

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

Agenda

September 13, 2021
5:00 to 7:00 p.m.

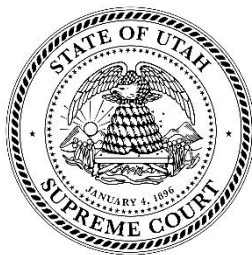
Via Webex

Welcome and approval of minutes	Tab 1	Simón Cantarero, Chair
Rule 1.5 and 5.4 (Referral fees, fee sharing, and solicitation) <ul style="list-style-type: none">• back with SC comments	Tab 2	Simón Cantarero, Alyson McAlister (subcommittee chair), Angie Allen, Dan Brough, Jurhee Rice, Gary Sackett
Rules 8.4 and 14-301: Subcommittee Update		Adam Bondy (subcommittee chair), Judge Michael Edwards, Judge Trent Nelson, Judge Amy Oliver, Steve Johnson, Austin Riter, Professor Dane Thorley, Katherine Venti, Julie Nelson

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

Next meeting: October 4, 2021

Tab 1



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

Meeting Minutes

August 2, 2021

WEBEX

17:00 Mountain Time

J. Simon Cantarero, Chair

Attendees:

J. Simon Cantarero, Chair
Hon. James Gardner
Katherine Venti
Alyson McAllister
Cory Talbot
Adam Bondy
Joni Jones
Gary Sackett (Emeritus)
Steve Johnson (Emeritus)
Jurhee Rice
Dan Brough
Hon. Trent Nelson (Emeritus)
Billy Walker
Amy Oliver
Dane Thorley
Julie J. Nelson
Hon. Mike Edwards
Phil Lowry
M. Alex Natt, Recording Secretary

Staff:

Gage DM Hansen

Guests:

Scottie Hill

Absent –Austin Riter, Angie Allen,
Vanessa Ramos, Phil Lowry

1. Welcome and approval of the June 7, 2021 meeting minutes: (Chair Cantarero)

Chair Cantarero recognized the existence of a quorum, welcomed everyone to the meeting including the guests. The Chair introduced the new members Julie J. Nelson and Robert Gibbons, spoke to the charge of the Committee, the attendance requirements and other matters and asked each member to introduce themselves starting with the Emeritus members.

The Chair asks for a Motion to approve the June 7, 2021 meeting minutes.

Mr. Talbot moves and Jurhee Rice seconds the Motion. The minutes are adopted unanimously without correction.

2. Rules 8.4 and 14-301: (Chair Cantarero)

The Chair presents the issue to the new members and revisits what has transpired to this point. At its last meeting the Committee tabled discussion and a proposed vote on a revised 8.4 pending review of a Colorado Supreme Court decision discussed in our last meeting entitled In the Matter of Robert E. Abrams, 2021 CO 44 which upheld the Colorado Rule 8.4 finding it Constitutional in a circumstance where counsel made a comment denigrating the presiding judge's physical appearance and alleged sexual orientation. The Chair asks for Committee opinions on the Colorado case vs. the rule proposed by this Committee. Mr. Johnson highlights some of the differences between the Colorado rule and our proposed rule. Mr. Sackett suggests we adopt a version of the Colorado rule, slightly modified, to be sure that our proposal passes Constitutional muster. Mr. Johnson and Judge Nelson suggest the Committee's proposed 8.4(g) should be maintained and not altered to match the Colorado standard.

The Chair turns to 8.4(h) and discusses egregious and/or repeated violations of the standards set forth therein, that would constitute violation of the standards of professional conduct. Can the Supreme Court limit attorney speech by these standards? Chair Cantarero asks each Committee member to give their thoughts. Vigorous discussion ensues.

Ms. Venti asks whether we are in a position to vote today or whether this discussion will continue until next month's meeting. The Chair suggests that we not vote today but instead the Subcommittee be reconstituted to (1) identify the state interests (i.e. the Utah Supreme Court's interests) at play and whether that it's compelling and (2) considering the options proposed in light of the Colorado Rule and Colorado Supreme Court decision. Mr. Bondy will remain Chair but Ms. Venti and Ms. Nelson are added to the subcommittee and Mr. Thorley is released from this assignment with the thanks of the Committee. Mr. Lowry is asked to invite Professor Volokh to meet with the subcommittee if possible to offer his thoughts on this matter.

