

Agenda

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

August 1, 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.	Tab 1	Cory Talbot, Chair, presiding
Discussion/Action: Referral fees and fee sharing (Rules 1.0, 1.5, 5.4(b), 5.8): <ul style="list-style-type: none">• Subcommittee will continue to refine rules, making sure to also address sandbox entities/professionals who may fee share. Rule 5.8 should start with a general rule about fee sharing.• Definitions need to be refined and better coordinated. Comment that addresses kickback statute should be generalized.• Rule 1.0: definitions for legal fees, fee sharing, and referral fees.• Rule 1.5: Added clarifying fee sharing provision (fee sharing provisions in (e) removed in 2020 but not replaced).• Rule 5.4: Clarified comments re fee sharing; added comment r.e. kickback statute.• Rule 5.8: Updated "lawyer" to "legal professional" to capture referral fees between lawyers and LPPs; added comment re kickback statute.	Tab 2	Alyson McAllister (sub-c chair), Billy Walker, Ian Quiel, Beth Kennedy
Discussion/Subcommittee assignment: ABA recommendation on RPC 1.16	Tab 3	Cory Talbot
Discussion/Subcommittee assignment: Codifying types of attorney fees using Illinois' example. RPC1.5 and RPC1.15.	Tab 4	Cory Talbot

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

2023 Meeting Schedule: ●January 3●February 7●March 7●April 11●May 9●June 6●August 1●
●September 5●October 3● November 7●December 5●

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

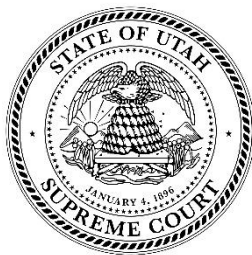
<p>Projects in the pipeline:</p> <ul style="list-style-type: none"> • Rule 1.2(d): advising medical marijuana clients (anticipated to be out for comment) • Rule 7.1 (advertising) (out for comment until September 2, 2023) • Rule 8.4 (undercover activities (out for comment until September 2, 2023) • Rules 8.4 and 14-301: Assigned to Judicial Council's Fairness and Accountability Committee (historical memo attached to August materials). 		<p>--</p>
--	--	-----------

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

2023 Meeting Schedule: •January 3•February 7•March 7•April 11•May 9•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

June 6, 2023

Utah Law and Justice Center & Zoom

16:00 Mountain Time

J. Simon Cantarero, Chair

Attendees:

J. Simon Cantarero, Chair

Jurhee Rice

Joni J. Jones

Billy Walker

Austin Riter

Alyson McAllister

Hon. James Gardner

Robert Gibbons

Mark Hales

Hon. Trent Nelson

Hon. Amy Oliver

Julie J. Nelson

Phillip Lowry

Adam Bondy

Dane Thorley

Christine Greenwood

Hon. Mike Edwards

Hon. M. Alex Natt, Recording
Secretary

Staff:

Nancy Sylvester

Guests:

Justice John Pearce, Beth Kennedy, J.D. Lauritzen

Excused: Cory Talbot, Vice Chair

1. **Welcome, fond farewell to members, and approval of the May 2023 meeting minutes (Chair Cantarero)**

Chair Cantarero recognized the existence of a quorum, called the meeting to order at 16:07.

Justice John Pearce joined the meeting to thank Simon, Joni, and Phil on behalf of the Utah Supreme Court for their excellent service to the Court and the Bar.

Chair Cantarero asked the committee if everyone had an opportunity to review the minutes from the May 9 meeting. He noted that Judge Gardner should be added as an attendee to the meeting minutes and Scotti Hill will be removed as she did not attend the meeting.

Further he asked that in Section 2. rule 7.1. the minutes be corrected to show that the subcommittee recommended keeping 7.1(b).

With those changes, Judge Oliver moved to approve the minutes; Jurhee Rice seconded. The Motion passed by acclamation.

The Committee welcomed new Bar Ethics counsel Beth Kennedy and guest JD Lauritzen.

2. Rule 1.2 (Mr. Riter)

The Chair asked Mr. Riter to update the Committee on cannabis advising rules. It is reported that the Supreme Court asked for a narrower rule. The Committee focused on the Virginia rule (line 147-149) of Tab 3. Judge Oliver suggested that the Committee keep the first sentence only of the Virginia rule. The Committee agreed. Lines 20-25, comment 12(a) on 120 and line 147-149 would be presented to the Supreme Court for its review.

