Agenda

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

May 3, 2022

4:00 to 6:00 p.m.

In-Person @ the Utah Law & Justice Center

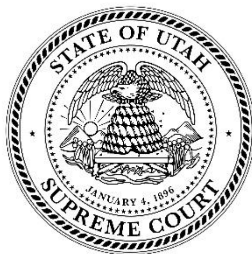
Welcome and approval of minutes	Tab 1	*Simon Cantarero*, presiding
Rule 1.2 • Proposal to create requirement that a lawyer in a criminal case abide by the client's decision of whether to file an appeal.	Tab 2	*Subcommittee*: Dane Thorley (chair), Alex Natt, Adam Bondy, Billy Walker, Doug Thompson, and Stacy Haacke
Rules 8.4 and 14-301: Antidiscrimination rules • Assignment to subcommittee • Historical compilation process (draft report included)	Tab 3	*Subcommittee*: Adam Bondy (chair), Billy Walker, Joni Jones, Katherine Venti, Judge Trent Nelson, and Jonathan Puente.
Projects in the pipeline: • Rule 8.3: Recommended to Supreme Court; awaiting further amendments to other rules from Fee Dispute Committee (will present rule package). • LPP updates.		--

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

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

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

Tab 1



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

[Draft] Meeting Minutes
April 5, 2022

Via Zoom
16:00 Mountain Time

J. Simon Cantarero, Chair

Attendees:
Dan Brough
Joni J. Jones
Katherine Venti
Alyson McAllister
Cory Talbot
Adam Bondy
Gary Sackett (Emeritus)
Steve Johnson (Emeritus)
Jurhee Rice
Billy Walker
Dane Thorley
Julie J. Nelson
Robert Gibbons
Hon. Mike Edwards
M. Alex Natt, Recording Secretary

Absent –Angie Allen, Hon. Amy Oliver, Austin Riter, Hon James Gardner, Chair J. Simon Cantarero, Phillip Lowry, Hon. Trent Nelson (Emeritus).

Staff:
Nancy Sylvester

Guests:
Scotti Hill
Christine Greenwood
Stacy Haacke
Douglas Thompson
Jacqueline Carlton
Jonathan Puente
Nick Styles

1. **Welcome and approval of the March 1, 2022 meeting minutes (Acting Chair Johnson)**

   Acting Chair Steve Johnson recognized the existence of a quorum, called the meeting to order at 16:01 and asked for a motion to approve the minutes. Ms. Jones indicated that she was not recorded as having been present at the March meeting and the Recording Secretary indicated he will correct the record in the revised minutes. With that correction, Ms. Jones moved for approval and Mr. Thorley seconded. The motion passed by acclamation.

2. **Rule 1.2 (Acting Chair Johnson)**

   Mr. Johnson welcomed guests Douglas Thompson and Stacy Haacke to discuss their proposal to amend Rule 1.2 to add language that specifically requires an attorney in a criminal case to abide by their client's decision of whether to file an appeal.

   Committee members asked questions of Mr. Thompson and discussion ensued. The Acting Chair indicated that this question should be referred to a subcommittee and asked Dane Thorley to chair. Alex Natt, Adam Bondy, Billy Walker, Doug Thompson, and Stacy Haacke will comprise the subcommittee. The subcommittee will discuss the proposal and decide whether it would fit better in 1.4, 1.16, or 2.1, or if there is another option for fixing issues surrounding the increased requests for reinstating time in criminal appeals. The subcommittee will report at the next meeting on May 3, 2022.

3. **Rule 8.3 and Fee Dispute Rules (Acting Chair Johnson, Nancy Sylvester)**

   Mr. Johnson and Ms. Sylvester presented a proposal to provide an exception to the requirement of reporting misconduct in the context of a Utah State Bar-sponsored fee dispute resolution program.

   Language was proposed to resolve a conflict in the Rules which presently requires reporting of attorney misconduct but does not comport with other law governing arbitrations and mediations.

