

Agenda

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

December 7, 2020

5:00 to 7:00 p.m.

Via Webex

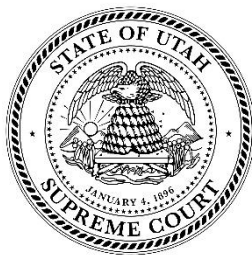
Welcome and approval of minutes	Tab 1	Simón Cantarero, Chair
Online reviews and recommended rule changes: <ul style="list-style-type: none">• Rule 1.6. Confidentiality of Information.• Rule 7.1. Communications Concerning a Lawyer's Services.	Tab 2	Judge Catherine Hoskins
Conflict between GAL statute and Rule 1.6: issue forwarded by Courts' Legislative Liaison, Michael Drechsel	Tab 3	Nancy Sylvester
Comment to Rule 1.0	Tab 4	Steve Johnson
Rapid Response Team volunteers		Simón Cantarero

2021 Meeting Schedule: 1st Monday of the month at 5pm.

Next meeting: January 4, 2021.

Tab 1

Attached are the draft October minutes for review and approval.



**Utah Supreme Court's
ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL
CONDUCT**

Meeting Minutes

October 05, 2020

Via WebEx

5:08 p.m.

Simón Cantarero, Chair

Attendees:

Simón Cantarero, Chair
Adam Bondy
Daniel Brough
Tim Conde (via phone)
Hon. Michael Edwards
Hon. James Gardner
Steven G. Johnson (Emeritus)
Joni Jones
Philip Lowry (via phone)
Alyson Carter McAllister
Hon Trent Nelson (Emeritus)
Amy Oliver
Vanessa Ramos
Jurhee Rice
Austin Riter
Gary Sackett (Emeritus)
Cory Talbot
Billy Walker
Dane Thorley

Staff:

Nancy Sylvester
Recording Secretary-vacant

Guests:

Jacquelyn Carlton-Office of Legislative Research

Not Present:

Angie Allen
Katherine Venti

1. Welcome and approval of August 31, 2020 meeting minutes: Simón Cantarero

Simón Cantarero welcomed everyone to the meeting and asked for approval of the minutes.

Motion:

Judge Gardner moved to approve the August 31, 2020 meeting minutes. Alyson McAllister seconded the motion. The motion passed unanimously.

2. Discussion-Review Comments to Rule 8.4(h): Adam Bondy, Alyson McAllister, Judge Mike Edwards, Steve Johnson Dan Brough, Simón Cantarero

Rule 8.4(h) has been revised to provide that it is professional misconduct for a lawyer to egregiously violate, or engage in a pattern of repeated violations of, Rule 14-301 if such violations harm the lawyer's client or another lawyer's client or are prejudicial to the administration of justice.

The majority of comments that oppose revisions to 8.4(h) claim that revisions will chill free speech, but fail to provide analyses to support how free speech will be chilled. The RPC Committee reviewed longstanding rules already limiting the free speech of attorneys. In particular, the Attorney Oath provides that Attorney speech may be limited.

3. Discussion-Review Comments to Standard 14-301: Adam Bondy, Alyson McAllister, Judge Mike Edwards, Steve Johnson Dan Brough, Simón Cantarero

Committee discussion regarding whether the standards in 14-301 should be aspirational or enforceable. After a review of the language, the Committee discussed whether a rule or order that is not enforced can be considered a rule or even aspirational.

The preamble was revised to provide clarification regarding the rules and standards and now reads as follows:

“Although originally intended to be aspirational, the Supreme Court, by adopting Rule 8.4(h) of the Rules of Professional Conduct, has made these Standards mandatory to the extent that an egregious violation of the Standards or a pattern of repeated violations of the Standards where a client is harmed or if the conduct is prejudicial to the administration of justice, may subject the lawyer to disciplinary action.”

Standard 3 was revised to read as follows:

“Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary or other participant in the legal process unless such matters are directly relevant under controlling substantive law or are necessary for legitimate advocacy.

