



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

Meeting Minutes

December 6, 2021

WEBEX

5:00 p.m. Mountain Time

J. Simon Cantarero, Chair

Attendees:

J. Simon Cantarero, Chair
Hon. James Gardner
Hon. Amy Oliver
Katherine Venti
Alyson McAllister
Cory Talbot
Adam Bondy
Joni Jones
Gary Sackett (Emeritus)
Steve Johnson (Emeritus)
Jurhee Rice
Dan Brough
Billy Walker
Dane Thorley
Julie J. Nelson
Hon. Mike Edwards
Austin Riter
Phillip Lowry
Robert Gibbons
M. Alex Natt, Recording Secretary

Staff:

Nancy Sylvester

Guests:

Scotti Hill
Curtis Larson
Christine Greenwood

Absent –Angie Allen, Julie Nelson,
Hon. Trent Nelson (Emeritus)

1. Welcome and approval of the October 4, 2021 meeting minutes: Mr. Cantarero

Chairman Cantarero recognized the existence of a quorum, called the meeting to order at 5:02 p.m. and discussed the future meetings of the committee being shifted to the first Tuesday of each month from 4 to 6 p.m. starting in 2022. He welcomed everyone to the meeting including the guests.

The Chair asked for a motion to approve the October 4, 2021 meeting minutes.

Mr. Walker moved and Mr. Gibbons seconded the motion. The minutes were adopted unanimously without correction.

2. Rule 3.8: Petition to Amend: Curtis Larson

Chairman Cantarero invited Mr. Larson to discuss a proposal he has made to the Committee. He introduced himself as a former police officer and prosecutor and noted his experiences and observations that prosecutors approach their cases in manners which in his opinion should be better harmonized to protect not only the rights of victims, but also ensure consistent application of statutes to all cases. Judge Oliver wondered whether the amendment would apply to federal prosecutors in the State of Utah. Mr. Larson said he hadn't considered this question. Judge Oliver suggested the U.S. Attorney's Office be consulted while the Committee considers the Petition. The Committee asked questions about the language employed and the intention of the Petitioner in proposing this modification to the Rule. Mr. Larson presented both paragraphs (f) and (g) and the Committee asked for clarification on both. Mr. Johnson suggested that in (g) a distinction may have to be made that a prosecutor may properly handle minor defendants differently from adult defendants. Mr. Walker inquired whether these rules apply specifically to the "line prosecutor" or whether it extended to every prosecutor in a particular office/chain of command which is responsible for a charging decision or prosecution of a criminal offense. Chair Cantarero thanked Mr. Larson for his suggestions and indicated that he will refer the matter to a subcommittee for further review as is the Committee's normal practice. Judge Edwards, Judge Oliver, Dane Thorley, Alex Natt, Austin Riter, a to-be-named federal prosecutor, and Vanessa Ramos or another defense counsel will serve on the subcommittee with Judge Oliver serving as its Chair. Mr. Larson was invited to engage with the subcommittee at its election.

3. Rules 1.0, 5.8, 5.4: Referral Fees, Fee Sharing, Solicitation: Alyson McAllister

Chairman Cantarero asked Ms. Sylvester to recap the discussions with the Supreme Court regarding the referral fee rules. Ms. Sylvester noted that the Court had specific suggestions as to the use of the word "indirectly" in paragraph (a)(2) regarding passing on referral fees. Ms. McAllister describes the thoughts of the

subcommittee in responding to Justice Lee's concerns of "indirect" vs. "direct." The subcommittee rewrote the language to avoid having to make the distinction. The next issue regarded contingency fees. The subcommittee said an attorney should not be able to pass along the cost of a referral fee to a particular client while charging another client a smaller contingency fee if no referral has been made and fee paid. Ms. McAllister discussed the reasonableness of fees as expressed in Rule 5.8(c), incorporating factors which currently exist in Rule 1.5(a). Justice Lee asked that the Committee state with specificity the factors to be considered. The Committee offered various suggested revisions to the Rule. Chairman Cantarero referred the matter back to the subcommittee for further consideration.

4. Rule 8.3: Mediation, Arbitration, Confidentiality: Steve Johnson

Mr. Johnson discussed a conflict that exists when a serious ethical violation comes to light in a mediation or arbitration, but due to confidentiality, it cannot be reported. Ms. Sylvester suggested modification to the fee dispute rule that will allow such violations to be reported under certain circumstances. Mr. Johnson and Ms. Sylvester will discuss these matters further and revisit this matter with the Committee at its next meeting.

5. Rule 8.4(c): Prosecutors Involved in Lawful, Covert Operations: Joni Jones

Ms. Jones indicated that lawyers who are acting in undercover capacities should not be considered to be acting in violation of this Rule when they are acting "dishonestly, fraudulently, deceitfully, or making misrepresentations of fact" when involved in covert conduct in furtherance of legal purposes. Mr. Sackett and Mr. Johnson discuss an ethic advisory opinion issued 18 years ago that informs the discussion here and which could be added to the Rule to clarify this issue. Ms. Sylvester noted the language she added to the rule which would permit this practice to be ethical. The language essentially tracked the ethics advisory opinion.

Chairman Cantarero asked for a motion to propose adoption of the revised Rule as described to the Committee. Motion by Ms. Jones. Second by Mr. Bondy. The Motion passed unanimously. The rule will move on to the Supreme Court with a recommendation to circulate for comment.

6. Adjournment

Chairman Cantarero wished happy holidays to all and good luck to the Utes in the upcoming Rose Bowl game. The meeting adjourned at 6:58 p.m. The next meeting will be held on January 4, 2021 at 4 p.m.