Agenda

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

March 1, 2022
5:00 to 6:00 p.m.
Via Zoom

Welcome and approval of minutes	Tab 1	Simón Cantarero, Chair
Rules 8.4 and 14-301: Antidiscrimination rules • Update on rules (including historical compilation process) • Letter from LGBTQ Chamber of Commerce (attachment)	Tab 2	Simón Cantarero, Nancy Sylvester
Rules 1.0, 5.4, and 5.8: Referral fees • Update on rules and potential overlap with legislation (rules attached for discussion)	Tab 3	Alyson McAlister (subcommittee chair), Simón Cantarero, Nancy Sylvester
Rule 3.8 • Discussion of recommendation from subcommittee • Original proposal attached for discussion	Tab 4	Judge Amy Oliver (subcommittee chair), Judge Edwards, Alex Natt, Dane Thorley, Austin Riter, Curtis Larson (former prosecutor and rule change proponent), Vanessa Ramos (Federal Public Defender), Michael Kennedy (Assistant U.S. Attorney).
FYI • Florida's remote work rule is similar to ours. • Rule 1.2 (next month's agenda) • **May's meeting will be in-person**	Tab 5	--
Projects in the pipeline: • Rule 8.3 (mediation, arbitration, confidentiality, and reporting attorney misconduct); • LPP updates; • Client fees issue from Bar Foundation (Kim Paulding);		--

2022 Meeting Schedule: 1st Tuesday of the month from 4 to 6 p.m. unless otherwise scheduled

Meetings: April 5, May 3 (in-person), June 7, (skip July), August 2 (in-person), September 6, October 4, November 1 (in-person), December 6

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

Tab 1

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

[Draft] Meeting Minutes
January 4, 2022

WEBEX
16:00 Mountain Time

J. Simon Cantarero, Chair

Attendees:
J. Simon Cantarero, Chair
Hon. James Gardner
Hon. Amy Oliver
Katherine Venti
Alyson McAllister
Cory Talbot
Adam Bondy
Gary Sackett (Emeritus)
Steve Johnson (Emeritus)
Jurhee Rice
Dan Brough
Billy Walker
Dane Thorley
Julie J. Nelson
Austin Riter
Robert Gibbons
Phillip Lowry
Hon. Trent Nelson (Emeritus)
M. Alex Natt, Recording Secretary

Staff:
Nancy Sylvester

Guests:
Scotti Hill
Christine Greenwood
Nick Stiles

Excused:
Angie Allen
Hon. Mike Edwards
Joni Jones

1. **Welcome and approval of the December 6, 2021 meeting minutes (Chair Cantarero)**

   Chairman Cantarero recognized the existence of a quorum, called the meeting to order at 16:02 and since it was the first meeting of a new year he asked everyone to introduce themselves.

   The Chair asked for a Motion to approve the December 6, 2021 meeting minutes.

   Ms. McAllister moved and Ms. Rice seconded the Motion. The minutes were adopted unanimously with the following minor corrections:

   The spelling of Ms. McAllister's name was corrected; Judge Oliver was recorded in the attendance list twice and that was corrected as well.

2. **Rule 5.5 and 1.0 Amendments (Chair Cantarero)**

   Motion for full adoption of 5.5 and changes to 1.0 on lines 33 and 34 regarding amending certain definitions. Judge Garner moved, seconded by Ms. McAllister. The Committee voted unanimously in favor of the motion. The rules will move on to the Supreme court for adoption.

3. **Rules 14-301 and 8.4 (Ms. Sylvester)**

   Ms. Sylvester presented cleanup edits for consideration. Chairman Cantarero discussed the proposed amendments to Rule 8.4(h). A proposal was made to clarify "process" to "legal process" as it appears in the Rule. Judge Nelson suggested that 14-301 should be clarified and that clarification will serve to update 8.4 by implication. Judge Oliver moved to add the word "legal" to line 20 to become "legal process." Katherine Venti seconded. The Motion passed unanimously.

   The Committee turned to 14-301. 14-802 was reviewed for its definition of "the practice of law." The Committee discussed various options of whether to place a reference to that rule in 14-301(3). Mr. Bondy moved to add the clarifying reference to the Rule. Mr. Riter seconded. The Motion passed by a majority vote.

   Next the Committee turned to the question of where to place the clarification. Ms. McAllister moved to add it to the cross-reference to 14-902(b)(1) somewhere on line 100. Ms. Venti seconded the Motion. The Motion passed by majority vote.

4. **Rules 1.0, 5.4, 5.8, 5.9 – Referral Fees (Ms. McAllister)**

   Ms. McAllister was asked to advise the Committee on the status of the referral fees issue.

   She first turned to Rule 1.0 and discussed a small proposed change which eliminated some verbiage and moved a section to new Rule 5.8. The Committee engage in a full discussion and reviewed various proposals and discussed how to move forward.

   The Committee attempted to revise Rule 5.8 but did not conclude the exercise. Chairman Cantarero suggested that the Subcommittee incorporate the changes, make any other related and necessary changes, and propose adoption of a final version of affected Rules and comments at the next meeting.

5. **Adjournment**
   The meeting adjourned at 18:05. The next meeting is scheduled to be held on February 1, 2022.

Tab 2

UTAH LGBTQ+ CHAMBER OF COMMERCE®

January 21, 2022

Utah Judicial Council
450 South State Street
Salt Lake City, UT 84111

VIA ELECTRONIC MAIL

Re: *In re Discipline of Morgan*

Dear Esteemed Colleagues:

I write to you today not only as the Chairwoman of the Utah LGBTQ+ Chamber of Commerce, but also as a member of Utah's legal community and as a transgender woman. I was deeply disturbed to learn of former Commissioner Morgan's conduct leading to his discipline and resignation. I was not however, shocked. Similar conduct is all too common among both the Bar and the Bench. I have experienced it personally. So have others at my firm, my friends, and far too many of our clients and our Chamber members. The chilling effect of former Commissioner Morgan and others' behavior on access to the courts cannot be overstated. Absent meaningful change, this behavior threatens to undermine all current and future access-to-justice initiatives.