3. Rule 5.5: (Ms. Jones)

Ms. Jones moves to adopt the changes to rule 5.5 as shown on tab 4 of the packet. Judge Gardner seconds the Motion. Mr. Sackett asks for a clarification of “public facing” and is directed to the definition in the materials which describes it as a defined term. A question is raised as to why the word “shall” is changed to “must” in this Rule. Mr. Sackett objects to this usage and urges it remain “shall” for consistently. Mr. Hansen discusses the Supreme Court’s direction that “must” is a modernization of “shall” and reflects modern usage for non-lawyer understanding. After the discussion the Motion remains the same and the Committee is asked to vote.

The Motion passes unanimously.

The remainder of the agenda is tabled until September’s meeting.

The meeting adjourned at 19:05. The next meeting will be held on September 13, 2021.

Tab 2

1 **Rule 1.5. Fees.**

2 (a) **Reasonableness of attorney fees and expenses.** A lawyer ~~shall~~must not make an
3 agreement for, charge, or collect an unreasonable fee or an unreasonable amount for
4 expenses. The factors to be considered in determining the reasonableness of a fee
5 include the following:

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

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

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

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

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

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

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

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

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

23 (c) **Permitted contingency fees.** A fee may be contingent on the outcome of the matter
24 for which the service is rendered, except in a matter in which a contingent fee is
25 prohibited by paragraph (d) or other law. A contingent fee agreement ~~shall~~must be in a
26 writing signed by the client and ~~shall~~must state the method by which the fee is to be

27 determined, including the percentage or percentages that ~~shall~~must accrue to the
28 lawyer in the event of settlement, trial or appeal; litigation and other expenses to be
29 deducted from the recovery; and whether such expenses are to be deducted before or
30 after the contingent fee is calculated. The agreement must clearly notify the client of any
31 expenses for which the client will be liable whether or not the client is the prevailing
32 party. Upon conclusion of a contingent fee matter, the lawyer ~~shall~~must provide the
33 client with a written statement stating the outcome of the matter and, if there is a
34 recovery, showing the remittance to the client and the method of its determination.

35 (d) **Prohibited contingency fees.** A lawyer ~~shall~~must not enter into an arrangement for,
36 charge, or collect:

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

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

41 **(e) Referral fee restrictions.** Referral fees paid to a non-lawyer or paid to a lawyer who
42 does not represent the client in the referred matter must:

43 (1) not be paid until an attorney fee is payable to the lawyer representing the
44 client in the referred matter;

45 (2) not be passed directly to the client; and

46 (3) be subject to the client giving informed consent confirmed in writing to the
47 terms of the referral fee arrangement.

48 A referring party is not prohibited from charging reasonable fees directly to the client
49 for services actually provided by the referring party, whether related to the claim or not.

50 **(f) No referral fees to potential witnesses.** No referral fee may be paid, directly or
51 indirectly, to a potential witness in the referred case. Even if the lawyer does not intend
52 to call the person as a witness, if it is foreseeable that an opposing party or third party

53 may do so, a referral fee violates this rule. Potential witnesses may include treating
54 providers, eyewitnesses, and family and friends of the client.

55 (g) Reasonableness of referral fee. Any referral fee payable in the case must be
56 reasonable in proportion to the total attorney fees that may ultimately be
57 earned~~obtained~~. The factors to be considered in determining the reasonableness of a
58 referral fee include the following:

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

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

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

64 (4) the amount of attorney fees involved and the results that may ultimately be
65 earned;

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

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

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

70 (8) whether the attorney fee is fixed or contingent.

71 (eh) A licensed paralegal practitioner may not enter into a contingent fee agreement
72 with a client.

73 (#) Before providing any services, a licensed paralegal practitioner must provide the
74 client with a written agreement that:

75 (1) states the purpose for which the licensed paralegal practitioner has been
76 retained;

77 (2) identifies the services to be performed;

Commented [NS1]: What about a contingency fee case where case isn't successful?

