

# Agenda

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

February 23, 2015

5:00 to 7:00 p.m.

Administrative Office of the Courts  
Scott M. Matheson Courthouse  
450 South State Street  
Salt Lake City  
Judicial Council Room, Suite N31

Welcome and approval of minutes from February 2, 2015 meeting.	Tab 1	Steve Johnson, Chair
Report from the Professionalism Subcommittee on the overlap between the Standards of Professionalism and Civility and the Rules of Professional Conduct	Tab 2	Leslie Van Frank
Report from the Advertising Rules Subcommittee on the Advertising Rules Comments (rule 7.3)	Tab 3	Paul Veasy
Next meeting		Steve Johnson

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

# Tab 1

**MINUTES OF THE MEETING OF THE  
COMMITTEE ON RULES OF PROFESSIONAL CONDUCT**

February 2, 2015  
Draft. Subject to Approval.

The meeting commenced at 5:00 pm.

**Committee Members Attending:**

Steve Johnson (chair)  
Trent Nelson  
Judge Darold McDade  
Simon Cantarero  
John Bogart  
Vanessa Ramos  
Daniel Brough  
Gary Chrystler  
Paul Veasy  
Leslie Van Frank  
Judge Vernice Trease  
Kent Roche  
Paula K. Smith  
Gary Sackett

**Visitors Attending:**

Robert Clark  
Joni Seko

**Staff**

Nancy Sylvester

**Secretary**

Phillip Lowry

**Approval of Minutes**

Corrections to the minutes of the November 3, 2014 meeting of the committee were made and noted. A motion was made and seconded to adopt the minutes as corrected, and the motion carried unanimously.

**General Business Items**

Mr. Johnson noted that seven members of the committee have their terms expiring effective June 30, 2015, that several of those members had already served two terms and, absent extraordinary circumstances, pursuant to Court rule, would not be eligible to continue on the committee. He further elaborated on the procedure for allowing members to continue to serve on the committee. He invited any contending that they meet exceptional circumstances to relate the same to him formally before the term expiration in June.

## **Rule 5.5 Discussion**

Mr. Johnson discussed the attempts of the committee to always include an explanation in the Comments to the Rules whenever a Utah Rule differed from the ABA Model Rules. We used to just put the Comment explaining the differences at the end of the other Comments. However, it has been more helpful to add such Comments immediately after the relevant existing Comment. When the committee adopted our recommendations to Rule 5.5 in our last meeting, we forgot to insert the Comments showing the differences from the Model Rules next to their relevant Comment. Mr. Sackett brought this concern to the attention of Mr. Johnson a day or two after the last meeting. He also raised a couple of other concerns about Rule 5.5.

Mr. Sackett then addressed the committee on the Rule 5.5(d) issues. He stated that the Proposed Rule that has been approved has inverted logic from the ABA Rule. Mr. Sackett does not understand why the proposed rule is trying to invert this logic. Mr. Sackett discussed his memo regarding this matter. He also addressed a gap created by rules governing in-house counsel who may or may not have applied for admission for the Utah State Bar and differences in treatment depending on whether such an application is pending.

Ms. Seko agreed with most of the changes that Mr. Sackett has proposed. She noted one typographical error. She has made some changes and has prepared a revised version. The proposed changes are:

Comment 15a discusses the admission of military lawyers. They come through the office of general counsel of the Bar. This rule is limited only to pro bono services provided to indigent military members. It is not a conduit to Bar admission. Ms. Seko contended that does not make any sense for a reference to admission of military lawyers to be in the present-Comment.

Under Comment 15b, Ms. Seko suggested removing the reference to Rule 14-718, and adding the reference to Article 14 as the governing standard. Ms. Seko feels that this is clearer as to the governing standard.

Under Comment 17, she feels that this is really referring to annual licensing fees and complying with CLE requirements. She feels that there is no need for a list of other administrative rules.

She also is concerned about reference to government lawyers in Comment 16. The rule is really designed for in-house counsel, not government lawyers. Government lawyers are covered by (d)(2).

Mr. Sackett expressed concern regarding the stripping of a reference to government lawyer from the (d)(1) Comment. He disagreed that it should be taken out. Ms. Seko responded that there are limitations on being in-house counsel.

