MINUTES OF THE SUPREME COURT'S

ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

September 17, 2018

Committee Members Attending:
Steven G. Johnson, Chair
Don Winder
Gary Sackett
Hon. Trent Nelson
Phil Lowry
Vanessa Ramos
Cristie Roach
Amy Oliver
Timothy Conde
Billy Walker
Tom Brunker
Dan Brough
Simon Cantarero
Hon. James Gardner (via telephone)
Hon. Darold McDade (via telephone)
Katherine Venti (via telephone)

Guests:
Patricia Owen

Members Excused:
Austin Riter
Joni Jones
Padma Veeru-Collings
Adam Bondy
Tim Merrill

Staff:
Nancy Sylvester

I. Welcome and Approval of Minutes

Quorum was announced and the meeting commenced at 5:05 p.m. Mr. Johnson welcomed the committee.

Motion on the Minutes:
Tim Conde moved to approve the minutes from the August 2018 meeting with several changes suggested by Mr. Johnson. Judge Trent Nelson seconded the motion. The motion passed unanimously.

II. Rule 8.4 and Christian Legal Society Feedback

The committee discussed a letter from the Christian Legal Society. The committee determined that the letter discussed things already addressed by a subsequent version of the rule. Mr. Johnson proposed removing the comma after "lawyer's firm" before "as defined in Rule 1.0." Mr. Johnsons said he'd been contacted by a former committee member about the word "local" in the rule to refer to ordinances addressing discrimination. The suggestion was to remove the term. The committee unanimously adopted the removal of the comma, but did not adopt the suggestion to remove the term "local." The committee did not take a vote because the comma change was stylistic.

III. Supreme Court Standing Order 7 Update

This agenda item relates to the conversion of Standing Order 7 to a new Rule 14-302.
The subcommittee received feedback from the new Counseling Board, which is Addenda 3 online. Mr. Johnson suggested an edit to remove "standing order" references from the new rule. "OPC" will need to be changed due to the changes to the structure of the Office of OPC. Mr. Sackett suggested updating the rule for style consistent with the rest of Chapter 14. A consistency subcommittee consisting of Tim Conde, Gary Sackett, and Nancy Sylvester will work on bringing the rule in line with the rest of the chapter. Billy Walker pointed out that the subcommittee should look at the 300 series.

Billy Walker moved to approve Rule 14-302 subject to a consistency review; Cristie Roach seconded the motion and it passed unanimously.

Don Winder announced his retirement from the practice of law and from the committee. Mr. Winder then discussed his presentation to the Conference of Chief Justices on civility. He said he encouraged the chief justices to put civility in the attorney oath in every state. He told the group that Utah is looking at adding (h) to Rule 8.4, which deals with civility.

IV. Military Spouse Admissions Rules

Mr. Lowry noted that Missouri, the 31st state to adopt a military spouse rule, just adopted the subcommittee's version of the rule. He said the Admissions Committee's proposal is not in the nature of a reciprocal admission:

- It requires at the point of application that the military spouse be in Utah.
    - Committee commentary: as soon as you get military orders, you should be able to apply because the military person gets these about 6 months in advance.
- Test scores: attorneys admitted in other states would not be able to practice here if their state required lower scores for admission.
    - Question from Ms. Venti: is there a minimum requirement for waiving in? Committee commentary: No, because you have established yourself in another legal community. The difficulty is that these are often times junior lawyers. Pro hac vice attorneys don't have these requirements. The committee discussed that the test scores likely wouldn't make much difference on competency.

The committee discussed how long someone would conceivably be here: the average is 3 years. If their spouse deploys, it may be longer. The committee also discussed the requirements for waiving in. Mr. Johnson reminded the committee that all DOPL licenses now transfer from other states under new legislation introduced last year to benefit military families.

Mr. Lowry noted that the subcommittee added malpractice insurance as a safety net. The lawyer also has to have supervision by local counsel.

The following are the Admissions Committee's comments regarding their edits to the rule:

> 1) Although the Admissions Committee does not object to removing the repeated use of "provisional" when referring to the license, it is important to retain at least one reference to it to call attention to the fact that this is not a typical license. It is provisional based on the spouse's military orders.
> 2) Admissions believes this change is advisable because some active military with orders to be stationed in Utah may not actually be serving in this state but the military spouse will still be residing here.
> 3) This paragraph has simply been moved from (a)(10) because it is a defining requirement of this rule and therefore it is logical to state it up front. Several other requirements in this list have been reordered in a manner that seems to flow more logically (for example, (a)(8) is now (a)(5)). Likewise, internal references within the rule have been altered to reflect these changes.
> 4) This statement was removed by the subcommittee, but it is in fact necessary based on experience. The subcommittee assumed it was a burden of proof requirement, but it is in fact a timing requirement. Without it, applicants will try to file applications explaining that they plan to eventually meet the qualifications, and then they will never do so. For example, if an applicant will not pay the application fees up front, a large amount of time and resources is spent on the application that may never be recompensed if the applicant decides not to pursue admission. Another example would be an applicant who claims they will eventually return to good standing in the jurisdiction where they are licensed but they are not willing to do so right now. When applicants make these assurances, we find they never follow through. On the other side, we have to make it clear

