

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

## Agenda

September 5, 2023

4:00 to 6:00 p.m.

Utah Law and Justice Center with [Zoom](#) available

Welcome; approval of minutes.	Tab 1	Cory Talbot (chair)
<p><b>Discussion/Action:</b> Referral fees and fee sharing (Rules 1.0, 1.5, 5.4(b), 5.8)</p> <ul style="list-style-type: none"> <li>• 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.</li> </ul>	Tab 2	Alyson McAllister (subcommittee chair)
<p><b>Discussion/Action:</b> Rule 1.6: Review subcommittee recommendations</p> <ul style="list-style-type: none"> <li>• Subcommittee considered the ABA's proposed changes to expressly forbid lawyers from facilitating money laundering and financing terrorism. <ul style="list-style-type: none"> <li>○ <a href="#">ABA's proposed changes</a></li> <li>○ <a href="#">ABA's procedural history</a></li> <li>○ <a href="#">ABA's round table discussion</a></li> </ul> </li> </ul>	--	Ashley Gregson (subcommittee chair)
<p><b>Discussion/Action:</b> Rule 1.15: Review subcommittee recommendations</p> <ul style="list-style-type: none"> <li>• Subcommittee considered <a href="#">Illinois' version of Rule 1.15</a> which expressly forbids lawyers from using client funds.</li> </ul>	Tab 3	Cory Talbot (chair, subcommittee chair)
<p><b>Discussion/Action:</b> <a href="#">Rule 1.0</a>: Consider and discuss possible revisions to definitions.</p>	Tab 2	Gary Sackett

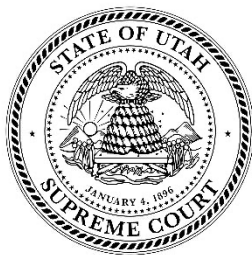
Meetings are held at the Utah Law and Justice Center, usually on the first Tuesday of the month from 4 to 6 p.m.

**2023 Meeting Schedule:** Jan 3 • Feb 7 • Mar 7 • April 11 • May 9 • June 6 • Aug 1 • Sep 5 • Oct 3 • Nov 7 • Dec 5

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

<p><b>Projects in the pipeline:</b></p> <ul style="list-style-type: none"><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>		--
---	--	----

Tab 1



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

## Meeting Minutes

August 8, 2023

Utah Law and Justice Center & Zoom

16:00 Mountain Time

*Cory Talbot, Chair*

### **Attendees:**

Cory Talbot, Chair  
Adam Bondy  
Hon. James Gardner  
Robert Gibbons  
Ashley Gregson  
Christine Greenwood  
Mark Hales  
Alyson McAllister  
Julie Nelson  
Hon. Trent Nelson  
Hon. Amy Oliver  
Ian Quiel  
Jurhee Rice  
Gary Sackett  
Dane Thorley  
Mark Nickel

### **Staff:**

Beth Kennedy

### **Excused:**

Hon. Mike Edwards; Joni J. Jones; Phillip Lowry; Hon. M. Alex Natt, Recording Secretary; Austin Riter; Billy Walker, Ex Officio

**1. Welcome of new committee members and approval of the June 2023 meeting minutes (Chair Talbot)**

Chair Talbot recognized the existence of a quorum, called the meeting to order at 16:05.

Chair Talbot asked the committee if everyone had an opportunity to review the minutes from the June 6 meeting.

Judge Oliver moved to approve the minutes; Mark Hales seconded. The motion passed by acclamation.

Chair Talbot welcomed two new members to the committee: Ashley Gregson and Mark Nickel. Each member of the Committee introduced themselves.

**2. Rules 1.0, 5.4, and 5.8 (Ms. McAllister)**

The Chair asked Ms. McAllister to update the Committee on her subcommittee's work proposing revisions the rules to define and address fee sharing and referral fees. Ms. McAllister addressed the purpose behind each of the proposed changes.