Ms. Seko continued the discussion with Comment 18a. This concerns the six-month safe harbor. The Bar's position is that this allows one to secure licensure after they have moved and changed jobs. This is not the preferred mode; it would be better to be admitted before relocation.

Mr. Sackett raised the concern that it does not make a lot of sense to fail to point to an applicable rule. He feels that the idea of the Comment is to point out exemplars of situations where exceptions might apply.

Mr. Johnson pointed out that 14-719(c) does not seem to suggest any time deadline applies for filing an application under the house counsel Rule. Ms. Seko responded that this is to merely point out that the exam deadlines do not apply.

Mr. Sackett agreed with most of the suggested changes to the comments. He moved to adopt the suggestions made by Ms. Seko and the Bar, including to correct the spelling of the word "State" in 5.5(d), to accept proposed changes to Comments 15a, 15b, and 17, but to reject the proposals to Comments 16 and 18a. The Motion was seconded.

The motion carried unanimously.

Mr. Johnson requested that Mr. Sackett provide to him a redline and clean version of the changes carried by the motion.

### **Civility Standards**

Mr. Johnson introduced Mr. Rob Clark. He is a member of the Utah Supreme Court Professionalism Committee, and Chair of the Professionalism Counseling Board.

He described how in 2003 the Court introduced the Rules of Professionalism, now found in Rule 14-301 of the Rules of the Court. They tend to be aspirational, but the judges feel that they are very important. The Court created by Standing Order 7 the Professionalism Counseling Board. It was created to provide mentoring and counseling to lawyers. He described the process of how the Board confers and reasons with referred attorneys. He also discussed the overlap (or lack thereof) of the professional conduct and civility standards.

Mr. Clark noted that lawyer reactions to the standards are varied. Some lawyers embrace them, while others regard them as foolish or lacking authority. So the conundrum arises with respect to repeat offenders: Is there ever a time when violation of the standards are a violation of the RPC? There has been discussion of cross-referencing the RPC to the professionalism standards. At their outset the standards were articulated as being aspirational. He mentioned Rule 8.4(d) in the RPC. The Rule makes it a violation to engage in conduct being prejudicial to the administration of justice. The Oregon Supreme Court has stated that there is such a violation if civility standards are ignored.

Mr. Clark cited to abusive emails, corridor confrontations, and deposition abuse. It is difficult to say if any one of these is prejudicial to the administration of justice. But a consistent pattern of incivility may give rise to acts that are prejudicial to the administration of justice. Another concern is a pattern of male lawyers being condescending to female lawyers. So, this has been raised in a professionalism meeting. The Supreme Court, and especially Justice Lee, feels that this issue should be raised in this committee. Mr. Clark senses that Justice Lee's sentiments reflect those of the Court.

Thus, he continued, the standards of professionalism perhaps should state that repeated violations may very well rise to the level of a violation of the RPC. This might give better notice to attorneys. Then, it was proposed to add language to a Rule or to a comment to address this relationship between the standards and the rules.

Mr. Clark was asked whether this change would yield more power to his committee. He feels that it would certainly enhance its persuasive effect.

If a judge refers anything to the committee, it is required to report on the result to the judge. Referees' reactions to these referrals vary.

The concern was raised by a committee member that the standards at this point have little ability to be enforced. Another committee member asked whether the entire corpus of the standards might be converted into a RPC violation, particularly the discovery rules, which have their own set of remedies. Another committee member pointed out that even with discovery remedies, repeat offenders can still wreak mischief with discovery antics.

Mr. Sackett suggested that Mr. Clark's committee be treated as a special master, which can make a finding that a referee attorney be referred to OPC for prosecution. Mr. Clark noted that the committee can make referrals now, but Mr. Sackett suggested that it would have a more powerful effect.

Mr. Johnson appointed a subcommittee to study this issue, if not by February 23, then as soon as they can formulate a report and/or response. The committee members are Leslie Van Frank (subcommittee chair), John Bogart, Simon Catarero, Trent Nelson, and Tom Bruner.

