

Agenda

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

February 26, 2018
5:00 to 7:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Salt Lake City
Judicial Council Room, Suite N31

Welcome and approval of minutes.	Tab 1	Steve Johnson, Chair
Rule 8.4(g)	Tab 2	Steve Johnson, Simón Cantarero, Nancy Sylvester
Rule 14-802	Tab 3	Steve Johnson
Supreme Court Standing Order 7	Tab 4	Steve Johnson
Next meeting: March 19, 2018 at 5 p.m.		Steve Johnson

Committee Webpage: <http://www.utcourts.gov/committees/RulesPC/>

Tab 1

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

January 22, 2018

DRAFT

The meeting commenced at 5:00 p.m.

Committee Members Attending:

Steven G. Johnson, Chair
Thomas B. Brunner
Daniel Brough
J. Simón Cantarero
Hon. James Gardner – via telephone
Joni Jones
Hon. Darold J. McDade –via telephone
Timothy Merrill –via telephone
Hon. Trent D. Nelson
Vanessa M. Ramos
Austin Riter - via telephone
Cristie Roach
Gary G. Sackett
Billy Walker
Donald Winder
Katherine Venti (recording secretary)

Members Excused:

Tim Conde
Padma Veeru-Collings
Phil Lowry

Staff:

Nancy Sylvester

I. Welcome and Approval of Minutes

Joni Jones moved to approve the minutes of the December 4, 2017 committee meeting. Simón Cantarero seconded the motion and the motion carried.

II. Rule 8.4(g) Discussion

Simón Cantarero reported from the Rule 8.4 Subcommittee, which provided a detailed memorandum in the materials. Even though the model rule received many negative comments, the subcommittee still recommended amendments to Rule 8.4 to prohibit harassment and

discrimination. The subcommittee offered four options, aside from the option of doing nothing: (1) ABA Model Rule 8.4(g); (2) the January 23, 2017 subcommittee version; (3) the March 6, 2017 subcommittee version; and (4) the December 4, 2017 version based on California Rule 2-400, which narrowed the focus to the employment context.

Billy Walker commented on the constitutional concerns that had been addressed by the ABA and others. Chairman Johnson commented on the possibility of adopting option 4 and addressed section 8.4(d) regarding the language, “prejudicial to the administration of justice.”

Gary Sackett asked whether the subcommittee had a recommendation. The subcommittee reported it was not unanimous, but that the majority supports option 3. This option was previously submitted to the Supreme Court, but the court rejected it in favor of the ABA model rule.

Chairman Johnson reported that the Supreme Court is very concerned about this issue and did not expect the number or kind of comments that expressed opposition to the ABA model rule.

The committee continued to discuss the options and issues at length.

Don Winder then submitted an article from Civility Matters regarding the Utah Standards of Professionalism and Civility. He asked whether something should be added to the Standards, which are aspirational, rather than amending the rule. Committee members also inquired whether it was time to change the Standards from aspirational to required. The committee discussed these options.

Judge Nelson pointed out that the Code of Judicial Conduct already addresses issues of harassment and discrimination that occur within the courtroom, but committee members pointed out the problems that happen once parties leave the courtroom.

Steve Johnson submitted a new redlined option 4 adding additional categories from the ABA Model Rule 8.4(g) into paragraph (g), revising Comments 2, and 3, and adding a Comment 4 regarding several definitions, including “law practice.” The revisions also added Comment 7 to flag that this rule would differ from the ABA Model Rule.

Chairman Johnson took an informal poll regarding options 3 and 4 and Mr. Winder’s proposal to add language to the Standards. The committee was not unanimous on any of the options.

Chairman Johnson then proposed sending option 4 to the Supreme Court with the subcommittee’s memorandum and a letter of explanation. The committee discussed the pros and cons of this option, including that addressing the employment context, which has a well-developed body of law already, could be an interim step before more robust amendments.

Thomas Bruner moved to recommend option 4, as amended by Steve Johnson and the committee during discussion, to the Supreme Court. Mr. Winder seconded the motion. The motion carried, but not unanimously.

Cristie Roach moved that Chairman Johnson also include in his letter to the Supreme Court a recommendation or suggestion that it amend the Standards to address these issues more broadly along the lines of option 3. Mr. Winder seconded motion. The motion carried, but not unanimously.

III. Rule 14-802 and HJR 3 Discussion

The committee briefly discussed an issue raised by the Bar about an argument made recently by an attorney that in-house counsel did not fall under Admissions Rules because of a comment to the rule. The committee also briefly discussed related issues under proposed HJR 3.

The committee will continue this discussion at its next meeting.

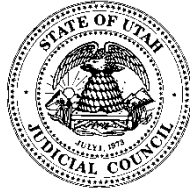
IV. Next Meeting

The next meeting is scheduled for Monday, February 26, 2018 at 5:00.

V. Adjournment

The committee adjourned at 6:53 p.m.

Tab 2

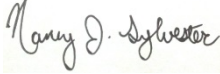


Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

MEMORANDUM

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

To: Advisory Committee on the Utah Rules of Professional Conduct
From: Nancy Sylvester 
Date: February 21, 2018
Re: Rule 8.4(g)

On February 21, Steve Johnson, Simón Cantarero, and I met with the Supreme Court to go over the committee's recommendation regarding Rule 8.4. The Court expressed its appreciation for the committee's efforts on this rule. Following discussion, the Court said its preferred approach was to simplify the language in paragraph (g) as follows: "It is professional misconduct for a lawyer to: (g) engage in conduct that amounts to unlawful discrimination or harassment under applicable local, state, or federal law." This removed it from the employment context only and also removed the list of protected classes, which can change over time.

The Court also removed Comment 4, which dealt with the employment context language and asked that the committee explore whether adding the following language from ABA Model Rule 8.4(g) to a new Comment 4 made sense: "Paragraph (g) does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these Rules."

The Court briefly addressed bringing Comment 3a, regarding the Standards of Professionalism and Civility, into the rule itself. Proposed language is now in paragraph (h).

