

1 Rule 1.8. Conflict of Interest: ~~prohibited transactions~~ Current Clients: Specific Rules.

2 (a) A lawyer shall not enter into a business transaction with a client or knowingly
3 acquire an ownership, possessory, security or other pecuniary interest adverse to a
4 client unless:

5 ~~(a)(1) The the~~ transaction and terms on which the lawyer acquires the interest are
6 fair and reasonable to the client and are fully disclosed and transmitted in writing ~~to the~~
7 ~~client~~ in a manner ~~which that~~ can be reasonably understood by the client; ~~and~~

8 ~~(a)(2) The client the client is advised in writing of the desirability of seeking and~~ is
9 given a reasonable opportunity to seek the advice of independent legal counsel ~~in on~~
10 the transaction; and

11 ~~(a)(3) The client consents in writing thereto the client gives informed consent, in a~~
12 ~~writing signed by the client, to the essential terms of the transaction and the lawyer's~~
13 ~~role in the transaction, including whether the lawyer is representing the client in the~~
14 ~~transaction.~~

15 (b) A lawyer shall not use information relating to representation of a client to the
16 disadvantage of the client unless the client ~~consents after consultation gives informed~~
17 ~~consent, except as permitted or required by these Rules.~~

18 (c) A lawyer shall not ~~prepare an instrument giving the lawyer or a person related to~~
19 ~~the lawyer as parent, child, sibling or spouse solicit~~ any substantial gift from a client,
20 including a testamentary gift, ~~except where the client is related to the donee, or prepare~~
21 ~~on behalf of a client an instrument giving the lawyer or a person related to the lawyer~~
22 ~~any substantial gift unless the lawyer or other recipient of the gift is related to the client.~~
23 ~~For purpose of this paragraph, related persons include a spouse, child, grandchild,~~
24 ~~parent, grandparent or other relative or individual with whom the lawyer or the client~~
25 ~~maintains a close, familial relationship.~~

26 (d) Prior to the conclusion of representation of a client, a lawyer shall not make or
27 negotiate an agreement giving the lawyer literary or media rights to a portrayal or an
28 account based in substantial part on information relating to the representation.

29 (e) A lawyer shall not provide financial assistance to a client in connection with
30 pending or contemplated litigation, except that:

31 ~~(e)(1) A-a~~ lawyer may advance court costs and expenses of litigation, the repayment
32 of which may be contingent on the outcome of the matter; and

33 ~~(e)(2) A-a~~ lawyer representing an indigent client may pay court costs and expenses
34 of litigation, and minor expenses reasonably connected to the litigation, on behalf of the
35 client.

36 (f) A lawyer shall not accept compensation for representing a client from one other
37 than the client unless:

38 ~~(f)(1) The the~~ client ~~consents after consultation~~ gives informed consent;

39 ~~(f)(2) There there~~ is no interference with the lawyer's independence of professional
40 judgment or with the client-lawyer relationship; and

41 ~~(f)(3) Information information~~ relating to representation of a client is protected as
42 required by Rule 1.6.

43 (g) A lawyer who represents two or more clients shall not participate in making an
44 aggregate settlement of the claims of or against the clients or in a criminal case an
45 aggregated agreement as to guilty or nolo contendere pleas, unless each client
46 ~~consents after consultation, including disclosure of~~ gives informed consent, in writing
47 signed by the client. The lawyer's disclosure shall include the existence and nature of
48 all the claims or pleas involved and of the participation of each person in the settlement.

49 (h) A lawyer shall not:

50 ~~(h)(1)~~ make an agreement prospectively limiting the lawyer's liability to a client for
51 malpractice unless ~~permitted by law and~~ the client is independently represented in
52 making the agreement; or

53 ~~(h)(2)~~ settle a claim or potential claim for such liability with an unrepresented client
54 or former client ~~without first advising that person in writing that independent~~
55 ~~representation is appropriate unless that person is advised in writing of the desirability~~
56 of seeking and is given a reasonable opportunity to seek the advice of independent
57 legal counsel in connection therewith.

