Agenda

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

January 4, 2022
4:00 to 6:00 p.m.
Via Zoom

Welcome and approval of minutes	Tab 1	Simón Cantarero, Chair
Rule 8.4(h) • Clarify "process"(line 20) (see NS comments in rule). *Rule 14-301* • Make distinctions between "law related activities" (lines 41-43) and "practice of law" (line 83) clearer or tie them back to each other (see NS comments in rule).	Tab 2	Nancy Sylvester
Rules 5.5 and 1.0: • Remote work amendments. • No comments during comment period. • Recommend for final action to Supreme Court.	Tab 3	Nancy Sylvester
Rules 1.0,5.4, 5.8. and 5.9: Referral fees • **Subcommittee recommendation to split out lawyer to lawyer referral fees (Rule 5.8) from lawyer to non-lawyer referral fees (Rule 5.9).** • Recommendation to move Rule 5.8 on to Court; continue to study Rule 5.9 in consideration of practitioner feedback	Tab 4	Alyson McAlister (subcommittee chair), Angie Allen, Dan Brough, Simón Cantarero, Robert Gibbons, Jurhee Rice, Gary Sackett Sue Crismon (Innovation Office)
Projects in the pipeline: • Rule 3.8 (with subcommittee); • Rule 8.3 (mediation, arbitration, confidentiality, and reporting attorney misconduct); • LPP updates; • Client fees issue from Bar Foundation (Kim Paulding); • Rules 8.4 and 14-301 have been recommended to Court (including paragraph (2)).		--

2022 Meeting Schedule: 1st Tuesday of the month from 4 to 6 p.m.

Meetings: February 1, March 1, April 5, May 3, June 7, (skip July), August 2, September 6, October 4, November 1, December 6

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

Tab 1

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

[Draft] Meeting Minutes
December 6, 2021

WEBEX
5:00 p.m. Mountain Time

J. Simon Cantarero, Chair

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

Absent –Angie Allen, Julie Nelson,
Hon. Trent Nelson (Emeritus)

Staff:
Nancy Sylvester

Guests:
Scotti Hill
Curtis Larson
Christine Greenwood

1. **Welcome and approval of the October 4, 2021 meeting minutes:** Mr. Cantarero

   Chairman Cantarero recognized the existence of a quorum, called the meeting to order at 5:02 p.m. and discussed the future meetings of the committee being shifted to the first Tuesday of each month from 4 to 6 p.m. starting in 2022. He welcomed everyone to the meeting including the guests.

   The Chair asked for a motion to approve the October 4, 2021 meeting minutes.

   Mr. Walker moved and Mr. Gibbons seconded the motion. The minutes were adopted unanimously without correction.

2. **Rule 3.8: Petition to Amend:** Curtis Larson

   Chairman Cantarero invited Mr. Larson to discuss a proposal he has made to the Committee. He introduced himself as a former police officer and prosecutor and noted his experiences and observations that prosecutors approach their cases in manners which in his opinion should be better harmonized to protect not only the rights of victims, but also ensure consistent application of statutes to all cases. Judge Oliver wondered whether the amendment would apply to federal prosecutors in the State of Utah. Mr. Larson said he hadn't considered this question. Judge Oliver suggested the U.S. Attorney's Office be consulted while the Committee considers the Petition. The Committee asked questions about the language employed and the intention of the Petitioner in proposing this modification to the Rule. Mr. Larson presented both paragraphs (f) and (g) and the Committee asked for clarification on both. Mr. Johnson suggested that in (g) a distinction may have to be made that a prosecutor may properly handle minor defendants differently from adult defendants. Mr. Walker inquired whether these rules apply specifically to the "line prosecutor" or whether it extended to every prosecutor in a particular office/chain of command which is responsible for a charging decision or prosecution of a criminal offense. Chair Cantarero thanked Mr. Larson for his suggestions and indicated that he will refer the matter to a subcommittee for further review as is the Committee's normal practice. Judge Edwards, Judge Oliver, Dane Thorley, Alex Natt, Austin Riter, a to-be-named federal prosecutor, and Vanessa Ramos or another defense counsel will serve on the subcommittee with Judge Oliver serving as its Chair. Mr. Larson was invited to engage with the subcommittee at its election.

3. **Rules 1.0, 5.8, 5.4: Referral Fees, Fee Sharing, Solicitation**: Alyson McAlister

Chairman Cantarero asked Ms. Sylvester to recap the discussions with the Supreme Court regarding the referral fee rules. Ms. Sylvester noted that the Court had specific suggestions as to the use of the word "indirectly" in paragraph (a)(2)

regarding passing on referral fees. Ms. McAlister describes the thoughts of the subcommittee in responding to Justice Lee's concerns of "indirect" vs. "direct." The subcommittee rewrote the language to avoid having to make the distinction. The next issue regarded contingency fees. The subcommittee said an attorney should not be able to pass along the cost of a referral fee to a particular client while charging another client a smaller contingency fee if no referral has been made and fee paid. Ms. McAlister discussed the reasonableness of fees as expressed in Rule 5.8(c), incorporating factors which currently exist in Rule 1.5(a). Justice Lee asked that the Committee state with specificity the factors to be considered. The Committee offered various suggested revisions to the Rule. Chairman Cantarero referred the matter back to the subcommittee for further consideration.

4. Rule 8.3: Mediation, Arbitration, Confidentiality: Steve Johnson

Mr. Johnson discussed a conflict that exists when a serious ethical violation comes to light in a mediation or arbitration, but due to confidentiality, it cannot be reported. Ms. Sylvester suggested modification to the fee dispute rule that will allow such violations to be reported under certain circumstances. Mr. Johnson and Ms. Sylvester will discuss these matters further and revisit this matter with the Committee at its next meeting.