Mr. Johnson stated that he found an error in the Comments to Rules 3.5 (Comment 5) and 3.3 (Comment 1). Both refer to 1.0(m), instead of 1.0(n).

### **Discussion of Comments to Proposed Changes to Advertising Rules**

The discussion then turned to particular public comments to the proposed advertising rules:

- Comment by Lynn Heward: The committee felt that no discussion was necessary on this comment.
- Comment by Michael Jenson: Mr. Johnson felt that this comment deserved some discussion.
- Comment by Paul Maxfield: The committee felt that no discussion was necessary on this comment.
- Comments (3) by Jared Clark.: The committee felt that no discussion was necessary on these comments.

The committee discussed Mr. Jenson's comment about direct contact by counsel under Rule 7.3 after a referral. The committee discussed to what degree this constitutes solicitation of a client, whether this is an expansion of a prior professional relationship,

and if someone refers a prospective client to an attorney, whether the attorney can contact the prospective client directly, or must the attorney wait until the client calls the attorney. Mr. Johnson raised the issue of a criminal defendant that gets one phone call, calls his mother, and asks her to find a lawyer. The defendant cannot call back. Another committee member raised the issue of whether a lawyer can hand out a card, unsolicited, at a party.

Another member questioned whether this version of the rule has really resulted in referrals to the Bar. The example of handing out cards in the jail was raised (which ended up in a Bar referral).

Mr. Johnson suggested that a Rule 7.3 subcommittee be appointed. A subcommittee consisting of Gary Chrystler, Vanessa Ramos, and Paul Veasy was appointed to study the issue and to report back to the entire committee at the next committee meeting.

The meeting adjourned at 6:31 p.m. The next meeting is scheduled for February 23, 2015, on the third floor of the Matheson Courthouse in the Judicial Conference Room.

# Tab 2

## **Overlap Between the Standards of Professionalism and Civility and the Rules of Professional Conduct**

February 23, 2015

### Subcommittee:

John Bogart  
Tom Brunker  
Simón Cantarero  
Trent Nelson  
Leslie Van Frank, Chair

### Assignment:

Determine a way to connect the Standards of Professionalism and Civility (SPC) and the Rules of Professional Conduct (RPC) so that egregious or repeated violations of the SPC could be considered a violation of the RPC. Give the Advisory Committee of Professionalism some teeth to enforce the SPC.

### Discussion:

In broad strokes, the preamble of the SPC announces its overarching principle as ensuring the administration of justice. That ties into Rule 8.4(d) of the RPC. The subcommittee's initial consideration was to revise the comments to RPC 8.4(d) to refer to the SPC.

But each SPC has cross-references to multiple rules of professional conduct, with the goals not necessarily being just the administration of justice. Reading all those references and trying to determine the Professionalism Committee's thinking on making those references would be likely impossible. Further, by revising only the comments of Rule 8.4, many other potential RPC violations could be excluded by lack of mention.

Revising more (or all) of the RPCs mentioned in the SPCs seemed extreme, particularly in light of the RPC committee's traditional reluctance to change the RPC to deviate from the ABA's rules.

### Recommendation:

The subcommittee determined that a couple of sentences could be added to the last paragraph of the SPC preamble, so that the preamble would read as set forth on the following page, with the new language underlined.

This proposed language does not expand the powers of the Advisory Committee on Professionalism. Attorneys on that committee already have obligations under the RPC to report misconduct to the OPC, and they also already have the power to report anything they want to the OPC. It also does not create any new standard of conduct. But it does bring it home to Utah

attorneys the idea that they need to be taking the SPC and the Advisory Committee on Professionalism seriously. The Supreme Court could announce this revision to the Bar with a strongly-worded caution.

## 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. Egregious violations or a pattern of repeated violations of these standards may support a finding that the lawyer has violated one or more of the Rules of Professional Conduct. The Advisory Committee on Professionalism is empowered to report such a finding to the Office of Professional Conduct.

## **Rule 14-301. Standards of Professionalism and Civility.**

To enhance the daily experience of lawyers and the reputation of the Bar as a whole, the Utah Supreme Court, by order dated October 16, 2003, approved the following Standards of Professionalism and Civility as recommended by its Advisory Committee on Professionalism.