   Ms. Venti made a motion to recommend that the Supreme Court circulate the proposed language for comment. Ms. McAllister seconded the motion. The motion carried unanimously.

4. **Rules 8.4 and 14-301: Anti-Discrimination Rules (Mr. Puente)**

   Mr. Puente, from the Utah State Courts' Office of Fairness and Accountability, explained the courts' interest in Rule 8.4(g). He said the courts created a committee on fairness and accountability, the goal of which is to eliminate bias in the courts. He said the courts can't meet their mission when there is bias present. Sometimes things come downstream to the courts, such as from a prosecutorial or law enforcement decision. But, he said, there must be a concerted effort by the

whole legal community to eliminate bias. Bias creates an access to justice issue. He noted that a number of states have been requiring education on eliminating bias through MCLE requirements. He said the RPC Committee should continue to work on these efforts. The court's new committee on fairness and accountability will be a resource to the RPC committee.

Mr. Johnson asked Ms. Sylvester to try to compile the history of 8.4(g), if possible, for the Committee's May meeting. Ms. Jones suggested that the original 8.4(g) subcommittee might be helpful in compiling the history of the effort and she and Ms. Venti indicated that they would be willing to help.

Timeline:

- Ms. Sylvester to report to the Committee by the May meeting on the history of Rules 8.4, 14-301, including addressing the negative treatment in the federal courts.
- The subcommittee will report back to Committee by the August meeting on a recommendation.

5. Adjournment.

The meeting adjourned at 17:21. The next meeting will be held on May 3, 2022 in-person at the Utah Law and Justice Center.

Tab 2

Ad hoc sub-committee report: On April 19, 2022, the sub-committee met via zoom to discuss the proposed amendments to the rules dealing with the obligations of criminal defense attorneys relating to appeal at the conclusion of the criminal adjudication process (i.e. conviction or plea). In our previous meeting with the full committee, we heard from Doug Thompson, who had proposed an amendment to Rule 1.2, and the sub-committee was tasked with further exploring the proposal.

In our sub-committee meeting we discussed (i) whether such an amendment to the rules was warranted, (ii) where in the rules the amendment would be made, and (iii) the precise language of the amendment.

After hearing more from Doug and reading through some caselaw that he provided (primarily Roe v. Flores-Ortega 528 U.S 470) and the relevant ABA Standard 4-.91, we determined that the rights related to appeal that the amendment covers have already been deemed as part of the constitutional right to representation (sufficient that the lack of such action would be deemed ineffective assistance of counsel) and that the proposed amendment would simply reemphasize existing (albeit potentially ignored) obligations as opposed to creating new ones. Consequentially, we determined that the proposed amendment was warranted.

After discussing various options regarding the location of the addition (including Rules 1.2, 1.4, 1.16, and 2.1), we determined that the nature of these obligations as ones that often come up immediately before the termination of the client-lawyer relationship at plea/conviction made Rule 1.16 the best spot for the addition. We briefly considered adding language to 1.16(d) but ultimately determined that an additional sub-rule, (e), would be best.

The language of the proposed rule 1.16(e) and the associated comment [10] was pulled mostly from ABA Standard 4-9.1, making adjustments where appropriate to avoid inconsistencies with the language elsewhere in the Utah Rules of Professional Conduct.

Rule 1.16. Declining or terminating representation. [Proposed additions to rules and comments in red]

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(a)(1) the representation will result in violation of the rules of professional conduct or other law;

(a)(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(a)(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(b)(1) withdrawal can be accomplished without material adverse effect on the interests of the client ;

(b)(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(b)(3) the client has used the lawyer’s services to perpetrate a crime or fraud;

(b)(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(b)(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(b)(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(b)(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer's expense.

