

# Agenda

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

March 7, 2023

4:00 to 6:00 p.m.

*In-person at the Utah Law and Justice Center with [Zoom](#) available*

Welcome and approval of minutes. Discussion of new Rule, <a href="#">CJA11-0107</a> . <b>Open and Public Meetings.</b>	Tab 1	Corey Talbot, Vice Chair, presiding
<b>Discussion:</b> Update on <a href="#">Rule 7.1</a> (expedited rulemaking): out for comment until April 9, 2023.	Tab 2	Alyson McAllister, Nancy Sylvester, Nick Stiles, Joni Jones, Mark Hales, Billy Walker
<b>Discussion:</b> Rule 8.4(c): The universe of investigative activities attorneys may undertake. Resubmit rule to the Supreme Court after discussion.	Tab 3	Joni Jones
<b>Discussion:</b> Attorney referral fees and clarification needed (Rule 5.4(b)).	Tab 4	Scotti Hill, Billy Walker
<b>Discussion:</b> <a href="#">Rule 1.1</a> . Competence. Adding a well-being component.	Tab 5	Nancy Sylvester, Martha Knudsen, Scotti Hill
<b>Action:</b> Move Committee meetings to April 11th and May 9th.		Cory Talbot
Projects in the pipeline: <ul style="list-style-type: none"> <li>• <b>Rule 8.3 (reporting misconduct in fee dispute resolution):</b> Take comments to Supreme Court along with amendments to Fee Dispute Rules.</li> <li>• <b>Rule 1.2</b> (cannabis advising): Submit research to Supreme Court on other states' approaches to lawyers and cannabis.</li> <li>• <b>Rules 8.4 and 14-301:</b> Assigned to Judicial Council's Fairness and Accountability Committee (historical memo attached to August materials).</li> </ul>		--

Meetings are in-person at the Utah Law and Justice Center and are generally held on the 1<sup>st</sup> 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

February 7, 2023

Utah Law and Justice Center & Zoom

16:30 Mountain Time

*J. Simon Cantarero, Chair*

### **Attendees:**

J. Simon Cantarero, Chair  
Cory Talbot, Vice Chair  
Jurhee Rice  
Joni J. Jones  
Gary Sackett  
Alyson McAllister  
Robert Gibbons  
Mark Hales  
Hon. Mike Edwards  
Hon. Trent Nelson  
Hon. Amy Oliver  
Ian Quiel  
Julie J. Nelson  
Phillip Lowry  
Hon. James Gardner  
Christine Greenwood (ex officio)  
Hon. M. Alex Natt, Recording  
Secretary

### **Excused:**

Billy Walker  
Adam Bondy  
Austin Riter  
Dane Thorley

### **Staff:**

Nancy Sylvester

### **Guests:**

J.D. Lauritzen  
Anna Hollander  
Nick Stiles

**1. Welcome and approval of the December 6, 2022, meeting minutes (Chair Cantarero)**

Chair Cantarero recognized the existence of a quorum, called the meeting to order at 16:32 and discussed Rule 11-101(4) code of Judicial Administration which requires the committee members to introduce themselves at each first meeting of a new year. The members introduced themselves accordingly.

Chair Cantarero asked the committee if everyone had an opportunity to review the minutes from the December 6, 2022, meeting. Judge Oliver moved to approve the minutes; Julie Nelson seconded. The Motion passed by acclamation.

**2. Projects in the Pipeline (Chair Cantarero)**

Chair Cantarero updated the committee on the status of Rules 8.4(c) (investigative activities), 1.2 (cannabis company advising), 5.8 (referral fees between attorneys). Each of the committee's suggestions regarding these rules had been briefed to the Supreme Court. Ms. Sylvester noted that referral fees and investigative activities will come back to the committee in March.

**3. Rule 8.3 (Chair Cantarero)**

The Committee reviewed the one comment that followed the publication of the proposed amendments to Rule 8.3 and determined that was best addressed by the Fee Dispute Resolution Committee. Chair Cantarero called for a vote on recommending Rule 8.3 as final to the Supreme Court. A motion and vote was taken, with unanimous support for that action. Rule 8.3 will accompany the Fee Dispute Resolution rules to the Supreme Court when they are ready.