Former Commissioner Morgan's behavior was atrocious. Every gay, lesbian, transgender, or queer litigant, attorney, and witness who has ever crossed the threshold of his courtroom will now wonder what really motivated his rulings. Vulnerable women who relied on his judgment and protection will question whether their photographs were "worth looking at." That he felt safe to conduct himself in such a manner speaks to a larger problem within the judiciary. My peers' faith in his office and in the judiciary as a whole is forever marred by his conduct.

Businesses thrive when their regulatory environment is stable and predictable. While this foremost requires just laws, it also requires just and impartial interpretation and application of those laws. Responsible businesses also seek an environment where their diverse workforces can be safe, happy, and free from prejudices. Our Board of Directors often learns of lost opportunities because of concerns that Utah is not safe for the people who ultimately make up the organizations that would do business in our state.

I initially joined the leadership of this organization in the hopes that I could not only be a role model for other transgender people to follow, but also so that I could build bridges and pave the way for those who will follow.

Forty percent of transgender individuals will attempt suicide at some point in our lives. While some — like former Commissioner Morgan —believe this is evidence that we are "mentally ill," I would counter that it is more likely due to the hardships we face from those who hold antiquated and harmful views towards our community. We are twice as likely as the general population to live in poverty. We have three times the rate of unemployment. We experience extreme rates of discrimination in housing and the workforce. Education and healthcare are not much better. We regularly face harassment and physical and sexual violence. I recently learned of a former client who was driven to suicide by a member of the Bar's persistent, repulsive harassment. Again, a judicial officer could have restrained this behavior —much of which occurred in their presence — but did not.

My peers already hesitated to seek redress from the courts because the overwhelming sentiment is that they will at best not be taken seriously and at worst be openly ridiculed. That sentiment is consistent with my own experiences, and those of many of my colleagues.

Since coming out as transgender, I have sat in nearly every seat in the courtroom save for the bench. I have even had the privilege to stand at the (Webex) podium on occasion. I have quietly stood —in a skirt suit and heels— while a judicial officer addressed me as Mr. Taylor in a demeaning and dehumanizing manner. Far more often, I have endured argument from my colleagues directly attacking my character, qualifications, and the quality of my arguments all based on my gender identity — despite pleas to the court to curb such behavior. As bizarre as it sounds, I have had to raise the defense of res judicata regarding my gender on multiple occasions.

I cannot adequately describe the abject terror and despair LGBTQ+ litigants face knowing such individuals sit on our Bench holding the power to ruin them financially, professionally, or even sever their relationships with their children —because they disapprove of their identities. Many of my colleagues fear that in certain courtrooms, their identities are a liability to their clients. This is unacceptable.

Much of my work as a paralegal involves reassuring clients that they will be treated fairly by the court system. At what point does doing so violate my ethical duty of candor? When people in positions of power espouse such views, they teach others that their poor behavior is okay. These attitudes cost lives and hurt our children. The damage is real, and it is measurable.

On behalf of the Chamber, its members, and the communities I represent, I ask that you use this as an opportunity to send a firm message that this conduct is unacceptable, will not be tolerated, and, if discovered, will be met with swift corrective and remedial actions. Your symbolic vote to terminate former Commissioner Morgan despite his resignation was a good start. I also ask you to take affirmative measures to prevent such behavior in the future and to ensure every participant in our judicial system be afforded

the courtesy, dignity, and respect they deserve. Nothing else will be sufficient to begin the healing required to restore faith in the judiciary.

To that end, I propose the following measures:

(1) That the Utah Supreme Court immediately and without delay adopt ABA Model Rule 8.4(g) which states:

> It is professional misconduct for a lawyer to: (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[1]

(2) That in the interim, the Office of Professional Conduct and judicial officers — where appropriate — apply Rule 3.4, Fairness to Opposing Party and Counsel, ("A lawyer shall not: (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant.") and Rule 4.4, Respect for Rights of Third Persons, ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person."), and the Standards of Professionalism and Civility to restrain improper conduct based on participants' sexual orientation or gender identity.

(3) That an advisory committee be formed to consider and adopt changes to the Standards of Professionalism and Civility to specifically address the use of pronouns, preferred names, and honorifics.

(4) That the newly formed Office of Fairness and Accountability be given sufficient power to effect meaningful change, and LGBTQ+ individuals have a seat at its table.

(5) That the Judicial Institute, Administrative Office of the Courts, and the Utah State Bar develop regular trainings on diversity, equity, inclusion, and belonging. My organization and my firm would gladly assist in developing curriculum and providing speakers.

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[1] I am familiar with the various objections to this model rule. They are not well-taken. There is a colossal difference between, for example, refusing to address a participant in a court proceeding by their name, pronouns, and preferred honorific or suggesting that being transgender is a form of sexual deviancy vs that a minor child's struggle to adjust to a parent's transition factor into a best interests consideration. It is well-established that restraining the former does not encroach on constitutionally protected speech any more than insisting that counsel properly address each other and the court and refrain from utilizing racial slurs. Such speech is intended solely to demean, degrade, and dehumanize and it has no place in our profession.

(6) That the Administrative Office of the Courts provide full support for Employee Resource Groups and work to create a safe environment for employees to report similar concerns in the future. The Chamber has extensive experience establishing and supporting similar ERGs in private businesses throughout the state. We welcome any opportunity to assist on this front as well.

(7) That you make your organizations, courtrooms, and surroundings inhospitable to the type of animosity, bias, and conduct that former Commissioner Morgan exhibited.

