

2015

**State of Utah, Plaintiff/Appellee, vs. William Tirado, Defendant/  
Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff / Appellee,

vs.

WILLIAM TIRADO,

Defendant / Appellant.

Case No: 20140967-CA

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BRIEF OF APPELLANT

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APPEAL FROM THE SECOND DISTRICT COURT, WEBER COUNTY, STATE OF UTAH, FROM A CONVICTION OF ARRANGING THE DISTRIBUTION OF A CONTROLLED SUBSTANCE, A SECOND DEGREE FELONY, BEFORE THE HONORABLE ERNIE W. JONES

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Oral Argument Requested

Appellant is currently incarcerated at the Utah State Prison

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
JURISDICTION OF THE COURT .....	1
ISSUES PRESENTED AND STANDARD OF REVIEW .....	1
CONTROLLING STATUTORY PROVISIONS.....	1
STATEMENT OF THE CASE.....	2
A. Nature of the Case.....	2
B. Trial Court Proceedings and Disposition .....	2
NOTE REGARDING CITATIONS .....	3
STATEMENT OF RELEVANT FACTS .....	3
SUMMARY OF ARGUMENT .....	9
ARGUMENT	
I. Trial counsel provided ineffective assistance of counsel .....	10
A. Relevant Law .....	10
B. Application to the facts .....	19
CONCLUSION AND RELIEF SOUGHT .....	24
CERTIFICATE OF COMPLIANCE WITH RULE 24	
ADDENDA	
Utah Rules of Professional Responsibility, Rule 1.6 – Confidentiality of Information	
Utah Rules of Professional Responsibility, Rule 1.7 – Conflicts of Interest: Current Clients	
Utah Rules of Professional Responsibility, Rule 1.8 – Conflicts of Interest: Current Clients: Specific Rules	

## TABLE OF AUTHORITIES

### STATUTORY PROVISIONS AND RULES

UTAH CODE §78A-4-103(e) .....	1
UTAH CODE §58-37-8 .....	2
UTAH CODE §58-37a-5 .....	2
UTAH R APP PRO 23B .....	3
UT R PRO RESP 1.1 .....	10
UT R PRO RESP 1.6 .....	10
UT R PRO RESP 1.7 .....	11,12,21
UT R PRO RESP 1.8 .....	12,13

### CASES

<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) .....	14
<i>Danner v. United States</i> , 820 F.2d 1166 (11th Cir. 1987) .....	15
<i>Hammond v. Ward</i> , 466 F.3d 919 (10th Cir. 2009) .....	17
<i>Holloway v. Arkansas</i> , 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2 426 (1978) .....	14,16,18
<i>State v. Graham</i> , 2012 UT App 332, 291 P.3d 243 .....	22,23
<i>State v. Lovell</i> , 1999 UT 40, 984 P.2d 382 .....	15,16
<i>State v. Vos</i> , 2007 UT App 215, 164 P.3d 1258 .....	1
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....	13,14
<i>United States v. Alvarez</i> , 137 F.3d 1249 (10th Cir. 1998) .....	14,15
<i>United States v. Bowie</i> , 892 F.2d 1494, 1500 (10th Cir. 1990) .....	17,18
<i>United States v. Cook</i> , 45 F.3d 388 (10th Cir. 1995) .....	19
<i>United States v. Cronin</i> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) .....	16
<i>United States v. Gallegos</i> , 108 F.3d 1272 (10th Cir. 1997) .....	18,19
<i>United States v. McCullah</i> , 76 F.3d 1087 (10th Cir. 1996) .....	19

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**BRIEF OF APPELLANT**

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**JURISDICTION OF THE UTAH COURT OF APPEALS**

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code §78A-4-103(2)(e).

**ISSUES PRESENTED AND STANDARDS OF REVIEW**

Whether trial counsel committed ineffective assistance of counsel by laboring under an actual conflict of interest which adversely affected counsel's performance. Claims of ineffective assistance of counsel raised for the first time on appeal are reviewed for correctness. *State v. Vos*, 2007 UT App 215, ¶ 9, 164 P.3d 1258.

**CONTROLLING STATUTORY PROVISIONS**

All controlling statutory provisions are set forth in full in the Addenda.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

William Tirado appeals from the judgment, sentence, and commitment of the Honorable Ernie W. Jones, Second District Court, from a conviction of Arranging the Distribution of a Controlled Substance, a second degree felony, and Possession of Drug Paraphernalia, a class A misdemeanor, after he was convicted by a jury.

### **B. Trial Court Proceedings and Disposition**

On August 1, 2012, the State charged Tirado with Possession of Drug Paraphernalia, a Class A misdemeanor, in violation of Utah Code §58-37a-5(1). R.001. A separate count of Arranging to Distribute a Controlled Substance, a second degree felony, in violation of Utah Code §58-37-8(1)(a)(ii), was subsequently added by amended information filed in October, 2013. R.031. A preliminary hearing was held on December 4, 2013 and Tirado was bound over for trial upon a finding of probable cause. R.043-46.

On May 12, 2014, the case was tried to a jury who found Tirado guilty on both counts of the information. R.078-84.

Tirado was sentenced October 15, 2014 to statutory terms in the Utah State Prison. R.172; 218. The judgment was entered on October 20, 2014. R.174.

On October 21, 2014, Tirado filed a notice of appeal in Second District Court. R.176.

Samuel Newton was initially assigned as appellate counsel for Tirado, and on May 27, 2015 Newton filed a brief and a motion to remand based on Rule 23B. However, in June a Stipulated Motion for Temporary Remand to Address Potential Conflict of Interest

was filed and granted. In that motion Samuel Newton disclosed that he had a conflict of interest based on his representation of both Tirado and Carl Courtney. On remand the district court concluded that a conflict existed and assigned current appellate counsel to represent Tirado.

After having reviewed the case and consulting with Tirado, current appellate counsel moved to strike the brief and 23B motion filed by Samuel Newton. That motion was granted by this Court. Tirado now simultaneously files this brief and a Rule 23B motion for remand.

#### **NOTE REGARDING CITATIONS**

Because this brief is filed consistent with this Court's Order Pertaining to Rule 23B, many of the factual assertions in this brief will be cited from the Attachments to Tirado's simultaneously-filed Rule 23B Motion to Remand, rather than being cited directly to the record. Tirado anticipates supplementing this brief in the event that this Court grants his motion for remand and further evidence is placed on the record.

#### **STATEMENT OF RELEVANT FACTS**

Jason Vanderwarf, a police officer working with the Multijurisdictional Counterdrug Task Force, testified that on July 26, 2012, he had an informant named Lorenzo Gomez who contacted him and said that he had agreed with the defendant, William Tirado, to purchase two eight balls of methamphetamine for \$440. R.217:110-12. An eight ball was approximately 3.5 grams, so around 7 grams total. R.217:111. The eight ball would have at least 20 individual uses in it. R.217:186-87.

Gomez knew Tirado previously and knew his voice. R.217:170-71. Gomez and Tirado talked privately and agreed to the deal before Gomez decided to take it to the police. R.217:171-73.<sup>1</sup> Vanderwarf decided to set up a sting operation to apprehend the dealer. R.217:112. Gomez, the State's confidential informant, was a convicted felon who was getting paid anywhere from \$50 to \$200 to create drug deals for the police. R.217:155-56, 170. He had his own drug charges to work off and was an admitted drug addict who was still using at the time of this event. R.217:180, 185.

The officer drove by Tirado's house and witnessed him standing out in front with Carl Courtney, whom the officer "had prior dealings with" for drug offenses. R.217:112. Vanderwarf, Gomez and another police officer, Cox, parked around the corner from the home, right by the library, and made a phone call. R.217:113, 173. Vanderwarf had a recording device that he used to record the phone call as it was on speaker phone. R.217:113.

Gomez made the phone call to 801-686-6567 and Tirado answered. R.217:114.<sup>2</sup> Gomez said the caller was Tirado. R.217:173. Vanderwarf said he recognized the caller as Tirado from previous dealings two years earlier and his subsequent conversation with

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<sup>1</sup> Neither Gomez nor Vanderwarf mentioned this phone call in the preliminary hearing. Indeed, Vanderwarf seemed to imply that it was Gomez's first recorded call where the agreement to purchase two eight-balls took place. R.216:23-24.

<sup>2</sup> Vanderwarf testified that Tirado gave 801-686-6567 as his contact number when he was booked into jail and his address as 653 25<sup>th</sup> Street (about a half a block away from the corner). R.217:136-37; State's Ex. 8.

him while he was in custody. R.217:114, 149-50.<sup>3</sup> Gomez asked Tirado if “he had it” and then confirmed “four-four-zero.” R.217:114, 174.

There was no specific mention of drugs on any of the phone calls. Gomez said the \$440 referred to a quarter ounce of methamphetamine. R.217:175-76. The officer also testified he knew this was a drug transaction from the language used: Gomez’s prior (unrecorded) call where eight balls were mentioned, the “do you got it” phrase, “four-four-zero” and “they just left,” which the officer testified were part of “their own little language” which he said “is, without a doubt,” the language of “a drug transaction.” R.217:151-54. Gomez said the call involved where they should meet and if he had money on him, but he added that when he asked if he had it, he meant “if he had the dope, if he had it on him.” R.217:174, 184.