Attached to this memo are four items: 1) Rule 8.4 as amended during the Supreme Court's conference (draft date February 21, 2018); 2) the version of Rule 8.4 that was submitted to the Supreme Court (draft date February 13, 2018); 3) the November 30, 2017 memorandum created by the Rule 8.4 subcommittee, and 4) the Standards of Professionalism and Civility.

**The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.**

1 **Rule 8.4. Misconduct.**

2 It is professional misconduct for a lawyer to:

3 (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce
4 another to do so, or do so through the acts of another;

5 (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or
6 fitness as a lawyer in other respects;

7 (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

8 (d) engage in conduct that is prejudicial to the administration of justice;

9 (e) state or imply an ability to influence improperly a government agency or official or to
10 achieve results by means that violate the Rules of Professional Conduct or other law; or

11 (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of
12 judicial conduct or other law;

13 (g) engage in conduct that amounts to unlawful discrimination or harassment under applicable
14 local, state, or federal law; or

15 (h) egregiously violate or engage in a pattern of repeated violations of the Standards of
16 Professionalism and Civility.

17 Comment

18 [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of
19 Professional Conduct or knowingly assist or induce another to do so through the acts of another, as
20 when they request or instruct an agent to do so on the lawyer's behalf.

21 Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the
22 client is legally entitled to take.

23 [1a] A violation of paragraph (a) based solely on the lawyer's violation of another Rule of
24 Professional Conduct shall not be charged as a separate violation. However, this rule defines
25 professional misconduct as a violation of the Rules of Professional Conduct as the term professional
26 misconduct is used in the Supreme Court Rules of Professional Practice, including the Standards for
27 Imposing Lawyer Sanctions. In this respect, if a lawyer violates any of the Rules of Professional
28 Conduct, the appropriate discipline may be imposed pursuant to Rule 14-605.

29 [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses
30 involving fraud and the offense of willful failure to file an income tax return.

31 However, some kinds of offenses carry no such implication. Traditionally, the distinction was
32 drawn in terms of offenses involving "moral turpitude." That concept can be construed to include
33 offenses concerning some matters of personal morality, such as adultery and comparable offenses,
34 that have no specific connection to fitness for the practice of law. Although a lawyer is personally
35 answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses
36 that indicate lack of those characteristics relevant to law practice. Offenses involving violence,
37 dishonesty, breach of trust or serious interference with the administration of justice are in that category.

38 A pattern of repeated offenses, even ones of minor significance when considered separately, can
39 indicate indifference to legal obligation.

40 [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias
41 or prejudice based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation,
42 gender identity, marital status, or socioeconomic status, ~~violates~~ may violate paragraph (d) when such
43 actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing
44 factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised
45 on a discriminatory basis does not alone establish a violation of this rule.

46 [3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended
47 to improve the administration of justice. An egregious violation or a pattern of repeated violations of the
48 Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph
49 (d).

50 [4] Paragraph (g) does not limit the ability of a lawyer to accept, decline, or withdraw from a
51 representation in accordance with Rule 1.16, nor does paragraph (g) preclude legitimate advice or
52 advocacy consistent with these Rules.

53 [45] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no
54 valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity,
55 scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

56 [56] Lawyers holding public office assume legal responsibilities going beyond those of other citizens.
57 A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The
58 same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian,
59 agent and officer, director or manager of a corporation or other organization.

60 [7] This rule differs from ABA Model Rule 8.4.

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6 fitness as a lawyer in other respects;

7 (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

8 (d) engage in conduct that is prejudicial to the administration of justice;

9 (e) state or imply an ability to influence improperly a government agency or official or to
10 achieve results by means that violate the Rules of Professional Conduct or other law; or

11 (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of
12 judicial conduct or other law; or

13 (g) unlawfully discriminate or harass, or knowingly permit unlawful discrimination or
14 harassment, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual
15 orientation, gender identity, marital status, or socioeconomic status in the management or operation
16 of a law practice, or in interactions with other members of the Bar, paralegals, and administrative
17 staff in hiring, promoting, discharging, or otherwise affecting the conditions of employment of any
18 person.

19 Comment

20 [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of
21 Professional Conduct or knowingly assist or induce another to do so through the acts of another, as
22 when they request or instruct an agent to do so on the lawyer's behalf.

23 Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the
24 client is legally entitled to take.

25 [1a] A violation of paragraph (a) based solely on the lawyer's violation of another Rule of
26 Professional Conduct shall not be charged as a separate violation. However, this rule defines
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29 Imposing Lawyer Sanctions. In this respect, if a lawyer violates any of the Rules of Professional
30 Conduct, the appropriate discipline may be imposed pursuant to Rule 14-605.

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49 to improve the administration of justice. An egregious violation or a pattern of repeated violations of the
50 Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph
51 (d).

52 [4] "Law practice" can include solo practices, law partnerships, law corporations, corporate and
53 government legal departments, and other entities which employ lawyers to practice law. "Knowingly
54 permit" means the lawyer fails to advocate corrective action when the lawyer knows of conduct in the
55 lawyer's law practice that is prohibited by paragraph (g). "Unlawful" is determined by reference to
56 applicable state or federal statutes or decisions making discrimination or harassment in employment
57 unlawful. "Conditions of employment" can include informal and formal work meetings or social gatherings
58 both during normal work hours and after hours.

59 [45] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no
60 valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity,
61 scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

62 [56] Lawyers holding public office assume legal responsibilities going beyond those of other citizens.
63 A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The
64 same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian,
65 agent and officer, director or manager of a corporation or other organization.

66 [7] This rule differs from ABA Model Rule 8.4.