Women, LGBTQ+ individuals, and our friends within the Utah legal community are grieving today as old wounds have been reopened and new ones inflicted by those who would defend former Commissioner Morgan's conduct. Please stand with us as we heal and seek to restore dignity and honor to our profession.

Very truly yours,

Samantha Taylor, ALP
Chairwoman – UTAH LGBTQ+ CHAMBER OF COMMERCE
Director of Operations – WHARTON LAW, PLLC

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CC: Valeria Jimenez, Public Outreach Coordinator, UTAH COURTS OFFICE OF FAIRNESS AND ACCOUNTABILITY

Lauren Anderson, Director, UTAH JUDICIAL INSTITUTE

J. Simon Cantarero, Chair, UTAH SUPREME COURT'S ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Billy L. Walker, Chief Disciplinary Counsel, OFFICE OF PROFESSIONAL CONDUCT

Tania Mashburn, Communications Director, UTAH STATE COURTS

Martha Knudsen, Executive Director, Well-Being Committee for the Legal Profession, UTAH STATE BAR

Michelle Oldroyd, Chief Diversity, Equity, and Inclusion Officer, UTAH STATE BAR

Matthew Page, Communications Director, UTAH STATE BAR

Kaitlyn Piper, Executive Director, UTAH CENTER FOR LEGAL INCLUSION

Elizabeth Kronk Warner, Dean, UNIVERSITY OF UTAH SJ QUINNEY COLLEGE OF LAW

D. Gordon Smith, Dean, BRIGHAM YOUNG UNIVERSITY J. REUBEN CLARK LAW SCHOOL

Nubia Peña, Senior Advisor on Equity and Opportunity, OFFICE OF THE GOVERNOR OF THE STATE OF UTAH

Daniel Hemmert, Executive Director, GOVERNOR'S OFFICE OF ECONOMIC OPPORTUNITY

Theresa Foxley, President & CEO, ECONOMIC DEVELOPMENT CORPORATION OF UTAH

Tiffeny Yen-Louie, CMO, WORLD TRADE CENTER UTAH

Troy Williams, Executive Director, EQUALITY UTAH

Candace Metzler, PhD, Executive Director, TEA OF UTAH

Chris Jensen, Chair, UTAH PRIDE CENTER

Enclosures: (1) Findings of Fact, Conclusions of Law, and Recommendations, *In re Discipline of Morgan*

BEFORE THE COURT COMMISSIONER CONDUCT COMMITTEE
STATE OF UTAH

In re: COMMISSIONER T.R. MORGAN	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

On October 21, 2021, the Court Commissioner Conduct Committee ("the Committee") conducted a confidential formal hearing, pursuant to rule 3-201.02(4) of the Utah Code of Judicial Administration, to consider a complaint against Commissioner T.R. Morgan ("Commissioner Morgan"). The complaint was filed jointly by a former Second District Court law clerk ("Complainant") and by Bart Olsen ("Olsen"), in his capacity as the Human Resources Director of the Administrative Office of the Courts. At the hearing, which was conducted via videoconference due to the COVID-19 pandemic, Complainant was present and unrepresented by counsel; Commissioner Morgan was present and unrepresented by counsel; and three members—Olsen, Jeremy Marsh, and Sarah Osmund—of the Human Resources Department ("HR") of the Administrative Office of the Courts were present. All members of the Committee were present, as was Keisa Williams, General Counsel of the Administrative Office of the Courts. Prior to the hearing, the Committee reviewed Complainant's complaint, a redacted version of a report prepared by HR, and Commissioner Morgan's written response. At the hearing, the Committee placed both Complainant and Commissioner Morgan under oath, and

interviewed them. HR also called one additional witness, as described below, who was also placed under oath and interviewed by the Committee. No other witnesses testified. Complainant, HR, and Commissioner Morgan were afforded the opportunity to suggest questions for the Committee to put to the witnesses. After considering the evidence presented, including the sworn testimony of the witnesses, the Committee makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Commissioner Morgan was appointed to his current position as court commissioner in Utah's Second District Court in July 2016, and has served full-time in that capacity since then. At all times relevant here, Commissioner Morgan's courtroom and chambers have been located at the Second District Court's Farmington location.
2. In April 2017, the Second District Court hired Complainant as a law clerk. Complainant had completed law school, and was thus law-trained, but was not yet licensed to practice law in the State of Utah.
3. In the Second District Court, as with most district courts in Utah, law clerks do not work for just one judge. Instead, law clerks are shared between several judicial officers. Complainant was assigned to work in the Farmington location for multiple judicial officers, including—for most of her tenure—both Judge John Morris and Commissioner Morgan.
4. Complainant spent most of her time working for Judge Morris. Complainant spent no more than 30% of her time assisting Commissioner Morgan.
5. But because of the proximity of her office to Commissioner Morgan's, and because of perceived common interests, Complainant and Commissioner Morgan would interact on

more or less a daily basis, and would engage in conversations not only about legal topics but about current events and other things. In the beginning, for the first months of Complainant's tenure, the conversations were constructive, mutual, and friendly.

6. Over time, however, Commissioner Morgan began to, in his words, become "too comfortable" around Complainant, and the conversations began to involve other topics, including homosexuality, gender identity or expression, sexual behavior, and religion; Commissioner Morgan indicated that many of these conversations occurred, or at least began, in the context of discussing issues that had arisen in pending cases.
7. Complainant identifies as queer, but had not disclosed her sexual orientation to Commissioner Morgan, and there is no indication that Commissioner Morgan was aware of Complainant's sexual orientation.
8. Many of the conversations in question took place in Complainant's small office, with Commissioner Morgan sitting in a chair by the door. Complainant testified that, in some of the conversations, she felt uncomfortable but did not feel like it was easy to leave, given the physical layout of the office.
9. Complainant worked for the Second District Court for more than three years, until June 2020. During that time, she had literally hundreds of interactions with Commissioner Morgan, many of which Complainant considered inappropriate, and some of which she described for the Committee during her testimony.
10. The Committee finds Complainant to be a credible witness. Even Commissioner Morgan acknowledged Complainant's credibility, and while Commissioner Morgan did not remember all of the events Complainant described, he testified that he did not take issue

with her credibility. Thus, the Committee credits Complainant's account of the events she described.

