

Agenda

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

April 5, 2022

4:00 to 6:00 p.m.

Via Zoom

Welcome and approval of minutes	Tab 1	Steven G. Johnson, presiding
<i>Rule 1.2</i> <ul style="list-style-type: none">Proposal to create requirement that a lawyer in a criminal case abide by the client's decision of whether to file an appeal.	Tab 2	Doug Thompson and Stacy Haacke
<i>Rule 8.3 and fee dispute rules</i> <ul style="list-style-type: none">Proposal to provide exception to reporting misconduct in the context of a Utah State Bar-sponsored fee dispute resolution program.	Tab 3	Steve Johnson, Nancy Sylvester
<i>Rules 8.4 and 14-301: Antidiscrimination rules</i> <ul style="list-style-type: none">Assignment to subcommitteeHistorical compilation process	Handout	(This item may circulate by email post-meeting if the handout is not ready by 4/5)
<i>FYI</i> <ul style="list-style-type: none">May's meeting will be in-person		--
Projects in the pipeline: <ul style="list-style-type: none">LPP updates;Client fees issue from Bar Foundation (Kim Paulding);		--

2022 Meeting Schedule: 1st Tuesday of the month from 4 to 6 p.m. unless otherwise scheduled

Meetings: May 3 (in-person), June 7, (skip July), August 2 (in-person), September 6, October 4, November 1 (in-person), December 6

Tab 1



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

[Draft] Meeting Minutes

March 1, 2022

Via Zoom

17:00 Mountain Time

J. Simon Cantarero, Chair

Attendees:

J. Simon Cantarero, Chair
Hon. James Gardner
Katherine Venti
Alyson McAlister
Cory Talbot
Adam Bondy
Gary Sackett (Emeritus)
Steve Johnson (Emeritus)
Jurhee Rice
Billy Walker
Dane Thorley
Julie J. Nelson
Phillip Lowry
Hon. Trent Nelson (Emeritus)
M. Alex Natt, Recording Secretary

Staff:

Nancy Sylvester

Guests:

Scotti Hill
Christine Greenwood

Excused:

Angie Allen
Hon. Amy Oliver
Dan Brough
Austin Riter
Robert Gibbons
Hon. Mike Edwards

1. Welcome and approval of the December 6, 2021 meeting minutes (Chair Cantarero)

Chairman Cantarero recognized the existence of a quorum and called the meeting to order at 17:00. Mr. Cantarero asked for a Motion to approve the January 4, 2022 meeting minutes.

Ms. Rice moved and Judge Gardner seconded the Motion. The minutes were adopted unanimously with the following minor corrections:

The spelling of Judge Gardner's name will be corrected and in the last line of section 3 the reference to 14-902(b)(1) will be corrected to 14-802(b)(1).

2. Update on Rule 8.4 Amendments

Mr. Cantarero discussed a letter received from the LGBTQ Chamber of Commerce in regard to Commissioner Morgan and its relation to the status of proposed modifications to Rule 8.4. He noted that staff were in the process of an historical compilation process with respect to the discussions around Rule 8.4 and 14-301.

3. Rules 1.0, 5.4, and 5.8 (Chair Cantarero)

Mr. Cantarero noted that the committee had already approved sending the referral fee rules to the Supreme Court with a recommendation that they circulate for comment. In that recommendation, the committee had proposed that only lawyer-to-lawyer referral fees be permitted at this time. He and Ms. Sylvester noted some potential overlap with proposed legislation, S.B. 43, that was before the Utah Legislature.

4. Rule 3.8 (Chair Cantarero)

Mr. Cantarero discussed the recommendation of the subcommittee submitted by Judge Oliver regarding a proposal by retired prosecutor Curtis Larsen to amend Rule 3.8.

