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THE ETHICAL PROSECUTOR

August, 2004

Robert Stott

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Rules of Professional Conduct

Preamble: A Lawyer's Responsibilities.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Every lawyer is responsible to observe the law and the Rules of Professional Conduct, shall take the Attorney's Oath upon admission to the practice of law, and shall be subject to the Rules of Lawyer Discipline and Disability.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

In all professional functions, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact

that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the Bar regulate itself in the public interest.

A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideal of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the Bar. Not only is every lawyer responsible for observing the Rules of Professional Conduct, but the lawyer should also aid in securing observance of the Rules of Professional Conduct by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Attorney's Oath

"I do solemnly swear that I will support, obey and defend the Constitution of the United States and the Constitution of this State; that I will discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty and fidelity; and that I will strictly observe the Rules of Professional Conduct promulgated by the Supreme Court of the State of Utah."

Scope.

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and

procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested that the lawyer render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intra-governmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a

violation and the severity of a sanction depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations. Disciplinary action shall be governed by the Procedures of Discipline of the Utah State Bar, and the burden of proof shall be on the State Bar to sustain any allegation of violation by clear and convincing evidence.

Violation of a Rule should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment or for sanctioning a lawyer under the administration of a disciplinary authority does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rule should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the client-lawyer or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the client-lawyer privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The client-lawyer privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with the recognized exceptions to the client-lawyer and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope

provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared to compare counterparts in the Code of Professional Responsibility (approved by the Utah Supreme Court February 19, 1971) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the Rules and are not intended to affect the application or interpretation of the Rules and Comments.

Terminology.

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

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

"Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

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

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

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

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

"Substantial," when used in reference to degree or extent, denotes a material matter of clear and weighty importance.

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.

COMMENT

Legal Knowledge and Skill

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

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

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

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

Thoroughness and Preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

Clients resent professional procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.14, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Rule 1.11. Successive government and private employment.

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person, unless the appropriate government client consents after consultation with the lawyer. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, unless the appropriate government client consents after consultation with the lawyer.

(d) As used in this Rule, the term "matter" includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge,

accusation, arrest or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

COMMENT

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is the counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specifically retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in a public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Rule 2.1. Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

Scope of Advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same

time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 3.3. Candor toward the tribunal.

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion

supporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(c), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward a tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the

existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(c).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule - that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client - applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In

criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

(a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Rule 3.5. Impartiality and decorum of the tribunal.

A lawyer shall not:

(a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law; or

(b) Communicate ex parte with a juror or prospective juror before the discharge of the jury except as permitted by law; or

(c) In an adversary proceeding, communicate, or cause another to communicate, as to the merits of the cause with a judge or other official before whom a matter is pending, except:

(1) In the course of official proceedings in the cause;

(2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if such party is not represented by a lawyer;

(3) Orally upon adequate notice to opposing counsel or to the adverse party if such party is not represented by a lawyer; or

(4) As otherwise authorized by law; or

(d) Engage in conduct intended to disrupt a tribunal.

COMMENT

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Rule 3.6. Trial publicity.

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a) a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such

information as is necessary to mitigate the recent adverse publicity.

COMMENT

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a

proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be present;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearing and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's

lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Rule 3.7. Lawyer as witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in the trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyer to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation, the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will

conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

COMMENT

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

Rule 4.1. Truthfulness in statements to others.

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

Rule 4.2. Communication with Persons Represented by Counsel

(a) General Rule. A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by:

(1) constitutional law or statute;

(2) decision or a rule of a court of competent jurisdiction;

(3) a prior written authorization by a court of competent jurisdiction obtained by the lawyer in good faith; or

(4) paragraph (b) of this rule.

(b) Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction in the matter, may communicate with a person known to be represented by a lawyer if:

(1) the communication is in the course of, and limited to, an investigation of a different matter unrelated to the representation or any ongoing, unlawful conduct; or

(2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or

(3) the communication is made at the time of the arrest of the represented person and after he or she is advised of his or her rights to remain silent and to counsel and voluntarily and knowingly waives these rights; or

(4) the communication is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication.

(c) Organizations as Represented Persons

(1) When the represented person is an organization, an individual is represented by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communication, and

(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(i) a current member of the control group of the represented organization; or

(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.

(2) The term control group means the following persons: (A) the chief executive officer, chief operating officer, chief financial officer, and chief legal officer of the organization; and (B) to the extent not encompassed by the foregoing, the chair of the organization's governing body, president, treasurer, and secretary, and a vice-president or vice-chair who is in charge of a principal business unit, division, or function (such as sales administration, or finance) or performs a major policy making function for the organization and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

(3) This rule does not apply to communications with government parties, employees, or officials unless litigation about the subject of the representation is pending or imminent. Communications with elected officials on policy matters are permissible when litigation is pending or imminent after disclosure of the representation to the official.

(d) Limitations on Communications. When communicating with a represented person pursuant to this Rule, no lawyer may

(1) inquire about privileged communications between the person and counsel or about information regarding litigation strategy or legal arguments of counsel, or seek to induce the person to forgo representation or disregard the advice of the person's counsel; or

(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by paragraphs (a)(1), (2) or (3), or (b)(4).

