



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

Meeting Minutes

June 7, 2022

Zoom

16:00 Mountain Time

J. Simon Cantarero, Chair

Attendees:

J. Simon Cantarero, Chair

Katherine Venti

Alyson McAllister

Cory Talbot

Adam Bondy

Gary Sackett (Emeritus)

Steve Johnson (Emeritus)

Jurhee Rice

Billy Walker

Dane Thorley

Austin Riter

Robert Gibbons

Hon. Mike Edwards

Hon. Trent Nelson (Emeritus)

Hon. James Gardner

Dan Brough

Excused:

Phillip Lowry

M. Alex Natt, Recording Secretary

Scotti Hill

Julie J. Nelson

Hon. Amy Oliver

Staff:

Nancy Sylvester

Guests:

Christine Greenwood

Jacqueline Carlton

Douglas Thompson

Bryson King

J.D. Lauritzen

Hannah Follender

1. Welcome and approval of the May 3, 2022 meeting minutes (Chair Cantarero)

Chair Cantarero recognized the existence of a quorum and called the meeting to order at 16:05.

Professor Thorley moved to adopt the May 3, 2022 minutes. Ms. Jones seconded. The Motion passed by acclamation.

2. Rule 1.16 (Mr. Thorley)

Professor Thorley discussed the work of the subcommittee. He noted two questions: whether trial attorneys would have to discuss the merits with a client and whether the attorney should have to file a notice of appeal.

He noted that the subcommittee deleted the previously proposed language: “consulting with the client regarding the lawyer’s professional judgment as to whether there are meritorious grounds for appeal.” He said the subcommittee instead used this language (in bold):

(e) In the event of a conviction or a guilty plea in a criminal case, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests in appeal, including informing the client of the right to take an appeal and the time within which any appeal must be filed, **the potential grounds for appeal**, and filing a notice of appeal if requested.

The subcommittee also drafted the following comment:

Assisting the Client upon End of Client-Lawyer Relationship at Criminal Plea or Conviction

[10] These obligations can be fulfilled by timely ensuring that the client has secured representation for appeal. Some critical decisions regarding a client's rights of appeal occur soon after a conviction or guilty plea but before the termination of trial-stage representation. The trial lawyer should take whatever steps are necessary to protect the client’s rights of appeal, including filing a timely notice of appeal with the trial court if requested by the client, even if counsel does not expect to continue as counsel on appeal, and requesting the appointment of counsel for appeal if indigent. Consultation regarding the potential grounds for appeal should include advising the client about the meaning of the court’s judgment, **any preserved issues**, and the advantages and disadvantages of an appeal. During consultation and representation, the lawyer should make reasonable efforts to discover the client’s wishes.

Professor Thorley noted that the bolded language “any preserved issues” captures the “grounds for appeal” language in (e). He also noted that the subcommittee expects that there will be an increase in notices of appeal filed, but that it will probably be slight. Mr. Thompson observed that any non-meritorious appeals will be handled expeditiously by the Court of Appeals. The court has implemented good tools in the last few years to weed out non-meritorious claims. He also observed that when defendants realize that the Court of Appeals can only review the sentence following a plea, defendants often voluntarily waive their appeals.

The committee discussed the importance of having in a black-letter rule the *Strickland/Roe v. Flores-Ortega* requirements/public policy of protecting criminal defendants’ appeal rights. The committee also noted that the trial attorneys’ job would end if there is appellate counsel to pass the case off to.

Chairman Cantarero noted that the comment language, “including filing a timely notice of appeal with the trial court if requested by the client,” was redundant to the rule and should be taken out.

Mr. Sackett observed that the comment should reference paragraph (e) specifically. He also observed that the comment language should talk about informing the client of the right to appeal first. Following discussion about sentence order, Professor Thorley moved this language to the end of the comment paragraph: “The obligations under paragraph (e) can be fulfilled by timely ensuring that the client has secured representation on appeal.”

The committee then added at the beginning of the comment: “Paragraph (e) highlights that there are some critical decisions....” to flag to the reader which rule language the comment was addressing.

Billy Walker moved to recommend that the amendments to Rule 1.16 be sent to the Supreme Court. Katherine Venti seconded. The motion carried.

3. Rule 1.2(d) and the Cannabis Industry (J.D. Lauritzen)

J.D. Lauritzen introduced himself, noting that he is the head of governmental compliance with Wholesome.co, a Utah cannabis company. Mr. Lauritzen noted that Hannah Follender is an IP attorney who works on trademarking cannabis strains. Mr. Lauritzen and Ms. Follender are the co-chairs of the Cannabis Law Section. Mr. Lauritzen discussed with the committee the tension between state and federal law and how this plays out in Rule 1.2(d). He said his private practice fee agreements would specifically state that he was only representing the client on state issues and that cannabis remained illegal at the federal level.

Billy Walker noted that Rule 1.2(d) is problematic because of the term “assist.” He said he served on an ABA Committee that tried to take up the tension between the rule and legal work with the cannabis industry, but the committee

ultimately left it to the states to figure out what to do with the rule. He noted that some presidential administrations have chosen not to enforce the federal law on cannabis, while some have.

Mr. Lauritzen said at last check, 64 attorneys belonged to the Cannabis Law Section, so there is definitely an interest in this area of the law and as such a need for protection.

Chairman Cantarero asked a subcommittee to take up the issues Ms. Lauritzen presented. He said the subcommittee should specifically look at what constitutes criminal conduct under Rule 1.2(d).

Subcommittee: Austin Riter (chair), Cory Talbot, Billy Walker, Joni Jones, Judge Trent Nelson

4. Fond Farewell to Dan Brough and Katherine Venti

Chairman Cantarero and the committee said a fond farewell to Mr. Brough and Ms. Venti as their terms were expiring.

5. Adjournment

The meeting adjourned at 17:24. The next meeting will be in-person on August 2, 2022.