TAB 1

USB ETHICS ADVISORY OPINION 06-04

Requirement to promptly comply with reasonable requests for information. (Rule 1.4)

Utah Ethics Opinions

2006.

06-04. UTAH STATE BAR

ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 06-04

Issued December 8, 2006

1. **Issue:** May a current or former client's access to information in his client file in a criminal matter be restricted by his attorney?

2. **Opinion:** Absent prosecutorial or court-ordered restrictions, a former client's access to his client file may not be restricted. In limited circumstances, a lawyer may delay transmission of certain information in a current client's file.

3. **Facts:** In the course of representation, a public defender may develop client files that contain crime-scene photos, autopsy photos, victim body photos (such as in criminal or physical-abuse cases), third-party medical reports, victim-identification information (social security numbers, addresses and telephone numbers), psychological and psychosexual evaluations and reports regarding the client and others. Some of these documents in the client file may have been obtained through discovery or be subject to court-ordered or other prosecutorial restrictions on dissemination to the client. Not infrequently, current and former clients in criminal matters request all or portions of their files that may contain restricted materials.

Analysis:

A. As to Current Clients.

4. Rule 1.4 sets out the general rule:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.1

5. The obligation of a lawyer to keep the client "reasonably informed" and "promptly comply with reasonable requests for information" contained in Rules 1.4(a)(3), and (a)(4), implies that the lawyer may, under some circumstances, withhold information from a client whose request may be viewed as "unreasonable." This is supported in comment [7] to Rule 1.4:

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. *Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client.* Rule 3.4(c) directs compliance with such rules or orders.2

Comment [7] makes clear that rules and court orders restricting disclosure of information that may become part of the client file cannot be disclosed to the client.

6. There are several rules and statutes that permit or impose dissemination restrictions on sensitive materials. Rule 16(e) of the Utah Rules of Criminal Procedure allows limits to be imposed on the use of information provided through discovery. Rule 16(f) further provides for the entry of court orders limiting dissemination of sensitive discovery.3 Information obtained from a governmental entity may be subject to court orders restricting dissemination under the Governmental Records Access and Management Act.4

7. Discovery that has been provided with restrictions on dissemination to a client in a criminal law case under Rule 16(e) or is subject to a court order limiting its release to the client may not be released to the client by the client's lawyer, notwithstanding a specific request by the client or

former client. It should be noted, however, that material in the client file that may have been submitted by third parties to defense counsel under restrictions imposed by law on the *third party*, but not defense counsel, may be subject to release to the client on request.5

8. If the client file contains information that is not subject to restrictions, comment [7] to Rule 1.4 gives the lawyer limited ability to withhold information in the client file on her own determination.6 Comment [7] makes explicit what has been left implicit in Rule 1.4 - that a lawyer under some circumstances may *delay* transmission of information to a current client to which he "would be likely to react imprudently." This phrase is remarkably broad, particularly in this instance where the text of the rule contains no explicit exception in this regard. The term "imprudently" is not defined in the comment or the Rules. However, the example provided in the comment [7] gives context for interpreting the scope of this implicit duty to a client. The example approves a lawyer's withholding a report of a client's psychiatric diagnosis when the examining psychiatrist indicates that disclosure would harm the client. The example is representative of the level of certainty that the lawyer needs to reach before invoking this exception on behalf of a current client.

9. In cases where it is clear that the client may be harmed by an immediate disclosure or, in other cases where the client might take reasonably anticipated "imprudent" action that would harm his interest or freedom, delayed communication of information may be justified.

10. The phrase "react imprudently" is limited further by comment [7], which provides that a lawyer cannot withhold information to serve his or another person's interest or convenience. Based on the example in comment [7], we believe the lawyer is not justified in withholding information to spare a client from unpleasantness or shock or to serve a third party's interest where a client makes a request for such material.7

11. Hazard and Hodes argue for a narrow reading of the comment:

The final paragraph of the comment to Model Rule 1.4 contains a statement respecting communication that might be misunderstood and perhaps would have been better left unsaid. Comment [7] permits a delay in communicating information if the client might "react imprudently to an immediate communication." The examples given (of disturbing psychiatric diagnosis or of information embargoed by court order) are unusual, and the Comment must be understood to be limited to similarly unusual situations. In particular, the Comment should not be interpreted to mean that a lawyer may withhold information simply because he fears the client will make an "imprudent" decision about the subject of the representation, such as accepting an inadequate settlement offer. See Illustration 7 3. Such conduct would be paternalistic, and would fly in the face of Rule 1.2(a) which requires the lawyer to abide by the client's decision as to settlement.8

12. Given that there is no explicit exception in Rule 1.4 and understanding that the comment to Rule 1.4 is not "authoritative," a lawyer needs to proceed cautiously in this area with the perceived harm to the client being clearly identified and reasonably certain.

