MEMORANDUM

To: Supreme Court Advisory Committee on the Rules of Professional Conduct

From: Steven G. Johnson

Re: Reponses to Comments to Rules 1.2, 1.6, 1.8, 1.14, and 8.4

Date: May 31, 2005

Following is a review of comments received by the Court regarding proposed Rules 1.2, 1.6, 1.8, 1.14, and 8.4 of the Rules of Professional Conduct.

Rule 1.2

A 4-27-05 comment requests that the deleted portion of Comment 2 to Rule 1.2 be added back in. ("At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that lawyer to do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues . . .") this language makes it clear that the lawyer need not perform at the client's insistence such frivolous tasks as meritless motions and objections.

This language is unnecessary for the following reasons:

1. We have added a new Comment 14 to the Rule: "Lawyers are encouraged to advise their clients that their representations are guided by the Utah Standards of Professionalism and Civility and to provide a copy to their clients. If lawyers provide a copy of these Standards to and discuss them with their clients, the problems raised by this comment would likely be non-existant.
2. Language from old Rule 1.2(d) has now been moved to Rule 1.4(a)(5). This language covers this matter: "A lawyer shall . . . consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."
3. Other rules also apply to the actions contemplated by the deleted language of Comment 2:
    a. Rule 4.4(a): "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."
    b. Rule 3.1 Meritorious Claims and Contentions
    c. Rule 3.3 Candor Toward a Tribunal.
    d. Rule 3.4 Fairness to Opposing Party and Counsel.
    e. Rule 8.4 Misconduct.

No further changes should be made to Rule 1.2.

[See also the notes regarding Rule 1.8, below.]

Rule 1.6

A 5-4-05 comment (by Charles M. Bennett) suggests that the words "or is using" be added to the last phrase of Rule 1.6(b)(2) so that the Rule will read:

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used *or is using* the lawyer's services.

"Has used" includes the time up to and including the most recent time, so the addition of these words is unnecessary.

This same comment suggests that the language of the Model Rule be used in the first part of Rule 1.6(b)(6) so that the Rule reads:

"to comply with other law or a court order or when necessary to comply with these Rules," instead of "to comply with the law or court order or when necessary to comply with these Rules."

I suggest that we not change "the" to "other" because "other" suggests that these Rules are the law. We should, however, add the word "a" before" "court order" so that the redlined version of the Rule reads:

(6) ~~To~~ to comply with ~~the Rules of Professional Conduct or other law~~ the law or a court order or when necessary to comply with these rules;

[See also the notes regarding rule 1.8, below.]

Rule 1.8

A 5-4-05 comment (by Charles M. Bennett) recommends that Rules 1.2, 1.6, 1.8, and 1.9 be modified. The concern of Mr. Bennett is that the Rules as proposed allow a lawyer to be disloyal to a client in certain circumstances. The specific situation that was most troubling to him is the situation where a lawyer represents a fiduciary, and the fiduciary violates his or her trust. Case law and the commentators state that the attorney for the fiduciary has a duty to disclose to the beneficiaries of the trust or estate that the fiduciary has acted wrongfully. This would be contrary to the interests of the fiduciary.

Rule 1.6(a) allows a lawyer to take any action that he or she is impliedly authorized to take in order to carry out the representation. Since a fiduciary is required to provide truthful and complete information to a beneficiary, a competent lawyer for the fiduciary must ensure that relevant information is passed along to the beneficiary, even if the information is not in the best interests of the fiduciary.

Mr. Bennett believes this Rule as proposed forces the lawyer to be disloyal to his or her client.

There are many exceptions to the requirements of confidentiality between a lawyer and his or her client (the attorney-client privilege). To some degree or another, these exceptions can be described as requiring or allowing a lawyer to be disloyal to the

client. These exceptions to the privilege are recognized because of some greater societal needs than maintaining client confidences. Disclosing a fiduciary's misdeeds may very well fit into this kind of exception.

It should be noted that there is no mandatory disclosure of client confidences in the case of a fiduciary's misdeeds. The right to disclose is only permissive. Under the Rule, an attorney can refuse to disclose, even if the fiduciary has a duty to disclose.

I think that Mr. Bennett's concern lies not with the "implied authorization to disclose," but with the generally accepted rule in some jurisdictions that an attorney for a fiduciary has a duty to disclose fiduciary misdeeds to the beneficiaries.

Because the right to disclose is only permissive and not mandatory, and the Rule as proposed does not conflict with current laws, no changes should be made to the Rule as proposed.

This same reasoning applies to Mr. Bennett's recommendations regarding Rules 1.2(a), 1.6(a). and 1.9(c). No changes should be made to those Rules as proposed.

Rule 1.14

A 5-4-05 comment (by Charles M. Bennett) raises a concern about the limitation on a lawyer taking action to protect the interests of a client with diminished capacity. Proposed Rule 1.14(b) allows a lawyer to take protective action when the lawyer reasonably believes that the client has a diminished capacity and is at risk of a *substantial* physical, financial or other harm. It is suggested that the word "substantial" is too limiting. If a client with diminished capacity is at risk of *any* harm, the lawyer should be able to take action, and not have to wait until the risk of harm reaches the "substantial" level. This is a good suggestion. The comment suggests substituting the word "any" for the word "substantial." I see no need to have a limiting adjective, and suggest that the word "substantial" merely be deleted. This deletion should also occur in the first line of Comment 5.

The red-lined Rule 1.14(b) would then read as follows:

(b) ~~A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when~~ When the lawyer reasonably believes that the client has diminished capacity, is at risk of physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest~~.~~, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

The red-lined Comment 5 will read as follows:

[5] If a lawyer reasonably believes that a client is at risk of physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using

voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

A new Comment 5A should be added to read:

[5A] The ABA Model Rules provide that the lawyer may take reasonably necessary protective action if the client has a diminished capacity and if the client is at risk of *substantial* physical, financial or other harm. The word "substantial" has been eliminated from the Utah Rule so that if the client is at risk of any physical, financial or other harm, the lawyer is authorized to take reasonably necessary protective action.

Rule 8.4

(1) A 4-7-05 comment (by Scott Pugsley) states the belief that new Comment 3 to Rule 8.4 attempts to set new standards of political correctness by dictating what is or is not bias. The comment states, "What is bias to one person may be another person's legitimately [held] political or religious belief." The comment further states, "The bar's disciplinary function should not become the profession's 'thought police' or otherwise get involved in the political correctness game."

Comment 3 is not new to the Model Rules, but is new to Utah. It does establish sexual orientation as a new area of potential discrimination in Utah. The Comment does not, however, state that held beliefs are inappropriate, and the Bar will not be involved in attempting to govern a person's political or religious beliefs. The Comment only states that a lawyer should not by comment or action manifest bias or prejudice *when that bias or prejudice is prejudicial to the administration of justice.*

Lawyers should not take action that is prejudicial to the administration of justice, no matter what the basis of that action is.

The Comment explicitly allows legitimate advocacy respecting the listed factors that might give rise to a claim of bias or prejudice.

(2) A comment dated 4-6-05 (by Scott Pugsley) decries the elimination from Rule 8.4 of the prohibition on sexual relations with a client that exploits the lawyer-client relationship. It appears that Mr. Pugsley did not realize that the prohibition was merely moved to Rule 1.8(j), and remains a part of the Rules of Professional Conduct.

For these reasons, Rule 8.4 and the Comments to this Rule as proposed should not be changed.

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May 24, 2005

Members of the Utah Supreme Court
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Members of the Rules of Professional Responsibility Advisory Committee
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Dear Justices and Members of the Rules of Professional Responsibility Advisory Committee:

This letter addresses concerns that the Legislature and its attorneys have with the proposed Rules of Professional Responsibility submitted for comment by the Advisory Committee. As drafted, those rules, particularly the conflict of interest rules, would make it impossible for our legislative attorneys to meet their obligations to the Legislature without violating the Rules of Professional Responsibility. We respectfully request the opportunity to discuss possible modifications of these rules to preserve the ability of our legislative attorneys to provide us with the legal representation we need.