Lawyers shall avoid hostile, demeaning, humiliating or discriminatory conduct in law-related activities. Discriminatory conduct includes all discrimination against protected classes as those classed are enumerated in Utah Code Section 34A-5-106(1)(a), and federal statutes, as amended from time to time.”

Motion

Joni Jones moves to approve the motion for 8.4(h) as published and 14-301 with modifications incorporating the inclusion of preamble language and revisions to standard 3 as discussed. Adam Bondy seconded the motion. The motion passed.

Simón Cantarero will prepare a transmittal letter for submission to the Court.

4. Scheduling of Future Meetings:

November 02, 2020 at 5:00 p.m.: This meeting is tentative and subject to change.

December 07, 2020 at 5:00 p.m.

The meeting adjourned at 6:17 p.m. The next meeting will be held on November 02, 2020 at 5:00 p.m. via WebEx.

Tab 2

Catherine Hoskins, who is both a justice court judge and a private family law practitioner and mediator, has brought an issue to this committee regarding negative online reviews.

Judge Hoskins wrote the following: "I was admitted to the Utah State Bar in October 2002 and have been actively practicing the majority of that time. My primary practice is in the area of family law. I am also a justice court judge for the cities of Clinton and Syracuse. Due to the number of years that I have been practicing and my emphasis in divorce my need for direct advertising marketing is relatively small. The majority of my work comes from referrals, from former clients and other attorneys. Recently, I have become more and more frustrated with the problems associated with online reviews. I received my first negative review in 2014, but was unable to post a response unless I claimed my 'profile' on AVVO. Around this same time the Utah State Bar posted a sanction against an attorney for disclosing confidential information in response to a negative review. I therefore reached out to a national attorney about trying to get my profile removed or filing a class action against AVVO. I was told that the issue has been tried and that the host sites had prevailed in the Courts under the auspices of free speech. I then ignored the reviews and went back to work."

Since that time, Judge Hoskins has received several more negative reviews, one of which references a situation over a decade old when she served as a GAL (but the review looks recent), another from someone who is not actually a client, and another from a client who was frustrated about the current child support laws so he wrote a negative review about Judge Hoskins.

The challenge with online reviews is that they can be written instantly and last indefinitely, whether true or not. Judge Hoskins would like this committee to consider two rule amendments to help ameliorate such situations:

1) Rule 1.6 (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (b)(5)...**to respond to online comments, reviews, advertising made by a client or any third party.**

2) Rule 7.1 Additions:

(4) lawyers may compensate former clients for reviews of their services.

(5) All websites that use information obtained from the Utah State Bar about attorneys must clearly state that it is for advertisement purposes. All websites that post information about Utah State attorneys must identify clearly whether or not the attorney opts in for their services.

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(b)(1) to prevent reasonably certain death or substantial bodily harm;

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

(b)(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(b)(4) to secure legal advice about the lawyer's compliance with these Rules;

(b)(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(b)(6) to comply with other law or a court order; or

(b)(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(d) For purposes of this rule, representation of a client includes counseling a lawyer about the need for or availability of treatment for substance abuse or psychological or emotional problems by members of the Utah State Bar serving on a Utah State Bar endorsed lawyer assistance program.

Proposed Modification

(b)(5), o establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client, *to respond to online comments, reviews, advertising made by a client or any third party.*

Rule 7.1. Communications Concerning a Lawyer's Services.

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified or unreasonable expectation about results the lawyer can achieve or has achieved; or

(3) contains a testimonial or endorsement that violates any portion of this Rule.

(b) A lawyer shall not interact with a prospective client in a manner that involves coercion, duress, or harassment.

Requested additions

(4) lawyers may compensate former clients for reviews of their services.

(5) All Websites that use information obtained from the Utah State Bar about attorneys must clearly state that it is for advertisement purposes. All websites that post information about Utah State attorneys must identify clearly whether or not the attorney opts in for their services.