(e) In the event of a conviction or a guilty plea in a criminal case, a lawyer shall take steps to protect a client’s interest in appeal, including informing the client of the right to take an appeal, informing the client of the deadlines concerning appeal, consulting with the client regarding the lawyer’s professional judgment as to whether there are meritorious grounds for appeal, and filing a notice of appeal if requested. These obligations can be fulfilled by timely ensuring that the client has secured representation for appeal.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment 4.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the rules of professional conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. See Rule 1.15. Upon termination of representation, a lawyer shall provide, upon request, the client's file to the client notwithstanding any other law, including attorney lien laws. It is impossible to set forth one all encompassing definition of what constitutes the client file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation materials such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert

opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings. The Utah rule differs from the ABA Model Rule in requiring that papers and property considered to be part of the client’s file be returned to the client notwithstanding any other laws or fees or expenses owing to the lawyer.

Assisting the Client upon End of Client-Lawyer Relationship at Criminal Plea or Conviction

[10] Some critical decisions regarding a client's rights of appeal occur soon after a conviction or guilty plea but before the termination of trial-stage representation. The trial lawyer should take whatever steps are necessary to protect the client’s rights of appeal, including filing a timely notice of appeal in the trial court, even if counsel does not expect to continue as counsel on appeal, and requesting the appointment of counsel for appeal if indigent. Consultation regarding the grounds for appeal should include advising the client about the meaning of the court’s judgment, the potential grounds for appeal, and the advantages and disadvantages of an appeal. During consultation, the lawyer should make reasonable efforts to discover the client’s wishes. If those wishes are made known, the lawyer must follow the client’s express instructions with respect to filing a notice of appeal. The decision whether to appeal must be the client’s own choice.

Tab 3

Utah State Bar®

M E M O R A N D U M

TO: Rules of Professional Conduct Committee

FROM: Nancy Sylvester, General Counsel, Utah State Bar
Scotti Hill, Ethics Counsel, Utah State Bar

RE: History of Rule 8.4(g) and (h) amendments

DATE: April 29, 2022

In August 2016, the American Bar Association (ABA) adopted Model Rule 8.4(g) in response to concerns over the pervasiveness of sexual harassment and other forms of discrimination in the law. The amendment prohibits discrimination and harassment by lawyers based on a protected class (including sex, race, national origin, and sexual orientation) while engaged in "conduct related to the practice of law." ABA Formal Ethics Opinion 493, written in July 2020, aimed to explain the application of this novel rule. Interestingly, by the time the ABA Standing Committee on Ethics and Professional Responsibility adopted Rule 8.4(g) in August 2016, several jurisdictions had already crafted similar language into their state rules.[1]

The year preceding the ABA Model Rule's adoption, Utah's Advisory Committee on the Rules of Professional (RPC) commenced discussions regarding whether repeated violations of the Standards of Professionalism and Civility (SPC) under Rule 14-301 should be professional misconduct under the RPC. These discussions were topically similarly to issues addressed by ABA Model Rule 8.4.

Since 2015, the Advisory Committee has proposed numerous versions of Rule 8.4 and Rule 14-301 to the Supreme Court. The Court has published for comment five versions of Rule

[1] According to a March 12, 2019, ABA article, "The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law," Kristine A. Kubes, Cara D. David, and Mary E. Schwind, prior to the ABA adoption of Rule 8.4(g), 20 jurisdictions had already incorporated similar language prohibiting discrimination into their state rules. A total of 29 states have included antidiscrimination language into their rules, while 13 states have declined to adopt the amended rule. Note: this calculation has likely changed in the years following this source reporting. https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/

8.4 and two versions of Rule 14-301.[2] The Court adopted just two Rule 8.4 proposals, each of which came in response to Utah Supreme Court case law.[3]

The Court has not yet finalized Rule 8.4 as part of the larger ABA Model Rule efforts. This is likely due at least in part to the swift, negative reaction the rule generates each time it is published. Most commenters oppose adopting language that even resembles the ABA Model Rule, opining that the language is overbroad and violates attorneys' First Amendment rights. Nonetheless, the issues identified by the ABA persist in Utah's legal profession and there is renewed interest to pass a rule. This time, that interest derives from the Utah State Courts' newly-created Office of Fairness and Accountability and Utah's LGBTQ+ Chamber of Commerce.