5. Rule 8.4(c): Prosecutors Involved in Lawful, Covert Operations: Joni Jones

Ms. Jones indicated that lawyers who are acting in undercover capacities should not be considered to be acting in violation of this Rule when they are acting "dishonestly, fraudulently, deceitfully, or making misrepresentations of fact" when involved in covert conduct in furtherance of legal purposes. Mr. Sackett and Mr. Johnson discuss an ethic advisory opinion issued 18 years ago that informs the discussion here and which could be added to the Rule to clarify this issue. Ms. Sylvester noted the language she added to the rule which would permit this practice to be ethical. The language essentially tracked the ethics advisory opinion.

Chairman Cantarero asked for a motion to propose adoption of the revised Rule as described to the Committee. Motion by Ms. Jones. Second by Mr. Bondy. The Motion passed unanimously. The rule will move on to the Supreme Court with a recommendation to circulate for comment.

6. Adjournment

Chairman Cantarero wished happy holidays to all and good luck to the Utes in the upcoming Rose Bowl game. The meeting adjourned at 6:58 p.m. The next meeting will be held on January 4, 2021 at 4 p.m.

Tab 2

Rule 8.4. Misconduct.

(1) It is professional misconduct for a lawyer to:

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

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

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

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

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

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

(g) notwithstanding the number of employees in the lawyer's firm, engage in any conduct that is listed as a discriminatory or prohibited employment practice under Sec 2000e-2 [Section 703] of Title VII of the Civil Rights Act of 1964, as amended, or under Section 34A-5-106 of the Utah Antidiscrimination Act, as amended, or pursuant to applicable court cases; or

(h) egregiously violate, or engage in a pattern of repeated violations of, Rule 14-301 if such violations harm a participant in the process and are prejudicial to the administration of justice.

(2) Paragraph (1)(c) does not apply to a government lawyer who participates in a lawful, covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation, or deceit for the purpose of gathering relevant information.

Commented [NS1]: Query to Court whether this rule may contain a numbering convention that differs from the Style Guide. The Style Guide calls for rules to start with (a). But the numbering/lettering of these provisions is so ingrained in caselaw, it would be helpful to have the rule start with a (1) so that paragraph (d), for example, is not renumbered to (a)(4) but instead becomes (1)(d).

Commented [NS2]: Question for committee: Is it sufficiently clear what process we are referring to? Do we want to say **legal process?**

(3) Paragraphs (1)(d), (1)(g), and (1)(h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

(4) Legitimate advocacy does not violate this rule.

Comment

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

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

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

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

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

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law governs the application of paragraph (g), except that for the purposes of determining a violation of paragraph (g), the size of the law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from representation, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact finder in order to allege or prove a violation of paragraph (g). Lawyers may discuss the benefits and challenges of diversity and inclusion without violating

paragraph (g). Unless otherwise prohibited by law, implementing or declining to implement initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

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

[6] Participants in the legal process include lawyers, clients, witnesses, judges, clerks, court reporters, translators, bailiffs, arbitrators, and mediators.

~~[4]~~ [7] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

~~[5]~~ [8] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[9] This rule differs from ABA Model Rule 8.4 to the extent that it renumbers the paragraphs, changes paragraph (1)(g), adds paragraphs (1)(h), (2), (3), and (4), and modifies the comments accordingly.

Rule 14-301. Standards of Professionalism and Civility.

Preamble

The fair and equal administration of justice is an important function of a civil society. The Supreme Court has a compelling interest to ensure and promote the fair administration of justice, to ensure all participants in the judicial system or legal process are treated fairly and respectfully, and to provide remedial measures when lawyers and legal professionals face discrimination in their employment. Unlawful discrimination or harassment in legal proceedings or in the operation of a law practice is inappropriate and damages the perception that the administration of justice is based on fairness. As such, the Supreme Court has determined that these standards are enforceable consistent with the Rules of Professional Conduct.

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

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

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

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

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

Although for ease of usage the term "court" is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any ~~proceedings~~ law-related activities in this State. Law-related activities include, but are not limited to, settlement negotiations; depositions; mediations; arbitrations; representation in legal matters; and court appearances. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards. Nothing in these standards supersedes or detracts from existing disciplinary codes or standards of conduct.

Commented [NS1]: Is this what we mean by the practice of law in standard 3? I can see pros and cons to saying "we mean the practice of law." If "law related activities" here means "you should be civil with others when doing these things," that may be sufficient since we say later on that lawyers should not discriminate in the practice of law, which is broadly defined in Rule 14-802.

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

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

Comment: Lawyers should maintain the dignity and decorum of judicial and administrative proceedings, as well as the esteem of the legal profession. Respect for the court includes lawyers' dress and conduct. When appearing in court, lawyers should dress professionally, use appropriate language, and maintain a professional demeanor. In addition, lawyers should advise clients and witnesses about proper courtroom decorum, including proper dress and language, and should, to the best of their ability, prevent clients and witnesses from creating distractions or disruption in the courtroom.

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

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

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

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

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Neither written submissions nor oral presentations may disparage the integrity, intelligence, morals, ethics, or personal behavior of any 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 acting in the practice of law shall avoid unlawful discrimination against protected classes as those classes are enumerated in the Utah Antidiscrimination Act of 1965, Utah Code section 34A-5-106(1)(a) and applicable federal statutes, as amended from time to time.