Judge Oliver made the motion to amend rule 1.2 and comment 12a as described above. Mr. Riter seconded the motion. The motion passed by acclamation.

Mr. Lauritzen thanked the Committee for its work and was excused.

3. Rule 7.1 (Mr. Gibbons)

The Committee turned its attention to Rule 7.1 and focused initially on in-person solicitation. Mr. Gibbons addressed the Committee and referenced the comments made regarding 7.1(c).

Chair Cantarero spoke to ABA model rule 7.3(b)(2) and asked if the subcommittee thought moving back to that rule would satisfy the Utah Supreme Court's concerns. Ms. Sylvester informed the Committee that the Supreme Court's concerns would not be satisfied.

The Committee discussed the proposed rule at length. Issues debated include whether the rule is intended to address specifically personal injury solicitation or

any other instance where potential clients are particularly vulnerable. A question was posed about who would make a subjective determination of vulnerability.

It was suggested that the issue of “initiation of communication” was key but that prospective clients should be able to obtain counsel at their initiation or has a familial, close personal, or prior business or professional relationship with the lawyer.

The Committee substantially redrafted the proposed rule section (c) during the meeting.

Ms. Jones made a motion to adopt the redrafted 7.1 (c) language and comment 12. Mr. Walker seconded. The Motion passed and this language will be forwarded to the Supreme Court for review.

The Committee moved on to 7.1(d) regarding referrals. It is decided that proposed 7.1(d) will not move forward.

4. Rule 8.4(c) (Ms. Jones)

Ms. Jones updated the Committee on the status of the review of the proposed rule and the comments received from the Supreme Court to date.

Ms. Jones made a motion to adopt the language suggested by Justice Pohlman. Mr. Walker seconded the motion. The motion passed unanimously. The language will be referred back to the Supreme Court for its consideration.

August 1, 2023 is the next meeting of the Committee.

The meeting adjourned at 5:51 pm.

Tab 2

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) "Fee sharing" refers to the division of legal fees obtained from the representation of a
13 client's case or legal matter between two or more legal professionals who work together on the
14 case. These legal professionals may belong to different law firms or practices.

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

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

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

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

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

29 (j) "Legal fees" refer to the charges that a lawyer or law firm assesses for their legal services,
30 which may include time spent on legal research, preparation of legal documents, court

31 appearances, and advice on legal matters. These fees are typically negotiated and agreed upon
32 between the lawyer and client in advance of the legal work, and may be based on factors such
33 as the complexity of the legal issue, the lawyer's experience and expertise, and the amount of
34 time and resources required to handle the matter.

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

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

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

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

43 (mn) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the
44 conduct of a reasonably prudent and competent lawyer.

45 (no) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes
46 that the lawyer believes the matter in question and that the circumstances are such that the
47 belief is reasonable.

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

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

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

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

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

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

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

73 **Comment**

74 **Confirmed in Writing**

75 [1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives
76 informed consent, then the lawyer must obtain or transmit it within a reasonable time
77 thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance
78 on that consent so long as it is confirmed in writing within a reasonable time thereafter.

79 **Firm**

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

90 so regarded for purposes of the rule that information acquired by one lawyer is attributed to
91 another.

92 [3] With respect to the law department of an organization, including the government, there is
93 ordinarily no question that the members of the department constitute a firm within the
94 meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the
95 identity of the client. For example, it may not be clear whether the law department of a
96 corporation represents a subsidiary or an affiliated corporation, as well as the corporation by
97 which the members of the department are directly employed. A similar question can arise
98 concerning an unincorporated association and its local affiliates.

99 [4] Similar questions can also arise with respect to lawyers in legal aid and legal services
100 organizations. Depending upon the structure of the organization, the entire organization or
101 different components of it may constitute a firm or firms for purposes of these Rules.

102 **Fraud**

103 [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is
104 characterized as such under the substantive or procedural law of the applicable jurisdiction
105 and has a purpose to deceive. This does not include merely negligent misrepresentation or
106 negligent failure to apprise another of relevant information. For purposes of these Rules, it is
107 not necessary that anyone has suffered damages or relied on the misrepresentation or failure
108 to inform.