MEMORANDUM

FROM: Subcommittee on Rule 8.4(g)

TO: Advisory Committee on Rules of Professional Conduct

DATE: November 30, 2017

SUBJECT: Amendments to Rule 8.4 - Background and Proposals

The primary purpose of this memorandum is two-fold: (1) to summarize the record for the benefit of the Advisory Committee, the Utah Supreme Court, the members of the Utah State Bar, and the interested public as it pertains to the addition of paragraph (g) to Rule 8.4; and (2) to present to the Advisory Committee several options or choices of an amended Utah Rule 8.4.

I. Historical Background of Proposal to Amend Rule 8.4

The issue of amending Rule 8.4 was introduced to the Advisory Committee on October 3, 2016, by the then-President of Utah State Bar and its ABA Delegate. The Advisory Committee received a letter from the Chair of the ABA's Center for Professional Responsibility Policy Implementation Committee, addressed to Chief Justice Durrant and dated September 29, 2016. In that letter, the ABA committee asked the Chief Justice to "consider integrating" the new paragraph (g) to Rule 8.4 into the Utah Rules of Professional Conduct. The presentation by the Bar President and ABA Delegate on October 3, 2016 was a recommendation that the Advisory Committee consider seriously adopting the ABA Model Rule 8.4(g) or amending the existing Utah Rule 8.4 to be consistent with the ABA Model Rule.

The Advisory Committee was informed that adding paragraph (g) to Rule 8.4 would promote the Utah State Bar's initiative and efforts for diversity and inclusion in the legal profession. It should be noted that the subcommittee did not find a single reference or any point of discussion by the Utah Bar Commission, the governing body of the Utah State Bar and its lawyer members, in any of its Agendas or Minutes since August 2016. The Bar Commission did, however, submit a public comment in support of adopting ABA Model Rule 8.4(g). The ABA Delegate provided the background and history of the amendments, including debates and revisions that led to ABA Model Rule 8.4(g) after a two-year process, including comments in support and in opposition to the Model Rule and its various iterations during the drafting and editing process, and during the comment period. The amount of information regarding Rule 8.4(g) was voluminous when it was first presented to the Advisory Committee and has increased since.

It is worth noting that the ABA committee chair stated in his letter that, as of September 29, 2016, "twenty-five jurisdictions have adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules." Many, if not the vast majority, of those twenty-five jurisdictions, adopted or amended their rules before the Model Rule was approved by the ABA in August 2016. See, "ABA adopts new anti-discrimination Rule 8.4(g), September

2016, Peter Geraghty, director, ETHICSearch, ABA Center for Professional Responsibility, available at <https://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html> (last visited November 30, 2017).

A couple of recent examples from sister jurisdictions are worth highlighting. In Nevada, the Board of Governors of the State Bar of Nevada filed an administrative matter with the Nevada Supreme Court, seeking to adopt the ABA Model Rule. *In Re: Amendments to Rule of Prof. Conduct 8.4*, ADKT 0526, filed May 8, 2017 (Nevada Sup. Ct.). After filing, the Court received comments – primarily and vastly – in opposition to the rule. As a result, the Supreme Court twice rescheduled its original public hearing and twice extended the comment period. See <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=43193> (last visited November 30, 2017). The State Bar of Nevada withdrew its petition to adopt the ABA Model Rule on September 22, 2017, citing among the reasons: “Many comments were filed in opposition to the ADKT that [sic] causing the Board to pause” and “the consensus being that the language used in other jurisdictions was inconsistent and changing. Thus, the Board of Governors determined it prudent to retract ADKT 0526 with reservation to refile an ADKT when, and if the language in the rule sorts out in other jurisdictions.” See ADKT 0526, Doc. No. 17-15190. The Nevada Supreme Court granted the petition, and closed the matter on September 25, 2017. *Id.*, Doc. No. 17-32294.

In contrast, the Vermont Supreme Court amended and adopted a rule based on ABA Model Rule 8.4(g) on July 14, 2017.¹ See <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4%28g%29.pdf>. The Vermont rule differs from the ABA Model rule in some respects. In particular, the Vermont rule added color, ancestry, and place of birth as additional protected classes and the phrase “or other grounds that are illegal or prohibited under federal or state law” was added at the end of the first sentence to include provisions of state and federal law protecting discrimination against those afflicted with HIV, military veterans, and on the basis of genetic information. In explaining the breadth and scope of the new rule, the Court noted: “Comment [4] makes clear that ‘conduct related to the practice of law’ is to be understood broadly to include many activities beyond the confines of traditional client representation, including law practice management and bar association or other practice-related activities including social occasions.”

As with many issues of constitutional consequence, the question of adopting the ABA Model Rule 8.4(g) has a legion of supporters and opponents, many well-known and well-funded. There is a great volume of literature and propaganda on both sides of the argument. See e.g., ABA Journal, “States split on new ABA Model Rule limiting harassing or discriminatory conduct,” available at http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct (last visited November 30, 2017). Also, the issue of harassment and discrimination in the workplace has attracted national and international attention during the time the subcommittee has undertaken its task. See e.g., Wall Street Journal, “The Workplace After Harvey Weinstein: Harassment Scandals Prompt Rapid Changes”, November 10, 2017, available at <https://www.wsj.com/articles/the-workplace-after-weinstein-harassment-scandals-prompt-rapid->

¹ Vermont was one of the original 25 jurisdictions referenced by the ABA committee chair.

[changes-1510333058](https://www.wsj.com/articles/sexual-harassment-in-the-workplace-1510333058) (subscription required) (last visited November 30, 2017). The results of a survey conducted by the Wall Street Journal and NBC News are summarized in the following graphic:

View from the Workplace

American workers say sexual harassment remains prevalent at their jobs.

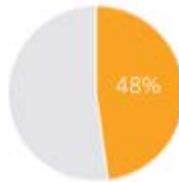
How prevalent is sexual harassment in the workplace?