**4. Rule 1.2 (Chair Cantarero)**

The committee welcomed J.D. Lauritzen and Hannah Follender and began discussing the so-called Cannabis Safe Harbor provision. The Chair related that there appeared to be a split of opinion amongst the Supreme Court justices regarding the necessity or appropriateness of the proposed safe harbor.

Chair Cantarero referenced a memo drafted by Mr. Lauritzen. The committee members did not receive the memo prior to the meeting but it was promptly circulated. Discussion ensued.

Chair Cantarero asked whether the Rohrabacher-Farr amendment, which does not permit the Department of Justice to utilize funds to interfere with the implementation of state cannabis laws and by extension to prosecute those

involved in state-legalized cannabis industry. Mr. Lauritzen responded that to his recollection it has been included in every omnibus spending bill since 2014.

Chair Cantarero asked Mr. Lauritzen and Ms. Follender to elaborate on section 2 of their memorandum regarding how lawyers in this industry represent cannabis businesses and the necessity of providing good legal advice prior to them getting into regulatory trouble. The attorneys advised the committee that it is their belief that as counsel they are charged with providing good legal advice to clients and since Utah has legalized medical cannabis, attorneys giving legal advice deserve protection from potential OPC prosecution.

The committee asked whether a rule change was necessary or whether an ethics opinion would be sufficient. It was agreed that a rule change would provide the highest level of protection, but an ethics opinion may suffice. Ms. Follender discussed how either would allow law firms to understand that by representing these types of clients they are not violating the ethical rules. She also mentioned the inability of lawyers advising this industry to obtain malpractice insurance without an ethical opinion at minimum.

Judge Nelson suggested that the best argument for a rule change is that this is the public policy of the State of Utah regardless of what the federal position is. He suggested not referring to cannabis as “legal” as it is still illegal under federal law.

Judge Oliver suggested that it is strange that the State of Utah allows legal medical use but practicing lawyers are exposed to potential ethical liability, nonetheless.

It was discussed that an ethics opinion prevents OPC from prosecuting lawyers, but no Court is bound by the ethics opinion. That assumes, of course that the ethics opinion supports the cannabis practitioner. An ethics opinion from the State of Maine did not.

Chair Cantarero asked the Committee how it would like to proceed. Mr. Sackett suggested that the Committee advise the Supreme Court that the Court take up the change to the Rule as described in 1.2 version 2.

Ms. Jones made a Motion supporting Mr. Sackett’s advice to refer Option 2 back to the Court for their action along with a suggested comment (12a) referring specifically to Utah’s cannabis statutes as an example.

Ms. Rice seconded the Motion. The Motion passed unanimously.

## **5. Rule 7.1 (Alyson McAllister)**

Ms. McAllister informed the committee that the UAJ and the Legislature are concerned about direct solicitation of clients by lawyers and that there might be action this legislative session on the rule allowing it (as of 2020). She said she would work with Mr. Stiles to come up with proposed language to address the concerns. Chair Cantarero asked Joni Jones to assist them in their efforts. It was noted that their work product would not come back to the committee as time was of the essence and instead their advice would be given directly to the Court.

**6. Adjournment.**

The meeting adjourned at 18:05. The next meeting will be held on March 7, 2023.

# Tab 2

February 3, 2023

Re: Solicitation Rule

Dear Utah Supreme Court and Committees:

The Utah Association for Justice is an association of Utah attorneys who strive to promote justice and fairness for persons injured by others and safeguard victims' rights. Along with Utah State Senator Mike McKell we are writing to express our concern to certain changes to Rule 7.3 "solicitation of clients," now Rule 7.1(b), and how these changes negatively impact victims already harmed by the fault of others.

We raised this specific issue in prior correspondence to the Utah Supreme Court, dated December 27, 2021. In that correspondence, we stated:

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.