### **Preamble**

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Cross-References: R. Prof. Cond. Preamble [1], [13]; R. Civ. P. 1; R. Civ. P. 65B(b)(5); R. Crim. P. 1(b); R. Juv. P. 1(b); R. Third District Court 10-1-306; Fed. R. Civ. P. 1; DUCivR 83-1.1(g).

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.

Comment: Lawyers should maintain the dignity and decorum of judicial and administrative proceedings, as well as the esteem of the legal profession. Respect for the court includes lawyers' dress and conduct. When appearing in court, lawyers should dress professionally, use appropriate language, and maintain a professional demeanor. In addition, lawyers should advise clients and witnesses about proper courtroom decorum, including proper dress and language, and should, to the best of their ability, prevent clients and witnesses from creating distractions or disruption in the courtroom.

The need for dignity and professionalism extends beyond the courtroom. Lawyers are expected to refrain from inappropriate language, maliciousness, or insulting behavior in depositions, meetings with opposing counsel and clients, telephone calls, email, and other exchanges. They should use their best efforts to instruct their clients and witnesses to do the same.

Cross-References: R. Prof. Cond. 1.4; R. Prof. Cond. 1.16(a)(1); R. Prof. Cond. 2.1; R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5(d); R. Prof. Cond. 3.8; R. Prof. Cond. 3.9; R. Prof. Cond. 4.1(a); R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

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.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 1.2(a); R. Prof. Cond. 1.2(d); R. Prof. Cond. 1.4(a)(5).

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.

Comment: Hostile, demeaning, and humiliating communications include all expressions of discrimination on the basis of race, religion, gender, sexual orientation, age, handicap, veteran status, or national origin, or casting aspersions on physical traits or appearance. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it.

Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 3.1; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

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.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.5(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

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

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. Civ. P. 11(c); R. Civ. P. 16(d); R. Civ. P. 37(a); Fed. R. Civ. P. 11(c)(2).

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.

Cross-References: R. Prof. Cond. 1.1; R. Prof. Cond. 1.3; R. Prof. Cond. 1.4(a), (b); R. Prof. Cond. 1.6(a); R. Prof. Cond. 1.9; R. Prof. Cond. 1.13(a), (b); R. Prof. Cond. 1.14; R. Prof. Cond. 1.15; R. Prof. Cond. 1.16(d); R. Prof. Cond. 1.18(b), (c); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3; R. Prof. Cond. 3.4(c); R. Prof. Cond. 3.8; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.3(a), (b); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

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.

Comment: When providing other counsel with a copy of any negotiated document for review, a lawyer should not make changes to the written document in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. Changes should be clearly and accurately identified in the draft or otherwise explicitly brought to the attention of other counsel. Lawyers should be sensitive to, and accommodating of, other lawyers’ inability to make full use of technology and should provide hard copy drafts when requested and a redline copy, if available.

Cross-References: R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. App. P. 11(f).

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.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Civ. P. 7(f); R. Third District Court 10-1-306(6).

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.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

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.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(d); R. Prof. Cond. 8.4(d); R. Third District Court 10-1-306 (1)(A); Fed. R. Civ. P. 16(2)(C).

11. Lawyers shall avoid impermissible ex parte communications.

Cross-References: R. Prof. Cond. 1.2; R. Prof. Cond. 2.2; R. Prof. Cond. 2.9; R. Prof. Cond. 3.5; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 77(b); R. Juv. P. 2.9(A); Fed. R. Civ. P. 77(b).

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.

Cross-References: R. Prof. Cond. 3.5(a); R. Prof. Cond. 3.5(b); R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d).

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.

Cross-References: R. Prof. Cond. 8.4(c); R. Juv. P. 19.

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.

Comment: Lawyers should not evade communication with other counsel, should promptly acknowledge receipt of any communication, and should respond as soon as reasonably possible. Lawyers should only use data-transmission technologies as an efficient means of communication and not to obtain an unfair tactical advantage. Lawyers should be willing to grant accommodations where the use of technology is concerned, including honoring reasonable requests to retransmit materials or to provide hard copies.