Comment: ~~Hostile, demeaning, and humiliating communications include all expressions of discrimination on the basis of race, religion, gender, sexual orientation, age, handicap, veteran status, or national origin, or casting aspersions on physical traits or appearance. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it.~~

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

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

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

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

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

Commented [NS2]: We need to tie this back to "law related activities" if that's what we mean. We have not otherwise defined the practice of law in this rule. Justice Lee will be all over this one. So we either amend the "law-related activities" paragraph above, or we say, "the practice of law, as that term is defined in Rule 14-802, shall avoid…."

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

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

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

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

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

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

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly

prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

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

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

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

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

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

11. Lawyers shall avoid impermissible ex parte communications.

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

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

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

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

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

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

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

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

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

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

other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

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

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

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

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

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

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

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

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

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

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

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

Adopted by Supreme Court order October 16, 2003.

Tab 3

Rule 1.0. Terminology.

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

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

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

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

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

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

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

(h) "Lawyer" ~~includes~~ denotes lawyers licensed to practice law in any jurisdiction of the United States, foreign legal consultants, and licensed paralegal practitioners, insofar as the licensed paralegal practitioner is authorized in Utah Special Practice Rule 14-802, unless provided otherwise.

(i) "Legal Professional" ~~includes~~ denotes a lawyer and a licensed paralegal practitioner.

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

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

(l) "Public-facing office" means an office that is open to the public and provides a service that is available to the population in that location.

(~~l~~m) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

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

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

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

(~~q~~r) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(~~r~~s) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral

official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

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

Comment

Confirmed in Writing

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

Firm

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

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

Fraud

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g, Rules 1.2(c), 1.6(a), 1.7(b), 1.8, 1.9(b), 1.12(a), and 1.18(d). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. Other rules require a lawyer to make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. See, e.g., Rules 1.4(b) and 1.8. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other

person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

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

Screened

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

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on

the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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

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

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction: ~~shall not:~~

(1) must not, except as authorized by these Rules or other law, establish a~~n~~ public-facing office ~~or other systematic and continuous presence~~ in this jurisdiction for the practice of law; ~~or~~

(2) must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction; ~~.~~

(3) may, while physically located in this jurisdiction, provide legal services remotely to clients in a jurisdiction where the lawyer is admitted, so long as the lawyer does not establish a public-facing office in this jurisdiction and complies with subsection (b)(2).

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a

jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services through an office or other systematic and continuous presence in this jurisdiction without admission to the Utah State Bar if:

(1) the services are provided to the lawyer's employer or its organizational affiliates while the lawyer has a pending application for admission to the Utah State Bar and are not services for which the forum requires pro hac vice admission; or

(2) the services provided are authorized by specific federal or Utah law or by applicable rule.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer's assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. The "practice of law" in Utah is defined in Rule 14-802(b)(1), Authorization to Practice Law, of the Supreme Court Rules of Professional Practice. This Rule does not prohibit a lawyer from employing the services of paraprofessionals

and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[2a] The Utah rule modifies the second sentence of ABA Comment [2] to reflect and be consistent with Rule 14-802(b)(1), Authorization to Practice Law, of the Supreme Court Rules of Professional Practice, which both defines the "practice of law" and expressly authorizes nonlawyers to engage in some aspects of the practice of law as long as their activities are confined to the categories of services specified in that rule.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes a~~n~~ public-facing office ~~or other systematic and continuous presence~~ in this jurisdiction for the practice of law. ~~Presence may be systematic and continuous even if the lawyer is not physically present here.~~ Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rule~~s~~ 7.1(a) ~~and 7.5(b)~~.

[4a] Utah's Rule 5.5(b) differs from the ABA Model Rule by recognizing in paragraph (b)(3) that systematic and continuous physical presence in Utah while providing legal services remotely to clients in a jurisdiction where the lawyer is admitted does not in itself violate this Rule.

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may

provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraphs (c) and (d) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a

tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3).

[13a] The last sentence in Comment [13] to ABA Model Rule 5.5 has been omitted to comport with Utah's definition of the "practice of law" in Rule 14-802(b)(1).

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[15a] Utah's Rule 5.5(d) differs from the ABA Model Rule by requiring a person providing services to the lawyer's employer to have submitted an application for admission to the Bar, such as an application for admission of attorney applicants under Supreme Court Rules of Professional Practice, Rule 14-704; admission by motion under Rule 14-705; or admission as House Counsel under Rule 14-719.

[15b] Utah Rule 5.5 does not adopt the ABA's provisions dealing with foreign lawyers, as other rules in Article 7 of the Rules Governing the Utah State Bar cover this matter.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer under paragraph (d)(1), the lawyer is subject to Utah admission and licensing requirements, including assessments for annual licensing fees and client protection funds, and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[18a] The Utah version of Paragraph (d)(2) clarifies that a lawyer not admitted to practice in Utah may provide legal services under that paragraph only if the lawyer can

cite specific federal or state law or an applicable rule that authorizes the services. See, e.g., Rule DUCivR 83-1.1, Rules of Practice of the United States District Court of the District of Utah; Rule 14-804 of the Supreme Court Rules of Professional Practice, admission for military-lawyer practice; Rule 14-719(d)(2), which provides a six-month period during which an in-house counsel is authorized to practice before submitting a House Counsel application; practice as a patent attorney before the United States Patent and Trademark Office.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Rule 7.1 governs ~~W~~whether and how lawyers may communicate the availability of their services in this jurisdiction. ~~are governed by Rules 7.1 to 7.5.~~

Tab 4

Rule 1.0. Terminology.