11. On numerous occasions, Commissioner Morgan referred to members of the LGBTQ community as "homos." In Complainant's words, this happened "over and over." Complainant told Commissioner Morgan that she considered his use of that term inappropriate and derogatory, and asked him to "cool it" with his use of that term, and he responded by asking, "What else am I supposed to call them?" Complainant suggested various alternative terms Commissioner Morgan might consider using, but he did not immediately desist in his use of the term and continued to use it in Complainant's presence even after being asked not to.

12. Complainant's account regarding Commissioner Morgan's use of the term "homos" was corroborated by the other witness ("Witness") who testified at the hearing. Witness worked as a judicial assistant to Judge Morris in the Farmington location for several years, including the time period in question here, although she no longer works for the courts. The Committee finds Witness's testimony, like Complainant's, to be credible. Witness also heard Commissioner Morgan make derogatory use of the term "homos" on multiple occasions.

13. The Committee finds Commissioner Morgan's use of the term "homos" to have been inappropriate, derogatory, and demeaning.

14. Commissioner Morgan made other inappropriate comments regarding members of the LGBTQ community. For instance, Commissioner Morgan told Complainant that he "could never imagine anyone taking it up the butt," and asked her "why do gay men talk like women?"

15. On another occasion, while discussing a request by two women for a same-sex marriage, he asked Complainant, "Why can't I get a hot lesbian couple in my court?"

16. Commissioner Morgan also expressed antipathy toward transgender individuals, stating (in both Complainant's and Witness's presence) that "Transgender people are mentally ill, and going to therapy wouldn't help them." He also remarked to Complainant that, "If you want to be a man, you should go out and get a penis," but then asked, "Why would anyone do that?" He also told Complainant that transgender youth were "brainwashed kids who think they're something they aren't."

17. On other occasions, Commissioner Morgan's conversations with Complainant would turn inappropriately sexual. For instance, on several occasions, while discussing cases involving custody of children, Commissioner Morgan would say to Complainant something like "if we were to have sex" or "if we had sex," and then would add "you're welcome, by the way" and would wink or smirk at Complainant in a way that communicated to her that Commissioner Morgan thought that Complainant would be fortunate to be able to have sex with him.

18. Complainant told Commissioner Morgan she was uncomfortable with him saying this to her and suggested that they could have a conversation about the relevant issues without the necessity of imagining the two of them having sex. Nevertheless, even after she asked him not to say such things, he said it to her again on more than one occasion.

19. Commissioner Morgan attempts to excuse his behavior in this regard by indicating that, when evaluating cases, he sometimes attempts to imagine himself in the shoes of the litigants, and finds it helpful to role-play this with another individual. The Committee makes no determination about whether this technique can, in the abstract, be a useful way

to evaluate cases. But in any event, Commissioner Morgan's use of this technique to ask a subordinate employee to imagine having sex with him, then telling her "you're welcome" and smirking, is not an appropriate application of it.

20. The Committee also does not credit Commissioner Morgan's explanation that he just "forgot" that Complainant had asked him not to do this.

21. On another occasion, in a similar vein, Complainant expressed to Commissioner Morgan that she was having "déjà vu" and that she "must have dreamt" something, and Commissioner Morgan responded, "If you dreamt about me, you must have liked it."

22. On two occasions, Commissioner Morgan—unbidden and unsolicited—rubbed Complainant's shoulders in a massage-like manner. One of these occasions occurred in Witness's office, in the presence of both Witness and Complainant. On this occasion, as soon as Commissioner Morgan began to rub Complainant's shoulders, Witness testified that both she and Complainant told Commissioner Morgan to stop it, but he did not immediately do so, and continued to rub Complainant's shoulders for another twenty to thirty seconds before finally stopping. Complainant clarified that she did not remember saying something herself; rather, she recalled that she tensed or "froze" up because she so dislikes being touched, and was extremely uncomfortable.

23. On the other occasion, Commissioner Morgan rubbed Complainant's shoulders as they were both walking in a hallway in the courthouse. Complainant shrugged her shoulders to get him to remove his hands, and he did so.

24. Sometimes, as part of reviewing cases, Commissioner Morgan would be required to look at exhibits submitted by parties that contained explicit photographs of women. On

occasion, Commissioner Morgan remarked to Complainant, as he was looking at such photos, "Ugh, I don't want to look at that" or "It's not worth looking at."

25. Commissioner Morgan got in the habit of calling another judicial assistant in the office "a heifer." This judicial assistant did not testify before the Committee; according to other information at the Committee's disposal, this banter may not have bothered the judicial assistant in question, who responded in kind by calling Commissioner Morgan "a heifer." There is also some indication that it was actually the judicial assistant who first used this term. But Commissioner Morgan's use of the term made others in the office uncomfortable, and he was eventually asked to stop using the term, and he did so. However, he lamented to Complainant that he was unhappy about it, and told her that, in his view, the office staff who reported him for using the term "heifer" were "just jealous I didn't have a nickname for them."

26. Commissioner Morgan made occasional comments about Complainant's style of dress. Nothing about Complainant's dress style was inappropriate. Complainant often wore black clothing, and Commissioner Morgan expressed his view, to both Witness and Complainant, that he would "dress [Complainant] differently" and have her wear more color.

27. Commissioner Morgan also expressed to Complainant some of his views regarding diversity in employment. After Commissioner Morgan was not selected for a position with the courts, he complained that "If I were a woman I would have gotten the job" and that he was not selected due to his status as "a white man." Complainant attempted to push back on these comments, but Commissioner Morgan snapped at her, raising his voice and telling her to "shut up and listen."

