

Agenda

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

January 4, 2021
5:00 to 7:00 p.m.

Via Webex

Welcome and approval of minutes	Tab 1	Simón Cantarero, Chair
Bare referral fees Referral Fee Statement	Tab 2	Lucy Ricca, Simón Cantarero, Shelley Miller, Nancy Sylvester, Steve Johnson
Conflict between GAL statute and Rule 1.6	Tab 3	Michael Drechsel, Nancy Sylvester
Projects in the pipeline: <ul style="list-style-type: none">• Rule-like comments (Steve Johnson's subcommittee)• Online reviews & Rules 1.6, 7.1 (Amy Oliver's subcommittee)• Rapid Response Team• Rules 8.4 and 14-301 (Court)• Rule 6.5 (Court)• New recording secretary (Court)		

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

Next meeting: February 1, 2021.

Tab 1



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

Meeting Minutes

December 7, 2020

Via WebEx

5:01 p.m.

Simón Cantarero, Chair

Attendees:

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

Staff:

Nancy Sylvester
Recording Secretary-vacant

Guests

Judge Catherine Hoskins

Not Present

Angie Allen

1. Welcome and approval of the October 5, 2020 meeting date's minutes: Simón Cantarero, Chair

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

Vanessa Ramos moved to approve the October 5, 2020 minutes. Amy Oliver seconded the motion, and it passed unanimously.

2. Online reviews and recommended rule changes: Rule 1.6 Confidentiality of information: Judge Catherine Hoskins

Online reviews can be written instantly and last indefinitely, whether true or not. Judge Hoskins would like this committee to consider amending rule 1.6(b) as follows:

Rule 1.6(b) states, a lawyer may reveal information related to the representation of a client to the extent the lawyer reasonably believes necessary.

Judge Hoskins recommends amending Rule 1.6 to incorporate (b)(5) to say the following:

Rule 1.6(b)(5)...to respond to online comments, reviews, advertising made by a client or any third party.

Subcommittee chaired by Amy Oliver will review whether an amendment to Rule 1.6 should be made to allow attorneys the ability to respond to online comments, reviews, advertising made by a client or any third party.

3. Online reviews and recommended rule changes: Rule 7.1 Communications Concerning a Lawyer's Services: Judge Catherine Hoskins

Rule 7.1 states:

- a. A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A Communication is 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.

Judge Hoskins recommends amending Rule 7.1 by adding the following language:

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

Rule 7.1(c): lawyers may compensate former clients for reviews of their services.

Rule 7.1(d): All websites that use information obtained from the Utah State Bar about attorneys must identify clearly whether or not the attorney opts in for their services.

Attorneys and their conduct can be regulated on a website, but this committee does not have the authority to regulate third party websites and control their content. The regulation of websites and website content falls under the jurisdiction of consumer protection.

Whether the online ratings violate the rules of professional conduct and whether such content is misleading and harmful to attorneys will be reviewed by the subcommittee chaired by Amy Oliver. The subcommittee will meet within first months of 2021 and provide feedback to RPC Committee.

Judge Hoskins' contact information will be available via Nancy Sylvester and Simón Cantarero.

4. Conflict between GAL statute and Rule 1.6: Issue forwarded by Courts' Legislative Liaison, Michael Drechsel: Nancy Sylvester

As part of the juvenile recodification bill, statute 78A-6-902(12) regarding the intersection between attorney Guardian ad Litem records and Rule 1.6 of the Rules of Professional Conduct.

The statute has been on the books in substantially the same form since at least 2004. Statute 78A-6-902(12) provides as statutory exception to Rule 1.6. The statute's reference to Rule 1.6(b)(4) is out of date and currently says, "(b)(4) to secure legal advice about a 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. 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. This 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 Rule 1.6. Representative 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 with moving incorporating the statutory language into Rule 1.6.

It is recommended that Rule 1.6 be amended to incorporate the statutory language as follows:

Rule 1.6(d)(i) states:

- (i) Because of the unique role of an attorney guardian ad litem and states role and responsibility to provide a guardian ad litem program; and as *parens patriae*, to protect minors, a claim of attorney privilege does not bar access to the records of an attorney guardian ad litem by the legislature through legislative subpoena.
- (ii) Records released in accordance with a legislative subpoena shall be maintained by the Legislature.
- (iii) The office of the Legislative Auditor General may include summary data and nonidentifying information in its audits and reports to the Legislature.

The recommended rule amendment was tabled pending a draft or amendment of statute. Nancy Sylvester will contact Michael Drechsel to obtain more information and schedule a potential presentation of information at next RPC meeting in January 2021.

5. Comment to Rule 1.0: Steve Johnson

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 suggests amending the comment to the following: "Other rules require a lawyer to make reasonable efforts . . ." and citing the other rules in the comment.

A subcommittee chaired by Steve Johnson, joined by Phil Lowry, and Vanessa Ramos will review Rule 1.0 and Comment 6 and report back to the committee within the next year with suggestions. The subcommittee review will not be expanded to additional rules.

6. Rapid Response Team Volunteers: Simón Cantarero, Chair

The committee has been asked to form a Rapid Response Team of volunteers to review legislation being proposed or adopted that would affect our advisory committee.

Simón Cantarero will chair the Rapid Response Team, joined by Austin Riter and Joni Jones.