Ms. McAllister explained that the revisions to Rule 1.0 add a definition of "legal fees" to clarify that legal fees are fees that a lawyer is paid for legal services. The revisions also add a definition of "fee sharing" in an effort to distinguish that concept from "referral fees." The proposed definition of "fee sharing" refers to the division of legal fees, i.e., fees that have been earned.

Mr. Sackett noted additional inconsistencies in the definitions in Rule 1.0. Ms. Kennedy recommended adding the issue to the agenda for the September meeting; Chair Talbot agreed.

As to Rule 5.4, Ms. McAllister explained that the proposed revisions add "fee sharing" to the title to make it easier for practitioners to find the governing rule. The proposed revisions to the rule allow lawyers to share legal fees as long as each lawyer is providing legal services in the matter, and the total fee is reasonable.

The Committee discussed whether the rule should instead require lawyers to have a notice of appearance in the case to be able to share fees in the matter. The Committee discussed the various ways that lawyers may work on a case without entering an appearance, such as providing legal advice to the attorney of record, or conducting a moot oral argument. The Committee agreed that fee sharing should not be limited to lawyers who enter an appearance.

Ms. McAllister then discussed the proposed changes to Rule 5.8. The draft changes the use of the word "attorney" to "lawyer" to be consistent with the usage in other places in the Rules. Ms. McAllister noted that, although the Committee had previously discussed proposing a new rule concerning fee

sharing, the subcommittee believed that the concepts should be kept distinct in Rules 5.4 and 5.8.

The Committee discussed the proposed changes and their interaction with each other. Ms. McAllister noted that, under the proposed changes, “referral fees” addressed situations where the lawyer who initially worked on a case referred it to another lawyer. In those circumstances, the fees paid to the original lawyer are referral fees.

Judge Oliver suggested that “referral fees” might instead refer to a payment that a lawyer makes to someone who refers a case to them. Chair Talbot, Ms. Kennedy, Mr. Nickel, and Ms. Greenwood noted that this definition was more consistent with their understandings.

The Committee then discussed whether “referral fees” should instead refer to this type of payment to a person who has done no work on the case. Ms. McAllister answered that this definition would not address the concerns of the Supreme Court.

The Committee continued to discuss the two competing definitions but did not come to a resolution. Chair Talbot recommended that Ms. McAllister’s subcommittee continue to work on the issue and that the Committee would revisit it at the next meeting in September.

### **3. Subcommittee assignment on ABA’s proposed changes to Model Rule 1.16**

Chair Talbot then turned the Committee’s attention to the American Bar Association’s proposed changes to Model Rule 1.16 (Tab 3 of the materials). The proposed changes seek to prevent lawyers from assisting clients in money laundering and financing terrorism.

Chair Talbot suggested that a subcommittee form to review the proposed changes and determine whether Utah’s Rule 1.16 should be amended. The Committee agreed.

The subcommittee for this issue will be Ashley Gregson (chair), Judge Oliver, Mark Nickel, and Jurhee Rice.

### **4. Subcommittee assignment on Illinois’ Rule 1.15**

Chair Talbot next addressed the version of Rule 1.15 in place in Illinois (tab 4 of the materials). The Illinois version expressly forbids lawyers from using any client funds. It states that “A lawyer must not, even temporarily, use funds or property of clients or third persons for the lawyer’s own purposes without authorization.”

In an email to Chair Talbot, Ms. Sylvester noted that many disciplinary actions against lawyers arise out of Rule 1.15 violations. Chair Talbot proposed that the Committee evaluate whether to adopt similar changes. The Committee agreed.

The subcommittee for this issue will be Cory Talbot (chair), Alyson McAllister, Christine Greenwood, and Judge Nelson.

September 5, 2023 is the next meeting of the Committee.

The meeting adjourned at 5:54 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 lawyers who collaborate on the matter and are not in the  
14 same firm.
- 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

Deleted: two or more law firms

Deleted: work together on the case

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

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

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

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

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

46 (o) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes  
 47 that the lawyer believes the matter in question and that the circumstances are such that the  
 48 belief is reasonable.

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

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

53 (r) "Referral fee" means a payment made to a lawyer or firm who does not represent or no  
 54 longer represents a client for referring that client to another lawyer or firm for legal services.