COMMENT

The purpose of this Rule is to foster and protect legitimate attorney-client relationships. It seeks to guard against inequities that exist when a lawyer speaks to an untrained lay person. The Rule should not, however, be used as a vehicle to thwart appropriate contacts between lawyers and lay persons.

This Rule does not prohibit communications with a represented person or entity, or an employee or agent of such represented person or entity, where the subject of the communication is outside the scope of the representation. For example, the existence of a controversy between a government agency and a private person, between two organizations, between individuals or between an organization and an individual does not prohibit a lawyer for either from communication with non-lawyer representatives of the other regarding a separate matter. Nor does the Rule prohibit government lawyers from communicating with a represented person about a matter that does not pertain to the subject matter of the representation but is related to the investigation, undercover or overt, of ongoing unlawful conduct. Moreover, this Rule does not prohibit a lawyer from communicating with a person to determine if the person in fact is represented by counsel concerning the subject matter that the lawyer wishes to discuss with that person.

This Rule does prohibit communications with any person who is known by the lawyer making the communication to be represented by counsel in the matter to which the communication relates. A person is known to be represented when the lawyer has actual knowledge of the representation. Knowledge is a question of fact to be resolved by reference to the totality of the circumstances, including reference to any written notice of the representation. Written notice to a lawyer is relevant, but not conclusive, on

the issue of knowledge. Lawyers should ensure that written notice of representation is distributed to all attorneys working on a matter.

A lawyer may communicate with a person who is known to be represented by counsel in the matter to which the communication relates only if the communicating lawyer obtains the consent of the represented person's lawyer, or if the communication is otherwise permitted by paragraphs (a) or (b). Paragraph (a) permits a lawyer to communicate with a person known to be represented by counsel in a matter without first securing the consent of the represented person's lawyer if the communicating lawyer is authorized to do so by subparagraph (1), (2), or (3) of this paragraph. Paragraph (b) specifies the circumstances in which government lawyers engaged in criminal and civil law enforcement matters may communicate with persons known to be represented by a lawyer in such matters without first securing consent of that lawyer.

A communication with a represented person is authorized under subparagraph (a)(1) if permitted by the Constitution or a constitutionally valid statute. Under subparagraph (a)(2), lawyers may also rely on existing judicial precedent or court rules that authorize lawyers to contact persons without permission of the represented person's lawyer. This recognizes the well-established role of the state judiciary in regulating the practice of the legal profession. Direct communications are also permissible if they are made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal before which a matter is pending.

A communication is authorized under subparagraph (a)(1) if the lawyer is assisting the client to exercise a constitutional right to petition the government for redress of grievances in a policy dispute with the government and if the lawyer notifies the government's lawyer in advance of the intended communication. This would include, for example, a communication by a lawyer with a governmental official with authority to take or recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including the possibility of resolving a disagreement about a policy position taken by the government. If, on the other hand, the matter does not relate solely to a policy issue, the communicating lawyer must comply with this Rule.

Any lawyer desiring to engage in a communication with a represented person that is not otherwise permitted under this Rule may apply in good faith to a court of competent jurisdiction, either *ex parte* or upon notice, for

an order authorizing the communication under subparagraph (a)(3) of this Rule. A court of competent jurisdiction means, depending on the context:

(1) a district judge or magistrate judge of the United States District Court; (2) a judge or commissioner of a court of general jurisdiction of a state having jurisdiction over the matter to which the communication relates; or (3) a military judge.

A proceeding under subparagraph (a)(3) should be summary in nature, but the specific procedure for obtaining such judicial authorization may vary from jurisdiction to jurisdiction.

In determining whether a communication is appropriate the court should consider factors such as:

(1) the communication with the represented person is intended to gain information that is relevant to the matter for which the communication is sought;

(2) the communication would not be unreasonable or oppressive;

(3) the purpose of the communication is not primarily to harass the represented person; and

(4) good cause exists for not requesting the consent of the person's counsel to the communication.

A written record of the application, including the grounds for the application, the scope of the authorized communications, and the action of the judicial officer, should be required absent exigent circumstances.

Paragraph (b) of this Rule makes clear that this Rule does not prohibit all communications with represented persons by state or federal government lawyers (including law enforcement agents and cooperating witnesses acting at their direction) when the communications occur during the course of civil or criminal law enforcement. The exemptions for government lawyers contained in paragraph (b) of this Rule recognize the unique responsibilities of government lawyers to enforce public law. Nevertheless, where the lawyer is representing the government in any other role or litigation (such as a contract or tort claim) the same rules apply to government lawyers as are applicable to lawyers for private parties.

A civil law enforcement proceeding means a civil action or proceeding before any court or other tribunal brought by the governmental agency that seeks to engage in the communication under relevant statutory or regulatory provisions, or under the government's police or regulatory powers to enforce the law. Civil law enforcement proceedings do not include proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand; nor do they include enforcement actions brought by an agency other than the one that seeks to make the communication.