109 **Informed Consent**

110 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed
111 consent of a client or other person (e.g., a former client or, under certain circumstances, a
112 prospective client) before accepting or continuing representation or pursuing a course of
113 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
114 necessary to obtain such consent will vary according to the rule involved and the
115 circumstances giving rise to the need to obtain informed consent. Other rules require a lawyer
116 to make reasonable efforts to ensure that the client or other person possesses information
117 reasonably adequate to make an informed decision. See, e.g., Rules 1.4(b) and 1.8. Ordinarily,
118 this will require communication that includes a disclosure of the facts and circumstances
119 giving rise to the situation, any explanation reasonably necessary to inform the client or other

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

133 [7] Obtaining informed consent will usually require an affirmative response by the client or
134 other person. In general, a lawyer may not assume consent from a client's or other person's
135 silence. Consent may be inferred, however, from the conduct of a client or other person who
136 has reasonably adequate information about the matter. A number of rules require that a
137 person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of
138 "writing" and "confirmed in writing," see paragraphs (r) and (b). Other rules require that a
139 client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For
140 a definition of "signed," see paragraph (r).

141 **Referral Fees**

142 [8] Fees paid for generating consumer interest for legal services with the goal of converting the
143 interests into clients include lead generation service providers, online banner advertising, pay-
144 per-click marketing, and similar marketing or advertising fees.

145 **Screened**

146 [89] This definition applies to situations where screening of a personally disqualified lawyer is
147 permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

148 [910] The purpose of screening is to assure the affected parties that confidential information
149 known by the personally disqualified lawyer remains protected. The personally disqualified

150 lawyer should acknowledge the obligation not to communicate with any of the other lawyers
151 in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on
152 the matter should be informed that the screening is in place and that they may not
153 communicate with the personally disqualified lawyer with respect to the matter. Additional
154 screening measures that are appropriate for the particular matter will depend on the
155 circumstances. To implement, reinforce and remind all affected lawyers of the presence of the
156 screening, it may be appropriate for the firm to undertake such procedures as a written
157 undertaking by the screened lawyer to avoid any communication with other firm personnel
158 and any contact with any firm files or other information, including information in electronic
159 form, relating to the matter, written notice and instructions to all other firm personnel
160 forbidding any communication with the screened lawyer relating to the matter, denial of
161 access by the screened lawyer to firm files or other information, including information in
162 electronic form, relating to the matter and periodic reminders of the screen to the screened
163 lawyer and all other firm personnel.

164 ~~[1011]~~ In order to be effective, screening measures must be implemented as soon as practical
165 after a lawyer or law firm knows or reasonably should know that there is a need for screening.

166 ~~[10a11a]~~ The definitions of “consult” and “consultation,” while deleted from the ABA Model
167 Rule 1.0, have been retained in the Utah Rule because “consult” and “consultation” are used in
168 the rules. See, e.g., Rules 1.2, 1.4, 1.14, and 1.18.

1 **Rule 1.5. Fees.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 (e) A licensed paralegal practitioner may not enter into a contingent fee agreement with
42 a client.

43 (f) Before providing any services, a licensed paralegal practitioner must provide the client
44 with a written agreement that:

45 (1) states the purpose for which the licensed paralegal practitioner has been
46 retained;

47 (2) identifies the services to be performed;

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

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

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

57 (6) describes the document to be prepared;

58 (7) describes the purpose of the document;

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

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

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

63 (g) A licensed paralegal practitioner may not make an oral or written statement
64 guaranteeing or promising an outcome, unless the licensed paralegal practitioner has
65 some basis in fact for making the guarantee or promise.

66 **Comment**

67 **Reasonableness of Fee and Expenses**

68 [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the
69 circumstances. The factors specified in (a)(1) through (a)(8) are not exclusive. Nor will
70 each factor be relevant in each instance. Paragraph (a) also requires that expenses for
71 which the client will be charged must be reasonable. A lawyer may seek reimbursement
72 for the cost of services performed in-house, such as copying, or for other expenses
73 incurred in-house, such as telephone charges, either by charging a reasonable amount to
74 which the client has agreed in advance or by charging an amount that reasonably reflects
75 the cost incurred by the lawyer.