Happens in: ■ Almost all companies ■ Most ■ Not sure ■ Some ■ Very few

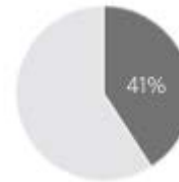


Personal experience with sex harassment at work

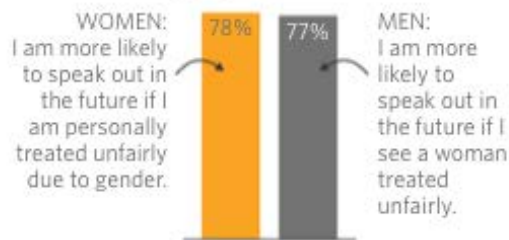
Share of employed women who say they've been the object of an unwelcome sexual advance or form of sexual harassment



Share of men who have witnessed women receiving an unwelcome sexual advance or form of sexual harassment



How recent high-profile stories about harassment have influenced opinions:



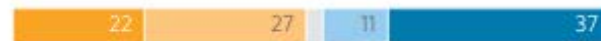
Source: WSJ/NBC News telephone polls, most recent of 900 adults conducted Oct. 23-26; margin of error +/-3.27 pct. pts.

Agree: ■ Strongly ■ Somewhat ■ Not sure
Disagree: ■ Strongly ■ Somewhat

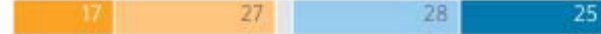
These stories have made you want to share your own past personal experiences about how you have been treated as a woman.



These stories have caused you to think about your own behavior and how you interact with women.



These stories have changed your view about how women are treated in society.



Ultimately, the subcommittee's preeminent concern is whether an addition of paragraph (g) and classifying discrimination and harassment as "professional misconduct" would be a net benefit for Utah lawyers and for the legal profession in Utah.

II. Review of Subcommittee Proposals

The subcommittee has previously submitted two memoranda, with supporting materials, for consideration by the Advisory Committee. In each instance, the subcommittee proposed amending Rule 8.4 by adding paragraph (g). However, the new paragraph (g) proposed by the

subcommittee varied from the ABA Model Rule in certain important respects, with heightened standards and more narrow scope. The amendments proposed by the subcommittee aligned more closely to the Illinois version of Rule 8.4, and the Advisory Committee revised the proposed amendments before formally proposing them to the Utah Supreme Court. Ultimately, the version of Rule 8.4(g) proposed by the Advisory Committee on May 15, 2017, was declined by the Utah Supreme Court, which *sua sponte* published ABA Model Rule 8.4(g) for public comment. The overwhelming majority of comments submitted were in opposition of adopting the ABA Model Rule.

The Advisory Committee, and its subcommittee on Rule 8.4(g), is now tasked once again to deliberate whether, or how, Rule 8.4 should be amended. Should the decision be to amend Rule 8.4, it is the responsibility of the Advisory Committee, with assistance from its subcommittee, to propose a draft of Rule 8.4 that captures the public policy intent to deter and prohibit discrimination and harassment perpetrated by attorneys by codifying such behavior as professional misconduct, subject to disciplinary action. An important corollary of the anti-discrimination, anti harassment policy is the objective to promote professionalism, civility, inclusion, and diversity in the legal profession. The subcommittee is conscientious and cautious in its work to achieve the public policy objectives while at the same time remain faithful to Constitutional protections. Indeed it is a fine balance.

III. Proposed Alternatives of Utah Rule 8.4(g)

The objective of adding paragraph (g) to Utah Rule 8.4 is to codify discriminatory and harassing conduct as “professional misconduct.” The rule is intended to deter and prevent misbehavior, and to discipline offending attorneys when the harassment or discrimination is committed when attorneys are not providing legal representation and advocacy on behalf of a client or the attorney’s employer. It is admitted that the rule would be more expansive than what civil law imposes, consistent with the public policy and aspiration that the rules governing attorney conduct impose upon a heightened expectation of civility, professionalism, respect, inclusion, and tolerance toward all – fellow members of the bar as well as the general public.

Inherent and implicit in the comments submitted regarding amending Rule 8.4 is the question, “why is this rule change necessary?” It is the subcommittee’s opinion that experience and history, both recorded and anecdotal, has shown that certain groups – particularly the historically underrepresented – are more vulnerable to being harassed, discriminated, alienated, and subject to demeaning and derogatory conduct by attorneys in a position of authority and power. As a matter of fact and experience, harassing, discriminatory, and demeaning conduct by attorneys to other attorneys and even clients continues to this day in a variety of settings, both public and private. Often silence and private humiliation are manifestations and outcomes of being harassed and discriminated against. While adopting paragraph (g) will not eradicate discrimination, harassment, and disrespect that is common to the human condition among lawyers, it would effectively censor and deter such behavior by defining it as “professional misconduct” unbecoming an officer of the court and subject to disciplinary action.

As the rule is currently written, there is no prohibition on discrimination or harassment. The closest the rule comes to prohibiting such misbehavior is to define professional misconduct

when an attorney “engage[s] in conduct that is prejudicial to the administration of justice.” Rule 8.4(d). Comment 3 to the rule explains and suggests that discrimination and harassment are violations of paragraph (d) when “such actions are prejudicial to the administration of justice.” In this way, the current rule defines professional misconduct as long as the offense is committed in such a way as to stunt the administration of justice. The corollary to the present rule, and its implied reading, is that discrimination and harassment are condoned when they are committed in the hallways of the courthouse, in the law firm hallways and parties, outside the deposition or mediation, or in the social functions of lawyers. Surprisingly, under the current rule, any harassment, discrimination, and hostility committed by an attorney in a corporate board room or during private negotiations of commercial transactions may very well be beyond the reach of Rule 8.4(d).

While the civil law may provide protections to victims of harassment and discrimination in some of the contexts and settings mentioned above, the effective consequence of speaking up and exercising those legal protections would lead to marginalizing the victim, labeling the victim as overly sensitive, or otherwise preclude advancement in the profession – whether in the law firm or company where the harassment was committed, or in the general marketplace for lawyers. In this sense, a victim of harassment or discrimination has some false choices: they are damned if they do, damned if they don’t stand up and speak out.

