



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

Meeting Minutes

December 7, 2020

Via WebEx

5:01 p.m.

Simón Cantarero, Chair

Attendees:

Simón Cantarero, Chair
Adam Bondy
Daniel Brough
Tim Conde
Hon. Michael Edwards
Hon. James Gardner
Steven G. Johnson (Emeritus)
Joni Jones
Philip Lowry
Alyson Carter McAllister
Hon. Trent Nelson (Emeritus)
Amy Oliver
Vanessa Ramos
Jurhee Rice
Austin Riter
Gary Sackett (Emeritus)
Cory Talbot
Dane Thorley
Katherine Venti
Billy Walker

Staff:

Nancy Sylvester
Recording Secretary-vacant

Guests

Judge Catherine Hoskins

Not Present

Angie Allen

1. Welcome and approval of the October 5, 2020 meeting minutes: Simón Cantarero, Chair

Simón Cantarero, Chair welcomed everyone to the meeting and asked for approval of the minutes.

Vanessa Ramos moved to approve the October 5, 2020 minutes. Amy Oliver seconded the motion, and it passed unanimously.

2. Online reviews and recommended rule changes: Rule 1.6 Confidentiality of information: Judge Catherine Hoskins

Online reviews can be written instantly and last indefinitely, whether true or not. Judge Hoskins would like this committee to consider amending rule 1.6(b) as follows:

Rule 1.6(b) states, a lawyer may reveal information related to the representation of a client to the extent the lawyer reasonably believes necessary.

Judge Hoskins recommends amending Rule 1.6 to incorporate (b)(5) to say the following:

Rule 1.6(b)(5)...to respond to online comments, reviews, advertising made by a client or any third party.

The subcommittee chaired by Amy Oliver and joined by Gary Sackett, Billy Walker, Katherine Venti, and Alyson McAllister will review whether an amendment to Rule 1.6 should be made to allow attorneys the ability to respond to online comments, reviews, advertising made by a client or any third party.

3. Online reviews and recommended rule changes: Rule 7.1 Communications Concerning a Lawyer's Services: Judge Catherine Hoskins

Rule 7.1 states:

- a. A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A Communication is misleading if it:
 1. Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.
 2. Is likely to create an unjustified or unreasonable expectation about results the lawyer can achieve or has achieved; or
 3. Contains a testimonial or endorsement that violates any portion of this Rule.
- b. A lawyer shall not interact with a prospective client in a manner that involves coercion, duress, or harassment.

Judge Hoskins recommends amending Rule 7.1 by adding the following language:

Rule 7.1(c): lawyers may compensate former clients for reviews of their services.

Rule 7.1(d): All websites that use information obtained from the Utah State Bar about attorneys must identify clearly whether or not the attorney opts in for their services.

Attorneys and their conduct online can be regulated, on a website, but this committee does not have the authority to regulate third party websites and control their content. The regulation of websites and website content falls under the jurisdiction of consumer protection.

Whether the online ratings violate the rules of professional conduct and whether such content is misleading and harmful to attorneys will be reviewed by the subcommittee chaired by Amy Oliver. The subcommittee will meet within the first months of 2021 and provide feedback to the RPC Committee.

Judge Hoskins' contact information will be available via Nancy Sylvester and Simón Cantarero.

4. Conflict between GAL statute and Rule 1.6: Issue forwarded by Courts' Legislative Liaison, Michael Drechsel: Nancy Sylvester

As part of the juvenile recodification bill, statute 78A-6-902(12) regarding the intersection between attorney Guardian ad Litem records and Rule 1.6 of the Rules of Professional Conduct.

The statute has been on the books in substantially the same form since at least 2004. Statute 78A-6-902(12) provides as statutory exception to Rule 1.6. The statute's reference to Rule 1.6(b)(4) is out of date and currently says, "(b)(4) to secure legal advice about a lawyer's compliance with these Rules." In the past, Rule 1.6(b)(4) said, "(b)(4) to comply with the Rules of Professional Conduct or other Law."

Rule 1.6 already recognizes that certain requirements of the law may require disclosure. A broad interpretation would permit the Legislature to outline the contours of attorney confidentiality by passing a statute that says an attorney must disclose certain information. This seems to strike at the core of regulating a fundamental obligation of the practice of law. For that reason alone, the committee should explore revising this Rule 1.6. Representative Snow is open to this and thinks it would be a good change that makes sense. The Guardian Ad Litem's office is also on board with incorporating the statutory language into Rule 1.6.

It is recommended that Rule 1.6 be amended to incorporate the statutory language as follows:

Rule 1.6(d)(i) states:

- (i) Because of the unique role of an attorney guardian ad litem and states role and responsibility to provide a guardian ad litem program; and as *parens patriae*, to protect minors, a claim of attorney privilege does not bar access to the records of an attorney guardian ad litem by the legislature through legislative subpoena.
- (ii) Records released in accordance with a legislative subpoena shall be maintained as confidential by the Legislature.
- (iii) The office of the Legislative Auditor General may include summary data and nonidentifying information in its audits and reports to the Legislature.

The recommended rule amendment was tabled pending a draft or amendment of statute. Nancy Sylvester will contact Michael Drechsel to obtain more information and schedule a potential presentation of information at next RPC meeting in January 2021.

5. Comment to Rule 1.0: Steve Johnson

Justice Lee raised a concern about rule-type language in Comment 6 to Rule 1.0, dealing with informed consent. His concern was with the third sentence of that comment, which states, “The lawyer must make reasonable efforts . . .” He thought that this mandatory language shouldn’t be in the comments.

Steve Johnson suggests amending the comment to the following: “Other rules require a lawyer to make reasonable efforts . . .” and citing the other rules in the comment.

A subcommittee chaired by Steve Johnson, joined by Phil Lowry, and Vanessa Ramos will review Rule 1.0 and Comment 6 and report back to the committee within the next year with suggestions. The subcommittee review will not be expanded to additional rules.

6. Rapid Response Team Volunteers: Simón Cantarero, Chair

The committee has been asked to form a Rapid Response Team of volunteers to review legislation being proposed or adopted that would affect attorney conduct or Rules of Professional Conduct.

Simón Cantarero will chair the Rapid Response Team, joined by Austin Riter and Joni Jones.

7. Old business/new business: (all)

2021 meeting schedule: 1st Monday of the month at 5pm.

The meeting adjourned at 6:25 p.m. The next meeting will be held on January 4th, 2021 at 5pm via WebEx.