76 **Basis or Rate of Fee**

77 [2] When the lawyer has regularly represented a client, they ordinarily will have evolved
78 an understanding concerning the basis or rate of the fee and the expenses for which the
79 client will be responsible. In a new client-lawyer relationship, however, an understanding
80 as to fees and expenses must be promptly established. Generally, it is desirable to furnish

81 the client with at least a simple memorandum or copy of the lawyer's customary fee
82 arrangements that states the general nature of the legal services to be provided, the basis,
83 rate or total amount of the fee and whether and to what extent the client will be
84 responsible for any costs, expenses or disbursements in the course of the representation.
85 A written statement concerning the terms of the engagement reduces the possibility of
86 misunderstanding.

87 [3] Contingent fees, like any other fees, are subject to the reasonableness standard of
88 paragraph (a) of this Rule. In determining whether a particular contingent fee is
89 reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer
90 must consider the factors that are relevant under the circumstances. Applicable law may
91 impose limitations on contingent fees, such as a ceiling on the percentage allowable, or
92 may require a lawyer to offer clients an alternative basis for the fee. Applicable law also
93 may apply to situations other than a contingent fee, for example, government regulations
94 regarding fees in certain tax matters.

95 **Terms of Payment**

96 [4] A lawyer may require advance payment of a fee but is obligated to return any
97 unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for
98 services, such as an ownership interest in an enterprise, providing this does not involve
99 acquisition of a proprietary interest in the cause of action or subject matter of the litigation
100 contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject
101 to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a
102 business transaction with the client.

103 [5] An agreement may not be made whose terms might induce the lawyer improperly to
104 curtail services for the client or perform them in a way contrary to the client's interest.
105 For example, a lawyer should not enter into an agreement whereby services are to be
106 provided only up to a stated amount when it is foreseeable that more extensive services
107 probably will be required, unless the situation is adequately explained to the client.
108 Otherwise, the client might have to bargain for further assistance in the midst of a
109 proceeding or transaction. However, it is proper to define the extent of services in light

110 of the client's ability to pay. A lawyer should not exploit a fee arrangement based
111 primarily on hourly charges by using wasteful procedures.

112 **Prohibited Contingent Fees**

113 [6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic
114 relations matter when payment is contingent upon the securing of a divorce or upon the
115 amount of alimony or support or property settlement to be obtained. This provision does
116 not preclude a contract for a contingent fee for legal representation in connection with
117 the recovery of post-judgment balances due under support, alimony or other financial
118 orders because such contracts do not implicate the same policy concerns.

119 **Disputes over Fees**

120 [7] If a procedure has been established for resolution of fee disputes, such as an
121 arbitration or mediation procedure established by the Bar, the lawyer must comply with
122 the procedure when it is mandatory, and, even when it is voluntary, the lawyer should
123 conscientiously consider submitting to it. Law may prescribe a procedure for determining
124 a lawyer's fee, for example, in representation of an executor or administrator, a class or a
125 person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled
126 to such a fee and a lawyer representing another party concerned with the fee should
127 comply with the prescribed procedure.

128 [8] This rule differs from the ABA model rule.

1 **Rule 5.4. Professional Independence of a Lawyer and Fee Sharing.**

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 other legal professionalslawyers or
10 law firms if:

11 (1) each of them is providing legal services on behalf of the client in the matter,

12 and

13 (2) the total fee to be shared is reasonable.

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

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

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

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

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

23 (e) A lawyer may practice law with nonlawyers, or in an organization, including a
24 partnership, in which a financial interest is held or managerial authority is exercised by
25 one or more persons who are nonlawyers, provided that the nonlawyers or the

Commented [AM1]: The subcommittee would like input on drafting language that makes it clear fee sharing is distinguishable from referral fees, but takes into account the other kind of fee sharing arrangements like Beth runs into.