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

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

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

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

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

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

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

(h) “Lawyer” ~~includes~~ denotes lawyers licensed to practice law in any jurisdiction of the United States, foreign legal consultants, and licensed paralegal practitioners, insofar as the licensed paralegal practitioner is authorized in Utah Special Practice Rule 14-802, unless provided otherwise.

(i) “Legal Professional” ~~includes~~ denotes a lawyer and a licensed paralegal practitioner.

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

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

(l) “Public-facing office” means an office that is open to the public and provides a service that is available to the population in that location.

(~~l~~m) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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

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

(~~o~~p) “Reckless” or “recklessly” denotes the conscious disregard of a duty that a lawyer is or reasonably should be aware of, or a conscious indifference to the truth.

(q) “Referral fee” means any exchange of value beyond marginal or of minimal value that is paid for the referral of a client, whether in cash or in kind.

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

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(~~s~~u) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

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

Firm

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

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by

which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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

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

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g, Rules 1.2(c), 1.6(a), 1.7(b), 1.8, 1.9(b), 1.12(a), and 1.18(d). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. Other rules require a lawyer to make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. See, e.g., Rules 1.4(b) and 1.8. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed

and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

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

Screened

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

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic

form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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

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

Rule 5.4. Professional Independence of a Lawyer

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

(1) professional independence of judgment,

(2) duty of loyalty to a client, and

(3) protection of client confidences.

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

(c) A lawyer or law firm may pay a referral fee to a nonlawyer only if the referral fee complies with Rule 5.8. ~~A lawyer or law firm may share legal fees with a nonlawyer if:~~

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

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

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

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

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

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

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

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

Comments

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

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

[3] Paragraph (c) permits individual lawyers or law firms to pay non lawyers for client referrals~~, share fees with nonlawyers, or allow third party retention.~~ in accordance with Rule 5.8. ~~In each of these instances, the financial arrangement must be reasonable,~~

~~authorized as required under Supreme Court Standing Order No. 15, and disclosed in writing to the client before engagement and before fees are shared.~~ Other fee sharing arrangements with non-lawyers, besides referral fees as defined in Rule 1.0, are governed by Supreme Court Standing Order No. 15. Whether in accepting or paying for referrals, or fee-sharing, the lawyer must protect the lawyer's professional judgment, ensure the lawyer's loyalty to the client, and protect client confidences.

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

[5] This ~~Rule~~ rule differs from the ABA model rule.

Rule 5.8. Lawyer to Lawyer Referral Fee.

(a) **Referral fee restrictions.** A referral fee paid to a lawyer who does not represent the client in the referred matter must:

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

(2) not be passed along to the client either as a cost or an increase of the total fee; and

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

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

(b) **Reasonableness of referral fee.** Any referral fee payable in the case must be reasonable relative to the total attorney fees that may ultimately be earned, considering the following factors:

(1) the referral fee customarily paid in the locality for similar referrals;

(2) the amounts involved and the potential results; and

(3) the nature and length of the referrer's relationship with the client.

(c) **Fee sharing.** A fee shared with a lawyer who continues to represent the client in the matter referred is not considered a referral fee for the purposes of these rules.

(d) **Referral fee to non-lawyer prohibited.** A referral fee may not be paid to a non-lawyer.

Comment

[1] Paragraph (a) prohibits lawyers from paying a referral fee to a lawyer making a referral to them until the lawyer who represents the client in the matter is entitled to be paid attorney fees. In the case of a contingent fee matter, the lawyer may not pay the referral fee to the referring lawyer until the lawyer who actually represents the client in the matter is entitled to receive the contingent fee, which may be at the conclusion of the

matter. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter diligently. See Rules 1.1 and 1.3. Paragraph (a)(2) prohibits a lawyer from charging a client in a referred matter a higher fee , or from seeking payment of greater costs, than the lawyer charges other clients where no referral fee was paid. For the definitions of "informed consent," "confirmed in writing," and "referral fees," see Rule 1.0.

[2] When considering the reasonableness of the referral fee in Paragraph (b), the total attorney fee must still comply with the reasonableness factors set out in Rule 1.5.

[3] The term "amounts involved" in paragraph (b)(2) refers to things such as the estimated value of the case, anticipated recovery, insurance limits, and statutory caps.

[4] This rule is not part of the ABA Model Rules.

Rule 5.9. Lawyer to Non-Lawyer Referral Fee. [discuss whether specific practice areas should be exempted, such as domestic and personal injury]

(a) **Referral fee restrictions.** A referral fee paid to a non-lawyer must:

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

(2) not be passed along to the client either as a cost or an increase of the total fee; and

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

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

(b) **No referral fee to potential witnesses.** No referral fee may be paid, directly or indirectly, to a potential witness in the referred case.

(c) **Reasonableness of referral fee.** Any referral fee payable in the case must be reasonable relative to the total attorney fees that may ultimately be earned, considering the following factors:

(1) the referral fee customarily paid in the locality for similar referrals;

(2) the amounts involved and the potential results; and

(3) the nature and length of the referrer's relationship with the client.

(d) **Fees paid for generating consumer interest for legal services.** Fees paid for generating consumer interest for legal services with the goal of converting the interests into clients, such as lead generation service providers, online banner advertising, pay-per-click marketing, and similar marketing or advertising fees, are not referral fees.