Gomez then made a second call that was played for the jury.<sup>4</sup> In that call, Gomez told Tirado to meet him across from the library—this was because the officers did not want Gomez to cross the street “for his safety and officer safety.” R.217:145, 175. Officers then searched Gomez, gave him cash and fitted him with a bug. R.217:116, 174. Gomez then walked toward 25<sup>th</sup> Street and Jefferson, 490 feet from a Baptist church. R.217:116-17, 124. Vanderwarf and Officer Sean Grogan watched Tirado walking

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<sup>3</sup> No parties self-identified on the tape. R.217:150.

<sup>4</sup> Vanderwarf earlier testified that only one phone call was made and that no subsequent phone calls occurred, but later changed that story. R.217:116.

toward the corner. R.217:117, 191.<sup>5</sup> They could also see Gomez standing on the corner. R.217:123, 191.

Gomez asked Tirado to come over across the street. R.217:145, 177. Gomez asked him if he “got it” and said that his friend was going to pick him up and he had to hurry “and get this or he’s going to say F it.” R.217:178. Tirado asked Gomez if he had the money on him and Gomez said that he did. R.217:178. But Tirado told Gomez that he did not have it because “his dude left.” R.217:183. Vanderwarf could hear Tirado (over the recording) say “my friend’s already left” or “they’ve already left” or “my dude just left” and the two bantering. R.217:123, 178. Because agents told Gomez he could not cross the street, neither person crossed—“they both held at their corners.” R.217:124. As one officer put it, Gomez “was on the north side of the road, the defendant was on the south side of the road, and they were mostly conversing back and forth across the street, mostly trying to get one another to cross the street to meet.” R.217:191. Gomez ended up just walking away. R.217:124, 177-78. No actual drug transaction took place and the two never met. R.217:163.

Vanderwarf decided to take Tirado and Carl Courtney into custody. R.217:125, 128. Vanderwarf testified “I had active charges [on Courtney] and was actually looking for him that I had for distribution of narcotics.” R.217:128.

Officers found no drugs or paraphernalia on Tirado. R.217:151, 154-55. While Tirado was in custody, officers obtained Courtnee Reynolds’ (Tirado’s fiancé)

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<sup>5</sup> Gomez testified inconsistently at the preliminary hearing that Tirado was already there when he arrived. R.216:15.

permission to search their home. R.217:129-35, 191, 194-96. They did not locate any drugs in the search. R.217:167, 196. But they were able to locate items of paraphernalia, including some pipes, baggies and some scales, which the officers believed could have been used for distribution purposes. R.217:129-35, 160, 168, 191-92. Vanderwarf interviewed Tirado about these items and he “admitted that it was all his”—“that he was a meth user.” R.217:129. He said he used “enough to get by.” R.217:130. Vanderwarf did not book Tirado for arranging a drug deal, but for possession of drug paraphernalia, which he said they delayed screening to protect their informant. R.217:157-58.<sup>6</sup>

Carl Courtney possessed of 2.1 grams of methamphetamine, well shy of the 7 grams needed for the deal. R.217:142, 160, 164, 198.<sup>7</sup> Vanderwarf also interviewed Courtney, who said that “if he needed to sell [the methamphetamine], he would sell from that specific amount.” R.217:138. The drugs located on Courtney were found with other “separate empty baggies” which the officer opined could be used for redistribution and repackaging. R.217:142, 199. Officer Jensen testified the amount on Carl Courtney was a “user’s amount”, depending upon the user. R.217:201.

Vanderwarf had previously bought drugs from Courtney himself and testified that “from my knowledge of Carl Courtney, he deals directly to his people” and did not use a

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<sup>6</sup> Defense counsel pointed out at trial that Tirado was not charged for a year and a half until after the State convicted Courtney of his crime, insinuating that somehow the charge was not believed to be sustainable at the time. R.217:260-61.

<sup>7</sup> One officer testified that it was 1.75 grams, which was “typically a user’s amount.” R.217:200-01.

middleman. R.217:165.<sup>8</sup> He admitted a “possible theory” was that Courtney used Tirado as a middleman to arrange the deal. R.217:166. Gomez believed as much, saying that based on his prior interactions with Tirado he obtained his drugs from Carl Courtney. R.217:179. But Gomez said all but one time he purchased drugs from Tirado directly. R.217:181-82.

Even though Tirado was not in possession of drugs and the amount found on Courtney was not consistent with what the State contended was the arranged deal, the State argued that Tirado acted as a middleman. When questioned about charging Tirado with arranging to distribute when no drugs were found on Tirado, Vanderwarf responded: “But for the arrangement there doesn’t have to be drugs found. All that is—all it requires is the act of the arrangement for the distribution of narcotics. This is a case wherein which Mr. Tirado, using a middleman, Carl Courtney, to possibly get the money first, go meet with Carl Courtney.” R.217:163-64.

Middlemen don’t always have the drug, because they guarantee whether the person has money and they act as lookouts. R.217:146. There could be other scouts present to make sure the scene is clear and no police are around. R.217:147. Vanderwarf explained the different quantities as a fear of robbery from the dealer’s end. R.217:147. They may want to make sure the person has money and then take them to a new location—to “clear their tail” and make sure no one is following them. R.217:148. Sometimes they intend to rob a person as well and not give them any drugs. R.217:149.

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<sup>8</sup> Though the officer later retracted that and said that Courtney had used middle men as well. R.217:166-67.

Tirado presented testimony from his fiancé, Courtney Reynolds, who said that she told the officers they could not come into the house, but that they “pushed the door open and followed us back in.” R.217:210-13. She said they searched the room without a search warrant. R.217:213. The State called Officer Derek Draper in rebuttal, who said that they asked Reynolds for permission to enter and to search and that she gave it to them. R.217:218-19.

### **SUMMARY OF ARGUMENT**

Tirado’s attorney, Sean Young, also represented Carl Courtney, who was in reality Tirado’s codefendant. Carl Courtney, although not charged as a codefendant in the case, was arrested at the scene with Tirado, was discovered to have methamphetamine on his person, was charged and convicted based on the same evidence presented in this case, and his statements were admitted against Tirado. Tirado’s trial counsel had a duty to discovery and present a defense, to cross examine the witnesses against Tirado, and to direct blame away from Tirado on to codefendants. Because counsel also had a duty to Carl Courtney to avoid self-incrimination, a duty of confidentiality, a duty of loyalty, Sean Young had a conflict of interest. Because counsel failed to call Carl Courtney as a witness or confront his statements admitted against Tirado that conflict affected counsel’s performance. This is an actual conflict of interest and constitutes ineffective assistance of counsel.

## **ARGUMENT**

### **I. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY OPERATING UNDER AN ACTUAL CONFLICT OF INTEREST**

#### **A. Relevant Law**

##### **Statutes and Rules**

Several of the Utah Rules of Professional Responsibility are implicated in this appeal. The first and most basic rule governing an attorney's obligation to his client is Rule 1.1 Competence. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The comments to this rule give some insight into how "thoroughness and preparation" can be measured.

"Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation."

Put simply, in a criminal case an attorney must be adequately prepared to confront the evidence presented against his client. That also mean knowing the who the codefendants and witnesses will be.

Another relevant rule is Rule 1.6 Confidentiality of Information. "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent..." except in several enumerated circumstances. Thus an attorney's disclosure of any information about his client, without informed consent is generally prohibited. This is especially true regarding information that could potentially be adverse

to the client's interests or reputation. This rule is tied directly to a lawyer's duty of loyalty. When a lawyer learns information about his client, his duty is to keep that information confidential, to keep his mouth shut about anything that has to do with his client unless disclosure is authorized by the client or is part of the representation.

Rule 1.7 Conflict of Interest: Concurrent Clients says

"a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (a)(1) The representation of one client will be directly adverse to another client; or (a)(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

The comments to this rule instruct an attorney who discovers a potential conflict of interest to

"1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and, 4) if so... obtain their informed consent, confirmed in writing."

Rule 1.7 Comment 2. Lawyers should adopt reasonable procedures to determine whether a conflict of interest exists. In criminal law reasonable procedures include reviewing the evidence to see whether multiple people are implicated, or if witnesses may be called, and if so, whether the lawyer's duties to others may impact the lawyer's duties to the defendant. When unforeseeable developments arise creating a conflict of interest "the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict." Rule 1.7 Comment 3.

“Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.” In some instances, a lawyer representing multiple parties may be “materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client.”

Rule 1.7 Comment 8.

“The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.” Comment 23. “A conflict of interest exists... if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case... If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.”

Rule 1.7 Comment 24.

“As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use that information to that client’s benefit.”

Rule Comment 31.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules says:

“[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.”

The comments expand the rule.

“Use of information relating to the representation to the disadvantage of the client violates the lawyer’s duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer.”

Rule 1.8 Comment 5.

These rules can be combined to say that lawyers should be cautious when undertaking the representation of a new client because the lawyer’s duties include the duty not to represent multiple clients with conflicting interests. This is especially true in a criminal case where the lawyer is faced with the potential of representing two defendants who have been charged with crimes arising from the same evidence. This is compounded even further in cases where one of the clients has provided a statement implicating the other client because the duty to protect one client at the expense is so readily apparent no matter which client the lawyer chooses to protect.

### **Cases on Actual Conflicts of Interests**

According to *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) “[w]hen a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” “Representation of a criminal defendant entails

certain basic duties” including “a duty of loyalty, a duty to avoid conflicts of interest.” *Strickland*, 466 U.S. 668, 688.