Tab 3

As part of the juvenile recodification bill, a statute came to Mike Drechsel's (Court Legislative Liaison) attention that he has passed along to this committee.

The statute is 78A-6-902(12) and has to do with the intersection between attorney guardian ad litem records and Rule 1.6 of the Rules of Professional Conduct (see subsection (12)(d)).

https://le.utah.gov/xcode/Title78A/Chapter6/78A-6-S902.html?v=C78A-6-S902_2019051420190514

https://www.utcourts.gov/resources/rules/ucja/ch13/1_6.htm

This statute has been on the books in substantially the same form since at least 2004 (as far back as Westlaw goes). It basically provides a statutory exception to Rule 1.6. The statute's reference to Rule 1.6(b)(4) is out of date. That part of the rule currently says "(b)(4) to secure legal advice about the lawyer's compliance with these Rules." In the past, Rule 1.6(b)(4) said: "(b)(4) To comply with the Rules of Professional Conduct or other law."

Rule 1.6 already recognizes that certain requirements of the law may require disclosure. But a broad interpretation would permit the Legislature to outline the contours of attorney confidentiality by passing a statute that says an attorney must disclose certain information. That seems to strike at the core of regulating a fundamental obligation of the practice of law. For that reason alone, the committee should explore rolling this into Rule 1.6. Rep. Snow is open to this and thinks it would be a good change that makes sense. The Guardian ad Litem's office is also on board.

1 **Rule 1.6. Confidentiality of Information.**

2 (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives
3 informed consent, the disclosure is impliedly authorized in order to carry out the representation or the
4 disclosure is permitted by paragraph (b).

5 (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer
6 reasonably believes necessary:

7 (b)(1) to prevent reasonably certain death or substantial bodily harm;

8 (b)(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in
9 substantial injury to the financial interests or property of another and in furtherance of which the client
10 has used or is using the lawyer's services;

11 (b)(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another
12 that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in
13 furtherance of which the client has used the lawyer's services;

14 (b)(4) to secure legal advice about the lawyer's compliance with these Rules;

15 (b)(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and
16 the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon
17 conduct in which the client was involved, or to respond to allegations in any proceeding concerning
18 the lawyer's representation of the client;

19 (b)(6) to comply with other law or a court order; or

20 (b)(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or
21 from changes in the composition or ownership of a firm, but only if the revealed information would not
22 compromise the attorney-client privilege or otherwise prejudice the client.

23 (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or
24 unauthorized access to, information relating to the representation of a client.

25 (d) For purposes of this rule, representation of a client includes counseling a lawyer about the need for or
26 availability of treatment for substance abuse or psychological or emotional problems by members of the
27 Utah State Bar serving on a Utah State Bar endorsed lawyer assistance program.

28 (d) Exception for attorney guardian ad litem.

29 (i) Because of the unique role of an attorney guardian ad litem and the state's role and responsibility
30 to provide a guardian ad litem program; and as parens patriae, to protect minors, a claim of attorney-
31 client privilege does not bar access to the records of an attorney guardian ad litem by the Legislature
32 through legislative subpoena.

33 (i) Records released in accordance with a legislative subpoena shall be maintained as confidential by
34 the Legislature.

35 (ii) The Office of the Legislative Auditor General may include summary data and nonidentifying
36 information in its audits and reports to the Legislature.

37 Comment

38 [1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client
39 during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to
40 information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal
41 information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(l) for
42 the lawyer's duties with respect to the use of such information to the disadvantage of clients and former
43 clients.

44 [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed
45 consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for the
46 definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer
47 relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and
48 frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs
49 this information to represent the client effectively and, if necessary, to advise the client to refrain from
50 wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and
51 what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience,
52 lawyers know that almost all clients follow the advice given, and the law is upheld.