The subcommittee is conscientious of constitutional legal arguments regarding freedom of expression, association, and religious practice. The subcommittee has weighed the benefits, burdens, rights, duties, and privileges of being a licensed lawyer with respect to imposing a degree of censorship as paragraph (g) inevitably does. In the final analysis, and as a matter of public policy, the subcommittee recommends amending Rule 8.4 by adding paragraph (g). This memorandum presents several alternatives of a new Rule 8.4(g) in order to give the full Advisory Committee options on which to deliberate and send to the Supreme Court for consideration.

The alternatives for consideration by the full committee are as follows:

- 1) The ABA Model Rule 8.4(g).
- 2) January 23, 2017 version, proposed by the subcommittee and based in part on the Illinois rule.
- 3) March 6, 2017 version of Utah Rule 8.4(g) approved by Advisory Committee.
- 4) December 4, 2017 version of Utah Rule 8.4(g), based and modeled after California Rule 2-400.

Each of these rules, with their accompanying comments, is included in following pages. A modified rule, to be determined by the Advisory Committee after deliberations at its December 4, 2017 meeting, may still be another possibility, though not included in this memorandum, but to be included in the meeting minutes.

Option 1
ABA Model 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 on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

New Comments:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). 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 also should 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 views or activities. See Rule 1.2(b).

Option 2
Utah Rule 8.4(g)
January 23, 2017 version
(based in part on the Illinois Rule)
Proposed by Subcommittee

It is professional misconduct for a lawyer to:

...

(g) engage in conduct that violates a federal, state, or local statute or ordinance that prohibits harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. 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 lawyer knew or should have known the conduct was prohibited by statute or ordinance; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in connection with the lawyer's professional activities. 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. For purposes of determining the violation of a statute or ordinance under this Rule, number of employees is not a defense.

Comments 3 and 4

[3] Discrimination and harassment by lawyers in violation of paragraph (g) 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. Lawyers may engage in conduct undertaken to discuss diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations.

[4] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). 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 of these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5a). 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).

Option 3
Utah Rule 8.4(g)
March 6, 2017 version
(based in part on the Illinois Rule)
Approved by Advisory Committee and Proposed to Utah Supreme Court

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 Advisory Committee also recommended adding new comments 3, 4, and 5:

[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 3 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).

Option 4
Utah Rule 8.4(g)
December 4, 2017 version
(based in part on California Rule 2-400)
Proposed by Subcommittee

It is professional misconduct for a lawyer to:

...

(g) unlawfully discriminate or harass, or knowingly permit unlawful discrimination or harassment, on the basis of race, national origin, sex, sexual orientation, religion, age or disability in the management or operation of a law practice, or in interactions with other members of the Bar, paralegals, and administrative staff in hiring, promoting, discharging, or otherwise affecting the conditions of employment of any person.

Comments

[4] "Law practice" includes sole practices, law partnerships, law corporations, corporate and government legal departments, and other entities which employ lawyers to practice law. "Knowingly permit" means a failure to advocate corrective action where the lawyer knows of a discriminatory or harassing policy or practice which results in the unlawful discrimination or unlawful harassment prohibited in paragraph (g). "Unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination or unlawful harassment in employment. The "conditions of employment" also covers informal and formal work meetings or social gatherings, both during normal work hours and after hours.

Rule 14-301. Standards of Professionalism and Civility.

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

Lawyers should educate themselves on the potential impact of using digital communications and social media, including the possibility that communications intended to be private may be republished or misused. Lawyers should understand that digital communications in some circumstances may have a widespread and lasting impact on their clients, themselves, other lawyers, and the judicial system.

We expect judges and lawyers will make mutual and firm commitments to these standards. Adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this State. We further expect lawyers to educate their clients regarding these standards and judges to reinforce this whenever clients are present in the courtroom by making it clear that such tactics may hurt the client's case.

Although for ease of usage the term "court" is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards. Nothing in these standards supersedes or detracts from existing disciplinary codes or standards of conduct.

Cross-References: R. Prof. Cond. Preamble [1], [13]; R. Civ. P. 1; R. Civ. P. 65B(b)(5); R. Crim. P. 1(b); R. Juv. P. 1(b); R. Third District Court 10-1-306; Fed. R. Civ. P. 1; DUCivR 83-1.1(g).

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

Comment: Lawyers should maintain the dignity and decorum of judicial and administrative proceedings, as well as the esteem of the legal profession. Respect for the court includes lawyers' dress and conduct. When appearing in court, lawyers should dress professionally, use appropriate language, and maintain a professional demeanor. In addition, lawyers should advise clients and witnesses about proper courtroom decorum, including proper dress and language, and should, to the best of their ability, prevent clients and witnesses from creating distractions or disruption in the courtroom.

The need for dignity and professionalism extends beyond the courtroom. Lawyers are expected to refrain from inappropriate language, maliciousness, or insulting behavior in depositions, meetings with opposing counsel and clients, telephone calls, email, and other exchanges. They should use their best efforts to instruct their clients and witnesses to do the same.

Cross-References: R. Prof. Cond. 1.4; R. Prof. Cond. 1.16(a)(1); R. Prof. Cond. 2.1; R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5(d); R. Prof. Cond. 3.8; R. Prof. Cond. 3.9; R. Prof. Cond. 4.1(a); R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 1.2(a); R. Prof. Cond. 1.2(d); R. Prof. Cond. 1.4(a)(5).

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

Comment: Hostile, demeaning, and humiliating communications include all expressions of discrimination on the basis of race, religion, gender, sexual orientation, age, handicap, veteran status, or national origin, or casting aspersions on physical traits or appearance. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it.

Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 3.1; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a “record” that has not occurred.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.5(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. Civ. P. 11(c); R. Civ. P. 16(d); R. Civ. P. 37(a); Fed. R. Civ. P. 11(c)(2).