The following memorandum summarizes Utah's efforts to adopt amendments to Rule 8.4 and 14-301. Our hope is that this historical document will serve as a launching point for these renewed discussions and ensure that the committee does not continue to pave old paths.

I. Origin of a proposed amendment to Rule 8.4 (2015)

Discussions on Rule 8.4 began in ***February 2015*** in response to a Supreme Court request to analyze the overlap between the SPC and the RPC. The Committee studied whether Rule 8.4 should be amended to make repeated violations of the SPC professional misconduct. These discussions came in response to concerns that incivility by attorneys was having a negative impact on the legal profession, the courts, and access to justice. The Committee convened a subcommittee to research the issue.

At the ***April 27, 2015*** RPC committee meeting, the committee proposed a new comment advising attorneys that certain violations of the SPC *could* lead to sanctions. The new comment language read as follows:

> *[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).*[4]

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[2] The Court published proposed amendments to Rule 8.4 in May 2015, June 2017, December 2018, March 2019, and most recently in June 2020. The Court published proposed amendments to Rule 14-301 in March 2019 and August 2020.

[3] The 2015 amendments added Comment [3a] and the 2018 amendments added Comment [1a].

[4] The committee added "approved by the Utah Supreme Court" as a reminder of the importance of the SPC. To make the remaining language more concise, they deleted "even actions of minor significance when considered separately" because it is covered by "a pattern of repeated violations". The committee also deleted "prejudicial to the administration of justice" as it is inherent in paragraph (d), and "through this State" because it is unnecessary. The committee was concerned that the automatic violation mandate dictated by the last clause of the last sentence may not be precisely correct. The language was changed to "may support a finding" that paragraph (d) is violated.

The Supreme Court circulated the proposal, which garnered three comments during the comment period. All three opposed adoption. Nonetheless, the Supreme Court adopted the amendment and the comment remains in the rule today.

II. Developments from 2016-2017

The 2016 Utah Supreme Court case of *Larsen v. Utah State Bar*, 2016 UT 26, raised important questions for the RPC committee about the knowledge requirement necessary to affirm a rule violation and also the role that rule comments play.

Larsen was a Davis County prosecutor who was assigned to a 2009 proceeding involving a woman on DUI probation. He was also assigned to a 2010 felony robbery case. On July 8, 2014, the district court entered a seven-month Order of Suspension against Larsen for violations of Rule 3.3(a)(1) (Candor toward the Tribunal) and Rule 3.8(d) (Special Responsibilities of a Prosecutor). As to the 2009 proceeding, the court found that Mr. Larsen recklessly misstated facts regarding a DUI probationer's fine payments. As to the 2010 case, it found that Mr. Larsen failed to show photographs of any suspect other than the defendant to robbery victims and failed to make timely disclosure of this fact to the defense. Larsen challenged both rule violations. On June 16, 2016, the Utah Supreme Court affirmed the district court's six-month Rule 3.8 suspension, but struck the Rule 3.3 thirty-day suspension. The Court addressed at length the requirement that a lawyer must have "actual knowledge," and not constructive knowledge or recklessness, to establish a Rule 3.3 violation. It found that the district court had erroneously relied upon comment [3], which appeared to override Rule 3.3(a)(1) in setting forth a "reasonably diligent inquiry" standard. The Court then analyzed the role of advisory committee notes as follows: "The Advisory Committee Notes are not law. They are not governing rules voted on and promulgated by this court. They set forth only the advisory committee's views of our rules. And although they may provide helpful guidance, they cannot override the terms of the rules themselves." *Id.* at ¶31.

In light of this analysis, Billy Walker, Chief Disciplinary Officer of the Office of Professional Conduct, expressed concern that the language of Rule 8.4, comment [3a], as amended on November 1, 2015, was insufficient to impose liability on attorneys if it did not appear in the body of the rule.