Lawyers should not request inappropriate extensions of time or serve papers at times or places calculated to embarrass or take advantage of an adversary.

Cross-References: R. Prof. Cond. 1.2(a); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Juv. P. 54.

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.

Comment: When scheduling and attending depositions, hearings, or conferences, lawyers should be respectful and considerate of clients' and adversaries' time, schedules, and commitments to others. This includes arriving punctually for scheduled appointments. Lawyers should arrive sufficiently in advance of trials, hearings, meetings, depositions, and other scheduled events to be prepared to commence on time. Lawyers should also advise clients and witnesses concerning the need to be punctual and prepared. Lawyers who will be late for a scheduled appointment or are aware that another participant will be late, should notify the court, if applicable, and all other participants as soon as possible.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 5.1; R. Prof. Cond. 8.4(a); R. Juv. P. 20; R. Juv. P. 20A.

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.

Cross-References: R. Prof. Cond. 8.4; R. Civ. P. 55(a); Fed. R. Civ. P. 55(b)(2).

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.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 4.1; R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4; R. Civ. P. 26(b)(1); R. Civ. P. 26(b)(8)(A); R. Civ. P. 37(a)(1)(A), (D); R. Civ. P. 37(c); R. Crim. P. 16(b); R. Crim. P. 16(c); R. Crim. P. 16(d); R. Crim. P. 16(e); R. Juv. P. 20; R. Juv. P. 20A; R. Juv. P. 27(b); Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 26(g)(1)(B)(ii), (iii).

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.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 30(c)(2); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 30(c)(2); Fed. R. Civ. P. 30(d)(2); Fed. R. Civ. P. 30(d)(3)(A).

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.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 8.4; R. Prof. Cond. 3.4; R. Civ. P. 26(b)(1); R. Civ. P. 37; R. Crim. P. 16(a); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 37(a)(4).

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

# Tab 3

1        **Rule 7.3. ~~Direct Contact with Prospective~~ Solicitation of Clients.**

2        (a) A lawyer shall not by in-person, live telephone or real-time electronic  
3        ~~contact or other real-time communication~~ solicit professional employment from  
4        a prospective client when a significant motive for the lawyer's doing so is the  
5        lawyer's pecuniary gain, unless the person contacted:

6        (a)(1) is a lawyer; or

7        (a)(2) has a family, close personal, or prior professional relationship with  
8        the lawyer.

9        (b) A lawyer shall not solicit professional employment ~~from a prospective~~  
10       ~~client~~ by written, recorded or electronic communication or by in-person, live  
11       telephone or real-time electronic ~~contact or other real-time communication~~  
12       even when not otherwise prohibited by paragraph (a), if:

13       (b)(1) the ~~prospective client~~ target of the solicitation has made known to the  
14       lawyer a desire not to be solicited by the lawyer; or

15       (b)(2) the solicitation involves coercion, duress or harassment.

16       (c) Every written, recorded or electronic communication from a lawyer  
17       soliciting professional employment from ~~a prospective client~~ anyone known to  
18       be in need of legal services in a particular matter shall include the words  
19       "Advertising Material" on the outside envelope, if any, and at the beginning of  
20       any recorded or electronic communication, unless the recipient of the  
21       communication is a person specified in paragraphs (a)(1) or (a)(2). For the  
22       purposes of this subsection, "written communication" does not include  
23       advertisement through public media, including but not limited to a telephone  
24       directory, legal directory, newspaper or other periodical, outdoor advertising,  
25       radio, ~~or television~~ or webpage.

26       (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may  
27       participate with a prepaid or group legal service plan operated by an  
28       organization not owned or directed by the lawyer that uses in-person or other

29 real-time communication to solicit memberships or subscriptions for the plan  
30 from persons who are not known to need legal services in a particular matter  
31 covered by the plan.

32 Comment

33 [1] A solicitation is a targeted communication initiated by the lawyer that is  
34 directed to a specific person and that offers to provide, or can reasonably be  
35 understood as offering to provide, legal services. In contrast, a lawyer's  
36 communication typically does not constitute a solicitation if it is directed to the  
37 general public, such as through a billboard, an Internet banner advertisement,  
38 a website or a television commercial, or if it is in response to a request for  
39 information or is automatically generated in response to Internet searches.