26 organization has been authorized as required by Utah Supreme Court Standing Order
27 No. 15 and provided the lawyer shall:

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

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

34 **Comments**

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

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

54 ~~[3] Fee sharing arrangements with nonlawyers are governed by Supreme Court Standing~~
55 ~~Order No. 15. Fee sharing and r~~Referral fees are defined in Rule 1.0. Paragraph (ed) does
56 ~~not permits~~ individual lawyers or law firms to pay referral fees to nonlawyers. ~~Referral~~
57 ~~fees are defined in Rule 1.0. for client referrals, share fees with nonlawyers, or allow third~~
58 ~~party retention. In each of these instances, the financial arrangement must be reasonable,~~
59 ~~authorized as required under Supreme Court Standing Order No. 15, and disclosed in~~
60 ~~writing to the client before engagement and before fees are shared. — Fee sharing~~
61 ~~arrangements with nonlawyers are governed by Supreme Court Standing Order No. 15.~~
62 ~~Whether in accepting or paying for referrals, or fee-sharing, the lawyer must protect the~~
63 ~~lawyer’s professional judgment, ensure the lawyer’s loyalty to the client, and protect~~
64 ~~client confidences. Referral fees between legal professionalslawyers are addressed~~
65 ~~in~~governed by Rule 5.8.

66 [4] Paragraph (d) permits individual lawyers or law firms to enter into business or
67 employment relationships with nonlawyers, whether through nonlawyer ownership or
68 investment in a law practice, joint venture, or through employment by a nonlawyer-
69 owned entity. In each instance, the nonlawyer-owned entity must be approved by the
70 Utah Supreme Court for authorization under Standing Order No. 15.

71 [5] Nothing in this rule is intended to conflict with any statutory prohibition on kickbacks.
72 These prohibitions currently exclude legal fees shared between individuals who are
73 each/all licensed to practice law, aswhich is also specifically permitted by paragraph (c).

74 [56] 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~~a legal fee is payable to the lawyer representing the
5 client in the referred matter;

6 (2) not be passed along to the client either as a cost or an increase of the total
7 attorneylegal 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
11 attorneylegal fees that may ultimately be earned. The factors to be considered in
12 determining the 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 lawyer and the amount
15 of work anticipated to be performed by the attorney lawyer 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 anyone who is not a lawyer ~~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 legal 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 another lawyer whom the referring lawyer
26 reasonably believes is competent to handle the matter diligently. See Rules 1.1 and 1.3.

Commented [AM1]: The notes from the last committee meeting ask for a general rule about fee sharing. However, the subcommittee believes fee sharing and referral fees should be kept separate and distinct, and fee sharing fits within Rule 5.4, not Rule 5.8.

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," "lawyer" "legal fees," 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 anyone who is not a lawyer for referring clients or
35 legal matters. Fee-sharing with lawyers is permitted in accordance with Rule 5.4. Fee
36 sharing with ~~nonlawyers~~ anyone who is not a lawyer is only permitted when done in
37 accordance with Rule 5.4 and Standing Order No. 15.

38 [7] Before engaging in any ~~fee sharing~~ referral fee arrangement, legal professionals should
39 be familiar with U.C.A. §76-10-3201. Utah law regarding the ~~P~~prohibitions on kickbacks.

40 [78] This rule is not part of the ABA Model Rules.

41

Tab 3

Re: Fw: FYI - RPC 1.16

Simón Cantarero

Thu 6/8/2023 9:05 PM

To: Nancy Sylvester

Cc: Cory Talbot

This proposal creates an element of professional responsibility to the requirements under the rules of procedure. The amendment attempts to align them, and sends the message that if you can't and shouldn't do it under the procedural process and rules, you can't and shouldn't do it in the first place. At least as far as due diligence is concerned.

For the agenda:

Beginning on page 3:

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20230123-final-scepr-scpr-discussion-draft-for-comment-client-due-diligence1-16.pdf

Procedural history of this proposal at:

https://www.americanbar.org/groups/professional_responsibility/discussion-draft-of-possible-amendments-to-model-rules-of-profes/

Round table discussion of latest version at:

https://players.brightcove.net/1866680404001/mgEOLY1p8_default/index.html?videoid=6321625934112.

Simón

On Thu, Jun 8, 2023 at 4:32 PM Nancy Sylvester wrote:

Cory and Simon,

A heads up on potential changes coming to Model Rule 1.16 and an ABA request for support.