13. If a lawyer determines to withhold information from a current client, it is incumbent on the lawyer to make a full disclosure to the client of the materials withheld, the basis for withholding the information and the harm avoided or client interest being protected or advanced. If a client disagrees with the lawyer's judgment, the client can consult further with the lawyer or other professionals or terminate the representation and request the full client file in the possession of the lawyer.

14. Rule 1.14, Client with Diminished Capacity, also may apply to restrict dissemination of information in the client file. The lawyer under this rule is charged to take "reasonably necessary protective action." Comment [6] to Rule 1.4 acknowledges this possibility:

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

15. The presumption under Rule 1.4 is that all information in a client file is the client's unless restricted by a statute, discovery rule or court order, and, however unpleasant the information, unless the anticipated harm to the client is reasonably certain, the client is entitled to receive the information in his client file. This is not to say that the lawyer is required to copy and forward to a client all reports and information in his file without request, if the information is not necessary to the representation. However, if the client requests a full copy of the file or certain reports or information, unless otherwise restricted, it must be provided to the client, unless exceptional circumstances apply.

16. The Restatement of the Law Governing Lawyers provides:

On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to their representation unless substantial grounds exist to refuse.

Unless a client or former client consents to non delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former reasonably needs.10

17. Comment c of § 46 of the Restatement provides, in part:

Under conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm, may deny the client access to the report (see § 20, Comments c and d; and § 24, Comment c). Ordinarily, however, what will be useful to the client is for the client to decide.11

We believe that this commentary is consistent with the Utah Rules of Professional Conduct and accordingly adopt its conclusion.

B. As to Former Clients.

18. Rule 1.16(d), Declining or Terminating Representation, provides, in part: "The lawyer must provide, upon request, the client's file to the client." Comment [9] to Rule 1.16 states:

Upon termination of representation, a lawyer shall provide, upon request, the client's file to the client notwithstanding any other law, including attorney lien laws. It is impossible to set forth one all-encompassing definition of what constitutes the client file. However, the client file generally would include the following: all papers and property the client provides to the lawyer, litigation materials such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions, business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings.

19. A former client's right to material that constitutes the client file is almost always unrestricted, notwithstanding a concern over a client's reaction to or subsequent use of expert's evaluations or reports, discovery, correspondence, crime scene photos and other papers. However, information or material received by the client's lawyer that is restricted by statute, court rule or court order is not a part of the "client file" that the client or former client has a right to receive.

C. An Exception.

20. An exception to unrestricted access that applies to both current and former clients making requests for information in their client file is found in Rule 1.2(d):

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any professional conduct with the client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

If the lawyer knows that material in a client file will be used in conduct that is criminal or fraudulent, she may decline to assist the client by withholding the material, but she must so inform the client of her belief and reasons for withholding information in the client file that the client would otherwise have unrestricted right to receive. The unrestricted right of a former client to his client file was confirmed in our recent Opinion No. 06 02. 12 Other jurisdictions have reached similar conclusions.13

Conclusion:

21. Other than material subject to restrictions imposed pursuant to Rule 16 of the Utah Rules of Criminal Procedure, court order or by a statute 14 (which do not become part of the "client file"), the client or former client, if competent and not engaging in fraudulent or criminal conduct, has a right to all material in the client file under Rule 1.16 and our Opinion No. 06 02. However, in the exceptional circumstance where harm to a current client is reasonably certain if the information is given to the client, delayed transmission of information under Rule 1.4 may be justified to protect the client. For either current or former clients, material that is part of the client file may be withheld to prevent fraudulent or criminal conduct.

Footnotes

1. Utah R. Prof. Conduct 1.4 (2006). Subsequent references to the Rules are to the Utah Rules of Professional Conduct, effective November 1, 2006.

2. *Id.*, cmt. [7] (emphasis added). Rule 3.4(c) provides that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on

an assertion that no valid obligation exists."

3. Rules 16(e), (f) and (g) of the Utah Rules of Criminal Procedure provide:

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places. The prosecutor or defense may impose reasonable limitations on the further dissemination of sensitive information or to protect victims and witnesses from harassment, abuse or undue invasion of privacy, including limitations on the further dissemination of videotaped interviews, photographs, or psychological or medical reports.

