

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

November 28, 2016

The meeting commenced at 5 p.m.

Committee Members Attending:

Steven G. Johnson (chair)
John H. Bogart
Daniel Brough (phone)
Thomas B. Bruner
J. Simon Cantarero (phone)
Gary L. Chrystler
Joni Jones
Phillip E. Lowry
Hon. Darold J. McDade
Vanessa M. Ramos
Christie Roach
Gary G. Sackett
Billy L. Walker
Donald Winder

Excused:

Trent Nelson
Hon. Vernice Trease
Padma Veeru-Collings
Timothy Conde (recording secretary)

Staff:

Nancy Sylvester

Approval of Minutes

Chairman Steven Johnson proposed that Christie Roach, Judge Vernice Trease, and Padma Veeru-Collings be listed as “excused” in the minutes from the last meeting. He also suggested additional changes to clarify two points addressed in the minutes. Those changes were adopted and incorporated. The committee adopted the meeting minutes, as revised.

ABA Model Rule 8.4(g) Proposed Amendment

Simon Cantarero, chairman of the subcommittee appointed to review the proposed changes to the existing Rule 8.4, provided a report on the subcommittee’s work. The

subcommittee met two times to discuss questions that were raised during the committee's October meeting. The subcommittee also reviewed the materials Nancy Sylvester circulated in October that included comments and letters that were submitted in support and in opposition to Rule 8.4(g). The subcommittee reviewed and considered them, but was unable to reach conclusions about important questions that arose from those materials.

Mr. Cantarero reported that the subcommittee's discussions were ongoing and that it was not yet prepared to recommend a proposed change to the rule. Among the questions the subcommittee had been discussing was the scope of that rule, *i.e.*, the scope of 8.4(g) as it applies to attorneys who are merely conducting the business of practicing law. The subcommittee was also concerned with the notion of elevating attorneys to some sort of public status or quasi-state actor by making misconduct *professional misconduct* in any harassment or discriminatory practices they may have. That concern led to questions about whether the proposed change to the rules would lead to better and less discriminatory behavior. The subcommittee could not reach a consensus on these and other issues and questions.

The committee continued to discuss the proposed changes. Specifically, the committee focused on how other states have approached the issue and whether the Utah State Bar had seen complaints filed based on discrimination. Billy Walker responded by acknowledging that he had seen substantial evidence of females being treated differently, whether it be clothing styles or other issues. The committee also discussed the subcommittee's concern about holding attorneys to higher non-discrimination standards.

After the committee discussion, Mr. Cantarero informed the committee that the subcommittee planned to meet again in December to draft a revision to Utah's current Rule 8.4 that could be presented to this committee for discussion and consideration. The subcommittee also offered to provide the committee with guidance regarding enforceability at its next meeting.

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. In *Larsen*, the Court found that Larsen had recklessly misrepresented to the court, but that he had not done so knowingly. Thus, there was no violation of Rule 3.3. *Larsen* dealt only with Rule 3.3(a)(1), which provides that a lawyer shall, among other things, not make a false statement to a tribunal. The Utah Supreme Court has since requested that this committee draft a version of the Rule 3.3 that allows a violation for a recklessly false statement of fact or law made to the tribunal. As the subcommittee began drafting a proposed Rule 3.3(a)(1), it discovered that Rule 3.3(a)(1) and (a)(2) were similar in many respects, *i.e.*, (a)(1) relates to false statements made to a tribunal, while (a)(2) relates to an attorney's failure to disclose to the court legal authority that is directly adverse to the position of her client. However, the subcommittee viewed Rule 3.3(a)(3) as being different in that it prohibited a lawyer from offering evidence he *knows* to be false. In other words, while (a)(1) and (a)(2) may apply a reckless standard, (a)(3) already applies a knowingly standard.

Based on these differences, the subcommittee considered proposing two different versions of Rule 3.3 to the Court: (i) one version incorporating a reckless standard for (a)(1),

(a)(2), and (a)(3), and (ii) another version incorporating a reckless standard for (a)(1) and (a)(2), but applying a knowingly standard to (a)(3). The larger committee discussed which of the two versions the committee preferred. The committee preferred the second version. The committee also suggested that Rule 1.0 be amended to include a definition for “reckless” or “recklessly,” and that a new comment 3(a) be added that provides that Rule 3.3 is different from the ABA Model Rule. The new comment should also cite *Larsen* and the amended Rule 1.0, which includes the definition of “reckless.” The subcommittee will draft the proposed changes and present them at the committee’s next meeting.

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

Chairman Johnson asked committee members to divide up the Rules of Professional Conduct to determine whether there are rules, in addition to those the committee previously identified, that require change due to the licensed paralegal practitioner developments. Ms. Roach volunteered and was assigned to review Rule 1. Gary Chrystler was assigned to review Rule 2-5. Judge McDade was assigned to review Rules 6-8. These three volunteers agreed to provide a report of their review at the next meeting. \

NEXT MEETING: January 23, 2017 @ 5 p.m.

The meeting adjourned at 6:15 p.m.