Due to egregious abuses (characterized by victims as aggressive, inappropriate, or uninvited solicitation at an injury scene or hospital) as a result of changes to Rule 7.3, the Utah Association for Justice respectfully requests this Court to revisit and revise Rule 7.1 to reinstall specific protections involving inappropriate solicitation of professional employment. The Utah Association for Justice will gladly participate in drafting clear and unequivocal language to prevent these abuses and, more importantly, provide the Office of Professional Conduct bright line guidance and enforcement tools. We look forward to any future communications on this matter and opportunity to assist further.

*Respectfully submitted by Utah State Senator, Mike McKell and the Executive Committee on behalf of the Utah Association for Justice and Utah Senator*

Mike McKell – State Senator

Alyson McAllister – President

Rick S. Lundell – Vice President

Charles T. Conrad – President Elect

D. Russell Hymas – Secretary

Kevin Swensen - Treasurer

Kenneth L. Christensen – Past President



# Tab 3

Non-criminal Cases & Treatises Recognizing Validity of Lawyers or Lawyers' Agents Using  
Deception

- *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) Court rejected argument that plaintiffs in Fair Housing lawsuit suffered no injury because they never intended to rent/buy property and tacitly approved use of “testers”. “That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d).”
- [\*Gidatex S.r.L. v. Campaniello Imports, Ltd.\*, 82 F.Supp.2d 119, 122 \(S.D.N.Y.1999\)](#) [H]iring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation. . . . “[E]thical rules [prohibiting lawyer misrepresentation] should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover posing as a member of the general public engaging in ordinary business transactions with the target. To prevent this use of investigators might permit targets to freely engage in unfair business practices which are harmful to both trademark owners and consumers in general.”  
*Id.*
- [\*Apple Corps Ltd., MPL v. Int'l Collectors Soc.\*, 15 F.Supp.2d 456, 475 \(D.N.J.1998\)](#) The court in this intellectual property case denied motion for sanctions for violating ethics rule prohibiting misrepresentation when plaintiffs’ lawyers and investigators called defendants and posed as customers. “The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.”
- [\*Turfgrass Group, Inc. v. Northeast La. Turf Farms, LLC\*, 2013 WL 6145294 \\*4 \(W.D.La. Nov. 20, 2013\)](#). Holding that plaintiff’s lawyer did not violate ethical rules “by employing an undercover investigator to determine whether NELA Turf had violated protected patent and trademark rights” and citing, *Gidatex S.r.L.*, and *Apple* for proposition that “a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.”

- David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibilities of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentations Under the Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791, 804, 807 (Summer 1995). “[T]here is no satisfactory line to be drawn as to the ethical permissibility of the misrepresentations necessarily made by undercover investigators and discrimination testers by reference to whether the supervising lawyer involved is in public or private practice. A bright enough line could be drawn, but the result would be underinclusive. Moreover, the line would be difficult to justify as a gloss on the present text of the *Model Rules*, which contains no reference to a public/private lawyer dichotomy on which such a distinction might be hung.”
- **Joseph G. Michaels**, “Lawful Investigative Activities” and Rule 8.4(C), **48-JUN Colo. Law. 36** (discussing need for deception by discrimination testers and in investigations into civil or consumer-related violations “because pretext, deception, and the use of undercover investigators and discrimination testers is an indispensable means of detecting and proving violations that might otherwise escape discovery or proof” and identifying jurisdictions that allow lawyers to engage in deception)

1 **Rule 8.4. Misconduct.**

2 It is professional misconduct for a lawyer to:

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

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

7 (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation,  
8 except that a lawyer may participate in investigative activities employing deception  
9 that are conducted pursuant to established law;

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

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

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

16 **Comment**

17 [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of  
18 Professional Conduct or knowingly assist or induce another to do so through the acts of  
19 another, as when they request or instruct an agent to do so on the lawyer's behalf.

20 Paragraph (a), however, does not prohibit a lawyer from advising a client concerning  
21 action the client is legally entitled to take.

