# Agenda

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

December 6, 2022
4:00 to 6:00 p.m.
*In-person with Zoom available*

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|---|---|---|
| Welcome and approval of minutes. | Tab 1 | Simón Cantarero, presiding |
| Lawyer well-being discussion<br>(Coming in 2023: *Tava* therapy and *Unmind* proactive well-being app) | | Martha Knudsen, Director of the Utah State Bar's Well-Being Committee for the Legal Profession |
| Review proposals regarding Rule 1.2(d) (lawyers practicing cannabis law). | Tab 2 | Subcommittee: Autin Riter (chair), Billy Walker, Cory Talbot, Judge Trent Nelson |
| Review proposal to address comments to Rule 1.16 (criminal case appeals). | Tab 3 | Subcommittee: Dane Thorley (chair), Alex Natt, Adam Bondy, Billy Walker, Ian Quiel, Annie Taliaferro, Doug Thompson, and Stacy Haacke |
| Projects in the pipeline:<br>• **Rule 8.3** (*reporting misconduct in fee dispute resolution*): Out for comment until 12/23/22.<br>• **Rule 8.4(c)** (*investigative activities*): on 12/7/22 Supreme Court agenda for discussion re recirculating for comment.<br>• **Rule 5.8** (*referral fees between attorneys*): on 12/7/22 Supreme Court agenda for discussion<br>• **Rules 8.4 and 14-301**: Assigned to Judicial Council's Fairness and Accountability Committee (*historical memo attached to August materials*). | | -- |

**Meetings are in-person at the Utah Law and Justice Center and are held on the 1st Tuesday of the month from 4 to 6 p.m.**

**2023 Meeting Schedule:** ●January 3●February 7●March 7●April 4●May 2●June 6●August 1● ●September 5●October 3● November 7●December 5●

**http://www.utcourts.gov/committees/RulesPC/**

# Tab 1

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

## [Draft] Meeting Minutes
## November 1, 2022

Utah Law and Justice Center & Zoom
16:00 Mountain Time

*J. Simon Cantarero, Chair*

**Attendees:**
J. Simon Cantarero, Chair

Phillip Lowry
Gary Sackett
Cory Talbot
Dane Thorley
Alyson McAllister
Joni J. Jones
Robert Gibbons
Hon. James Gardner
Adam Bondy
Austin Riter
Mark Hales
Hon. Trent Nelson
Ian Quiel
Julie Nelson
Hon. Amy Oliver
Christine Greenwood (ex officio)

**Staff:**
Nancy Sylvester
Scotti Hill

**Guests:**

**Excused:**
Jurhee Rice
Billy Walker
Hon. M. Alex Natt, Recording Secretary
Hon. Mike Edwards

1. **Welcome and approval of the October 4, 2022 meeting minutes (Chair Cantarero)**

   Chair Cantarero recognized the existence of a quorum, called the meeting to order at 4:03 and asked for a Motion to Approve the October 4, 2022, Meeting Minutes.

   Chair Cantarero suggested one edit to the October minutes. Judge Gardner was incorrectly omitted from the attendees list. Judge Nelson also suggested we make clear the following regarding his remarks, "plead, judge conviction, *or* conviction," regarding the proposed amendments to Rule 1.16.

   Ian Quiel moved to accept the October 4, 2022, minutes with the aforementioned changes. Mark Hales seconded the Motion. The Motion passed by acclamation.

2. **Rule 1.2 (Mr. Riter)**

   Subcommittee Chair Austin Riter presented the subcommittee's work on Rule 1.2(d).

   Mr. Riter discussed the subcommittee's desire to revise Rule 1.2(d) to add clarity for lawyers counseling clients in cannabis-related industries. Namely, to add language that would insulate lawyers from running afoul of the ethics rules for advising their clients on these issues, which concern a conflict of laws between state and federal statutory schemes.

   The group opined that the fact that the Legislature has weighed in on this issue is ample justification for the committee to craft an applicable rule to address this from an ethics perspective. There is a strong desire for there to not be an open question as to whether lawyers can advise and assist clients in this burgeoning industry.

   Mr. Riter explained that the subcommittee reviewed several ethics opinions and rules on this issue from various jurisdictions, which led to the subcommittee's proposal for two distinct rule options.