Legislative attorneys have a unique status in the legal world because they are subject to regulation and direction from two co-equal branches of state government: the Judiciary and the Legislature. As attorneys, legislative lawyers are licensed, regulated, and disciplined by the Utah Supreme Court under Article VIII, Section 4 of the Utah Constitution: "The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of person admitted to practice law." UTAH CONST. Art. VIII, Sec. 4. As attorneys employed by the Legislature, legislative lawyers are subject to legislative direction under Article VI, Section 32 of the Utah Constitution: "The Legislature may appoint legal counsel which shall provide and control all legal services for the Legislature unless otherwise provided by statute." UTAH CONST. Art VI, Sec. 32. Legislative lawyers have been able to strike this balance in the past -- to provide the Legislature and individual legislators with the legal services they require while fulfilling their obligations under the Rules of Professional Responsibility.

Unfortunately, the new Rules of Professional Responsibility, as proposed, disrupt that delicate balance. In order to meet the new conflict of interest requirements, for

example, legislative lawyers would be prevented by these rules from drafting many bills, drafting most amendments, and would be seriously limited in the advice they could provide to individual legislators and groups of legislators. In fact, the proposed Rules would literally make it impossible for legislative lawyers to continue to provide the Utah Legislature with the full scope of legal services they have routinely provided over the past 33 years.

The Advisory Committee was probably unaware of the unique nature of the practice of legislative lawyers and that the pronounced effect of the proposed Rules on our practice was likely inadvertent. From our perspective, conversations with the Court or the Advisory Committee or both about the Proposed Rules and their effect on the practice of legislative lawyers would be fruitful: we would be pleased to have our Legislative General Counsel meet with any of you to discuss the Rules and their implications at a mutually agreeable time. Our ultimate objective is to maintain the balance that has always existed: to allow legislative lawyers to meet their professional obligations as lawyers in manner satisfactory to the Utah Supreme Court while providing their clients, the Utah Legislature and its individual members, with the legal services they need.

Thank you for your consideration.

President John Valentine
President, Utah State Senate

Speaker Greg Curtis
Speaker, Utah House of Representatives

Michael Christensen
Director, Office of Legislative
Research and General Counsel

M. Gay Taylor
General Counsel
Utah Legislature

cc: Tim Shea

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June 8, 2005

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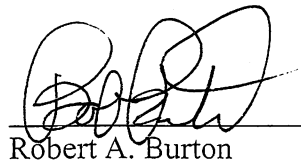
RE: Rules of Professional Responsibility

Dear Messrs. Valentine, Curtis, Christensen, and Ms. Taylor:

I chair the Supreme Court's Advisory Committee on the Rules of Professional Conduct. I have your letter dated May 24, 2005. I have spoken with Ms. Taylor about this letter, and have invited each of you to attend our next committee meeting on June 20, 2005. The meeting will begin at 4:30 p.m., and will be held in the second floor conference room at the offices of the Utah State Bar, 645 South 200 East, Salt Lake City.

In your letter, you requested the opportunity to discuss possible modifications of some of the Rules of Professional Conduct. When I spoke with Ms. Taylor, she stated you are really interested in the conflict of law rules. Since you apparently have some proposed modifications to these rules in mind, it would be very helpful if you could submit to Matty Branch and me your written proposals in advance of our June 20 meeting. That way, Ms. Branch can insure that your written comments are distributed to committee members prior to the meeting and everyone will have had an opportunity to think about and review your proposals before the meeting actually begins.

Yours truly,



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June 20, 2005

The Legislature's Position with Regard to the Proposed Revisions to the Rules of Professional Conduct

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

Thank you for honoring the request to speak to this committee made by President John L. Valentine, Speaker Greg Curtis; Director of the Office of Legislative Research and General Counsel, Mike Christensen, and myself, Legislative General Counsel, Gay Taylor.

I have two points to make today:

FIRST POINT: The Proposed Revisions to the Utah Rules of Professional Conduct, specifically, the provisions related to conflict of interest, consent, and organization as client, (Rules 1.7, 1.8(b), 1.9, 1.11, 1.13, and 1.18) are inconsistent with the constitutional and statutory requirements governing the provision of legal services for the Legislature.

Let me outline and highlight what those governing constitutional and statutory provisions say:

Article VI, Section 32. [Appointment of additional employees -- Legal counsel.]

"... (2) **The Legislature may appoint legal counsel which shall provide and control <u>all</u> [let me underscore that word "all"] legal services for the Legislature unless otherwise provided by statute." (emphasis added)**

"36-12-12. Office of Legislative Research and General Counsel -- Established -- Powers, functions, and duties -- Organization of office -- Selection of director and general counsel.

(1) There is established an Office of Legislative Research and General Counsel as a permanent staff office for the Legislature.

(2) The **powers, functions, and duties of the Office of Legislative Research and General Counsel under the supervision of the director shall be:**

(a) to **provide research and legal staff assistance to all standing, special, and interim committees as follows:**

(i) **to assist each committee chairman in planning the work of the committee;**

(ii) **to prepare and present research and legal information in accordance with committee instructions or instructions of the committee chairman;**

(iii) to prepare progress reports of committee work when requested; and

(iv) to prepare a final committee report in accordance with committee instructions, that includes relevant research information, committee policy recommendations, and recommended legislation;

(b) to collect and examine the acts and official reports of any state and report their contents to any committee or member of the Legislature;

(c) **to provide research and legal analysis services to any interim committee, legislative standing committee, or individual legislator on actual or proposed legislation or subjects of general legislative concern;**

(d) to maintain a legislative research library that provides analytical, statistical, legal, and descriptive data relative to current and potential governmental and legislative subjects;

(e) (I) **to exercise under the direction of the general counsel the constitutional authority provided in Article VI, Sec. 32, Utah Constitution, in serving as legal counsel to the Legislature, majority and minority leadership of the House or Senate, any of the Legislature's committees or subcommittees, individual legislators, any of the Legislature's staff offices, or any of the legislative staff;** and

(ii) **to represent the Legislature, majority and minority leadership of the House or Senate, any of the Legislature's committees or subcommittees, individual legislators, any of the Legislature's staff offices, or any of the legislative staff in cases and controversies before courts and administrative agencies and tribunals;**

(f) **to prepare and assist in the preparation of legislative bills, resolutions, memorials, amendments, and other documents or instruments required in the legislative process and, under the direction of the general counsel, give advice and counsel regarding them to the Legislature, majority and minority leadership of the House or Senate, any of its members or members-elect, any of its committees or subcommittees, or the legislative staff;**

(g) . . . .

(5) In organizing the management of the Office of Legislative Research and General Counsel, the Legislative Management Committee may either:

(a) **select a person to serve as both the director of the office and as general counsel. In such case, the director of the office shall be a lawyer admitted to practice in Utah** and shall have practical management experience or equivalent academic training; or

(b) select a person to serve as director of the office who would have general supervisory authority and select another person to serve as the legislative general counsel within the office. In such case, the director of the office shall have a master's degree in public or business administration, economics, or the equivalent in academic or practical experience and the **legislative general counsel shall be a lawyer admitted to practice in Utah.**" (emphasis added)

This constitutional and its related statutory provision require the legislative general counsel and other attorneys within the Office of Legislative Research and General Counsel (OLRGC) to represent:

- the Legislature;
- the majority and minority leadership of the House or Senate;
- any of the members or members-elect of the House or Senate;
- any of the legislative committees or subcommittees;
- committee chairs;
- legislative staff offices; **and**
- legislative staff.

So it is clear statutorily that attorneys in our office represents not just the Legislature as an organization, but that we represent each component part within the Legislature as well.

Rule 1.13 of the Proposed Utah Rules of Professional Conduct, which governs representation of a governmental entity, states:
"(h) A lawyer elected, appointed, retained, or employed to represent a governmental entity shall be considered for the purpose of this rule as representing an organization. The government lawyer's client is the governmental entity **except as the representation or duties are otherwise provided by law.**" (emphasis added.)
Comment [13a] of this rule, which talks about government agencies, notes that "the relationship between the governmental lawyer . . . and the client may be further defined by statute, regulation, ordinance, or other law. This Rule does not limit that authority."