Under subparagraph (b) of this Rule, communications are permitted in a number of circumstances. For instance, subparagraph (b)(1) permits the investigation of a different matter unrelated to the representation or any ongoing unlawful conduct. (Unlawful conduct involves criminal activity and conduct subject to a civil law enforcement proceeding.) Such violations include, but are not limited to, conduct that is intended to evade the administration of justice including in the proceeding in which the represented person is a defendant, such as obstruction of justice, subornation of perjury, jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution. Also permitted are undercover activities directed at ongoing criminal activity, even if it is related to past criminal activity for which the person is represented by counsel.

Under subparagraph (b)(2), a government lawyer may engage in limited communications to protect against an imminent risk of serious bodily harm or substantial property damage. The imminence and gravity of the risk will be determined from the totality of the circumstances. Generally, a risk would be imminent if it is likely to occur before the government lawyer could obtain court approval or take other measures. An imminent risk of substantial property damage might exist if there is a bomb threat directed at a public building. The Rule also makes clear that a government attorney may communicate directly with a represented party Aat the time of arrest of the represented party@ without the consent of that party's counsel, provided that the represented party has been fully informed of his or her constitutional rights at that time and has waived them. A government lawyer must be very careful to follow Rule 4.2(d) and would have a significant burden to establish that the waiver of the right to counsel was knowing and voluntary. The better practice would include a written or recorded waiver. Nothing in this rule, however, prevents law enforcement officers, even if acting under the general supervision of a government lawyer, from questioning a represented person. The actions of the officers

will not be imputed to the government lawyer unless the conversation has been scripted by the government lawyer.

Under subparagraph (b)(4), post-charge communications are permitted if initiated by the represented person, either directly or through an intermediary, and if prior to the communication the represented person has given a recorded voluntary and informed waiver of counsel for that communication. The waiver may be written or recorded on videotape, audiotape, or other similarly reliable means.

If government lawyers have any concerns about the applicability of any of the provisions of subparagraph (b) or are confronted with other situations in which communications with represented persons may be warranted, they may avail themselves of the *ex parte* procedures for seeking court approval under subparagraph (a)(3).

Organizational clients are entitled to the protections of this Rule. Paragraph (c) specifies which individuals will be deemed for purposes of this Rule to be represented by the lawyer who is representing the organization in a matter. Included within the control group of an organizational client, for example, would be the designated high level officials identified in subparagraphs 2(A) and (B). Whether an officer performs a major policy function is to be determined by reference to the organization's business as a whole. Therefore, a vice-president who has policy making functions in connection with only a unit or division would not be a major policy maker for that reason alone, unless that unit or division represents a substantial part of the organization's total business. A staff member who gives advice on policy but does not have authority, alone or in combination with others, to make policy does not perform a major policy making function.

Also included in the control group are other current employees known to be participating as principal decision makers in the determination of the organization's legal position in the proceeding or investigation of the matter. In this context, employee could also encompass former employees who return to the company's payroll or are specifically retained for compensation by the organization to participate as principal decision makers for a particular matter. In general, however, a lawyer may, consistent with this Rule, interview a former employee of an organization without consent of the organization's lawyer.

If an officer or employee of an organization that is represented by counsel in a matter retains another lawyer to separately represent the officer or employee in the matter, a lawyer (including a government lawyer) who

wishes to communicate with the individual about the matter must obtain the consent of the individual's lawyer (if consent of a lawyer is required by the Rule) and need not obtain the consent of the organization's lawyer.

In a criminal or civil law enforcement matter involving a represented organization, government lawyers may, without consent of the organization's lawyer, communicate with any officer, employee, or director of the organization who is not a member of the control group. In all other matters involving organizational clients, however, the protection of this Rule is extended to two additional groups of individuals: individuals whose acts might be imputed to the organization for the purpose of subjecting the organization to civil or criminal liability and individuals whose statements might be binding upon the organization. A lawyer permitted by this Rule to communicate with an officer, employee, or director of an organization must abide by the limitations set forth in paragraph (d).

Paragraph (d) is intended to regulate a lawyer's communications with a represented person, which might otherwise be permitted under the Rule, by prohibiting any lawyer from taking unfair advantage of the absence of the represented person's counsel. The prohibition contained in paragraph (d) is limited to inquiries concerning privileged communications and lawful defense strategies. The rule does not prohibit inquiry into unlawful litigation strategies or communications involving, for example, perjury or obstruction of justice.

The prohibition of paragraph (d) against the communicating lawyer's negotiating with the represented person with respect to certain issues does not apply if negotiations are authorized by subparagraphs (a)(1), (2) or (3). For example, a court of competent jurisdiction could authorize a lawyer to engage in direct negotiations with a represented person. Government lawyers may engage in such negotiations if a represented person who has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding initiates communications with the government lawyer and the communication is otherwise consistent with the requirements of subparagraph(b)(4).

Rule 8.2. Judicial officials.

(a) A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Rule 8.3. Reporting professional misconduct.

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of the applicable Rules of Judicial Conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) This rule does not require disclosure of information provided to or discovered by members of the Utah State Bar during the course of their work on the Lawyers Helping Lawyers Committee, a committee which has as its purpose the counseling of other bar members about substance abuse or psychological or emotional problems.

