

**MINUTES OF THE MEETING OF THE
COMMITTEE ON RULES OF PROFESSIONAL CONDUCT**

February 2, 2015

The meeting commenced at 5:00 pm.

Committee Members Attending:

Steve Johnson (chair)
Trent Nelson
Judge Darold McDade
Simon Cantarero
John Bogart
Vanessa Ramos
Daniel Brough
Gary Chrystler
Paul Veasy
Leslie Van Frank
Judge Vernice Trease
Kent Roche
Paula K. Smith
Gary Sackett

Visitors Attending:

Robert Clark
Joni Seko

Staff

Nancy Sylvester

Secretary

Phillip Lowry

Approval of Minutes

Corrections to the minutes of the November 3, 2014 meeting of the committee were made and noted. A motion was made and seconded to adopt the minutes as corrected, and the motion carried unanimously.

General Business Items

Mr. Johnson noted that seven members of the committee have their terms expiring effective June 30, 2015, that several of those members had already served two terms and, absent extraordinary circumstances, pursuant to Court rule, would not be eligible to continue on the committee. He further elaborated on the procedure for allowing members to continue to serve on the committee. He invited any contending that they meet exceptional circumstances to relate the same to him formally before the term expiration in June.

Rule 5.5 Discussion

Mr. Johnson discussed the attempts of the committee to always include an explanation in the Comments to the Rules whenever a Utah Rule differed from the ABA Model Rules. We used to just put the Comment explaining the differences at the end of the other Comments. However, it has been more helpful to add such Comments immediately after the relevant existing Comment. When the committee adopted our recommendations to Rule 5.5 in our last meeting, we forgot to insert the Comments showing the differences from the Model Rules next to their relevant Comment. Mr. Sackett brought this concern to the attention of Mr. Johnson a day or two after the last meeting. He also raised a couple of other concerns about Rule 5.5.

Mr. Sackett then addressed the committee on the Rule 5.5(d) issues. He stated that the Proposed Rule that has been approved has inverted logic from the ABA Rule. Mr. Sackett does not understand why the proposed rule is trying to invert this logic. Mr. Sackett discussed his memo regarding this matter. He also addressed a gap created by rules governing in-house counsel who may or may not have applied for admission for the Utah State Bar and differences in treatment depending on whether such an application is pending.

Ms. Seko agreed with most of the changes that Mr. Sackett has proposed. She noted one typographical error. She has made some changes and has prepared a revised version. The proposed changes are:

Comment 15a discusses the admission of military lawyers. They come through the office of general counsel of the Bar. This rule is limited only to pro bono services provided to indigent military members. It is not a conduit to Bar admission. Ms. Seko contended that does not make any sense for a reference to admission of military lawyers to be in the present Comment.

Under Comment 15b, Ms. Seko suggested removing the reference to Rule 14-718, and adding the reference to Article 14 as the governing standard. Ms. Seko feels that this is clearer as to the governing standard.

Under Comment 17, she feels that this is really referring to annual licensing fees and complying with CLE requirements. She feels that there is no need for a list of other administrative rules.

She also is concerned about reference to government lawyers in Comment 16. The rule is really designed for in-house counsel, not government lawyers. Government lawyers are covered by (d)(2).

Mr. Sackett expressed concern regarding the stripping of a reference to government lawyer from the (d)(1) Comment. He disagreed that it should be taken out. Ms. Seko responded that there are limitations on being in-house counsel.

Ms. Seko continued the discussion with Comment 18a. This concerns the six-month safe harbor. The Bar's position is that this allows one to secure licensure after they have moved and changed jobs. This is not the preferred mode; it would be better to be admitted before relocation.

Mr. Sackett raised the concern that it does not make a lot of sense to fail to point to an applicable rule. He feels that the idea of the Comment is to point out exemplars of situations where exceptions might apply.

Mr. Johnson pointed out that 14-719(c) does not seem to suggest any time deadline applies for filing an application under the house counsel Rule. Ms. Seko responded that this is to merely point out that the exam deadlines do not apply.

Mr. Sackett agreed with most of the suggested changes to the comments. He moved to adopt the suggestions made by Ms. Seko and the Bar, including to correct the spelling of the word “State” in 5.5(d), to accept proposed changes to Comments 15a, 15b, and 17, but to reject the proposals to Comments 16 and 18a. The Motion was seconded.

The motion carried unanimously.

Mr. Johnson requested that Mr. Sackett provide to him a redline and clean version of the changes carried by the motion.

Civility Standards

Mr. Johnson introduced Mr. Rob Clark. He is a member of the Utah Supreme Court Professionalism Committee, and Chair of the Professionalism Counseling Board.

