

Minutes of the Committee on Rules of Professional Conduct

April 21, 2014

Meeting convened at 1704.

Attending: Diane Abegglen, John H. Bogart, Thomas B. Brunker, J. Simon Cantarero, Gary L. Chrystler, Steven G. Johnson, Chair, Trent D. Nelson, Kent Roche, Gary G. Sackett, Stuart Schultz, Paula K. Smith, Judge Vernice S. Trease, Leslie Van Frank, Paul Veasy, Billy L. Walker

Excused: Nayer H. Honarvar, Judge Darold J. McDade, Vanessa M. Ramos

Staff: Philip Lowry, Tim Shea

(1) Approval of minutes

Ms. Van Frank noted that her name needs to be corrected. Mr. Sackett proposed that the minutes be approved at the next meeting, since so much had been discussed, and the draft had been circulated only earlier that day. This motion was approved unanimously.

(2) Recognition

Mr. Schulz was recognized for his service. He has finished his maximum number of terms and will be leaving the committee. He was presented with a certificate from the Court recognizing his service.

(3) Concerns over Confidentiality in OPC Proceedings

Mr. Johnson raised the issue of whether the committee members have experience with documents regarding confidentiality of proceedings before the OPC. The problem arises in the context of multiple interrelated claims. A letter from the OPC Counsel has raised the concern that confidential information might be improperly disclosed.

The proceeding is confidential, and this raises the issue of what is a proceeding. Are the documents the proceeding? Mr. Sackett raises the issue of whether disclosure to the complainant is a breach. Mr. Johnson does not believe so. There is also the issue of who the duty is imposed on. It seems that OPC, and not the claimant, has the duty not to disclose. Discussion of this matter ensued.

Mr. Walker opines that everything that happens after a complaint has been filed constitutes a proceeding. A nonattorney may not be bound by the rules, but her credibility may be adversely affected by her disclosure of confidential information. Even when one lawyer discloses against another lawyer, this is not a violation of a rule of professional conduct, but rather of a procedural rule.

Mr. Sackett notes that the letter from the OPC Counsel seems to threaten the recipient through referral to the rules. Ms. Van Frank notes that the rule seems to refer to all participants, not just lawyers. Mr. Walker notes that the complainant in question has not been measured in her restraint.

(4) Advertising Advisory Committee

There are two errors in the draft of Rule 7.2. The first paragraph of 7.2 and comment 7a should be deleted.

The discussion then shifted to the advertising advisory committee (AAC). The comment was made that ethics advisory opinion committee (EAOC) does not want to be the appellate body for decisions issuing from the AAC. They don't want to get into the technical aspects of advertising. The current proposal is that the EAOC needs to weigh in, even on advertising, so in the end the EAOC is the de facto appellate authority.

Mr. Bogart raises the issue of whether the EAOC or the AAC can opine on what is offensive to the lay person. He is concerned about this. Mr. Sackett raises the issue of whether criticism of the judiciary should be deemed false or misleading. Mr. Johnson raises the issue that "offensive" statements may not necessarily be false. Mr. Walker raises the point that the catchall provision regarding impugning the judiciary could be a predicate for disciplinary action. Mr. Shea raises the issue of whether such a statement is the kind of representation that should appear before the AAC.

Mr. Walker addresses the integrity of the judiciary provision as being implicitly misleading, unless proven true. The falseness provides the offense. Ms. Van Frank raises the issue of when the committee refers impugning issues over to OPC.

Ms. Van Frank raises the issue of what is the fine line between expressing opinion and making disparaging remarks concerning the judiciary. Mr. Walker discusses how puffing or similar statements act to shift the burden to the lawyer to prove it is not false and misleading speech. The discussion continues between Ms. Van Frank and Mr. Walker regarding bias and recusal and its relationship to general representations and more particularly advertising.

Mr. Johnson raises the issue of a blog or a tweet, outside the realm of traditional advertising, and how a disparaging comment could be made in that context.

Mr. Chryster raises the issue of whether legislators who disparage the judiciary are subject to ROPC. Mr. Walker indicates that they are. Mr. Shea points out that the integrity of a judge is really the issue, not the judiciary.

Ms. Van Frank raises the issue of whether something undignified is impermissible, even if true.

In connection with section IV(b) of the proposed Advertising Advisory Committee rules, Mr. Sackett proposes having a short version of what might constitute false or misleading advertising to give the public an idea of what is false or misleading and allow them to check a corresponding box. Mr. Sackett suggests seven boxes, none of which mention undignified statements about the judiciary. The suggestions are limited to potentially false or misleading advertising. A motion is made to modify the set of boxes so there are seven boxes, a, b, c, d, e and f, and the seventh box would be "other." No second.

A substitute motion is made to keep the definition of offensive advertising to three boxes: false, misleading or other. The motion is seconded. Mr. Sackett is concerned that this does not give sufficient guidance to the public.

A vote is taken on having three boxes: reduce categories IV(b) to false, misleading or other. The motion fails.

Mr. Johnson summarizes the suggestions. The committee discusses alternative phrases describing the grounds for complaints about advertising. The Committee attempts to craft seven choices for the form using the language of the proposed amended Rules 7.1(a) through (d). A motion is made and seconded to adopt wording for the seven boxes as so constructed by the Committee. The motion passes. (After the close of the meeting, Mr. Sackett suggested a revision to parts of the language adopted, to be considered at the May meeting.)

A motion is made to submit to the Bar Commission rules 7.1, 7.2, and 7.3, as amended by the Committee, including the subcommittee's proposals to create an Advertising Advisory Committee. The motion carries unanimously. This also eliminates the Bar Commission's proposed Rules 7.2A and 7.2B, which had already been voted on at a previous meeting and approved unanimously.

(5) Discussion of Rule 1.6

The Rule concerns an attorney changing employment. This is an ABA model rule, and the subcommittee recommends that it be adopted with some stylistic changes. Mr. Bogart raises an issue as to whether certain bars to disclosure could prevent a merger. Mr. Walker indicates that they are distinguishing Rule 1.6 from the attorney-client privilege. This raises the need to secure a waiver from the client, which Mr. Bogart indicated may not be possible.

Mr. Sackett indicates that in the past there has been confusion regarding the proper standard of successor or merger counsel.

Ms. Smith raises a question about references to comments to the Utah rule. The comments apparently do not figure in this draft. We need to ensure that the packet that goes up includes a complete draft of the text and comments. Ms. Smith suggests that the pending draft be adopted

subject to cross-checking Rule 5.3 comments 3-4 to ensure accurate cross-referencing. The motion carries unanimously.

There was a discussion of which rules remain pending for discussion. Rules 1.1 4.4, 5.3 and 5.5 remain. They will be the subject of the next meeting, to be convened at 1700 on 19 May 2014.

The Meeting is adjourned at 1830.