There were two amendments to Rule 3.8 proposed by Mr. Larsen. With respect to subsection (f), there was a consensus among the subcommittee that the current Federal and State Victims Rights statutes adequately address the concerns raised and there was no need to duplicate those efforts by adding a rule of professional responsibility. With respect to subsection (g), there was a consensus among the subcommittee that the upcoming revisions to Rule 8.4 would likely address the concerns here. There was also a consensus that the creation of these new rules could add a significant number of bar complaints due to the fact that victims and Defendants can frequently be unhappy with the resolution of criminal cases and that these complaints would likely be difficult to adjudicate.

The committee elected to not act on the rule at this time.

5. Adjournment.

Mr. Cantarero discussed the upcoming meetings, some of which will be in-person, including the May meeting.

The meeting adjourned at 17:30. The next meeting will be held on April 5, 2022.

Tab 2

Mr. Cantarero,

I am reaching out to you as the Chair of the Supreme Court's Advisory Committee on the Rules of Professional Conduct and requesting the committee review Rule 1.2(a), specifically the last sentence related to criminal cases. Currently the rule requires a lawyer in a criminal case to "abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." I believe the rule should be amended to include the decision whether to file an appeal. As described in the Utah Constitution, criminal defendants have "the right to appeal in all cases" (Art. I, sect. 12), and the decision whether to appeal belongs to the defendant. See *Jones v. Barnes*, 463 U.S. 745, 751 ("It is also recognized that the accused has the ultimate authority to make certain foundational decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").

There is an increase in litigation on the issue or reinstatement of time to file notice of appeal pursuant to Rule 4 of the Utah Rules of Appellate Procedure. My experience leads me to conclude that much of this litigation stems from defense counsel's failure to adequately consult with defendants about the right to appeal and the potential issues that could be raised on appeal. I suggest that adding this language is justified and would reduce this unnecessary litigation if it helped lawyers understand and recognize that duty.

I'd be happy to answer any questions or speak to the committee. I've attached my proposal.

Thank you.

Douglas J. Thompson
Utah County Public Defender Assoc.
Appeals Division

1 **Rule 1.2. Scope of representation and allocation of authority between client and**
2 **lawyer. Licensed paralegal practitioner notice to be displayed.**

3 (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the
4 objectives of representation and, as required by [Rule 1.4](#), shall consult with the client as to the
5 means by which they are to be pursued. A lawyer may take such action on behalf of the client as
6 is impliedly authorized to carry out the representation. A lawyer shall abide by a client's
7 decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's
8 decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury
9 trial and whether the client will testify, and whether to take an appeal.

10 (b) A lawyer's representation of a client, including representation by appointment, does not
11 constitute an endorsement of the client's political, economic, social or moral views or activities.

12 (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the
13 circumstances and the client gives informed consent.

14 (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer
15 knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any
16 proposed course of conduct with a client and may counsel or assist a client to make a good faith
17 effort to determine the validity, scope, meaning or application of the law.

18 (e) A licensed paralegal practitioner shall conspicuously display in the licensed paralegal
19 practitioner's office a notice that shall be at least 12 by 20 inches with boldface type or print with
20 each character at least one inch in height and width that contains a statement that the licensed
21 paralegal practitioner is not a lawyer licensed to provide legal services without limitation.

22 **Comment**

23 **Allocation of Authority between Client and Lawyer**

24 [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to
25 be served by legal representation, within the limits imposed by law and the lawyer's
26 professional obligations. The decisions specified in paragraph (a), such as whether to settle a

27 civil matter, must also be made by the client. See [Rule 1.4\(a\)\(1\)](#) for the lawyer's duty to
28 communicate with the client about such decisions. With respect to the means by which the
29 client's objectives are to be pursued, the lawyer shall consult with the client as required by [Rule](#)
30 [1.4\(a\)\(2\)](#) and may take such action as is impliedly authorized to carry out the representation.