He described how in 2003 the Court introduced the Rules of Professionalism, now found in Rule 14-301 of the Rules of the Court. They tend to be aspirational, but the judges feel that they are very important. The Court created by Standing Order 7 the Professionalism Counseling Board. It was created to provide mentoring and counseling to lawyers. He described the process of how the Board confers and reasons with referred attorneys. He also discussed the overlap (or lack thereof) of the professional conduct and civility standards.

Mr. Clark noted that lawyer reactions to the standards are varied. Some lawyers embrace them, while others regard them as foolish or lacking authority. So the conundrum arises with respect to repeat offenders: Is there ever a time when violation of the standards are a violation of the RPC? There has been discussion of cross-referencing the RPC to the professionalism standards. At their outset the standards were articulated as being aspirational. He mentioned Rule 8.4(d) in the RPC. The Rule makes it a violation to engage in conduct being prejudicial to the administration of justice. The Oregon Supreme Court has stated that there is such a violation if civility standards are ignored.

Mr. Clark cited to abusive emails, corridor confrontations, and deposition abuse. It is difficult to say if any one of these is prejudicial to the administration of justice. But a consistent pattern of incivility may give rise to acts that are prejudicial to the administration of justice. Another concern is a pattern of male lawyers being condescending to female lawyers. So, this has been raised in a professionalism meeting. The Supreme Court, and especially Justice Lee, feels that this issue should be raised in this committee. Mr. Clark senses that Justice Lee’s sentiments reflect those of the Court.

Thus, he continued, the standards of professionalism perhaps should state that repeated violations may very well rise to the level of a violation of the RPC. This might give better notice to attorneys. Then, it was proposed to add language to a Rule or to a comment to address this relationship between the standards and the rules.

Mr. Clark was asked whether this change would yield more power to his committee. He feels that it would certainly enhance its persuasive effect.

If a judge refers anything to the committee, it is required to report on the result to the judge. Referees' reactions to these referrals vary.

The concern was raised by a committee member that the standards at this point have little ability to be enforced. Another committee member asked whether the entire corpus of the standards might be converted into a RPC violation, particularly the discovery rules, which have their own set of remedies. Another committee member pointed out that even with discovery remedies, repeat offenders can still wreak mischief with discovery antics.

Mr. Sackett suggested that Mr. Clark's committee be treated as a special master, which can make a finding that a referee attorney be referred to OPC for prosecution. Mr. Clark noted that the committee can make referrals now, but Mr. Sackett suggested that it would have a more powerful effect.

Mr. Johnson appointed a subcommittee to study this issue, if not by February 23, then as soon as they can formulate a report and/or response. The committee members are Leslie Van Frank (subcommittee chair), John Bogart, Simon Catarero, Trent Nelson, and Tom Brunner.

Mr. Johnson stated that he found an error in the Comments to Rules 3.5 (Comment 5) and 3.3 (Comment 1). Both refer to 1.0(m), instead of 1.0(n).

Discussion of Comments to Proposed Changes to Advertising Rules

The discussion then turned to particular public comments to the proposed advertising rules:

- Comment by Lynn Heward: The committee felt that no discussion was necessary on this comment.
- Comment by Michael Jenson: Mr. Johnson felt that this comment deserved some discussion.
- Comment by Paul Maxfield: The committee felt that no discussion was necessary on this comment.
- Comments (3) by Jared Clark.: The committee felt that no discussion was necessary on these comments.

The committee discussed Mr. Jenson's comment about direct contact by counsel under Rule 7.3 after a referral. The committee discussed to what degree this constitutes solicitation of a client, whether this is an expansion of a prior professional relationship, and if someone refers a prospective client to an attorney, whether the attorney can contact the prospective client directly, or must the attorney wait until the client calls the attorney. Mr. Johnson raised the issue of a criminal defendant that gets one phone call, calls his mother, and asks her to find a lawyer. The defendant cannot call back. Another

committee member raised the issue of whether a lawyer can hand out a card, unsolicited, at a party.

Another member questioned whether this version of the rule has really resulted in referrals to the Bar. The example of handing out cards in the jail was raised (which ended up in a Bar referral).

Mr. Johnson suggested that a Rule 7.3 subcommittee be appointed. A subcommittee consisting of Gary Chrystler, Vanessa Ramos, and Paul Veasy was appointed to study the issue and to report back to the entire committee at the next committee meeting.

The meeting adjourned at 6:31 p.m. The next meeting is scheduled for February 23, 2015, on the third floor of the Matheson Courthouse in the Judicial Conference Room.