Generally, a claim of ineffective assistance of counsel has two components; “[f]irst, the defendant must show that the performance was deficient”, and, “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687. However, in some contexts, prejudice is presumed. One such instance is “when counsel is burdened by an actual conflict of interest” because “[i]n those circumstances, counsel breaches the duty of loyalty...” *Strickland*, at 692. The harmless error rule (or the requirement of demonstrating prejudice) is not necessary because “in the case of joint representation of conflicting interests the evil... is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process... Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.” *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). In these cases, prejudice is presumed “if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” *Strickland*, at 692 (*citing Cuyler v. Sullivan*, 446 U.S. 335, 348, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)).

“An actual conflict of interest results if counsel was forced to make choices advancing other interests to the detriment of his client.” *United States v. Alvarez*, 137 F.3d 1249, 1251 (10th Cir. 1998). In *Alvarez* the defendant claimed ineffective assistance of counsel based on an actual conflict of interest where he claimed his retained

attorney had been hired and paid by his codefendants and that “his counsel was not working on his behalf, but on behalf of codefendant...” *Alvarez*, 137 F.3d 1249, 1251.

The Tenth Circuit considered the “two-part test” governing the claim, that “the client must demonstrate [1] an actual conflict of interest [2] which adversely affected his lawyer’s performance.” *Alvarez*, at 1251 (rejecting the governments contention that a defendant must also show prejudice). The Court noted that “possible conflicts” are common in multiple representation but an actual conflict “results if counsel was forced to make choices advancing other interests to the detriment of his client.” *Id.* “Indeed, ‘to demonstrate an actual conflict of interest, the petitioner must be able to point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party.’” *Id.* (citing *Danner v. United States*, 820 F.2d 1166, 1170 (11th Cir. 1987)).

The Court carefully reviewed the record but could not find anything to “suggest a divergence of interests between [the defendant] and his codefendants or a compromise of any kind in counsel’s defense...” *Id.* Because the defendant could not demonstrate an adverse affect, the fact that a possible conflict could not support his ineffective assistance claim.

The same issue was considered in *State v. Lovell*, 1999 UT 40, 984 P.2d 382 (*cert denied* 528 U.S. 1083, 120 S.Ct. 806, 145 L.Ed.2d 679 (2000)). There the defendant, who pled guilty after confessing to murder, argued “his trial counsel had extensive personal associations with prosecutor Reed Richards and that the relationship denied Lovell his constitutional right to conflict-free counsel.” *Lovell*, 1999 UT 40, ¶22. Lovell

showed that his attorney and the prosecutor had “a lengthy personal and professional relationship” that included jointly owned real estate, help with tax returns, political campaigning, former law partnership, and an alleged access to each other’s files.

However, because the defendant failed to establish that his attorney’s ties to the prosecutor forced him to make any choice that advanced his interests to the detriment of the defendant failed to meet his burden.

“Determining whether any conflict adversely affected [counsel’s] performance turns on whether (1) other counsel likely would have approached the case differently and (2) a tactical reason other than the alleged conflict existed for [counsel’s] decisions.”

*Lovell*, 1999 UT 40, ¶24. There, because of the strength of the State’s case “it was in Lovell’s best interest to work toward a plea bargain, and it is not apparent that other counsel could have or would have approached the case differently.”

Of course, an attorney is not obligated to pursue a defense strategy just because it is a defendant’s preference. “If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

“Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing... Generally speaking, a conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another...” *Holloway v. Arkansas*, 435 U.S. 475, 489-90, 98 S.Ct. 1173, 55 L.Ed.2 426 (1978). Or for that matter, it may prevent an attorney from *presenting*

evidence prejudicial to one client and favorable to another, especially when the evidence may betray the attorney-client privilege.

An example of this problem is demonstrated in *Hammond v. Ward*, 466 F.3d 919 (10th Cir. 2009). There a single attorney represented two codefendant brothers. Prior to trial the two had planned to work together and the trial strategy involved one brother “would take the full rap for the gun found in the vehicle, [and] both men would disavow knowledge that there were drugs in the car”. *Hammond*, 466 F.3d 919, 930. However, sometime prior to trial the government offered the brother a favorable plea agreement but only if he agreed to inculcate the defendant. Even though the brother did not actually testify against the defendant “counsel’s performance was adversely affected by an actual conflict in this case... because trial counsel could not simultaneously negotiate the most favorable deal for [brother]... without both disqualifying [brother] from providing exculpatory testimony for [defendant] and, consequently, sabotaging [defendant’s] most viable defense strategy...” *Hammond*, at 930.

When brother got an opportunity to obtain a favorable conditional plea his interest “conflicted with [defendant’s] interest in presenting his best defense. And when trial counsel continued to represent the defendant through trial, without brother’s exculpatory testimony, he did so “without the best witness... to create a reasonable doubt in the State’s case.” *Id.* See also *United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990) (“[D]efense counsel’s performance [is] adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to

defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests.").

Another relevant example can be found in *United States v. Gallegos*, 108 F.3d 1272 (10th Cir. 1997). There the defendant argued he was denied effective assistance of counsel where his codefendant, who was represented by the same attorney, entered a plea. On the morning of trial, when the codefendant was to be called as a witness it came to light that he planned to 'take the fifth' in order to avoid any additional charges. Counsel then raised his concern, "my loyalties to [codefendant] has to be to say you need to take the Fifth Amendment. My loyalties to my client, [defendant], is that he should testify. I see no way to rectify that decision..." *Gallegos*, 108 F.3d 1272, 1282. The trial court did not sever the defendant's case, did not appoint separate counsel, and did not secure a waiver of the conflict.

The Tenth Circuit applied the *Holloway* rule and found "there was indeed a material conflict of interest" and that trial counsel:

"was in a very precarious situation. Because [codefendant] possessed information that was exculpatory to [defendant], [counsel's] duty to [defendant] was to encourage [codefendant] to testify and to attempt to elicit this exculpatory information from him. On the other hand, [counsel's] obligation to [codefendant] was to discourage him from testifying. If [codefendant] had testified, he would have subjected himself to the risk of additional criminal charges. Thus, there was a real conflict of interest present, and the trial court erred in failing to either obtain a waiver from [defendant] or take adequate steps to protect [defendant's] right to conflict-free representation."

*Gallegos*, 108 F.3d at 1283. The Court distinguished the defendant's case from an

“inapposite” case where a conflict of interest never actually materialized. *See United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996). Unlike that case, the attorney in *Gallegos* “was placed in a position of representing interests of a... witness directly adverse to those of his client.” *Gallegos*, at 1283 (citing *United States v. Cook*, 45 F.3d 388, 394 (10th Cir. 1995)).

Typical actual conflict of interest cases involve multiple representation of codefendants but “a defendant's right to counsel free from conflicts of interest is not limited to cases involving joint representation of co-defendants but extends to any situation in which a defendant's counsel owes conflicting duties to that defendant and some other third person.” *United States v. Cook*, 45 F.3d 388, 393 (10th Cir. 1995).

#### **B. Application to the facts**

##### **Trial counsel provided ineffective assistance of counsel for laboring under an actual conflict of interest that affected his performance and decision making**

According to the record, Sean Young was assigned as Tirado’s attorney on August 8, 2012. R.007. According to the affidavits and documents attached to Tirado’s Rule 23B Motion, Sean Young represented Carl Courtney as the appointed public defender. See Attachment C, D, E, F. If Sean Young was appointed at or near the beginning of Carl Courtney’s case that would have been in August of 2012, around the same time he was assigned to represent Tirado. That means that Sean Young was acting as appointed counsel for both Tirado and Carl Courtney long before Courtney entered his plea in November of 2013, and long before Tirado went to trial in May of 2014. It means he represented both men in December of 2013 when the State presented evidence and

argument at Tirado's preliminary hearing that the drugs found on Carl Courtney could be attributed to Tirado because drug deals often involve more than one person and Tirado has been known to get his drugs from Carl Courtney in the past. R.216:26-31.

As noted above, a concurrent conflict of interest arises when "[t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client..." UT R PRO RESP, RULE 1.7. As noted in the comments to the rule, even where there is no direct adverseness "a lawyer representing multiple parties may be 'materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client.'" Rule 1.7, comment 8. Thus, as the cases proceeded, Carl Courtney's to a plea agreement and Tirado's to a jury trial, these two defendants were "concurrent clients."

The question becomes whether or not Sean Young's duty of loyalty to Carl Courtney infringed upon his duty of loyalty to Tirado at any relevant time, or vice versa, and therefore limited counsel's ability to take possible positions that could be advantageous to either client. Tirado asserts that counsel's representation of Carl Courtney prevented Sean Young from being able to prepare a defense by investigating and calling Carl Courtney as a witness and it prevented him from confronting the statements offered by the State attributed to Carl Courtney and impeaching his credibility. Sean Young was prevented from doing these things because to do so would have violated his duties of loyalty and confidentiality to Carl Courtney, pitting Carl

Courtney's interests against Tirado's. Tirado had the right to be informed about anything Sean Young knew relevant to his defense, and he had the right to expect his lawyer would use any available information, evidence, witness to his benefit. Unfortunately, due to the conflict of interest, Tirado's right to counsel was infringed when it butted up against Sean Young's duties to Carl Courtney. See Rule 1.7, comment 31.<sup>9</sup>

At trial the State presented evidence of Carl Courtney's crime, his statements, his criminal history. This evidence was admitted without objection or challenge from the defense. And this evidence was used by the State to bolster the otherwise unsupported claims of the paid confidential informant, Lorenzo Gomez. The police said Gomez came to them after allegedly speaking to Tirado about a drug deal involving two "eight-balls". However, when the police got involved the discussions they overheard and recorded between Tirado and Gomez never discuss any specifics. Neither Tirado nor Gomez mentioned drugs, or meth, or any other language the officers could translate as meaning methamphetamine. And there is no explicit discussion about any kind of exchange. Instead there was discussion about whether Tirado had "it" and Tirado used the phrase "four-four-zero". As explained above, Gomez never met with Tirado, no exchange ever occurred, and when the police arrested and searched Tirado and his home, no evidence of his having possession of methamphetamine was ever discovered.