58 ~~(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not~~
59 ~~represent a client in a representation directly adverse to a person who the lawyer knows~~
60 ~~is represented by the other lawyer except upon consent by the client after consultation~~
61 ~~regarding the relationship.~~

62 ~~(i)~~(i) A lawyer shall not acquire a proprietary interest in the cause of action or
63 subject matter of litigation the lawyer is conducting for a client, except that the lawyer
64 may:

65 ~~(i)(1) Acquire-acquire~~ a lien ~~granted-authorized~~ by law to secure the lawyer's fee or
66 expenses; and

67 ~~(i)(2) Contract-contract~~ with a client for a reasonable contingent fee in a civil case.

68 ~~(i) A lawyer shall not engage in sexual relations with a client that exploit the lawyer-~~
69 ~~client relationship. For the purposes of this Rule:~~

70 ~~(i)(1) "sexual relations" means sexual intercourse or the touching of an intimate part~~
71 ~~of another person for the purpose of sexual arousal, gratification, or abuse; and~~

72 ~~(i)(2) except for a spousal relationship or a sexual relationship that existed at the~~
73 ~~commencement of the lawyer-client relationship, sexual relations between the lawyer~~
74 ~~and the client shall be presumed to be exploitive. This presumption is rebuttable.~~

75 ~~(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs~~
76 ~~(a) through (i) that applies to any one of them shall apply to all of them.~~

77 Comment

78 Business Transactions Between Client and Lawyer

79 ~~As a general principle, all transactions between client and lawyer should be fair and~~
80 ~~reasonable to the client. In such transactions, a review by independent counsel on~~
81 ~~behalf of the client is often advisable. Furthermore, a lawyer may not exploit information~~
82 ~~relating to the representation to the client's disadvantage. For example, a lawyer who~~
83 ~~has learned that the client is investing in specific real estate may not, without the client's~~
84 ~~consent, seek to acquire nearby property where doing so would adversely affect the~~
85 ~~client's plan for investment. Paragraph (a) does not, however,~~

86 [1] A lawyer's legal skill and training, together with the relationship of trust and
87 confidence between lawyer and client, create the possibility of overreaching when the
88 lawyer participates in a business, property or financial transaction with a client, for
89 example, a loan or sales transaction or a lawyer investment on behalf of a client. The
90 requirements of paragraph (a) must be met even when the transaction is not closely
91 related to the subject matter of the representation, as when a lawyer drafting a will for a
92 client learns that the client needs money for unrelated expenses and offers to make a

93 loan to the client. The Rule applies to lawyers engaged in the sale of goods or services
94 related to the practice of law, for example, the sale of title insurance or investment
95 services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies
96 to lawyers purchasing property from estates they represent. It does not apply to
97 ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5,
98 although its requirements must be met when the lawyer accepts an interest in the
99 client's business or other nonmonetary property as payment of all or part of a fee. In
100 addition, the Rule does not apply to standard commercial transactions between the
101 lawyer and the client for products or services that the client generally markets to others,
102 for example, banking or brokerage services, medical services, products manufactured
103 or distributed by the client, and ~~utilities~~utilities' services. In such transactions, the
104 lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a)
105 are unnecessary and impracticable.

106 [2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that
107 its essential terms be communicated to the client, in writing, in a manner that can be
108 reasonably understood. Paragraph (a)(2) requires that the client also be advised, in
109 writing, of the desirability of seeking the advice of independent legal counsel. It also
110 requires that the client be given a reasonable opportunity to obtain such advice.
111 Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a
112 writing signed by the client, both to the essential terms of the transaction and to the
113 lawyer's role. When necessary, the lawyer should discuss both the material risks of the
114 proposed transaction, including any risk presented by the lawyer's involvement, and the
115 existence of reasonably available alternatives and should explain why the advice of
116 independent legal counsel is desirable. See Rule 1.0(e) (definition of informed
117 consent).

118 [3] The risk to a client is greatest when the client expects the lawyer to represent the
119 client in the transaction itself or when the lawyer's financial interest otherwise poses a
120 significant risk that the lawyer's representation of the client will be materially limited by
121 the lawyer's financial interest in the transaction. Here the lawyer's role requires that the
122 lawyer must comply, not only with the requirements of paragraph (a), but also with the
123 requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks

124 associated with the lawyer's dual role as both legal adviser and participant in the
125 transaction, such as the risk that the lawyer will structure the transaction or give legal
126 advice in a way that favors the lawyer's interests at the expense of the client. Moreover,
127 the lawyer must obtain the client's informed consent. In some cases, the lawyer's
128 interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's
129 consent to the transaction.