What about leaving this to the market?

Commented [NS2]: Is this the right word to use?

Commented [NS3]: Include relevant factors here.

78 (3) identifies the rate or fee for the services to be performed and whether and to
79 what extent the client will be responsible for any costs, expenses or
80 disbursements in the course of the representation;

81 (4) includes a statement printed in 12-point boldface type that the licensed
82 paralegal practitioner is not an attorney and is limited to practice in only those
83 areas in which the licensed paralegal practitioner is licensed;

84 (5) includes a provision stating that the client may report complaints relating to a
85 licensed paralegal practitioner or the unauthorized practice of law to the Office
86 of Professional Conduct, including a toll-free number and Internet website;

87 (6) describes the document to be prepared;

88 (7) describes the purpose of the document;

89 (8) describes the process to be followed in preparing the document;

90 (9) states whether the licensed paralegal practitioner will be filing the document
91 on the client's behalf; and

92 (10) states the approximate time necessary to complete the task.

93 (e) A licensed paralegal practitioner may not make an oral or written statement
94 guaranteeing or promising an outcome, unless the licensed paralegal practitioner has
95 some basis in fact for making the guarantee or promise.

96 **Comment**

97 **Reasonableness of Fee and Expenses**

98 [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the
99 circumstances. The factors specified in (a)(1) through (a)(8) are not exclusive. Nor will
100 each factor be relevant in each instance. Paragraph (a) also requires that expenses for
101 which the client will be charged must be reasonable. A lawyer may seek reimbursement
102 for the cost of services performed in-house, such as copying, or for other expenses
103 incurred in-house, such as telephone charges, either by charging a reasonable amount to

104 which the client has agreed in advance or by charging an amount that reasonably
105 reflects the cost incurred by the lawyer.

106 **Basis or Rate of Fee**

107 [2] When the lawyer has regularly represented a client, they ordinarily will have
108 evolved an understanding concerning the basis or rate of the fee and the expenses for
109 which the client will be responsible. In a new client-lawyer relationship, however, an
110 understanding as to fees and expenses must be promptly established. Generally, it is
111 desirable to furnish the client with at least a simple memorandum or copy of the
112 lawyer's customary fee arrangements that states the general nature of the legal services
113 to be provided, the basis, rate or total amount of the fee and whether and to what extent
114 the client will be responsible for any costs, expenses or disbursements in the course of
115 the representation. A written statement concerning the terms of the engagement
116 reduces the possibility of misunderstanding.

117 [3] Contingent fees, like any other fees, are subject to the reasonableness standard of
118 paragraph (a) of this Rule. In determining whether a particular contingent fee is
119 reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer
120 must consider the factors that are relevant under the circumstances. Applicable law
121 may impose limitations on contingent fees, such as a ceiling on the percentage
122 allowable, or may require a lawyer to offer clients an alternative basis for the fee.
123 Applicable law also may apply to situations other than a contingent fee, for example,
124 government regulations regarding fees in certain tax matters.

125 **Terms of Payment**

126 [4] A lawyer may require advance payment of a fee but is obligated to return any
127 unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for
128 services, such as an ownership interest in an enterprise, providing this does not involve
129 acquisition of a proprietary interest in the cause of action or subject matter of the
130 litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may

131 be subject to the requirements of Rule 1.8(a) because such fees often have the essential
132 qualities of a business transaction with the client.

133 [5] An agreement may not be made whose terms might induce the lawyer improperly to
134 curtail services for the client or perform them in a way contrary to the client's interest.
135 For example, a lawyer should not enter into an agreement whereby services are to be
136 provided only up to a stated amount when it is foreseeable that more extensive services
137 probably will be required, unless the situation is adequately explained to the client.
138 Otherwise, the client might have to bargain for further assistance in the midst of a
139 proceeding or transaction. However, it is proper to define the extent of services in light
140 of the client's ability to pay. A lawyer should not exploit a fee arrangement based
141 primarily on hourly charges by using wasteful procedures.

