

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

October 3, 2016

The meeting commenced at 5 p.m.

Committee Members Attending:

Steven Johnson (chair)
Gary Sackett
Joni Jones
Trent Nelson
John Bogart
Vanessa Ramos
Phillip Lowry
Simòn Cantarero
Daniel Brough
Gary Chrystler
Billie Walker
Thomas Bruner
Timothy Conde (recording secretary)

Excused:

Hon. Darold J. McDade
Timothy Merrill
Don Winder
Judge Vernice Trease
Padma Veeru-Collings
Cristie Roach

Staff:

Nancy Sylvester

Approval of Minutes

Mr. Sackett provided a few non-substantive comments regarding the draft of the meeting minutes. Those comments were adopted and incorporated. The committee adopted the meeting minutes, as revised.

ABA Model Rule 8.4(g) Proposed Amendment

Robert Rice, President of the Utah State Bar, and Margaret Plane, Salt Lake City Attorney and the State Delegate for Utah to the ABA's House of Delegates, attended the meeting

to speak about the ABA's proposed changes to Rule 8.4(g). Mr. Rice commented that the Utah State Bar promulgated a statement regarding diversity and inclusion years ago and it continues to work to implement it. Mr. Rice stated that a change to Rule 8.4(g) would further the Bar's efforts. Mr. Rice also commented that he is confident the Office of Professional Conduct could implement the new rule in a manner that is consistent with the Bar's diversity and inclusion statement.

Ms. Plane encouraged the committee to take the proposed change seriously. She was a State Delegate in the ABA's House of Delegates at the time the rule change was debated. The focus of the debate seemed to her to be the ability of a state bar to enforce the rule. After months of debate, she believes the rule change the ABA adopted represents a good model rule. Ms. Plane encouraged the committee to make some change, should it not adopt the model rule as written. In other words, the discussions should not be only whether the model rule is adopted, but also whether some deviation of the model rule should be adopted. She believes an anti-discrimination rule protects clients and attorneys.

The model rule includes a mens rea requirement. Ms. Plane provided the committee with a state-by-state survey of black letter rules for anti-discrimination. Some of the issues she expects to be debated are the breadth of the rule and the difficulty of enforcement. Ms. Plane offered to provide the committee with additional resources.

Chairman Johnson inquired whether the issue of the rule change could be resolved during the meeting that day. The group opined that the issue should be analyzed and discussed further. Chairman Johnson appointed a subcommittee to study the issue and make a recommendation to the committee. Simón Cantarero (chair), Billie Walker, Vanessa Ramos, Joni Jones, and Trent Nelson were appointed to the subcommittee. In addition to the issues the group had already identified, the group also encouraged the subcommittee to discuss a possible conflict between Rules 8.4(g) and 1.16. Ms. Plane commented that a sentence was inserted into Model Rule 1.16 to address that issue.

Once the subcommittee was formed, the committee continued to discuss concerns about the proposed rule change. Specifically, discussion ensued about whether members of the committee had viewed conduct that might violate the rule. Members commented they could not be sure, since the rule was vague regarding what constitutes the "practice of law." Another issue raised by the group was whether courts have defined the practice of law and how any such definition bears on the proposed rule change. There were also questions raised about the proposed rule's impact, if any, on affirmative action policies, the definition of "socio-economic," the rule's impact on extending Title VII to all lawyers, and an attorney's freedom to make appropriate client intake decisions. Members also wondered why Rule 8.4 was chosen as the vehicle for the many changes being proposed. Ms. Plane answered that doing so would likely allow the broadest application of the proposed changes. The committee also asked about whether formal comments were made during the ABA process. Ms. Plane said there were and agreed to supply those comments and along with some other resources on this issue.

Report of Rule 3.3 Subcommittee

A subcommittee had been formed to work with the Utah Supreme Court to determine what changes, if any, should be made to Rule 3.3 in light of the Court's decision in *Larsen v. Utah State Bar*, 2016 UT 26. The subcommittee reported that the Court requested that "recklessly" be added to the rule. The subcommittee also identified additional issues that should be considered as a result of the decision. For example, it wondered if "recklessly" should apply to all three subparts of the rule. This is reflected in Ms. Sylvester's notes, which were attached to the meeting agenda. The subcommittee also invited input regarding whether 3.3(a)(3) should be subject to a "reckless" standard. It proposed amending (a)(1)(3) to permit liability only if one *knows* the evidence is false. Another issue identified was whether "recklessly" should be defined in the rule. Members suggested inserting the following change: "with reasonable diligence should have known." In other words, the rule should apply the definition set forth in the *Rader* decision, which *Larsen* cites. The subcommittee agreed to approach the Court again for further guidance regarding the applicability of the reckless standard to subparts. Chairman Johnson also suggested that a comment be made highlighting any differences between the proposed changes and the model rule and why any changes should be made that would cause the rule to be different from the model rule.

Note About Ethics Advisory Opinion re Lawyers Settling Potential Malpractice or Disciplinary claims.

Last spring, the committee asked the Ethics Advisory Committee to write an opinion about clients settling complaints against attorneys. The Ethics Advisory Committee issued Ethics Advisory Opinion 16-02 and it comported with what this committee had requested.

Update on Licensed Paralegal Practitioners and the Effects on the Rules of Professional Conduct.

The Utah Supreme Court is concerned with providing legal services in areas that are vastly unrepresented. A task force has been assigned to work with Justice Deno Himonas to work on implementing the new paralegal practitioners program. The Utah Rules of Professional Conduct will need to be adjusted to accommodate this new program. A few changes will be simple (*e.g.*, 5.2 and 4.1), but some others will require more extensive work, *e.g.*, Rule 14-802. The Court has set February 2017 as the goal to have the changes made.

NEXT MEETING: November 28, 2016 @ 5 p.m.

The meeting adjourned at 6:41 p.m.