

**MINUTES OF THE SUPREME COURT'S
ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT**

January 23, 2017

The meeting commenced at 5 p.m.

Committee Members Attending:

Steven G. Johnson (chair)
John H. Bogart
Daniel Brough (phone)
Thomas B. Bruner
J. Simon Cantarero
Vanessa M. Ramos
Gary G. Sackett
Billy L. Walker
Tim Merrill (phone)
Timothy Conde (recording secretary)
Cristie Roach
Padma Veeru-Collings (phone)
Donald Winder

Excused:

Trent Nelson
Joni Jones
Hon. Darold J. McDade
Phillip Lowry
Gary Chrystler

Staff:

Nancy Sylvester

Approval of Minutes

Ms. Sylvester noted that she had corrected the spelling to Billy Walker's name in the November minutes. The minutes were then approved unanimously.

Annual Introduction of Committee Members

Because it was the first meeting of 2017, Chairman Johnson had each committee member introduce himself or herself.

Report of Rule 3.3 Subcommittee

The committee reviewed the report and recommendations authored by the Rule 3.3 subcommittee. The committee recommended and adopted, through motion, the following changes:

- Regarding Comment “3a,” the “a” should be removed.
- “former” should be inserted into Comment 3 between “the” and “rule’s.”
- All comment numbers should be bracketed.
- The last sentence of Comment 3 should be deleted.
- In Rule 3.3(a)(2), the phrase “known to the lawyer to be” should be deleted.

As amended, the revised rule was adopted by motion. The committee also voted to remove the definition of reckless and recklessly from Rule 1.0.

ABA Model Rule 8.4(g) Proposed Amendment

The ABA Model Rule 8.4(g) subcommittee issued and discussed its report and recommendation, as set forth in the committee’s memorandum dated January 16, 2017 (the “Rule 8.4(g) Report”). The subcommittee chair, Simòn Cantarero, emphasized to the committee that the subcommittee took into account the *Larsen* decision and worked to include any comment-type language in the rule itself.

Several committee members expressed concerns and questions regarding the Rule 8.4(g) Report. Among the concerns were whether a change was necessary in light of the existing rules regarding whether an attorney is fit to practice law. Members also were concerned that the rule is not direct enough and creates significant uncertainty. Specific questions or issues that were raised include the following:

- Does the proposed rule delegate rulemaking to governmental entities? For example, are Salt Lake City attorneys required to comply with Logan City’s ordinances?
- Does the proposed rule force attorneys to be responsible for standards of all states and municipalities? The committee favored limiting its reach to only Utah.
- Among the factors to consider in determining the severity of the misconduct is “whether the conduct was committed in connection with the lawyer’s professional activities.” This language appears to suggest that connection to professional activity is not a necessary condition. If so, the rule likely reaches throughout a lawyer’s private life, which many members of the committee did not favor.
- What is the preclusive effect of disciplinary proceedings? This may be relevant since there is no requirement that there be an adjudicatory finding of harassment or discrimination before disciplinary proceedings.
- Regarding the second sentence of Comment 3, it is unclear whether that sentence prohibits *any* discussion of sex, gender, race, etc. For example, would a firm be prohibited from discussing increasing diversity within the firm?
- Committee members were troubled by the statement in Comment 4 that “a trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).”

In light of the significant discussion regarding whether the subcommittee should include comment-type language in the rule itself, Chairman Johnson recommended that a few

representatives from the committee schedule time to visit with the Utah Supreme Court to gain further insight on how to address *Larsen* in future rulemaking. Before ending the discussion due to time, Chairman Johnson, after seeking input from the committee, determined that there was too much concern about the ABA model rule and the subcommittee's proposed rule for the committee to act. The subcommittee agreed to reconvene to discuss the matter further and to propose various options to the committee.

All other items on the agenda were continued to the committee's next meeting.

Next meeting: March 6, 2017 @ 5 pm

The meeting adjourned at 7:15 pm.