At the ***October 3, 2016*** meeting of the RPC Committee, Robert Rice, President of the Utah State Bar, and Margaret Plane, State Delegate for Utah to the ABA's House of Delegates, attended the meeting to speak about the ABA's proposed change to Rule 8.4(g). Mr. Rice emphasized that amending the rule would further the Bar's diversity and inclusion efforts. Ms. Plane noted that she was a State Delegate in the ABA's House of Delegates at the time the rule change was debated. She noted that the model rule included a mens rea, or knowledge, requirement. Ms. Plane then provided the committee with a state-by-state survey of black letter rules on anti-discrimination. The committee discussed a few general areas of concern: whether

the language was overbroad and implicated First Amendment concerns, whether the rule was unclear regarding what practices constitute the "practice of law," whether the rule may impact affirmative action policies, the definition of "socio-economic," the rule's impact on extending Title VII to all lawyers, and the lawyer's freedom to make appropriate client intake decisions. Another subcommittee was formed—comprised of Simón Cantarero, Billy Walker, Vanessa Ramos, Joni Jones, and Trent Nelson—to study the ABA Model Rule. In addition to the issues already identified, the group was also encouraged to discuss a possible conflict between Rules 8.4(g) and Rule 1.16.

During the RPC Committee's ***November 28, 2016***, meeting, Simón Cantarero reported that the subcommittee was unable to reach conclusions about the important questions underlying this debate. Mr. Cantarero reported that the subcommittee's discussions were ongoing and that it was not yet prepared to make a rule change recommendation to the Supreme Court. The subcommittee worried that the application of the rule could be overly broad, applying to situations where the lawyer is merely conducting the business of practicing law and could elevate attorneys to some sort of public status or quasi-state actor.

The committee also solicited feedback as to whether they had heard complaints about discriminatory behavior. Among other comments, Mr. Walker stated that he had seen substantial evidence of females being treated differently from males.

The ABA Model Rule 8.4(g) subcommittee issued and discussed its report and recommendation, as set forth in the committee's memorandum dated ***January 16, 2017***, (the "Rule 8.4(g) Report," p.15-32 of the Agenda Materials). Several committee members expressed concerns and questions regarding the report. Specific questions or issues that were raised included the following:

- Does the proposed rule delegate rulemaking to governmental entities? For example, are Salt Lake City attorneys required to comply with Logan City's ordinances?
- Does the proposed rule force attorneys to be responsible for standards of all states and municipalities? The committee favored limiting its reach to only Utah.
- Among the factors to consider in determining the severity of the misconduct is "whether the conduct was committed in connection with the lawyer's professional activities." This language appears to suggest that connection to professional activity is not a necessary condition. If so, the rule likely reaches throughout a lawyer's private life, which many members of the committee did not favor.
- What is the preclusive effect of disciplinary proceedings? This may be relevant since there is no requirement that there be an adjudicatory finding of harassment or discrimination before disciplinary proceedings. Regarding the second sentence of Comment 3, it is unclear whether that sentence prohibits any discussion of sex, gender, race, etc. For example, would a firm be prohibited from discussing increased diversity within the firm?
- Committee members were troubled by the statement in Comment 4 that "a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a)."

As such, the committee chairman recommended that a few representatives from the committee schedule a time to discuss this issue with the Utah Supreme Court to gain further insight on how to address *Larsen* in future rulemaking. The result of that discussion was guidance that mandatory rule language should appear in the rule itself. Comments should only explain, but not add to, the black letter law.

