

**MINUTES OF THE SUPREME COURT'S
ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT**
August 19, 2019

The meeting commenced at 5:02 p.m.

Committee Members Attending:

J. Simón Cantarero, Chair
Adam Bondy
Daniel Brough
Thomas Bruner
Steven Johnson (Emeritus)
Joni Jones
Phillip Lowry (by telephone)
Allison McAllister
Hon. Darold McDade
Amy Oliver
Vanessa Ramos
Austin Riter
Cristie Roach
Cory Talbot
Katherine Venti

Guests:

Justice Deno Himonas

Members Excused:

Tim Conde
Hon. Jim Gardner
Hon. Trent Nelson
Gary Sacketts (Emeritus)
Billy Walker
Padma Veeru-Collings

Staff:

Nancy Sylvester

Recording Secretary:

Jurhee Rice

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

I. Welcome, Farewell, and New Members

Mr. Cantarero determined quorum and welcomed the committee.

II. Regulatory Reform and LPP's

Justice Himonas updated the committee on the work of the regulatory reform task force and the pending release of the 70-page report to the Supreme Court. Justice Himonas requested that this committee continue to move its rules forward. Justice Himonas requested volunteers to assist with evaluating the ethics portion of the LPP exam. Volunteers will be tasked with determining the cut off passing score for the ethics portion of the LPP exam. Interested persons should contact Steven Johnson.

Justice Himonas stated that a discussion will begin next week with the Court regarding two main points and recommendations for changes: (1) lawyer advertising and solicitation; and (2) lawyer referral fees (relaxing restrictions on sharing fees).

Justice Himonas discussed how Arizona has abolished Rule 5.4 but how this abolition caused them to look at creating replacement rules for regulation. Justice Himonas believes that the Court is going to ask for something like what Arizona has created. Justice Himonas believes that the creation of a regulator will allow people to practice law but still be regulated by an algorithm so that the risks to the community vs. the effectiveness of the program can be reviewed and assessed. The LSA in England found a 25% error rate in non-lawyers but when compared to lawyers, the error rate was similar.

Justice Himonas stated that Utah is the third state to adopt the Sandbox model and will be the first jurisdiction to use a Legal Regulatory Sandbox if it passes. There are national organizations (such as Rand and PEW) with Block grant money interested in funding the program and using Utah as a pilot site. Justice Himonas stated that the long-term goal of a legal regulatory sandbox is to ease the transition to a multi-state certification program that allows the expansion of legal services-a kind of reciprocity.

III. Review of Committee Procedures:

New members Alyson, Jurhee (recording secretary replacing Adam Bondy, who is now a full member), and Judge Edwards introduced themselves to the committee and the committee bid a fond farewell to Tom Brunner, who has served for 8 years. A discussion regarding drafting rules, editing, and adding comments ensued. Mr. Johnson reminded everyone to make sure that when amending a rule that it did not alter another rule. Mr. Cantarero walked the committee through [CJA Rule 11-101](#) and asked that the committee's rules consistency checklist be circulated.

IV. Approval of Minutes

Motion:

Cristie Roach moved to approve the minutes from the July 17 meeting. Joni Jones seconded the motion. The motion passed unanimously.

V. Report: Meeting with Supreme Court re: Rule 8.4 and 14-301

Rules 8.4 and 14-301: Mr. Cantarero and Mr. Johnson updated the committee on the Court's discussion of Rules 8.4 and 14-301. The Court's primary concern involved the infringement of constitutionally-protected speech, which should be balanced against (1) discrimination among members of the Bar; and (2) egregious violations of the standards of professionalism and civility.

Hostile, demeaning, and humiliating conduct

If speech is going to be regulated, it must be done carefully. The committee focused on the language of Standard 3 and its comment in Rule 14-301. The discussion involved defining "hostile, demeaning, and humiliating conduct" either separately from discriminatory conduct or in conjunction with it (broad vs. narrow).

The committee made numerous edits and modifications to the documents throughout the meeting (sent out in an email by Ms. Sylvester). The Court had a concern that "in all proceedings" only dealt with formal proceedings before the court and so the Court wanted this to be changed to encompass all other interactions that an attorney may have with clients and others. The Committee had concerns regarding the over-broad application of comment 4 as application of this idea of "intimidating and harassing" to all proceedings could chill the ability of an attorney to do their job appropriately, such as in trial, and there could be a misinterpretation of how an attorney is perceived making them susceptible to unjustifiable.

Mr. Cantarero stated that the Court likely just wants a guideline for lawyers to abide by. Mr. Brough stated that the reasons why a person is acting hostile should not matter. If a person is acting in a hostile way, the fact that the party receiving the hostility is a protected class should not matter-it should be enough that the lawyer is acting in an inappropriate way.

It was decided that the rules needed further investigation and discussion. The subcommittee will review the application of the standards to proceedings as well as the definitions as they apply to diversity as separate concepts from hostility since the committee concluded they likely should remain associated but separate. It was recommended to review the GAL statute which provides a good definition of all proceedings. The subcommittee will provide an update at the September 2019 meeting.

Subcommittee:

Adam Bondy (chair), Dan Brough, Steve Johnson, Cristie Roach, Alyson McAllister.

VI. Report: MDP subcommittee re: Rule 5.4(a) & 1.5(e)

Mr. Steven Johnson reviewed the suggested amendments to Rule 5.4. Mr. Johnson explained that the recent amendments to the advertising rules say an attorney may advertise any way he or she wants as long as the attorney doesn't misrepresent the facts. Under Rule 5.4, you may share fees so long as it does not interfere with the basic core values of the lawyer. Mr. Johnson reiterated that Arizona is abolishing Rule 5.4 but states that this will require a new rule to protect hybrid business and believes that a new rule is not necessary when revising the current rule could provide for such safeguards.

The Committee discussed ways in which a client may be informed of the structure of the lawyer's employment with an organization in which a financial interest is held or managerial authority is exercised by one or more non-lawyers. It was discussed whether the use of consent, notification, or disclosure would provide the client with the necessary information to make an informed decision. While most clients may not care, commercial clients may have more of an interest and may need the information. Informed consent was thought to create too high of a standard, while some form of disclosure or notice was thought to be slightly low but likely to suffice with the needs of the clients. The committee decided the issue should be further reviewed by the subcommittee. The subcommittee will review the rule and discuss informed consent and disclosure/notice requirements. The subcommittee will recommend an appropriate procedure based upon their review and assessment.

Subcommittee:

Cory Talbot-chair, Judge Gardner, Simon Cantarero, Gary Sackett, Tim Conde, and Steve Johnson (on call only). Tom Brunner is released from service.

VII. Report: Rule 6.5 & Bar Commission Recommendations

Deferred until September 2019 Meeting.

VIII. Other Business

Cristie Roach's subcommittee on Rule 6.5 will be first on the agenda at September 2019 meeting.

IX. Scheduling of Future Meetings

September 16, 2019 at 5:00 p.m.

October 21, 2019 at 5:00 p.m.

November 18, 2019 at 5:00 p.m.

X. Adjournment

The meeting adjourned at 6:58 p.m.