(f) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, that limitations on the further dissemination of discovery be modified or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed or it may enter such other order as it deems just under the circumstances.

4. Utah Code Ann. §§ 63 2 202, -206 (2006).

5. *See, e.g.*, S. Car. Ethics Op 98 10, http://www.scbar.org/member/opinion.asp?opinionID= 499 (client mental health records delivered by physician marked "not to be shown to the patient" and held by the lawyer to be turned over to client upon his request after representation ends, notwithstanding that, under an applicable state statute, a physician can withhold from a patient a patient's medical information).

6. Although comments to the Rules of Professional Conduct are not authoritative, they provide guidance in applying our Rules: "The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on Scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative." Utah R. Prof. Conduct, Preamble [21].

7. At least one state has modified comment [7] to Rule 1.4 to foreclose the possibility of any broad reading that would erode the mandate of Rule 1.4. North Dakota has adopted the following comment to Rule 1.4 as it applies to withholding information:

When a lawyer reasonably believes the disclosure of certain information to a client would have a high probability of resulting in substantial harm to a client or others, the lawyer may withhold or delay the transmission of the information, but only to the extent reasonably necessary to avoid the harm. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold or delay the transmission of information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

N. Dak. R. Prof. Conduct 1.4, cmt. [4].

8. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 7.4, at 7-8 to 7-9 (3d ed. 2001).

9. The "client file" does not necessarily refer to all information that is in the physical file the lawyer maintains and develops for the client. It does not include, for example, lawyer work product or unfiled pleadings. Rule 1.16, cmt. [9].

10. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 46(2) & 46(3) (2000).

11. *Id.* cmt. c.

12. Utah Ethics Adv. Op. 06-02, 2006 WL 7134886 (Utah St. Bar).

13. *See* S.Car. Ethics Op. 98-10, n.3.

14. *E.g.*, Utah Government Records Access and Management Act, Utah Code Ann. §§ 63-2-101 *et seq.* (2006).

TAB 2

USB ETHICS ADVISORY OPINION 06-02

Expert reports are part of the "client file."

Utah Ethics Opinions

2006.

06-02. UTAH STATE BAR

ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 06-02

June 2, 2006

Issue: Is an unexecuted trust or will or an unfiled extraordinary writ prepared by a lawyer for a client part of the "client's file" within the meaning of Rule 1.16 which must be delivered to the client at the termination of the representation.

Opinion: An unexecuted legal instrument such as a trust or will, or an unfiled pleading, such as an extraordinary writ, is not part of the "client's file" within the meaning of Rule 1.16(d). The lawyer is not required by Rule 1.16 to deliver these documents to the client at the termination of the representation.

Facts: An attorney accepted a fixed fee engagement to prepare for a client a trust, a will and a petition for extraordinary writ. The lawyer sent a retainer agreement to the client reflecting the fixed fee engagement, but the client did not sign the retainer agreement. The lawyer prepared the trust, will and petition for extraordinary writ, but the client refused to pay the lawyer for the services, and the client terminated the attorney-client relationship. The client is now demanding that the lawyer deliver to the client as part of the "client's file" the unexecuted trust and will, and the unfiled extraordinary writ.

Analysis: Rule 1.16(d) of the Utah Rules of Professional Conduct differs from the ABA Model Rule 1.16(d) in that the Model Rule permits the lawyer to retain the "client's file" following the termination of the attorney-client relationship if state law affords the lawyer a retaining lien against the client's file for purposes of securing the lawyer's fee. Model Rule 1.16(d) states: "The lawyer may retain papers relating to the client to the extent permitted by other laws."

Utah Rule 1.16(d) was amended to delete from Rule 1.16(d) the right of the lawyer to assert a retaining lien against the "client's file". Utah Rule 1.16(d) states: "The lawyer must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer's expense."

Comment 9 to Rule 1.16(d) explains the amendment to Utah Rule 1.16(d) as follows: "The Utah Rule differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses owing to the lawyer."