40 ~~[1]~~ [2] There is a potential for abuse inherent in when a solicitation involves  
41 direct in-person, or other real-time communication live telephone or real-time  
42 electronic contact by a lawyer with a prospective client someone known to  
43 need legal services. These forms of contact between a lawyer and a  
44 prospective client subject the layperson a person to the private importuning of  
45 the trained advocate in a direct interpersonal encounter. The prospective  
46 client person, who may already feel overwhelmed by the circumstances giving  
47 rise to the need for legal services, may find it difficult fully to evaluate all  
48 available alternatives with reasoned judgment and appropriate self-interest in  
49 the face of the lawyer's presence and insistence upon being retained  
50 immediately. The situation is fraught with the possibility of undue influence,  
51 intimidation, and over-reaching.

52 ~~[1a] "Real-time communication" means telephonic, electronic, radio, wire,~~  
53 ~~wireless or other similar communication directed to a specific recipient and~~  
54 ~~characterized by the immediacy and interactivity of response between~~  
55 ~~individuals, such as that provided through standard telephone connections~~  
56 ~~and Internet "chat rooms." This Comment is not included in the ABA Model~~

57 Rule 7.3, and is added to clarify that the definition of real-time communication  
58 is broad enough to cover real-time communication of all types.

59 ~~[2] The [3] This~~ potential for abuse inherent in direct in-person, ~~and other~~  
60 ~~real-time live telephone or real-time electronic~~ solicitation of prospective  
61 clients justifies its prohibition, particularly since lawyers' advertising and written  
62 and recorded communication permitted under Rule 7.2 offer have alternative  
63 means of conveying necessary information to those who may be in need of  
64 legal services. ~~Advertising and written and recorded~~ In particular,  
65 communications that may can be mailed or autodialed transmitted by email or  
66 other electronic means that do not involve real-time contact and do not violate  
67 other laws governing solicitations. These forms of communications and  
68 solicitations make it possible for a ~~prospective client~~ the public to be informed  
69 about the need for legal services, and about the qualifications of available  
70 lawyers and law firms, without subjecting the ~~prospective client~~ public to direct  
71 in-person, ~~or other real-time live telephone or real-time electronic~~ persuasion  
72 that may overwhelm the client's a person's judgment.

73 ~~[3] [4]~~ The use of general advertising and written, recorded or electronic  
74 communications to transmit information from lawyer to ~~prospective client~~ the  
75 public, rather than direct in-person or other real-time communications, will  
76 help to ensure that the information flows cleanly as well as freely. The  
77 contents of advertisements and communications permitted under Rule 7.2 can  
78 be permanently recorded so that they cannot be disputed and may be shared  
79 with others who know the lawyer. This potential for informal review is itself  
80 likely to help guard against statements and claims that might constitute false  
81 and misleading communications in violation of Rule 7.1. The contents of direct  
82 in-person, ~~or other real-time communication between a lawyer and a~~  
83 ~~prospective client~~ live telephone or real-time electronic contact can be  
84 disputed and may not be subject to third-party scrutiny. Consequently, they

85 are much more likely to approach (and occasionally cross) the dividing line  
86 between accurate representations and those that are false and misleading.

87 ~~[4]~~[5] There is far less likelihood that a lawyer would engage in abusive  
88 practices against ~~an individual who is a~~ former client, or a person with whom  
89 the lawyer has a close personal or family relationship, or in situations in which  
90 the lawyer is motivated by considerations other than the lawyer's pecuniary  
91 gain. Nor is there a serious potential for abuse when the person contacted is a  
92 lawyer. Consequently, the general prohibition in Rule 7.3(a) and the  
93 requirements of Rule 7.3(c) are not applicable in those situations. Also,  
94 paragraph (a) is not intended to prohibit a lawyer from participating in  
95 constitutionally protected activities of public or charitable legal-service  
96 organizations or *bona fide* political, social, civic, fraternal, employee or trade  
97 organizations whose purposes include providing or recommending legal  
98 services to ~~its~~their members or beneficiaries.

