federal statutes and is not meant to be an exhaustive list as the statutes may be amended from time to time. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of ~~this~~ paragraph (d)~~rule~~.

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

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guides the application of paragraph (g), except that for purposes of determining a violation of paragraph (g), the size of a law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from a representation, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of paragraph (g). Lawyers may engage in conduct undertaken to discuss diversity and inclusion, including any benefits and challenges, without violating paragraph (g). Implementing initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[4a] Paragraph (g) does not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

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

[6]~~[4]~~ A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] ~~[5]~~ Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[8] This rule differs from ABA Model Rule 8.4 to the extent that it changes paragraph (g), adds new paragraph (h), and modifies comments accordingly.

Tab 3

5.4

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
(a)(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
(a)(2)(i) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
(a)(2)(ii) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and
(a)(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
(a)(4) a lawyer may share legal fees with a nonlawyer if the fee-sharing arrangement:
(a)(4)(i) is for the sole purpose of providing legal services: ~~and~~
(a)(4)(ii) will not in any way interfere with the lawyer's professional independent judgment in providing legal services to clients, or interfere with the lawyer's duties of loyalty to a client or protection of client confidences; and~~.~~
(a)(4)(iii) satisfies the applicable requirements of ~~r~~Rule 1.5.
(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
(d)(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(d)(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
(d)(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.
(e) A lawyer may practice in a non-profit corporation which is established to serve the public interest provided that the nonlawyer directors and officers of such corporation do not interfere with the independent professional judgment of the lawyer.
Comment
[1] The provisions of this Rule ~~express traditional~~impose limitations on sharing fees ~~. These limitations are~~ to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.
[1][a] This rule is different from the ABA Model rule.
[2] The Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent)

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

1.5

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) A division of a fee between lawyers who are not in the same firm or between a lawyer and non-lawyer as permitted by ~~r~~Rule 5.4 may be made only if:

(e)(1) the division is in proportion to the services performed by each lawyer or by the lawyer and the non-lawyer, or each lawyer assumes joint responsibility for the representation;

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

ALTERNATIVE

(e) A division of a fee between lawyers who are not in the same firm may be made only if:
(e)(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
(e)(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is
confirmed in writing; and(e)(3) the total fee is reasonable.
(f) ŧThe total fee charged under an agreement permitted by ŧRule 5.4 between a lawyer and non-lawyer is reasonable under this rule.

ALTERNATIVE
(f) A lawyer and a non-lawyer may agree to the division of fee as provided in Rule 5.4.

Comment
Reasonableness of Fee and Expenses
[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (a)(1) through (a)(8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.
Basis or Rate of Fee
[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.
[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.
Terms of Payment
[4] A lawyer may require advance payment of a fee but is obligated to return any unearned portion. See Rule1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.
[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is

foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

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

Division of Fees

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

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

Disputes over Fees

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