28. Commissioner Morgan, in discussing alimony cases with Complainant, often expressed his view that he had a bias against men being caretakers or stay-at-home dads, and that he was uncomfortable awarding alimony to men, because in his view women are supposed to stay home with the children and men are supposed to work.

29. While Commissioner Morgan expressed these views to Complainant in private, Complainant did not ever observe—and there is no evidence before the Committee—that Commissioner Morgan issued rulings that reflected these biases. Indeed, Complainant testified that, in her view, Commissioner Morgan made every effort to be fair in his rulings despite his acknowledged biases.

30. Commissioner Morgan would also discuss his religious beliefs with Complainant. Commissioner Morgan is an active member of the Church of Jesus Christ of Latter-day Saints, and he would mention this often to Complainant and encourage her to adopt those same beliefs. For instance, he would tell her that she needed to do genealogy, and spoke of a religious song called "I Know that My Redeemer Lives" and told Complainant that "you know that song to be true." Witness also testified to hearing Commissioner Morgan talk about religion on other occasions, and considered these conversations inappropriate.

31. Complainant testified that the conversations and comments she described were only a portion of the similar comments Commissioner Morgan made to her on almost a daily basis.

32. Toward the end of her tenure with the Second District Court, Complainant had become extremely uncomfortable even being in the same office building as Commissioner Morgan. As a result, she would seek leave to do more of her work from home, and would attempt to time her visits to the office during times when she knew Commissioner

Morgan would be on the bench or otherwise unavailable, all so that she could minimize her interaction with Commissioner Morgan.

33. Complainant left the employ of the Second District Court in June 2020, in part because of her discomfort with Commissioner Morgan, and in part for other reasons.

34. Upon her departure, she sent a letter to the presiding judge of the Second District Court, explaining her concerns with Commissioner Morgan's behavior. That letter was forwarded to HR, which conducted a full investigation into the matter. As part of that investigation, HR interviewed several witnesses, including some witnesses that did not testify before this Committee, as well as Complainant. HR did not, however, notify Commissioner Morgan of the complaint, and did not interview him in connection with its investigation.

35. Eventually, after completing its investigation, HR concluded that Commissioner Morgan had committed harassment, as that term is defined in HR's written policies. However, because of Commissioner Morgan's status as a judicial officer, HR was not in a position to take corrective or disciplinary action against Commissioner Morgan. At that point, in late 2020, the matter was referred to this Committee.

36. The rules governing this Committee require that proceedings be initiated by the filing of a complaint, which complaint will then be shared with the commissioner in question. *See* Utah Code of Jud. Admin. § 3-201.02(2). In this situation, Complainant was for a time unsure about whether she wished to proceed with a complaint before this Committee. Once it was confirmed that Complainant wished to move forward, the Committee began the process of reviewing the complaint under applicable rules, and in July 2021 determined that a hearing would be necessary.

CONCLUSIONS OF LAW

1. Commissioner Morgan violated Rule 2.3(B). That rule states that judicial officers "shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice or engage in harassment." The term "harassment" is defined as "verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation."
2. All of the conduct described above occurred "in the performance of" Commissioner Morgan's "judicial duties." While none of it occurred in the courtroom, it occurred during deliberation and evaluation of judicial cases, and in interactions with subordinate judicial employees in the courthouse.
3. While performing those judicial duties, Commissioner Morgan committed harassment toward Complainant on multiple occasions. Much of the conduct described above served to denigrate Complainant, members of the LGBTQ community, and others, on the basis of sex, gender, or sexual orientation. Using derogatory terms ("homos") toward members of the LGBTQ community, especially in the presence of Complainant who is a member of that community (and after requests that he stop doing so), constituted harassment. Asking Complainant—a subordinate employee—to imagine having sex with him, and telling her "you're welcome" and smirking, constituted harassment. Rubbing the shoulders of Complainant, especially after being asked not to, constituted harassment.
4. The Committee is especially concerned about two aspects of this situation. First, the Committee is concerned that Commissioner Morgan does not fully understand the importance of the power imbalance dynamic inherent in the judicial workplace.

Individuals who work for judicial officers are often very eager to please their employer, and perhaps hesitant to challenge their employer or report improper actions on the part of that employer,[1] because their employer can have a wide and important influence on their future job prospects. This is especially true with regard to law clerks, who are generally young lawyers just starting out in the legal profession. Commissioner Morgan's comments that he considered Complainant "an equal" and that he did not consider himself to be in a position of power over her belie a fundamental misunderstanding of the situation.

5. Second, the Committee is concerned that some of the behavior described involved Commissioner Morgan taking action—using the term "homos" around Complainant, asking Complainant to imagine having sex with him, rubbing her shoulders—after he had specifically been asked not to do so. Commissioner Morgan's persistence in taking certain actions even after he learned that such actions were unwelcome and that others considered them inappropriate is a matter of no small concern.
6. The Committee therefore concludes that Commissioner Morgan's actions, considered in their totality, served to denigrate or show aversion to Complainant on the basis of sex, gender, or sexual orientation, and therefore constitute harassment.[2]
7. Commissioner Morgan violated Rule 2.8(B). That rule requires judicial officers to "be patient, dignified, and courteous to . . . court staff." For the reasons just discussed, the Committee concludes that Commissioner Morgan's actions, considered in their totality,

[1] We note that HR had originally intended to call five witnesses (other than Complainant) to testify to the Committee, but in the end only one appeared (Witness), and she no longer works for the Second District Court. We do not know the reasons why the other witnesses did not appear, and apparently neither does HR, but we note that the only two witnesses to appear before the Committee to testify against Commissioner Morgan in this matter are both *former* (and not current) employees of the courts.

