



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

### Meeting Minutes

March 7, 2023

Utah Law and Justice Center & Zoom

16:00 Mountain Time

*Cory Talbot, Vice Chair, presiding.*

#### **Attendees:**

Cory Talbot, Vice Chair  
Billy Walker  
Hon. James Gardner  
Joni J. Jones  
Jurhee Rice  
Julie J. Nelson  
Mark Hales  
Phillip Lowry  
Gary Sackett  
Ian Quiel  
Hon. Mike Edwards  
Hon. Amy Oliver  
Robert Gibbons  
Adam Bondy  
Christine Greenwood (ex officio)

#### **Staff:**

Nancy Sylvester  
Scotti Hill

#### **Guests:**

Martha Knudsen

#### **Excused:**

J. Simon Cantarero, Chair  
Alyson McAllister  
Austin Riter  
Dane Thorley  
Hon. M. Alex Natt, Recording  
Secretary  
Hon. Trent Nelson

**1. Welcome and approval of the February 7, 2023, meeting minutes (Vice Chair Talbot)**

Vice Chair Talbot recognized the existence of a quorum and called the meeting to order at 4:10 pm.

Vice Chair Talbot asked the committee if everyone had an opportunity to review the minutes from the February 7, 2023, meeting. Judge Oliver moved to approve the minutes; Robert Gibbons seconded. The Motion passed by acclamation.

**2. Projects in the Pipeline (Vice Chair Talbot)**

Vice Chair Talbot updated the committee on Rule 11-107 (Open and Public Meetings), a new rule that discusses open and public committee meetings and creates more uniformity. This rule emphasizes the fact that the advisory rules committees are all open and public, which allows interested individuals to attend and weigh in. Billy Walker inquired as to whether the OPC Oversight Committee was exempted from this rule and Ms. Sylvester observed that it was not exempted but had the ability to go into executive session, unlike rules committees. She also observed that this new rule shouldn't change the Rules of Professional Conduct Committee's processes much at all, apart from the ability of guests to stay for the whole meeting, including deliberations on rule language.

**3. Rule 7.1 (Alyson McAllister, Joni Jones, Nick Stiles, Billy Walker, Mark Hales, Nancy Sylvester)**

Ms. Sylvester reported that Rule 7.1 is out for comment until April 9, 2023. It was amended in response to a petition from the Utah Association for Justice (UAJ) and expedited to accommodate the legislative session. Its principal signatory was a state senator. Ms. Sylvester reported that there are many comments in opposition thus far and a subcommittee would need to be convened to review the comments to the rule. The amendments add paragraph (c) to outline a prohibition on direct solicitation of potential clients. This amendment took language from previous Rule 7.3. Mr. Walker reported that the former rule was not as specific in listing the types of direct solicitation that were prohibited. Overall, the rule is close to what Rule contained before.

Subcommittee: Robert Gibbons (chair), Mark Hales, Julie Nelson, Billy Walker, and Scotti Hill.

#### **4. Rule 8.4(c) (Joni Jones)**

Ms. Jones reported that Rule 8.4(c) would allow for an exception – to the dishonesty, untrustworthy standard-- for lawyers who are engaged in investigative activities. Ms. Sylvester reported that there was a question from Justice Petersen regarding what undercover activities were recognized by established law and as contemplated by this rule amendment. Ms. Jones went through her research, the list of which was already placed in a comment (“Examples covered by this rule are governmental ‘sting’ operations; use of testers in fair-housing cases to determine whether landlords or real estate agents discriminate against protected classes of applicants; and gathering evidence of copyright violations.”).

The Committee members discussed whether the scope of this rule should be limited to lawyers supervising other lawyers. Gary Sackett discussed the relevant Utah Ethics Advisory Opinion he authored that discussed this issue, noting that this should be applied both to lawyers engaging in the behavior themselves and in a supervisory capacity. The comments cite such specific examples. Colorado limits its rule to government lawyers supervising.

The Committee has already voted on this, so it will return to the court with Ms. Jones’s research and a request that the rule be recirculated for public comment.

#### **5. Rule 5.4(b) (Scotti Hill)**

Scotti Hill, Utah State Bar Ethics Counsel, penned a memorandum posing the following issues relevant to referral fees:

- a) Lawyers commonly conflate “legal fees” with “referral fees” and this should prompt an amendment to Rule 1.0 and 5.4.
- b) Rule 5.4(b) seemingly allows for non-lawyers to pay referral fees to lawyers. This was once prohibited by Rule 7.3’s prohibition on non-lawyers “giving something of value” for a legal referral. Was this the Committee’s intention? A reasonable reading would conclude that non-lawyers are permitted to provide referral fees. There is a concern that this runs afoul of Utah Code 76-10-3201 (anti-kickback statute).
- c) The issue of whether lawyers can share “bare referral fees” with other lawyers is not addressed by the Supreme Court press release on this issue in 2020.

The Committee previously drafted a standalone Rule 5.8 (referral fees) as well as an accompanying definition of “referral fees” in Rule 1.0. Ms. Sylvester observed that the Court declined to adopt this rule because of the need to analyze whether referral fees in any form are permitted by the anti-kickback statute. She proposed

convening a subcommittee to consider these issues and amending the rule language accordingly.

Subcommittee: Alyson McAllister (chair), Scotti Hill, Billy Walker, and Ian Quiel.

## **6. Rule 1.1 (Martha Knudsen, Nancy Sylvester, and Scotti Hill)**

Martha Knudsen, Executive Director of the Utah State Bar's Wellbeing Committee presented a potential amendment to Rule 1.1 that would address well-being. She reported that the ABA had proposed – but not yet adopted – a comment to the rule that contained permissive, rather than mandatory language tying lawyer well-being to competence.

The impetus for this amendment was a study about the well-being of lawyers that revealed startling results: lawyers are far less well than other professionals. The national Conference of Chief Justices challenged each state to address these issues. Chief Justice Durrant assigned Justice Petersen to the task, which resulted in the creation of Utah's well-being committee.

Ms. Knudsen relayed that the rate of suicidal ideations is higher in Utah than in other jurisdictions. The ABA and various jurisdictions have grappled with the question of how to de-stigmatize mental health. California, New Mexico, and Vermont have already amended each of their Rule 1.1 on this issue.

Judge Oliver asked if the proposed comment language would impose additional requirements and burdens on lawyers who are already struggling. The committee discussed that the language was permissive (“may”) rather than mandatory (“must” or “shall”). The comment language also discussed “resources supporting lawyer well-being,” adding a clause that these resources were available through the Utah State Bar.” This language allows for lawyers to reach out on their own instead of imposing additional or regulatory requirements on the lawyer. Ms. Knudsen noted that the amendment is set to be voted on by the ABA in August but could already be used as a model for Utah.

Mr. Sackett mused on the usefulness of the language when it was buried in a comment. Knudsen replied that it sets a standard and acknowledges the importance of mental health. The amendment is meant to explain the nexus between well-being and competence, which will help in education efforts. The committee determined that a subcommittee should study this out and propose a final version for vote at the April meeting.

Subcommittee: Judge Gardner (chair), Judge Oliver, Martha Knudsen, Nancy Sylvester, and Joni Jones.

**7. Scheduling discussion.**

The committee moved the next two Committee meetings to April 11<sup>th</sup> and May 9<sup>th</sup>.

**8. Adjournment.**

The meeting adjourned at 5:19pm. The next meeting will be held on April 11, 2023.