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

Cross-References: R. Prof. Cond. 1.1; R. Prof. Cond. 1.3; R. Prof. Cond. 1.4(a), (b); R. Prof. Cond. 1.6(a); R. Prof. Cond. 1.9; R. Prof. Cond. 1.13(a), (b); R. Prof. Cond. 1.14; R. Prof. Cond. 1.15; R. Prof. Cond. 1.16(d); R. Prof. Cond. 1.18(b), (c); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond.

3.3; R. Prof. Cond. 3.4(c); R. Prof. Cond. 3.8; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.3(a), (b); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

Comment: When providing other counsel with a copy of any negotiated document for review, a lawyer should not make changes to the written document in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. Changes should be clearly and accurately identified in the draft or otherwise explicitly brought to the attention of other counsel. Lawyers should be sensitive to, and accommodating of, other lawyers' inability to make full use of technology and should provide hard copy drafts when requested and a redline copy, if available.

Cross-References: R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. App. P. 11(f).

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Civ. P. 7(f); R. Third District Court 10-1-306(6).

9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(d); R. Prof. Cond. 8.4(d); R. Third District Court 10-1-306 (1)(A); Fed. R. Civ. P. 16(2)(C).

11. Lawyers shall avoid impermissible ex parte communications.

Cross-References: R. Prof. Cond. 1.2; R. Prof. Cond. 2.2; R. Prof. Cond. 2.9; R. Prof. Cond. 3.5; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 77(b); R. Juv. P. 2.9(A); Fed. R. Civ. P. 77(b).

12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

Cross-References: R. Prof. Cond. 3.5(a); R. Prof. Cond. 3.5(b); R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d).

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

Cross-References: R. Prof. Cond. 8.4(c); R. Juv. P. 19.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

Comment: Lawyers should not evade communication with other counsel, should promptly acknowledge receipt of any communication, and should respond as soon as reasonably possible. Lawyers should only use data-transmission technologies as an efficient means of communication and not to obtain an unfair tactical advantage. Lawyers should be willing to grant accommodations where the use of technology is concerned, including honoring reasonable requests to retransmit materials or to provide hard copies.

Lawyers should not request inappropriate extensions of time or serve papers at times or places calculated to embarrass or take advantage of an adversary.

Cross-References: R. Prof. Cond. 1.2(a); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Juv. P. 54.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

Comment: When scheduling and attending depositions, hearings, or conferences, lawyers should be respectful and considerate of clients' and adversaries' time, schedules, and commitments to others. This includes arriving punctually for scheduled appointments. Lawyers should arrive sufficiently in advance of trials, hearings, meetings, depositions, and other scheduled events to be prepared to commence on time. Lawyers should also advise clients and witnesses concerning the need to be punctual and prepared. Lawyers who will be late for a scheduled appointment or are aware that another participant will be late, should notify the court, if applicable, and all other participants as soon as possible.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 5.1; R. Prof. Cond. 8.4(a); R. Juv. P. 20; R. Juv. P. 20A.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

Cross-References: R. Prof. Cond. 8.4; R. Civ. P. 55(a); Fed. R. Civ. P. 55(b)(2).

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 4.1; R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4; R. Civ. P. 26(b)(1); R. Civ. P. 26(b)(8)(A); R. Civ. P. 37(a)(1)(A), (D); R. Civ. P. 37(c); R. Crim. P. 16(b); R. Crim. P. 16(c); R. Crim. P. 16(d); R. Crim. P. 16(e); R. Juv. P. 20; R. Juv. P. 20A; R. Juv. P. 27(b); Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 26(g)(1)(B)(ii), (iii).

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 30(c)(2); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 30(c)(2); Fed. R. Civ. P. 30(d)(2); Fed. R. Civ. P. 30(d)(3)(A).

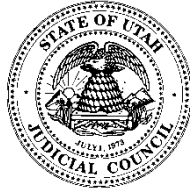
19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 8.4; R. Prof. Cond. 3.4; R. Civ. P. 26(b)(1); R. Civ. P. 37; R. Crim. P. 16(a); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 37(a)(4).

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

Adopted by Supreme Court order October 16, 2003.

Tab 3

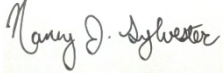


Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

MEMORANDUM

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

To: Advisory Committee on the Utah Rules of Professional Conduct
From: Nancy Sylvester 
Date: February 21, 2018
Re: Rule 14-802

On December 14, 2017, Elizabeth Wright contacted Steve Johnson about Rule 14-802, Authorization to practice law. She asked who is covered by subsection (b), the third paragraph that begins "Similarly." She said the Bar had been contacted by an attorney stating he didn't need a House Counsel license under the language of that comment. But Ms. Wright pointed out that there would be no need for the House Counsel rule if that was the case. She asked Mr. Johnson whom the committee thought would be engaged in "activities involving the law."

Mr. Johnson responded as follows: "The intent is to cover people who, for example, must have regulatory compliance duties as part of their employment, or people who have sales functions and must enter into contracts with others under UCC Article 2. I can see that with the current language, house counsel have a good argument to not have to be licensed." He suggested amending the comment by adding in "or to the business entity" at the end of the sentence beginning "Similarly." He also suggested referring to the requirements under the House Counsel rule. Ms. Wright agreed with both of those suggestions.

Attached is an initial draft amending the comment as Mr. Johnson proposed.

**The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.**

Rule 14-802. Authorization to practice law.

(a) Except as set forth in subsection (c) of this rule, only persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah.

(b) For purposes of this rule:

(b)(1) The “practice of law” is the representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person’s facts and circumstances.

(b)(2) The “law” is the collective body of declarations by governmental authorities that establish a person’s rights, duties, constraints and freedoms and consists primarily of:

(b)(2)(A) constitutional provisions, treaties, statutes, ordinances, rules, regulations and similarly enacted declarations; and

(b)(2)(B) decisions, orders and deliberations of adjudicative, legislative and executive bodies of government that have authority to interpret, prescribe and determine a person’s rights, duties, constraints and freedoms.