99 ~~[5]~~[6] But even permitted forms of solicitation can be abused. Thus, any  
100 solicitation which contains information that is false or misleading within the  
101 meaning of Rule 7.1, that involves coercion, duress or harassment within the  
102 meaning of Rule 7.3(b)(2), or that involves contact with ~~a prospective client~~  
103 someone who has made known to the lawyer a desire not to be solicited by  
104 the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after  
105 sending a letter or other communication to ~~a client~~ as permitted by Rule 7.2  
106 the lawyer receives no response, any further effort to communicate with the  
107 ~~prospective client~~ recipient of the communication may violate the provisions of  
108 Rule 7.3(b).

109 ~~[6]~~[7] This Rule is not intended to prohibit a lawyer from contacting  
110 representatives of organizations or groups that may be interested in  
111 establishing a group or prepaid legal plan for their members, insureds,  
112 beneficiaries or other third parties for the purpose of informing such entities of

113 the availability of and the details concerning the plan or arrangement which  
114 the lawyer or lawyer's firm is willing to offer. This form of communication is not  
115 directed to ~~a prospective client~~ people who are seeking legal services for  
116 themselves. Rather, it is usually addressed to an individual acting in a  
117 fiduciary capacity seeking a supplier of legal services for others who may, if  
118 they choose, become prospective clients of the lawyer. Under these  
119 circumstances, the activity which the lawyer undertakes in communicating  
120 with such representatives and the type of information transmitted to the  
121 individual are functionally similar to and serve the same purpose as  
122 advertising permitted under Rule 7.2.

123 ~~[7]~~[8] The requirement in Rule 7.3(c) that certain communications be  
124 marked "Advertising Material" does not apply to communications sent in  
125 response to requests of potential clients or their spokespersons or sponsors.  
126 General announcements by lawyers, including changes in personnel or office  
127 location, do not constitute communications soliciting professional employment  
128 from a client known to be in need of legal services within the meaning of this  
129 Rule.

130 ~~[7a]~~[8a] Utah Rule 7.3(c) requires the words "Advertising Material" to be  
131 marked on the outside of an envelope, if any, and at the beginning of any  
132 recorded or electronic communication, but not at the end as the ABA Model  
133 Rule requires. Lawyer solicitations in public media that regularly contain  
134 advertisements do not need the " Advertising Material" notice because  
135 persons who view or hear such media usually recognize the nature of the  
136 communications.

137 ~~[8]~~[9] Paragraph (d) of this Rule permits a lawyer to participate with an  
138 organization that uses personal contact to solicit members for its group or  
139 prepaid legal service plan, provided that the personal contact is not  
140 undertaken by any lawyer who would be a provider of legal services through

141 the plan. The organization must not be owned by or directed (whether as  
142 manager or otherwise) by any lawyer or law firm that participates in the plan.  
143 For example, paragraph (d) would not permit a lawyer to create an  
144 organization controlled directly or indirectly by the lawyer and use the  
145 organization for the in-person or telephone, live person-to-person contacts or  
146 other real-time electronic solicitation of legal employment of the lawyer  
147 through memberships in the plan or otherwise. The communication permitted  
148 by these organizations also must not be directed to a person known to need  
149 legal services in a particular matter, but is to be designed to inform potential  
150 plan members generally of another means of affordable legal services.  
151 Lawyers who participate in a legal service plan must reasonably assure that  
152 the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule  
153 8.4(a).

The Court stated that there must be evidence of deception before an advertisement can be categorized as "actually misleading." *Id.*, 496 U.S. at 106. It then stated that a potentially misleading communication does not justify "a categorical prohibition against the dissemination of accurate factual information to the public." *Id.*, 496 U.S. at 109.

The Court did note that it could be misleading "if the certification had been issued by an organization that had made no inquiry into petitioner's fitness, or by one that issues certificates indiscriminately for a price." *Id.*, 496 U.S. at 102.

#### THERE IS A HEAVY CONSTITUTIONAL BURDEN TO RESTRICT TRUTHFUL AND NON-MISLEADING ADVERTISING.

The case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) and its progeny set forth strict criteria that courts must apply to permit restrictions on truthful and non-misleading advertising.