53 [3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client
54 privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The
55 attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a
56 lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The
57 rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from
58 the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters
59 communicated in confidence by the client but also to all information relating to the representation,
60 whatever its source. A lawyer may not disclose such information except as authorized or required by the
61 Rules of Professional Conduct or other law. See also Scope.

62 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client.
63 This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected
64 information but could reasonably lead to the discovery of such information by a third person. A lawyer's
65 use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no
66 reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation
67 involved.

68 Authorized Disclosure

69 [5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer
70 is impliedly authorized to make disclosures about a client when appropriate in carrying out the
71 representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that
72 cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.
73 Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a
74 client of the firm, unless the client has instructed that particular information be confined to specified
75 lawyers.

76 Disclosure Adverse to Client

77 [6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the
78 confidentiality of information relating to the representation of their clients, the confidentiality rule is subject
79 to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and
80 permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.
81 Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and
82 substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action
83 necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged
84 toxic waste into a town's water supply may reveal this information to the authorities if there is a present
85 and substantial risk that a person who drinks the water will contract a life-threatening or debilitating
86 disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

87 [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal
88 information to the extent necessary to enable affected persons or appropriate authorities to prevent the
89 client from committing a crime or fraud, as defined in Rule 1.0(e), that is reasonably certain to result in
90 substantial injury to the financial or property interests of another and in furtherance of which the client has
91 used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client
92 forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from
93 the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's
94 misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or
95 fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw
96 from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer,
97 where the client is an organization, to reveal information relating to the representation in limited
98 circumstances.

99 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or
100 fraud until after it has been consummated. Although the client no longer has the option of
101 preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss
102 suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer
103 may disclose information relating to the representation to the extent necessary to enable the affected

104 persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph
105 (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for
106 representation concerning that offense.

107 [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice
108 about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing
109 information to secure such advice will be impliedly authorized for the lawyer to carry out the
110 representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such
111 disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

112 [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or
113 other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent
114 the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim
115 involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal ,
116 disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against
117 the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded
118 by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such
119 complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of
120 an action or proceeding that charges such complicity, so that the defense may be established by
121 responding directly to a third party who has made such an assertion. The right to defend also applies, of
122 course, where a proceeding has been commenced.

123 [11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action
124 to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship
125 may not exploit it to the detriment of the fiduciary.

126 [12] Other law may require that a lawyer disclose information about a client. Whether such a law
127 supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of
128 information relating to the representation appears to be required by other law, the lawyer must discuss
129 the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this
130 Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are
131 necessary to comply with the law.

132 Detection of Conflicts of Interest

133 [13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to
134 each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association
135 with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of
136 a law practice. See Rule 1.17. Comment [7]. Under these circumstances, lawyers and law firms are
137 permitted to disclose limited information, but only once substantive discussions regarding the new
138 relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the

139 persons and entities involved in a matter, a brief summary of the general issues involved, and information
140 about whether the matter has terminated. Even this limited information, however, should be disclosed
141 only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from
142 the possible new relationship. Moreover, the disclosure of any information is prohibited if it would
143 compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate
144 client is seeking advice on a corporate takeover that has not been publicly announced; that a person has
145 consulted a lawyer about the possibility of divorce before the person's intentions are known to the
146 person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to
147 a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or
148 former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a
149 lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

150 [14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the
151 extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of
152 information acquired by means independent to any disclosure pursuant to paragraph (b)(7). Paragraph
153 (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise
154 authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in
155 the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a
156 new representation.

157 [15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or
158 by another tribunal or governmental entity claiming authority pursuant to other law to compel the
159 disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of
160 the client all nonfrivolous claims that the order is not authorized by other law or that the information
161 sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event
162 of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent
163 required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to
164 comply with the court's order.

165 [16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is
166 necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to
167 persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure
168 adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to
169 accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the
170 disclosure should be made in a manner that limits access to the information to the tribunal or other
171 persons having a need to know it and appropriate protective orders or other arrangements should be
172 sought by the lawyer to the fullest extent practicable.