Comment

[1] Paragraph (a) prohibits lawyers from paying a referral fee to a person making a referral to them until the lawyer who represents the client in the matter is entitled to be

paid attorney fees. In the case of a contingent fee matter, the lawyer may not pay the referral fee to the referring person until the lawyer who actually represents the client in the matter is entitled to receive the contingent fee, which may be at the conclusion of the matter. Paragraph (a)(2) prohibits a lawyer from charging a client in a referred matter a higher fee, or from seeking payment of greater costs, than the lawyer charges other clients where no referral fee was paid. For the definitions of "informed consent," "confirmed in writing," and "referral fees," see Rule 1.0.

[2] Referral fees to a non-lawyer who is a potential witness may create a conflict of interest between the client and the potential witness referring party. Additionally, the payment of a referral fee to a witness may create such a pervasive and serious appearance of impropriety to the trier of fact that a client's case may be significantly compromised. Before entering into an agreement to pay a referral fee, the lawyer should evaluate whether the person requesting the referral fee could potentially testify to facts or issues that might be relevant if the anticipated claim should proceed to trial. Even if the lawyer does not intend to call the person as a witness, if it is foreseeable that an opposing party or third party may do so, a referral fee violates this rule. Potential witnesses include treating providers, eyewitnesses, and family and friends of the client. This prohibition applies to direct (i.e., to the potential witness directly) or indirect (i.e., to a facility, brokerage, or other third party associated or affiliated with the potential witness) payments of referral fees.

[3] When considering the reasonableness of the referral fee in Paragraph (c), the total attorneys fee must still comply with the reasonableness factors set out in Rule 1.5.

[4] The term "amounts involved" in paragraph (c)(2) refers to things such as the estimated value of the case, anticipated recovery, insurance limits, and statutory caps.

[5] This rule is not part of the ABA Model Rules.

JEFFREY D. EISENBERG
DAVID A. CUTT
JORDAN P. KENDELL
ERIC S. OLSON
JACQUELYNN D. CARMICHAEL
NATHAN S. MORRIS
CHRISTOPHER P. HIGLEY
LENA DAGGS
MARGIE G. COLES

EISENBERG CUTT KENDELL & OLSON
ATTORNEYS AT LAW

215 SOUTH STATE STREET, #900
SALT LAKE CITY, UTAH 84111
PHONE 801.366.9100
FACSIMILE 801.350.0065
TOLL FREE 877.850.3030
ECKOLAW.COM
~
OF COUNSEL:
ROBERT SHERLOCK

December 29, 2021

J. Simon Cantarero
Alyson Carter-McAlister
Supreme Court Advisory Committee on the Rules of Professional Conduct

I am writing to submit my comments on proposed changes to Rule 5.4 of the Utah Rules of Professional Conduct. For the reasons I will discuss here, the rule should not be changed to permit a lawyer to pay a referral fee to a non-lawyer. However, if the Committee is inclined to allow referral fees to be paid to non-lawyers in certain circumstances, I have included a proposal to define the circumstances in which a referral fee can be paid, subject to court approval.

Referrals to non-lawyers will lead to abuses and legalize graft

During the brief period during 2020 that Rule 5.4 permitted lawyers to pay referral fees to non-lawyers, lawyers in the personal injury bar began talking about serious problems and abuses which were occurring as "unintended consequences" of the rule change. There were reports of chiropractors, physical therapists and even family members demanding payment for the referral of cases to lawyers. The Supreme Court recognized that problems existed. In December, 2020, the Court announced that the part of the rule allowing bare referral fees to non-lawyers had been suspended. It stated in a press release: "**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.**"

Although the proposal now under consideration by this Committee is an improvement in degree compared to the original proposal, I believe the unintended consequences of the proposed rule under consideration allowing non lawyers to be paid for referrals of contingency fee cases remain, and will cause substantial harm to consumers. I also believe that such payments will ultimately damage public confidence in the legal profession and our system of justice.

Until 2020, no state in the U.S. permitted referral fees to be paid to non-lawyers. However, I work with lawyers in states where there has been lax enforcement of the rules prohibiting referral fees to non-lawyers. Lawyers practicing in these parts of the country report that unseemly high-pressure tactics to acquire cases are far more common than I have ever experienced during my 39 years practicing in Utah. I'll share a recent example illustrating how

abuses can occur. In 2019, I was hired to represent four families of Chinese nationals killed when a tour bus overturned in Southern Utah. More than thirty people on the bus were injured in the accident. Most of the families hired a non-lawyer "agent" who shopped the cases around . The agent directed the clients to a California firm which was already under investigation for fraud. That firm's founder has since been disbarred for massive theft of client funds and the firm disbanded. California counsel I have worked with have advised me that for years, independent "runners" operate in some areas of the state, trolling for cases, which they then sell to the highest bidder.

I believe that a rule facilitating referrals to non-lawyers is likely to facilitate a cottage industry in Utah, where non lawyers acting as "independent agents" solicit cases in hospitals, at accident sites, in therapy clinics and so on, to sell to the attorney willing to pay them the highest referral fee. The result will be back door deals, high pressure sales tactics and ultimately, increased cost to consumers. I can think of few circumstances where a potential client or family member is more vulnerable to making bad decisions than when under the stress of a tragic accident that has sent a loved one to a hospital ICU. Does the bar want to promote visitation by "sugar lipped" strangers making "cold calls" offering to help?

Even if the above scenario could be prevented through changes to Rule 7.1 with adequate policing, if the proposed rule is enacted and once it becomes widely known, more widespread abuse is likely. Inevitably, friends, family and other "influencers" among the general public will come to view this new "rule" as an opportunity to earn money brokering cases for injured people they know. The general public will perceive the new rule as legalizing "graft".

