

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

February 23, 2015

The Meeting commenced at 5:02 pm.

Committee Members Attending:

Steve Johnson (chair)
Trent Nelson
Simon Cantarero
John Bogart
Vanessa Ramos
Gary Chrystler
Paul Veasy
Leslie Van Frank
Kent Roche
Paula K. Smith
Nayer Honarvar
Billy Walker
Thomas Bruncker

Visitors Attending:

Robert Clark

Staff

Nancy Sylvester

Secretary

Phillip Lowry

Approval of Minutes

Corrections to the minutes of the February 2, 2015 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

Proposed Rule 7.3.

With respect to the changes being proposed to Rule 7.3 and the comments thereto, the discussion commenced with the existence of the word “presence” in Comment [2]. Leslie Van Frank moved to remove this word, and John Bogart seconded. The motion carried unanimously.

Report on Standards of Professionalism and Civility

Leslie Van Frank reported on her subcommittee's proceedings. She expressed concern about mentioning every single rule, lest by omission certain rules are deemed not promulgating any kind of standard. So, the committee concluded, they could put something in the preamble with respect to the seriousness of their meaning. This is how the "egregious" language was inserted into the preamble. Robert Clark then was asked to comment on the subcommittee's report. He thought it was brilliant because it matched the work his entity had already done. He then noted that the advisory committee on professionalism has still not yet been sunsetted. That would not happen until this current task is complete. He also noted that there are two separate entities responsive to conduct inquiries: the advisory committee on professionalism, and the professionalism advisory board. The latter will continue.

Mr. Clark stated that the fact that the subcommittee came up with a similar approach seems more than coincidental. He also stated that it seemed to be the sense of the Utah Supreme Court that civility standards should find themselves in the Rules of Professional Conduct. The standards talk about obligations that lawyers have to represent their clients. These standards are cross-referenced in the rules. There is no linkage, actual or intended, between violating the standards and a breach of the rules of professional conduct. The only rule in his judgment that is implicated is Rule 8.4(d). There is a fair amount of authority in other states that addresses violations of Rule 8.4(d) in connection with standards of civility.

Mr. Walker stated that Justice Lee and the committee had some concerns about putting the proposal in the standards. They are aspirational, and not intended to be enforceable. The court is serious about the standards, but they are not a basis for discipline. So, the solution would be to actually make the standards' language part of the actual rules. With respect to the rules, he noted that they tend to be very narrow. On the other hand, the standards are far broader. So, the notion is to put a little more specific guidance in crafting enforceable standards.

Ms. Van Frank noted that there appears to be a contradiction between aspirational and mandatory goals. Simon Cantarero noted that the standards were promulgated by an order. Mr. Walker stated that the standards are Supreme Court Rules, as opposed to the Rules of Professional Conduct, which are enforceable guidance. The Rules are made a part of the oath; the standards are not.

Mr. Bogart stated that he was at a loss as to what the task or request was before the committee. Mr. Clark did not necessarily agree that the standards are not enforceable, but rather that they are not self-executing. Ms. Van Frank responded that there needs to be notice of enforceability, and that there now is not such notice. Mr. Clark stated that the question is whether OPC wants to enforce them. Mr. Bogart asked which ones. Mr. Clark responded that it is whether a lawyer is abusive or engaging in conduct prejudicial to the administration of justice. Chairman Steve Johnson noted that a violation needs to be egregious. Comments might assist with this analysis. Ms. Van Frank was concerned

about why a comment or preamble should be used rather than the text itself of an individual rule.

Kent Roche suggested putting the language in one of the rules, such as Rule 8.4(d). Mr. Johnson noted that the Court is hesitant about putting new law in the comments. Ms. Van Frank noted that the Court could just create a standing order to create the standard. Mr. Walker noted that the Court is not wedded to 8.4(d) as the conduit to impose the standards. There might be a better conduit.

Mr. Walker, reading from a variety of the standards by a commentator, emphasized the need to identify a pattern of misconduct, as opposed to one individual instance, in order for a violation to occur. Ms. Honarvar raised concerns over the subjectivity of the standards and how such a pattern would be identified. A second issue she raised is that there are already standards that govern egregious misconduct—does the need to identify such a pattern impose either an additional or alternative standard defining a violation? Chairman Johnson referred the matter back to the subcommittee after a lively discussion. The subcommittee can amend the preamble to the standards, or amend 8.4(d), or create a new Rule 8.6. Mr. Cantarero suggested that perhaps the preamble to the RPC could be amended, but the problem in his view is that no one reads the preamble.

Discussion of Advertising Rules

The subcommittee's analysis focused on the former rules and revised rule on solicitation (prior relationship). Comments had been received, and were discussed as follows.

Comment by Michael Jensen. He was concerned about communications from a referee, and whether the referring attorney needs to be present. He was also concerned about referral within a family, such as a mother referring a daughter. Initially there were few concerns with what was raised, but upon reflection, incarceration and incapacity situations came to mind. Hence the draft that was prepared. A draft was circulated. Blue text showed ABA changes, red showed the subcommittee changes. Chairman Johnson also made some small changes.

The changes add a third exception concerning inability of the potential client to contact the lawyer when a third party has referred the client to the lawyer. Chairman Johnson raised the issue of internal consistency of rule language and cross-reference.

Gary Chrystler raised the issue distinguishing “at the request of” the client rather than “on behalf.” The referred client may not be aware they need an attorney. Nancy Sylvester raised the issue of whether inability to contact is material.

It was proposed to change the language in Comment 5(a) to remove reference to the “version”; instead the comment would just refer to Utah's Rule 7.3 and reference to the ABA model rule. Ms. Van Frank moved to adopt the version with these changes. Discussion ensued. Ms. Sylvester felt that new comment 5 did not flow well and so she circulated a version with highlighted language that was hers. She also added language

“Nor is there a serious potential for abuse.” Paula Smith made some suggestions regarding comma placement. There was additional discussion of allowing pro bono assistance to a pro se defendant.

Ms. Van Frank moved to adopt the changes (all of them), Mr. Bruner seconded, the motion carried unanimously.

The meeting adjourned at 6:22 p.m. The next meeting is set for 27 April 2015 in the Judicial Conference Room at the Matheson Courthouse, to commence at 5:00 p.m.