COMMENT

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report

should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

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

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

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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

(e) State or imply an ability to influence improperly a government agency or official;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or

(g) Engage in sexual relations with a client that exploit the lawyer-client relationship. For purposes of this subdivision:

(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 a lawyer and a client shall be presumed to be exploitative. This presumption is rebuttable.

COMMENT

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the

practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

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

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

Subdivision (g) proscribes sexual exploitation of the lawyer's client. A lawyer who commences a sexual relationship with the client during legal representation may be exploiting the client's trust in the lawyer, the client's vulnerability in a stressful situation, or the lawyer's superior professional position. A sexual relationship that exploits the client's trust in the lawyer compromises the lawyer-client relationship.

If the client is an organization, references to the client in this subdivision include any individual who oversees the client's interests in the representation and gives instructions to the lawyer on behalf of the organization.

The proscription of subdivision (g) applies only to a lawyer who is directly involved in the representation of the client.

REPORT OF THE SUPREME COURT'S ADVISORY COMMITTEE ON PROFESSIONALISM

JUNE 2003

REPORT OF THE SUPREME COURT'S ADVISORY COMMITTEE ON PROFESSIONALISM

June 2003

I. Executive Summary

The Supreme Court's Advisory Committee on Professionalism has been asked by the court to explore ways to increase professionalism and civility in the practice of law. Recommendations made in this report focus upon adoption of a code of professionalism standards and enforcement of those standards through education, moral suasion (peer pressure) and support, and judicial intervention. The Committee recommends as follows:

1. The Utah Supreme Court should adopt Utah Standards of Professionalism and Civility.

2. The Utah Supreme Court should urge judges to encourage lawyers in their courtrooms to adhere to the standards. A professionalism effort will not be successful without strong judicial support. Judges should make it clear that civility enhances the effectiveness of counsel and that lack of civility and professionalism has the opposite effect and could damage the client's case.

3. The Bar should offer at least twelve CLE hours per year on professionalism topics and attendance at these events should count towards satisfaction of the three-hour ethics requirement per reporting period.

4. The Judiciary should implement, on a trial basis, a part-time discovery commissioner in the Third Judicial District.

5. The Utah Supreme Court should make its Advisory Committee on Professionalism a permanent entity with a rotating membership appointed from the Bench and Bar.

6. The Committee on Professionalism should maintain a web page as a means of disseminating information and attracting support. At the time of bar membership renewal, or on a regular basis, all lawyers in Utah should be invited to take a pledge to adhere to the standards and to add their names to the list maintained on the website of those lawyers who have so pledged. At the commencement of any case, the lawyers can determine from the website whether the opponent is on the list. If not, the lawyer should write a letter stating that he or she will adhere to the standards and invite opposing counsel to do the same. If one or more of the attorneys have not signed up as of the time of the first appearance, the judge should encourage them to do so and explain the benefits of civility in his or her

court.

7. The Committee on Professionalism should develop a network of liaisons representing private law firms, county bar associations, and other legal entities or organizations to address civility complaints, disseminate information, and bolster the professionalism initiative.

In March of 2001, then Chief Justice Richard Howe and several Utah lawyers attended a conference in Del Mar, California, sponsored by the American Bar Association's Center for Professional Responsibility and by the Conference of Chief Justices (CCJ). The conference was designed to encourage the Chief Justices in each of the fifty states to implement an action plan on lawyer professionalism.

Following the conference, Chief Justice Howe asked several lawyers to informally survey practicing lawyers as to whether they felt there was a problem with professionalism in Utah. The feedback reported to Chief Justice Howe was that nearly all practitioners surveyed felt there was a significant problem.

II. Creation of the Committee

In 1996, the CCJ adopted a resolution calling for a study of lawyer professionalism and the development of a National Action Plan to assist state supreme courts in providing leadership and support for professionalism initiatives. In January of 1999, the CCJ promulgated a National Action Plan that described the responsibilities of the bench, the bar, and the law schools in promoting lawyer ethics and professionalism and included specific recommendations in the areas of professionalism, lawyer competence, lawyer regulation, and public outreach efforts. In 2001, the CCJ issued a National Implementation Plan for its National Action Plan. Copies of both of these Plans are included in the Appendix to this report.

On October 1, 2001, in response to the CCJ's National Action Plan and feedback from Bar leadership and Utah attorneys, the Utah Supreme Court (the "Court") voted to create an advisory committee on professionalism in the practice of the law and appointed Justice Matthew Durrant to chair the Committee. The Court appointed the following judges, law professors, and attorneys to serve on the Committee: Judge Gregory Orme, Judge Kay Lindsay, Judge Ann Boyden, Judge Jerry Jensen, Robert Clark, Professor Thomas Lee, Professor Susan Poulter, Billy Walker, Frank Carney, Jeff Vincent, Lowry Snow, Gus Chin, Suzanne Marychild, Don Winder, Royal Hansen, Nate Alder, Scott Daniels, Ruth Lybbert, Matty Branch, and Fran Wikstrom.

At the first Committee meeting, held on January 15, 2002, Justice Durrant advised that the Court was increasingly concerned about the erosion of civility and professionalism in the practice of law, and that it wanted the Committee to examine the nature and extent of the civility problem within the state and to make recommendations as

to how professionalism might be enhanced.