22 [1a] An act of professional misconduct under Rule 8.4(b), (c), (d), (e), or (f) cannot be  
23 counted as a separate violation of Rule 8.4(a) for the purpose of determining sanctions.  
24 Conduct that violates other Rules of Professional Conduct, however, may be a violation  
25 of Rule 8.4(a) for the purpose of determining sanctions.

26

27 [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as  
28 offenses involving fraud and the offense of willful failure to file an income tax return.  
29 However, some kinds of offenses carry no such implication. Traditionally, the  
30 distinction was drawn in terms of offenses involving "moral turpitude." That concept  
31 can be construed to include offenses concerning some matters of personal morality,  
32 such as adultery and comparable offenses, that have no specific connection to fitness for  
33 the practice of law. Although a lawyer is personally answerable to the entire criminal  
34 law, a lawyer should be professionally answerable only for offenses that indicate lack of  
35 those characteristics relevant to law practice. Offenses involving violence, dishonesty,  
36 breach of trust or serious interference with the administration of justice are in that  
37 category. A pattern of repeated offenses, even ones of minor significance when  
38 considered separately, can indicate indifference to legal obligation.

39 [2a] Paragraph (c) provides a safe harbor for attorneys who engage in lawful covert  
40 operations, often in criminal investigations or investigations involving suspected  
41 violations of constitutional rights or civil law. Examples covered by this rule are  
42 governmental "sting" operations; use of testers in fair-housing cases to determine  
43 whether landlords or real estate agents discriminate against protected classes of  
44 applicants; and gathering evidence of copyright violations. These are legitimate  
45 activities that benefit the common good and that courts and commentators have long  
46 recognized do not violate ethics rules. The safe harbor does not apply when a lawyer  
47 uses deception to violate others' constitutional rights or directs others to do so, and it  
48 does not change the lawyer's obligations for candor and fairness under Rules 3.3 and  
49 3.4.

50 [3] A lawyer who, in the course of representing a client, knowingly manifests by words  
51 or conduct bias or prejudice based upon race, sex, religion, national origin, disability,  
52 age, sexual orientation, or socioeconomic status, violates paragraph (d) when such  
53 actions are prejudicial to the administration of justice. Legitimate advocacy respecting  
54 the foregoing factors does not violate paragraph (d). A trial judge's finding that

55 peremptory challenges were exercised on a discriminatory basis does not alone  
56 establish a violation of this rule.

57 [3a] The Standards of Professionalism and Civility approved by the Utah Supreme  
58 Court are intended to improve the administration of justice. An egregious violation or a  
59 pattern of repeated violations of the Standards of Professionalism and Civility may  
60 support a finding that the lawyer has violated paragraph (d).

61 [4] A lawyer may refuse to comply with an obligation imposed by law upon a good  
62 faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a  
63 good faith challenge to the validity, scope, meaning or application of the law apply to  
64 challenges of legal regulation of the practice of law.

65 [5] Lawyers holding public office assume legal responsibilities going beyond those of  
66 other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the  
67 professional role of lawyers. The same is true of abuse of positions of private trust such  
68 as trustee, executor, administrator, guardian, agent and officer, director or manager of a  
69 corporation or other organization.

70 [6] This rule differs from ABA Model Rule 8.4.

# Tab 4

# Utah State Bar®

## M E M O R A N D U M

**TO:** Advisory Committee on the Rules of Professional Conduct

**FROM:** Scotti Hill, Ethics Counsel

**RE:** Referral Fees

**DATE:** March 3, 2023

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Currently, Utah’s [Rule 5.4\(b\)](#) states the following: “a lawyer may permit a person to recommend, retain, or pay the lawyer to render legal services for another.” This language seemingly allows a lawyer to do what language in former [Rule 7.2\(f\)](#) once prohibited, giving something “of value” for legal services. Inquirers to the Ethics Hotline ask if they are permitted to give gift cards, money, etc. to nonlawyers for referrals. A reasonable lawyer may conclude that they can based on the foregoing and the fact that Rule 7.2 was repealed.

This of course is also complicated by what I see as a direct conflict between the ethics rules – or at least 5.4 – and state law, namely [Utah Code 76-10-3201](#) (prohibition on kickbacks), which disallows referrals for cases involving insurance or damages.

