ETHICS

I. The Importance of Ethics

A. Why so much attention to ethics?

B. E=T=S

C. The most essential quality to prosecution

II. Sources Identifying Ethical Conduct

A. Utah Rules of Professional Conduct

B. NDAA National Prosecution Standards

C. Case law

III. National Prosecution Standards

A. 1-1.1 The purpose of prosecution

B. 2-10.2 Advising a witness who defense counsel desires to interview

C. 2-10-3 Talking to a witness who has obtained counsel

D. 3-2.1 Search warrant review

E. 2-14.6 Police and Press

F. Screening, charging, diversions, pleas in abeyance, and plea agreements

V. Case Law

A. Discovery-the area where prosecutors get into the most trouble

1. Rule 3.8 (d) of the URPC

2. *State v. Barkalov*,, 979P.2d 799 (Utah 1999). Disclosure of credibility or impeachment evidence.

B. Improper statements during trial

1. *State v. Larsen*, 113 P.3d 998 (Utah App.2005)

2. *State v. Nguyen*, 2011 UT App 2, 246 P.3d 535

3. *State v. King*, 2010 UT App 396, 248 P,3d 984

4. *State v. Young*, 853 P.2d 327 (Utah 1993)

5. *Portuondo v. agard*, 529 U.S. 61 (2000)

6. *State v. Todd*, 2007 UT App 349, 173 P.3d 170

7. Signing Complaints. *Roberts v. Kling*, 104 F.3d 316 (10th Cir 1997)

THE ETHICAL PROSECUTOR

August, 2004

Robert Stott

I. Why Should A Prosecutor Be Ethical?

II. What Ethical Guidelines Are Available?

III. Charging.
- A. Rule 3.8(a) of the RPC.
- B. What is probable cause?
- C. Temptations to charge without probable cause or to over charge.
- D. Cases that fall below probable cause after they are filed.

IV. Trial Publicity.
- A. Rule 3.6 of RPC.
  1. Do's.
  2. Don't.
- B. Duty to prevent others from making public statements – Rule 3.8(e).

V. Discovery.
- A. Rule 3.8(d).
- B. Duty to obtain all reports and information from investigating agencies.

VI. Case Presentation.
- A. Honesty.
  1. Rule 3.3(a)(1).
  2. Rule 3.3(a)(4).
  3. Rule 3.4(b).
- B. Briefs and arguments (Rule 3.3(3)).

VII Closing Arguments.
- A. Rule 3.4(e).
- B. Facts not in evidence.
- C. Personal opinions.
- D. Resort to fear.

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

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

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

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

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 1.11. 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,

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.

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.

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

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

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.

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.

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

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.

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.

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 4.2. 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) 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

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.

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

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.

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.

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

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

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)

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

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.

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.

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

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:

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.