III. Methods

Since the first meeting, twelve two-hour Committee meetings have been held, as well as numerous subcommittee meetings. At its meeting in May 2002, the Committee met with Beryl Crowley, Executive Director of the Texas Center for Legal Ethics and Professionalism. Ms. Crowley advised as to what other state bars and jurisdictions in the country were doing to promote civility. She also provided detailed information about the development of the Texas Lawyer's Creed and the four-hour professionalism course offered through the Texas Center for Legal Ethics and Professionalism.

At its first meeting, Committee members echoed the Court's view regarding the loss of civility in the legal profession. Committee members' initial reactions to the issue included the following:

- Specific rather than general enumerated principles of civility are needed.
- Lawyers need to explain to clients that lawyers are more effective advocates when they are civil. Judges should reinforce this in the presence of clients as appropriate.
- The public needs to understand the risks of demanding that lawyers employ a "mad dog" approach.
- Judges need to get involved in addressing incivility that occurs inside and outside of the courtroom.
- Judges should make lawyers who act uncivilly feel uncomfortable and aware that their conduct is hurting both their reputation and their clients' cases.
- There should be real consequences for and disincentives to uncivil behavior.
- We need to enlist those among the profession who exemplify civility to assist in promoting it.

After several meetings, the Committee voted to form three subcommittees; one charged with developing a code of civility to define expectations; another to explore educational approaches to the civility problem; and a third to spearhead the drafting of a report to the Court.

IV. Relationship Between Ethics and Professionalism

The committee explored whether "ethics" differed from "professionalism." Ultimately, the Committee concluded that, for members of the legal profession, there is no rigid boundary between the two concepts. Ethics and Professionalism, as disciplines, are both concerned with a lawyer's obligations to his or her clients, to fellow attorneys, and to the justice system. A truly ethical attorney will invariably be professional in his or her dealings with others. By the same token, an attorney who is a consummate

professional will necessarily observe the highest ethical standards.

V. What Other Jurisdictions Are Doing

Professionalism commissions are presently in place in New York, South Carolina, North Carolina, Texas, Georgia, New Jersey, Ohio, and Florida, and at least fourteen other states are involved in some sort of professionalism study or initiative. Many jurisdictions have addressed civility by developing professional codes. The ABA Standing Committee on Professionalism indicates that there are over one hundred such codes from state and local bar associations, courts, state professionalism commissions, ABA entities, and other groups.

During its meeting with Beryl Crowley, Executive Director of the Texas Center for Legal Ethics and Professionalism, the Committee learned about the Texas Center's development of a four-hour professionalism course that the Texas Supreme Court requires every lawyer licensed in Texas to take within twelve months of licensing. Ms. Crowley advised that between 2,500 to 3,000 lawyers take the course every year. Texas also has an aspirational Lawyer's Creed, which each attorney is required to sign and abide by.

VI. Professionalism/Civility Presentations

Since the creation of the Committee, various members have prepared and participated in presentations aimed either at promoting civility in the practice of law or educating members of the bench and bar as to the work of the Committee. The following is a list of those presentations and presenters:

May 23, 2002	New Lawyer's CLE Sharp Practices Workshop (Justice Matthew Durrant and Frank Carney)
June 14, 2002	Annual New Lawyer MCLE – first hour of 8-hour session was devoted to civility presentation (Justice Matthew Durrant and Frank Carney)
June 26, 2002	Utah State Bar annual meeting, Sun Valley – breakout session on professionalism (Judge Greg Orme)
September, 2002	Civility panel discussion at Utah Trial Lawyer's Seminar (Ruth Lybbert, Nate Alder, Frank Carney, Scott Daniels)
September 11, 2002	Professionalism presentation at Annual Judicial Conference (Justice Matthew Durrant, Don Winder, Frank Carney, Rob Clark, Scott Daniels, and Matty Branch)

September 20, 2002	Civility presentation at University of Utah College of Law CLE series (Justice Matthew Durrant)
October 2, 2002	Civility presentation at Utah State Bar leadership workshop (Frank Carney, Don Winder)
October 18, 2002	Civility and Professionalism presentation at BYU J. Reuben Clark Law School CLE program (Rob Clark)
November 1, 2002	Civility presentation at New Lawyer MCLE seminar (Justice Matthew Durrant)
December 13, 2002	Professionalism presentation at ethics seminar sponsored by Lawyers Helping Lawyers (Judge Greg Orme and Don Winder)
January 15, 2003	Civility presentation at Utah State Bar Ethics School (Justice Matthew Durrant)
May 6, 2003	Civility presentation at Utah Municipal Attorneys Association Annual Meeting (Don Winder)
May 30, 2003	Professionalism presentation before Weber County Bar Association (Frank Carney)
June13, 2003	Civility Presentation at the New Lawyer MCLE Seminar (Justice Matthew Durrant)

Future presentations:

July 19, 2003	Plenary session concerning recommendations of Professionalism Committee during Utah State Bar Annual Meeting in Sun Valley (Justice Matthew Durrant)
November 7, 2003	Professionalism Seminar presented by various members of the Committee