The legal system depends upon the public's confidence that the system operates honestly. I feel that the proposed changes to Rule 5.4 will diminish the reputation of the bar and damage the confidence our citizens have in Utah's legal system.

I could add many specific examples of abuses that we will likely see if the proposed rule change is enacted. For instance, do we want to have tow truck drivers making a second income by handing out the cards of a favored lawyer or even getting the lawyer on the phone and out to see a client immediately? Do we want a cottage industry to develop where anyone can become a salesperson in the business of collecting and selling their neighbor's legal cases? How does any of this help consumers?

We don't need financial incentives to encourage people who really care for their friends, family, colleagues and patients to help them find a lawyer. I have been practicing in the contingency fee area for more than thirty years. Many of the cases I handle come from non-lawyer referrals. I know many other lawyers also receive cases this way. Non lawyers who refer cases <u>without</u> demanding payment are genuinely interested in getting the best service for their friends, family, colleagues, etc. Ethical friends, family and colleagues will continue to locate and refer cases to lawyers without demanding to be paid. What can we say about the person who would only perform this service for a fee? Can we have any confidence that such a person will choose the lawyer who is most qualified? If a person demands a fee in order to help an injured friend, colleague or family member, it seems more likely that many will simply choose the lawyer willing to pay them the most for doing so.

Permitting Referral fees to non-lawyers will not benefit consumers.

By definition, the goal of civil law is to provide full compensation for harm one person or entity causes another. When a "bare referral fee" is permitted, that additional fee costs the client a significant part of her or his recovery. Unlike in a co-counsel arrangement, the person being paid does not perform a service on the case in exchange for the fee.

How will paying a non-lawyer a share of the fee benefit clients? This practice decreases the net recovery to the lawyer chosen to handle the matter. Many attorneys paying this additional referral fee will pass the cost on to the client by taking a higher contingency percentage for the case. Even if such fee increases are prohibited by the Bar (and assuming an effective mechanism exists to police violations). Many lawyers, knowing the eventual fee will be smaller to them, will likely spend less time and money developing the client's case.

I have conflicting feelings about even permitting a lawyer to receive a fee for a "bare referral ", i.e., where after referral the lawyer does not participate in handling the case. The pre 2020 rule worked well. That rule only permitted contingency fee sharing when the referring lawyer accepted joint responsibility over prosecution of the case. Under the prior rule, lawyers could refer a case, remain involved in a case in a limited capacity and receive compensation for the referral. This seemed to encourage referrals without causing many abusive or shady practices.

That said, if the Supreme Court is convinced that "bare referrals" between lawyers should be permitted, it can be argued that doing so might benefit some consumers. The practice incentives the lawyer who lacks the skill and training to handle a case to direct the client to one who does. Without this rule or the prior "joint representation" rule, some lawyers will be tempted to handle contingency fee matters for which they are neither trained nor qualified.

This reasoning does not hold up as a justification to allow non-lawyers to be paid for referrals. Non-lawyers do not have the option to prosecute a case themselves, so they will not harm the client's case if no referral fee is paid to them. Most non-lawyers lack the sustained and wide contact and experience with the bar. They will either choose a lawyer they know, regardless of skill for the particular matter, or they will choose a lawyer who makes it known that the lawyer will pay for referrals.

If the proposed rule is enacted, what is to stop a lawyer from advertising that the lawyer will pay a referral fee to any member of the public that sends him a case? If financially incentivized, many non-lawyers "helping" others for a fee will only be incentivized to look for lawyer who will pay them.

Although the Bar will always have to deal with a few bad apples, lawyers are taught that they owe fiduciary obligations to their clients. They are trained to understand that the client's case is not a commodity merely to be sold at auction to the highest bidder, even if the bidder lacks the qualifications to do the best job. Thus, they are trained to find the best lawyer available when the matter is beyond their expertise. Moreover, a mechanism exists for the Bar and the Courts to discipline lawyers who abuse their fiduciary duties.

In contrast, the non-lawyer does not receive this training, is not a fiduciary per se and may not appreciate or care about fiduciary responsibilities. Moreover, the Bar lacks the ability to sanction non-lawyers who profit without getting the client to a well-qualified lawyer.

Non-Lawyer referral fees are not necessary to enable consumers to access contingency fee lawyers , nor will permitting them increase access.

Will legalizing non lawyer referral fees help more consumers access lawyers willing to accept their case on contingency fee? I cannot see how it can. I support efforts to foster innovation to improve access to justice in areas where consumers needing legal help are underserved. However, clients with meritorious cases who seek contingency fee legal help are not underserved today.

There are scads of lawyers practicing contingency fee law. The Utah Association for Justice alone has more than 400 members. Lawyer advertisements and social media resources for the consumer to see proliferate. Internet, social media and TV/radio advertising allow clients to identify many lawyers and firms and find the lawyer they prefer. When a consumer uses these tools, they can compare price by asking what percentage each firm will charge. They can vet expertise and quality by asking to talk to present and former clients of each lawyer they are considering. They can see user internet reviews for each firm. If they choose, they can "eyeball" the lawyers under consideration. Referral fees to non-lawyers will often bypass these quality controls in favor of personal payment arrangements that the injured client did not arrange. They are not needed to identify lawyers.

Still, it is true that not every person thinking they have a "good case" can find a lawyer willing to work on contingency fee. Would permitting a non-lawyer to be paid a referral fee enable a consumer who can't find a contingency fee lawyer under the present system to now find one ? How could it? If a lawyer must pay a referral fee to obtain a case, it is less likely, not more likely, that the lawyer will accept a case with marginal value or questionable prospects.