Clearly, statute has further defined the representation to be provided by OLRGC to be not just the organization of the Legislature, but each and all of its component parts. Because our client is not just one entity, i.e., the Legislature, the proposed conflict of interest provisions seem to require that a written, informed consent document must be sought and signed by each current and even past legislative client where a conflict might exist, before work may be undertaken. That requirement is what makes the conflict of interest rules unworkable for the attorneys for the Legislature. In fact, strictly complying with that requirement would make it impossible for the lawyers in our office to provide the legal services the Legislature has used and relied on for over 30 years.

Let me give you some examples of how our relationship with these many legislative clients works:

Example A - Preparing a bill and any amendments:

- A legislative committee may ask an attorney within our office to draft a bill. The attorney assigned specializes in that portion of the Utah Code, and would draft that bill for the committee.

- The bill would be approved by the committee and numbered.
- During the session, a member of the Legislature, who may or may not have been member of that committee, asks that same attorney to draft an amendment to this committee bill, which the attorney drafter does. This amendment may have the purpose of undoing, changing, or subverting the intent of the bill and the original sponsor's purposes behind that bill. Under traditional and current practice of attorneys within OLRGC, the attorney drafter would prepare the amendment without informing the original sponsor about the amendment. The legislative attorney drafter would keep the amendment confidential until the requesting legislator authorized it to be made public.

Under the classic analysis of conflicts of interest, this act would violate the Proposed Rules of Professional Conduct. The original client, who was the sponsor of the bill, would have a continuing interest in a pending legal matter, which is the passage of the bill. It would be a violation of the proposed rules for the attorney drafter to prepare an amendment for another legislator without the written, informed consent of both legislators, particularly when the attorney drafter knows the proposed amendment is contrary to the intent of the original client, who was the sponsor of the bill. Disclosure to both parties in order to obtain a waiver of this conflict is unworkable because informing the original sponsor about a proposed, unfriendly amendment breaches the duty of confidentiality to the second legislator. And by giving the sponsor advance notice that the amendment is coming, it would allow the sponsor to employ procedural or political tactics to defeat the amendment. Even if the attorney drafter sought the waiver of the conflict, the sponsor would be unlikely to waive it, because the amendment is against his interests. And no other attorney within OLRGC could draft the amendment because the conflict of interest rules would disqualify the entire office.

Obtaining a waiver of the conflict of interest before giving advice or preparing an amendment for another legislator:

- imposes a requirement that is inconsistent with the statute outlining representation by attorneys within OLRGC;
- would violate the confidentiality of the legislator requesting the amendment, particularly because legislators sometimes ask that amendments be prepared and then decide the timing of when or if they are introduced;
- may be impossible to obtain as the amendment may be directly contrary to the original sponsor's primary interests;
- if consent were requested and refused by either the legislative sponsor or the legislator requesting the amendment, may result in no one being authorized to represent the legislator. The Utah Constitution says the Legislature's legal counsel "shall provide and control **all** legal services for the Legislature . . . ." (emphasis added.) Surely that does not mean the legislator requesting the amendment must go without legal counsel, yet this would be the case, because the Utah Constitution, Article VI, Section 32, says legal counsel for the Legislature provides and controls "all legal services for the Legislature".

Example B - Advising the Minority Party on Strategy:

The minority party approaches the Deputy General Counsel and asks for strategic advice on use of the legislative rules to accomplish its political purposes with regard to defeating a gubernatorial appointment. The majority party's interest is to have the appointment confirmed. Therefore, there is a conflict of interest. Is informed, written consent required? Does outlining the "proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct"[Rule 1.0(f)] destroy the confidentiality of the information necessary to the minority party so it may accomplish its purpose? The answer is clear, consent should not be required in this situation.

SECOND POINT: America's form of government provides that each member of Congress, and each member of a state legislature may introduce and amend legislation as part of the legislative process.

In Congress, each Senator and Congressman has their own individual staff to do this, so conflicts of interest do not arise. Similarly, in large states, such as California and New York, where state legislatures work year round, they have majority, minority, and individual staff.

In Utah, the Utah Constitution and its corresponding statute provide for only one nonpartisan staff office that provides and controls all legal services for the Legislature and each of its component parts which make up the Legislature.

You may wonder, how do other state legislative counsel offices handle the conflict of interest provisions under the model law? I asked the National Conference of State Legislatures (NCSL), this question. The response I received from other states through NCSL was that other states treat its legislature as one organization. Therefore, there is no requirement of written, informed consent as to its component parts within the legislature. But Utah's statute is unique in that it specifies that not only the entity of the Legislature is our client, each of its component parts are also our client. So we cannot take this same approach.

In conclusion, although the Proposed Rules of Professional Conduct would generally apply to our practice as legislative attorneys, our representation of multiple legislative clients, as required by law, mandates a limited exemption from rules addressing conflict of interests, consent, and organization as a client. Therefore, we recommend a rule be enacted addressing the unique practice of the attorneys of OLRGC and propose possible language.

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Solution Proposed for Attorneys Representing the Utah Legislature and Its Component Clients

June 20, 2005

Add a New Rule

Rule 1.13.1 - Representing Legislative Clients

(a) A lawyer acting within the course and scope of the lawyer's professional employment with the Office of Legislative Research and General Counsel is exempt from the Utah Rules of Professional Conduct relating to conflict of interest, informed consent, informed consent confirmed in writing, and the organization as client, including Rules 1.7, 1.8(b), 1.9, 1.11, 1.13, and 1.18.
(b) The legislative general counsel is responsible to educate each legislative client about the requirements established in the Utah Constitution and Utah Code that govern the duties of lawyers within the Office of Legislative Research and General Counsel to legislative clients.

Comment
General Principles
[1] The authority for lawyers in the Office of Legislative Research and General Counsel providing legal services to legislative clients has its basis in Utah Constitution, Article VI, Section 32. The attorney-client relationship is further established in Utah Code Annotated Title 36, including Section 36-12-12, and requires legislative lawyers to represent the Legislature, the majority and minority leadership of the House or Senate, any of the members or members-elect of the House or Senate, any of the legislative committees or subcommittees, committee chairs, legislative staff offices, and legislative staff. Because of this unique constitutional and statutory foundation, this Rule allows lawyers in that office to represent its legislative clients as required by the Utah Constitution and statute.

Rules - Comments

Comments: Rules of Professional Conduct

Post a comment

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○ Yes ◉ No

Comments:

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In Rule 1.2, no changes should be made to comment [2]. The deleted sections make it clear a lawyer does not have to perform frivilous tasks at the client's insistence, such as making meritless motions or objections at trial. Such tactical matters should be the lawyer's call. The deletion and replacement of language giving a lawyer control of tactical decisions opens up attorneys, particularly in pro-bono cases, to being willed by their client to waste time, effort and money on things unimportant to the ultimate case outcome.

Rule 5.4 (a) (4) should not be adopted. The reasons for fee sharing concerns do not go away just because the entity getting part of the legal fees is a non-profit, rather than a for-profit organization.
Thank you

Posted by April 27, 2005 10:17 AM

Rule 1.5

I'm not the brightest bulb on the tree but I have some concerns about the change in fee agreements for hourly clients. I believe that the stringent rule of requiring written fee agreements in almost all cases relieves the lawyer and client of ambiguities. While attorneys may find themselves in tight spots when this requirement is not met – and I really am not for making it harder on us – the written fee agreement idea in every instance is a good practice. I do not think this requirement should be lessened in any way.