At a ***March 6, 2017***, RPC Committee meeting, the committee recommended that the following language be inserted as Rule 8.4(g):

It is professional misconduct for a lawyer to:

> *(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status as provided in Federal and Utah State law and jurisprudence, and that reflects adversely on the lawyer's fitness as a lawyer. This paragraph does not limit the ability of the lawyer to accept representation or decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per rule 2.1, or limit a lawyer's full advocacy on behalf of the client.*

The committee also recommended that the following comments (new comments three, four, and five) be included among the Rule 8.4 changes:

> *[3] Discrimination and harassment by lawyers in violation of paragraph (g) may undermine confidence in the legal profession and the legal system. Discrimination or harassment does no need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Such discrimination includes harmful conduct that manifests bias or prejudice toward others. Harassment includes sexual harassment and derogatory or demeaning conduct. Sexual conduct includes unwelcome sexual advances, requests for sexual favors, and other unwelcome conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in the lawyer's professional capacity.*
>
> *[4] Lawyers may engage in conduct undertaken to discuss diversity, including discussing any benefits or challenged without violating this rule. Implementing initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).*
>
> *[5] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules or other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers should also be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and*

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(c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's view or activities. See Rule 1.2(b).

The revisions included the following deviations from the ABA Model Rule 8.4(g): (a) a lawyer must know his conduct is harassing, and (b) the conduct must reflect adversely on the profession. The draft sparked discussion regarding what type of conduct reflects adversely on the profession. The committee also discussed comment 3 and whether the "substantive law" sentence is necessary in light of the addition of "unlawful." Cristie Roach moved to circulate the rule in a preliminary discussion period (not a full comment period) to get a feel for attorneys' thoughts on the proposed rule and its deviations from the Model Rule. The motion passed unanimously. The subcommittee agreed to draft bullet points outlining the pros and cons of the revisions versus the Model Rule for the discussion period.

The committee voted to approve these additions and Chairman Johnson agreed to advise the Utah Supreme Court promptly of the Committee's actions. The Supreme Court declined to publish the Committee's version of Rule 8.4(g). In ***June 2017***, the Court published ABA Model Rule 8.4(g) for comment. The rule received 60 comments.

On ***August 28, 2017***, the Committee discussed the many comments to Rule 8.4(g). Steve Johnson noted that most were negative and that they generally fell into the following categories: a) vagueness/due process/overbreadth; b) freedom of speech/conscience; and c) freedom of religion, association, and the 6th amendment. The concerns prompted the Utah Supreme Court to request that the RPC committee provide clear guidance on the issues addressed in the comments.[5]

At this juncture, the committee contemplated the following options: (1) propose the Model Rule; (2) re-submit the proposed rule from the subcommittee; and (3) hold on to the rule and wait to see how the adoption of the Model Rule and similar rules in other states proceeded before recommending further action. The committee voted to revisit the originally proposed rule from March 6, 2017, along with a supporting memorandum, policy briefing, and comments.

At the ***October 30, 2017***, RPC committee meeting, Judge Trent Nelson suggested that given the Model Rule's broad implication on all areas of practice, the committee should instead focus on a more limited area, such as the employment law context, which may resolve some of the concerns many commenters have. The subcommittee said it would explore amending its proposal to address only the employment law context.

III. Developments from 2018-2019

Following the 2017 discussions, new Utah Supreme Court caselaw created the need for an additional amendment to Rule 8.4. On ***December 19, 2018***, the Utah Supreme Court approved for the addition of comment [1a] in response to *In re Discipline of Steffensen*, 2018 UT 53, Footnote

[5] This message was relayed at the August 28, 2017, RPC Committee meeting.

7. The comment sought to eliminate confusion as to what sanctions may be applicable for a violation of Rule 8.4. It provides that an act of professional misconduct under Rule 8.4(b), (c), (d), (e), or (f) cannot be counted as a separate violation of Rule 8.4(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(a) for the purpose of determining sanctions.

Meanwhile, the Rules of Professional Conduct Committee continued to study Model Rule 8.4(g). In ***March 2019***, the Utah Supreme Court published a version of Rule 8.4(g) that contained a narrower definition of the proscribed behavior, curtailing the discriminatory conduct to that which is banned by Title VII of the Civil Rights Act of 1964 and by the Utah Antidiscrimination Act. The March 2019 amendments also included a new paragraph (h), which incorporated 2015's comment [3a]. During the comment period, fifteen comments opposed the rule, two supported, and one was mixed. The Court instructed the committee to continue working on the rule amendments.