31 [2] On occasion, however, a lawyer and a client may disagree about the means to be used to
32 accomplish the client's objectives. Clients normally defer to the special knowledge and skill of
33 their lawyer with respect to the means to be used to accomplish their objectives, particularly
34 with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the
35 client regarding such questions as the expense to be incurred and concern for third persons who
36 might be adversely affected. Because of the varied nature of the matters about which a lawyer
37 and client might disagree and because the actions in question may implicate the interests of a
38 tribunal or other persons, this Rule does not prescribe how such disagreements are to be
39 resolved. Other law, however, may be applicable and should be consulted by the lawyer. The
40 lawyer should also consult with the client and seek a mutually acceptable resolution of the
41 disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement
42 with the client, the lawyer may withdraw from the representation. See [Rule 1.16\(b\)\(4\)](#).
43 Conversely, the client may resolve the disagreement by discharging the lawyer. See [Rule](#)
44 [1.16\(a\)\(3\)](#).

45 [3] At the outset of a representation, the client may authorize the lawyer to take specific
46 action on the client's behalf without further consultation. Absent a material change in
47 circumstances and subject to [Rule 1.4](#), a lawyer may rely on such an advance authorization. The
48 client may, however, revoke such authority at any time.

49 [4] In a case in which the client appears to be suffering diminished capacity, the lawyer's
50 duty to abide by the client's decisions is to be guided by reference to [Rule 1.14](#).

51 **Independence from Client's Views or Activities**

52 [5] Legal representation should not be denied to people who are unable to afford legal
53 services or whose cause is controversial or the subject of popular disapproval. By the same
54 token, representing a client does not constitute approval of the client's views or activities.

55 Agreements Limiting Scope of Representation

56 [6] The scope of services to be provided by a lawyer may be limited by agreement with the
57 client or by the terms under which the lawyer's services are made available to the client. When a
58 lawyer has been retained by an insurer to represent an insured, for example, the representation
59 may be limited to matters related to the insurance coverage. A limited representation may be
60 appropriate because the client has limited objectives for the representation. In addition, the
61 terms upon which representation is undertaken may exclude specific means that might
62 otherwise be used to accomplish the client's objectives. Such limitations may exclude actions
63 that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

64 [7] Although this Rule affords the lawyer and client substantial latitude to limit the
65 representation, the limitation must be reasonable under the circumstances. If, for example, a
66 client's objective is limited to securing general information about the law the client needs in
67 order to handle a common and typically uncomplicated legal problem, the lawyer and client
68 may agree that the lawyer's services will be limited to a brief telephone consultation. Such a
69 limitation, however, would not be reasonable if the time allotted were not sufficient to yield
70 advice upon which the client could rely. Although an agreement for a limited representation
71 does not exempt a lawyer from the duty to provide competent representation, the limitation is a
72 factor to be considered when determining the legal knowledge, skill, thoroughness and
73 preparation reasonably necessary for the representation. See [Rule 1.1](#).

74 [8] All agreements concerning a lawyer's representation of a client must accord with the
75 Rules of Professional Conduct and other law. See, e.g., [Rules 1.1](#), [1.8](#) and [5.6](#).

76 Criminal, Fraudulent and Prohibited Transactions

77 [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to
78 commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving
79 an honest opinion about the actual consequences that appear likely to result from a client's
80 conduct. Nor does the fact that a client uses advice in a course of action that is criminal or
81 fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction

82 between presenting an analysis of legal aspects of questionable conduct and recommending the
83 means by which a crime or fraud might be committed with impunity.

84 [10] When the client's course of action has already begun and is continuing, the lawyer's
85 responsibility is especially delicate. The lawyer is required to avoid assisting the client, for
86 example, by drafting or delivering documents that the lawyer knows are fraudulent or by
87 suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a
88 client in conduct that the lawyer originally supposed was legally proper but then discovers is
89 criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the
90 client in the matter. See [Rule 1.16\(a\)](#). In some cases, withdrawal alone might be insufficient. It
91 may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any
92 opinion, document, affirmation or the like. See [Rule 4.1](#).

93 [11] Where the client is a fiduciary, the lawyer may be charged with special obligations in
94 dealings with a beneficiary.

95 [12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction.
96 Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent
97 avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense
98 incident to a general retainer for legal services to a lawful enterprise. The last clause of
99 paragraph (d) recognizes that determining the validity or interpretation of a statute or
100 regulation may require a course of action involving disobedience of the statute or regulation or
101 of the interpretation placed upon it by governmental authorities.