Posted by Scott Hadford April 25, 2005 05:34 PM

From: "Scott Pugsley" <Scott.Pugsley@ihc.com>
To:<tims@email.utcourts.gov>
Date: 4/7/05 9:16AM
Subject: Comment on new comment (3) to Rules of Professional ConductRule 8.4

New comment (3) to rule 8.4 Misconduct, adds a standard of political correctness to a rule that otherwise would seem to have nothing to do with that subject, which is conduct prejudicial to the "administration of justice." Lawyers and judges should lead out in recoiling in horror at any attempt to intimidate anyone, including other lawyers, who want or need to make politically unpopular statements, even ones involving "bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status." What is bias to one person may be another person's legitimately help political or religious belief. Forcing a lawyer in the course of representing a client to make political judgments on what constitutes "legitimate advocacy" and what may offend the delicate sensibilities of the political elite, makes no sense to me. Judges are well able to control inappropriate behavior in their proceedings, and these rules are not the place to put this kind of implied threat against unpopular thought and "words." The bar's disciplinary function should not become the profession's "thought police" or otherwise get involved in the political correctness game.

Scott Pugsley
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Date: 4/6/05 5:16PM
Subject: Comment on Rules of Professional Conduct Rule 8.4(g)

Mr. Shea:

It turns out that the on-line comment functionality for the proposed rules will not allow me to submit a comment with the word "sex" in it, something that is quite necessary to the comment I would like to make. Therefore, I submit my comment directly to you in the hope that you will direct it to the right place.

I am opposed to deleting Rule of Professional Conduct 8.4(g) dealing with sexual conduct with clients. The ethical rules of other learned professions such as medicine continue to recognize this standard; why not for lawyers? Is the conduct that was previously forbidden now acceptable? If so, how did that happen? Please reconsider this change.

See, e.g., AMA Policy E-8.14 Sexual Misconduct in the Practice of Medicine.

"Sexual contact that occurs concurrent with the physician-patient relationship constitutes sexual misconduct. Sexual or romantic interactions between physicians and patients detract from the goals of the physician-patient relationship, may exploit the vulnerability of the patient, may obscure the physician's objective judgment concerning the patient's health care, and ultimately may be detrimental to the patient's well-being. If a physician has reason to believe that non-sexual contact with a patient may be perceived as or may lead to sexual contact, then he or she should avoid the non-sexual contact. At a minimum, a physician's ethical duties include terminating the physician-patient relationship before initiating a dating, romantic, or sexual relationship with a patient. Sexual or romantic relationships between a physician and a former patient may be unduly influenced by the previous physician-patient relationship. Sexual or romantic relationships with former patients are unethical if the physician uses or exploits trust, knowledge, emotions, or influence derived from the previous professional relationship. (I, II, IV) Issued December 1989; Updated March 1992 based on the report "Sexual Misconduct in the Practice of Medicine," adopted December 1990 (JAMA. 1991; 266: 2741-2745)."

See also the Utah Professional Licensing Act, Title 58, Chapter 1, section 58-1-501 "Unlawful and unprofessional conduct. ... (2)

"Unprofessional conduct" means conduct, by a licensee or applicant, that is defined as unprofessional conduct under this title or under any rule adopted under this title and includes: ... (k) verbally, physically, mentally, or sexually abusing or exploiting any person through conduct connected with the licensee's practice under this title or otherwise facilitated by the licensee's license; ...."

Why should Utah lawyers be subject to a lesser standard than the state's plumbers, architects, and contractors?

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Comments: Rules of Professional Conduct

Statewide Association of Public Attorneys
Board of Directors
Resolution Regarding Proposed Rule 4.2 of the Rules of Professional Conduct

Whereas: This board represents the prosecutors and government civil attorneys of the State Of Utah; and

Whereas, provision of competent and ethical legal advise to investigative agencies is of paramount importance to the preservation of individual freedom and the protection of society from criminal activity;

Now therefore: We urge the following modification of the proposed rule.

First of all, we express our gratitude to the members of the committee for their professional cooperation in working out the difficulties in Rule 3.8 and Rule 4.2. These rules remain among the most balanced in the nation.

One proposed change in the wording of 4.2(a) is of great concern. The redrafting of paragraph (a) is generally a good idea since it adds the idea that communication should be restricted to that allowed by the law, rule or court order. That is undeniably good public policy. The difficulty is the use of the words "meet the requirements" on line 12 of the draft of March 25, 2005. The current rule uses the standard of "...authorized to do so by....". The difference is potentially very significant. Government attorneys are not "required" to advise police in legally conducted undercover investigations, but they are certainly "authorized" to do so. If they are discouraged from giving such advice by the Rules of Professional Conduct, the potential for violation of individual rights by zealous but unadvised law enforcement agents is enormous.

We realize that such an outcome is not the purpose of the committee since the Rule contains several contrary provisions. First, the very sentence containing the word "requirements" then goes on to refer to restricting the communication to that "allowed by the law, rule or court order....(line13). Second, paragraph (c) of the rule contains extensive authorization of the type of conduct in question, but makes no mention of the public attorney's being "required" to perform the described duties. Third, Comment 7 (beginning on line124) describes paragraph (a) - the language in question - as allowing the communication "...if the communicating lawyer is authorized to do so..." (Line130). Judging from the comment, there was no change (or at least intended change) in paragraph (a).

We suggest that the following language resolves the issue:

On line 12 delete the words "in order to meet the requirements of" and in their place insert the words "if authorized to do so by".

This change would preserve both the carefully negotiated and crafted provisions of the current Rule 4.2 and the improvements suggested by the committee.

Resolved this 6th day of June, 2005, in a regular meeting of The Board of Directors of the Statewide Association of Public Attorneys by a vote of eleven in favor and none

against.

/s/ David E. Yocom, Chairman /s/Paul W. Boyden, Executive Director

Posted by Paul W. Boyden June 6, 2005 03:34 PM

In Rule 1.2, no changes should be made to comment [2]. The deleted sections make it clear a lawyer does not have to perform frivilous tasks at the client's insistence, such as making meritless motions or objections at trial. Such tactical matters should be the lawyer's call. The deletion and replacement of language giving a lawyer control of tactical decisions opens up attorneys, particularly in pro-bono cases, to being willed by their client to waste time, effort and money on things unimportant to the ultimate case outcome.

Rule 5.4 (a) (4) should not be adopted. The reasons for fee sharing concerns do not go away just because the entity getting part of the legal fees is a non-profit, rather than a for-profit organization.
Thank you

Posted by April 27, 2005 10:17 AM

Rule 1.5

I'm not the brightest bulb on the tree but I have some concerns about the change in fee agreements for hourly clients. I believe that the stringent rule of requiring written fee agreements in almost all cases relieves the lawyer and client of ambiguities. While attorneys may find themselves in tight spots when this requirement is not met – and I really am not for making it harder on us – the written fee agreement idea in every instance is a good practice. I do not think this requirement should be lessened in any way.

Posted by Scott Hadford April 25, 2005 05:34 PM

Regarding Rule 4.2:
It seems to me that we have a good opportunity here to strengthen substantially the explanation of contact with corporate or quasi-governmental boards or agencies. For instance, at a shareholders meeting, can a represented shareholder have his attorney make a presentation to the board if the company's counsel is not present? In other words, does the prohibition apply equally to corporate individuals as well as entire corporate boards? We should think about this, anyway, to avoid having to address it in later proceedings.

Posted by Scott M. Ellsworth May 27, 2005 01:49 PM

The Utah Supreme Court Advisory Committee on the Rules of Professional Conduct

Re: Comment to the proposed change to Rule 4.2.

Dear Committee Members,

I very much appreciate the fact that you have consistently been cooperative and professional in considering the concerns of law enforcement and public attorneys. I'm confidant that the current proposal to re-word Rule 4.2 was not intended to produce significant substantive changes. However, it is my opinion that if adopted, the proposed change will have unanticipated, but broad and significant adverse impact upon law enforcement and their ability to receive sound legal advice.

The current Rule 4.2 allows communication by a lawyer when "...**authorized** to do so by: ..." the constitution, statutes etc. The new language which replaces that concept would only allow communication "...in order to meet the **requirements** of any law...." [See line 5 of the March 25, 2005 draft.] If adopted, this would result in a substantial and unacceptable change, particularly as it pertains to legally conducted undercover operations. Public attorneys are not necessarily **required** by law to advise police in investigations, but they are **authorized** to do so.

