

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

August 20, 2018

Committee Members Attending:

Steven G. Johnson, Chair
Dan Brough (by telephone)
Tom Brunker
Joni Jones
Phillip Lowry (by telephone)
Hon. Darold McDade
Hon. Trent Nelson (by telephone) (emeritus)
Amy Oliver
Vanessa Ramos
Austin Riter
Gary Sackett (emeritus)
Padma Veeru-Collings (by telephone)
Katherine Venti
Billy Walker

Guests:

Patricia Owen
Andrew Riggle
Jacey Skinner
Rep. Norm Thurston

Members Excused:

Simón Cantarero
Tim Conde
Don Winder
Judge James Gardner
Cristie Roach
Tim Merrill

Staff:

Nancy Sylvester

Recording Secretary:

Adam Bondy

I. Welcome and Approval of Minutes

Quorum was announced and the meeting commenced at 5:03 p.m. Mr. Johnson welcomed the committee and recognized the new members of the committee. Per Rule 11-101, all members introduced themselves and their areas of practice.

Motion on the Minutes:

Mr. Riter moved to approve the minutes from the June 18, 2018 meeting. Ms. Ramos seconded the motion. The motion passed unanimously.

II. Supreme Court Standing Order 7 Update

This agenda item relates to the possible conversion of Standing Order 7 to a new Rule 14-302. Due to subcommittee member absences, the update will be postponed. It was noted that the committee will need to examine the other rules to ensure that references to Standing Order 7 are updated. It was further noted that a comment should be included to the effect that a judge need not necessarily recuse from a lawyer's cases when the judge has referred that lawyer to the Board authorized by now-Standing Order 7.

III. Rule 8.4(g) and Standards of Professionalism and Civility

Mr. Johnson reported on his meeting with the Utah Supreme Court regarding Rule 8.4. The court had no specific comments but asked the committee to consider the rule's constitutionality.

Mr. Johnson brought the recent California rule to the committee's attention. That rule (8.4.1) includes a Comment 4 that clarifies, "This rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution."

The committee discussed adding a similar comment to the proposed rule. The committee suggested not referring specifically to only one article of the Utah Constitution. Mr. Sackett noted that adding this comment as Comment 6 would render our comment numbering out of order.

Motion on Rule 8.4(g) Comment:

Ms. Venti moved to add "This rule does not apply to conduct protected by the United States Constitution or by Article I of the Utah Constitution" as Comment 4(a) to the proposed Rule 8.4. Mr. Walker seconded. The motion passed unanimously.

Mr. Sackett raised a concern that Rule 8.4(g) as proposed states, "irrespective of the number of employees," but does not clarify what employees are meant. The committee considered that the rule meant the lawyer's legal organization. Mr. Johnson noted that the term "firm" is defined broadly in Rule 1.0(d). Ms. Venti suggested changing the language to "irrespective of the number of employees of the lawyer's firm, as defined in Rule 1.0(d)." The committee considered whether the rule should explicitly point the reader to Rule 1.0(d). The committee decided that an explicit reference would be helpful, noting that some of the other rules include "as defined by"

pointers. Ms. Sylvester suggested omitting the reference to (d) and instead referring the reader to Rule 1.0, so as to avoid renumbering problems if another definition is added in the future.

Motion on Rule 8.4(g) Wording:

Ms. Jones moved to amend proposed Rule 8.4(g) to read, “engage in conduct that amounts to unlawful discrimination or harassment under applicable local, state or federal law, irrespective of the number of employees of the lawyer’s firm as defined in rule 1.0.” Mr. Riter seconded the motion. The motion passed unanimously.

The committee then considered the Standards of Professionalism and Civility in Rule 14-301. Mr. Johnson directed the committee to whether a lawyer should be subject to sanctions under Standard 2 for failing to “advise their clients that civility, courtesy, and fair dealing are expected.” Ms. Venti suggested that it might be appropriate if the lawyer repeatedly fails to do so. Some committee members noted that they or their firms include the advice in their engagement letters. Other committee members noted that it was not part of their or their firms’ normal practice. Mr. Bruner stated that most clients do not need to be advised of these expectations.

Mr. Johnson indicated that the Utah Supreme Court may be aware of a case where this is an issue. Mr. Johnson suggested splitting Rule 8.4 into two sections: things that are professional misconduct and things that may not be professional misconduct. Mr. Sackett opined that “may” is too vague to reasonably inform lawyers what conduct is expected and appropriate.