102 [13] If a lawyer comes to know or reasonably should know that a client expects assistance
103 not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act
104 contrary to the client's instructions, the lawyer must consult with the client regarding the
105 limitations on the lawyer's conduct. See [Rule 1.4\(a\)\(5\)](#).

106 [14] Lawyers are encouraged to advise their clients that their representations are guided by
107 the Utah Standards of Professionalism and Civility and to provide a copy to their clients.

108 [14a] This rule differs from the ABA Model Rule by adding section (e) which requires
109 licensed paralegal practitioners to post a conspicuous notice of their limited licensure status.

Tab 3

1 **Rule 8.3. Reporting Professional Misconduct.**

2 (a) A lawyer who knows that another legal professional has committed a violation of the
3 applicable Rules of Professional Conduct that raises a substantial question as to that legal
4 professional's honesty, trustworthiness or fitness as a legal professional in other respects
5 shall inform the appropriate professional authority.

6 (b) A lawyer who knows that a judge has committed a violation of applicable Rules of
7 Judicial Conduct that raises a substantial question as to the judge's fitness for office shall
8 inform the appropriate authority.

9 (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6
10 or information gained by a lawyer or judge while participating in an
11 approved lawyers assistance program or in a Utah State Bar-sponsored fee dispute
12 resolution program.

13 **Comment**

14 [1] Self-regulation of the legal profession requires that members of the profession initiate
15 disciplinary investigation when they know of a violation of the applicable Rules of
16 Professional Conduct. Lawyers have a similar obligation with respect to judicial
17 misconduct. An apparently isolated violation may indicate a pattern of misconduct that
18 only a disciplinary investigation can uncover. Reporting a violation is especially
19 important where the victim is unlikely to discover the offense.

20 [2] A report about misconduct is not required where it would involve violation of Rule
21 1.6. However, a lawyer should encourage a client to consent to disclosure where
22 prosecution would not substantially prejudice the client's interests.

23 [3] If a lawyer were obliged to report every violation of the Rules, the failure to report
24 any violation would itself be a professional offense. Such a requirement existed in many
25 jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to
26 those offenses that a self-regulating profession must vigorously endeavor to prevent. A
27 measure of judgment is, therefore, required in complying with the provisions of this Rule.

28 The term "substantial" refers to the seriousness of the possible offense and not the
29 quantum of evidence of which the lawyer is aware. A report should be made to the bar
30 disciplinary agency unless some other agency, such as a peer review agency, is more
31 appropriate in the circumstances. Similar considerations apply to the reporting of judicial
32 misconduct.

33 [4] The duty to report professional misconduct does not apply to a lawyer retained to
34 represent a legal professional whose professional conduct is in question. Such a situation
35 is governed by the rules applicable to the client-lawyer relationship.

36 [5] Information about a lawyer's or judge's misconduct or fitness may be received by a
37 lawyer in the course of that lawyer's participation in an approved lawyers or judges
38 assistance program. In that circumstance, providing for an exception to the reporting
39 requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to
40 seek treatment through such a program. Conversely, without such an exception, lawyers
41 and judges may hesitate to seek assistance from these programs, which may then result
42 in additional harm to their professional careers and additional injury to the welfare of
43 clients and the public.

44 [6] Information about a lawyer's misconduct or fitness may also be received during a fee
45 dispute arbitration or mediation. Providing an exception to the reporting requirements
46 in such cases encourages lawyers to use the Bar's fee dispute resolution process and helps
47 lawyers and clients resolve such matters without litigation.]

Commented [NS1]: Explanatory Note: Adding the exception to Rule 8.3(c) eliminates the conflict between Rule 8.3, which mandates reporting of lawyer egregious wrongdoing, with the Fee Dispute rules which require confidentiality in fee dispute matters.