For example, the Constitution allows an undercover investigator to perform pre-indictment, pre-charge undercover operations that may involve speaking with the target of the investigation even if that person has engaged a lawyer. Since there is no **requirement** to advise police, lawyers who advise the police might simply tell the police that they cannot consult legal counsel during investigations. The shackling of government lawyers and thwarting legal advice to law enforcement agencies is obviously not what is sought by the Rules of Professional Conduct. That result also would be inconsistent with the goals of subsections (c) and (d) of Rule 4.2.

On lines 127 through 131 of the proposal, in the *Comment* section, I note that the lawyer may communicate if " . . . the communicating lawyer is **authorized** to do so by law, rule or court order." So the proposal to change the text of the rule from **authorized** to **required** would produce an inconsistency between the text of the rule and the comment.

Based upon these concerns, I respectfully suggest that this problem is most easily solved as follows:

> *On line 12 delete the words* "in order to meet the requirements of" *and insert the word* "if authorized to do so by".

Re-wording the text of the rule to permit communications when "authorized" by law, etc. would also be consistent with the Rule 4.2 amendments which were adopted in the late 1990s after many months of negotiation and careful crafting. The current proposal to change the wording to "in order to meet the requirements of . . ." would be entirely inconsistent with the intention of the agreements reached in the 1990s between prosecutors, defense lawyers,

legislators and the Utah Supreme Court.

I hope that this comment is helpful to the committee. However, if you are still inclined to retain the proposed new requirement that would limit Rule 4.2 to communication to "meet the requirements of law," then I would appreciate the opportunity to address the committee at the earliest available time. The proposed wording as it now stands would result in a major policy dispute and, in my view, would be significantly detrimental to law enforcement policy in Utah and would interfere with providing sound legal advice to law enforcement officers who legitimately seek that legal advice in order to comply with our laws.

Thank you for the tremendous service you render in working to improve and clarify the rules under which we all serve. Thanks also for your consideration of this issue, and for the opportunity to share my concerns.

Sincerely,

Mark L. Shurtleff
Utah Attorney General

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Henry K. Chai II (1952-2004)

May 4, 2005

Timothy Shea
By email

Re: The Proposed Utah Rules of Professional Conduct
Comments of Charles M. Bennett

Dear Tim:

I am writing with my recommendations concerning the proposed revisions to the Utah Rules of Professional Conduct (URPC). I have attached a copy of my resume to my email so that you can see that I have had substantial experience regarding the application of the Model Rules of Professional Conduct to lawyers practicing as trust and estate lawyers. I think my comments, though lengthy, will be of assistance to the Supreme Court in finalizing the revised Utah Rules of Professional Conduct.

1. **Restricting a Lawyer's Ability to be Disloyal to a Client.** I believe the amendments to the URPC should make clear that a lawyer may not use confidential information to a client's disadvantage except under the specific circumstances set forth in proposed Rule 1.6(b) or with the client's informed consent. I propose changes to Rule 1.6(a), Rule 1.8(b), Rule 1.2(a) and Rule 1.9(c) to effectuate this recommendation.

Current Rule: Under the current Utah Rules of Professional Conduct (URPC), a lawyer is not impliedly authorized to take any action to the disadvantage of a client. In Rule 1.6(a), Utah deleted the phrase "unless . . . the disclosure is impliedly authorized in order to carry out the representation . . .." Arguably, a Utah lawyer must have an express authorization in all cases. Furthermore in Rule 1.8 (b) (regarding not using "information relating to the representation . . . to the disadvantage of the client"), Utah deleted the last phrase of the Model Rules of Professional Conduct (MRPC) Rule 1.8(b) that provided "except as permitted or required by these Rules." Given that the URPC had deleted the implied authorization provision in Rule 1.6(a) and the

proviso at the end of Rule 1.8(b), it followed logically that a Utah lawyer could not use information relating to the representation, including confidential information under Rule 1.6(a), to a client's disadvantage, unless the client provided informed consent, the disclosure was specifically authorized under Rule 1.6(b), or unless the disclosure was required by other rules. *See* URPC Rule 3.3.

Revised ABA Rule: Under the prior version of the MRPC and the current version of the MRPC (proposed for adoption in Utah), under Rule 1.6(a) of the MRPC, a lawyer is impliedly authorized to disclose confidential information "in order to carry out the representation . . .." Further, under Rule 1.8(b) the lawyer's duty **not** to use information to a client's disadvantage is subject to the exception "except as authorized *or permitted by these rules.*" Emphasis added.

Interpretation of Rule 1.6(a) and Rule 1.8(a). What prompts my comment is that several authoritative sources take the position that the implied authorization in Rule 1.6(a) authorizes a lawyer representing a fiduciary client to disclose information harmful to the client to the beneficiaries of the fiduciary estate. Rule 1.8(b) creates no obstacle to these sources because "the use of information to a client's disadvantage" is permitted if the lawyer is authorized to make the disclosure under any other rule, including Rule 1.6(a).

When a lawyer represents a fiduciary in its fiduciary capacity, such as lawyer for a personal representative or for a trustee, I do not believe the lawyer should ever be "impliedly authorized" to disclose the fiduciary's misconduct. To act disloyally, the lawyer should have the fiduciary's express consent. Without that, the lawyer should only be allowed to disclose information as allowed by Rule 1.6(b) or as required by other rules.

The Correct Statement of the Lawyer's Ethical Duties

Before citing the authorities that rely on "implied authorization" to permit disloyal disclosures, I believe the correct rule is set forth in the Restatement (Third) of the Law Governing Lawyers that concludes that a lawyer should not disclose confidential client information to the detriment of the client. The relevant sections are Sections 60 through 67.

> § 60. A Lawyer's Duty To Safeguard Confidential Client Information
>
> > 1) Except as provided in §§ 61-67, during and after representation of a client:
> >
> > (a) the lawyer may not use or disclose confidential client information as defined in § 59 if there is a reasonable prospect that

> doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information.

See also § 61. Using Or Disclosing Information To Advance Client Interests; § 62. Using Or Disclosing Information With Client Consent; § 63. Using Or Disclosing Information When Required By Law; § 64. Using Or Disclosing Information In A Lawyer's Self-Defense; § 65. Using Or Disclosing Information In A Compensation Dispute; § 66. Using Or Disclosing Information To Prevent Death Or Serious Bodily Harm; and § 67. Using Or Disclosing Information To Prevent, Rectify, Or Mitigate Substantial Financial Loss.

The exceptions allowing disclosure in Sections 63 through 67 of the Restatement (Third) of the Law Governing Lawyers are those contained in proposed URPC Rule 1.6(b).

Authoritative Sources Permitting Disloyal Disclosures Based on Implied Authorization under MRPC Rule 1.6(a)

The Law of Lawyering

Hazard & Hodes in their treatise entitled The Law of Lawyering make these highly relevant comments:

> Although the basic command of Rule 1.6 is that lawyers must maintain silence with respect to information about their clients, there are many situations in which clients either actively want disclosures made or in which it can be assumed that they would want disclosures made in order to advance the task the lawyer has engaged to carry out. In still other situations, *the operation of* law requires that disclosure be made by the client or by the lawyer as the client's agent. All of these situations are contemplated by the introductory language of Rule 1.6(a) permitting disclosures "that are impliedly authorized in order to carry out the representation."

The Law of Lawyering 1.6:201-l "Authorized or Required Disclosure of Information About a Client" at 158 (emphasis added). Based on the idea that a client impliedly authorizes all disclosures that the operation of law demands, the authors then argue:

> Since a fiduciary is required to provide truthful and complete information to a beneficiary, a competent lawyer for a fiduciary *must insure* that such information is in fact passed along. Disclosing this kind of information must be understood as "impliedly authorized in order to carry out the representation," as set forth in Rule 1.6(a). As

> discussed in 5 1.6:201- 1 [see quoted language above], it is often the *case* that *clients would rather nor have disclosed what they have already "authorized"* to be disclosed in this sense, and that would certainly include defalcating or otherwise faithless fiduciaries.