   The first option is a rule with language narrowly focused on lawyers advising and assisting clients with Utah's cannabis related statutes. The subcommittee proposed the amendment as an addition to comment [12], which would read,

*Under paragraph (d), a lawyer may also counsel a client regarding the validity, scope, and meaning of Utah's cannabis-related statutes, and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, and other state or local provisions implementing the statutes. In these circumstances, the lawyer shall also advise the client regarding the potential consequences of the client's conduct under related federal law and policy.*

The amendment would also include an explanatory note that enumerates the specific cannabis-related statutes the rule is meant to encompass.

Mr. Riter noted that this approach tracks very similar language that's used in at least three other jurisdictions-Vermont, Nevada, and Alaska. A critical component of this language is not simply to allow lawyers to counsel clients on how to comply with state law, but to advise on the conflict between state and federal law. The Rule 1.2 amendment also includes an accompanying amendment to Rule 8.4 that introduces an exception to the misconduct listas follows: "*Except as provided in Rule 1.2(d), it is professional misconduct for a lawyer to…*"

The second proposal is influenced by a Model ABA rule that was eventually abandoned by the ABA House of Delegates. This proposal generalizes the concept of lawyers advising on cases in which a conflict between state and federal law exists but does not narrow to cannabis-related statutes.

Chairman Cantarero expressed concern that the first option's reference to specific cannabis-related statutes in the comment would require the committee to continually update these references as laws change and are renumbered. There is also a concern that there may be additional laws or applications this committee is unaware of at this time. Additionally, rule-like language, evidenced by the term "shall," should not be in a comment. The Utah Supreme Court has stated any obligatory language should be in the rule itself, rather than in the comments.

Mr. Quiel noted that other RPCs have similarly strong language in the comments, the comments of Rule 3.3 for example. Ms. Sylvester responded that while this can be true in some places, the Court is moving away from that practice.

Judge Garner also noted that the Legislature changes statutes all the time, echoing the concern about listing out specific subsections of statutes. The committee may list out statutes generally, but there's no need to use the rule to interpret every single statute.

Ms. Sylvester echoed the sentiment that the committee should not have rule-like language in the comments. She stated that it's permissible to have "shall" language in the comments as long as it matches what appears in the relevant rules themselves. What is not advisable is having a strict prohibition appear for the first time in comment language. She noted that regarding the current focus of

discussion, the committee could craft a broader rule and use the state's cannabis laws as an example in the comments.

Mr. Sackett agreed with this sentiment and took issue with the first option's very specific mention of cannabis-related statutes. He also asked why the Committee would render a distinction between Utah and federal law, which implies that Utah laws are supreme to federal law. There are many examples where the opposite is true. This reasoning was echoed by Ms. Jones and Judge Oliver. Mr. Sackett also questioned why civil penalties aren't listed alongside criminal penalties.

Apart from the issue of where the language is placed, Judge Nelson considered the "shall" language was warranted given the gravity of advising a client that state conduct may be prohibited under federal law. Judge Nelson stated that this is not a "gray area" issue since cannabis is still explicitly illegal under federal law. He noted that the committee was considering a safe haven from OPC disciplinary proceedings, not a safe haven from federal prosecution.

Judge Nelson also introduced a second question: what happens if the lawyer is an owner of one of these cannabis-related entities? Does this calculation change?

Judge Nelson voiced opposition to the amendment to Rule 8.4 beginning with Rule 1.2, which puts "everything through the lens of 1.2." Mr. Sackett also questioned why we need to amend Rule 8.4.

Ms. Greenwood stated her belief that Rule 1.2 should be left the way it is because it already captures the idea of not advising your client to violate the law whether it is state or federal. She opined that if the committee is looking to craft a general amendment, the rule as it stands already covers this.

The committee discussed revising Rule 8.4 to say that it is not professional misconduct to advise clients in instances where there's a conflict between state and federal laws.

Chair Cantarero asked why would this not just apply to paragraph (c) of Rule 8.4? Others commented that it has implications outside of this paragraph. He asked whether the subcommittee had guidance from the House of Delegates on this issue? Subcommittee member Mr. Walker said no because this was abandoned by the ABA.

