

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

April 23, 2018

The Meeting commenced at 5:00 p.m.

**Committee Members Attending:**

**Steven G. Johnson, Chair**  
**Daniel Brough – via telephone**  
**Thomas B. Brunner**  
**J. Simon Cantarero**  
**Tim Conde**  
**Hon. James Gardner**  
**Joni Jones**  
**Hon. Darold J. McDade –via telephone**  
**Timothy Merrill – via telephone**  
**Vanessa M. Ramos**  
**Austin Riter**  
**Cristie Roach**  
**Gary G. Sackett**  
**Padma Veeru-Collings – via telephone**  
**Billy Walker**  
**Donald Winder**

**Katherine Venti (recording secretary)**

**Guests:**

Patricia Owen

**Members Excused:**

Hon. Trent D. Nelson  
Phil Lowry

**Staff:**

Nancy Sylvester

## **I. Welcome and Approval of Minutes**

Mr. Johnson welcomed the Committee.

**Motion on the Minutes:** Billy Walker moved to approve the minutes from March 19, 2018; Cristie Roach seconded the motion. The motion to approve carried unanimously.

## **II. Rule 8.4(g) and (h) and Standards of Professionalism and Civility, Standard 3**

Mr. Cantarero reported regarding Standard No. 3 to the Standards of Professionalism and Civility. Mr. Cantarero referred to Exhibits B, C, D, and E of the Committee Packet to show various proposed changes that would align Standard 3 with the proposed changes made to Rule 8.4(g) and (h) and make the Standard more compulsory, rather than aspirational. Mr. Walker commented that the Standards were initially meant to be aspirational, but over time, steps were taken to move the Standards to be more compulsory, for example, by oath. Mr. Walker explained other evolutions in the applicability of the Standards.

Mr. Walker further explained that the Standards were meant to apply to attorneys' behavior within the court system, including court, court staff, and other lawyers.

The Committee discussed the having the revisions to Standard 3 be compulsory or aspirational.

**Motion on proposed changes to Standard 3, Version 3 (Exhibit D to Committee Packet):** Timothy Merrill moved to adopt Version 3 (Exhibit D) of the Standards. The motion was not seconded and further discussion continued.

In response, Mr. Winder proposed other changes to Version No. 4 (Exhibit E to the committee Packet). Mr. Winder's proposed changes included putting a period after the word "conduct," in the second sentence. Mr. Winder also proposed referring to Standard No. 1, which lists and defines participants. A discussion regarding Mr. Winder's suggested word changes continued.

**Motion on Proposed change to Standard 3, Version 4 (Exhibit E to Committee Packet):** Mr. Winder moved to adopt Version 4, with selected changes to Standard 3, as set forth in the attached Revised Version 4. Mr. Winder's motion recognized that he was not making any additional changes to the proposed changes in the Comment section of Version 4. Judge Gardner Seconded the Motion. The motion passed unanimously.

## **III. Supreme Court Standing Order No. 7 Update**

Tim Conde reported on the work of the Subcommittee on Standing Order No. 7. Standing Order No. 7 allows lawyers, judges, and/or the OPC to refer a complaint regarding uncivil behavior to the Professionalism Counseling Board. The issue the Subcommittee was exploring was the kind of "teeth" the Board has regarding such complaints. The subcommittee's task was to (1) evaluate the process and (2) evaluate whether there should be an anonymous avenue to lodge judge referrals to the Board.

The Committee discussed the detailed process regarding a referral to the Board under Standing Order No. 7. The Committee also discussed issues regarding response, or lack thereof, by attorneys to referred complaints made to the Board. Mr. Bruner noted that the “teeth” regarding a referral may be found in the proposed amendments to Rule 8.4(h).

Judge Gardner commented on the feasibility of making an anonymous referral and having the counseling be helpful. Judge Gardner also mentioned that judges may be reluctant to make referrals in ongoing cases due to concerns regarding recusal. Judge Gardner recommended education on the Standing Order as he believes the parameters of the Standing Order may not be widely known.

A discussion ensued regarding whether language should be added to the Standing Order that a referral to the Board by a judge will not act as the sole basis for recusal.

The discussion continued on whether the Standard should be revised to add language that failure to respond may result in an automatic referral to the OPC. Committee members also discussed Rule 8.4(h), which will be new and may be sufficient to give “teeth.” Some committee members advocated giving 8.4(h) some time to go into effect and to take “baby steps” on rolling out changes to Standing Order No. 7.

Mr. Conde requested a straw poll on which possible option to work on: (1) “baby steps” (2) amending the Standing Order; and (3) the filing of miscellaneous cases and subpoena power for attorneys who do not show after being requested appearance by the Board. The “baby steps” approach was the preferred method.

The Subcommittee will work on language regarding baby steps to the Standard. The Subcommittee will also incorporate language regarding recusal of judges who make referrals. The Subcommittee will reconvene with Board members to vet possible proposals and language.

A discussion ensued regarding the specific charge of the Court to the Committee and whether Standing Order No. 7 should be included in the Rules of Professionalism and Civility or as a subsequent rule, such as 14-302 or in the 14-500 series.

The Subcommittee will attempt to get a revised version of Standing Order No. 7 to Ms. Sylvester by May 16, 2018 and report back to the Committee on May 21, 2018.

**IV. Next Meeting:**

The next meeting is scheduled for May 21, 2018 at 5:00 p.m.

**V. Adjournment**

The meeting adjourned at 6:43 p.m.

## ATTACHMENT TO APRIL 23, 2018 MINUTES

Standards of Professionalism and Civility – Version 4 REVISED AT APRIL 23, 2018 MEETING:

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers ~~should~~ shall avoid hostile, demeaning, or humiliating, intimidating, harassing, or discriminatory words in written and oral communications conduct with all other counsel, parties, judges, witnesses, and other participants in all proceedings ~~adversaries, other lawyers, paralegals, or administrative staff~~. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of any such participant ~~an adversary another legal professional~~ 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, color, religion, gender, pregnancy, childbirth or pregnancy-related conditions, sexual orientation, gender identity, marital status, age, handicap disability, veteran status, or national origin, ethnicity, or socioeconomic status, 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).