After the proposed comment period, and at the ***June 17, 2019***, RPC committee meeting, the Committee made two additional amendments. The committee amended paragraph (h) in comment 4a to read:

> *Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.*

The committee also moved to amend standard 3 of Rule 14-301 to read:

> *3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of any such participant unless such matters are directly relevant under controlling substantive law. Lawyers shall avoid hostile, demeaning, humiliating, intimidating, harassing, or discriminatory conduct with all other counsel, parties, judges, witnesses, and other participants in all proceedings. Discriminatory conduct includes all expressions of discrimination against protected classes as enumerated in the Utah Antidiscrimination Act of 1965, Utah Code section 34A-5-106(1)(a), and federal statutes, as amended from time to time.*

The committee, after conversing with the Court, decided the rules required additional investigation and research.

At the ***September 16, 2019***, RPC committee meeting, the subcommittee discussed which standards from Rule 14-301 should be included in Rule 8.4. The committee discussed the problem with including particular standards while excluding others. The subcommittee recommended that court personnel and venue be added but with specificity (such as a listing of services and/or places) so that "venue" is defined and limited to those places where legal services are being provided with a specific purpose.

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IV. Developments from 2020-2021

In April and May 2020, the subcommittee recommended additional language amendments to Rule 8.4 and Rule 14-301. The subcommittee proposed changing Standard 14-301 into a Rule under Rule 8.4(h), making it an extension of the Rules of Professional Conduct prohibiting discriminatory conduct. In order to reconcile the comment and rule, the subcommittee agreed and recommended a change to the word "participant" to "person" under Standard 14- 301(3). The committee also approved the following revision to Rule 14-301(3):

> *Lawyers shall avoid hostile, demeaning humiliating or discriminatory conduct in law-related activities. Discriminatory conduct includes all discrimination against protected classes as those classes are enumerated in the Utah Antidiscrimination Act of 1965, Utah Code section 34A-5-106(1)(a), and federal statutes, as amended from time to time.*

In addition, the committee sought to incorporate the following language:

> *Finally, the term "standard" has historically pointed to the aspirational nature of this rule. But Rule 8.4(h) now makes the provisions of this rule mandatory for all lawyers. Cross References: R. Prof. Cond. Preamble [1], [13]; R. Civ. P. 1; R. Civ. P. 65B(b)(5); R. Crim. P. 31 1(b); R. Juv. P. 1(b); R. Third District Court 10-1-306; Fed. R. Civ. P. 1; DUCivR 83-1.1(g)" and to retain standards throughout for Rule 14-301.*

In ***June 2020***, the March 2019 version of Rule 8.4(g) and (h) was republished for public comment with the following amendment: comment 3 was updated to include gender identity to the list of protected classes. Nearly all the thirty comments received during the comment period were opposed to the amendments.

In ***March 2021***, the committee once again investigated the issue of constitutionality and whether the rule language was narrowly tailored to advance a compelling state interest. A subcommittee was formed to continue researching the issue. At the ***June 7, 2021***, RPC committee meeting, Mr. Walker noted a new opinion from the Colorado Supreme Court captioned, *In the Matter of Robert E. Abrams*, 2021 CO 44, which upheld Colorado Rule 8.4(g). The court found the rule constitutional in a circumstance where counsel made a comment denigrating the presiding judge's physical appearance and apparent sexual orientation. Mr. Walker circulated the opinion for committee review.

