

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

October 30, 2017

DRAFT

The meeting commenced at 5:03 p.m.

Committee Members Attending:

Steven G. Johnson, Chair
Thomas B. Bruner
J. Simon Cantarero
Judge James Gardner
Joni Jones
Phillip E. Lowry
Judge Darold J. McDade - attending by phone
Judge Trent D. Nelson –attending by phone
Vanessa M. Ramos
Austin Riter
Cristie Roach – attending by phone
Gary G. Sackett- attending by phone
Billy Walker
Donald Winder
Katherine Venti (recording secretary)

Guests: Joni Sekko, Steve Waterman, Dan Jensen, Paul Burke

Members Excused:

Padma Veeru-Colling,
Tim Conde
Timothy Merrill

Staff:

Nancy Sylvester

Welcome, Introductions, and Approval of Minutes:

Chairman Johnson welcomed the committee to the meeting and asked that members introduce themselves to new committee member Judge James Gardner. He then recommended that the September 25, 2017 minutes be amended to reflect that John Bogart appeared as a guest rather than a member. Billy Walker moved to approve the minutes with that amendment and Tom Bruner seconded it. The motion carried.

Rule 14-804 Certification rule for military lawyers and Rule 14-806 Admission rule for military spouse lawyers:

Rule 14-804

Phil Lowry reported on meeting with members of the Admissions Committee and his subcommittee. With regard to Rule 14-804 Certification Rule for Military Lawyers, the subcommittee and the Admissions Committee had very little disagreement over the rule.

Rule 14-806

Mr. Lowry reported that the subcommittee and the Admissions Committee failed to reach an agreement on Rule 14-806 for Military Spouses. The primary disagreements include the Admissions Committee's request to include minimum score on multistate bar exam and an oversight or supervisory relationship with another Utah barred lawyer in the rule. The Subcommittee disagreed with adding these provisions.

Paul Burke added that what the subcommittee is recommending would be more protective to the public in that the State Bar has power to oversee military lawyers. With regard to military spouse lawyers, the public would be served in that military spouse lawyers could potentially take on cases for underserved constituencies. The military spouse rule would also require professional liability insurance.

The subcommittee said it presumes that all lawyers licensed in another state are competent. The number of military spouse lawyers affected by this rule would be around 1 to 2 per year.

Joni Sekko of the Admissions Committee reported that many states have more restrictive statutes for admission of spouses than the one proposed by the subcommittee. The Admissions Committee also incorporated the Utah CLE requirements for lawyers admitted by waiver.

Mr. Burke reported that the subcommittee's rule has been adopted from the Model Rule, which is nationally endorsed. He said subsection (e) contains the CLE requirements that the Admissions Committee recommends. The subcommittee would not object to including the additional Utah CLE requirements for lawyers admitted by waiver. This is found in subsection (b) of the Admissions Committee's proposed Rule 14-806.

Ms. Sekko explained that the rationale of the Admissions Committee is that the military spouse lawyer's application will be quickly reviewed, but the Military Spouse Lawyer would need to associate with an attorney for quicker access to e-filing. And, on the other hand, if they have to depart early, an affiliation with a Utah attorney would ensure that the Utah public would continue to be served and protected. The Admissions Committee did not understand why a military spouse lawyer would not be held to the same standards as other out-of-state lawyers similarly situated. Although a number of states have adopted a military spouse rule, very few individuals have taken advantage of it, so data is not readily available.

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Mr. Burke said that the national association's (Military Spouse J.D. Network) concern is that any additional impediment would be difficult for a military spouse attorney because of the nature of military orders. Mr. Burke explained that another important distinction is the subcommittee's rule requires a rolling admission requirement, rather than the temporary admission status pending "full" admission proposed by the Admissions Committee.

Mr. Lowry explained that usually there is notice of transfer orders in the military, typically 6 months.

Regarding the minimum score on the multistate bar exam, Dan Jensen explained that the Admissions Committee believes that because military spouse lawyers are working for a fee, they should be treated like other lawyers seeking admission. The Admissions Committee would prefer to seek competence up front like they expect of other lawyers coming here and apply the rules uniformly. The Admissions Committee is reluctant to change standards for one category of lawyers. Steve Waterman added to those comments.

Steve Johnson inquired as to whether the full committee had had enough time to review the subcommittee's proposal and the Admission Committee's proposal. The general response was that this Committee needs additional time to review both proposals. Mr. Jensen reported that the Admissions Committee has a memo regarding the differences in the proposals. Ms. Sekko will submit the memo to Ms. Sylvester for circulation.

Gary Sackett inquired regarding the cost of malpractice insurance and whether that will be a further impediment.

Mr. Johnson recommended that respective memoranda regarding both sets of proposed rules be circulated from both the Admissions Committee and the Subcommittee for discussion at the next committee meeting.

Mr. Burke, Ms. Sekko, Mr. Jensen, and Mr. Waterman were excused from the meeting at 6:00 p.m.

Rule 8.4(g):

The chair of the Rule 8.4(g) subcommittee, Simón Cantarero, explained to the new members the proposed rule's background, the submission of the Committee's recommendation for 8.4(g) to the Supreme Court, the Supreme Court's circulation of the ABA Model Rule, the public comments regarding 8.4(g), and the current status of the decision before this Committee.

Mr. Johnson reported on his September 6, 2017 meeting with the Supreme Court. The Supreme Court is seeking a recommendation from this Committee regarding action on the Rule. Options include: (1) do not amend and see how this rule plays out in other states; (2) use the ABA Model Rule; (3) resubmit what was previously submitted; and (4) submit another revised rule 8.4(g), which could include simply bringing comment 3 up into the rule.

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Donald Winder submitted an ABA Journal article regarding the constitutional conflict on the rule. Mr. Winder recommended waiting.

Mr. Cantarero reported on other states' promulgation of similar rules and the reaction to the rule circulated for comment. Mr. Cantarero suggested that a rule change is still needed to address the harassment situations. He said nearly all of the subcommittee had personally dealt with it in some form or another and felt the need for a change.

Joni Jones highlighted the studies and data provided by the subcommittee in their January 2017 submission supporting the need for the rule. Mr. Walker explained the benefits of recommending the Model Rule again. Mr. Winder discussed a possible "aspirational" rule. Further discussion among the committee members ensued.

Chairman Johnson highlighted current Rule 8.4(g), Comment 2. Mr. Walker pointed out that Comment 2 is directed at 8.4(b), which says it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects..." Comment 2 states,

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

The committee discussed the interplay between the language of paragraph (b), Comment 2, and Model Rule 8.4(g).

Ultimately, Judge Trent Nelson suggested that given the Model Rule's broad reach over all aspects of practice, the committee should instead focus on a more limited area, such as the employment context. He said that may resolve some of the concerns many commenters have.

The subcommittee said it would explore amending its proposal to address only the employment context.

ADA Litigation Complaints:

Nancy Sylvester and Chairman Johnson raised a new issue regarding numerous cases being filed against small businesses alleging ADA violations. The Legislature is apparently concerned

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about the cost of such litigation on small businesses and the alleged abusive practices by attorneys being reported. The Legislature requested that the Committee review the rules to see if there is a way to tie in sanctions against attorneys for abusive practices relating to ADA lawsuits. Ms. Jones offered materials regarding this issue and practice. Austin Riter, Mr. Sackett, and Judge Gardner volunteered to join the subcommittee. Chairman Johnson appointed Mr. Riter to the subcommittee chairmanship. The subcommittee will report back at next meeting.

Next Meeting:

The next meeting is scheduled for Monday, December 4, 2017 at 5:00.

Adjournment: 6:45 p.m.