Specifically, (1) there must be a substantial state interest warranting the restriction; (2) the restriction must substantially further that interest; and (3) the restriction must not be overly broad. Furthermore, the entity restricting commercial speech has the burden to prove the criteria are satisfied: "[T]he First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement." *Id.* 447 U.S. at 572.

#### RULE 7.2 MUST CLEARLY COMPLY WITH THE UNITED STATES CONSTITUTION.

There is no substantial state interest furthered by precluding payment to a person for recommending the lawyer's services in a truthful and non-misleading advertisement.

Therefore, the list of permitted advertising costs in Comment 5 to Rule 7.2 should specifically include such a payment. That is, the third sentence of that Comment should read something like: "Paragraph (f), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio air time, domain-name registration, sponsorship fees, SPOKESPERSONS RECOMMENDING THE LAWYER'S SERVICES, internet-based advertisements, and group advertising."

Posted by Lynn P. Heward December 15, 2014 11:36 AM

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RPC 7.03 seems not to allow an attorney to contact a prospective client when the name and contact information for the prospective client has been referred to me by another attorney or another person, perhaps a family member of the prospective client. For example, John Doe calls or sends an email to me informing me that Jane Sparks has a particular problem with which John believes I can be of help and asks me to call Jane and then provides me her contact information. It would appear under RPC 7.03 that I would be in violation if I contacted her because it would appear that I am soliciting her for pecuniary gain. At least I do not see any exception for this kind of example that often occurs.

Posted by Michael A Jensen October 30, 2014 12:10 PM

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Almost every aspect of Rule 7.3, including the proposed changes, are completely ridiculous and sweepingly broad for the stated purposes within the rule. Rule 7.3 is reminiscent of the movie *Minority Report*, where Tom Cruise worked on a team punishing "pre-crime" because someone might commit a crime sometime in the near future. A Utah attorney cannot even call Bill Gates or President Obama to offer their services because they, the attorneys, may possibly exercise some undue influence over the richest and most powerful people on Earth. Really? We also cannot hire a salesman to do it for us because salesmen who work for attorneys somehow become dangerous when both prior and after working for the attorney, they were relatively benign salesmen. Again...really?

Though a number of states follow the ABA model rule, many other states permit in person solicitation. From a quick Google search I found that VA, NJ, MO, ME, NH, CT, and RI permit in person solicitation. Even CA and DC, some of the most regulated places in America, allow in person solicitation. Others probably also allow it, but

**Rule 7.3. ~~Direct Contact with Prospective~~ Solicitation of Clients.**

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact ~~or other real time communication~~ solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(a)(1) is a lawyer; ~~or~~

(a)(2) has a family, close personal, or prior professional relationship with the lawyer; or

(a)(3) is unable to make personal contact with a lawyer and the lawyer's contact with the prospective client has been initiated by a third-party on behalf of the prospective client....

**Comment**

...~~[4]~~~~[5]~~ There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or a person with whom the lawyer has a close personal or family relationship, or where the lawyer has been asked by a third-party to contact a prospective client unable to contact a lawyer, for example when the prospective client is incarcerated and unable to place a call or is mentally incapacitated and unable to appreciate the need for legal counsel, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain....

[10] The Utah version of Rule 7.3 varies from the model rule in that it authorizes in-person or other real time contact by a lawyer of a prospective client unable to make personal contact with a lawyer when the lawyer's contact with the prospective client has been initiated by a third-party on behalf of the prospective client.

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[45] There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client, or a person with whom the lawyer has a close personal or family relationship, or where the lawyer has been asked by a third party to contact a prospective client unable to contact a lawyer, for example when the prospective client is incarcerated and unable to place a call or is mentally incapacitated and unable to appreciate the need for legal counsel, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~its~~ their members or beneficiaries.

[5a] The Utah version of Rule 7.3 varies from the model rule in that it authorizes in-person or other real time contact by a lawyer of a prospective client unable to make personal contact with a lawyer when the lawyer's contact with the prospective client has been initiated by a third party on behalf of the prospective client.