VII. Committee Recommendations

A. Utah Standards of Professionalism and Civility

Early in the Committee's deliberations, it became apparent that many jurisdictions

have hoped to increase civility in the legal profession by promulgating codes of civility. In 1992, the Seventh Federal Judicial Circuit issued its "Proposed Standards for Professional Conduct." Those standards have become a model for other courts and bar associations. The Civility Code Subcommittee reviewed the Seventh Circuit's "Standards," relied primarily upon the American Board of Trial Advocates ("ABOTA") Principles of Civility, and also reviewed The Florida Bar Trial Lawyers Section Guidelines for Professional Conduct, The Texas Lawyer's Creed, the Civility and Professional Guidelines for the Central District of California, the ABA Guidelines for Conduct, Lawyer's Duties to Other Counsel, the San Diego County Bar Association's "Civil Litigation Code of Conduct," the American College of Trial Lawyers' Codes of Pretrial and Trial Conduct, the Federal Bar Association Standards for Civility in Professional Conduct, and the American Inns of Court Professional Creed. Copies of these documents may be found in the Appendix to this report. Following this review process, the subcommittee spent many hours creating and refining the unique set of standards stated below.

The Committee was mindful of not adding rules governing attorney conduct simply for the sake of adding rules. Additionally, the Committee is not so naive as to believe that the Court's formalization of a code of civility will, by itself, halt the decline in civility among Utah lawyers. It does sincerely believe, however, that adoption of a code will provide guidance to new lawyers and a reminder for experienced ones of the higher standard of behavior expected of all lawyers. After lengthy deliberations, the Committee unanimously agreed upon the following Preamble and twenty Standards. The Committee recommends that the Court approve and promulgate these Standards.

Utah Standards of Professionalism and Civility

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the

public and participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make mutual and firm commitments to these standards. Adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this State. We further expect lawyers to educate their clients regarding these standards and judges to reinforce this whenever clients are present in the courtroom by making it clear that such tactics may hurt the client's case.

Although for ease of usage the term "court" is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards. Nothing in these standards supersedes or detracts from existing disciplinary codes or standards of conduct.

Annotation: See generally Preamble to Standards for Professional Conduct Within the Seventh Federal Judicial Circuit ("7th Cir. Standards"); Preamble to American College of Trial Lawyers Code of Pretrial Conduct ("ACTL Pretrial Code"); Preamble to Federal Bar Association Standards for Civility in Professional Conduct ("FBA Standards"); American Inns of Court Professional Creed. All Annotations may be found on the Committee's web site at www.utprofcomm.org.

Lawyers' Duties

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

Annotation: American Board of Trial Advocates Principles of Civility ("ABOTA Principles"), No. 1; see also ACTL Pretrial Code, Std. 4(a); Participant's Manual for the Professionalism Course, State Bar of Arizona, February 1999, Professionalism Principle X ("Arizona Professionalism"); ABA Section of Litigation, Guidelines for Conduct, Lawyers' Duties to Other Counsel ("ABA Guidelines"), No. 2; FBA Standards, No. 2.

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness.

Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

Annotation: Civility and Professionalism Guidelines for the Central District of California ("Central Dist. Cal."), No. A. 3; The Texas Lawyer's Creed, a Mandate for Professionalism, promulgated by the Supreme Court of Texas ("Texas Creed"), No. II. 6; FBA Standards, Nos. 3 & 13.

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

Annotation: ABOTA Principles, No. 3; ACTL Pretrial Code, Stds. 3(b) & 4(b); American College of Trial Lawyers Code of Trial Conduct ("ACTL Trial Code"), Std. 13(d) (1994); see also Texas Creed No. III. 10; 7th Cir. Standards, Lawyers' Duties to Other Counsel, No. 4; FBA Standards, Nos. 5, 24 & 25.

4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

Annotation: ABOTA Principles, No. 28; ACTL Pretrial Code, Std. 4(c); see also ABA Standards, No. 29.

5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

Annotation: See Civil Litigation Code of Conduct, San Diego County Bar Association ("San Diego Bar"), No. III. 13; Texas Creed, No. III. 19; FBA Standards, No. 23.

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

Annotation: ABOTA Principles, No. 5; ACTL Pretrial Code, Std. 4(e); ACTL Trial Code, Std. 13(b); see also Central Dist. Cal., B.1.a; The Florida Bar Trial Lawyers Section, Guidelines for Professional Conduct ("Fla. Guidelines"), No.

D.5; FBA Standards, No. 48.

7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

Annotation: ABOTA Principles, No. 6; Central Dist. Cal., B.1.b.; cf. Texas Creed, No. III. 4; Aspirational Statement on Professionalism, entered by Order of Supreme Court of Georgia, October 9, 1992, ("Georgia Aspirational"), No. 5; FBA Standards, Nos. 49 & 50.

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

Annotation: See ABA Guidelines, No. 28; ABOTA Principles, No. 27; see generally CJA Rule 4-504.

9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

Annotation: ABOTA Principles, No. 7.

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

Annotation: ABOTA Principles, No. 8; ABA Standards, No. 9; see ACTL Code, Stds. 6(b) & 9(i); FBA Standards, No. 15.

11. Lawyers shall avoid impermissible *ex parte* communications on any substantive matter and on any matter that could reasonably be perceived as a substantive matter.