173 [17] Paragraph (b) permits but does not require the disclosure of information relating to a client's
174 representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the

175 discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's
176 relationship with the client and with those who might be injured by the client, the lawyer's own
177 involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's
178 decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be
179 required, however, by other rules. Some rules require disclosure only if such disclosure would be
180 permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires
181 disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See
182 Rule 3.3(d).

183 Acting Competently to Preserve Confidentiality

184 [18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the
185 representation of a client against unauthorized access by third parties and against inadvertent or
186 unauthorized disclosure by the lawyer or other persons who are participating in the representation of the
187 client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized
188 access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a
189 client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent
190 the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's
191 efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if
192 additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of
193 implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability
194 to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A
195 client may require the lawyer to implement special security measures not required by this Rule or may
196 give informed consent to forgo security measures that would otherwise be required by this Rule. Whether
197 a lawyer may be required to take additional steps to safeguard a client's information in order to comply
198 with other law, such as state and federal laws that govern data privacy or that impose notification
199 requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of
200 these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own
201 firm, see rule 5.3. Comments [3]-[4].

202 [19] When transmitting a communication that includes information relating to the representation of a
203 client, the lawyer must take reasonable precautions to prevent the information from coming into the hands
204 of unintended recipients. This duty, however, does not require that the lawyer use special security
205 measures if the method of communication affords a reasonable expectation of privacy. Special
206 circumstances, however, may warrant special precautions. Factors to be considered in determining the
207 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and
208 the extent to which the privacy of the communication is protected by law or by a confidentiality
209 agreement. A client may require the lawyer to implement special security measures not required by this
210 Rule or may give informed consent to the use of a means of communication that would otherwise be

211 prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with
212 other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

213 Former Client

214 [20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule
215 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the
216 former client.

217 [20a] Paragraph (d) is an addition to ABA Model Rule 1.6 and provides for confidentiality of information
218 between lawyers providing assistance to other lawyers under a Utah State Bar endorsed lawyer
219 assistance program.

220

221 Effective November 1, 2017

222

Tab 4

Justice Lee raised a concern about rule-type language in Comment 6 to Rule 1.0, dealing with informed consent. His concern was with the third sentence of that comment, which states, "The lawyer *must* make reasonable efforts ..." He thought that this mandatory language shouldn't be in the comments.

Steve Johnson suggested something along the lines of, "Other rules require a lawyer to make reasonable efforts..." The members of the Court seemed to like that idea, and he told the Court that he would raise this concern with the advisory committee at its next meeting. He thought that if we use the suggested language, we should also cite the other rules in the comment. In the bigger picture, Steve observed, we should most likely take the time to make an effort to go through all of the rules to pull out rule-type language from the comments.

1 **Rule 1.0. Terminology.**

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

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

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

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

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

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

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

21 (h) "Legal Professional" includes a lawyer and a licensed paralegal practitioner.

22 (i) "Licensed Paralegal Practitioner" denotes a person authorized by the Utah Supreme Court to provide
23 legal representation under Rule 15-701 of the Supreme Court Rules of Professional Practice.

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

26 (k) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a
27 reasonably prudent and competent lawyer.

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

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

32 (n) "Reckless" or "recklessly" denotes the conscious disregard of a duty that a lawyer is or reasonably
33 should be aware of, or a conscious indifference to the truth.

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

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

39 (q) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body,
40 administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative
41 agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of
42 evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a
43 party's interests in a particular matter.

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

49 **Comment**

50 **Confirmed in Writing**

51 [1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed
52 consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has
53 obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is
54 confirmed in writing within a reasonable time thereafter.