The amendment of Utah Rule 1.16(d) followed the Utah Supreme Court's decision in *Jones Waldo Holbrook & McDonough v. Dawson*, 923 P.2d 1366 (Utah 1996). In *Dawson* the plaintiff law firm sued its client for payment of its attorney's fees. In a "postscript" to its decision, the Utah Supreme Court stated that it disapproved of the plaintiff law firm's assertion of a retaining lien in the defendant's file during on-going litigation following the termination of the attorney-client relationship. Although the Court affirmed in part a judgment in favor of the plaintiff law firm for unpaid fees and costs, the Court stated that the plaintiff law firm had failed to "take steps to the extent reasonably practicible to protect the client's interest, such as surrendering papers and property to which the client is entitled (quoting from Rule 1.16(d))" when the law firm refused to surrender to defendant her file during the course of on-going litigation. 1

It is noteworthy that the plaintiff law firm's conduct in *Dawson* was consistent with Ethics Advisory Opinion Committee Opinion No. 91 (May 17, 1989). This Opinion concluded that the use of the common law attorney's retaining lien recognized by the Utah Supreme Court in several cases was not per se improper under Rule 1.14 (currently, Rule 1.16). Relying on decisions of the Utah Supreme Court, Opinion No. 91 permitted use of a retaining lien even in the course of on-going litigation if (i) the lawyer was wrongfully discharged or withdrew for good cause; and (ii) during the representation, the lawyer represented the client with reasonable diligence.

In adopting Opinion No. 91, the Board of Bar Commissioners recommended a Petition for Amendment of Rule 1.14 (currently Rule 1.16) be filed with the Utah Supreme Court "to clarify the attorney's duty to the client in returned documents and papers upon termination of representation".

With Utah's amended Rule 1.16(d), it is clear that if the unexecuted trust and will or the unfiled petition for extraordinary writ are part of the "client's file", then the lawyer is required by Rule 1.16(d) to turn over to the client the trust, will and petition for extraordinary writ upon the termination of the representation, regardless of whether the lawyer has been wrongfully discharged and regardless of whether the lawyer has been paid for these services. It is therefore critical to determine what is the "client's file" within the meaning of Rule 1.16(d).

Comment 9 of Rule 1.16 states: "It is impossible to set forth one all encompassing definition of what constitutes the client's file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation material such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings."

Of significance to the issue before the Committee is the statement in Comment 9 to Rule 1.16 that the client file would not include the attorney's work product and would not include unfiled pleadings. This would exclude the unfiled petition for extraordinary writ from the "client's file" within the meaning of Rule 1.16(d). We interpret Comment 9 to also exclude from the "client's file" unsigned legal instruments such as agreements, trusts and wills. Unsigned legal instruments such as agreements, trusts and wills are the transactional lawyer's equivalent of the litigation lawyer's unfiled pleadings. 2 This interpretation is not at odds with the Rule 1.16(d) requirement that upon the termination of representation the lawyer takes steps "to the extent reasonably practicible to protect the client's interest". Unlike the pleadings and correspondence files withheld from the client in *Dawson* during on-going litigation, depriving the client of unexecuted legal instruments (such as agreements, trusts and wills) will not normally prejudice the client's interests. The same is true of withholding from the client unfiled legal pleadings. The client is entitled to the client's own papers and property and the "client's file", and the client may deliver these to new counsel for the purpose of preparing the legal instruments and the legal pleadings in accordance with the instructions of the client.

Our interpretation of Comment 9 also is consistent with public policy on two fronts: (i) lawyers should not be exposed to liabilities arising from a requirement that the lawyer deliver to the client upon termination of the representation legal instruments that are neither executed nor filed as such instruments may be incomplete drafts or unchecked final documents not appropriate for execution or filing by the client or the client's new counsel; and (ii) the Utah Rules of Professional Conduct should not be interpreted in a manner to encourage and facilitate unscrupulous clients in defrauding lawyers by requesting the preparation of legal instruments, then terminating the attorney-client relationship after the legal instruments are prepared, for the purpose of obtaining the lawyer's services without payment.

Footnotes

1 *Jones Waldo Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1376 (Utah 1996).

2 The punctuation of Comment 9 quoted above is interpreted by the Committee to exclude from the client file unfiled pleadings, whether or not they constitute lawyer's "work product". The Committee interprets the Comment to include as lawyer's "work product" documents containing the lawyer's recorded mental impressions. Unexecuted legal instruments and unfiled legal pleadings are often incomplete or non-final drafts. As such, these documents contain the lawyer's mental impressions (not the lawyer's finalized legal services), and constitute the lawyer's "work product".

TAB 3

RULE 20A OF THE URJP; RULE 35 OF THE URCP; AND RULE 706 OF THE URE

Mental Examination of Persons and Court-Appointed Experts

Rule 20A. Discovery in non-delinquency proceedings.

