



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

Meeting Minutes November 1, 2022

Utah Law and Justice Center & Zoom
16:00 Mountain Time

J. Simon Cantarero, Chair

Attendees:

J. Simon Cantarero, Chair

Phillip Lowry

Gary Sackett

Cory Talbot

Dane Thorley

Alyson McAllister

Joni J. Jones

Robert Gibbons

Hon. James Gardner

Adam Bondy

Austin Riter

Mark Hales

Hon. Trent Nelson

Ian Quiel

Jurhee Rice

Julie Nelson

Hon. Amy Oliver

Christine Greenwood (ex officio)

Staff:

Nancy Sylvester

Scotti Hill

Guests:

Excused:

Billy Walker

Hon. M. Alex Natt, Recording
Secretary

Hon. Mike Edwards

1. Welcome and approval of the October 4, 2022 meeting minutes (Chair Cantarero)

Chair Cantarero recognized the existence of a quorum, called the meeting to order at 4:03 and asked for a Motion to Approve the October 4, 2022, Meeting Minutes.

Chair Cantarero suggested one edit to the October minutes. Judge Gardner was incorrectly omitted from the attendees list. Judge Nelson also suggested we make clear the following regarding his remarks, “plead, judge conviction, *or* conviction,” regarding the proposed amendments to Rule 1.16.

Ian Quiel moved to accept the October 4, 2022, minutes with the aforementioned changes. Mark Hales seconded the Motion. The Motion passed by acclamation.

2. Rule 1.2 (Mr. Riter)

Subcommittee Chair Austin Riter presented the subcommittee’s work on Rule 1.2(d).

Mr. Riter discussed the subcommittee’s desire to revise Rule 1.2(d) to add clarity for lawyers counseling clients in cannabis-related industries. Namely, to add language that would insulate lawyers from running afoul of the ethics rules for advising their clients on these issues, which concern a conflict of laws between state and federal statutory schemes.

The group opined that the fact that the Legislature has weighed in on this issue is ample justification for the committee to craft an applicable rule to address this from an ethics perspective. There is a strong desire for there to not be an open question as to whether lawyers can advise and assist clients in this burgeoning industry.

Mr. Riter explained that the subcommittee reviewed several ethics opinions and rules on this issue from various jurisdictions, which led to the subcommittee’s proposal for two distinct rule options.

The first option is a rule with language narrowly focused on lawyers advising and assisting clients with Utah’s cannabis related statutes. The subcommittee proposed the amendment as an addition to comment [12], which would read,

Under paragraph (d), a lawyer may also counsel a client regarding the validity, scope, and meaning of Utah's cannabis-related statutes, and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, and other state or local provisions implementing the statutes. In these circumstances, the lawyer shall also advise the client regarding the potential consequences of the client's conduct under related federal law and policy.

The amendment would also include an explanatory note that enumerates the specific cannabis-related statutes the rule is meant to encompass.

Mr. Riter noted that this approach tracks very similar language that's used in at least three other jurisdictions-Vermont, Nevada, and Alaska. A critical component of this language is not simply to allow lawyers to counsel clients on how to comply with state law, but to advise on the conflict between state and federal law. The Rule 1.2 amendment also includes an accompanying amendment to Rule 8.4 that introduces an exception to the misconduct list as follows: "*Except as provided in Rule 1.2(d), it is professional misconduct for a lawyer to...*"

The second proposal is influenced by a Model ABA rule that was eventually abandoned by the ABA House of Delegates. This proposal generalizes the concept of lawyers advising on cases in which a conflict between state and federal law exists but does not narrow to cannabis-related statutes.

Chairman Cantarero expressed concern that the first option's reference to specific cannabis-related statutes in the comment would require the committee to continually update these references as laws change and are renumbered. There is also a concern that there may be additional laws or applications this committee is unaware of at this time. Additionally, rule-like language, evidenced by the term "shall," should not be in a comment. The Utah Supreme Court has stated any obligatory language should be in the rule itself, rather than in the comments.

Mr. Quiel noted that other RPCs have similarly strong language in the comments, the comments of Rule 3.3 for example. Ms. Sylvester responded that while this can be true in some places, the Court is moving away from that practice.

Judge Garner also noted that the Legislature changes statutes all the time, echoing the concern about listing out specific subsections of statutes. The committee may list out statutes generally, but there's no need to use the rule to interpret every single statute.

Ms. Sylvester echoed the sentiment that the committee should not have rule-like language in the comments. She stated that it's permissible to have "shall" language in the comments as long as it matches what appears in the relevant rules themselves. What is not advisable is having a strict prohibition appear for the first time in comment language. She noted that regarding the current focus of

discussion, the committee could craft a broader rule and use the state's cannabis laws as an example in the comments.

Mr. Sackett agreed with this sentiment and took issue with the first option's very specific mention of cannabis-related statutes. He also asked why the Committee would render a distinction between Utah and federal law, which implies that Utah laws are supreme to federal law. There are many examples where the opposite is true. This reasoning was echoed by Ms. Jones and Judge Oliver. Mr. Sackett also questioned why civil penalties aren't listed alongside criminal penalties.