V. Developments from 2022

In a January 5 letter to the Utah Supreme Court, RPC committee Chair Simón Cantarero summarized the various oppositions and reoccurring concerns of the RPC committee regarding the efforts to address Model Rule 8.4(g):

> Opponents have objected to the language and structure of the ABA Model Rule for its overbreadth and ambiguities. The same and very similar arguments have been repeated by largely the same commenters, against the most recent versions of the Utah Rule. Most comments in opposition take the view that Rules 8.4(g), (h), and 14-301 create a speech code for lawyers that extends beyond the courtroom and into private settings. They

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argue that the amended rules constitute a content- or viewpoint-based restriction on protected speech, suppressing politically incorrect speech while protecting or promoting politically correct speech. Opponents assert that adopting the rules would chill speech and dramatically curtail an attorney's responsibility to vigorously and aggressively litigate a case, particularly when cross-examining witnesses, and would adversely affect their livelihood for fear of discipline for engaging an objectionable client or cause or declining to represent a particular client when the client alleges to have been discriminated against. In addition to being an intrusive regulation of private conduct, opponents also argue that the rule changes violate the Free Exercise clause and infringe on an attorney's freedom of association protected by the First Amendment. Opponents also point out that the rules would impose legal liability on lawyers and law firms that are otherwise immune from employment laws and regulations because of their size and number of employees.

The issues to study remain the following:

1) In addition to being an intrusive regulation of private conduct, opponents argue that the rule changes violate the Free Exercise clause and infringe on an attorney's freedom of association protected by the First Amendment. Opponents also point out that the rules would impose legal liability on lawyers and law firms that are otherwise immune from employment laws and regulations because of their size and number of employees.
2) Paragraph (1)(h) as currently drafted requires that the prohibited conduct be egregious or involve a pattern of repeated violations of Rule 14-301. This is like the well-established "severe and pervasive" standard in employment law.
3) Paragraph (1)(h) requires "harm" to a participant in the legal process and the offensive conduct must also be "prejudicial to the administration of justice." Comment [6] provides a non-exhaustive list of the participants in the process (lawyers, clients, witnesses, judges, clerks, court reporters, translators, bailiffs, arbitrators, and mediators).
4) Paragraph (3) makes clear that paragraphs (1)(d), (1)(g), and (1)(h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.
5) Paragraph (4) provides that legitimate advocacy does not violate the rule. A similar exception for "legitimate advocacy" has been added to Rule 14-301(3).

At this juncture, the Court has expressed hesitation with amending Rule 14-301 and is not prepared to adopt the committee's suggested amendments to Rule 8.4(g).

Nonetheless, the issues identified by the ABA persist in Utah's legal profession and there is renewed interest to pass a rule. This time, that interest derives from the Utah State Courts' newly-created Office of Fairness and Accountability and Utah's LGBTQ+ Chamber of Commerce. In a letter dated January 21, 2022, (p. 7-24 of the March RPC committee meeting materials), Samantha Taylor, Chairwoman for the Utah LGBTQ+ Chamber of Commerce, proposed the immediate adoption of the ABA Model Rule. Taylor's letter also noted recent efforts by the Court's newly formed Office of Fairness and Accountability, and cited the Court Commissioner Conduct Committee's recommendation (and the Judicial Council's adoption of

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that recommendation) to remove of Second District Court Commissioner T.R. Morgan. The Court Commissioner Conduct Committee found that Commissioner Morgan violated Rule 2.3 of the Code of Judicial Administration (UCJA Chapter 12, Canon 2) for actions meant to "denigrate or show aversion to Complainant on the basis of sex, gender, or sexual orientation, and therefore constitute[s] harassment."

On April 5, 2022, Johnathan Puente, Director of the Utah State Courts' Office of Fairness and Accountability, attended the RPC committee meeting. He explained how the courts created a committee on fairness and accountability, the goal of which is to eliminate bias in the courts. He discussed the difficulty of the courts in achieving their mission when there is bias present and the need for a concerted effort by the whole legal community to eliminate bias. He noted that bias creates an access to justice issue and that several states have been requiring education on eliminating bias through MCLE. The RPC Committee decided to continue to work on these efforts. The court's new Office of Fairness and Accountability will be a resource to the RPC committee. A new subcommittee is comprised of Adam Bondy, Billy Walker, Joni Jones, Katherine Venti, Judge Trent Nelson, and Jonathan Puente. The subcommittee agreed to report back to the RPC committee by August on a recommendation.

VI. Caselaw Developments [TO BE DRAFTED]

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