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<sup>9</sup> "As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit."

So what the State was left with was the word of a paid informant and two audio recordings that do not disclose any incriminating statements or evidence. That is why the evidence related to Carl Courtney was so important to the State, and confronting it was so important to Tirado. This importance is at the heart of why Sean Young should not have represented these two codefendants.

A “legal conflict of interest generally refers to an incompatibility between the interests of two of a lawyer's clients...” *State v. Graham*, 2012 UT App 332, ¶28, 291 P.3d 243 (internal citation omitted). The incompatibility between the interests of Tirado and his defense, and the interests of Carl Courtney and his confidential relationship with Sean Young created a “legal conflict of interest.” Tirado’s interest was to demonstrate that he had nothing to do with the drugs found in Carl Courtney’s pocket, to separate himself from Carl Courtney’s statement that he could sell those drugs, from Carl Courtney’s history and reputation for selling drugs. It was in Tirado’s interest to impeach and criticize Carl Courtney in any way that would distance himself from Carl Courtney in order to challenge the State’s argument that Tirado was acting as his middleman.

On the other hand, Carl Courtney was defending himself against this and other cases filed in the same court. See Attachment C (“...I was also defending myself in several other cases. Sean Young was also appointed to represent me in those cases.). Carl Courtney had an interest in negotiating possible favorable outcomes in those case, in seeking favorable sentencing recommendations from the prosecution. He also had an interest in keeping secret any potentially incriminating evidence he may have told Sean Young in confidence.

Because these interests were incompatible, Sean Young faced what the Court in *Graham* calls a “legal conflict of interest...”. He was forced to choose to compromise Tirado’s interests in challenging the State’s evidence and presenting a defense, or to compromise Carl Courtney’s interest in keeping his confidential communications private, in maintaining the lawyer/client relationship and loyalty, and in keeping in the good graces of the State. To Tirado’s detriment, Sean Young chose to run the risk that the jury would not tie the Carl Courtney evidence with Tirado. That choice should not have to have been made, a lawyer should not have to be forced to make a compromise between two clients. Tirado deserved Sean Young’s undivided loyalty.

This compromise adversely affected Sean Young’s performance. It prevented him from wholeheartedly representing Tirado. The manifestation of this misrepresentation played out at trial when Carl Courtney was not called to testify as a defense witness to say that the drugs in his pocket had nothing to do with Tirado’s phone conversation with Gomez. See Attachment C. It was manifest when Carl Courtney’s statements were admitted without objection in violation of Tirado’s right to confront the witnesses against him.

Tirado predicts that the State’s response to this claim will focus on the quantity and quality of the other evidence presented to prove Tirado committed the act of arranging to distribute. This Court should recognize that such a response misses the point of an ineffective assistance of counsel claim based on an actual conflict. As the cases make clear, Tirado is not required to show that the conflict actually prejudiced him, in other words he is not required to show that but for the conflict of interest he would have been

acquitted. The presumption of prejudice means that Tirado only has to show that the actual conflict adversely affected his attorneys' performance, and being prevented from calling a witness with evidence that could legitimately rebut the elements of the case is sufficient. Showing that the actual conflict prevent counsel from asserting Tirado's right to confront the witnesses against him is sufficient.

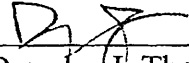
Because Sean Young's concurrent representation of Carl Courtney prevented Tirado from presenting a witness who could interfere with the State's argument tying Tirado to the drugs in Carl Courtney's pocket, which was consistent with the overall defense strategy, the conflict of interest adversely affected counsel's performance.

Because Sean Young's representation of Carl Courtney prevented Tirado from confronting and impeaching the witness who the State used to establish that the drugs were possessed for distribution, the conflict of interest adversely affected counsel's performance. This actual conflict of interest denied Tirado his Sixth Amendment right to effective and conflict-free assistance of counsel.

### **CONCLUSION AND PRECISE RELIEF SOUGHT**

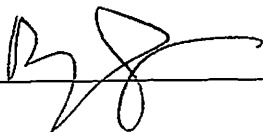
Because Tirado's right to effective assistance of counsel was denied, he asks this Court to reverse his conviction and remand the case to the District Court for a new trial.

RESPECTFULLY SUBMITTED this 28th day of November, 2015.

  
\_\_\_\_\_  
Douglas J. Thompson  
Appointed Conflict Appellate Counsel

### **CERTIFICATE OF MAILING**

I hereby certify that I mailed a true and correct copy of the foregoing Appellant's Brief postage prepaid to the Utah State Attorney General, Appeals Division, PO Box 140854, Salt Lake City, Utah 84114-0854 on this 28th day of November, 2015.



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### Certificate of Compliance With Rule 24(f)(1)

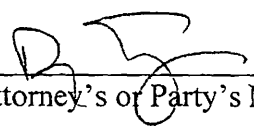
#### Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:

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\_\_\_\_\_  
Attorney's or Party's Name

Dated: 11/28/2015

## **ADDENDA**

Utah Rules of Professional Responsibility, Rule 1.6 – Confidentiality of Information

Utah Rules of Professional Responsibility, Rule 1.7 – Conflicts of Interest: Current Clients

Utah Rules of Professional Responsibility, Rule 1.8 – Conflicts of Interest: Current Clients: Specific Rules

# Utah Rules of Prof'l Conduct Rule 1.6

Current through rules effective as of November 1, 2015.

Utah Court Rules > UTAH CODE OF JUDICIAL ADMINISTRATION > PART II. SUPREME COURT RULES OF PROFESSIONAL PRACTICE > CHAPTER 13. RULES OF PROFESSIONAL CONDUCT > CLIENT-LAWYER RELATIONSHIP

## Rule 1.6. Confidentiality of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
  - (4) to secure legal advice about the lawyer's compliance with these Rules;
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (6) to comply with other law or a court order; or
  - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
- (d) For purposes of this rule, representation of a client includes counseling a lawyer about the need for or availability of treatment for substance abuse or psychological or emotional problems by members of the Utah State Bar serving on a Utah State Bar endorsed lawyer assistance program.

## History

Amended effective October 10, 1990; November 1, 1998; November 1, 2005; May 1, 2015

## Annotations

## Notes

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to

## Utah Rules of Professional Conduct Rule 1.6

the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

#### Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

#### Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does

## Utah Rules of Professional Conduct Rule 1.6

not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together.

The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

#### Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17. Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge).

## Utah Rules of Prof'l Conduct Rule 1.6

Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent to any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

#### Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see rule 5.3. Comments [3]-[4].

## Utah Rules of Professional Conduct Rule 1.6

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

**Former Client**

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

[20a] Paragraph (d) is an addition to ABA Model Rule 1.6 and provides for confidentiality of information between lawyers providing assistance to other lawyers under a Utah State Bar endorsed lawyer assistance program.

**Amendment Notes. --**

The 2015 amendment added "or is using" in (b)(2); added (b)(7) and (c); redesignated former (c) as (d); and made related and stylistic changes.

**Case Notes**

Applicability of privilege.  
Disclosure of privileged information.  
No violation.

**Applicability of privilege.**

Attorney could not claim attorney-client privilege regarding information in a document as to which the client had already expressly waived the attorney-client privilege. Even if the privilege had applied, it would not protect against the disclosure of the names of individuals and firms that had allegedly expressed interest in a business venture because the attorney's contact with those third parties was outside the scope of any privilege. *Sorenson v. Rizzo*, 2008 U.S. Dist. LEXIS 46642 (D. Utah June 16, 2008).

**Disclosure of privileged information.**

Attorneys could use information they learned as insurer's in-house counsel and as attorneys for the insurer's insureds in their lawsuit against the insurer, as long as the information disclosed was reasonably necessary to the prosecution of their claims. *Spratley v. State Farm Mut. Auto. Ins. Co.*, 2003 UT 39, 78 P.3d 603.

**No violation.**

Defense counsel in a criminal case did not violate the rules of professional conduct by disclosing to the trial judge and presiding judge that they felt intimidated by their client. Defense counsel, mindful of their obligations to their client, limited their disclosures. *State v. Martinez*, 2013 UT App 39, 297 P.3d 653.

**Cited in**

SLC Ltd. V v. Bradford Group W., Inc., 999 F.2d 464 (10th Cir. 1993); *Bullock v. Carver*, 910 F. Supp. 551 (D. Utah 1995).

## **Research References & Practice Aids**

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### **Cross-References. --**

Reports to legislature by guardian ad litem as exception to this rule, § 78A-6-902.

### **COLLATERAL REFERENCES**

#### **Broad nature of requirement.**

Ethical Advisory Opinions.

Confidentiality requirement of this rule includes not only statements and information obtained directly from a client, but also other information obtained by a lawyer in the course of investigating a client's case. Utah Ethics Advisory Op. No. 03-02 (Utah State Bar).

#### **Client's name, address, etc.**

Information given to an attorney by his client, including the client's name, address and telephone number, is confidential, and the attorney is prohibited from disclosing such information to securities brokers, financial planners, insurance salesmen and other professionals, without receiving prior permission from the clients. Utah Ethics Advisory Op. No. 97-04 (Utah St. Bar).