There is no shortage of lawyers willing handle smaller contingency fee cases. My firm is in contact with hundreds of lawyers in Utah's plaintiff bar. We know of many lawyers who will happily accept a case worth four figures, provided the case has merit.

I know of two situations in which some consumers may have difficulty obtaining contingency fee counsel. Allowing referral fees to nonlawyers will not fix either problem.

First, consumers with claims of low value (a few thousand dollars or less) and which have questionable merit often have difficulty finding a lawyer under any system (except for a no-fault system). It is debatable that this is a problem. Small claims of questionable merit impose a significant cost on both businesses and consumers in the form of unnecessary legal fees to businesses. Legal expenses are passed on to consumers in the form of higher prices for services and products. Although I am a plaintiff's attorney, I do not believe that the Committee's goal should be to provide every person access to a contingency fee lawyer, *regardless of the size and merit of the claim*. Instead, the goal should instead be a system designed to facilitate access to clients having good claims to rectify serious harms.

Second, under any referral system, some consumers with complex claims have difficulty finding a contingency fee lawyer where the case will be expensive to prosecute and the value of the claim is problematic. Here too, permitting referral fees to non-lawyers will do nothing to solve this problem. Complex cases require a high degree of training and skill, significant outlay of hard costs, and a commitment to stay with a case even when the results are uncertain. Imposing another layer of expenses in the form of the referral fee to a non-lawyer only makes it more difficult for the client with such a claim to find access to a qualified lawyer.

What can be done to improve access to justice for those harmed who cannot access a contingency fee lawyer? The answer is through legislation or simplification of the legal process. The Utah Personal Injury Protection system, created by the Utah Legislature many years ago, is one example of a no-fault system that has worked. Mandatory arbitration of smaller auto accident cases has worked. Utah's consumer laws should be made more user friendly; Many states have stronger laws to help consumers recover damages for monetary injury. Utah's tiered personal injury system is also a good step, as it streamlines litigation for smaller cases. Utah's small claims court allows for claims under $11,000 to be easily prosecuted and any non-lawyer can assist the claimant. A streamlined mediation system for smaller claims is another idea worth exploring.

However, we cannot solve most access problems through changes to Rule 5.4 referral fee rules, and the harms of doing so will far outweigh any benefits.

<u>If referral fees to non-lawyers are allowed in any circumstances, the Court should require case by case approval with strict guidelines</u>

If the Subcommittee, Advisory Committee and Supreme Court do approve amending Rule 5.4 to allow referral fees to be paid to non-lawyers, the circumstances should be limited, the guidance in the rules should permit no "grey area evasion" and there should be a mechanism for Court approval.

Specifically, Rule 5.4 should require that all referral fees paid to a non-lawyer be approved by a court prior to disbursement. Additionally, the rule and corresponding judicial interpretation should contain clear standards to inform the Court, members of the Bar, and the public what must be shown to the Court to obtain court approval. I propose the following:

A referral fee payment to a non-lawyer must be approved by a Utah court of competent jurisdiction. In order to be approved by the Court, the attorney and the party requesting payment of a referral fee must demonstrate to the Court's satisfaction: (1) The total fees paid by the client are not greater than those that are commonly charged in the community for a similar matter in which no referral fee is generally paid, (2) the assistance of the non-lawyer applicant was materially necessary to enable the client to locate a lawyer holding special qualifications to handle the matter, (3) prior to engaging the lawyer, the client was informed <u>in writing</u> that the non-lawyer would receive a referral fee and the percentage of the fee to be paid, and (4) the referral fee and the total fee are not excessive.

This proposal minimizes the likelihood of the unintended harms I have referred to and would prevent wasteful fees to diminish a consumer's recovery via unnecessary referral fees to non-lawyers. It would also discourage shady or high-pressure tactics to acquire cases using non lawyer agents. Courts already approve many types of settlements (minors, incompetent persons, class actions, etc.). A streamlined procedure could be created for approval of non-lawyer referral fees.

I believe the better, and simpler approach is to bar lawyers from paying referral fees to non-lawyers. But the alternative I have suggested is worth considering if the committee determines that some change to Rule 5.4 is in the best interest of consumers.

Closing comments

Helping the less affluent and less powerful in our society obtain legal justice is what motivated my switch to plaintiff work more than thirty years ago. It is also why I have worked with groups such as the Public Justice Foundation and the Utah Brain Injury Alliance over several decades.

I support the goal of fostering innovation to make legal services available and more affordable for Utah's people. I support many of the projects that the Office of Innovation is sponsoring and evaluating. But as changes are considered, the Bar must closely examine the potential unintended adverse consequences that may occur.

Under the current system, when non lawyers are involved in directing legal services to others, they have been trained that they have the responsibilities of fiduciaries to always put the client's interests first. The Bar also has a mechanism to deal appropriately with lawyers who behave unethically. These robust controls do not exist for the general public. Many people will see the opportunity to "broker" legal cases for a fee as a way to benefit only themselves.

I understand the perception that groups like the Bar operate as "guilds" in that they seek to further the interests of their members. But the Bar should not back away from its important role of critically examining whether a proposed change will benefit consumers or have unintended adverse effects on our legal system.

When I study the new proposal and consider all I have learned in my four decades of practice, I am very convinced these rules will lead to undesirable and serious problems.