Sincerely,

Nancy

Nancy Sylvester**General Counsel**

Utah State Bar

[645 South 200 East](#)[Salt Lake City, UT 84111-3834](#)

P: 801-297-7047

E-mail and attachments sent from the Utah State Bar may contain information that is CONFIDENTIAL or LEGALLY PRIVILEGED. It is intended only for the use of the individual or entity named as the intended recipient. If you have received this e-mail (and any attachments) in error, please notify the sender immediately. Thank you.

From: Elizabeth Wright
Sent: Wednesday, May 24, 2023 10:36 AM
To: Beth E. Kennedy; [Nancy Sylvester](#)
Subject: FYI - RPC 1.16

Beth and Nancy,

This was in my inbox this morning. It concerns a proposed resolution for the ABA House of Delegates concerning Rule 1.16.

Jennifer Lewin

On behalf of our colleagues in the ABA Center for Professional Responsibility, I'm sharing the following information about Resolution 100 which will be considered at the HOD in Denver:

Resolution 100 proposes amendments to ABA Model Rule of Professional Conduct 1.16, making explicit that which has long been implicit – that lawyers have an obligation to inquire into and assess the facts and circumstances of a representation before determining whether to undertake the representation or withdraw from an ongoing one.

The proposed amendments present a balanced, risk-based approach to conducting client due diligence – one that is appropriate to the circumstances. The Resolution is another piece of the ABA's longstanding and ongoing efforts to help lawyers detect and prevent becoming involved in a client's or prospective client's unlawful activities. It reinforces, in the face of potential federal government action, the ABA's longstanding support of state-based judicial regulation of the profession.

The Standing Committees want your support for this Resolution. We are always available to discuss the Resolution with your entity and answer any questions. Please contact our counsel, Mary McDermott or Ellyn Rosen. They may be reached at mary.mcdermott@americanbar.org, or ellyn.rosen@americanbar.org, if you have questions or would like to schedule a discussion.

Sincerely,

Lynda C. Shely, Chair, ABA Standing Committee on Ethics and Professional Responsibility

Justice Daniel J. Crothers, Chair, ABA Standing Committee on Professional Regulation

Elizabeth A. Wright

Executive Director

Utah State Bar

Phone: 801-297-7028

[645 South 200 East, Salt Lake City, UT 84111](#)

Tab 4

RE: Codifying types of attorney fees?

Cory Talbot

Tue 3/14/2023 8:48 PM
To: Nancy Sylvester; Simón Cantarero
Cc: Scotti Hill

Thanks Nancy. That's a lot clearer, isn't it? I'd say it's worth considering.

Cory Talbot
Partner, Holland & Hart LLP

catalbot@hollandhart.com | **T:** (801) 799-5971 | **M:** (801) 884-6266

CONFIDENTIALITY NOTICE: This message is confidential and may be privileged. If you believe that this email has been sent to you in error, please reply to the sender that you received the message in error; then please delete this email.

From: Nancy Sylvester
Sent: Tuesday, March 14, 2023 10:39 AM
To: Simón Cantarero; Cory Talbot
Cc: Scotti Hill
Subject: Codifying types of attorney fees?

External Email

All,

I came across the announcement below from Illinois about their codification of attorney fee types. I think they have provided great clarification on fees, and it would be worthwhile to look at adopting something similar in Utah, too. Issues with trust accounts and fees are common disciplinary matters.

For example, Illinois has clarified in Rule 1.15 that "(a) A lawyer must not, even temporarily, use funds or property of clients or third persons for the lawyer's own purposes without authorization." On the other hand, our rule, which contains the model rule language, starts with the following: "(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." While Illinois's rule still contains a version of that language, they have done a great job of clarifying what the model rule language means.

<https://www.2civility.org/illinois-supreme-court-rules-changes-for-illinois-attorney-fees/>

For comparison:
[Illinois amended rules](#)

[Utah Rule 1.5](#)

[Utah Rule 1.15](#)

Should I add this to the next agenda for assignment to a subcommittee?

Sincerely,

Nancy

Nancy Sylvester

General Counsel

Utah State Bar

645 South 200 East

Salt Lake City, UT 84111-3834

P: 801-297-7047

E-mail and attachments sent from the Utah State Bar may contain information that is CONFIDENTIAL or LEGALLY PRIVILEGED. It is intended only for the use of the individual or entity named as the intended recipient. If you have received this e-mail (and any attachments) in error, please notify the sender immediately. Thank you.