(a) Scope of discovery. The scope of discovery is governed by Utah R. Civ. P. 26(b)(1). Unless ordered by the court, no discovery obligation may be imposed upon a minor.

(b) Disclosures. Within 14 days of the answer, a party shall, without awaiting a discovery request, make reasonable efforts to provide to other parties information necessary to support its claims or defenses, unless solely for impeachment or unless the identity of a person is protected by statute, identifying the subjects of the information. The party shall inform the other party of the existence of such records.

(c) Depositions upon oral questions. After the filing of the answer, a party may take the testimony of any person, including a party, by deposition upon oral question without leave of the court. Depositions shall be conducted pursuant to Utah R. Civ. P. 30. The record of the deposition shall be prepared pursuant to Utah R. Civ. P. 30(f) except the deponent will have seven days to review the transcript or recording under Utah R. Civ. P. 30(e). The use of depositions in court proceedings shall be governed by Utah R. Civ. P. 32.

(d) Interrogatories. After the filing of the answer, interrogatories may be used pursuant to Utah R. Civ. P. 33 except all answers shall be served within 14 days after service of the interrogatories.

(e) Production of documents and things. After the filing of the answer, requests for production of documents may be used pursuant to Utah R. Civ. P. 34 except all responses shall be served within 14 days after service of the requests.

(f) Physical and mental examination of persons. Physical and mental examinations may be conducted pursuant to Utah R. Civ. P. 35.

(g) Requests for admission. Except as modified in this paragraph, requests for admission may be used pursuant to Utah R. Civ. P. 36. The matter shall be deemed admitted unless, within 14 days after service of the request, the party to whom the request is directed serves upon the requesting party a written answer or objection addressed to the matter, signed by the party or by his attorney. Upon a showing of good cause, any matter deemed admitted may be withdrawn or amended upon the court's own motion or the motion of any party. Requests for admission can be served anytime following the filing of the answer.

(h) Experts.

(h)(1) Adjudication trials. Any person who has been identified as an expert whose opinions may be presented at the adjudication trial must be disclosed by the party intending to present the witness at least ten days prior to the trial or hearing unless modified by the court. If ordered by the court, a summary of the proposed testimony signed by the party or the party's attorney shall be filed at the same time.

(h)(2) Termination of parental rights trials. Any person who has been identified as an expert whose opinions may be presented at the termination of parental rights trial must be disclosed by the party intending to present the witness at least thirty days prior to the trial or hearing unless modified by the court. Unless an expert report has been provided, a summary of the proposed testimony signed by the party or the party's attorney shall be filed at the same time.

(h)(3) A party may not present the testimony of an expert witness without complying with this paragraph (h) unless the court determines that good cause existed for the failure to disclose or to provide the summary of proposed testimony.

(i) Protective orders. Any party or person from whom discovery is sought may request a

Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition or attribute of a party or of a person in the custody or control of a party is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or control. The order may be made only on motion for good cause shown. All papers related to the motion and notice of any hearing must be served on a nonparty to be examined. The order must specify the time, place, manner, conditions, and scope of the examination and the person by whom the examination is to be made. The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination.

(b) Report. The party requesting the examination must disclose a detailed written report of the examiner within the shorter of 60 days after the examination or 7 days prior to the close of fact discovery, setting out the examiner's findings, including results of all tests performed, diagnoses, and other matters that would routinely be included in an examination record generated by a medical professional. If the party requesting the examination wishes to call the examiner as an expert witness, the party must disclose the examiner as an expert in the time and manner as required by Rule 26(a)(4), but need not provide a separate Rule 26(a)(4) report if the report under this rule contains all the information required by Rule 26(a)(4).

(c) Sanctions. If a party or a person in the custody or under the legal control of a party fails to obey an order entered under paragraph (a), the court on motion may take any action authorized by Rule 37(b), except that the failure cannot be treated as contempt of court.

Advisory Committee Notes

Effective May 1, 2017

Rule 706. Court-Appointed Experts

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim. Rules 59-61 of the Uniform Rules of Evidence (1953), on which the Utah Rules of Evidence (1971) were patterned, provided for the appointment, compensation and handling of appointed expert witness testimony. These rules were not adopted in the state of Utah. The reason for the rejection is unknown. However, the Utah Supreme Court has previously indicated that a trial judge has inherent authority to call a witness. Merchants Bank v. Goodfellow, 44 Utah 349, 140 P. 759 (1914).