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

59 (t) "Substantial" when used in reference to degree or extent denotes a material matter of clear  
 60 and weighty importance.

61 (u) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative  
 62 body, administrative agency or other body acting in an adjudicative capacity. A legislative

Commented [BK1]: Add to new comment

Deleted: (i)

Deleted: "Legal Professional" denotes a lawyer and a licensed paralegal practitioner. ¶

Deleted: j

Deleted: k

Deleted: l

Deleted: m

Deleted: n

Deleted: o

Deleted: p

Deleted: q

Deleted: means any exchange of value beyond marginal or of minimal value that is paid for the referral of a client, whether in cash or in kind.

Deleted: Fees shared with a lawyer who continues to represent the client in the matter referred and fees paid for generating consumer interest for legal services with the goal of converting the interests into clients are not referral fees for purposes of these rules.

Deleted: p

Deleted: r

Deleted: q

Deleted: s

Deleted: r

Deleted: t

88 body, administrative agency or other body acts in an adjudicative capacity when a neutral  
89 official, after the presentation of evidence or legal argument by a party or parties, will render a  
90 binding legal judgment directly affecting a party's interests in a particular matter.

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

96 **Comment**

97 **Confirmed in Writing**

98 [1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives  
99 informed consent, then the lawyer must obtain or transmit it within a reasonable time  
100 thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance  
101 on that consent so long as it is confirmed in writing within a reasonable time thereafter.

102 **Firm**

103 [2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the  
104 specific facts. For example, two practitioners who share office space and occasionally consult  
105 or assist each other ordinarily would not be regarded as constituting a firm. However, if they  
106 present themselves to the public in a way that suggests that they are a firm or conduct  
107 themselves as a firm, they should be regarded as a firm for purposes of these Rules. The terms  
108 of any formal agreement between associated lawyers are relevant in determining whether they  
109 are a firm, as is the fact that they have mutual access to information concerning the clients they  
110 serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the  
111 rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule  
112 that the same lawyer should not represent opposing parties in litigation, while it might not be  
113 so regarded for purposes of the rule that information acquired by one lawyer is attributed to  
114 another.

115 [3] With respect to the law department of an organization, including the government, there is  
116 ordinarily no question that the members of the department constitute a firm within the  
117 meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the

Deleted: s

Deleted: u

120 identity of the client. For example, it may not be clear whether the law department of a  
121 corporation represents a subsidiary or an affiliated corporation, as well as the corporation by  
122 which the members of the department are directly employed. A similar question can arise  
123 concerning an unincorporated association and its local affiliates.

124 [4] Similar questions can also arise with respect to lawyers in legal aid and legal services  
125 organizations. Depending upon the structure of the organization, the entire organization or  
126 different components of it may constitute a firm or firms for purposes of these Rules.

#### 127 **Fraud**

128 [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is  
129 characterized as such under the substantive or procedural law of the applicable jurisdiction  
130 and has a purpose to deceive. This does not include merely negligent misrepresentation or  
131 negligent failure to apprise another of relevant information. For purposes of these Rules, it is  
132 not necessary that anyone has suffered damages or relied on the misrepresentation or failure  
133 to inform.

#### 134 **Informed Consent**

135 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed  
136 consent of a client or other person (e.g., a former client or, under certain circumstances, a  
137 prospective client) before accepting or continuing representation or pursuing a course of  
138 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  
139 necessary to obtain such consent will vary according to the rule involved and the  
140 circumstances giving rise to the need to obtain informed consent. Other rules require a lawyer  
141 to make reasonable efforts to ensure that the client or other person possesses information  
142 reasonably adequate to make an informed decision. See, e.g., Rules 1.4(b) and 1.8. Ordinarily,  
143 this will require communication that includes a disclosure of the facts and circumstances  
144 giving rise to the situation, any explanation reasonably necessary to inform the client or other  
145 person of the material advantages and disadvantages of the proposed course of conduct and a  
146 discussion of the client's or other person's options and alternatives. In some circumstances it  
147 may be appropriate for a lawyer to advise a client or other person to seek the advice of other  
148 counsel. A lawyer need not inform a client or other person of facts or implications already  
149 known to the client or other person; nevertheless, a lawyer who does not personally inform the

