Utah Supreme Court's
Advisory Committee on the Rules of Professional Conduct

Meeting Minutes
March 1, 2021

WEBEX

5:00 p.m.

J. Simon Cantarero, Chair

Attendees:
J. Simón Cantarero, Chair
Steven Johnson (Emeritus)
Katherine Venti
Alyson McAllister
Jurhee Rice
Vanessa Ramos
Cory Talbot
Hon. James Gardner
Billy Walker
Adam Bondy
Joni Jones
Hon. Trent Nelson
Austin Riter
Gary Sackett (Emeritus)
Amy Oliver
Prof. Dane Thorley
Hon. Mike Edwards
M. Alex Natt, Recording Secretary

Staff:
Nancy Sylvester

Guests:
Nick Stiles, Shelley Miller, Lucy Ricca, Jeff Eisenberg

1. **Welcome and approval of the January 4, 2021 meeting minutes:** Mr. Cantarero.

   Mr. Cantarero welcomed everyone to the meeting and asked for approval of the minutes.

There was discussion about the previous meeting minutes. Mr. Riter identified himself in the prior meeting minutes as the attendee identified only by telephone number. With that, the record was corrected.

Mr. Riter moved approval. Ms. McAllister seconded. The motion passed unanimously.

With Mr. Natt joining the Committee as Recording Secretary, the members were asked to identify themselves according to the rules and did so.

2. **Rule 1.5(e) Changes:** Ms. McAllister.

The Committee followed up on the last meeting's review of draft revised Rule 1.5(e) involving how referral fees may be paid to attorneys who are not staying actively involved with the matter to be referred. The draft language was reviewed and comments were sought.

Ms. Oliver asked whether these proposed revisions have been tested in other jurisdictions. Ms. McAllister indicated that they have. Mr. Riter inquired whether #1 and #2 are duplicative. Mr. Eisenberg indicated that "up front" payments should not be permitted. He also stated that the term "referral fee" may not be clearly different from "co-counsel fees" which he indicated in his opinion would be a different matter. Mr. Johnson suggested that the comment should indicate that the Rule would not apply in co-counsel situations. Mr. Walker took issue with #4, suggesting that the client is protected by #5 in terms of reasonableness of the fees and that "informed consent" of the client is not required in this circumstance. Ms. McAllister replied that this rule is intended to ensure that the client is aware of what referring counsel is receiving for the referral. Mr. Cantarero considered #4 to be a desirable consumer protection matter. Mr. Cantarero said he would like the rule to explicitly state that these restrictions apply also to co-counsel fees paid for referrals between different firms when both counsel remain as counsel. Mr. Eisenberg agreed that making it explicit would be better. Mr. Cantarero inquired whether the rule should be changed to address fees as being "reasonable" rather than "shall not be unreasonable."

Ms. Ricca suggests that she understood that the subcommittee's task in this area was intended only to govern fees paid to non-lawyers. Mr. Cantarero suggested a different understanding and Mr. Johnson confirmed his understanding that it was to address both issues.

Ms. Venti suggested that the word "unreasonable" is appropriate as it is consistent with 1.5(a) as that is the ethical violation detailed in the rule.

The matter was referred back to the subcommittee for further study.

3. **Online Reviews:** Ms. Oliver.

Ms. Oliver discussed proposed changes to rules governing how attorneys can respond to online reviews.

First, whether Rule 7.1 should be amended to permit attorneys to respond to online reviews. The subcommittee believed that amending the rule was unnecessary at this time. It then considered whether Rule 1.6 should be amended to permit lawyers to reveal confidential information to respond to an online review and the subcommittee determined that it was inappropriate to do so.

The subcommittee considered whether Rule 7.1 should be amended to compensate former clients for online reviews and it was referred to Ms. McAllister's subcommittee for further investigation. No changes are currently contemplated. Mr. Johnson indicated that the ABA has reached a recent similar conclusion on the first two matters considered by the subcommittee.

4. **Rule-Like Comments:** Mr. Johnson.

Mr. Johnson related a conversation with Justice Lee in which Justice Lee indicated that compulsory language like "shall" should not be in comments since they are rule-like. Mr. Johnson proposed deleting compulsory language in the comments to the Rules as a long-term project, starting with Rule 1.0. He proposed the following amendments to comment [6]:

See, e.g, Rules 1.2(c), 1.6(a), and 1.7(b), 1.8, 1.9(b), 1.12(a), and 1.18(d). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. ~~The lawyer must~~ Other rules require the lawyer to make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. See, e.g., Rules 1.4(b) and 1.8.