Ms. Jones said she preferred the broader language addressing the conflict between state and federal law. Mr. Quiel agreed, stating that there is a national trend where states are legalizing controlled substances that might still be illegal under federal law, so the committee doesn't want to keep updating the rule language if this occurs.

Judge Nelson stated that this is a broad policy decision that is asking the committee to hypothesize about issues that the committee may not fully understand just yet.

The committee decided to table the discussion. Ms. Sylvester suggested the subcommittee take the issues that were raised at the meeting and create two versions of the rule to present the Court with specific rule language to be voted on by the committee before being presented to the Court.

**3. Rule 8.4(c) (Ms. Jones)**

Subcommittee Chair Joni Jones presented the subcommittee's work on Rule 8.4(c).

The subcommittee was tasked with reconciling the draft rule with comments received during the comment period. One commenter supported the change, and three others were critical about the proposed language. Ms. Jones noted that the discussion at the subcommittee was helpful.

Originally, when putting this rule together, Ms. Jones said she was thinking exclusively about protecting government lawyers, but later realized there are other situations where non-government lawyers would be involved with deception, such as investigating discrimination in housing or trademark violations. The new recommendation is to make the language broad enough to include non-governmental lawyers as well.

A second consideration was whether the protection would apply simply to those actually involved in the deception, as well as whether the conduct was pursuant to the individual's role as a lawyer or during the performance of non-law related duties. The subcommittee spoke with Mr. Sackett about an Ethics Advisory Opinion on point during his tenure as Chair of the Ethics Advisory Opinion Committee. The ethics opinion involved a federal attorney working as an investigator for the FBI/CIA. The attorney was licensed in Utah, but his federal job required him to participate in the deception on a federal level. This motivated the subcommittee to include the following language permitting deception, "conducted to established law."

The subcommittee suggested the following amendments:

1) To Rule 8.4(c)

*It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may participate in investigative activities employing deception that are conducted pursuant to established law.*

In addition, the subcommittee proposed new comment 2a as follows:

> ***Comment***: *Subsection (c) provides a safe harbor for attorneys who engage in lawful covert operations, often in criminal investigations or investigations involving suspected violations of constitutional rights or civil law. Whether a covert operation is lawful would be determined by reference to the definition of "law" in Rule 14-802(b)(2).*
>
> *Examples covered by this rule are governmental "sting" operations; use of testers in fair-housing cases to determine whether renters discriminate against protected classes of applicants and gathering evidence of copyright violations. These are legitimate activities that benefit the common good and that courts and commentators have long recognized do not violate ethics rules.*
>
> *The safe harbor does not apply when a lawyer uses deception to violate others' constitutional rights or directs others to do so, and it does not change the lawyer's obligations for candor and fairness under Rule 3.3 and 3.4.*

The committee agreed that this amended rule is a lot more concise and general, but that the language "this differs from the ABA model rule" should be added and the numbers should be reordered.

Ms. Jones added that for government lawyers, "deception" usually applies to identity and purpose. Judge Nelson asked whether the deception lasts during the litigation or beyond the investigative phase. Judge Oliver stated this usually does not extend into the litigation.

Ms. Jones moved to recommend the new amendment to Rule 8.4(c) as well as new comment 2a. The motion was seconded by Judge Garner. The committee made a friendly amendment that the recommendation is to send the second proposed version to the Supreme Court for a new comment period.

**4. Adjournment.**

The meeting adjourned at 5:23pm. The next meeting will be held on December 6, 2022, at the Law and Justice Center and via Zoom.

# Tab 2

**PROPOSAL 1**
**12/6/2022**

**Rule 1.2. Scope of representation and allocation of authority between client and lawyer. Licensed paralegal practitioner notice to be displayed.**
***Effective: 5/1/2021***

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. A lawyer may also counsel a client regarding the validity, scope, and meaning of Utah's cannabis statutes and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer must also advise the client regarding the potential consequences of the client's conduct under related federal law and policy.

**Commented [AJR1]:** At our November 2022 meeting, the Committee determined that using this phrase is preferable to citing the multiple different cannabis statutes, the numbering of which the Legislature may change periodically.