As I see it, there are also two additional issues worth consideration:

- Lawyers commonly conflate “legal fees” with “referral fees” and this could be clarified in one or more rules.
- The issue of whether lawyers can share “bare referral fees” with other lawyers is not addressed by the Court’s [press release](#) prohibiting bare referrals between lawyers and non-lawyers.



I understand the Court recently said they would consider the committee's proposed Rule 5.8 (referral fees) but may have deferred in light of the kickback statute. However, in the meantime, I think we could clarify the issue in Rule 5.4 with a possible amendment.

1 **Rule 1.0. Terminology.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

43 (q) "Referral fee" means any exchange of value beyond marginal or of minimal value that is  
44 paid for the referral of a client, whether in cash or in kind. Fees shared with a lawyer who  
45 continues to represent the client in the matter referred and fees paid for generating consumer  
46 interest for legal services with the goal of converting the interests into clients are not referral  
47 fees for purposes of these rules.

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

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

54 (~~rt~~) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative  
55 body, administrative agency or other body acting in an adjudicative capacity. A legislative  
56 body, administrative agency or other body acts in an adjudicative capacity when a neutral  
57 official, after the presentation of evidence or legal argument by a party or parties, will render a  
58 binding legal judgment directly affecting a party's interests in a particular matter.

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

64 **Comment**

65 **Confirmed in Writing**

66 [1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives  
67 informed consent, then the lawyer must obtain or transmit it within a reasonable time  
68 thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance  
69 on that consent so long as it is confirmed in writing within a reasonable time thereafter.

70 **Firm**

71 [2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the  
72 specific facts. For example, two practitioners who share office space and occasionally consult  
73 or assist each other ordinarily would not be regarded as constituting a firm. However, if they  
74 present themselves to the public in a way that suggests that they are a firm or conduct  
75 themselves as a firm, they should be regarded as a firm for purposes of these Rules. The terms  
76 of any formal agreement between associated lawyers are relevant in determining whether they  
77 are a firm, as is the fact that they have mutual access to information concerning the clients they  
78 serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the  
79 rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule  
80 that the same lawyer should not represent opposing parties in litigation, while it might not be  
81 so regarded for purposes of the rule that information acquired by one lawyer is attributed to  
82 another.

83 [3] With respect to the law department of an organization, including the government, there is  
84 ordinarily no question that the members of the department constitute a firm within the  
85 meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the  
86 identity of the client. For example, it may not be clear whether the law department of a  
87 corporation represents a subsidiary or an affiliated corporation, as well as the corporation by

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

90 [4] Similar questions can also arise with respect to lawyers in legal aid and legal services  
91 organizations. Depending upon the structure of the organization, the entire organization or  
92 different components of it may constitute a firm or firms for purposes of these Rules.

### 93 **Fraud**

94 [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is  
95 characterized as such under the substantive or procedural law of the applicable jurisdiction  
96 and has a purpose to deceive. This does not include merely negligent misrepresentation or  
97 negligent failure to apprise another of relevant information. For purposes of these Rules, it is  
98 not necessary that anyone has suffered damages or relied on the misrepresentation or failure  
99 to inform.

### 100 **Informed Consent**

101 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed  
102 consent of a client or other person (e.g., a former client or, under certain circumstances, a  
103 prospective client) before accepting or continuing representation or pursuing a course of  
104 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  
105 necessary to obtain such consent will vary according to the rule involved and the  
106 circumstances giving rise to the need to obtain informed consent. Other rules require a lawyer  
107 to make reasonable efforts to ensure that the client or other person possesses information  
108 reasonably adequate to make an informed decision. See, e.g., Rules 1.4(b) and 1.8. Ordinarily,  
109 this will require communication that includes a disclosure of the facts and circumstances  
110 giving rise to the situation, any explanation reasonably necessary to inform the client or other  
111 person of the material advantages and disadvantages of the proposed course of conduct and a  
112 discussion of the client's or other person's options and alternatives. In some circumstances it  
113 may be appropriate for a lawyer to advise a client or other person to seek the advice of other  
114 counsel. A lawyer need not inform a client or other person of facts or implications already  
115 known to the client or other person; nevertheless, a lawyer who does not personally inform the  
116 client or other person assumes the risk that the client or other person is inadequately informed

