



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

### Meeting Minutes

December 6, 2022

Zoom

16:00 Mountain Time

*J. Simon Cantarero, Chair*

#### **Attendees:**

J. Simon Cantarero, Chair

Jurhee Rice

Billy Walker

Adam Bondy

Mark Hales

Ian Quiel

Gary Sackett

Hon. Mike Edwards

Dane Thorley

Alyson McAllister

Joni J. Jones

Robert Gibbons

Hon. James Gardner

Austin Riter

Hon. Trent Nelson

Julie Nelson

Hon. Amy Oliver

Christine Greenwood (ex officio)

Cory Talbot

Phillip Lowry

#### **Staff:**

Nancy Sylvester

Scotti Hill

#### **Guests:**

Martha Knudsen, Executive Director, Utah State  
Bar Wellbeing Committee

#### **Excused:**

Hon. M. Alex Natt, Recording  
Secretary

Chair Cantarero recognized the existence of a quorum, called the meeting to order at 4:03.

1. The meeting commenced with an announcement from Martha Knudsen about the new well-being initiatives from the Bar Commission, including the Bar's contract with "Unmind," a platform lawyers can access from any computer or mobile device as an app. The service makes recommendations based on a small assessment on a host of offerings, including physical and mental health as well as stress management using data-based methods. The second benefit is access to qualified mental health professionals in a quick manner, which is a service provided by new service provider Tava Health. The services will be available February 1, 2023.
2. **Welcome and approval of the November 1, 2022, meeting minutes (Chair Cantarero)**

Chair Cantarero asked the committee if everyone had an opportunity to review the minutes from the November 1, 2022, meeting. Jurhee Rice indicated that the minutes incorrectly stated that she was absent. Chair Cantarero indicated that these would be corrected.

Alyson McAllister motioned to approve the minutes contingent on this correction, Mark Hales seconded. The Motion passed by acclamation.

3. **Rule 1.2 discussion (Mr. Riter)**

Subcommittee Chair Austin Riter presented the subcommittee's work on Rule 1.2(d). He reiterated that the subcommittee had been considering two options for the amended rule. Option 1 explicitly mentions cannabis law, and Option 2 is a more broadly applicable rule concerning advising clients on a conflict between state and federal law. In each proposed version, an accompanying amendment to Rule 8.4 (misconduct) has been included for suggestion.

#### **A) *Option 1***

Option 1 of the amended rule that appeared in the meeting materials was slightly different from the version discussed last time in light of committee suggestions. The new Option 1, refers to "Utah's cannabis statutes," as a general descriptor rather than listing specific statutes that would require the committee to continually update as the legislature re-orders the statutory numerical references.

The amended language in Rule 1.2(d) reads:

*A lawyer may also counsel a client regarding the validity, scope, and meaning of Utah's cannabis statutes and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer must also advise the client regarding the potential consequences of the client's conduct under related federal law and policy.*

The word "must" was included to describe the affirmative obligation to inform the client of the federal implications of the cannabis statutes to be more compliant with the Court's style guide.

Chair Cantarero suggested replacing the word "the" with "related" and replacing "other state or local provisions implementing them" with "ordinance."

In the explanatory notes, the statutes that are included in this category are listed as well as the three different rules of this kind from Vermont, Nevada, and Alaska.

The accompanying amendment to Rule 8.4 is an addition to Comment [2], which reads:

*But actions that comply with Rule 1.2(d) do not constitute professional misconduct.*

In addition, an explanatory note to Rule 8.4 was added:

*This proposed revision to Comment 2 to Rule 8.4 is intended to clarify that the conduct allowed by Rule 1.2(d), including the cannabis-related advising and assisting now referenced in Rule 1.2(d), cannot be misconduct under related Rule 8.4.*

Mr. Riter questioned whether an amendment to Rule 8.4 was necessary, and the committee largely agreed that it was not. The committee agreed to omit the amendments to Rule 8.4.

## **B) Option 2**

A second option was presented that takes a more generalized approach to outlining the duty to advise clients on a conflict between state and federal law. This amendment to Rule 1.2(d) reads:

*(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (i) discuss the legal consequences of any proposed course of conduct with a client; and may (ii) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; (iii) advise and assist a client in complying with and taking actions consistent with state laws, and rules,*

*regulations, orders, and other state or local provisions implementing state laws, while at the same time advising the client of the existence and consequences of federal law that may impose criminal and other penalties for actions or matters permitted by state law; and (iv) advise and assist a client in complying with and taking actions consistent with federal laws, and rules regulations, orders, and other federal provisions implementing federal laws, while at the same time advising the client of the existence and consequences of state law that may impose criminal penalties for actions or matters permitted by federal law.*

Nancy Sylvester shared her screen to showcase the re-ordering of the rule she had performed to make it appear clearer to read.