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

158 [7] Obtaining informed consent will usually require an affirmative response by the client or  
159 other person. In general, a lawyer may not assume consent from a client's or other person's  
160 silence. Consent may be inferred, however, from the conduct of a client or other person who  
161 has reasonably adequate information about the matter. A number of rules require that a  
162 person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of  
163 "writing" and "confirmed in writing," see paragraphs (r) and (b). Other rules require that a  
164 client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For  
165 a definition of "signed," see paragraph (r).

#### 166 Referral Fees

167 [8] Referral fees include any exchange of value beyond marginal or of minimal value that is  
168 paid for the referral of a client, whether in cash or in kind.

169 [9] The distinguishing factor between fee sharing and referral fees is whether there is ongoing  
170 collaboration between the lawyers. Fees shared with a lawyer who continues to represent the  
171 client in the matter referred are not referral fees for purposes of these rules.

172 [10] Fee paid for generating consumer interest for legal services with the goal of converting the  
173 interests into clients, including lead generation service providers, online banner advertising,  
174 pay-per-click marketing, and similar marketing or advertising fees are not referral fees for  
175 purposes of these rules.

#### 176 Screened

177 [11] This definition applies to situations where screening of a personally disqualified lawyer is  
178 permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

Deleted: sharing as defined by these rules and fees

Deleted: 8

Deleted: 9

182 [12] The purpose of screening is to assure the affected parties that confidential information  
183 known by the personally disqualified lawyer remains protected. The personally disqualified  
184 lawyer should acknowledge the obligation not to communicate with any of the other lawyers  
185 in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on  
186 the matter should be informed that the screening is in place and that they may not  
187 communicate with the personally disqualified lawyer with respect to the matter. Additional  
188 screening measures that are appropriate for the particular matter will depend on the  
189 circumstances. To implement, reinforce and remind all affected lawyers of the presence of the  
190 screening, it may be appropriate for the firm to undertake such procedures as a written  
191 undertaking by the screened lawyer to avoid any communication with other firm personnel  
192 and any contact with any firm files or other information, including information in electronic  
193 form, relating to the matter, written notice and instructions to all other firm personnel  
194 forbidding any communication with the screened lawyer relating to the matter, denial of  
195 access by the screened lawyer to firm files or other information, including information in  
196 electronic form, relating to the matter and periodic reminders of the screen to the screened  
197 lawyer and all other firm personnel.

198 [13] In order to be effective, screening measures must be implemented as soon as practical  
199 after a lawyer or law firm knows or reasonably should know that there is a need for screening.

200 [13a] The definitions of "consult" and "consultation," while deleted from the ABA Model Rule  
201 1.0, have been retained in the Utah Rule because "consult" and "consultation" are used in the  
202 rules. See, e.g., Rules 1.2, 1.4, 1.14, and 1.18.

Deleted: 9

Deleted: 10

Deleted: 10

Deleted: 11

Deleted: 10a

Deleted: 11

1 **Rule 1.5. Fees.**

2 Effective:

3 (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or  
4 an unreasonable amount for expenses. The factors to be considered in determining the  
5 reasonableness of a fee include 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) The scope of the representation and the basis or rate of the fee and expenses for  
18 which the client will be responsible shall be communicated to the client, preferably in  
19 writing, before or within a reasonable time after commencing the representation, except  
20 when the lawyer will charge a regularly represented client on the same basis or rate.

21 Any changes in the basis or rate of the fee or expenses shall also be communicated to  
22 the client.

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

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

35 (d) A lawyer shall not enter into an arrangement for, charge, or collect:

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

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

40 (e) Fee sharing is permitted as provided in Rule 5.4.