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

124 [7] Obtaining informed consent will usually require an affirmative response by the client or  
125 other person. In general, a lawyer may not assume consent from a client's or other person's  
126 silence. Consent may be inferred, however, from the conduct of a client or other person who  
127 has reasonably adequate information about the matter. A number of rules require that a  
128 person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of  
129 "writing" and "confirmed in writing," see paragraphs (r) and (b). Other rules require that a  
130 client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For  
131 a definition of "signed," see paragraph (r).

### 132 **Referral Fees**

133 [8] Fees paid for generating consumer interest for legal services with the goal of converting the  
134 interests into clients include lead generation service providers, online banner advertising, pay-  
135 per-click marketing, and similar marketing or advertising fees.

### 136 **Screened**

137 [89] This definition applies to situations where screening of a personally disqualified lawyer is  
138 permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

139 [910] The purpose of screening is to assure the affected parties that confidential information  
140 known by the personally disqualified lawyer remains protected. The personally disqualified  
141 lawyer should acknowledge the obligation not to communicate with any of the other lawyers  
142 in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on  
143 the matter should be informed that the screening is in place and that they may not  
144 communicate with the personally disqualified lawyer with respect to the matter. Additional  
145 screening measures that are appropriate for the particular matter will depend on the

146 circumstances. To implement, reinforce and remind all affected lawyers of the presence of the  
147 screening, it may be appropriate for the firm to undertake such procedures as a written  
148 undertaking by the screened lawyer to avoid any communication with other firm personnel  
149 and any contact with any firm files or other information, including information in electronic  
150 form, relating to the matter, written notice and instructions to all other firm personnel  
151 forbidding any communication with the screened lawyer relating to the matter, denial of  
152 access by the screened lawyer to firm files or other information, including information in  
153 electronic form, relating to the matter and periodic reminders of the screen to the screened  
154 lawyer and all other firm personnel.

155 ~~[1011]~~ In order to be effective, screening measures must be implemented as soon as practical  
156 after a lawyer or law firm knows or reasonably should know that there is a need for screening.

157 ~~[10a11a]~~ The definitions of “consult” and “consultation,” while deleted from the ABA Model  
158 Rule 1.0, have been retained in the Utah Rule because “consult” and “consultation” are used in  
159 the rules. See, e.g., Rules 1.2, 1.4, 1.14, and 1.18.

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

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

4 (1) professional independence of judgment,

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

6 (3) protection of client confidences.

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

9 (c) A lawyer or law firm may share legal fees with a nonlawyer if:

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

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

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

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

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

23 (1) before accepting a representation, provide written notice to a prospective client  
24 that one or more nonlawyers holds a financial interest in the organization in which  
25 the lawyer practices or that one or more nonlawyers exercises managerial  
26 authority over the lawyer; and



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

## 29 **Comments**

30 [1] The provisions of this Rule are to protect the lawyer's professional independence of  
31 judgment, to assure that the lawyer is loyal to the needs of the client, and to protect clients  
32 from the disclosure of their confidential information. Where someone other than the  
33 client pays the lawyer's fee or salary, manages the lawyer's work, or recommends  
34 retention of the lawyer, that arrangement does not modify the lawyer's obligation to the  
35 client. As stated in paragraph (a), such arrangements must not interfere with the lawyer's  
36 professional judgment. See also Rule 1.8(f) (lawyer may accept compensation from a third  
37 party as long as there is no interference with the lawyer's independent professional  
38 judgment and the client gives informed consent). This Rule does not lessen a lawyer's  
39 obligation to adhere to the Rules of Professional Conduct and does not authorize a  
40 nonlawyer to practice law by virtue of being in a business relationship with a lawyer. It  
41 may be impossible for a lawyer to work in a firm where a nonlawyer owner or manager  
42 has a duty to disclose client information to third parties, as the lawyer's duty to maintain  
43 client confidences would be compromised.