The Law of Lawyering 1.3: 108 "Primary and Derivative Clients" at 78-80.1, fn. 2.1 (emphasis added).

I strongly disagree with these comments because, first and foremost, I do not believe that a lawyer should ever be allowed to rely on an "implied" authorization to act disloyally. In addition, when the "operation of law" requires disclosure, a client's consent is irrelevant. The lawyer discloses because he or she must. Moreover, the concept that the client has already agreed to the lawyer's disloyal disclosure "and would rather it not be disclosed" implies that even an express consent cannot be revoke. This is directly rebutted by Comment 21 of proposed URPC Rule 1.7. Finally, I find the concept that a lawyer for a fiduciary "must insure" any result exceptionally troubling. If that is the law, the lawyer for the fiduciary is the real fiduciary, while the fiduciary is only a titular head.

The ACTEC Commentaries

Drawing upon this same idea of "implied" authorization to act disloyally, the ACTEC Commentaries to the Model Rules of Professional Conduct (published by the ACTEC Foundation and the American College of Trust & Estate Counsel) make the following comments:

> As indicated in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), the lawyer and the fiduciary may agree between themselves that the lawyer may disclose to the beneficiaries or to an appropriate court any action or inaction on the part of the fiduciary that might constitute a breach of trust. Whether or not the lawyer and fiduciary enter into such an agreement, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). The existence of those duties alone may qualify the lawyer's duty of confidentiality with respect to the fiduciary. *Moreover, the fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may impliedly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries.*

Emphasis added. Commentary to Rule 1.6, the ACTEC Commentaries, The ACTEC

Foundation, (4th Ed. 2005, unpublished at this date, but it is in the final editorial, review process). This supports the same point made by Hazard and Hodes. A lawyer is impliedly authorized to act disloyally.

In the Commentary to Rule 1.2, to which the quoted material is cross referenced, the Commentaries suggest this:

> *Disclosure of Acts or Omissions by Fiduciary Client.* In some jurisdictions a lawyer who represents a fiduciary generally with respect to the fiduciary estate may disclose to a court or to the beneficiaries acts or omissions by the fiduciary that might constitute a breach of fiduciary duty. In deciding whether to make such a disclosure, the lawyer should consider MRPC 1.8 (b). See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In jurisdictions that do not require or permit such disclosures, *a lawyer engaged by a fiduciary may condition the representation upon the fiduciary's agreement that the creation of a lawyer-client relationship between them will not preclude the lawyer from disclosing to the beneficiaries of the fiduciary estate or to an appropriate court any actions of the fiduciary that might constitute a breach of fiduciary duty.* The lawyer may wish to propose that such an agreement be entered into in order better to assure that the intentions of the creator of the fiduciary estate to benefit the beneficiaries will be fulfilled. Whether or not such an agreement is made, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. The nature and extent of the duties of the lawyer for the fiduciary are shaped by the nature of the fiduciary estate and by the nature and extent of the lawyer's representation.

ACTEC Commentaries to Rule 1.2 (Fourth Edition, unpublished).

I have never even contemplated following this suggestion because I think it is unworkable. When a client hires a lawyer, the one thing that the client expects is that the lawyer will be a zealous and loyal advocate for the client. Asking a client to permit disloyal acts in favor of non-clients at the outset of the representation seems an impossible way to start an attorney client relationship.

The Commentaries, having recommended an agreement with the client authorizing disloyal acts in favor of non-clients, then restrict the lawyer's ability to contract with the fiduciary to be a loyal advocate:

> *Lawyer Should Not Attempt to Diminish Duties of Lawyer to Beneficiaries Without Notice*

> *to Them.* Without having first given written notice to the beneficiaries of the fiduciary estate, an attorney who represents a fiduciary generally should not enter into an agreement with the fiduciary that attempts to diminish or eliminate the duties that the lawyer owes to the beneficiaries of the fiduciary estate. For example, without first giving notice to the beneficiaries of the fiduciary estate, *an attorney should not agree with a fiduciary not to disclose to the beneficiaries of the fiduciary estate any acts or omissions on the part of the fiduciary* that the lawyer *would otherwise be permitted* or required to disclose to the beneficiaries. In jurisdictions that permit the lawyer for a fiduciary to make such disclosures, the lawyer generally should not give up the opportunity to make such disclosures when the lawyer determines the disclosures are needed to protect the interests of the beneficiaries.

ACTEC Commentaries (1999) at 56-57 (emphasis added).

If this Commentary accurately states the law, it is unethical to contract with a fiduciary client to provide loyal service to the fiduciary. In my engagement letters, I specifically advise fiduciary clients that I will be loyal to them. I also advise them of their duties and responsibilities. The key issue is what I should or can do if I learned of a breach of trust. My position is that without the fiduciary's informed consent, I would generally not disclose the misconduct to the beneficiaries. If the provisions of Rule 1.6(b) applied, I might disclose the misconduct, but I could also make either a noisy or quiet withdrawal. The italicized language further shows the general feelings of the original drafters of the ACTEC Commentaries, consistent with the views of Hazard and Hodes, that lawyers owe a greater duty of loyalty to the beneficiaries of the fiduciary estate than lawyers owe to their fiduciary clients. That makes lawyers watchdogs for third parties rather than advocates for their clients. I do not think that is what the Supreme Court would want for Utah.

The ABA's Real Property, Probate, and Trust Law Section's Special Study Committee

The third authoritative source takes a position that is even stronger, and thus even more troubling, than Hazard and Hodes and the ACTEC Commentaries. In 1994, the ABA's Real Property, Probate, and Trust Law Section established an ad hoc "Special Study Committee" to review lawyer client confidentiality issues in a variety of estate situations, including fiduciary representation. 28 Real Prop. Prob. & Tr. J. 765 (1994). In its Report, in the section entitled *Counseling the Fiduciary,* the Special Study Committee considered whether a lawyer could agree with a fiduciary to be loyal to the fiduciary and not disclose information to the beneficiaries. The Committee concluded:

> *The Duties of the Lawyer for the Fiduciary May Be Modified by a Written Agreement. . .*." [In executing an engagement agreement between a fiduciary and its lawyer,] if the rights or protections of the beneficiaries will be affected, *the beneficiaries also must consent to the agreement.* For instance, *if the fiduciary wants to take away the lawyer's authority to disclose breaches of fiduciary duty to the beneficiaries, the beneficiaries' consent is required.*

Special Study Committee Report at 861 (emphasis added). Thus, if a lawyer follows this counsel, the lawyer must have the consent of a non-client before agreeing to be loyal and protect the confidences of the fiduciary client. That, I think, is a rejection of the fundamental concept that a lawyer represents a client, not third parties.

Recommended Solution

My concern is that these authoritative sources could lead a Utah Court to view disloyal actions in this manner. I do not think that is what Rule 1.8(b) was intended to convey nor do I think this is a result that the Supreme Court would want.

Since all of these comments are based on the concept in Rule 1.6(a) that a lawyer is impliedly authorized to act disloyally "in order to carry out the representation," my suggested solution is to enact changes to Rules 1.8, 1.6, 1.2(a) and 1.9(c) that would preclude this interpretation.

Recommendations Regarding Rule 1.8(b)

I view the suggested change to Rule 1.8 as the most important change. The problem in terms of drafting is that if a disclosure is permitted in Rule 1.6(b), then a lawyer "may disclose" it. Thus, where Rule 1.6(b) is concerned, the exception for disloyal disclosures "permitted by the Rules" is appropriate. Similarly, if the lawyer has the client's informed consent under Rule 1.6(a), the lawyer may properly disclose the confidential information. Furthermore, a lawyer in a court proceeding, such as a review of a fiduciary's fee application or accounting, might be required to disclose information that is prejudicial to the client under Rule 3.3. Accordingly, I do not think deleting "required or permitted" is appropriate.

I suggest the following change to the "exception" language in Rule 1.8(b): "except when the lawyer is required to disclose information relating to the representation of the client under these rules, when the lawyer is permitted to disclose confidential information under Rule 1.6(b), or when the lawyer has the client's informed consent under Rule 1.6(a)." By narrowing the scope of the exception, the implied authorization under Rule 1.6(a) could not serve as a basis for a disloyal disclosure of confidential information.