#### **Client's prior convictions.**

Where an attorney serving as defense counsel in a criminal case is expressly requested by the court at a sentencing hearing for information obtained from or about the defendant regarding the defendant's prior convictions, the attorney may only answer with the client's informed consent; otherwise, the attorney must respectfully decline to answer the court's request in a manner that will not be misleading to the court. Utah Ethics Advisory Op. No. 05-02 (Utah St. Bar).

#### **Communications with prospective client.**

After an attorney has interviewed a prospective client, and even though the lawyer does not undertake the representation and has not given legal advice to the prospective client, the obligation of confidentiality usually attaches. The circumstances when the attorney may breach confidentiality are governed by Rules 1.6 and 1.9, Utah Rules of Professional Conduct, applied to former clients. Utah Ethics Advisory Op. No. 05-04 (Utah St. Bar).

#### **Corporate counsel's representation of corporate employees.**

It is permissible for corporate counsel to assert that counsel concurrently represents present and former corporate employees whose testimony is relevant to a claim and ethically preclude opposing counsel's access to those corporate employee witnesses if corporate counsel has actually formed an attorney-client relationship with these employee-witnesses, and has fully complied with Utah Rules of Professional Conduct 1.7 (including obtaining informed consent from all multiple clients to joint representation and informing them of the possible need for withdrawal from representing any of them should an actual conflict arise). However, in the absence of such a fully formed and proper attorney-client relationship, it is improper for corporate counsel to block opposing counsel's access to other current corporate constituents, by asserting an attorney-client relationship unless these individuals were control group members, their acts could be imputed to the organization or their statement would bind the corporation with respect to the matter under Utah Rules of Professional Conduct 4.2, and, similarly, it is improper to block opposing counsel's access to any former employee in the absence of a current fully formed and proper attorney-client relationship. Utah Ethics Advisory Op. No. 04-06 (Utah St. Bar).

## Utah Rules of Professional Conduct Rule 1.6

**Disclosure of client's suicide threat.**

An attorney who reasonably believes a client is contemplating imminent suicide may be free from the strict requirement of (b)(1) of this rule and may disclose a suicide threat to another who may help prevent it, with the caveat that circumstances should be such as to cause a reasonably prudent attorney to deem the situation to be exigent in nature and of sufficient gravity to require the attorney in the exercise of his professional judgment to make such a disclosure, and the preferable recipient of such disclosure should be a Court or other authorities who might help prevent it as opposed to family members or other third parties. Utah Ethics Advisory Op. No. 95 (Utah St. Bar 1994).

**Duties when client has materially misled court.**

Counsel who knows that a client has materially misled the court may not remain silent and continue to represent the client, because to do so would be "assisting" the client in committing a fraud on the court. Counsel is obligated to remonstrate with the client and attempt to persuade the client to rectify the misleading or untruthful statements to the court, and if this is unsuccessful, counsel must seek to withdraw. If withdrawal is denied, counsel must disclose the fraud to the court. Utah Ethics Advisory Op. No. 00-06 (Utah St. Bar).

**Information falling under reporting requirements of abuse statute.**

An attorney who fails to report information obtained from a client that falls under the abuse statute in § 62A-4a-403 does not violate the Rules of Professional Conduct; however, the attorney does have the discretion to disclose such information with client consent under subsection (a) of this rule, or to the extent the attorney believes it is necessary under subsection (b). Utah Ethics Advisory Op. No. 97-12 (Utah St. Bar).

When an attorney has reason to believe a person who is not a client has abused a child and the information upon which the belief is based derives from the attorney's representation of a client, the attorney may report the suspected abuse over the client's objection without violating the Utah Rules of Professional Conduct. Utah Ethics Advisory Op. No. 95-06 (Utah St. Bar).

**Information given in initial conference.**

Information given to an attorney in an initial telephone conference by an individual whom the attorney has agreed to represent is confidential, even against a request for such information by law enforcement authorities seeking to apprehend the accused client. Utah Ethics Advisory Op. No. 97-02 (Utah St. Bar).

**Lawyer engaged for limited purpose.**

In the absence of a court order to the contrary, an attorney who was hired by a client for the limited purpose of reviewing and advising about a plea offer made by the prosecution to the client may not divulge any aspect of the communications with the client either to the prosecution or in open court. Utah Ethics Advisory Op. No. 05-01 (Utah St. Bar).

**Lawyer functioning in law-related profession.**

A lawyer functioning in a law-related profession, such as real estate brokerage, who holds himself out as either an active or inactive lawyer will be subject to the confidentiality requirements of this rule while engaged in that law-related profession. Utah Ethics Advisory Op. No. 01-05 (Utah St. Bar).

**Submission of billing statements to outside audit service.**

Before a lawyer may submit billing statements to an outside audit service, the lawyer must have the client's consent, and if the lawyer is relying on an insurance agreement for consent, the lawyer must review the agreement

with the client to renew the client's consent before sending any billing statements to the outside audit service. Utah Ethics Advisory Op. No. 98-03 (Utah St. Bar).

**Surreptitious recording of communications.**

It is not unethical for an attorney to surreptitiously record by electronic or mechanical means communications with clients, witnesses, or other attorneys. Utah Ethics Advisory Op. No. 090 (Utah St. Bar 1994).

**Third party's statements.**

Statements made by a client's health-care provider to an attorney are confidential information as to the client and are protected by this rule, even though the information may reveal past criminal conduct by a third party, or even an ongoing criminal fraud scheme in which the client is not participating; the attorney is bound to the obligation of confidentiality under this rule and may not reveal information received in the course of representing the client to anyone, including insurance carriers or law enforcement authorities, without the client's consent. Utah Ethics Advisory Op. No. 03-02 (Utah State Bar).

When a health-care provider treating an attorney's client made statements to the attorney regarding possible illegal practices of the provider, the attorney could generally warn existing or future clients that they should be careful in analyzing their health-care provider bills for accuracy. However, absent consent from the client, the attorney may not advise such clients that they should specifically be aware of this provider or state the reasons they should be aware of this particular provider, because such information has been obtained in the attorney's representation of a client, to whom the attorney owes a duty of confidentiality. Utah Ethics Advisory Op. No. 03-02 (Utah State Bar).

**Use of e-mail.**

A lawyer may, in ordinary circumstances, use unencrypted Internet e-mail to transmit client confidential information without violating the Utah Rules of Professional Conduct. Utah Ethics Advisory Op. No. 00-01 (Utah St. Bar).

Utah Law Review. -- Professional Standards Versus Personal Ethics: The Lawyer's Dilemma, 1989 Utah L. Rev. 1

**A.L.R. --**

Determination of whether a communication is from a corporate client for purposes of the attorney-client privilege -- modern cases, 26 A.L.R.5th 628.

UTAH COURT RULES ANNOTATED

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# Utah Rules of Prof'l Conduct Rule 1.7

Current through rules effective as of November 1, 2015.

Utah Court Rules > UTAH CODE OF JUDICIAL ADMINISTRATION > PART II. SUPREME COURT RULES OF PROFESSIONAL PRACTICE > CHAPTER 13. RULES OF PROFESSIONAL CONDUCT > CLIENT-LAWYER RELATIONSHIP

## Rule 1.7. Conflict of Interest: Current Clients.

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) The representation of one client will be directly adverse to another client; or
  - (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - (4) each affected client gives informed consent, confirmed in writing.

## History

Amended effective November 1, 2001; November 1, 2005

## Annotations

## Notes

### General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rules 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and, 4) if so, consult with the clients affected under paragraph (a)(1) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a)(1) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To

## Utah Rules of Professional Conduct Rule 1.7

determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[4a] To eliminate confusion, former Rule 2.2 "Intermediary" has been deleted entirely. The term "intermediation" is changed in Rule 1.7 to "common representation". Comment [4] sets out the analysis that a lawyer should make in order to determine when common representation is improper. The comments to Rule 1.7 specifically instruct lawyers on what informed consent means in the situations.

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

#### Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

#### Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a

## Utah Rules of Professional Conduct Rule 1.7

difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

## Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

## Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

## Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

## Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1

## Utah Rules of Professional Conduct Rule 1.7

(competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

#### Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

#### Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

#### Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

#### Consent to Future Conflict

## Utah Rules of Professional Conduct Rule 1.7

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

## Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

## Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

## Utah Rules of Prof'l Conduct Rule 1.7

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

#### Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the client should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be

## Utah Rules of Prof'l Conduct Rule 1.7

fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

### Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

## Case Notes

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Bankruptcy.

Disqualification.

Loyalty to client.

### Bankruptcy.

When applying to serve as counsel for a bankruptcy debtor, an attorney is required to disclose fully and candidly all relationships with the debtor, creditors, or any other party in interest in order that the court may properly evaluate the application and determine whether the attorney is disinterested. The existence of a pre-petition debt from one estate to another that the attorney also seeks to represent creates a disqualifying conflict of interest. *In re Green St.*, 132 Bankr. 460 (Bankr. D. Utah 1991).

### Disqualification.

Although this rule was violated by an attorney's estate-planning representation of an individual who was also a defendant in litigation being pursued by another attorney in the firm, that conduct did not amount to a need for disqualification. Apparently, no confidential or privileged information was shared between the attorneys; therefore, the situation did not involve the type of egregious conduct generally associated with the harsh remedy of disqualification. *Parkinson v. Phonex Corp.*, 857 F. Supp. 1474 (D. Utah 1994).