130 [4] If the client is independently represented in the transaction, paragraph (a)(2) of
131 this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is
132 satisfied either by a written disclosure by the lawyer involved in the transaction or by the
133 client's independent counsel. The fact that the client was independently represented in
134 the transaction is relevant in determining whether the agreement was fair and
135 reasonable to the client as paragraph (a)(1) further requires.

136 Use of Information Related to Representation

137 [5] Use of information relating to the representation to the disadvantage of the client
138 violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used
139 to benefit either the lawyer or a third person, such as another client or business
140 associate of the lawyer. For example, if a lawyer learns that a client intends to
141 purchase and develop several parcels of land, the lawyer may not use that information
142 to purchase one of the parcels in competition with the client or to recommend that
143 another client make such a purchase. The Rule does not prohibit uses that do not
144 disadvantage the client. For example, a lawyer who learns a government agency's
145 interpretation of trade legislation during the representation of one client may properly
146 use that information to benefit other clients. Paragraph (b) prohibits disadvantageous
147 use of client information unless the client gives informed consent, except as permitted
148 or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

149 Gifts to Lawyers

150 [6] A lawyer may accept a gift from a client, if the transaction meets general
151 standards of fairness. For example, a simple gift such as a present given at a holiday or
152 as a token of appreciation is permitted. If a client offers the lawyer a more substantial
153 gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift
154 may be voidable by the client under the doctrine of undue influence, which treats client

155 gifts as presumptively fraudulent. In any event, due to concerns about overreaching
156 and imposition on clients, a lawyer may not suggest that a substantial gift be made to
157 the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as
158 set forth in paragraph (c).

159 [7] If effectuation of a substantial gift requires preparing a legal instrument such as a
160 will or conveyance, ~~however,~~ the client should have the detached advice that another
161 lawyer can provide. ~~Paragraph (c) recognizes an~~ The sole exception to this Rule is
162 where the client is a relative of the donee ~~or the gift is not substantial.~~

163 [8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner
164 or associate of the lawyer named as executor of the client's estate or to another
165 potentially lucrative fiduciary position. Nevertheless, such appointments will be subject
166 to the general conflict of interest provision in Rule 1.7 when there is a significant risk
167 that the lawyer's interest in obtaining the appointment will materially limit the lawyer's
168 independent professional judgment in advising the client concerning the choice of an
169 executor or other fiduciary. In obtaining the client's informed consent to the conflict, the
170 lawyer should advise the client concerning the nature and extent of the lawyer's
171 financial interest in the appointment, as well as the availability of alternative candidates
172 for the position.

173 Literary Rights

174 [9] An agreement by which a lawyer acquires literary or media rights concerning the
175 conduct of the representation creates a conflict between the interests of the client and
176 the personal interests of the lawyer. Measures suitable in the representation of the client
177 may detract from the publication value of an account of the representation. Paragraph
178 (d) does not prohibit a lawyer representing a client in a transaction concerning literary
179 property from agreeing that the lawyer's fee shall consist of a share in ownership in the
180 property, if the arrangement conforms to Rule 1.5 ~~and paragraph (j).~~

181 ~~Person Paying for Lawyer's Services~~

182 ~~Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for~~
183 ~~by a third party. Such an arrangement must also conform to the requirements of Rule~~
184 ~~1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the~~

185 ~~client is a class, consent may be obtained on behalf of the class by court-supervised~~
186 ~~procedure.~~

187 ~~Family Relationships Between Lawyers~~

188 ~~Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in~~
189 ~~the same firm are governed by Rules 1.7, 1.9 and 1.10. The disqualification stated in~~
190 ~~Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers~~
191 ~~are associated.~~

192 ~~Acquisition of Interest in Litigation~~

193 ~~Paragraph (j) states the traditional general rule that lawyers are prohibited from~~
194 ~~acquiring a proprietary interest in litigation. This general rule, which has its basis in~~
195 ~~common law champerty and maintenance, is subject to specific exceptions developed in~~
196 ~~decisional law and continued in these Rules, such as the exception for reasonable~~
197 ~~contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs~~
198 ~~of litigation set forth in paragraph (e).~~

199 ~~This Rule is not intended to apply to customary qualifications and limitations in legal~~
200 ~~opinions and memoranda.~~