51 **Rule 14-1111. Exemption from future testimony and confidentiality of records and**
52 **information.**

53 (a) Exemption from future testimony. No Fee Dispute Resolution Committee member
54 participating in a fee dispute ~~decision arbitration~~ or mediation proceeding ~~shall~~ may be
55 called as a witness in any subsequent legal proceeding related to the fee dispute.

56 (b) Confidentiality of records and information. Records and ~~fi~~ information and
57 ~~documentation~~ submitted in a fee dispute proceeding shall be deemed confidential and
58 ~~shall~~ may not be disclosed other than to enforce a written decision or as provided in
59 paragraphs (c) and (d).

60 ~~(c) Notwithstanding the above,~~ (c) Disclosure of confidential information. Confidential
61 information in the Utah State Bar's possession may be disclosed if the request is made
62 to the Bar by:

63 (a1) an agency authorized to investigate the qualifications of persons for admission
64 to practice law;

65 (b2) an agency authorized to investigate the qualifications of persons for
66 government employment;

67 (c3) a lawyer discipline enforcement agency; or

68 ~~(d4)~~ an agency authorized to investigate the qualifications of judicial candidates.

69 Proposal: |

70 (d) When a Committee member may report misconduct. If a Fee Dispute Resolution
71 Committee member knows that a legal professional has committed a violation of the
72 applicable Rules of Professional Conduct that raises a substantial question as to the
73 legal professional's honesty, trustworthiness, or fitness as a legal professional, the
74 member may disclose confidential information to a lawyer discipline enforcement
75 agency.

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Commented [NS2]: Explanatory Note: Option 1 allows a Committee member to disclose confidential information where a legal professional's actions raise a substantial question as to the legal professional's honesty, trustworthiness, or fitness as a legal professional. In these egregious situations, the confidentiality of the fee dispute process may not be as important as the review of the legal professional's fitness to practice. Reporting the misconduct of a legal professional is not mandatory, but is only permissive.

Commented [NS3]: From Nelson Abbott (proposal to eliminate new paragraph):

UCA 78B-10-104 creates a privilege regarding mediation communications. 78B-10-108 makes all mediation communications confidential. There are several exceptions. Some are in 78B-10-105 but the ones that are most pertinent are in 78B-10-106(1)(e) and (f). However (e) applies only to a claim of professional misconduct against the mediator and (f) applies only to a claim of professional misconduct that occurs during mediation.

Arbitration does not have similar confidentiality statute. However, the courts have adopted ethical standards for mediators and arbitrators who are on the court roster and who are conducting certain proceedings. Canon IV(e) and (g) appear to prohibit some disclosures that might be permitted by the proposed rule.

My concern is that the proposed rule allows a committee member to disclose confidential information to a lawyer discipline enforcement agency even though that disclosure may be prohibited by statute or other rule. I think the proposed rule needs something to recognize that an attorney acting as a mediator or arbitrator is not excused from following a statute or other rule. Given the complexity of meshing this proposed rule with the statute and other rules, it may be simpler to delete this portion of the proposed rule.

77 **Rule 14-1116. Conduct of the mediation.**

78 (a) **Scheduling the mediation.** The designated mediator shall set the time and place for
79 the mediation and shall cause written notice of the mediation to be served personally or
80 by mail or email on all parties to the mediation.

81 (b) **Right to be represented by counsel.** In the notice of the mediation, the mediator shall
82 inform the parties of their right to be represented by their own legal counsel at their own
83 cost at any stage of the mediation process. Failure to be represented by legal counsel at
84 any stage of the mediation is a waiver of this right at that stage of the mediation, although
85 a party may use legal counsel later in the mediation process.

86 (c) **Right to be assisted at mediation.** A party may designate an individual to accompany
87 that party to the mediation and to participate with the party in the mediation process.

88 (d) **Procedure.** The mediator may use joint or private caucuses during the mediation
89 process. The process may be adjourned from time to time in the discretion of the mediator
90 or at the request of the parties.

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Commented [NS4]: Although not part of the mandatory reporting of legal malpractice issue, while we are amending Fee Dispute Resolution rules, Steve thought the following amendment would be helpful.