7. Old business/new business: (all)

2021 meeting schedule: 1st Monday of the month at 5pm.

The meeting adjourned at 6:25 p.m. The next meeting will be held on January 4th, 2021 at 5pm via WebEx.

Tab 2

Supreme Court Halts Consideration and Authorization of Bare Referral Fees

Allowing lawyers to enter into new and varied business arrangements to increase innovation and efficiency in Utah's legal market and thereby increase access to justice is a central goal of the Court's regulatory reform efforts. Permitting lawyers to share fees with nonlawyers is an aspect of these efforts. Thus, the Court, on September 1, 2020, authorized the sharing of reasonable fees with nonlawyers within the oversight of the regulatory reform Sandbox. It has become apparent, however, that the payment of referral fees - compensation paid to nonlawyers for the sole purpose of ensuring the referral of legal work - presents potential ethical challenges for lawyers and needs further consideration by the Court.



Press Release
December 8, 2020

Allowing lawyers to enter into new and varied business arrangements to increase innovation and efficiency in Utah's legal market and thereby increase access to justice is a central goal of the Court's regulatory reform efforts. Permitting lawyers to share fees with nonlawyers is an aspect of these efforts. Thus, the Court, on September 1, 2020, authorized the sharing of reasonable fees with nonlawyers within the oversight of the regulatory reform Sandbox. It has become apparent, however, that the payment of referral fees—compensation paid to nonlawyers for the sole purpose of ensuring the referral of legal work—presents potential ethical challenges for lawyers and needs further informed consideration by the Court.

In light of this need for further study, as of today the Court is halting the consideration and authorization of bare referral fee arrangements paid by lawyers to nonlawyers. Bare referral fee arrangements are those in which payment is made by the lawyer to the nonlawyer solely to compensate the nonlawyer for referring a potential client to the lawyer; there is no other business relationship between the lawyer and nonlawyer.

The Court will ask its advisory committee on the rules of professional responsibility to undertake further study of the issue of referral fees paid to nonlawyers. The committee's mandate in this regard will be to consider and recommend any further ethical guidance to be given to lawyers entering into referral fee arrangements with nonlawyers and to consider whether and how to oversee those arrangements, including whether the collection of data from lawyers in referral fee arrangements will be necessary. One of the committee's first items of business will be evaluating whether to amend Rule 1.5(a) to

clarify that the percentage of a fee paid as a referral to a nonlawyer is a factor to be considered in the reasonableness of the fee.

Applications to the Office solely proposing referral fee arrangements without any other non-traditional services or models will be tabled until further notice from the Court. The Court will, however, continue to consider and, as appropriate, authorize, other innovative business arrangements and service models involving lawyers and nonlawyers that incorporate innovations beyond bare referral fee arrangements. Such arrangements and services will be processed through the Sandbox via the Innovation Office's regulatory framework.

Fee Sharing Ethical Problems

It has been stated that fee sharing presents ethical problems for lawyers. I have tried to think about the kinds of ethical problems lawyers might encounter with such arrangements, and couldn't think of many. But here are a couple. Perhaps these comments and questions might seed the January 4th discussion.

1. A referring party will likely refer cases to the lawyer who is willing to pay them the highest referral fee, instead of referring the prospective client to the lawyer who can best represent that client. But this is not an ethical problem for the lawyer so much, as it is a problem for the members of the public, who might not get good representation in their legal matters.
But how is this different from the members of the public who have legal problems just picking a lawyer out of the yellow pages, instead of going online and checking their reviews?
2. If lawyers must pay a referral fee in order to get clients, will they artificially increase their fees to the clients in order to cover the referral fees? Will that make the fees unreasonable? Or will the lawyer charge a lower fee for his or her services so that the overall fee to the client is reasonable? For example, if the lawyer usually charges \$250 per hour for their work, will they only charge \$225 per hour for their services, but add the referral fee to the total fees? Is that a reasonable line item in the billing for fees? Or, if the referring party charges a percentage of the recovery, will the lawyer's contingency fee percentage jump up from 1/3 to 40% or to some other higher amount? And is that a reasonable fee?
3. Does fee sharing create a conflict of interest in that the lawyer may be tempted to keep the referring party happy instead of helping the client? Will lawyers seek to settle early in order to spend less time on a case for the client, especially if they must pay a percentage of their recovery as a referral fee? If the referral fee is a percentage of any recovery, then doesn't the lawyer have an obligation to the referring party that may conflict with the lawyer's duty to the client?
4. Do referral fees reduce a lawyer's independence? Do referral fees let money instead of professionalism and the client's best interests control the decision-making process?
5. What guidance should we put into the rules (especially Rule 1.5) to help lawyers avoid ethical problems when they use fee sharing agreements?

Tab 3

GAL Statute and Rule 1.6

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 to respond to online comments, reviews, advertising made by
19 a client or any third party; [recommendation from Catherine Hoskins]

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

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

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

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

29 (d) Exception for attorney guardian ad litem.

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

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

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

38 | Comment

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

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

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

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

69 Authorized Disclosure

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

77 Disclosure Adverse to Client

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

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

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

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

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

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

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

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

133 Detection of Conflicts of Interest

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

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

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

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

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

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

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

184 Acting Competently to Preserve Confidentiality

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

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

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

214 Former Client

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

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

221

222 Effective November 1, 2017

223