201 ~~Financial Assistance~~

202 ~~[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on~~
203 ~~behalf of their clients, including making or guaranteeing loans to their clients for living~~
204 ~~expenses, because to do so would encourage clients to pursue lawsuits that might not~~
205 ~~otherwise be brought and because such assistance gives lawyers too great a financial~~
206 ~~stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a~~
207 ~~client court costs and litigation expenses, including the expenses of medical~~
208 ~~examination and the costs of obtaining and presenting evidence, because these~~
209 ~~advances are virtually indistinguishable from contingent fees and help ensure access to~~
210 ~~the courts. Similarly, an exception allowing lawyers representing indigent clients to pay~~
211 ~~court costs and litigation expenses and minor sums reasonably connected to the~~
212 ~~litigation, such as the cost of maintaining nominal basic local telephone service or~~
213 ~~providing bus passes to enable the indigent client to have means of contact with the~~
214 ~~lawyer during litigation, regardless of whether these funds will be repaid, is warranted.~~

215 [10a] Relative to the ABA Model Rule, Utah Rule 1.8(e)(2) broadens the scope of
216 direct support that a lawyer may provide to indigent clients to cover minor expenses
217 reasonably connected to the litigation. This would include, for example, financial
218 assistance in providing transportation, communications or lodging that would be
219 required or desirable to assist the indigent client in the course of the litigation.

220 Person Paying for a Lawyer's Services

221 [11] Lawyers are frequently asked to represent a client under circumstances in
222 which a third person will compensate the lawyer, in whole or in part. The third person
223 might be a relative or friend, an indemnitor (such as a liability insurance company) or a
224 co-client (such as a corporation sued along with one or more of its employees).
225 Because third-party payers frequently have interests that differ from those of the client,
226 including interests in minimizing the amount spent on the representation and in learning
227 how the representation is progressing, lawyers are prohibited from accepting or
228 continuing such representations unless the lawyer determines that there will be no
229 interference with the lawyer's independent professional judgment and there is informed
230 consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's
231 professional judgment by one who recommends, employs or pays the lawyer to render
232 legal services for another).

233 [12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed
234 consent regarding the fact of the payment and the identity of the third-party payer. If,
235 however, the fee arrangement creates a conflict of interest for the lawyer, then the
236 lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements
237 of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if
238 there is significant risk that the lawyer's representation of the client will be materially
239 limited by the lawyer's own interest in the fee arrangement or by the lawyer's
240 responsibilities to the third-party payer (for example, when the third-party payer is a
241 co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with
242 the informed consent of each affected client, unless the conflict is nonconsentable
243 under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in
244 writing.

245 Aggregate Settlements

246 [13] Differences in willingness to make or accept an offer of settlement are among
247 the risks of common representation of multiple clients by a single lawyer. Under Rule
248 1.7, this is one of the risks that should be discussed before undertaking the
249 representation, as part of the process of obtaining the clients' informed consent. In
250 addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether
251 to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo
252 contendere plea in a criminal case. The rule stated in this paragraph is a corollary of
253 both these Rules and provides that, before any settlement offer or plea bargain is made
254 or accepted on behalf of multiple clients, the lawyer must inform each of them about all
255 the material terms of the settlement, including what the other clients will receive or pay if
256 the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed
257 consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding
258 derivatively, may not have a full client-lawyer relationship with each member of the
259 class; nevertheless, such lawyers must comply with applicable rules regulating
260 notification of class members and other procedural requirements designed to ensure
261 adequate protection of the entire class.

262 Limiting Liability and Settling Malpractice Claims

263 [14] Agreements prospectively limiting a lawyer's liability for malpractice are
264 prohibited unless the client is independently represented in making the agreement
265 because they are likely to undermine competent and diligent representation. Also,
266 many clients are unable to evaluate the desirability of making such an agreement before
267 a dispute has arisen, particularly if they are then represented by the lawyer seeking the
268 agreement. This paragraph does not, however, prohibit a lawyer from entering into an
269 agreement with the client to arbitrate legal malpractice claims, provided such
270 agreements are enforceable and the client is fully informed of the scope and effect of
271 the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form
272 of a limited-liability entity, where permitted by law, provided that each lawyer remains
273 personally liable to the client for his or her own conduct and the firm complies with any
274 conditions required by law, such as provisions requiring client notification or
275 maintenance of adequate liability insurance. Nor does it prohibit an agreement in
276 accordance with Rule 1.2 that defines the scope of the representation, although a

277 definition of scope that makes the obligations of representation illusory will amount to an
278 attempt to limit liability.

