

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

March 6, 2017

The meeting commenced at 5 p.m.

Committee Members Attending:

Steven G. Johnson (chair)
John H. Bogart
Daniel Brough
Joni Jones
Thomas B. Bruncker
J. Simòn Cantarero
Vanessa M. Ramos
Christie Roach
Gary G. Sackett
Hon. Trent Nelson
Billy L. Walker
Tim Merrill (phone)
Timothy Conde (recording secretary)
Padma Veeru-Collings (phone)

Excused:

Donald Winder
Gary Chrystler
Hon. Darold J. McDade

Staff:

Nancy Sylvester

Approval of Minutes

Approved without comment.

Report on 1.0 and 3.3

Chairman Johnson reported that the Utah Supreme Court accepted the committee's proposed changes to Rules 1.0 and 3.3. The Court did so with unanimous vote and will publish the proposed changes for public comment soon. Mr. Sackett inquired about whether these changes will affect other rules. Ms. Sylvester informed the committee that the Utah Supreme Court's approach is to vet any consequential changes once all public comments are received. Chairman Johnson also reminded the committee that it is the committee's responsibility to

conduct a detailed review of the rules upon making a report and recommendation to ensure that any recommended changes are consistent throughout the rules.

ABA Model Rule 8.4(g) Proposed Amendment

Mr. Cantarero provided a report of the additional recommendations raised by the ABA Model Rule 8.4(g) subcommittee. The subcommittee's recommendations are described in the subcommittee's memorandum dated March 2, 2017, which was distributed to the committee members. The committee discussed the memorandum extensively. The primary concern voiced by several committee members is the rule's scope. Specifically, the discussion centered on whether any proposed rule should include more than just conduct made "in the course of representing a client," and, if so, does a scope defined as acts "related to the practice of law" and/or "in the lawyer's professional capacity" create a rule that is overly broad. The committee also discussed how detailed the rule should be in light of the Utah Supreme Court's *Larsen* decision. Ultimately, the committee recommended that the following language be inserted as Rule 8.4(g):

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status as provided in Federal and Utah State law and jurisprudence, and that reflects adversely on the lawyer's fitness as a lawyer. This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client.

The committee also recommended that the following comments (new comments three, four, and five) be included among the Rule 8.4 changes:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) may undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Such discrimination includes harmful conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in the lawyer's professional capacity.

[4] Lawyers may engage in conduct undertaken to discuss diversity, including discussing any benefits or challenges, without violating this rule. Implementing initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers should also be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's view or activities. See Rule 1.2(b).

These changes to Rule 8.4 were voted on and approved by the committee. Chairman Johnson agreed to advise the Utah Supreme Court promptly of the committee's actions.

Paralegal Practitioner Rule Review

Committee members continue to review the rules to determine what changes, if any, must be made to the rules in light of previous changes that were made to the rules regarding paralegal practitioners.

Next Meeting

April 17, 2017 @ 5 p.m.

The meeting adjourned at 7:15 p.m.