Annotation: ACTL Pretrial Code, Std. 8(a); San Diego Bar, No. II. 8; compare Utah Supreme Court Rules of Professional Practice, 3.5(c), with Utah Canon 3(B)(7), Code of Judicial Conduct; FBA Standards, No. 33.

12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

Annotation: Cf. ABOTA Principles, No. 29; Texas Creed, No. III. 13.

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

Annotation: ABOTA Principles, No. 12; ACTL Pretrial Code, Std. 2(c); see also Georgia Aspirational, No. 1; FBA Standards, No. 8.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

Annotation: See ABOTA Principles, Nos. 13 & 17; ACTL Pretrial Code, Stds. 1(c); ACTL Trial Code, Std. 13(a); Texas Creed No. II. 10; FBA Standards, No. 10.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

Annotation: See generally ABOTA Principles, Nos. 13-16; ACTL Pretrial Code, Std. 1; FBA Standards, Nos. 9, 11, 30, 31 & 32.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

Annotation: ABOTA Principles, No. 18; ACTL Pretrial Code, Std. 13(b); see also ABA Guidelines, No. 18; Texas Creed, No. III. 11.

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

Annotation: See generally Utah Supreme Court Rules of Professional Practice, 4.4; Utah Rules of Civil Procedure 11, 26 & 37; FBA Standards, Nos. 14, 17 & 19.

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

Annotation: See Fla. Guidelines, No. E.9; FBA Standards, No. 16.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

Annotations for 17 - 19: See generally ABOTA Principles, Nos. 19-26; ACTL Pretrial Code, Stds. 5(a), 5(c) & 5(e)(5); FBA Standards, Nos. 18 & 20.

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

Annotation: ABOTA Principles, No. 2; see also Texas Creed, No. III. 9.

The question of enforcement of these Standards is a difficult one. Committee members considered enforcement mechanisms such as an ombudsman, peer review panels, censure in the *Bar Journal*, or required "corrective interviews" with a judge. Ultimately, the Committee felt such enforcement methods were probably prohibitive due to expense, time commitment, and due process concerns. Also, Committee research did not reveal

any state that had an enforceable rather than aspirational code. Therefore, at this time, the Committee recommends promulgation of the Standards on an aspirational basis. Nevertheless, the Committee believes that the Standards should operate as behavioral norms for the profession and that the Court should urge all state court judges to strongly encourage lawyers practicing before them to adhere to the Standards or risk the consequences.

B. Educational Approaches

1. Continuing Legal Education (CLE) – Professionalism Courses

Presently, new lawyers in Utah must attend one mandatory three-hour ethics session during their first year of mandatory CLE. New lawyers must also take ten hours of new-lawyer approved CLE. All other lawyers are required to attend 27 approved CLE hours in each two-year reporting period, three of which hours must be qualified ethics credits. The Committee recommends that professionalism courses qualify for ethics credits.

The Committee discussed the merits of having a CLE requirement for professionalism, separate from ethics. Some Committee members expressed concern that professionalism courses would hold little attraction for many lawyers over "pure" ethics classes of a more practical bent. Ultimately, the Committee decided not to initially recommend additional mandatory hours for professionalism credits. Instead, the Committee recommends that attendance at professionalism courses coming under the general ethics category be monitored to see how many attorneys are attending these courses.

The Committee makes the following CLE recommendations to the Court:

The first hour of new lawyers' mandatory CLE session should be dedicated to remarks on professionalism by a member of the judiciary. The tenor of their remarks should be positive and inspirational.

At all CLE presentations, specific guidelines should be emphasized rather than generalized comments or "war stories." Guidelines should be based on the Utah Standards of Professionalism and Civility. Lectures should include instruction on specifics. For example, extensions should be routinely allowed absent harm to the client or depositions should always be coordinated in advance of formal notice.

Professionalism courses should count toward satisfaction of the "ethics" requirement of 3.0 hours per reporting period. Attendance at "pure" professionalism seminars should be monitored for a two-year period to

determine whether professionalism courses are being ignored. If they are, the issue of mandatory professionalism CLE should be revisited.

The Bar should offer at least twelve available CLE hours per year on professionalism topics. A member of the Committee should be designated to monitor professionalism CLE and to encourage specialty bars and sections to sponsor professionalism topics.

2. Law School Education

As part of its deliberations, the Committee investigated whether concepts of professionalism are taught at the two local law schools. The Committee learned that professionalism was not a separate area of study, but that concepts of professionalism were generally incorporated in many law school classes. Courses on professional responsibility incorporate some professionalism topics, but the focus is on learning ethical rules. The Committee makes the following recommendations to the Court related to professionalism education in law schools:

Representatives of both local law schools should be members of the Committee. This will ensure that professionalism is addressed in the curriculum.

The law school representatives on the Committee should inquire of their respective faculties as to how professionalism might best be taught to students and report to the Committee within six months.

3. Judicial Education

The Committee also explored judicial education as to professionalism. It was generally agreed that any of the professionalism initiatives recommended by the Committee have limited chance of success absent judicial support and involvement. The Committee feels strongly that the call for judicial involvement must come from the members of the Court. The Committee makes the following two recommendations as to judicial education to the Court:

The Committee asks the Court to urge those entities responsible for judicial education to regularly offer presentations which focus on how Utah judges can promote professionalism and civility amongst the Bar.