### Loyalty to client.

When a defense attorney in a capital homicide case took a position in another homicide case directly contrary to his client's interest by seeking to characterize the client as a "prime candidate for the death penalty," the attorney

breached his duty of loyalty and was disqualified from further representation of the client. *State v. Holland*, 876 P.2d 357 (Utah 1994).

#### **Cited in**

*State v. Johnson*, 805 P.2d 761 (Utah Ct. App. 1991); *State v. Brown*, 853 P.2d 851 (Utah 1992); *Bullock v. Carver*, 910 F. Supp. 551 (D. Utah 1995).

## **Research References & Practice Aids**

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### **COLLATERAL REFERENCES**

#### **Appeals by Attorney General.**

##### **Ethical Advisory Opinions.**

Where no conflict with other constitutional or statutory provisions exist, the Attorney General retains common-law authority to protect what she perceives to be the public interest, and may appeal the decision of a division of a state agency to the executive director of that agency, without violating the Utah Rules of Professional Conduct. Utah Ethics Advisory Op. No. 95-07 (Utah St. Bar).

#### **Attorney serving as member of board of directors of client corporation.**

The Utah Rules of Professional Conduct do not prohibit an attorney from serving as a member of the board of directors of a client corporation; however, to avoid ethical violations, an attorney who undertakes a dual role as director and counsel for a corporate client should take adequate precautions both before and during the relationship. Utah Ethics Advisory Op. No. 98-10 (Utah St. Bar).

#### **Communication of settlement offer.**

It is ethical for plaintiff's lawyer to communicate to the defendant a settlement offer proposing that plaintiff take an assignment of any bad-faith claim that the defendant might have against the insurance carrier in exchange for plaintiff's agreement not to execute against defendant for amounts exceeding the insurance policy limits, so long as the communication complies with Utah Rules of Professional Conduct 4.1 and 4.2, and if the offer of settlement creates a conflict of interest for the defendant's insurance carrier-appointed lawyer, then the defendant's lawyer must fully comply with Rule 1.7. Utah Ethics Advisory Op. No. 00-05 (Utah St. Bar 2000).

#### **Concurrent representation of both parties in a divorce.**

The concurrent representation of both parties in a divorce is an ethically unacceptable practice that lends itself to both the appearance and the fact of impropriety. The danger to the parties and the courts outweighs the advantages of cost and convenience advanced as reasons for adoption of a rule allowing dual representation. Utah Ethics Advisory Op. No. 116 (Utah St. Bar 1994).

#### **Conflict with judge.**

Where an attorney filed a complaint with the Judicial Conduct Commission against a judge, which was eventually dismissed for insufficient evidence with no finding of misconduct, before accepting new cases as counsel and appearing before that judge, the attorney must inform the client if the attorney thinks the judge may harbor some ill feelings; however, if the attorney has a reasonable good-faith belief that the judge does not harbor any ill feeling, then the attorney need not advise the client of the complaint filed against the judge. Utah Ethics Advisory Op. No. 02-08 (Utah St. Bar).

## Utah Rules of Professional Conduct Rule 1.7

**Contingent fee including costs.**

There is no per se restriction prohibiting an attorney from assuming all litigation costs and expenses under a contingency-fee agreement; such fee agreements, however, must comply with all other applicable provisions of the Utah Rules of Professional Conduct concerning fees. Utah Ethics Advisory Op. No. 02-09 (Utah St. Bar).

**Corporate counsel's representation of corporate employees.**

It is permissible for corporate counsel to assert that counsel concurrently represents present and former corporate employees whose testimony is relevant to a claim and ethically preclude opposing counsel's access to those corporate employee witnesses if corporate counsel has actually formed an attorney-client relationship with these employee-witnesses, and has fully complied with Utah Rules of Professional Conduct 1.7 (including obtaining informed consent from all multiple clients to joint representation and informing them of the possible need for withdrawal from representing any of them should an actual conflict arise). However, in the absence of such a fully formed and proper attorney-client relationship, it is improper for corporate counsel to block opposing counsel's access to other current corporate constituents, by asserting an attorney-client relationship unless these individuals were control group members, their acts could be imputed to the organization or their statement would bind the corporation with respect to the matter under Utah Rules of Professional Conduct 4.2, and, similarly, it is improper to block opposing counsel's access to any former employee in the absence of a current fully formed and proper attorney-client relationship. Utah Ethics Advisory Op. No. 04-06 (Utah St. Bar).

**County and city attorneys.**

An attorney who serves as a part-time county attorney or part-time deputy county attorney is ethically barred from appearing as counsel on behalf of a defendant in a civil action brought in the county by the State of Utah to collect delinquent child support payments under §§ 62A-11-104, 77-31-12 and 78-45-9. Utah Ethics Advisory Op. No. 099 (Utah St. Bar 1994).

The private representation by a part-time county attorney of individuals at protective-order hearings is not a per se violation of the Utah Rules of Professional Conduct. However, the county attorney must fully inform the client that he will not be able to continue the representation if the client later becomes a criminal defendant in his county and that he will have to withdraw as counsel. The county attorney must also determine, on a case-by-case basis, the likelihood that this potential conflict of interest between his prosecutorial duties and the interest of his private client will actually arise and, if the likelihood that this will occur is relatively high, the attorney must obtain both the county's and the client's informed consent to the representation. Utah Ethics Advisory Op. No. 01-06A (Utah St. Bar).

Where a county attorney undertakes the representation of a petitioner, rather than a respondent, in a protective-order proceeding, and the issue arises as to whether the county attorney could participate as a prosecutor in a criminal proceeding eventually instituted against the object of the protective order, given (a) the risk that the neutrality that characterizes a prosecutor's role could be compromised by the interest that the prosecutor and his private client have in the case, (b) the confidential information regarding the pending charges to which the county attorney would be privy as a result of his representation of the victim of the alleged abuse, and (c) the possibility an actual conflict between the interests of the victim and the prosecuting authority, it would be unethical for the county attorney to continue in the protective-order case or to participate in the criminal proceeding. Utah Ethics Advisory Op. No. 01-06A (Utah St. Bar).

An individual county attorney may provide pro bono legal assistance to victims of domestic violence in seeking civil protective orders. However, after the county attorney has done so, he may not be involved in the prosecution of the perpetrator for the initial act or for a subsequent violation of the protective order. And he may continue the pro bono representation only if he is fully able to comply with Rule 1.7(a) where his personal interest in his paid work for the county does not create a material limitation. Utah Ethics Advisory Op. No. 06-01 (Utah St. Bar).

## Utah Rules of Prof'l Conduct Rule 1.7

A part-time county attorney providing pro bono legal assistance to a victim of domestic violence must, at the outset, fully inform the client of potential conflicts and the need to withdraw if actual conflicts arise. Moreover, if the possibility of a conflict is likely and if that possibility will materially interfere with the lawyer's representation, the lawyer should not undertake the case initially. Utah Ethics Advisory Op. No. 06-01 (Utah St. Bar).

It could be possible for a county attorney's office to organize itself in such a way as to ethically provide representation for individual client victims in civil cohabitant abuse actions and then later permit a separate division or attorney in the office to represent the state in any related criminal prosecution. However, any such organization would have to prohibit any confidential information from flowing from one sector to the other. Utah Ethics Advisory Op. No. 06-01 (Utah St. Bar).

**Financial interest in a collection agency.**

Subject to any legal constraints imposed by former Utah Code Ann. § 78-51-27(1), it is not per se unethical for an attorney who has a financial interest in a collection agency to represent the agency in lawsuits to collect on assigned accounts. (Reversing Opinion No. 45.) Utah Ethics Advisory Op. No. 111 (Utah St. Bar 1994).

**Firm's acquisition of financial interest in client.**

A law firm's acquisition of a financial interest such as stock ownership in a client, whether the investment is made directly by the law firm or through a blind trust, holding company, investment partnership or other investment vehicle, and whether the interest is acquired in exchange for legal services or whether the client's primary attorney is involved in investment decisions concerning the client's stock, is not per se unethical. However, in all such arrangements, counsel must comply with the requirements of Rules 1.5, 1.7(b) and 1.8(a) of the Utah Rules of Professional Conduct. Utah Ethics Advisory Op. No. 98-13 (Utah St. Bar).

**Guardianships.**

Representation of guardian by an attorney who also represented one of the parties to the proceeding for appointment of the guardian must be analyzed the same way the attorney would analyze any conflict of interest between two current clients or between a current and former client. If the facts and circumstances raise the specter of a direct or material adversity, or if responsibilities to the client impose a material limitation on the attorney's ability to represent the guardian effectively in light of the fiduciary, statutory, and court-imposed obligations on the guardianship, the attorney should either avoid the joint representation or exercise great care in obtaining the informed written consent of both affected clients. Utah Ethics Advisory Op. No. 08-02 (Utah State Bar).

**Investigation of office of Attorney General.**

Neither the Utah Rules of Professional Conduct, generally, nor Rules 1.11(c) and 1.7(b), specifically, prohibit the proposed investigation of the Office of the Attorney General, to determine whether any Utah criminal laws were violated by the Salt Lake City Bid Committee for the Olympic Winter Games, despite the Attorney General's prior involvement with the Bid Committee. Utah Ethics Advisory Op. No. 99-05 (Utah St. Bar).