(e) A licensed paralegal practitioner shall conspicuously display in the licensed paralegal practitioner's office a notice that shall be at least 12 by 20 inches with boldface type or print with each character at least one inch in height and width that contains a statement that the licensed paralegal practitioner is not a lawyer licensed to provide legal services without limitation.

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**Comment**
**Allocation of Authority between Client and Lawyer**

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law,

however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

**Independence from Client's Views or Activities**

[5] Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

**Agreements Limiting Scope of Representation**

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

**Criminal, Fraudulent and Prohibited Transactions**

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

[14] Lawyers are encouraged to advise their clients that their representations are guided by the Utah Standards of Professionalism and Civility and to provide a copy to their clients.

[14a] This rule differs from the ABA Model Rule by adding section (e) which requires licensed paralegal practitioners to post a conspicuous notice of their limited licensure status.

***Explanatory Notes**:

These proposed revisions to Rule 1.2(d) reflect an approach whereby attorneys can both advise and assist cannabis businesses. If the Utah Legislature has decided that cannabis companies can conduct medical marijuana business in Utah, then, in our subcommittee's view, Utah lawyers need to be able not only to advise such businesses on the law but also actively assist them with organizing and operating their businesses, including such matters as establishing and licensing businesses that meet the requirements of the statutes, adopting operating policies and procedures, and representing clients in state court and state agency proceedings regarding compliance with the statutes and licensing and certification issues. Such assistance is necessary to the practical functioning of the businesses, which are not illegal, whereas the intent of Rule 1.2 is to prohibit lawyers from assisting with criminal activity like money laundering. If lawyers can only advise but not assist, then both cannabis lawyers and cannabis business are hamstrung in their ability to take practical action steps to enforce the rights provided by the statutes and comply with the obligations required by the statutes.

**PROPOSAL 1**
**12/6/2022**

The term "Utah's cannabis statutes" is meant to encompass:

58-37-3.7. Utah Controlled Substances Act
58-37-3.7. Medical cannabis decriminalization
58-37-3.8. Enforcement
58-37-3.9. Exemption for possession or use of cannabis to treat a qualifying illness
4-41a. Cannabis Production Establishments
26-61. Cannabinoid Research Act

The proposed language is drawn from the following sources:

- Cmt. 14 to Vermont's Rule 1.2(d)
  https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDComment%20to%20V.R.Pr_.C.%201.2.pdf

  "With respect to paragraph (d), a lawyer may counsel a client regarding the validity, scope, and meaning of Title 18, chapters 84, 84A, and 86 of the Vermont Statutes Annotated, and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, other state and local provisions implementing the statutes. In these circumstances, the lawyer shall also advise the client regarding the potential consequences of the client's conduct under related federal law and policy."

- Cmt. 1 to Nevada's Rule 1.2
  https://www.leg.state.nv.us/courtrules/rpc.html

  "A lawyer may counsel a client regarding the validity, scope, and meaning of Nevada Constitution Article 4, Section 38, and NRS Chapter 453A, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, including regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy."

- Alaska's Rule 1.2(f):
  https://public.courts.alaska.gov/web/rules/docs/prof.pdf

  "A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

**PROPOSAL 1**
**12/6/2022**

**Rule 8.4. Misconduct.**
***Effective: 12/19/2018***

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.

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**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(b), (c), (d), (e), or (f) cannot be counted as a separate violation of Rule 8.4(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(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, but actions that comply with Rule 1.2(d) do not constitute professional misconduct. 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, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, violates 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.

[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] 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] 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.

***Explanatory Notes**:

This proposed revision to Comment 2 to Rule 8.4 is intended to clarify that the conduct allowed by Rule 1.2(d), including the cannabis-related advising and assisting now referenced in Rule 1.2(d), cannot be misconduct under related Rule 8.4.

**PROPOSAL 2**
**12/6/2022**

**Rule 1.2. Scope of representation and allocation of authority between client and lawyer. Licensed paralegal practitioner notice to be displayed.**
***Effective: 5/1/2021***

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (i) discuss the legal consequences of any proposed course of conduct with a client; ~~and may~~ (ii) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; (iii) advise and assist a client in complying with and taking actions consistent with state laws, and rules, regulations, orders, and other state or local provisions implementing state laws, while at the same time advising the client of the existence and consequences of federal law that may impose criminal penalties for actions or matters permitted by state law; and (iv) advise and assist a client in complying with and taking actions consistent with federal laws, and rules regulations, orders, and other federal provisions implementing federal laws, while at the same time advising the client of the existence and consequences of state law that may impose criminal penalties for actions or matters permitted by federal law.