Recommendations Regarding Rule 1.6(a)

In addition to this change, Rule 1.6(a) could be changed by adding after the phrase "in order to carry out the representation", this phrase "to the client's advantage." While not technically necessary, I think it is better to have the point made in both places. In addition, I think this change needs to be made to proposed Rule 1.2(a).

Recommendation Regarding Rule 1.2(a)

Please note also that the new version of MRPC Rule 1.2(a) includes a statement that lawyers are "impliedly authorized to take . . . actions . . . in order to carry out the representation." Consistent with my recommendations regarding Rules 1.6(a) and 1.8(b), I recommend this also be changed by adding the phrase "to the client's advantage" after the word "representation."

Recommendation Regarding Rule 1.9(c)

Rule 1.9(c) provides:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Consistent with Rule 1.8(b), I would suggest these changes:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (c)(1) use information relating to the representation to the disadvantage of the former client except when the lawyer is required to disclose information relating to the representation of the former client under these rules, when the lawyer is permitted to

disclose the former client's confidential information under Rule 1.6(b), or when the lawyer has the former client's informed consent under Rule 1.6(a); or

(c)(2) reveal information relating to the representation except when the lawyer is required to disclose information relating to the representation of the former client under these rules, when the lawyer is permitted to disclose confidential information regarding the former client under Rule 1.6(b), or when the lawyer has the former client's informed consent under Rule 1.6(a).

(c)(3) This subsection (c) does not prohibit the disclosure of information that has become generally known.

Special Note re Oxendine v. Overturf

In *Oxendine v. Overturf*, the Utah Supreme Court ruled that a lawyer representing a personal representative in a wrongful death action normally has a duty of care to the statutory heirs of the wrongful death action as intended third party beneficiaries of the contract between the lawyer and the personal representative. 1999 UT 4 (1999), ¶¶ 12-16. A lawyer for a fiduciary in such cases could have a need to disclose fiduciary misconduct to fulfill the lawyer's duty to the statutory heirs. In those circumstances, the lawyer's disclosure would be authorized under Rule 1.6(b)(6) (provided the language is changed back to the MRPC language; *see* my comments in paragraph 4 below). The lawyer may also be authorized to make a disclosure in those circumstances under Rule 1.6(b)(5) (to establish a defense to a civil claim against the lawyer involving the representation of the client).

Conclusion

Please excuse the lengthy explanation. If you feel it was not necessary, I apologize. I hope the reasoning behin my recommendation is helpful.

2. Keeping the $750 threshold Activating the Requirement for Written Statements Concerning Fees.

I also request that the changes to Rule 1.5 that eliminated the $750 threshold be reexamined and the threshold be reinstated.

As a member of ACTEC's Professional Responsibility Committee, I have listened to

many fine estate planning lawyers make impassioned pleas that the ACTEC Commentaries **not** require engagement letters or written statements regarding fees. These generally older lawyers have never used agreements, engagement letters, nor written statements, and they do not want to change. The Commentaries agreed to recommend, but not require, agreements etc. Political capital was paid and received.

The former MRPC and the current MRPC require a communication, "preferably in writing," but that is the extent of the ethical requirement to disclose the fee arrangement.

Under Utah's current Rule 1.5, if the fees are likely to exceed $750, the lawyer has a duty to provide the client with a written statement of the basis for the lawyer's fee. This is where the law should be now, and in the future, lawyer's should be required to have a client's informed consent, confirmed in writing, as to the basis of the lawyer's fees. Returning to the MRPC approach is a step backwards in Utah that serves neither the public or lawyers. Lawyers who are forced to provide the written statement will have fewer disputes with clients regarding fees. Clients will be benefitted by knowing they agreed to the basis of the fee or, if they were surprised by the written statement, by seeking new counsel.

I would strongly recommend that the threshold of $750 and the activation of the need for a written statement regarding the basis of the fee be continued under the proposed URPC Rule 1.5.

3. Changing Rule 1.14's Requirement of "substantiality" as a threshold for action.

I was a co-Reporter of 4th Edition of the ACTEC Commentaries, and the drafter of the Commentary on Rule 1.14. My colleagues on ACTEC's Professional Responsibility Committee and I were concerned about the requirement in Rule 1.14(b) that the person with diminished capacity must be at risk of "substantial physical, financial or other harm" before the lawyer's ability to take protective action is activated. To deal with this issue, we "interpreted" substantiality as follows:

> *Risk and Substantiality of Harm.* For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. In particular, the client's diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any

> wishes or directions that were clearly expressed by the client during his or her competency. Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client.

ACTEC Commentary to Rule 1.14 (Fourth Edition, unpublished). We believed that a lawyer should err on the side of protection, not inaction. However, a strict reading of "substantial physical, financial or other harm" might cause lawyers depending on the Rule itself to refuse to act. I think the ACTEC Commentary's approach is sound, but I think a better solution would be to change Utah's version of MRPC Rule 1.14 to authorize action by a lawyer if the client is "at risk of *any* physical, financial, or other harm."

Rule 1.14 is not mandatory. It is permissive. Setting the threshold at a lower level seems consistent with the intent of Rule 1.14. Moreover, the opportunities for a lawyer to abuse a client's rights with diminished capacity is no greater under the lower standard. A lawyer intent on abuse will certainly be able to find a "substantial physical, financial or other harm" or may have no concern with this requirement in any event. I think Utah is better served by lowering the standard because ethical lawyers should have the discretion to act when there is harm, even if someone else might feel that the harm was insubstantial.

Clarifications

4. Requested Changes to Clarify the Wording of Rule 1.6. I think the last phrase of Rule 1.6(b)(2) should be changed to read "in furtherance of which the client has used *or is using* the lawyer's services." The italicized words are an addition to the text.

Proposed Rule 1.6(b)(6) reads: "To comply with the law or court order or when necessary to comply with these rules." The revised MRPC rule reads: "To comply with other law or a court order." I think the proposed URPC rule is confusing. What is "the law" and what is "the court order?" I recommend that the MRPC text be adopted and that the last parenthetical added to the MRPC version in proposed Rule 1.6(b)(6) be retained.

5. Comment [2a] to URPC Rule 5.4 is Unclear and May be Inaccurate. Comment [2a] to Rule 5.4 states that paragraph 4 of the ABA Model Rule was not adopted because it was inconsistent with the provisions of Rule 7.2(c). I believe the deleted paragraph is MRPC Rule 5.4(a)(4). That paragraph provides: "(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter." I think the cross reference should be to Rule 7.2(b) rather than (c). Here are the two sections:

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Rule 7.2(c) does not address the issue raised in MRPC Rule 5.4(a)(4). While Rule 7.2(b) prohibits giving anything of value for the recommendation of a lawyer's services, Rule 5.4 authorizes the sharing of fees when the lawyer is employed or retained by a non-profit organization, in addition to when the lawyer is recommended by the non-profit.

I think the issue is not whether there is a conflict (that can be resolved) but whether the policy expressed in Rule 5.4(a)(4) is wise. The Comments to Rule 5.4 shed no light on the issue. I do not have the experience to comment further, but I think that the Supreme Court should make the decision on whether to retain or jettison paragraph (a)(4) of Rule 5.4 based on policy considerations and not the partial inconsistency identified in Comment [2a].

If you have questions or concerns about these recommendations and you would like me to comment further, please contact me.

Sincerely yours,

/s/

Charles M. Bennett

CMB/wps

June 6, 2005

COMMENT - PROPOSED CHANGES TO RULE 4.2

An attorney for the United States Government, including, of course, any Assistant United States Attorney, is, under 28 USC 530B, "subject to State laws and rules, and local and Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." Recent changes to the United States Attorneys Manual address contact with represented persons. USAM 9-13.200, makes it clear that Department of Justice attorneys "are governed in criminal and civil law enforcement investigations and proceedings by the relevant [State] rule of professional conduct that deals with communications with represented parties."