**Lawyer as insurance appraiser.**

The Rules of Professional Conduct do not apply to the conduct of a lawyer who has been appointed by an insurance company as an "independent" appraiser of the property of an insured of the company, even though the lawyer also provides legal services for the insurance company on unrelated matters, so long as the lawyer makes a written disclosure to the insurance company and to the insured (1) that the lawyer represents the insurance company on unrelated matters; (2) that the lawyer's retention by the insurance company as an "independent" appraiser is not a retention to perform legal services; and (3) that the retention does not create a client-lawyer relationship governed by the Rules of Professional Conduct and is not protected by the attorney-client privilege. Utah Ethics Advisory Op. No. 151 (Utah St. Bar 1994).

## Utah Rules of Prof'l Conduct Rule 1.7

**Lawyer as witness.**

There is no per se disqualification of a lawyer in a case where she may be called as a witness. The lawyer must determine whether, under the facts of the case, she is a "necessary witness" in the litigation under Rule 3.7. If she is, and if disqualification of the lawyer would not work a substantial hardship on the client, she must withdraw prior to trial. If the lawyer does not withdraw, the lawyer must insure that the client's interests are and can be protected in a timely manner. Utah Ethics Advisory Op. No. 04-02 (Utah State Bar).

**Lawyer functioning in law-related profession.**

A lawyer functioning in a law-related profession, such as real estate brokerage, who holds himself out as either an active or inactive lawyer will be subject to the conflict-of-interest provisions of Rules 1.7 through 1.11 while engaged in that law-related profession. Utah Ethics Advisory Op. No. 01-05 (Utah St. Bar).

**Loans.**

A lawyer may not directly or indirectly represent a lender to the lawyer's client in connection with a loan that is made for the purpose of enabling the client to pay the lawyer's fees or costs. Utah Ethics Advisory Op. No. 06-03.

A lawyer may not participate in a contingent, nonrecourse loan with a third-party lender to finance costs and expenses of litigation where the terms of the lending arrangement create the potential that the financial risk to the lawyer is lessened if the lawyer obtains no recovery for the client. Utah Ethics Advisory Op. No. 06-03.

**Providing non-legal services to law clients.**

It is permissible for a lawyer to refer a client to a cooperative organization created by the lawyer to provide non-legal services, and for the lawyer to participate in the organization's profit sharing, if the lawyer: (1) objectively concludes that any identifiable conflicts between the lawyer and the cooperative organization would not materially affect the representation of that client; (2) affirms in writing to the client that the referral will not compromise the client's interests in any way; (3) fairly concludes that the services provided by the cooperative organization are being provided at fair and reasonable fees; (4) discloses that the lawyer will receive a share of profits from the cooperative organization; (5) advises the client to seek independent counsel as to the referral; and (6) secures the client's consent. Utah Ethics Advisory Op. No. 04-05 (Utah State Bar).

**Relationship with client.**

Defense counsel in a criminal case continued to zealously represent their client, despite his complaints and apparent efforts at intimidation, so that their uneasy relationship did not result in a conflict for the attorneys. *State v. Martinez*, 2013 UT App 39, 297 P.3d 653.

**Representation by attorney guardian ad litem of interests of siblings.**

The same attorney guardian ad litem may represent the interests of siblings in, for example, abuse/neglect cases, where the interests of the siblings are not directly adverse, the representation of one sibling will not materially limit the lawyer's responsibilities to another sibling or adversely affect the lawyer's representation of another sibling, and it is not reasonably foreseeable that the lawyer will obtain confidential information relating to the representation of one sibling that might be used to the disadvantage of another sibling represented by the lawyer. Utah Ethics Advisory Op. No. 95-08 (Utah St. Bar).

**Representation by attorney guardian of siblings of represented child.**

If the same attorney guardian may not represent siblings of a represented child, other attorney guardians within the same office may not represent the siblings, however, attorney guardians in other offices may represent siblings

## Utah Rules of Professional Conduct Rule 1.7

of a represented child, if they have no opportunity to discuss the cases with each other, to access each other's files, or to share confidential information in other respects, and they are not subject to common direction, planning, or supervision with respect to the conduct of the case. Utah Ethics Advisory Op. No. 95-08 (Utah St. Bar).

**Representation in district in which law partner is judge.**

A lawyer may represent criminal defendants in the same judicial district in which a law partner sits as a justice court judge; however, the lawyer may not appear before that partner. Utah Ethics Advisory Op. No. 95-02A (Utah St. Bar).

A city attorney with prosecutorial functions may not represent a criminal defense client in any jurisdiction. However, a city attorney with no prosecutorial functions, who has been appointed as city attorney pursuant to statute, may represent a criminal defense client in other jurisdictions, provided that subsection (a) of this rule is satisfied. An attorney with no prosecutorial functions, who is retained by a city on a contract or retainer basis, may represent a criminal defense client in any jurisdiction, provided that subsection (a) of this rule is satisfied. An attorney who is a partner or associate of a city attorney may not represent a criminal defense client in any situation where the city attorney is so prohibited. Utah Ethics Advisory Op. No. 126 (Utah St. Bar 1994).

A part-time or contract city attorney with prosecutorial functions is not disqualified under this rule or Opinion No. 126 from representing a private client who is a defendant in a civil contempt proceeding, provided the city is not a party to the proceeding. Utah Ethics Advisory Op. No. 95-03 (Utah St. Bar).

**Representation of absent party.**

In action against employer and a vanished former employee, which arose when the missing person was an employee, the employer's lawyer may not act on behalf of or purport to represent the vanished former employee unless the lawyer has an existing attorney-client relationship with the former employee or the former employee agreed to the representation before vanishing and, in either case, the lawyer complies with Rules 1.7 and 1.8(f). The lawyer may engage in acts that may benefit the vanished former employee provided the lawyer makes it clear that he is acting on behalf of the employer as the employer's lawyer and not on behalf of the vanished former employee as the former employee's lawyer. Utah Ethics Advisory Op. No. 04-01A (Utah State Bar).

**Representation of association.**

For discussion of conflicts that might arise in representation of homeowner's associations with regard to the associations' managers, see, Utah Ethics Advisory Op. No. 09-02 (Utah St. Bar).

**Representation of both city and county on civil matters.**

The Utah Rules of Professional Conduct do not require a blanket prohibition of an attorney's representation of both a city and county on civil matters; however, in the event the two entities are directly in conflict as to a particular matter, the attorney may not represent both (and perhaps neither) of the parties in that matter or other matters, unless the attorney can comply with the provisions of Subdivision (a) of this rule. Utah Ethics Advisory Op. No. 98-02 (Utah St. Bar).

**Representation of both parents in abuse/neglect proceeding.**

An attorney appointed to represent both the mother and father in an abuse/neglect proceeding can not continue to represent either of the parents after an actual or potential conflict between the two parents arises, because such representation of either parent is prohibited by Rule 1.7 and Rule 1.9. Utah Ethics Advisory Op. No. 96-11 (Utah St. Bar).

**Retainer agreement in action against county.**

In a lawsuit against a Utah county, brought by the heirs of a decedent whose medical bills were paid, in part, by the State of Utah's Medicaid program after the decedent had been in the county's jail facility, the attorney

## Utah Rules of Professional Conduct Rule 1.7

representing the Office of Recovery Services may request the heirs and their attorney to execute a retainer agreement that precludes the heirs' attorney from acting adversely to ORS and provides that ORS will be paid first from any recovery from third parties as a condition for ORS's contributing to the heirs' attorneys' fees and costs. Whether the heirs' attorney may execute such a retainer agreement depends on whether the attorney can satisfy the conflict-of-interest requirements of Rule 1.7(b). Utah Ethics Advisory Op. No. 98-11 (Utah St. Bar).

**Settlements.**

An attorney representing a plaintiff in a personal injury action may not, under Rule 1.7(a), agree to indemnify an opposing party from claims by third persons to settlement funds. Utah Ethics Advisory Op. No. 11-01 (Utah St. Bar).

**Submission of billing statements to outside audit service.**

Before a lawyer may submit billing statements to an outside audit service, the lawyer must have the client's consent, and if the lawyer is relying on an insurance agreement for consent, the lawyer must review the agreement with the client to renew the client's consent before sending any billing statements to the outside audit service. Utah Ethics Advisory Op. No. 98-03 (Utah St. Bar).

**Taking referral fee not per se unethical.**

It is not per se unethical for a lawyer to refer a client to an investment advisor and take a referral fee from the commission paid to that advisor, although the lawyer has a heavy burden to insure compliance with applicable ethical rules. Utah Ethics Advisory Op. No. 99-07 (Utah St. Bar).

A Utah prosecuting attorney acting as a private practitioner should avoid engaging in a civil action that involves parties and facts that have been or become the subject of criminal investigation within the prosecutor's jurisdiction. The attorney already involved in civil litigation need not withdraw from the civil matter and can avoid inherent conflicts by referring the criminal matter to an appropriate conflicts attorney, provided the attorney has not become personally substantially involved in and has no meaningful control over any investigation of the criminal matter. Utah Ethics Advisory Op. No. 98-01 (Utah St. Bar).

Utah Law Review. -- Recent Developments in Utah Case Law: Examining Ethical Responsibilities of Defense Counsel in Death Penalty Cases, 1995 Utah L. Rev. 287.

Journal of Contemporary Law.

Where Does the Tenth Circuit Stand on Rules Concerning Conflict of Interest and Disqualification Rules?, 20 J. Contemp. L. 479 (1994)

**A.L.R. --**

Attorneys at law: disciplinary proceedings for drafting instrument such as will or trust under which attorney-drafter or member of attorney's family or law firm is beneficiary, grantee, legatee, or devisee, 80 A.L.R.5th 597.

UTAH COURT RULES ANNOTATED

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## **Utah Rules of Prof'l Conduct Rule 1.8**

Current through rules effective as of November 1, 2015.