Chair Cantarero suggested “and other penalties” be added after “criminal” in the rule language. Also, that the first mention of “state laws” should be singular, not plural, to read, “taking actions consistent with state law.” He also suggested the addition of “vice versa” after (iii) to negate the need for an additional subsection (iv). Lastly, he suggested replacing mentions of “state law” with “Utah law.”

Additional suggestions included “assist a client *to comply*,” to be consistent with the rule elsewhere (line 123) and the inclusion of “this differs from the ABA Model Rule” at the end of the draft rule.

Billy Walker suggested that “consistent with” should be replaced with “consistent,” to be more compliant with amendments made to Rule 5.5.

### *General discussion*

The committee discussed at length whether both versions should be brought to the Utah Supreme Court to allow them to decide which version they prefer as a policy matter.

Chair Cantarero asked if there was one version the subcommittee preferred. Mr. Riter suggested both were given equal support.

Chair Cantarero expressed concern that the amendment was carving out a safe harbor for a particular type of business lawyer, something the rules generally do not do.

Gary Sackett expressed agreement and voiced opposition to the specialized Option 1.

Cory Talbot and Judge Nelson expressed support for the first option because it was consistent with other states that have adopted amendments on cannabis law and is narrowly tailored. They expressed concern in adopting a more generalized approach that would open the door to conduct the Committee is unable to anticipate at this time. Judge Nelson said that cannabis law merits a special

mention because of the unique nature of this legal issue and that a more broad rule could be a “free for all.”

Judge Gardner suggested that if the Committee is split, it can send both options to the Court to decide, but generally make the Committee’s preference known.

Mr. Riter moved to send both options to the Court and Mr. Walker seconded. The motion carried.

A second vote was warranted to convey which version the committee prefers.

Mr. Riter moved to recommend Option 2 with Judge Oliver seconding. The motion passed.

Mr. Riter also moved for option 2, with the changes suggested by the committee, including the addition of “vice versa” in subparagraph (iii) and to omit an accompanying reference to Rule 1.2 in Rule 8.4. Mr. Walker seconded. The motion passed.

#### **4. Rule 1.16(e) discussion (Dane Thorley)**

Mr. Thorley recapped the discussion on proposed amendments to Rule 1.16. In April 2022, public defender Doug Thompson spoke to the committee about creating a duty to advise criminal defense clients on the implications of criminal conviction and an appeal. The subcommittee met several times and drafted possible amendments to the rule. An amendment was officially approved and was published for comment over the Summer. Richard Mauro, head of SLDA, raised concerns about the impact such an amendment would have on members of the criminal defense bar, specifically whether the rule would result in more bar complaints that served only as a backdoor method for attacking a conviction.

Mr. Thorley observed that the committee was faced with several important questions. Namely, 1) whether this rule was necessary to achieve its stated purpose, 2) if it was, how expansive should the rule be, and 3) will this rule change attorney behavior or create a chilling effect?

Committee member Ian Quiel, an attorney at SLDA, said he was opposed to the amendment, noting that a similar obligation already exists at law. This is found in case law and other remedies that address a lawyer’s ineffectiveness, such as Rule 4(f) motions, *Manning* motions, and ineffective assistance of counsel claims.

Mr. Walker indicated that OPC did not have a dog in this fight but questioned whether it was accurate that this amendment would result in an increase in bar complaints.

Stylistically, the committee suggested minor revisions to the proposed rule language. Judge Nelson suggested omitting “or guilty plea” from the proposed language. Mr. Thorley indicated that the original language published for comment was too expansive and the version proposed at the meeting omitted comment about “any preserved issues,” which required appellate level knowledge. The new version also softened language about requiring lawyers to advise on the advantages and disadvantages of an appeal.

Judge Nelson reasoned that remedies at law did not negate the need for language in a rule to advise before the fact.

The Committee continued its discussions and ultimately the sentiment appeared to favor SLDA’s concerns that this rule should not move forward. The judicial officers in attendance discussed the use of forms to accomplish the aim of the original proposal.

Judge Garner moved to not move forward with this proposed rule and to instead assist Doug Thompson in exploring alternative avenues, including court forms, for addressing this issue. Ian Quiel seconded the motion. The motion carried.

## **5. Adjournment.**

The meeting adjourned at 6:22pm. The next meeting is scheduled to be held on January 3, 2022, at the Law and Justice Center and via Zoom.