

# Agenda

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

June 7, 2022

4:00 to 5:00 p.m.

*Via Zoom*

Welcome and approval of minutes	Tab 1	Simon Cantarero, presiding
<i>Rule 1.16</i> <ul style="list-style-type: none"><li>Proposal to create requirement that a lawyer in a criminal case abide by the client's decision of whether to file an appeal.</li></ul>	Tab 2	<i>Subcommittee:</i> Dane Thorley (chair), Alex Natt, Adam Bondy, Billy Walker, Doug Thompson, and Stacy Haacke
<u><a href="#">Rule 1.2(d)</a></u> <ul style="list-style-type: none"><li>Proposal to clarify language so that attorneys providing counsel to the cannabis industry do not run afoul of the rule. See ABA <u><a href="#">article</a></u>. Create subcommittee to study and recommend solution.</li></ul>		J.D. Lauritzen and Hannah Follender
Fond farewell and thank you to Dan Brough and Katherine Venti		Simon Cantarero and Nancy Sylvester
Projects in the pipeline: <ul style="list-style-type: none"><li>Rule 8.3: Recommended to Supreme Court; awaiting further amendments to other rules from Fee Dispute Committee (will present rule package).</li><li>Rules 8.4 and 14-301: Assigned to Judicial Council's Fairness and Accountability Committee</li><li>LPP updates.</li></ul>		--

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

**Meetings: (In-person unless otherwise indicated) August 2, September 6, October 4, November 1, December 6**

# Tab 1



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

[Draft] Meeting Minutes  
May 3, 2022

Utah Law and Justice Center & Zoom  
16:00 Mountain Time

*J. Simon Cantarero, Chair*

**Attendees:**

J. Simon Cantarero, Chair

Katherine Venti

Alyson McAllister

Cory Talbot

Adam Bondy

Gary Sackett (Emeritus)

Steve Johnson (Emeritus)

Jurhee Rice

Billy Walker

Dane Thorley

Julie J. Nelson

Austin Riter

Robert Gibbons

Hon. Amy Oliver

Hon. Mike Edwards

Hon. Trent Nelson (Emeritus)

Hon. James Gardner

M. Alex Natt, Recording Secretary

Absent –Angie Allen, Dan Brough,  
Phillip Lowry,

**Staff:**

Nancy Sylvester

**Guests:**

Scotti Hill

Christine Greenwood

Jonathan Puente, Nick Stiles, Jacqueline Carlson,

Douglas Thompson, Stacey Haacke

## **1. Welcome and approval of the April 5, 2022 meeting minutes (Chair Cantarero)**

Chair Cantarero recognized the existence of a quorum, called the meeting to order at 16:06 and asked the attendees to introduce themselves as this is the first time the committee has met in person for quite a while.

Ms. Jones moved to adopt the April 5, 2022 minutes. Ms. Rice noted that she was marked as present but was not actually present. The minutes were corrected. With that correction, Ms. Rice seconded the Motion. The Motion passed by acclamation.

## **2. Rules 1.2 (Mr. Thorley)**

Subcommittee Chair Thorley asked guest Douglas Thompson to remind the Committee of the issue that the Committee has been asked to consider.

Professor Thorley discussed the work of the subcommittee, which it has styled as 1.1(e) rather than an amendment to 1.2 as initially presented. He recognized the alterations to the suggested verbiage presented by Chair Cantarero and on behalf of the subcommittee indicated that he had no objection to those largely grammatical changes.

A suggestion was made that the rule should specifically reference criminal defendants rather than the broader word "client" as the matter is intended to protect the rights of the accused after conviction or plea. The Committee discussed as there is some thought that the responsibility should be on both the prosecution and the defense.

Further, the Committee discussed the level of investigation that should be imposed on counsel to meet the ethical obligation of the proposed Rule.

The matter was referred to the subcommittee for further consideration as to the level of investigation and consultation required.

## **3. Rules 8.4 and 14-301 (Mr. Bondy)**

The Committee thanked Ms. Sylvester and Ms. Hill for their efforts compiling the history of Rules 8.4 and 14-301 and the next steps to be taken regarding moving this matter forward. The Committee recommended that further efforts focus principally on 8.4(g).

Mr. Puente reported that a new Judicial Council Standing Committee on Fairness and Accountability is available and happy to help this committee sort out the policy side of Rule 8.4(g). He noted that the committee is comprised of current and former judicial officers. The committee determined that the Judicial Council's committee will discuss this issue and return to the Rules of Professional Conduct with a recommendation on the policy, preferably by August.

#### **4. Adjournment.**

Chair Cantarero discussed items in the Committee's "pipeline" and upcoming meetings. The meeting adjourned at 17:33. The next meeting will be held on June 7, 2022.

# Tab 2

**Rule 1.16 Subcommittee Report:** On June 3, 2022, the Rule 1.16 subcommittee met to discuss the full committee’s questions and recommended changes to the draft of Rule 1.16 that was presented at the May 5, 2022 meeting.

The subcommittee first reviewed several stylistic suggestions made by Simón Cantarero (included in a document emailed to the committee on May 3, 2022) and the committee (suggested during the meeting). With two exceptions (noted in the language of the Rule, below), none of these changes were substantive and were therefore adopted without notation.