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

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

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

46 (2) identifies the services to be performed;

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

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

Deleted: between legal professionals who are acting as co-counsel on a matter except as otherwise prohibited by these rules or Utah Special Practice Rule 14-802

Deleted: e

Deleted: f



- 58 (5) includes a provision stating that the client may report complaints relating to a  
59 licensed paralegal practitioner or the unauthorized practice of law to the Office of  
60 Professional Conduct, including a toll-free number and Internet website;
- 61 (6) describes the document to be prepared;
- 62 (7) describes the purpose of the document;
- 63 (8) describes the process to be followed in preparing the document;
- 64 (9) states whether the licensed paralegal practitioner will be filing the document on  
65 the client's behalf; and
- 66 (10) states the approximate time necessary to complete the task.

67 (h) A licensed paralegal practitioner may not make an oral or written statement  
68 guaranteeing or promising an outcome, unless the licensed paralegal practitioner has  
69 some basis in fact for making the guarantee or promise.

Deleted: g

#### 70 **Comment**

#### 71 **Reasonableness of Fee and Expenses**

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

#### 80 **Basis or Rate of Fee**

81 [2] When the lawyer has regularly represented a client, they ordinarily will have  
82 evolved an understanding concerning the basis or rate of the fee and the expenses for  
83 which the client will be responsible. In a new client-lawyer relationship, however, an  
84 understanding as to fees and expenses must be promptly established. Generally, it is

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

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

#### 100 **Terms of Payment**

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

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

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

117 **Prohibited Contingent Fees**

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

124 **Fee Sharing**

125 ~~[7] Fee sharing between lawyers and non-lawyers is permitted only in accordance with~~  
126 ~~Rule 5.4 and Standing Order No. 15.~~

127 **Disputes over Fees**

128 [8] If a procedure has been established for resolution of fee disputes, such as an  
129 arbitration or mediation procedure established by the Bar, the lawyer must comply with  
130 the procedure when it is mandatory, and, even when it is voluntary, the lawyer should  
131 conscientiously consider submitting to it. Law may prescribe a procedure for  
132 determining a lawyer's fee, for example, in representation of an executor or  
133 administrator, a class or a person entitled to a reasonable fee as part of the measure of  
134 damages. The lawyer entitled to such a fee and a lawyer representing another party  
135 concerned with the fee should comply with the prescribed procedure.

136 [9] This rule differs from the ABA model rule.  
137

Deleted: [7] Paragraph (e) permits fee sharing arrangements between legal professionals, with some limitations. For example, fee sharing between lawyers and licensed paralegal practitioners may be limited by Utah Special Practice Rule 14-802. ¶

Deleted: 8

Deleted: by

Deleted: legal professionals

Deleted: with

Deleted: anyone who is not a legal professional

Deleted:

Deleted: only

Deleted: 7

Deleted: 9

Deleted: 8

Deleted: 10

Deleted: [8a] This rule differs from the ABA Model Rule by including certain restrictions on licensed paralegal practitioners.

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 engage in fee sharing if:**

- 10 **(1) the client agrees in writing to the arrangement, including the share each**
- 11 **lawyer will receive, and**
- 12 **(2) the total fee to be shared is reasonable under Rule 1.5.**

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

- 14 (1) the fee to be shared is reasonable and the fee-sharing arrangement has been
- 15 authorized as required by Utah Supreme Court Standing Order No. 15;
- 16 (2) the lawyer or law firm provides written notice to the affected client and, if
- 17 applicable, to any other person paying the legal fees;
- 18 (3) the written notice describes the relationship with the nonlawyer, including the
- 19 fact of the fee-sharing arrangement; and
- 20 (4) the lawyer or law firm provides the written notice before accepting
- 21 representation or before sharing fees from an existing client.