(b)(3) “Person” includes the plural as well as the singular and legal entities as well as natural persons.

(c) Whether or not it constitutes the practice of law, the following activity by a non-lawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted:

(c)(1) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(c)(2) Providing general legal information, opinions or recommendations about possible legal rights, remedies, defenses, procedures, options or strategies, but not specific advice related to another person’s facts or circumstances.

(c)(3) Providing clerical assistance to another to complete a form provided by a municipal, state, or federal court located in the State of Utah when no fee is charged to do so.

(c)(4) When expressly permitted by the court after having found it clearly to be in the best interests of the child or ward, assisting one’s minor child or ward in a juvenile court proceeding.

(c)(5) Representing a party in small claims court as permitted by Rule of Small Claims Procedure 13.

(c)(6) Representing without compensation a natural person or representing a legal entity as an employee representative of that entity in an arbitration proceeding, where the amount in controversy does not exceed the jurisdictional limit of the small claims court set by the Utah Legislature.

(c)(7) Representing a party in any mediation proceeding.

(c)(8) Acting as a representative before administrative tribunals or agencies as authorized by tribunal or agency rule or practice.

(c)(9) Serving in a neutral capacity as a mediator, arbitrator or conciliator.

(c)(10) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements or as otherwise allowed by law.

(c)(11) Lobbying governmental bodies as an agent or representative of others.

(c)(12) Advising or preparing documents for others in the following described circumstances and by the following described persons:

(c)(12)(A) a real estate agent or broker licensed by the state of Utah may complete State-approved forms including sales and associated contracts directly related to the sale of real estate and personal property for their customers.

(c)(12)(B) an abstractor or title insurance agent licensed by the state of Utah may issue real estate title opinions and title reports and prepare deeds for customers.

(c)(12)(C) financial institutions and securities brokers and dealers licensed by Utah may inform customers with respect to their options for titles of securities, bank accounts, annuities and other investments.

(c)(12)(D) insurance companies and agents licensed by the state of Utah may recommend coverage, inform customers with respect to their options for titling of ownership of insurance and annuity contracts, the naming of beneficiaries, and the adjustment of claims under the company's insurance coverage outside of litigation.

(c)(12)(E) health care providers may provide clerical assistance to patients in completing and executing durable powers of attorney for health care and natural death declarations when no fee is charged to do so.

(c)(12)(F) Certified Public Accountants, enrolled IRS agents, public accountants, public bookkeepers, and tax preparers may prepare tax returns.

[Advisory Committee Notes](#)

Rule 14-802

Advisory Committee Comment:

Subsection (a).

"Active" in this paragraph refers to the formal status of a lawyer, as determined by the Bar. Among other things, an active lawyer must comply with the Bar's requirements for continuing legal education.

Subsection (b).

The practice of law defined in Subparagraph (b)(1) includes: giving advice or counsel to another person as to that person's legal rights or responsibilities with respect to that person's facts and circumstances; selecting, drafting or completing legal documents that affect the legal rights or responsibilities of another person; representing another person before an adjudicative, legislative or executive body, including the preparation or filing of documents and conducting discovery; negotiating legal rights or responsibilities on behalf of another person.

Because representing oneself does not involve another person, it is not technically the "practice of law." Thus, any natural person may represent oneself as an individual in any legal context. To the same effect is Article 1, Rule 14-111 Integration and Management: "Nothing in this article shall prohibit a person who is unlicensed as an attorney at law or a foreign legal consultant from personally representing that person's own interests in a cause to which the person is a party in his or her own right and not as assignee."

Similarly, an employee of a business entity is not engaged in "the representation of the interest of another person" when activities involving the law are a part of the employee's duties solely in connection with the internal business operations of the entity and do not involve providing legal advice to another person or to the business entity. A person providing legal advice to a business entity would be required to apply for admission under Rule 14-719. Further, a person acting in an official capacity as an employee of a government agency that has administrative authority to determine the rights of persons under the law is also not representing the interests of another person.

As defined in subparagraph (b)(2), "the law" is a comprehensive term that includes not only the black-letter law set forth in constitutions, treaties, statutes, ordinances, administrative and court rules and regulations, and similar enactments of governmental authorities, but the entire fabric of its development, enforcement, application and interpretation.

Laws duly enacted by the electorate by initiative and referendum under constitutional authority would be included under subparagraph (b)(2)(A).

Subparagraph (b)(2)(B) is intended to incorporate the breadth of decisional law, as well as the background, such as committee hearings, floor discussions and other legislative history, that often accompanies the written law of legislatures and other law- and rule-making bodies. Reference to adjudicative bodies in this subparagraph includes courts and similar tribunals, arbitrators, administrative agencies and other bodies that render judgments or opinions involving a person's interests.

Subsection (c).

To the extent not already addressed by the requirement that the practice of law involves the representation of others, subparagraph (c)(2) permits the direct and indirect dissemination of legal information in an educational context, such as legal teaching and lectures.

Subparagraph (c)(3) permits assistance provided by employees of the courts and legal-aid and similar organizations that do not charge for providing these services.

Subparagraph (c)(7) applies only to the procedures directly related to parties' involvement before a neutral third-party mediator; it does not extend to any related judicial proceedings unless otherwise provided for under this rule (e.g., under subparagraph (c)(5)).

Tab 4



Nancy Sylvester <nancyjs@utcourts.gov>

Supreme Court Standing Order 7

Cathy Dupont <cathyd@utcourts.gov>

Mon, Feb 12, 2018 at 4:14 PM

To: Nancy Sylvester <nancyjs@utcourts.gov>, "Steven G. Johnson" <stevejohnson5336@comcast.net>

Nancy and Steve

During last week's Supreme Court Conference, the Justices heard from Billy Walker and Chris VonMaak regarding Standing Order 7 which establishes a program of professionalism and civility counseling for members of the Utah State Bar. The Court is interested in increasing the use of the counseling board. The Justices asked if the Committee on Professional Conduct Rules could evaluate how referrals are made to the counseling board under Standing Order 7, and whether anonymous referrals, perhaps from Judges, would be appropriate. The Court would also like to see language developed as a comment to a rule or a pre-amble to one of the rules for maintaining the integrity of the profession that mentions the need for civility and professionalism, the role of the counseling board, and the authority of the counseling board to meet with an attorney who has been referred to the board. Please let me know if I can answer any questions.