[2] Commissioner Morgan testified that he did not intend to harass Complainant. We note that Rule 2.3 does not contain a "scienter" requirement.

were not dignified or courteous toward Complainant and other members of the court staff.

8. Finally, Commissioner Morgan violated Rule 1.2. That rule requires judicial officers to "act at all times in a manner that promotes—and shall not undermine—public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." The term "impropriety" is defined as "conduct that violates the law, court rules, or provisions of this Code." By taking actions that constitute harassment of court staff, Commissioner Morgan has failed to avoid impropriety.

RECOMMENDATIONS TO THE JUDICIAL COUNCIL

1. The Committee unanimously agrees that a severe sanction is appropriate in this case, and that a mere censure—whether public or private—will not suffice. In considering an appropriate sanction, the Committee is constrained by Rule 3-201(7) of the Code of Judicial Administration, which provides that, with regard to corrective actions taken during a commissioner's term of office, any "suspension without pay" must be limited to "a period not to exceed 60 days." In addition to corrective actions, the Committee may also consider recommending removal from office.
2. In considering appropriate sanctions, the Committee inquired of HR, during the argument portion of the hearing, what level of sanction it would have considered imposing had HR been able to impose one. Olsen stated, in response to that question, that had these actions been committed by a non-judicial-officer supervisory employee of the courts, HR would have recommended termination of employment as the most appropriate sanction, with a

significant suspension without pay, perhaps coupled with remedial education requirements, as a minimum sanction.

3. The Committee unanimously recommends that those two options be given the highest consideration by the Council. The Committee sees no reason for judicial officers to be treated differently—and certainly not more leniently—than other judicial branch supervisors. Thus, the committee recommends that Commissioner Morgan either be removed from office, or that at a minimum he be suspended for a significant period of time and, during that time, be required to undergo meaningful remedial education regarding tolerance, diversity, implicit bias, sexual harassment, and other similar topics.
4. The Committee is concerned, however, that a suspension of only sixty days—the longest allowable suspension under the governing rule—may not be long enough under the circumstances, even coupled with meaningful remedial education.
5. Thus, as between removal from office and a sixty-day suspension, a majority of the Committee recommends that the Council remove Commissioner Morgan from office. However, if the Council can fashion an appropriate suspension-based remedy within the strictures of the governing rule, the Committee believes that such a remedy could be appropriate as well.

Dated this 19th day of November, 2021.

Judge Ryan M. Harris, Chair
Court Commissioner Conduct Committee

Tab 3

Rule 1.0. Terminology.

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(g) "Knowingly," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) “Lawyer” denotes lawyers licensed to practice law in any jurisdiction of the United States, foreign legal consultants, and licensed paralegal practitioners, insofar as the licensed paralegal practitioner is authorized in Utah Special Practice Rule 14-802, unless provided otherwise.

(i) “Legal Professional” denotes a lawyer and a licensed paralegal practitioner.

(j) “Licensed Paralegal Practitioner” denotes a person authorized by the Utah Supreme Court to provide legal representation under Rule 15-701 of the Supreme Court Rules of Professional Practice.

(k) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(l) “Public-facing office” means an office that is open to the public and provides a service that is available to the population in that location.

(m) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(n) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(o) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(p) “Reckless” or “recklessly” denotes the conscious disregard of a duty that a lawyer is or reasonably should be aware of, or a conscious indifference to the truth.

(q) “Referral fee” means any exchange of value beyond marginal or of minimal value that is paid for the referral of a client, whether in cash or in kind. Fees shared with a lawyer who continues to represent the client in the matter referred and fees paid for generating consumer interest for legal services with the goal of converting the interests into clients are not referral fees for purposes of these rules.

(~~p~~r) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(~~q~~s) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(~~r~~t) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(~~s~~u) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by

which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g, Rules 1.2(c), 1.6(a), 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. Other rules require a 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. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed

and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (r) and (b). Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (r).

Referral Fees

[8] Fees paid for generating consumer interest for legal services with the goal of converting the interests into clients include lead generation service providers, online banner advertising, pay-per-click marketing, and similar marketing or advertising fees.

Screened

[~~8~~9] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[~~9~~10] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the

circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[~~10~~11] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

[~~10a~~11a] The definitions of "consult" and "consultation," while deleted from the ABA Model Rule 1.0, have been retained in the Utah Rule because "consult" and "consultation" are used in the rules. See, e.g., Rules 1.2, 1.4, 1.14, and 1.18.

Rule 5.4. Professional Independence of a Lawyer.

(a) A lawyer may provide legal services pursuant to this Rule only if there is at all times no interference with the lawyer's:

(1) professional independence of judgment,

(2) duty of loyalty to a client, and

(3) protection of client confidences.

(b) A lawyer may permit a person to recommend, retain, or pay the lawyer to render legal services for another.

(c) A lawyer or law firm may share legal fees with a nonlawyer if:

(1) the fee to be shared is reasonable and the fee-sharing arrangement has been authorized as required by Utah Supreme Court Standing Order No. 15;

(2) the lawyer or law firm provides written notice to the affected client and, if applicable, to any other person paying the legal fees;

(3) the written notice describes the relationship with the nonlawyer, including the fact of the fee-sharing arrangement; and

(4) the lawyer or law firm provides the written notice before accepting representation or before sharing fees from an existing client.

(d) A lawyer may practice law with nonlawyers, or in an organization, including a partnership, in which a financial interest is held or managerial authority is exercised by one or more persons who are nonlawyers, provided that the nonlawyers or the organization has been authorized as required by Utah Supreme Court Standing Order No. 15 and provided the lawyer shall:

(1) before accepting a representation, provide written notice to a prospective client that one or more nonlawyers holds a financial interest in the organization in which the lawyer practices or that one or more nonlawyers exercises managerial authority over the lawyer; and

(2) set forth in writing to a client the financial and managerial structure of the organization in which the lawyer practices.