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

**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.

**Deleted:** participate

**Deleted:** (1) each of them is providing legal services on behalf of the client in the matter, and

**Deleted:** (a)

**Formatted:** Indent: First line: 0.5"

**Deleted:** d

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

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

### 38 Comments

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

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

58 [3] Fee sharing arrangements with nonlawyers are governed by Supreme Court Standing  
59 Order No. 15. Fee sharing and referral fees are defined in Rule 1.0. Paragraph (d) does

Moved (insertion) [1]

Deleted: ¶

Moved (insertion) [2]

Deleted: R

Deleted: c

63 ~~not permit individual lawyers or law firms to pay referral fees to nonlawyers. Referral~~  
64 ~~fees between lawyers are governed by Rule 5.8.~~

65 ~~[4] Before engaging in any referral fee arrangement, lawyers should be familiar with Utah~~  
66 ~~law regarding prohibitions on kickbacks.~~

67 ~~[5] Paragraph (d) permits individual lawyers or law firms to enter into business or~~  
68 ~~employment relationships with nonlawyers, whether through nonlawyer ownership or~~  
69 ~~investment in a law practice, joint venture, or through employment by a nonlawyer-~~  
70 ~~owned entity. In each instance, the nonlawyer-owned entity must be approved by the~~  
71 ~~Utah Supreme Court for authorization under Standing Order No. 15.~~

72 ~~[6] Nothing in this rule is intended to conflict with any statutory prohibition on kickbacks.~~  
73 ~~These prohibitions currently exclude legal fees shared between individuals who are~~  
74 ~~each/all licensed to practice law, which is also specifically permitted by paragraph (c).~~

75 ~~[7] This rule differs from the ABA model rule.~~

**Moved up [2]:** Referral fees are defined in Rule 1.0.

**Moved up [1]:** Fee sharing arrangements with nonlawyers are governed by Supreme Court Standing Order No. 15. Whether in accepting or paying for

**Deleted:** s

**Deleted:** for client referrals, share fees with nonlawyers, or allow third party retention. In each of these instances, the financial arrangement must be reasonable, authorized as required under Supreme Court Standing Order No. 15, and disclosed in writing to the client before engagement and before fees are shared.

**Deleted:** Fee sharing arrangements with nonlawyers are governed by Supreme Court Standing Order No. 15. Whether in accepting or paying for referrals, or fee-sharing, the lawyer must protect the lawyer's professional judgment, ensure the lawyer's loyalty to the client, and protect client confidences

**Deleted:** .

**Deleted:**

**Deleted:** legal professionals

**Deleted:** addressed in

**Deleted:** ¶

**Deleted:** 4

**Deleted:**

**Deleted:**

**Deleted:** 5

**Deleted:** as

**Deleted:** 5

**Deleted:** 6

**Deleted:** Rule

1 **Rule 5.8. Referral Fees.**

2 (a) Referral fees paid to anyone who is not a lawyer are prohibited.

3 (b) A referral fee must:

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

6 (2) not be passed along to the client either as a cost or an increase of the total legal fee;  
7 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 (c) Any referral fee must be reasonable relative to the total legal fees that may ultimately  
11 be earned. The factors to be considered in determining the reasonableness of a referral  
12 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 lawyer and the amount of work  
15 anticipated to be performed by the 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 **Comment**

19 [1] Paragraph (a) forbids payments to anyone who is not a lawyer for referring clients or  
20 legal matters. Fee-sharing with lawyers is permitted in accordance with Rule 5.4. Fee  
21 sharing with non-lawyers is permitted only in accordance with Rule 5.4 and Standing  
22 Order No. 15.

23 [2] Paragraph (b)(1) prohibits lawyers from paying a referral fee until the lawyer who  
24 represents the client in the matter is entitled to be paid a legal fee.

**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.

**Deleted:** a

**Deleted:** paid to a lawyer who does not represent the client in the referred matter

**Deleted:** an attorney

**Deleted:** attorney

**Deleted:** b

**Deleted:** payable in the case

**Deleted:** attorney

**Deleted:** attorney

**Deleted:** attorney

**Deleted:** (c) Referral fees to anyone who is not a lawyer nonlawyers are prohibited. ¶

**Deleted:** 1

**Deleted:** a

**Deleted:** attorney

**Deleted:** s

41 [3] In the case of a contingent fee matter, the lawyer may not pay the referral fee until the  
42 lawyer is entitled to receive the contingent fee, which may be at the conclusion of the  
43 matter.