--

Catherine J Dupont
Appellate Court Administrator
450 South State Street
P.O. Box 140230
Salt Lake City, UT 84114
[801-647-8268](tel:801-647-8268)

 **Standing Order 7.pdf**
43K

Utah Supreme Court Standing Order No. 7 **(As to establishment of a program of professionalism counseling** **for members of the Utah State Bar)**

Effective April 1, 2008; Amended June 12, 2012

The Court intends to establish a board (hereinafter the "Board") consisting of seven counselors to counsel and educate members of the Bar concerning the Court's Standards of Professionalism and Civility (hereinafter the "Standards"). Specifically, the Board's purposes are: (1) to counsel members of the Bar, in response to complaints by other lawyers, referrals from judges, or referrals from counsel in the Office of Professional Conduct ("OPC counsel"); (2) to provide counseling to members of the Bar who request advice on their own obligations under the Standards; (3) to provide CLE on the Standards; (4) to publish advice and information relating to the work of the Board.

Board Composition

Appointees shall serve on a volunteer basis and will be appointed based upon stature in the legal community and experience in legal professionalism matters. A minimum of one of the seven appointees shall have transactional experience, and at least one attorney shall have small firm or sole practitioner experience. Board members shall serve for staggered terms of no fewer than three years for continuity and so that each Board member has the opportunity to develop expertise on the Standards. The Court will appoint one of the Board members as chair.

Submission of Complaints and Questions to the Board

The Board is authorized to consider complaints by lawyers concerning the professionalism of other lawyers, referrals from judges or OPC counsel, and questions about professionalism from practicing lawyers. In the absence of a referral from a judge or OPC counsel, the Board shall not consider questions or complaints from clients or members of the public.

If a lawyer wishes to lodge a complaint with the Board concerning the conduct of another member of the Bar, the complaint must be in writing (i.e., by letter or email) and signed by the complainant. The Board shall not consider anonymous complaints about lawyers. Questions or requests for counseling from a lawyer concerning his or her own conduct need not be in writing but may be made by telephone or a personal visit with members of the Board. Referrals from judges may be directed by telephone. Referrals from OPC counsel should be in writing.

Procedure

The Board is authorized to develop its own procedures based upon this Standing Order, the purposes for which the program is established, and upon the Board's experience. Adherence to formal rules of procedure or evidence is not required. The Board may address a complaint or referral by whatever means it determines is best. In matters where the Board deems it helpful, matters may be addressed by panels of three. The

Board should generally notify the complainant or, in the case of a referral, the judge or OPC counsel, that the complaint or referral has been received within thirty days of the complaint. The notice should indicate the manner in which the Board intends to address the issue along with the general timing that is anticipated.

Confidentiality

Except as authorized in this Standing Order or in Rule 14-515(a)(4) of the Supreme Court Rules Governing the Utah State Bar, the contents of statements, communications or opinions made by any participant in the program shall be kept confidential. Board members may freely communicate with a referring judge or with OPC counsel in connection with any matter that has been referred to the Board. The Board may, in its discretion, inform the lawyer who is subject to a complaint or referral of relevant factual assertions that the Board may address. This may, at the discretion of the Board, include a copy of the complaint or written referral. The Board may also, in its discretion, investigate underlying facts or counsel lawyers by reference to facts or assertions learned in the process of its efforts. Board members are permitted to communicate directly with lawyers, judges, or clients involved in the dispute concerning the relevant facts and the application or interpretation of the Standards.

Resolution and Written Advisories

Resolution may be by written advisory to the lawyers involved, by a face-to-face meeting with the lawyers, or through counsel provided by telephone or other means. Should it determine to resolve the matter through a written advisory, reference should be made to individual Standards. A copy of each written advisory (including identifying information) shall be provided to the lawyers involved in the matter and may, at the discretion of the Board, also be provided to OPC counsel. Where a matter has come to the Board by means of judicial referral the Board shall, upon resolution of the matter, report to the judge the manner in which the matter was resolved, including, where applicable, a copy of the written advisory that includes identifying information. Further, the Board may in its discretion provide a copy of a written advisory (including identifying information) to supervisors, employers, or agencies whose lawyers have been the subject of a complaint. Also, the panel is permitted to disclose the general nature of the situation for the benefit of members of the Bar and the public (without identifying names or uniquely identifying facts such as the parties to a proceeding) and a sufficient description of the conduct at issue to convey the basis for its advice, through publication or other means of public dissemination including CLE presentations or posting to a web page.

The Duty of Good Faith

Attorneys seeking the assistance of the Board shall do so only in good faith and not for the purposes of harassment or to attain a strategic advantage. The Board is authorized to terminate any proceeding or referral that it believes has been initiated or utilized in bad faith or for an improper purpose.

Publication

The Board shall report annually to the Court concerning its operation, the Standards it has interpreted, the advice it has given, and any trends it believes important for the Court to know about. It should also make suggestions to the Court as to needed changes to the Standards.

The Board shall periodically publish summaries or selected portions of its advisories in the Utah Bar Journal for the benefit of practicing lawyers. Published advisories shall not include the names or uniquely identifying facts such as the parties to a proceeding. Also, the Board shall maintain a web page under the auspices of the Court or the Bar that provides a database of the advisories transmitted to the Utah Bar Journal for Publication.

Complaints should be sent to James Ishida, Appellate Court Administrator, Utah Supreme Court, P.O. Box 140210, Salt Lake City, UT 84114-0210; email address jamesi@utcourts.gov