Although the Committee does not recommend that judicial professionalism issues be addressed by the Committee at the present time, it believes that this is an important area for future attention.

C. Discovery Commissioner

Based upon personal observations and experiences, members believe more unprofessionalism occurs in the discovery process than in any other aspect of legal practice. The Committee recommends that a paid, part-time Discovery Commissioner be implemented as a pilot program in the Third Judicial District. Any judge in the Third District presented with a discovery dispute would have the option of referring the matter to the Discovery Commissioner for detailed investigation and recommendation of sanctions or other relief. The Committee envisions the commissioner taking an aggressive approach as to chronic offenders and, in some measure, liberating judges from dealing with discovery disputes, which they see as unpleasant and unrewarding tasks.

The Rules of Practice for the Eighth Judicial District Court for the State of Nevada (Clark County) require that all discovery disputes be first heard and a recommendation made by a Discovery Commissioner. This procedure has been in place since the late 1980's in Las Vegas, to apparently good reviews. Anecdotal information indicates that discovery disputes have lessened with the availability of a judicial officer tasked with handling discovery issues on short notice. The Clark County Discovery Commissioner publishes his opinions on-line in order to reduce the likelihood of disputes on issues that are recurrent, such as objections to document production on work-product grounds, and to promote uniformity in the resolution of such disputes. Examples of several of the Clark County Discovery Commissioner's on-line opinions are included in the appendix to this report.

D. Law Firm/County Bar Association Involvement in Professionalism Efforts

The Committee believes that law firms throughout the state could be involved in the professionalism initiative. As a first step in promoting involvement, Justice Durant, as a chair of the Committee, has sent letters to senior attorneys at approximately twenty sizeable Salt Lake City law firms as well as to the president of each county bar association advising as to the professionalism initiative and the proposed Utah Standards of Professionalism and Civility, and asking the firm or association to designate a liaison to the Committee.

Recommendations as to the law firm and/or county bar association involvement in the professionalism initiative include the following:

1. Liaisons will be requested to ask each member of their firm or association to commit to the Utah standards of professionalism and civility.

2. Liaisons will also be responsible for addressing concerns over particular lawyers in their firms on an ongoing basis.

3. A luncheon meeting will be held with the Court, select members of the Committee and the Liaisons to discuss the goals of the professionalism initiative and to generate active participation.

4. The Liaisons will lead orientations at their respective firms or association meetings. Members of the Committee will attend such orientations to provide information about the professionalism initiative. The primary purpose of such orientations would be to instill ownership of the professionalism initiative in as many groups of lawyers as possible.

E. Professionalism Award

The Committee recommends that the Bar institute a professionalism award to be periodically bestowed on a Utah attorney who consistently behaves as a consummate professional. The award should be separate and distinct from the awards presented at the Mid-year and Annual meetings, with the honoree being lauded in the Bar Journal.

F. Professionalism Web Page

Soon after the Committee's first few meetings, Frank Carney sought the assistance of the Utah State Bar to set up a web page to support the work of the Committee. The web page is now operational, with an address of www.utprofcomm.org. The Committee is indebted to the Bar, and specifically to Lincoln Mead of the Bar staff, for making the web page a reality.

Currently, the web page contains information about the formation of the Committee, the names of the Committee members, the minutes of Committee meetings and links to a variety of publications developed by professionalism commissions across the country. Copies of some of the web page materials are included in the Appendix to this report. The web page has also been designed to include a private section available only to Committee members via a password for Committee business, resources, and communication and as a means to maintain the Committee's institutional memory.

The Committee recommends to the Court that the web page be maintained as a means of disseminating material concerning professionalism to the bar and

the public as well as to attract new supporters to the cause. Should the Court endorse the recommendations contained in this report, the web page would eventually include this report, the Standards of Professionalism and Civility, a list of those attorneys who have pledged adherence to the standards, CLE professionalism offerings, and law firm liaison information.

G. Supreme Court's Advisory Committee on Professionalism

The Committee recommends to the Court that it make the Committee a permanent entity, with a rotating membership periodically appointed from the membership of the bench and bar. A permanent entity would facilitate the implementation of ideas concerning professionalism on an ongoing, long-term basis.

VIII. Conclusion

The Committee urges the Court to review this report and to authorize it to be published for comment in the Bar Journal and on the Bar's and Courts' web pages. Comments as to the proposed standards recommendations should be directed to the Court. After expiration of the comment period, and the Court's review of the comments received, the Committee requests that the Court consider the recommendations individually and take action to accept, reject or modify each of them. If the Court chooses to designate the Committee as an on-going entity, the Court could then direct the Committee to take the steps necessary to implement any other recommendations as may be approved.

Improving and fostering professionalism in the legal profession requires the cooperative efforts of the Bar, the Judiciary, and the law schools. We can no longer simply talk about the loss of civility among the members of our profession, lack of respect for the judiciary – and for our legal system, and the excessive commercialization of legal practice. We must act. The recommendations made in this report are respectfully offered as a starting point.