Deleted: 2

44 [4] A lawyer should only refer a matter to another lawyer whom the referring lawyer  
45 reasonably believes is competent to handle the matter diligently. See Rules 1.1 and 1.3.

Deleted: 3

46 [5] Paragraph (b)(2) prohibits a lawyer from charging a client in a referred matter a higher  
47 fee, or from seeking payment of greater costs, than the lawyer charges other clients where  
48 no referral fee was paid. For the definitions of "informed consent," "confirmed in  
49 writing," "lawyer" "legal fees," and "referral fees," see Rule 1.0.

Deleted: 4

Deleted: a

50 [6] The term "amounts involved" in paragraph (c)(3) refers to things such as the estimated  
51 value of the case, claims, estate, commercial transaction, anticipated recovery, insurance  
52 limits, and statutory limits.

Deleted: 5

Deleted: b

Deleted: 2

53 [7] Before engaging in any referral fee arrangement, legal professionals should be familiar  
54 with Utah law regarding prohibitions on kickbacks.

Deleted: [6] Paragraph (c) forbids payments to anyone who is not a lawyer for referring clients or legal matters. Fee-sharing with lawyers is permitted in accordance with Rule 5.4. Fee sharing with nonlawyers anyone who is not a lawyer is only permitted when done in accordance with Rule 5.4 and Standing Order No. 15. ¶

Deleted: fee sharing

Formatted: Not Highlight

Deleted: U.C.A. §76-10-3201.

Deleted: the

Deleted: P

Formatted: Not Highlight

Formatted: Not Highlight

Deleted: 7

55 [8] This rule is not part of the ABA Model Rules.



# Tab 3

1 **Rule 1.15. Safekeeping Property.**

2 (a) A lawyer must not, even temporarily, use funds or property of clients or third  
3 persons for the lawyer's own purposes without authorization.

4 (b) A lawyer must hold funds or property of clients or third persons that are in the  
5 lawyer's possession in connection with a representation separate from the lawyer's own  
6 funds or property. All such funds must be kept in a separate account maintained in the  
7 state where the lawyer's office is situated or elsewhere with the consent of the client or  
8 third person. The account may only be maintained in a financial institution that agrees  
9 to report to the Office of Professional Conduct in the event any instrument in properly  
10 payable form is presented against an attorney trust account containing insufficient  
11 funds, irrespective of whether or not the instrument is honored. Other property shall be  
12 identified as such and appropriately safeguarded. Complete records of such account  
13 funds and other property shall be kept by the lawyer and shall be preserved for a  
14 period of five years after termination of the representation.

- Deleted: shall
- Deleted: is
- Deleted: a
- Deleted: lawyer's
- Deleted: lawyer's
- Deleted: Funds shall
- Deleted: lawyer's

15 (c) A lawyer may deposit the lawyer's own funds in a client trust account for the sole  
16 purpose of paying bank service charges on that account, but only in an amount  
17 necessary for that purpose.

Deleted: b

18 (d) A lawyer shall deposit into a client trust account legal fees and expenses that have  
19 been paid in advance, to be withdrawn by the lawyer only as fees are earned or  
20 expenses incurred.

Deleted: c

21 (e) Upon receiving funds or other property in which a client or third person has an  
22 interest, a lawyer shall promptly notify the client or third person. Except as stated in  
23 this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall  
24 promptly deliver to the client or third person any funds or other property that the client  
25 or third person is entitled to receive and, upon request by the client or third person,  
26 shall promptly render a full accounting regarding such property.

Deleted: d

37 ~~(f)~~ When in the course of representation a lawyer is in possession of property in which  
38 two or more persons (one of whom may be the lawyer) claim interests, the property  
39 shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall  
40 promptly distribute all portions of the property as to which the interests are not in  
41 dispute.

