

Agenda

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

April 12, 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) and Standards of Professionalism and Civility #3 (Exhibits B-E)	Tab 2	Simón Cantarero (subcommittee chair), Billy Walker, Vanessa Ramos, Joni Jones, and Trent Nelson
Supreme Court Standing Order 7 update		Tim Conde (subcommittee chair), Don Winder, Cristie Roach, Padma Veeru-Collings, and Judge James Gardner
Next meeting: May 21, 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**

March 19, 2018

DRAFT

The meeting commenced at 5:03 p.m.

Committee Members Attending:

Steven G. Johnson, Chair
Daniel Brough
J. Simon Cantarero
Tim Conde – via telephone
Hon. James Gardner
Joni Jones
Phil Lowry
Hon. Darold J. McDade –via telephone
Hon. Trent D. Nelson – via telephone
Vanessa M. Ramos
Austin Riter
Cristie Roach
Gary G. Sackett
Padma Veeru-Collings – via telephone
Billy Walker
Donald Winder
Katherine Venti (recording secretary)

Guests:

Steve Waterman
Joni Seko
Paul Burke

Members Excused:

Thomas B. Bruner
Timothy Merrill

Staff:

Nancy Sylvester

I. Welcome and Approval of Minutes

Mr. Johnson welcomed the committee members and guests. **Motion on the minutes:** Simón Cantarero moved to approve the minutes of the February 26, 2018 meeting. Billy Walker seconded the motion. The motion to approve carried unanimously.

II. Military attorney admissions, Rules 14-804, 14-805, 14.806

The Committee continued discussion from the December 4, 2017 meeting regarding the Military Attorney Admission Rule (Rule 14-804) and the Military Spouse Admission Rule (14-806). Steve Waterman and Joni Seko appeared and represented the Bar Admissions Committee. Paul Burke appeared as a member of the subcommittee.

Steve Johnson raised a question as to Rule 14-804(h)(1) regarding disciplinary hearings. He requested a change from merely disciplinary hearing to disciplinary hearing with adverse determination. Mr. Johnson also raised questions as to paragraph (i) regarding reporting of actions in other state courts.

The Committee discussed in detail the March 19, 2018 submission from Mr. Burke regarding differences between the Military Spouse rule proposals from the subcommittee and the version offered by the Admissions Committee.

Mr. Johnson reported on recent legislative action regarding licensure of military spouses in other licensed areas licensed under DOPL.

Motion to recommend to the Court to adopt the Admissions Committee's version of the Military Lawyer Rule 14-804, with modification of language regarding revocation of license upon adverse disciplinary hearing: offered by Billy Walker. Seconded: Austin Riter. The motion carried unanimously.

Lengthy discussion continued regarding Rule 14-806, Admission for Military Spouses, and the differences between the subcommittee and the Admissions Committee versions. The discussion covered the following topics:

- Supervising attorneys for certain Military Spouse attorneys. The Admissions Committee's draft appeared to have more detail regarding supervision;
- The Admissions Committee's requirement of "limited licensure" disclosure and the issues the subcommittee had with that language. The subcommittee stated it took issue with the language of limited licensure because of its possible chilling effect on attorneys' ability to attract clients.
- Whether the Admissions Committee version required physical presence in Utah in order to be licensed or in order to apply. The Admissions Committee will clarify that applications can be submitted upon the military member's receipt of orders to Utah.

- The differences between the timing of termination: six months versus ninety days. Ms. Seko explained that for Admissions' purposes, termination is after the military member receives permanent orders to transfer and change "home of record."
- Length of service time recognition and the disagreement between the subcommittee and the Admissions Committee regarding the Military Spouse license length being a 36-month license. The subcommittee prefers no set deadline.
- The transfer of pending matters upon the military spouse leaving the state.
- The Bar's timing on processing and reviewing military spouse applications.
- The fee for the military spouse applications.

The committee summarized the remaining issues between the Subcommittee and the Admissions Committee versions as follows: (1) supervision; (2) time limitations; and some other issues.

Gary Sackett proposed that the subcommittee and the Admissions Committee revisit the actual differences and submit a marked version showing agreements and disagreements, using the Admissions Committee format.

Mr. Cantarero requested clarification regarding outstanding issues and whether they are specifically contained in the Admission Committee version: (a)(12) (b), (c), (f), (g), (j),(k), and (n)(1). Mr. Johnson requested that the Admissions Committee submit to the subcommittee a clean version of its Rule.

Motion that the Admissions Committee coordinates with subcommittee and redraft in their format the things they can agree on and note the things they cannot agree on in the Admissions Committee format: offered by Mr. Sackett. Seconded: Don Winder. Motion carried unanimously.

Ms. Seko, Mr. Burke, and Mr. Waterman departed the meeting.

Mr. Winder departed the meeting.

III. Rule 8.4(g), (h) Continued Discussion

Mr. Cantarero reported back to the committee that HB 283 (2018) failed during the legislative session. It would have made all businesses subject to non-discrimination laws, not just those over a certain size.