Respectfully submitted,

Jeffrey D. Eisenberg
Bar # A4029

December 27, 2021

Re: Referral Fees to Non-lawyers and Solicitation Rule

Dear Utah Supreme Court and Committees:

The Utah Association for Justice is an association of Utah attorneys who promote justice and fairness for persons injured by others and safeguard victims' rights. We are writing to express concern regarding how the proposed changes to referral fee and solicitation rules negatively affect accident victims.

Referral Fees (Rules 1.0, 5.4, and 5.8):

If the justification for non-lawyer referral fees is to aid clients in getting advice and finding representation, that justification fails with respect to personal injury clients.

- Personal injury victims are able to find an attorney easier than any other area of law. The television, freeways, radio and internet are full of ads for free consultations with contingency fee lawyers. It seems that a Google search would do far more than a non-lawyer referral fee to give a client an abundance of options. We worry that a non-lawyer referral fee would in fact *narrow* the scope of options for the client. Imagine someone has a referral fee agreement with a specific attorney. Why would that person refer to any other attorney? In fact, referral fees for non-lawyers simply rewards a person for referring, not for referring to the best priced lawyer, much less the most competent lawyer.
- We understand that one of the arguments in favor of non-lawyer referral fees is the reticence of personal injury attorneys to represent those with low-value cases. However, the Utah legislature has already provided multiple remedies to individuals with low-value claims:
  - Cases under $11,000 can be heard in small claims court with or without an attorney and property damage claims and injury claims can be bifurcated so the property damage claim does not count against the small claims court limits; and
  - Utah Code Sections 31A-22-321 and 18-1-4 allow for arbitration in cases of $50,000 or less. This allows for easier access to justice and avoids the expensive costs of litigation. These arbitrations are extremely efficient and can be used by lawyers and non-lawyers as the statutes specifically state that "the Rules of Civil Procedure and Rules of Evidence shall be applied liberally with the intent of concluding the claim in a timely and cost-efficient manner."
- While we sympathize with the Court's efforts to provide additional legal options to victims with lower-value claims, we worry about the cost of the proposed changes to

the catastrophic injury or death cases. Indeed, it is the Utahn whose injury will prevent them from no longer being able to work, the young family that lost a parent who financially provided for them, that will benefit most from legal expertise and experience. We worry that referral fees to non-lawyers could become a sale to the highest bidding attorney, rather than an attorney most qualified to handle such cases.

Additionally, we are concerned that a non-lawyer referral fee may reward a third party whose interests are likely contrary to the personal injury client.

- Personal injury attorneys work on contingency fee agreements instead of hourly rates. This means the client does not have to pay fees or costs unless the case is successfully resolved by the attorney. One justification for non-lawyer referral fees is to make contingent fee lawyers more competitive (i.e. incentivizing fees at lower percentages), but non-lawyer referral fees do not help with that. They reward a person for referring, not for referring to the best priced lawyer, much less the most competent lawyer. It is, in fact, more likely that the referring non-lawyer would refer to a high-priced lawyer rather than a low-priced lawyer, as the referral fee would presumably be more if referred to a high-priced lawyer. Non-lawyer referral fees, therefore, place the client's pecuniary interests contrary to the referring non-lawyer.

While we appreciate the committee's efforts to exclude potential witnesses from receiving referral fees, we do not believe this exclusion will solve the problems associated with referral fee for non-lawyers in personal injury cases.

- We can imagine too many ways around the proposed rule and the resources that would be required to police and enforce the rule. Maybe the referral source can't take the payment because they are a treating provider, but the source could have the referral fee paid to their medical clinic or an LLC set up by the referral source's spouse for precisely this purpose. Such an arrangement could sidestep the witness conflict problem but would maintain the integrity/credibility problem – and there are no ethical rules that attach to that arrangement, which is precisely why non-lawyer referral fees present such a conundrum. Furthermore, we anticipate these arrangements will result in an increased number of motions in limine and statements of discovery issues in an era where courts are trying to limit litigation and motions before the courts.

Solicitation (Rule 7.1)

The elimination of the prohibition against in-person solicitation previously found in Rule 7.3 has drastically affected personal injury victims – especially in situations of high stress following an accident. Unfortunately, several attorneys within our organization have become aware of law firms searching police scanners and showing up at accident scenes, hospitals and potential clients' homes after an accident. Personal injury clients need time to mourn the death of their loved ones and/or recover from significant injuries. The Utah legislature was concerned with personal injury clients' ability to make important decisions in these high stress situations, so they

created Utah Code 78B-5-813, which states that any adverse statement, written or oral, obtained from an injured person within 15 days of an occurrence or while the person is confined in a hospital is not admissible as evidence in any civil proceeding. The same rationale would apply to personal injury victims making the important decision of hiring an attorney in a high-stress environment, especially when being solicited in person where the individual is subject to a direct personal encounter without time for reflection.

Conclusion

While we applaud the Court's efforts in providing more access to justice for Utahns in all areas of law, we believe that the proposed changes to personal injury law will not aid the victims. The United Kingdom created a sandbox previous to Utah's sandbox, but specifically excluded personal injury law from the reforms. We believe that exclusion was due, in large part, to many of the reasons set forth above. Further, the UK's exclusion of personal injury law to its sandbox reforms would indicate that caution should be exercised when relying on data to support the success of the UK's changes, as that data would not apply to personal injury cases.

Respectfully submitted by the Executive Committee on behalf of the Utah Association for Justice.

Kenneth L. Christensen – President
Alyson McAllister – President-Elect
Rick S. Lundell – Vice President
Charles T. Conrad – Secretary
D. Russell Hymas – Treasurer
Jessica A. Andrew – Present