44 [2] The Rule also expresses traditional limitations on permitting a third party to direct or  
45 regulate the lawyer's professional judgment in rendering legal services to another. See  
46 also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is  
47 no interference with the lawyer's independent professional judgment and the client gives  
48 informed consent).

49 [3] Paragraph (c) ~~does not~~ permits individual lawyers or law firms to pay referral fees to  
50 nonlawyers. Referral fees are defined in Rule 1.0. for client referrals, share fees with  
51 nonlawyers, or allow third party retention. In each of these instances, the financial  
52 arrangement must be reasonable, authorized as required under Supreme Court Standing  
53 Order No. 15, and disclosed in writing to the client before engagement and before fees  
54 are shared. Fee sharing arrangements with nonlawyers are governed by Supreme Court

55 ~~Standing Order No. 15. Whether in accepting or paying for referrals, or fee sharing, the~~  
56 ~~lawyer must protect the lawyer's professional judgment, ensure the lawyer's loyalty to~~  
57 ~~the client, and protect client confidences.~~

58 [4] Paragraph (d) permits individual lawyers or law firms to enter into business or  
59 employment relationships with nonlawyers, whether through nonlawyer ownership or  
60 investment in a law practice, joint venture, or through employment by a nonlawyer-  
61 owned entity. In each instance, the nonlawyer-owned entity must be approved by the  
62 Utah Supreme Court for authorization under Standing Order No. 15.

63 [5] This ~~Rule~~-rule differs from the ABA model rule.

1 **Rule 5.8. Referral Fees.**

2 (a) A referral fee paid to a lawyer who does not represent the client in the referred matter  
3 must:

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

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

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

10 (b) Any referral fee payable in the case must be reasonable relative to the total attorney  
11 fees that may ultimately be earned. The factors to be considered in determining the  
12 reasonableness of a referral fee include the following:

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

14 (2) the amount of work performed by the referring attorney and the amount of work  
15 anticipated to be performed by the attorney taking over the matter;

16 (3) the amounts involved and the potential results; and

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

18 (c) Referral fees to nonlawyers are prohibited.

19 **Comment**

20 [1] Paragraph (a)(1) prohibits lawyers from paying a referral fee until the lawyer who  
21 represents the client in the matter is entitled to be paid attorney fees.

22 [2] In the case of a contingent fee matter, the lawyer may not pay the referral fee until the  
23 lawyer is entitled to receive the contingent fee, which may be at the conclusion of the  
24 matter.

25 [3] A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably  
26 believes is competent to handle the matter diligently. See Rules 1.1 and 1.3.

27 [4] Paragraph (a)(2) prohibits a lawyer from charging a client in a referred matter a higher  
28 fee, or from seeking payment of greater costs, than the lawyer charges other clients where  
29 no referral fee was paid. For the definitions of “informed consent,” “confirmed in  
30 writing,” and “referral fees,” see Rule 1.0.

31 [5] The term “amounts involved” in paragraph (b)(2) refers to things such as the  
32 estimated value of the case, claims, estate, commercial transaction, anticipated recovery,  
33 insurance limits, and statutory limits.

34 [6] Paragraph (c) forbids payments to nonlawyers for referring clients or legal matters.  
35 Fee-sharing with nonlawyers is only permitted when done in accordance with Rule 5.4  
36 and Standing Order No. 15.

37 [7] This rule is not part of the ABA Model Rules.

38

# Tab 5

# Utah Courts

## UCJA Rule 13-1.01 (Code of Judicial Administration)

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### **Rule 1.1. Competence.**

*Rule printed on March 3, 2023 at 4:47 pm. Go to <https://www.utcourts.gov/rules> for current rules.*

**Effective: 5/1/2021**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation, and, for licensed paralegal practitioners, a determination of whether a matter should be referred to a lawyer licensed to provide legal services without restrictions or limitations.

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### **Comment**

#### Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

#### Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

#### Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

#### Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

[8a] This rule differs from the ABA Model Rule.

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