55 **Firm**

56 [2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the specific facts.
57 For example, two practitioners who share office space and occasionally consult or assist each other
58 ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public
59 in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a
60 firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are
61 relevant in determining whether they are a firm, as is the fact that they have mutual access to information
62 concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying
63 purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the
64 rule that the same lawyer should not represent opposing parties in litigation, while it might not be so
65 regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

66 [3] With respect to the law department of an organization, including the government, there is ordinarily no
67 question that the members of the department constitute a firm within the meaning of the Rules of

68 Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it
69 may not be clear whether the law department of a corporation represents a subsidiary or an affiliated
70 corporation, as well as the corporation by which the members of the department are directly employed. A
71 similar question can arise concerning an unincorporated association and its local affiliates.

72 [4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations.
73 Depending upon the structure of the organization, the entire organization or different components of it
74 may constitute a firm or firms for purposes of these Rules.

75 **Fraud**

76 [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as
77 such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
78 This does not include merely negligent misrepresentation or negligent failure to apprise another of
79 relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages
80 or relied on the misrepresentation or failure to inform.

81 **Informed Consent**

82 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a
83 client or other person (e.g., a former client or, under certain circumstances, a prospective client) before
84 accepting or continuing representation or pursuing a course of conduct. See, e.g, Rules 1.2(c), 1.6(a) and
85 1.7(b). The communication necessary to obtain such consent will vary according to the rule involved and
86 the circumstances giving rise to the need to obtain informed consent. Other rules, such as [ADD RULES
87 HERE] require a lawyer to ~~The lawyer must~~ make reasonable efforts to ensure that the client or other
88 person possesses information reasonably adequate to make an informed decision. Ordinarily, this will
89 require communication that includes a disclosure of the facts and circumstances giving rise to the
90 situation, any explanation reasonably necessary to inform the client or other person of the material
91 advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other
92 person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a
93 client or other person to seek the advice of other counsel. A lawyer need not inform a client or other
94 person of facts or implications already known to the client or other person; nevertheless, a lawyer who
95 does not personally inform the client or other person assumes the risk that the client or other person is
96 inadequately informed and the consent is invalid. In determining whether the information and explanation
97 provided are reasonably adequate, relevant factors include whether the client or other person is
98 experienced in legal matters generally and in making decisions of the type involved, and whether the
99 client or other person is independently represented by other counsel in giving the consent. Normally, such
100 persons need less information and explanation than others, and generally a client or other person who is
101 independently represented by other counsel in giving the consent should be assumed to have given
102 informed consent.

103 [7] Obtaining informed consent will usually require an affirmative response by the client or other person.
104 In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be
105 inferred, however, from the conduct of a client or other person who has reasonably adequate information
106 about the matter. A number of rules require that a person's consent be confirmed in writing. See Rules
107 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (r) and (b). Other
108 rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a)
109 and (g). For a definition of "signed," see paragraph (r).

110 **Screened**

111 [8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to
112 remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

113 [9] The purpose of screening is to assure the affected parties that confidential information known by the
114 personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge
115 the obligation not to communicate with any of the other lawyers in the firm with respect to the matter.
116 Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is
117 in place and that they may not communicate with the personally disqualified lawyer with respect to the
118 matter. Additional screening measures that are appropriate for the particular matter will depend on the
119 circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening,
120 it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened
121 lawyer to avoid any communication with other firm personnel and any contact with any firm files or other
122 information, including information in electronic form, relating to the matter, written notice and instructions
123 to all other firm personnel forbidding any communication with the screened lawyer relating to the matter,
124 denial of access by the screened lawyer to firm files or other information, including information in
125 electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all
126 other firm personnel.

127 [10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer
128 or law firm knows or reasonably should know that there is a need for screening.

129 [10a] The definitions of "consult" and "consultation," while deleted from the ABA Model Rule 1.0, have
130 been retained in the Utah Rule because "consult" and "consultation" are used in the rules. See, e.g.,
131 Rules 1.2, 1.4, 1.14, and 1.18.

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