For these reasons, as the United States Attorney for the District of Utah, I am especially interested in Rule 4.2 issues. The Office has been an active participant in efforts to revise Rule 4.2 since 1995 when Scott Matheson, Jr., first asked the Utah State Bar for guidance in connection with federal attempts to clarify our duty regarding contact with represented persons and parties.

After the issuance of Utah Ethics Advisory Opinion No. 95-5 (January 1996), which attempted unsuccessfully to deal with the issues Scott raised, and in light of then Chief Justice Michael Zimmerman's involvement in the national effort to create a model Rule 4.2, the Utah State Bar suspended the "enforcement" of Opinion No. 95-5 pending further study.

A working group was formed by the Utah State Bar to examine the contact with represented persons and parties issue and come up with a recommended rule. The United States Attorneys Office was represented on the working group by David Schwendiman, who was then the First Assistant in the Office. Representatives from the Utah Attorney General's Office and the defense bar were also part of the group as were representatives from the Utah State Bar.

The efforts of the working group over more than a year resulted in the current version of Rule 4.2. It became a model looked to around the country for its balance and the care with which it was worded..

As far as I know, since its adoption, there have been no reported problems with the wording of the current version of Rule 4.2 and, to the best of my knowledge, no reports of abuse resulting from the way in which it is written or interpreted. There is, therefore, no reason that I know of for changing it.

In reviewing the proposed changes to Rule 4.2, I am troubled by two things. First, the substantial deletion of the following language from the Rule:

> (a) General Rule. A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer *or is*

authorized to do so by:

> (1) constitutional law or statute;
>
> (2) a decision or rule of a court of competent jurisdiction;
>
> (3) a prior written authorization by a court of competent jurisdiction obtained by the lawyer in good faith; or
>
> (4) paragraph (b) of this rule [exceptions governing government lawyers engaged in civil or criminal law enforcement and having to do, generally, with investigations regarding unrelated matters, matters involving imminent risk of death or serious bodily injury, communications made at the time of arrest, or communications initiated by the represented person].

I am unaware of any problems with this language, yet the proposed wording changes the rule to read:

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

The italicized phrases in both versions, the deletion of "is authorized to do so" in the one case, and the addition of "in order to meet the requirements of any law, rule, or court order," in the other, are the root of the problem I have with the proposed alteration of the existing rule.

From a law enforcement point of view, the change from what a prosecutor is *authorized* to do, especially a federal prosecutor who has rather broad routine responsibilities related to investigations, advising federal law enforcement agents and officers about contact with persons who may be represented being one, to what he or she *must do in order to meet the requirements of law, rule or court order*, is a significant and, in my opinion, unnecessary reversal of what was accomplished by the careful wording of the existing rule. As a prosecutor and adviser to law enforcement, there are things I am authorized to do which I am certainly not compelled to do to meet the requirements of law, rule or court order, when it comes to having contact with a represented party or person or advising law enforcement regarding same during the course of an investigation. *See e.g.* United States v. Ryan, 903 F.2d 731 (10th Cir. 1990). On the other hand, the limits set out in the existing Rule 4.2 are adequate, and have proven to be adequate, to keep me or investigators working

for me from going beyond what is allowed under the constitution, existing statutes, rules or an appropriate court order. It is in the best interests of the public to have me advise law enforcement on these issues; it limits the potential for abuse if I do.

If the rule is working the way it is, why change it, particularly when the change may have the unintended consequence of making it necessary for me to avoid advising officers and agents on the issues to preserve their ability to talk to a person or party in furtherance of an investigation under circumstances in which the rule might apply if I did.

Second, in the comments that were written to accompany the existing Rule 4.2, great care was taken to explain what the drafters were thinking. Oddly, the comments on the proposed changes [Paragraphs [7] and [8]], also talk in terms of "authorized" rather than what law, rule, or court order "require." The proposed changes and the commentary are, thus, inconsistent. It is apparent from the way the commentary on the proposed rule was drafted, particularly Paragraph 8, that those who drafted the new rule meant to say that communication with a "represented person is authorized by paragraph (a) if permitted by law, rule or court order," which, as the comment notes, recognizes "constitutional and statutory authority" as well as the role of the judiciary in supervising the legal profession. But that is not what the proposed rule now says. The situation is, at best, confusing. Again, without a good reason for changing the existing rule, tinkering with its language in a way the results in this kind of inconsistency and confusion is, I believe, unwise.

The problems I identify can be fixed by either leaving the existing Rule 4.2(a) intact or by simply amending the proposed language by removing the words ". . in order to meet the requirements of . . " from the second paragraph of 4.2(a) and substituting the words ". . . if authorized to do so by any . . ." so that the new second paragraph of proposed Rule 4.2(a) reads:

> Nothwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client *if authorized to do so by any* law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) or this Rule.

I appreciate the opportunity to comment on the proposed change. Please let me know if there is anything more I can do. My representative on this matter is David Schwendiman. He can be reached on his direct line (801) 325-3223 or at david.schwendiman@usdoj.gov.

Paul M. Warner
United States Attorney
District of Utah

From: <RichHumpherys@chrisjen.com>
To: <tims@email.utcourts.gov>
Date: 5/16/05 1:54PM
Subject: Comment on Rule 2.3, Rules of Professional Conduct

Tim,

I have concern with proposed Rule 2.3 (b), which states: "When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent."

In the insurance arena, when one who has liability insurance is sued, the carrier hires defense counsel to represent the insured and defend the claim. Under Spratley v. State Farm 78 P.3d 603 (Ut 2003), the court ruled that both the insurer and the insured are dual-clients of defense counsel, even though there may be a potential conflict of interest where the insured may want the case settled, but the insurer doesn't want to settle. If the conflict actually materializes, the Court has ruled that the attorney's "allegiance" is to the insured, not the insurer, because the insurer has a duty to provide a defense in good faith to the insured. Id. Yet, the attorney must still provide evaluations and analysis to both parties. At a point in time when policy limits have been demanded by the plaintiff and the insured wants to settle within the limits to avoid personal exposure, but the insurer won't pay limits, thus taking the relationship out of the typical tri-party relationship, it seems that the proposed Rule 2.3 (b) is quite problematic and creates even greater conflicts of interest. In this situation, candid and fair evaluations are even more important, whether or not the client has given an "informed consent". In fact, providing or failing to provide evaluations may have a direct impact on the attorney's liability to the client-insured or liability to the insurer-client, or impact on the insurer's liability to the insured for breach of good faith duties. I am aware of an increasing trend across the country where liability companies and/or the insureds are bringing claims against defense counsel for failing to fairly represent, evaluate or disclose information to one or the other.

While I appreciate that this kind of situation is not the one intended by Rule 2.3(b), you can see how this proposed rule could apply and could be a source of confusion or justification for failing to fulfill good faith duties in the insurance defense world. I therefore have concerns with its present form.

If I may be of further assistance, please feel free to contact me.

Rich

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COMMENT TO RULE 1.7

A difficult situation arises out of the tri-party relationship that exists when a liability insurer hires a defense attorney to defend the insured against a law suit filed by a third party. If coverage is disputed in some way or if the third party's claim may likely exceed the limits of the insurance, there is a conflict of interest between the insurer and the insured. In this situation, the Utah Supreme Court has held that the defense attorney's allegiance is to the insured, not the insurer. Spratley v. State Farm, 78 P.3d 603 ¶¶11-12 (Utah 2003). Yet, the insurer which still must pay for the defense and indemnify the insured pursuant to the provisions of the policy, still has an interest in the case. This may require the defense attorney to provide the insurer with analysis and evaluations. Some of the inherent conflicts in these circumstances may be minimized by having an independent counsel represent the insured and insurer separately.

COMMENT TO RULE 2.3

This rule is not intended to apply to the situation that arises when a third party files a claim against an insured defendant. In this situation the liability insurer would hire defense counsel to represent the insured. This rule would not alter any duties defense counsel may owe to provide evaluation and analysis to the insurer.

Rich Humphery's suggested comments