that they must continue to meet the requirements through admission. This might come up if an applicant is in good standing in all jurisdictions when the application is filed but then stops paying their bar dues in the other states (applicants have actually asked Admissions for permission to do this.)

5) The Admissions Committee moved the reference to the applicant's relocation and when it must be complete. It has also been reworded it so that it is less stringent: instead of requiring the applicants to have relocated before they can practice, the new wording will allow them to start accepting work as soon as they have a supervisor and have received the Certificate from the Bar. They only need to have finished moving here before they will be admitted to the Bar.

6) The Admissions Committee continues to object to the fairness and logic of waiving the standard competency requirement for Military Spouse Attorneys. The rule has been revised to return to Admissions' initial proposal, which explains that the exceptions provided are only for those who have met the same competency requirements of all attorneys who are admitted to practice in this state. See (a)(8).

The committee discussed the physical presence issue. Committee members thought it wasn't a bad idea to not be able to have the practice certificate until the military spouse is physically present and has a mentor.

Mr. Johnson noted a case from Georgia in which the Bar arbitrarily denied a military spouse lawyer admission.

The committee continued to discuss the Bar admission score. The subcommittee's version provides that the military spouse lawyer must either have the minimum Utah score or be supervised while practicing here. Ms. Oliver noted that if an attorney is moving every three years, they will never be able to waive in to a jurisdiction. The committee discussed an earlier fairness discussion about lower scores versus higher scores. Attorneys who sit for the Bar here choose to be here. Military spouses don't get to choose to be here.

Mr. Johnson said he preferred that the definitional term in the subcommittee's (a)(10) be moved up to the beginning of the rule as (a)(1). The committee agreed with that change.

Mr. Lowry noted that one version has two types of admission and the other one doesn't. Mr. Cantarero said his understanding is that once the person has an application that is pending, then they can practice anywhere. The Admissions Committee changed this so that this rule was not conflated with the practice pending admission rule.

Ms. Roach and Ms. Oliver questioned why if a person has Utah's minimum UBE score of 270 they would have to have supervision, too. The committee discussed the need for supervision if the lawyer applies and is able to practice before getting here.

Mr. Walker asked if the subcommittee had discussed the "practice privilege" or "diploma" states. Mr. Brunker noted that if they don't have the Bar score, they will have supervision.

Motion by Cristie Roach, Mr. Lowry will make the following changes and circulate it by email: Move (a)(10) definition to (a)(1); change verbiage on provisional practice rule to Admission's Committee's verbiage, "practice while the application is pending;" and clarify that when a military spouse attorney has a practice while the application is pending certificate and they do not have a physical presence in Utah, they must have a supervising attorney in good standing here in Utah (changing paragraph (b)). For final ratification by email or at the next meeting with those changes. Second by Tom Brunker. The motion passed unanimously.

V. ADA Issue

Billy Walker said his office would do some follow up based on the recording about the ADA issues circulated to the committee. The recording was from the last legislative session. Mr. Walker noted that the ADA does not require a real injury in terms of the ADA violations. The committee then discussed some of the concerns about the ADA. The committee discussed the impression that these cases are not meant to be litigated. Mr. Conde said he has settled these cases before but has advised his clients that they still need to make the fix because a settlement doesn't mean another plaintiff won't come by and sue them next week.

The committee noted that an attorney recruiting an ADA investigator may not be doing something that sits well with people, but it probably doesn't violate an ethical rule. The solution for the concerns the states have about ADA abuse likely lies at the federal level. The committee discussed several potential issues: 1) inappropriate advertisements, 2) solicitation, and 3) deceit.

Tom Brunker moved to advise the Supreme Court that the committee has studied this issue and does not see a need to amend the current rules. The existing rules already address, for example, inappropriate advertisements, solicitation, and deceit. The committee would also advise the Court of potential solutions, such as advising the business community of their rights and responsibilities and working with Congress on a fix to the ADA. Vanessa Ramos seconded the motion and it carried unanimously.

VI. Next Meeting

The next meeting is scheduled for October 22 at 5:00 p.m.

VII. Adjournment

The meeting adjourned at 6:50 p.m.