(e) A licensed paralegal practitioner shall conspicuously display in the licensed paralegal practitioner's office a notice that shall be at least 12 by 20 inches with boldface type or print with each character at least one inch in height and width that contains a statement that the licensed paralegal practitioner is not a lawyer licensed to provide legal services without limitation.

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**Comment**

**Allocation of Authority between Client and Lawyer**

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be

adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

**Independence from Client's Views or Activities**

[5] Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

**Agreements Limiting Scope of Representation**

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

**Criminal, Fraudulent and Prohibited Transactions**

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis

of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. ~~The last clause~~Subsection (ii) of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. Subsections (iii) and (iv) recognize that, at times, state law and federal law may diverge. When federal law prohibits conduct permitted by state law, a lawyer may advise and assist a client in complying with and taking actions consistent with state law that may conflict with federal law, but must advise the client both of the conflict between state and federal law and of any potential criminal penalties for violation of federal law. Likewise, when state law prohibits conduct permitted by federal laws, a lawyer may advise and assist a client in complying with and taking actions consistent with federal law that may conflict with state law, but must advise the client both of the conflict between federal and state law and of any potential criminal penalties for violation of state law.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

[14] Lawyers are encouraged to advise their clients that their representations are guided by the Utah Standards of Professionalism and Civility and to provide a copy to their clients.

[14a] This rule differs from the ABA Model Rule by adding section (e) which requires licensed paralegal practitioners to post a conspicuous notice of their limited licensure status.

## Rule 8.4. Misconduct.

***Effective: 12/19/2018***

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.

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**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(b), (c), (d), (e), or (f) cannot be counted as a separate violation of Rule 8.4(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(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, but actions that comply with Rule 1.2(d) do not constitute professional misconduct. 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, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, violates 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.

[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] 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] 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.

# Tab 3

**Rule 1.16 Subcommittee Report:**

On October 18, 2022, the Rule 1.16 sub-committee met to discuss the full committee's questions and recommended changes to the draft of Rule 1.16 that was presented at the October 2022 full committee meeting. The sub-committee felt that further discussion was warranted, so we did not present at the November 2022 full committee meeting and met again on November 29, 2022.

Coming into the December 2022 full committee meeting, the Rule 1.16 sub-committee has mixed recommendations regarding the adoption of Rule 1.16(e).

**Necessity and Consequences of Rule 1.16(e):**

While the sub-committee agreed regarding the language of the proposed rule (see below), it was not unanimously in favor of ultimately adopting the proposed rule. While many in the sub-committee feel that the adoption of the rule is warranted, some feel that the proposed rule will place an unnecessary burden on criminal trial lawyers and may potentially be worse for criminal defendants by creating a chilling effect on the willingness of lawyers to admit to errors and assist appellate counsel in addressing those errors. Others on the committee feel that the proposed rule is well-intentioned but will likely not have any teeth in practice.

In our past meetings (full committee and sub-committee) some have expressed concern that the proposed Rule 1.16 would result in too many notices of appeal being filed. Naturally, Rule 1.16 would increase the number of notices—indeed, the explicit purpose of the Rule is to lower the informational barriers for appeal in meritorious cases which are not appealed under the current system—but some worried that the Rule might facilitate notice of appeals in cases that do not merit appeal and add to an already overburdened Court of Appeals. We agree that any rule or amended rule that captured meritorious cases that would not be appealed but for the rule change would likely also induce some increase in the number of non-meritorious cases that were appealed. However, we feel that (1) at some level, an increase in the filing of notices of appeal in non-meritorious cases is worth the cost in order to provide defendants who have meritorious claims a more consistent and informed path for appeal, (2) the new language of the rule is moderate enough such that an increase of non-meritorious notice of appeals would be minimal, and (3) the fact that defendants in this context would still need to file a brief, which will often be done under guidance of their appellate attorney, likely means the number of non-meritorious appeals actually pursued will be even more minimal.