Comments

[1] The provisions of this Rule are to protect the lawyer's professional independence of judgment, to assure that the lawyer is loyal to the needs of the client, and to protect clients from the disclosure of their confidential information. Where someone other than the client pays the lawyer's fee or salary, manages the lawyer's work, or recommends retention of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (a), such arrangements must not interfere with the lawyer's professional judgment. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent). This Rule does not lessen a lawyer's obligation to adhere to the Rules of Professional Conduct and does not authorize a nonlawyer to practice law by virtue of being in a business relationship with a lawyer. It may be impossible for a lawyer to work in a firm where a nonlawyer owner or manager has a duty to disclose client information to third parties, as the lawyer's duty to maintain client confidences would be compromised.

[2] The Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[3] Paragraph (c) does not permit~~s~~ individual lawyers or law firms to pay referral fees to nonlawyers. Referral fees are defined in Rule 1.0. ~~for client referrals, share fees with nonlawyers, or allow third party retention. In each of these instances, the financial arrangement must be reasonable, authorized as required under Supreme Court Standing Order No. 15, and disclosed in writing to the client before engagement and before fees are shared.~~ Fee sharing arrangements with nonlawyers are governed by Supreme Court

Standing Order No. 15. ~~Whether in accepting or paying for referrals, or fee-sharing, the lawyer must protect the lawyer's professional judgment, ensure the lawyer's loyalty to the client, and protect client confidences.~~

[4] Paragraph (d) permits individual lawyers or law firms to enter into business or employment relationships with nonlawyers, whether through nonlawyer ownership or investment in a law practice, joint venture, or through employment by a nonlawyer-owned entity. In each instance, the nonlawyer-owned entity must be approved by the Utah Supreme Court for authorization under Standing Order No. 15.

[5] This ~~Rule~~ rule differs from the ABA model rule.

Rule 5.8. Referral Fees.

(a) A referral fee paid to a lawyer who does not represent the client in the referred matter must:

(1) not be paid until an attorney fee is payable to the lawyer representing the client in the referred matter;

(2) not be passed along to the client either as a cost or an increase of the total attorney fee; and

(3) be subject to the client's giving informed consent, confirmed in writing, to the terms of the referral fee arrangement.

(b) Any referral fee payable in the case must be reasonable relative to the total attorney fees that may ultimately be earned. The factors to be considered in determining the reasonableness of a referral fee include the following:

(1) the referral fee customarily paid in the locality for similar referrals;

(2) the amount of work performed by the referring attorney and the amount of work anticipated to be performed by the attorney taking over the matter;

(3) the amounts involved and the potential results; and

(4) the nature and length of the referrer's relationship with the client.

(c) Referral fees to nonlawyers are prohibited.

Comment

[1] Paragraph (a)(1) prohibits lawyers from paying a referral fee until the lawyer who represents the client in the matter is entitled to be paid attorney fees.

[2] In the case of a contingent fee matter, the lawyer may not pay the referral fee until the lawyer is entitled to receive the contingent fee, which may be at the conclusion of the matter.

[3] A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter diligently. See Rules 1.1 and 1.3.

[4] Paragraph (a)(2) prohibits a lawyer from charging a client in a referred matter a higher fee, or from seeking payment of greater costs, than the lawyer charges other clients where no referral fee was paid. For the definitions of "informed consent," "confirmed in writing," and "referral fees," see Rule 1.0.

[5] The term "amounts involved" in paragraph (b)(2) refers to things such as the estimated value of the case, claims, estate, commercial transaction, anticipated recovery, insurance limits, and statutory limits.

[6] Paragraph (c) forbids payments to nonlawyers for referring clients or legal matters. Fee--sharing with nonlawyers is only permitted when done in accordance with Rule 5.4 and Standing Order No. 15.

[7] This rule is not part of the ABA Model Rules.

Tab 4

Sub-committee on Rule 3.8

Judge Amy Oliver

To: Simón Cantarero <cantarero.law@gmail.com>; Nancy Sylvester <nancy.sylvester@utahbar.org>

Hi Simón and Nancy,

The Sub-committee on Rule 3.8 met today to discuss the proposal brought to the Committee by Curtis Larsen regarding additional responsibilities of prosecutors. We appreciated both Vanessa Ramos (Federal Public Defender and former Committee member) and Michael Kennedy (Assistant U.S. Attorney) joining us at the meeting to give their thoughts and perspectives. We also appreciated Curtis Larsen participating in the meeting.

There were two amendments to Rule 3.8 proposed by Mr. Larsen. With respect to subsection (f), there was a consensus among the Sub-committee that the current Federal and State Victims Rights statutes adequately address the concerns raised and there was no need to duplicate those efforts by adding a rule of professional responsibility. With respect to subsection (g), there was a consensus among the Sub-committee that the upcoming revisions to Rule 8.4 would likely address the concerns here. There was also a consensus that the creation of these new rules could add a significant number of bar complaints due to the fact that victims and Defendants can frequently be unhappy with the resolution of criminal cases and that these complaints would likely be difficult to adjudicate.

The consensus of the Sub-committee was that the proposed changes are not necessary at this time. The Sub-committee was sympathetic to the concerns raised by Mr. Larsen in proposing the new rule, but felt that amending Rule 3.8 would not necessarily solve the issue and would likely create additional issues.

I will plan to report back to the Committee at the February meeting.