Mr. Cantarero discussed issues raised in the subcommittee's March 16, 2018 Memorandum, which was submitted to the Committee to review before the present meeting. Mr. Cantarero also discussed various propositions regarding changed to Standards of Professionalism #3 in addition to Rule 8.4(g). The Supreme Court had requested this Committee also address the Standards. The Subcommittee addressed the comments to Rule 8.4 and the Standards and whether they should be aspirational or mandatory.

Judge Trent Nelson commented on the size of a law firm and the issue of harassment and discrimination in smaller firms. The committee discussed whether Comment 4 regarding the size of the law firm should be inserted in the Rule itself.

Mr. Johnson proposed adding the language “irrespective of the size of the number of employees” to paragraph (g). Mr. Johnson also proposes adding “ordinances” to Comment 4.

Mr. Johnson read into the record the final proposed changes as follows:

Rule 8.4. Misconduct.

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, irrespective of the number of employees; or

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

Comment

...

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

[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice.

[4]. The substantive law of antidiscrimination and anti-harassment statutes, ordinances and case law guides the application of paragraph (g), except for for purposes of determining the violation of paragraph (g), the size of a law firm or number of employees is not a defense. 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. 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, including any benefits and 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).

[4a] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish or rule out 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.

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

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

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

Motion to approve amendments to Rule 8.4(g) and (h) with comments, as read with changes: offered by Judge James Gardner. Seconded: Vanessa Ramos. The motion carried.

With regard to Standard 3, Mr. Cantarero requested that committee members submit their preferences to him regarding the four options in the materials. The committee will review the options at the April meeting.

IV. Supreme Court Standing Order No. 7

This matter was deferred until the April meeting.

V. Next Meeting

The next meeting is scheduled for Monday, April 23, 2018 at 5:00. The May meeting will be held on Monday May 21, 2018 at 5:00.

VI. Adjournment

The meeting adjourned at 7:06 p.m.

Tab 2

MEMORANDUM

FROM: Subcommittee on Rule 8.4(g)

TO: Advisory Committee on Rules of Professional Conduct

DATE: March 16, 2018

SUBJECT: Revised & Proposed Rule 8.4(g) and (h)

This memorandum arises out of the Utah Supreme Court’s request to clarify the proposed language in subparagraphs (g) and (h) to Rule 8.4, and to offer recommendations for amending language to the Utah Standards of Professionalism and Civility for consistency between the Rules of Conduct and the Standards. The recommended changes appear as Exhibits A-E at the end of this memorandum.

Applicability of Rule 8.4(g)

It has been well-documented by this subcommittee and by others that (i) the stated purpose for adopting subparagraph (g) is to create a new category of professional misconduct, and (ii) the policy reason is to deter and penalize discrimination and harassment committed by licensed lawyers. To achieve that aim, it is suggested to adopt the following language for subparagraph (g): “It is professional misconduct for a lawyer to...engage in conduct that amounts to unlawful discrimination or harassment under applicable local, state, and federal law.”

The subcommittee deliberated between using the terms “amounts to” or “tantamount” in describing the prohibited conduct. On the one hand, “conduct that amounts to unlawful discrimination or harassment under applicable...law” suggests a focused and nuanced interpretation of the type of behavior and the setting in which it would be prohibited under the Rules. In other words, discrimination and harassment would constitute professional misconduct in those instances and settings for which there is established law (e.g., employment, wage, age, gender, etc.) and applicable to those attorneys, firms, and companies that employ more than 15 persons. The subcommittee also considered that the phrase “that amounts to unlawful discrimination or harassment” under applicable law may narrow the applicability of the misconduct on a limited number of attorneys, and effectively create two classes of attorneys for whom the rule would apply, exempting solo practitioners, small firm lawyers, or in-house attorneys at companies with less than 15 employees. Existing federal and Utah antidiscrimination and anti-harassment laws generally apply to employers of 15 or more persons, exempting smaller employers.¹

¹ A minimum of 15 employees is required to file a claim under the Utah Antidiscrimination Act. See, Utah Code Ann. § 34A-5-101, *et seq.* It is worth noting that a Bill was introduced at the 2018 General Session of the Utah Legislature seeking to amend the Utah Antidiscrimination Act by allowing certain claims involving employers with fewer than 15 employees to proceed to an evidentiary hearing without an investigation by the Utah Division of Antidiscrimination and Labor; and providing additional state remedies for claims involving employers having as few

On the other hand, there was discussion on replacing the phrase “that amounts to” with the word “tantamount,” being defined by Merriam-Webster as “equivalent in value, significance, or effect.” See <https://www.merriam-webster.com/dictionary/tantamount> (last visited March 16, 2018). The reason for the change is to capture the public policy intent of 8.4(g), which is to deter discriminatory and harassing conduct committed by attorneys by making the misbehavior sanctionable professional misconduct. Simply stated, the use of “tantamount” focuses more on the conduct that is being prohibited, and less on whether the relevant or underlying law is technically applicable to the attorney or the employer.