Similarly, some members of the committee and community (via comment) have expressed concerns that the proposed rule will result in a significant number of non-meritorious bar complaints, which will further burden criminal trial lawyers. The opinions of the members of the sub-committee were mixed on this point. While recognizing that the introduction of a new rule would inevitably create some non-meritorious complaints, most members of the committee nonetheless felt that potential complaints are precisely the point of the new rule and would serve to incentivize criminal trial lawyers to better meet their post-trial obligations

to their clients. Others on the sub-committee felt that the rule was unlikely to result in any appreciable increase in complaints at all—which avoids the concerns about non-meritorious complaints but also means that the rule is unlikely to address the underlying concerns regarding post-trial obligations.

Finally, the sub-committee spend a good deal of time discussing the ultimate efficacy and necessity of the rule. The key questions coming out of our meetings are (a) whether the rule will prescriptively incentivize trial lawyers to do a better job with post-conviction/plea representation, (b) whether the rule will have a chilling effect on the willingness for trial attorneys to later admit mistake and proactively help facilitate the appeal process, and (c) if both (a) and (b) are true, whether we think that the prescriptive benefits sufficiently outweigh the potential chilling effects.

Coming into the December 2022 full committee meeting, we feel that the discussion in full committee should be focused on these questions. We ask that the committee reserve time in these discussions to hear from Doug Thompson, Annie Taliaferro, Ian Quiel, and Billy Walker.

**Language of Proposed Rule 1.16(e):**

The sub-committee was unanimous in approving some updates to the language of the proposed rule in order to (i) make it clear that the rule covers only post-conviction relief through appeal and (ii) further clarify/limit the obligations of trial lawyers after conviction.

Prompted by concerns about the meaning of “conviction or a guilty plea” in the previous version of the proposed rule, the sub-committee decided to remove all language regarding pleas and post-conviction relief in the rule and comment. We determined that such language unnecessarily widened the rule to cover an area that was not the initial focus of the proposed rule; pleas and post-conviction relief are different in type (both legally and substantively) than convictions and appeals; and while the sub-committee beliefs that there is clear constitutional jurisprudence supporting the obligations of lawyers regarding conviction and appeal (primarily Roe v. Flores-Ortega 528 U.S 470), the issues surrounding trial lawyer obligation regarding pleas and post-conviction relief does not have as much constitutional ground to stand on.

Additionally, the sub-commitee continued to be worried about how expansive the rule was, especially regarding the language requiring trial attorneys to discuss "potential grounds" for appeal with their clients. We felt that this language, in combination with the suggestions in the Comments, put too great a burden on trial counsel—many of whom had little professional experience with appeals—to either conduct additional research regarding the appeal process or provide unsubstantiated prognostication regarding the likelihood of a given issue succeeding on appeal. As a result, we decided to remove the language regarding "any preserved issues" from the proposed comment. We also added some softening language (“potential advantages and disadvantages”) while also making it clear that the required advise should not be universally generalizable (“in the client’s case”).

The sub-committee's current proposed version of the rule is as follows (changes in red):

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Rule 1.16. Declining or terminating representation.

…

(e) In the event of a conviction ~~or a guilty plea~~ in a criminal case, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests in a possible appeal, including informing the client of the right to take an appeal, the time within which any appeal must be filed, and the potential grounds for appeal; and filing a notice of appeal if requested.

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Comment

…

Assisting the Client After ~~Criminal Plea or~~ Conviction

[10] Paragraph (e) highlights that there are some critical decisions regarding a client's rights of appeal that occur soon after a conviction or guilty plea but before the termination of trial-stage representation. The trial lawyer should take whatever steps are necessary to protect the client's rights of appeal, including filing a timely notice of appeal with the trial court if requested by the client, even if counsel does not expect to continue as counsel on appeal, and requesting the appointment of counsel for appeal if the client is indigent. Consultation regarding the potential grounds for appeal in the cli should include advising the client about the meaning of the court's judgment, ~~any preserved issues,~~ and the potential advantages and disadvantages of an appeal in the client's case. During consultation and representation, the lawyer should make reasonable efforts to discover the client's wishes. The decision to appeal must be the client's own choice. The obligations under paragraph (e) can be fulfilled by timely ensuring that the client has secured representation for appeal.

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