

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

June 18, 2018

The meeting commenced at 5:00 p.m.

**Committee Members Attending:**

Steven G. Johnson, Chair  
Daniel Brough  
J. Simon Cantarero via telephone  
Tim Conde  
Hon. James Gardner  
Joni Jones  
Phil Lowry via telephone  
Hon. Trent D. Nelson 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:**

Thomas B. Bruner  
Hon. Darold McDade  
Timothy Merrill

**Staff:**

Nancy Sylvester

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

Mr. Johnson welcomed the committee.

### **Motion on the Minutes:**

Ms. Roach moved to approve the minutes from April 23, 2018. Mr. Riter seconded the motion. The motion to approve carried unanimously.

Mr. Johnson reported that as of July 1, 2018, two members' terms on the committee will end. Gary Sackett and Judge Nelson requested emeritus status and the Supreme Court approved their request. Mr. Johnson also reported that Katherine Venti was approved by the Court for full membership. Applications for new members are pending.

Mr. Johnson advised the committee of an upcoming ABA seminar on lawyer well-being issues. Lawyer well-being issues may become an area addressed by this Committee.

Mr. Johnson also reported a request from an attorney to make changes to the advertising rules, which will come up for discussion in later meetings.

## **II. Rule 8.4(g) and Standards of Professionalism and Civility**

Ms. Sylvester advised the Committee that it has a few remaining questions to answer regarding Rule 8.4 and Standard of Professionalism and Civility No. 3, specifically:

1. What do we mean by "age" in Comment [3]?
2. Should we match the categories in 8.4 comment [3] and Standard 3 to 34A-5-106?
3. What should we do about Comment 2, which says "Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professional answerable only for offenses that indicate lack of those characteristics relevant to law practice?" Does it comport well with what we've done with Rules 8.4(g), (h), and Comment [3]?

Mr. Johnson opened the discussion regarding the differences in the language between proposed Rule 8.4 and the Standards. He noted the chart he'd prepared for the materials that compared the suspect classes listed in ABA Model Rule 8.4, proposed Rule 8.4 comment [3], Standard 3, and Utah Code § 34A-5-106. The committee discussed the dubious illegality of "casting aspersions on physical traits or appearance" that appeared in the comment to Standard 3. With new 8.4(h) adding more teeth to the standards, the committee questioned enforcement of that standard.

**Motion on Change of Language:** Mr. Sackett moved that the phrase "casting aspersions on physical traits or appearance" be eliminated from the comment to Standard 3. Mr. Riter seconded. The motion carried with one vote against it.

The committee then discussed the differences between gender identity, gender, and sex. The committee determined that "gender identity" should be used instead of "gender" in conformity with Utah Code § 34A-5-106.

**Motion on Change of Language:** Ms. Roach moved to change “gender” to “sex” in the comment to Standard 3 in order to match the language of Rule 8.4 comment [3]. Ms. Ramos seconded. The motion carried unanimously.

Mr. Johnson introduced a discussion regarding liability for personal conduct in comment 2 to Rule 8.4. The committee discussed the issue but determined that comment 2 did not implicate paragraphs (g) and (h). It dealt with paragraphs (b) and (c).

**Motion on Potential Change of Language:** Mr. Walker moved to keep the language in proposed Comment 2 as written. Mr. Winder seconded. The motion carried unanimously,

Mr. Sackett noted that some of the Model Rule comments were omitted from proposed Rule 8.4. The subcommittee members present did not think that had been done intentionally.

**Motion on Language of Model Rule Comment 5:** Mr. Riter made a motion to delete proposed Comment 4(a), re-insert that sentence in Comment 5, and include all of Comment 5 of the Model Rule into the rule revision so that Comment 5 reads:

[5] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. See Rule 1.2(b).

Ms. Jones seconded. The motion carried unanimously

**Motion on Potential Language of Comment 4:** Mr. Sackett made a motion to rewrite the second sentence in proposed Comment 4 as follows: “Paragraph (g) does not limit the ability of a lawyer to accept, decline, or in accordance with Rule 1.16, withdraw from a representation, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Mr. Winder seconded. The motion carried unanimously.

The committee then discussed Comment 8 and the language “This rule differs from the ABA Model Rule 8.4.” The committee determined that it has typically written a more specific comment about how the rules differ from the model rule.

**Motion on Potential Change in Language for Comment 8:** Mr. Sackett made a motion to revise proposed Comment [8] to read: “This rule differs from ABA Model Rule 8.4 to the extent that it changes Paragraph (g), adds paragraph (h), and makes changes to Comments 3 and 4 of the ABA Model Rule.” Mr. Walker seconded. The motion carried unanimously

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

Tim Conde reported on behalf of the subcommittee on Standing Order No. 7. The standing order allows lawyers, judges, and/or OPC to refer a complaint regarding uncivil behavior to the governing Board for professional counseling.

The committee received a request from the Supreme Court on Standing Order No. 7 to (1) consider how the referral process is made; and (2) propose language that would codify the process in a rule.

Mr. Conde reported that the subcommittee met and discussed the issues and also discussed the Supreme Court’s request with the current, but new, governing board.

Mr. Conde said the subcommittee proposes creating a new Rule 14-302 of the Rules of Professional Practice. Mr. Conde provided the proposed new rule to the committee in its meeting materials. The committee discussed the subcommittee’s proposed rule and, specifically, the subcommittee’s suggestion that the rule (1) not permit anonymous complaints; and (2) not discuss recusals by judges who make referrals to the Board. Judge Gardner noted that the Code of Judicial Conduct and [Informal Opinion 05-2](#) already deal with recusal when a judge reports an attorney to the Bar for misconduct.

A further discussion was had regarding the language of the proposed preamble to new rule 14-302. The committee asked that the subcommittee consider placing a reference to the counseling board in Rule 14-301.

Mr. Johnson requested that the subcommittee consider the comments made in the meeting discussion and report to the Committee again at the August 20, 2018 meeting.

### **IV. Next Meeting:**

The next meeting is scheduled for August 20, 2018 at 5:00 p.m.

### **V. Adjournment**

The meeting adjourned at 6:30 p.m.