Thanks,

Amy Oliver

Petition for Amendment of Utah Rule of Professional Conduct 3.8, Special Duties of a Prosecutor

Mr. Cantarero,

Thank you for taking time to speak with me yesterday. I appreciated your understanding and assistance in how to proceed with a proposal of this type. As I mentioned to you, the foundation of my proposal stems from my service as a Deputy Utah County Attorney in the office's Criminal Division, for nearly 27 years. I recently retired from public service and am now on inactive status with the Utah State Bar. For some time I have felt that Rule 3.8 should be amended in two ways to update a prosecutor's ethical duties to victims of criminal offenses, and to assure equal application of the law to all persons to be charged and prosecuted for violation of a criminal law. I proposed the following amendments to Rule of Professional Conduct 3.8:

> Rule 3.8. Special Responsibilities of a Prosecutor.
>
> The prosecutor in a criminal case shall:
> (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
> (b) Make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
> (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
> (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; ~~and~~
> (e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6~~.~~;
> (f) Exercise reasonable care to assure that the constitutional and statutory rights of persons who suffer the consequences of another's criminal acts are protected and effectuated; and
> (g) Assure that criminal statutes and ordinances, any element or provision of a statute or ordinance, including the level of the offense, or any combination of statutes or ordinances, sentencing enhancements or similar provisions of law, are applied in equal fashion to all persons who are similarly situated in relation to those laws by personal circumstance or criminal history, and without regard to race, color, sex, national origin, sexual orientation, gender identity, age, religion or creed, in charging an offense, and during the prosecution thereof.

I offer the following comments pursuant to Judicial Council Code of Judicial Administration

Rule 11-102, regarding the need for and anticipated effect of the proposal.

Paragraph (f).
Prosecutors have a special duty that is spread across many fields, specifically, enforce the law, protect society, bring justice under the law to victims, make victims whole through restitution, and be a general minister of justice for the defendant. It's not uncommon for a prosecutor to be so busy focusing attention in one of these fields to loss track of the responsibilities in one of the others, especially when the bulk of prosecution efforts on behalf of victims is performed and coordinated by others in the office. Under current laws, victims possess a right to intervene in a case when they sense that their rights have been, or are being, impinged, yet most hesitate to do so due to personality, fear, or financial cost for representation. The court can correct issues when raised, yet, shouldn't there be some consequence for a manifest dilatory prosecutor? To my knowledge, currently there isn't a rule of professional conduct which allows victims of criminal violations to file a complaint with the bar as victims are not seen as clients of a prosecutor. The amendment corrects that deficiency in the rules, but only if shown that the prosecutor failed to exercise a reasonable effort in a case. It's anticipated that the effect of this proposal will be prosecutors paying greater attention to the victim's constitutional and statutory rights in a case, modify their approach or case management procedures in relation to them if necessary, and more fully effectuate and empower the victim's interest in their case.

Paragraph (g):
Prosecutors have a constitutional requirement upon them to treat all person equally under the law. They take an Oath to support, obey and defend two constitutions. The question is how to assure a prosecutor is fulfilling that requirement. Though a federal lawsuit can be filed for a violation of an established constitutional right, little will be accomplished by doing so as a prosecutor possesses "absolute immunity" from such. It's very difficult to pierce this mantle of immunity. Rule 3.8 lags behind the societal trend of today regarding equal treatment of persons under the law and accountability for a prosecutor not doing so. My proposal gives greater strength and foundation to the Oath to which a prosecutor subscribes, and their constitutional requirements. It also presents an alternative avenue of review to those who believe they have been injured by a prosecutor's unequal application of the law towards them and in their case. It's anticipated that the effect of this amendment will be that prosecutors will be more watchful of their constitutional duties of equal treatment to all persons, seek to assure with greater vigilance the equal application of laws in charging decisions and the equitable charging of offense levels as established by the law, prosecute offenses with an enhanced sensitivity to their obligation to be ministers of justice, better understand the application of law to individual circumstances, eliminate personal bias, and monitor the justice system for any appearance of inequitable application of the law.

Thank you for this opportunity,

Curtis L. Larson

Curtis L. Larson
Bar #6598
801-831-1804

Tab 5

Mr. Cantarero,

I am reaching out to you as the Chair of the Supreme Court's Advisory Committee on the Rules of Professional Conduct and requesting the committee review Rule 1.2(a), specifically the last sentence related to criminal cases. Currently the rule requires a lawyer in a criminal case to "abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." I believe the rule should be amended to include the decision whether to file an appeal. As described in the Utah Constitution, criminal defendants have "the right to appeal in all cases" (Art. I, sect. 12), and the decision whether to appeal belongs to the defendant. See *Jones v. Barnes*, 463 U.S. 745, 751 ("It is also recognized that the accused has the ultimate authority to make certain foundational decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").

There is an increase in litigation on the issue or reinstatement of time to file notice of appeal pursuant to Rule 4 of the Utah Rules of Appellate Procedure. My experience leads me to conclude that much of this litigation stems from defense counsel's failure to adequately consult with defendants about the right to appeal and the potential issues that could be raised on appeal. I suggest that adding this language is justified and would reduce this unnecessary litigation if it helped lawyers understand and recognize that duty.

I'd be happy to answer any questions or speak to the committee. I've attached my proposal.

I cc'd Keisa Williams to this email because I do not know who the staff member is that assists your committee. The website says it is Nancy Sylvester but I understand she is no longer with the Court.

Thank you.

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Rule 1.2. Scope of representation and allocation of authority between client and lawyer. Licensed paralegal practitioner notice to be displayed.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify, and whether to take an appeal.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(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 proposed course of conduct with a 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.

(e) A licensed paralegal practitioner shall conspicuously display in the licensed paralegal practitioner's office a notice that shall be at least 12 by 20 inches with boldface type or print with each character at least one inch in height and width that contains a statement that the licensed paralegal practitioner is not a lawyer licensed to provide legal services without limitation.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a

civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction

between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

[14] Lawyers are encouraged to advise their clients that their representations are guided by the Utah Standards of Professionalism and Civility and to provide a copy to their clients.

[14a] This rule differs from the ABA Model Rule by adding section (e) which requires licensed paralegal practitioners to post a conspicuous notice of their limited licensure status.