279 [15] Agreements settling a claim or a potential claim for malpractice are not
280 prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair
281 advantage of an unrepresented client or former client, the lawyer must first advise such
282 a person in writing of the appropriateness of independent representation in connection
283 with such a settlement. In addition, the lawyer must give the client or former client a
284 reasonable opportunity to find and consult independent counsel.

285 Acquiring Proprietary Interest in Litigation

286 [16] Paragraph (i) states the traditional general rule that lawyers are prohibited from
287 acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its
288 basis in common law champerty and maintenance and is designed to avoid giving the
289 lawyer too great an interest in the representation. In addition, when the lawyer acquires
290 an ownership interest in the subject of the representation, it will be more difficult for a
291 client to discharge the lawyer if the client so desires. The Rule is subject to specific
292 exceptions developed in decisional law and continued in these Rules. The exception for
293 certain advances of the costs of litigation is set forth in paragraph (e). In addition,
294 paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's
295 fees or expenses and contracts for reasonable contingent fees. The law of each
296 jurisdiction determines which liens are authorized by law. These may include liens
297 granted by statute, liens originating in common law and liens acquired by contract with
298 the client. When a lawyer acquires by contract a security interest in property other than
299 that recovered through the lawyer's efforts in the litigation, such an acquisition is a
300 business or financial transaction with a client and is governed by the requirements of
301 paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

302 Client-Lawyer Sexual Relationships

303 [17] The relationship between lawyer and client is a fiduciary one in which the
304 lawyer occupies the highest position of trust and confidence. The relationship is almost
305 always unequal; thus, a sexual relationship between lawyer and client can involve unfair
306 exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical
307 obligation not to use the trust of the client to the client's disadvantage. In addition, such

308 a relationship presents a significant danger that, because of the lawyer's emotional
309 involvement, the lawyer will be unable to represent the client without impairment of the
310 exercise of independent professional judgment. Moreover, a blurred line between the
311 professional and personal relationships may make it difficult to predict to what extent
312 client confidences will be protected by the attorney-client evidentiary privilege, since
313 client confidences are protected by privilege only when they are imparted in the context
314 of the client-lawyer relationship. Because of the significant danger of harm to client
315 interests and because the client's own emotional involvement renders it unlikely that the
316 client could give adequate informed consent, this Rule prohibits the lawyer from having
317 sexual relations with a client regardless of whether the relationship is consensual and
318 regardless of the absence of prejudice to the client.

319 [18] Spousal relationships and sexual relationships that predate the client-lawyer
320 relationship are not prohibited. Issues relating to the exploitation of the fiduciary
321 relationship and client dependency are diminished when the sexual relationship existed
322 prior to the commencement of the client-lawyer relationship. However, before
323 proceeding with the representation in these circumstances, the lawyer should consider
324 whether the lawyer's ability to represent the client will be materially limited by the
325 relationship. See Rule 1.7(a)(2).

326 [19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer
327 for the organization (whether inside counsel or outside counsel) from having a sexual
328 relationship with a constituent of the organization who supervises, directs or regularly
329 consults with that lawyer concerning the organization's legal matters.

330 [19a] Utah Rule 1.8(j) is different from the ABA Model Rule. It follows the language
331 from former Utah Rule 8.4(g) regarding the prohibition of sexual relations with a client.
332 This Rule defines "sexual relations" and clarifies the presumption that sexual relations
333 with a client are exploitive of the client.

334 Imputation of Prohibitions

335 [20] Under paragraph (k), a prohibition on conduct by an individual lawyer in
336 paragraphs (a) through (i) also applies to all lawyers associated in a firm with the
337 personally prohibited lawyer. For example, one lawyer in a firm may not enter into a
338 business transaction with a client of another member of the firm without complying with

339 paragraph (a), even if the first lawyer is not personally involved in the representation of
340 the client. The prohibition set forth in paragraph (j) is personal and is not applied to
341 associated lawyers.
342