As the preamble to the Utah Rules of Professional Conduct makes clear, “[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.” Utah R. Prof’l Conduct Preamble ¶ 5. Also, “a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law.” *Id.* at ¶ 7. The Rules of Professional Conduct impose on attorneys a professional responsibility broader than, and beyond those of, the legal requirements of statutes or stare decisis. For example, an attorney may violate the Rules and commit professional misconduct under Rules 8.4(b) and 8.4(c), even though the attorney may not have been previously found guilty beyond a reasonable doubt of the applicable criminal statutes. Similarly with respect to the in antidiscrimination and anti-harassment laws, proposed Rule 8.4(g) would impose a professional responsibility on attorneys not to discriminate or harass, even when the relevant laws may not be applicable to the company or law firm that employs the offending attorney.

The subcommittee welcomes deliberations of the Advisory Committee on these distinctions.

The subcommittee also recommends adding a few other conditions and protected classes to Comment 3 to be consistent with the Utah Antidiscrimination Act. The new inclusions and classes are: “color,” “pregnancy,” “childbirth,” and “pregnancy-related conditions.” See, Utah Code Ann. § 34A-5-106.

Proposed Rule 8.4(h) and Standards of Professionalism and Civility

It should be noted at the outset that the Utah Supreme Court has asked this Advisory Committee to consider changes to the Standards, as the former Advisory Committee on Professionalism was disbanded and not longer active. Comment 3a to Rule 8.4 currently states that “[a]n egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).” The Supreme Court seeks the Advisory Committee’s input regarding the incorporation of Comment 3a into the Rules by adding subparagraph (h) to Rule 8.4, thereby deterring and prohibiting discrimination and harassment in contexts beyond “the administration of justice” and expanding the applicability of the Standards.

as 5 employees. The proposed legislation did not pass. See, H.B. 238 (Workplace Protection Amendments) at <https://le.utah.gov/~2018/bills/static/HB0283.html>.

The subcommittee recommends adopting new paragraph (h) by making egregious violations of the Standards, and patterns of repeated violations, professional misconduct subject to discipline. Doing so would comport with the objective stated at the beginning of the Standards: “To enhance the daily experience of lawyers and the reputation of the Bar.” It would also seek to “achieve the twin goals of civility and professionalism.” Preamble to the Utah Standards of Professionalism and Civility, ¶ 1. The subcommittee also recommends amending the second sentence in Standard #3 from being aspirational to being mandatory, and consistent with the first sentence.

Furthermore, the subcommittee deliberated on the rephrasing language and the applicability of the Standards. The intention of the proposed changes to Standard #3 is to guide conduct by an attorney towards another attorney or legal professional (judges, paralegals, administrative staff, law clerks, court clerks and staff, etc.), and not sanction harassment or discrimination by one attorney in his private affairs with another private citizen – where there may or may not be an applicable law or avenue for relief to the person subject to the harassment or discrimination.

Below are several versions of Standard #3 for the Advisory Committee’s review and consideration.

EXHIBIT A

Rule 8.4. Misconduct.

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; or

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

Comment

...

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

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

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guides the application of paragraph (g). 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. For purposes of determining the violation of paragraph (g), the size of a law firm or number of employees is not a defense. 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, including any benefits and 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).

[4a] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish or rule out 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.

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

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

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

EXHIBIT B

Standards of Professionalism and Civility – Version 1

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers ~~should avoid~~ shall not engage in hostile, demeaning, or humiliating ~~words in written and oral communications~~ conduct with adversaries or other legal professionals. 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, color, religion, gender, pregnancy, childbirth or pregnancy-related conditions, sexual orientation, gender identity, marital status, age, handicap ~~disability~~, veteran status, or national origin, ethnicity, or socioeconomic status, 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).

EXHIBIT C

Standards of Professionalism and Civility – Version 2

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. Lawyers shall not engage in conduct with other attorneys and legal professionals that manifests bigotry, discrimination, or prejudice. 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, color, religion, gender, pregnancy, childbirth or pregnancy-related conditions, sexual orientation, gender identity, marital status, age, handicapdisability, veteran status, or national origin, ethnicity, or socioeconomic status, or casting aspersions on physical traits or appearance. ~~Lawyers should refrain~~ The prohibition from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, is applicable 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).

EXHIBIT D

Standards of Professionalism and Civility – Version 3

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers ~~should~~ shall 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, color, religion, gender, pregnancy, childbirth or pregnancy-related conditions, sexual orientation, gender identity, marital status, age, handicap disability, veteran status, or national origin, ethnicity, or socioeconomic status, 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.

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EXHIBIT E

Standards of Professionalism and Civility – Version 4

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers ~~should~~ shall avoid hostile, demeaning, ~~or~~ humiliating, ~~intimidating, harassing, or discriminatory words in written and oral communications~~ conduct with ~~adversaries~~ other lawyers, paralegals, or administrative staff. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of ~~an adversary~~ another legal professional 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, color, religion, gender, pregnancy, childbirth or pregnancy-related conditions, sexual orientation, gender identity, marital status, age, handicap ~~disability~~, veteran status, or national origin, ethnicity, ~~or socioeconomic status, 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).