**Utah Court Rules > UTAH CODE OF JUDICIAL ADMINISTRATION > PART II. SUPREME COURT RULES OF PROFESSIONAL PRACTICE > CHAPTER 13. RULES OF PROFESSIONAL CONDUCT > CLIENT-LAWYER RELATIONSHIP**

### **Rule 1.8. Conflict of Interest: Current Clients: Specific Rules.**

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
  - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
  - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purpose of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or an account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
  - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
  - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation, and minor expenses reasonably connected to the litigation, on behalf of the client.
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - (1) the client gives informed consent;
  - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - (3) information relating to representation of a client is protected as required by Rule 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

## Utah Rules of Professional Conduct Rule 1.8

- (h) A lawyer shall not:
- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
  - (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
- (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
  - (2) contract with a client for a reasonable contingent fee in a civil case.
- (j) A lawyer shall not engage in sexual relations with a client that exploit the lawyer-client relationship. For the purposes of this Rule:
- (1) "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse; and
  - (2) except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitive. This presumption is rebuttable.
- (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

## History

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Amended effective November 1, 2005

## Annotations

## Notes

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### Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires

## Utah Rules of Professional Conduct Rule 1.8

that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

#### Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

#### Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the

## Utah Rules of Professional Conduct Rule 1.8

lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

## Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5.

## Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses and minor sums reasonably connected to the litigation, such as the cost of maintaining nominal basic local telephone service or providing bus passes to enable the indigent client to have means of contact with the lawyer during litigation, regardless of whether these funds will be repaid, is warranted.

[10a] Relative to the ABA Model Rule, Utah Rule 1.8(e)(2) broadens the scope of direct support that a lawyer may provide to indigent clients to cover minor expenses reasonably connected to the litigation. This would include, for example, financial assistance in providing transportation, communications or lodging that would be required or desirable to assist the indigent client in the course of the litigation.

## Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

## Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be

## Utah Rules of Prof'l Conduct Rule 1.8

discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

## Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

## Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

## Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic

## Utah Rules of Professional Conduct Rule 1.8

ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Spousal relationships and sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

[19a] Utah Rule 1.8(j) is different from the ABA Model Rule. It follows the language from former Utah Rule 8.4(g) regarding the prohibition of sexual relations with a client. This Rule defines "sexual relations" and clarifies the presumption that sexual relations with a client are exploitive of the client.

#### Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

## Case Notes

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Financial interest in client.

COLLATERAL REFERENCES

Agreement to name judgment-creditor as beneficiary of insurance policy.

Ethical Advisory Opinions.

Contingent fee including costs.

Enforcement of fee agreement.

Financial interest in client.

Gifts to indigent clients.

Insurer's employment of lawyer to defend litigation.

Loans.

Payment for legal services in form other than money.

Providing non-legal services to law clients.

Representation of absent party.

Settlements.

Submission of billing statements to outside audit service.

Taking referral fee not per se unethical.

#### Financial interest in client.

Law firm's former oil and gas client had waived a conflict of interest by the firm because of its representation of and investment in another exploration company and the client was thus estopped from filing suit. The disclosure

## Utah Rules of Professional Conduct Rule 1.8

was adequate to provide full knowledge of the rights being waived and the waiver was further evidenced by the client's declining to enter into a joint venture with the other company and the client also continued to use the law firm. *Shaw Res. Ltd., L.L.C. v. Pruitt, Gushee & Bachtell, P.C.*, 2006 UT App 313, 142 P.3d 560.

**COLLATERAL REFERENCES****Agreement to name judgment-creditor as beneficiary of insurance policy.****Ethical Advisory Opinions.**

With proper written disclosure by the attorney of the terms, conditions and obligations of the participants, there are no ethical considerations for a judgment-creditor's attorney where the judgment-debtor agrees to name the judgment-creditor as the beneficiary of an insurance policy on the life of the judgment-debtor in order to satisfy the judgment. Utah Ethics Advisory Op. No. 135 (Utah St. Bar 1994).

**Contingent fee including costs.**

There is no per se restriction prohibiting an attorney from assuming all litigation costs and expenses under a contingency-fee agreement; such fee agreements, however, must comply with all other applicable provisions of the Utah Rules of Professional Conduct concerning fees. Utah Ethics Advisory Op. No. 02-09 (Utah St. Bar).

**Enforcement of fee agreement.**

A lawyer does not violate Rule 1.8(a) by entering into a fee agreement with a client and subsequently enforcing that agreement by asserting a claim under former § 78-51-41. Utah Ethics Advisory Op. No. 01-01 (Utah St. Bar).

**Financial interest in client.**

A law firm's acquisition of a financial interest such as stock ownership in a client, whether the investment is made directly by the law firm or through a blind trust, holding company, investment partnership or other investment vehicle, and whether the interest is acquired in exchange for legal services or whether the client's primary attorney is involved in investment decisions concerning the client's stock, is not per se unethical. However, in all such arrangements, counsel must comply with the requirements of Rules 1.5, 1.7(b) and 1.8(a) of the Utah Rules of Professional Conduct. Utah Ethics Advisory Op. No. 98-13 (Utah St. Bar).

**Gifts to indigent clients.**

Small and occasional charitable gifts by attorneys who are not seeking reimbursement and which would not influence the client to retain or remain with that attorney do not violate this rule. Utah Ethics Advisory Op. No. 11-02 (Utah St. Bar).

**Insurer's employment of lawyer to defend litigation.**

An insured must consent to an insurer's paying a lawyer employed to defend litigation brought by a third party against an insured. For purposes of Subdivision (f), the insured manifests this consent by entering into the insurance contract and accepting the representation offered; no new or separate consent is necessary. Utah Ethics Advisory Op. No. 02-03 (Utah St. Bar).

Subdivision (f)(2), which requires that a lawyer accepting compensation for representing a client from one other than that client assure that "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship," applies to a lawyer employed to defend litigation brought by a third party against an insured, whether or not the insurer is also a client. Utah Ethics Advisory Op. No. 02-03 (Utah St. Bar).

## Utah Rules of Professional Conduct Rule 1.8

**Loans.**

A lawyer may not directly or indirectly represent a lender to the lawyer's client in connection with a loan that is made for the purpose of enabling the client to pay the lawyer's fees or costs. Utah Ethics Advisory Op. No. 06-03.

**Payment for legal services in form other than money.**

The Utah Rules of Professional Conduct permit an attorney to accept payment for legal services in a form other than money; however all arrangements for payment of an attorney's fees must comply with the applicable provisions of the Utah Rules of Professional Conduct concerning fees and the attorney-client relationship. Utah Ethics Advisory Op. No. 97-05 (Utah St. Bar).

**Providing non-legal services to law clients.**

It is permissible for a lawyer to refer a client to a cooperative organization created by the lawyer to provide non-legal services, and for the lawyer to participate in the organization's profit sharing, if the lawyer: (1) objectively concludes that any identifiable conflicts between the lawyer and the cooperative organization would not materially affect the representation of that client; (2) affirms in writing to the client that the referral will not compromise the client's interests in any way; (3) fairly concludes that the services provided by the cooperative organization are being provided at fair and reasonable fees; (4) discloses that the lawyer will receive a share of profits from the cooperative organization; (5) advises the client to seek independent counsel as to the referral; and (6) secures the client's consent. Utah Ethics Advisory Op. No. 04-05 (Utah State Bar).

**Representation of absent party.**

In action against employer and a vanished former employee, which arose when the missing person was an employee, the employer's lawyer may not act on behalf of or purport to represent the vanished former employee unless the lawyer has an existing attorney-client relationship with the former employee or the former employee agreed to the representation before vanishing and, in either case, the lawyer complies with Rules 1.7 and 1.8(f). The lawyer may engage in acts that may benefit the vanished former employee provided the lawyer makes it clear that he is acting on behalf of the employer as the employer's lawyer and not on behalf of the vanished former employee as the former employee's lawyer. Utah Ethics Advisory Op. No. 04-01A (Utah State Bar).

**Settlements.**

An attorney representing a plaintiff in a personal injury action may not, under Rule 1.(e), agree to indemnify an opposing party from claims by third persons to settlement funds. Utah Ethics Advisory Op. No. 11-01 (Utah St. Bar).

**Submission of billing statements to outside audit service.**

Before a lawyer may submit billing statements to an outside audit service, the lawyer must have the client's consent, and if the lawyer is relying on an insurance agreement for consent, the lawyer must review the agreement with the client to renew the client's consent before sending any billing statements to the outside audit service. Utah Ethics Advisory Op. No. 98-03 (Utah St. Bar).

**Taking referral fee not per se unethical.**

It is not per se unethical for a lawyer to refer a client to an investment advisor and take a referral fee from the commission paid to that advisor, although the lawyer has a heavy burden to insure compliance with applicable ethical rules. Utah Ethics Advisory Op. No. 99-07 (Utah St. Bar).

**Research References & Practice Aids****A.L.R. --**

Attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct, 69 A.L.R.4th 974.

Utah Rules of Prof'l Conduct Rule 1.8

What items of client's property or funds are not subject to attorney's retaining lien, 70 A.L.R.4th 827.

Disciplinary action against attorney taking loan from client, 9 A.L.R.5th 193.

Attorneys at law: disciplinary proceedings for drafting instrument such as will or trust under which attorney-drafter or member of attorney's family or law firm is beneficiary, grantee, legatee, or devisee, 80 A.L.R.5th 597.

UTAH COURT RULES ANNOTATED

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