The committee floated the idea of moving Standard 2 and the first sentence of Standard 14 to the preamble of the Standards. Ms. Oliver noted that the preamble is phrased as “should” while the affected Standards are phrased as “shall.” Ms. Venti asked for clarification of the problem in the current standards the Supreme Court had identified. Mr. Johnson explained that the Supreme Court did not explicitly identify any current problem, but suggested the court was perhaps concerned that an attorney would use the requirements of Standard 2 or Standard 14 to file a complaint against another attorney. Mr. Bruner observed that this would be using the Standards as a sword rather than their intended use as shields. Ms. Venti noted that the Standards are shields in the sense that a lawyer can use them to refuse to engage in uncivil behavior at a client’s request. If the affected Standards are moved to the preamble, the lawyer may lose the ability to use them as a shield. Mr. Bruner and Ms. Venti suggested that, until the Supreme Court has a live case concerning possible misuse of the Standards, the Standards as written should stand. Adjusting the language of the Standards before any concrete problem with them has been identified may be more harmful than leaving them alone.

Motion to Table Discussion:

Mr. Bruner moved to keep the recommended language as currently drafted. Ms. Ramos seconded the motion. The motion passed unanimously.

The committee discussed and determined that, because Comment 4(a) is a subset of Comment 4, the committee notes need only refer to changes in Comment 4 without explicitly pointing out the addition of Comment 4(a).

IV. ADA Issue

Rep. Norm Thurston explained that the legislature considered a bill to ameliorate some of the possible abuses of ADA violation suits/demand letters but ran out of time during the legislative session. Rep. Thurston wanted to bring the issue to the committee's attention to determine if there was a professional conduct solution to the perceived abuses. Jacey Skinner explained the legislative and committee history in greater detail.

Rep. Thurston explained that some of the ADA violation litigation is abusive because lawyers seek a settlement amount, attorney fees, and an NDA in exchange for not filing or for dismissing the ADA cases, even though the ADA does not provide for personal damages to the complainant. Rep. Thurston further explained that some attorneys were advertising on Craigslist or similar forums for plaintiffs/investigators to be trained in ADA requirements and then to go looking for violations at businesses they would not otherwise visit. According to Rep. Thurston, the attorneys generally seek smaller amounts to avoid the business owners hiring lawyers (who might advise them that no damages should be paid). Furthermore, because the complainants are hired as investigators, they can get paid as staff (since there are not entitled to damages as plaintiffs under the ADA).

Rep. Thurston explained that this is an ethics problem more than a legal problem and asked whether there is something the committee can recommend or do. The businesses will never prevail because the violations did happen.

It was noted that even a non-attorney could do all these pre-litigation abusive practices (shopping for complainants, visiting businesses only to find violations, sending demand letters, asking for settlement amounts). It was further noted that the ADA is unlikely to be amended to add a cure period because there is opposition to moving the goalposts while businesses are still adjusting to the current goalposts. It was further noted that businesses have already had 28 years to come into compliance.

Mr. Walker wondered if, with regard to specific attorneys and their practices, there might be violations of rule 7.3 (improper solicitation) and rule 8.4(c) (deception). It was noted that rule 11 and 3.1 only apply to non-meritorious cases and these cases appear to have the possibility or even probability of legal merit.

The committee discussed whether there was an education problem and if there is some way for a chamber of commerce or the secretary of state to educate businesses as to ADA requirements and their rights when an ADA violation suit is brought or threatened. Rep. Thurston noted that businesses should be advised to fix the problem immediately and then refuse to sign a settlement/NDA unless advised to do so by their counsel.

Mr. Walker will review materials provided by Rep. Thurston, and will report back to the committee if he believes the current rules already cover this general type of situation.

V. Other Business

Mr. Walker brought up a point for future meetings regarding mechanisms for raising judicial concerns short of formal complaints. Ms. Sylvester suggested that one mechanism might include a letter to Brent Johnson or the Judicial Conduct Committee. The committee wondered if more education about alternatives could be included in the fall forum or bar journal article.

VI. Next Meeting

The next meeting is scheduled for September 17 at 5:00 p.m. The agenda will include bar licensing for military spouses and Supreme Court Standing Rule 7. Mr. Bondy will not be able to attend.

VII. Adjournment

The meeting adjourned at 6:50 p.m.