142 **Prohibited Contingent Fees**

143 [6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic
144 relations matter when payment is contingent upon the securing of a divorce or upon the
145 amount of alimony or support or property settlement to be obtained. This provision
146 does not preclude a contract for a contingent fee for legal representation in connection
147 with the recovery of post-judgment balances due under support, alimony or other
148 financial orders because such contracts do not implicate the same policy concerns.

149 Referral Fees

150 [7] Paragraph (e) prohibits lawyers from paying referral fees to persons making
151 referrals to them until such time as the lawyer who represents the client in the matter is
152 entitled to be paid attorney fees. In the case of a contingent fee matter, the lawyer may
153 not pay the referral fee to the referring person until such time as the lawyer who
154 actually represents the client in the matter is entitled to receive the contingent fee,
155 which may be at the conclusion of the matter. A lawyer should only refer a matter to a
156 lawyer whom the referring lawyer reasonably believes is competent to handle the
157 matter diligently. See Rules 1.1 and 1.3. Paragraph (e)(2) prohibits passing along the
158 referral fee to the client either as a cost or an increase of the total fee. A referral fee for

159 ~~purposes of paragraph (e) is any exchange of value, whether in cash or in kind,~~
 160 ~~bestowing an economic benefit to the referring party beyond what would be considered~~
 161 ~~marginal or of minimal value for accounting and tax purposes under applicable tax law.~~
 162 ~~For the definitions of “informed consent” and “confirmed in writing”, see Rule 1.0(b)~~
 163 ~~and (f).~~

164 [8] Referral fees to a non-lawyer who is a potential witness may create a conflict of
 165 interest between the client and the potential witness referring party. Additionally, the
 166 payment of a referral fee to a witness may create such a pervasive and serious
 167 appearance of impropriety to the trier of fact that a client’s case may be significantly
 168 compromised. Before entering into an agreement to pay a referral fee, the lawyer must
 169 evaluate whether the person requesting the referral fee could potentially testify to facts
 170 or issues that might be relevant if the anticipated claim should proceed to trial. ~~Even if~~
 171 ~~the lawyer does not intend to call the person as a witness, if it is foreseeable that an~~
 172 ~~opposing party or third party may do so a referral fee violates this rule and is~~
 173 ~~prohibited under paragraph (f). Potential witnesses may include treating providers,~~
 174 ~~eyewitnesses, and family and friends of the client. This rule does not prohibit the~~
 175 ~~referring party from charging reasonable fees directly to the client for services actually~~
 176 ~~provided by the referring party, whether related to the claim or not.~~

177 [9] ~~To the extent that the factors in (1)(a) are applicable, they may provide some guidance on~~
 178 ~~the reasonableness referenced in paragraph (g).~~

179 Disputes over Fees

180 [79] If a procedure has been established for resolution of fee disputes, such as an
 181 arbitration or mediation procedure established by the Bar, the lawyer must comply with
 182 the procedure when it is mandatory, and, even when it is voluntary, the lawyer should
 183 conscientiously consider submitting to it. Law may prescribe a procedure for
 184 determining a lawyer's fee, for example, in representation of an executor or
 185 administrator, a class or a person entitled to a reasonable fee as part of the measure of

Commented [NS4]: This is defining a referral fee. This needs to be in the rule that defines terms, not in the comment here.

Proposed solution:
The struck definition was moved up to the beginning of paragraph (e).

Commented [NS5]: This seems to be rule-like language.

Proposed solution:
The struck language was added to paragraphs (f) and (g).

Commented [NS6]: Put this in the rule.

Proposed solution: added relevant factors to paragraph (g).

186 damages. The lawyer entitled to such a fee and a lawyer representing another party
187 concerned with the fee should comply with the prescribed procedure.

188 [~~§~~10] This rule differs from the ABA model rule.

189 [~~§~~a10a] This rule differs from the ABA Model Rule by including certain restrictions on
190 licensed paralegal practitioners.

1 **Rule 5.4. Professional Independence of a Lawyer**

2 (a) A lawyer may provide legal services pursuant to this Rule only if there is at all times
3 no interference with the lawyer's:

4 (1) professional independence of judgment,

5 (2) duty of loyalty to a client, and

6 (3) protection of client confidences.