5. **Rule 1.0 and Government Lawyers:** Mr. Johnson.

John Bogart raised a concern that Rule 1.0 defines government lawyers as a firm, but Rule 1.10 says that for conflicts they aren't a firm. Comment [1a] to Rule 1.10 explains the distinction, but in the interest of usefulness and understanding, Steve Johnson said we should perhaps also state in the comments to Rule 1.0 that the rules apply to government lawyer firms, except when it comes to conflicts of interest.

The committee added the following to comment [2]:
"The general rule that government law departments constitute a firm for the purposes of these rules does not apply to conflicts of interest questions. See Rules 1.10(f) and 1.11."

Mr. Cantarero asked for a motion to approve the amended language to Rule 1.0, comments [2] and [6]. Mr. Talbot moved. Judge Gardner seconded. The motion passed unanimously.

6. **Rules 8.4 and 14-301:** Mr. Johnson and Mr. Riter.

The committee discussed Rule 8.4(g), which in part defines professional misconduct to include harassment and discriminatory conduct. The question before the Committee is whether based on the *Becerra* analysis, are the proposed revisions to the rule narrowly tailored to survive a strict scrutiny standard and serve a compelling state interest? Mr. Johnson discussed the status of recent decisions and indicated that a commenter suggested that our comment [6] appears to itself be discriminatory on its face by focusing only on "underserved populations." Mr. Johnson suggested that "underserved" be changed to "any particular population" to avoid this criticism. Mr. Johnson opined that the revisions to the rule are sound and pass Constitutional muster. Mr. Cantarero asked whether the revisions could be challenged as content-based discrimination and Mr. Johnsen indicated that comment [5] specifically references the First Amendment and that [g] would not apply to that protected speech.

The committee then discussed Rule 14-301. Mr. Johnson and Mr. Riter suggested that the proposed language may run afoul of the Constitution as well as impede the ethical responsibility of counsel to be effective advocates for their clients. It was suggested that clarifying language be added to permit conduct by attorneys which would appear on its face to violate the rule, so long as the conduct can be said to be necessary for effective advocacy. The Committee discussed the proposed language at length. Mr. Cantarero suggested that this matter be returned to the subcommittee for further consideration, particularly with respect to paragraph 3.

<u>Assignment to Subcommittee:</u>
The key question that needs to be answered is this: Do Rules 8.4(g), (h), and the amendments to 14-301 (especially paragraph 3) violate constitutional protections of the First Amendment? Put differently, are they written in such a way that would survive strict scrutiny analysis? Basically, are these rules narrowly tailored to advance a compelling interest? Looking at other prohibitions on conduct, or expression, in our rules would be helpful as a comparison. For example, where a lawyer could lose their law license for misconduct that is not "illegal" or "criminal" in the sense it violates a statute or ordinance.

There is another related issue, and that is the compulsory language in the Comment to 14-301(3), which requires lawyers to refrain from manifesting and acting upon bigotry, discrimination, etc. The subcommittee should look at that and determine if it should be incorporated into the rule instead of being in the advisory or explanatory comment.

Also, where the rules discuss discrimination, the rule benefits from applying a distinction or clarification that invidious discrimination is the sort the rules seeks

to prevent and prohibit. Maybe a short comment that any discrimination solely based on bias or prejudice would help to clarify that concern.

With respect to harassment, the case law in employment law is pretty clear that it must be persistent and pervasive to be actionable. We have a similar standard in referring to egregious and repeated violations of 14-301, but we could benefit from the subcommittee's review that harassment is adequately addressed in 8.4 and its comments.

Finally, the subcommittee should consider including the "legitimate advice or advocacy" exception into the rules as opposed to being in the comments.

Subcommittee Members
Adam Bondy, chair, and the following members:
1) Judge Edwards
2) Dan Brough
3) Austin Riter
4) Dane Thorley
5) Amy Oliver
6) Vanessa Ramos
7) Judge Nelson

7. Adjournment

The remainder of the agenda was tabled.

The meeting adjourned at 7:04 p.m. The next meeting will be held on April 5, 2021 at 5 p.m. via Webex.