Coming out of the May 5 meeting, the primary substantive concerns centered around the language in the Rule requiring trial attorneys to consult with the client regarding “meritorious grounds for appeal.” Members of the committee worried that including such language would require trial counsel—many of whom had little professional experience with appeals—to either conduct additional research regarding the appeal process or provide unsubstantiated prognostication regarding the likelihood of a given issue succeeding on appeal. It was also unclear whether the key case that the subcommittee used to justify the addition of Rule 1.16 (*Roe v. Flores-Ortega* 528 U.S 470) justified such an addition.

After discussing these issues, the subcommittee ultimately determined that (1) *Roe v. Flores* does not clearly establish that discussing the merits of issues that could be brought up on appeal is required to meet the *Strickland* standard (there was some disagreement here), (2) discussing the merits of potential issues would, in some cases, require professional knowledge of appeals or additional research, and (3) that the previously included language was not necessary in order for Rule 1.16 to accomplish the goal of insuring that defendants are able to make fully informed decisions regarding whether to file a notice of appeal in their case and seek appellate counsel. As a result, the subcommittee removed the previous language (“consulting with the client regarding the lawyer’s professional judgment as to whether there are meritorious grounds for appeal”) and replaced it with a requirement that lawyers shall discuss “the potential grounds for appeal.” The subcommittee also adjusted the language in the comment, clarifying that “[c]onsultation regarding the potential grounds for appeal should include advising the client about the meaning of the court’s judgment, any preserved issues, and the advantages and disadvantages of an appeal.” The subcommittee felt these changes to the language of the Rule and Comment (1) require much less of trial attorneys than the previous language, (2) concern legal questions that every trial attorney is well equipped to answer, while (3) still ensuring that trial attorneys go beyond simply conveying the technical timing requirements of appeal.

In the May 5 meeting, some committee members also expressed some concern that the proposed Rule 1.16 would result in too many notices of appeal being filed. Naturally, Rule 1.16 would increase the number of notices—indeed, the explicit purpose of the Rule is to lower the informational barriers for appeal in meritorious cases which are not appealed under the current system—but the committee worried that the Rule might facilitate notice of appeals in cases that do not merit appeal and add to an already overburdened Court of Appeals.

Understanding that some of these concerns may have been tied in with the broader requirements of the previous language of the Rule relating to merits, the subcommittee discussed the potential for the current draft of the Rule to induce too many notices of appeal. The subcommittee agreed that any rule or amended rule that captured meritorious cases that would not be appealed but for the rule change would likely also induce some increase in the number of non-meritorious cases that were appealed. However, they felt that (1) at some level, an increase in the filing of notices of appeal in non-meritorious cases is worth the cost in order to provide defendants who have meritorious claims a more consistent and informed path for appeal, (2) the new language of the rule is moderate enough such that an increase of

non-meritorious notice of appeals would be minimal (noting that there is no empirical evidence of this claim), and (3) the fact that defendants in this context would still need to file a brief, which will often be done under guidance of their appellate attorney, likely means the number of non-meritorious appeals actually pursued will be even more minimal (again, noting that we won't know the true effect until the Rule is adopted).

**Proposed Rule 1.16 (substantial changes highlighted and notated):**

Rule 1.16

(e) In the event of a conviction or a guilty plea in a criminal case, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests in appeal, including informing the client of the right to take an appeal and the time within which any appeal must be filed,<sup>1</sup> ~~consulting with the client regarding the lawyer's professional judgment as to whether there are meritorious grounds for appeal,~~<sup>2</sup> and filing a notice of appeal if requested.

Comment

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

[10] These obligations can be fulfilled by timely ensuring that the client has secured representation for appeal. 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 with the trial court if requested by the client, 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 potential grounds for appeal should include advising the client about the meaning of the court's judgment, any preserved issues,<sup>3</sup> ~~the potential grounds for appeal,~~ and the advantages and disadvantages of an appeal. During consultation and representation, the lawyer should make reasonable efforts to discover the client's wishes.

**Commented [DT1]:** Do we need to get rid of this?

**Commented [DT2R1]:** Possibility: "consulting with the client regarding the general standards or appeal and how they might apply to the client's case"

[Just delete it]

"consulting with the client regarding the general standards of appeal and the lawyer's professional judgment as to how those standards may apply to the client's case,"

"consulting with the client regarding the lawyer's professional judgment as to whether there are meritorious grounds for appeal sufficient to inform the client as to whether they should file a notice of appeal,"

<sup>1</sup> Originally, this read "the deadlines concerning appeal." We changed it to reflect the language in Crim Pro Rule 22.

<sup>2</sup> This is the big change. Originally, this read "consulting with the client regarding the lawyer's professional judgment as to whether there are meritorious grounds for appeal." However, after the committee expressed concerns regarding the obligations that this would put on trial counsel (e.g. having to give informed predictions on whether something will be successful on appeal), we toned down the language to put the obligation slightly beyond a pure recitation of the technical requirements of appeal but well within the trial attorney's professional knowledge regarding which issues may or may not be appealed.

<sup>3</sup> In addition to deleting some repetitive language in this sentence, we added this clause in order to provide some clarification on what "potential grounds for appeal" would mean.

If those wishes are made known, the lawyer must follow the client's express instructions with respect to filing a notice of appeal.<sup>4</sup> The decision to appeal must be the client's own choice.

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<sup>4</sup> This language was recommended in the last meeting but struck us as somewhat repetitive.