7 (b) A lawyer may permit a person to recommend, retain, or pay the lawyer to render legal
8 services for another.

9 (c) A lawyer or law firm may ~~share legal fees with~~ pay a referral fee to a nonlawyer only
10 if the referral fee complies with Rule 1.5.:

11 ~~(1) the fee to be shared is reasonable and the fee-sharing arrangement has been~~
12 ~~authorized as required by Utah Supreme Court Standing Order No. 15;~~

13 ~~(2) the lawyer or law firm provides written notice to the affected client and, if~~
14 ~~applicable, to any other person paying the legal fees;~~

15 ~~(3) the written notice describes the relationship with the nonlawyer, including the~~
16 ~~fact of the fee-sharing arrangement; and~~

17 ~~(4) the lawyer or law firm provides the written notice before accepting~~
18 ~~representation or before sharing fees from an existing client.~~

19 (d) A lawyer may practice law with nonlawyers, or in an organization, including a
20 partnership, in which a financial interest is held or managerial authority is exercised by
21 one or more persons who are nonlawyers, provided that the nonlawyers or the
22 organization has been authorized as required by Utah Supreme Court Standing Order
23 No. 15 and provided the lawyer shall:

24 (1) before accepting a representation, provide written notice to a prospective client
25 that one or more nonlawyers holds a financial interest in the organization in which

26 the lawyer practices or that one or more nonlawyers exercises managerial
27 authority over the lawyer; and

28 (2) set forth in writing to a client the financial and managerial structure of the
29 organization in which the lawyer practices.

30 **Comments**

31 [1] The provisions of this Rule are to protect the lawyer's professional independence of
32 judgment, to assure that the lawyer is loyal to the needs of the client, and to protect clients
33 from the disclosure of their confidential information. Where someone other than the
34 client pays the lawyer's fee or salary, manages the lawyer's work, or recommends
35 retention of the lawyer, that arrangement does not modify the lawyer's obligation to the
36 client. As stated in paragraph (a), such arrangements must not interfere with the lawyer's
37 professional judgment. See also Rule 1.8(f) (lawyer may accept compensation from a third
38 party as long as there is no interference with the lawyer's independent professional
39 judgment and the client gives informed consent). This Rule does not lessen a lawyer's
40 obligation to adhere to the Rules of Professional Conduct and does not authorize a
41 nonlawyer to practice law by virtue of being in a business relationship with a lawyer. It
42 may be impossible for a lawyer to work in a firm where a nonlawyer owner or manager
43 has a duty to disclose client information to third parties, as the lawyer's duty to maintain
44 client confidences would be compromised.

45 [2] The Rule also expresses traditional limitations on permitting a third party to direct or
46 regulate the lawyer's professional judgment in rendering legal services to another. See
47 also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is
48 no interference with the lawyer's independent professional judgment and the client gives
49 informed consent).

50 [3] Paragraph (c) permits individual lawyers or law firms to pay nonlawyers for client
51 referrals in accordance with Rule 1.5. Other fee sharing arrangements with non-lawyers
52 besides referral fee arrangements are governed by Supreme Court Standing Order No.

53 ~~15., share fees with nonlawyers, or allow third party retention. In each of these instances,~~
54 ~~the financial arrangement must be reasonable, authorized as required under Supreme~~
55 ~~Court Standing Order No. 15, and disclosed in writing to the client before engagement~~
56 ~~and before fees are shared.~~ Whether ~~in~~ accepting or paying for referrals, or fee-sharing,
57 the lawyer must protect the lawyer's professional judgment, ensure the lawyer's loyalty
58 to the client, and protect client confidences.

59 [4] Paragraph (d) permits individual lawyers or law firms to enter into business or
60 employment relationships with nonlawyers, whether through nonlawyer ownership or
61 investment in a law practice, joint venture, or through employment by a nonlawyer
62 owned entity. In each instance, the nonlawyer owned entity must be approved by the
63 Utah Supreme Court for authorization under Standing Order No. 15.

64 [5] This rule differs from the ABA model rule.