42 **Comment**

43 [1] A lawyer should hold property of others with the care required of a professional  
44 fiduciary. Securities should be kept in a safe deposit box, except when some other form  
45 of safekeeping is warranted by special circumstances. All property which is the  
46 property of clients or third persons, including prospective clients, must be kept separate  
47 from the lawyer's business and personal property and, if monies, in one or more trust  
48 accounts. Separate trust accounts may be warranted when administering estate monies  
49 or acting in similar fiduciary capacities. In addition to normal monthly maintenance  
50 fees on each account, the lawyers can anticipate that financial institutions may charge  
51 additional fees for reporting overdrafts in accordance with this Rule. A lawyer should  
52 maintain on a current basis books and records in accordance with generally accepted  
53 accounting practice and comply with any recordkeeping rules established by law or  
54 court order. See, e.g., ABA Model Financial Recordkeeping Rule.

55 [2] A lawyer who receives funds or property by any means must take reasonable steps  
56 to safeguard and segregate client and third-person funds and property pursuant to Rule  
57 1.15. Lawyers using an electronic payment method, including credit cards, ACH  
58 transfers (Automated Clearing House electronic funds transfers), and online payment  
59 systems, to accept the payment of client or third-person funds must take reasonable  
60 steps to ensure that the use of such a method does not result in any commingling with  
61 the funds of the lawyer, does not risk the loss of any client or third-person funds, and  
62 does not compromise the identity of any client or third-person funds. A lawyer also  
63 must take reasonable steps to ensure that client or third-person funds accepted through  
64 an electronic payment method are transferred immediately to an IOL TA account or  
65 non-IOLTA client trust account maintained by the lawyer.

Deleted: e

67 [3] While normally it is impermissible to commingle the lawyer's own funds with client  
68 funds, paragraph (c) provides that it is permissible when necessary to pay bank service  
69 charges on that account. Accurate records must be kept regarding which part of the  
70 funds are the lawyer's.

Deleted: 2

Deleted: b

71 [4] Lawyers often receive funds from third parties from which the lawyer's fee will be  
72 paid. The lawyer is not required to remit to the client funds that the lawyer reasonably  
73 believes represent fees owed. However, a lawyer may not hold funds to coerce a client  
74 into accepting the lawyer's contention. The disputed portion of the funds must be kept  
75 in a trust account, and the lawyer should suggest means for prompt resolution of the  
76 dispute, such as arbitration. The undisputed portion of the funds shall be promptly  
77 distributed.

Deleted: 3

78 [5] Paragraph (f) also recognizes that third parties may have lawful claims against  
79 specific funds or other property in a lawyer's custody, such as a client's creditor who  
80 has a lien on funds recovered in a personal injury action. A lawyer may have a duty  
81 under applicable law to protect such third-party claims against wrongful interference  
82 by the client. In such cases, when the third-party claim is not frivolous under applicable  
83 law, the lawyer must refuse to surrender the property to the client until the claims are  
84 resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the  
85 client and the third party, but, when there are substantial grounds for dispute as to the  
86 person entitled to the funds, the lawyer may file an action to have a court resolve the  
87 dispute.

Deleted: 4

Deleted: e

88 [6] The obligations of a lawyer under this Rule are independent of those arising from  
89 activity other than rendering legal services. For example, a lawyer who serves as an  
90 escrow agent is governed by the applicable law relating to fiduciaries even though the  
91 lawyer does not render legal services in the transaction and is not governed by this  
92 Rule.

Deleted: 5

93 [7] A lawyers' fund for client protection provides a means through the collective efforts  
94 of the Bar to reimburse persons who have lost money or property as a result of

Deleted: 6

102 dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must  
103 participate where it is mandatory, and, even when it is voluntary, the lawyer should  
104 participate.

105 [6a] This Rule is similar to ABA Model Rule 1.15. Paragraph (a) was added, resulting in  
106 re-lettering the following paragraphs. Also, the first two sentences of paragraph (b)  
107 differ from the ABA Model Rule 1.15, and that paragraph also incorporates two  
108 sentences that were added to the prior version of this Rule in 1997. These two sentences  
109 are the third sentence of paragraph (b) of the Rule and the corresponding fifth sentence  
110 of Comment [1]. Comment [2] was also added, resulting in renumbering the following  
111 Comments.

Deleted: identical

Deleted: except it

Deleted: a