Apart from the issue of where the language is placed, Judge Nelson considered the "shall" language was warranted given the gravity of advising a client that state conduct may be prohibited under federal law. Judge Nelson stated that this is not a "gray area" issue since cannabis is still explicitly illegal under federal law. He noted that the committee was considering a safe haven from OPC disciplinary proceedings, not a safe haven from federal prosecution.

Judge Nelson also introduced a second question: what happens if the lawyer is an owner of one of these cannabis-related entities? Does this calculation change?

Judge Nelson voiced opposition to the amendment to Rule 8.4 beginning with Rule 1.2, which puts "everything through the lens of 1.2." Mr. Sackett also questioned why we need to amend Rule 8.4.

Ms. Greenwood stated her belief that Rule 1.2 should be left the way it is because it already captures the idea of not advising your client to violate the law whether it is state or federal. She opined that if the committee is looking to craft a general amendment, the rule as it stands already covers this.

The committee discussed revising Rule 8.4 to say that it is not professional misconduct to advise clients in instances where there's a conflict between state and federal laws.

Chair Cantarero asked why would this not just apply to paragraph (c) of Rule 8.4? Others commented that it has implications outside of this paragraph. He asked whether the subcommittee had guidance from the House of Delegates on this issue? Subcommittee member Mr. Walker said no because this was abandoned by the ABA.

Ms. Jones said she preferred the broader language addressing the conflict between state and federal law. Mr. Quiel agreed, stating that there is a national trend where states are legalizing controlled substances that might still be illegal under federal law, so the committee doesn't want to keep updating the rule language if this occurs.

Judge Nelson stated that this is a broad policy decision that is asking the committee to hypothesize about issues that the committee may not fully understand just yet.

The committee decided to table the discussion. Ms. Sylvester suggested the subcommittee take the issues that were raised at the meeting and create two versions of the rule to present the Court with specific rule language to be voted on by the committee before being presented to the Court.

3. Rule 8.4(c) (Ms. Jones)

Subcommittee Chair Joni Jones presented the subcommittee's work on Rule 8.4(c).

The subcommittee was tasked with reconciling the draft rule with comments received during the comment period. One commenter supported the change, and three others were critical about the proposed language. Ms. Jones noted that the discussion at the subcommittee was helpful.

Originally, when putting this rule together, Ms. Jones said she was thinking exclusively about protecting government lawyers, but later realized there are other situations where non-government lawyers would be involved with deception, such as investigating discrimination in housing or trademark violations. The new recommendation is to make the language broad enough to include non-governmental lawyers as well.

A second consideration was whether the protection would apply simply to those actually involved in the deception, as well as whether the conduct was pursuant to the individual's role as a lawyer or during the performance of non-law related duties. The subcommittee spoke with Mr. Sackett about an Ethics Advisory Opinion on point during his tenure as Chair of the Ethics Advisory Opinion Committee. The ethics opinion involved a federal attorney working as an investigator for the FBI/CIA. The attorney was licensed in Utah, but his federal job required him to participate in the deception on a federal level. This motivated the subcommittee to include the following language permitting deception, "conducted to established law."

The subcommittee suggested the following amendments:

1) To Rule 8.4(c)

It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may participate in investigative activities employing deception that are conducted pursuant to established law.

In addition, the subcommittee proposed new comment 2a as follows:

Comment: Subsection (c) provides a safe harbor for attorneys who engage in lawful covert operations, often in criminal investigations or investigations involving suspected violations of constitutional rights or civil law. Whether a covert operation is lawful would be determined by reference to the definition of “law” in Rule 14-802(b)(2).

Examples covered by this rule are governmental “sting” operations; use of testers in fair-housing cases to determine whether renters discriminate against protected classes of applicants and gathering evidence of copyright violations. These are legitimate activities that benefit the common good and that courts and commentators have long recognized do not violate ethics rules.

The safe harbor does not apply when a lawyer uses deception to violate others’ constitutional rights or directs others to do so, and it does not change the lawyer’s obligations for candor and fairness under Rule 3.3 and 3.4.

The committee agreed that this amended rule is a lot more concise and general, but that the language “this differs from the ABA model rule” should be added and the numbers should be reordered.

Ms. Jones added that for government lawyers, “deception” usually applies to identity and purpose. Judge Nelson asked whether the deception lasts during the litigation or beyond the investigative phase. Judge Oliver stated this usually does not extend into the litigation.

Ms. Jones moved to recommend the new amendment to Rule 8.4(c) as well as new comment 2a. The motion was seconded by Judge Garner. The committee made a friendly amendment that the recommendation is to send the second proposed version to the Supreme Court for a new comment period.

4. Adjournment.

The meeting adjourned at 5:23pm. The next meeting will be held on December 6, 2022, at the Law and Justice Center and via Zoom.