

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

June 15, 2015

Approved June 18, 2015 by email

The meeting commenced at 5:00 pm.

Committee Members Attending:

Steven G. Johnson, Chair
Simón Cantarero (via phone)
Paul Veasy
Gary Chrystler
Dan Brough
Paula K. Smith
Vanessa Ramos
Gary Sackett
Kent Roche
Trent Nelson
Billy Walker
Tom Brunker
Don Winder

Excused

Nayer Honarvar
John Bogart
Leslie Van Frank
Phillip Lowry (recording secretary)

Staff

Nancy Sylvester

Welcome and Approval of Minutes

Mr. Johnson welcomed committee members to the meeting and asked that everyone double check the April 27, 2015 minutes for accuracy, specifically with respect to those listed as attending. A motion was made to approve the minutes, and that motion was seconded. The April 27, 2015 minutes were approved as written.

Recognition of Retiring Members

Mr. Johnson then thanked the retiring members for their dedicated service to the committee. He presented certificates of appreciation to Paul Veasy, Paula Smith, Kent Roche, and Leslie Van Frank (in absentia) and noted how difficult it would be to replace the amount of knowledge they had brought to the committee. Mr. Johnson then discussed the procedure for appointments to the

committee and also mentioned that he had received a large number of applicants for the open positions. He said the committee tries to get a good cross section from the Bar. Once Mr. Johnson receives the list of applicants, he selects who he thinks will be good representatives and sends them on to the Supreme Court for their decisions in the process. Ms. Sylvester noted that the Supreme Court will be making its decision on the current applicants in early July.

Comments to Rule 8.4

Mr. Johnson then turned to Comment 3a to Rule 8.4 and the public comments received during the recent comment period. Mr. Johnson noted that only three comments came in, and they seem to have arrived shortly after the rule was published. Mr. Johnson then asked if the members had read the comments and if they felt any changes needed to be made. The members present indicated that they had read the comments but did not feel that changes were needed. Mr. Johnson asked for a motion to approve the rule, which Mr. Roche made. Mr. Veasy seconded the motion and the rule was approved. Mr. Johnson said he would draft a letter to the Supreme Court about these actions and Ms. Sylvester said she would be happy to present the same when it came up in the court's next conference. She noted that the rule would be published November 1st, but Mr. Johnson clarified that the Supreme Court could make the rule effective immediately.

Rule 1.8(h) Subcommittee Report

Ms. Ramos (subcommittee chair) reported that she had met with the subcommittee on Rule 1.8(h). The subcommittee was formed in response to a letter the Supreme Court received from a woman concerned about attorneys contracting around OPC complaints. Ms. Ramos said Mr. Walker researched the states that have already dealt with this scenario and Ms. Ramos looked at the ethics opinions. Ms. Ramos noted that while many states have dealt with similar situations surrounding bar complaints, none of the ethics opinions addressed this exact situation. After looking into this issue and seeing what other states had done, the subcommittee determined that, rather than changing the rule, it seemed more appropriate to ask for an ethics advisory opinion. So they came up with a proposal to the Ethics Advisory Opinion Committee. Ms. Ramos noted that the subcommittee together came up with the question and Mr. Sackett came up with the accompanying example.

Mr. Johnson then shared an email that Mr. Bogart had sent to Ms. Sylvester and Mr. Johnson. In the email, Mr. Bogart suggested that the letter to the Ethics Advisory Opinion Committee might also include discussion of non-disparagement provisions in settlement. He asked whether a general non-disparagement provision would preclude reports to OPC, and whether a report to OPC would violate a non-disparagement provision in a settlement.

Mr. Sackett summarized his impression of Mr. Bogart's comments as basically, "You can't bad-mouth me if you sign this agreement." Mr. Roche asked if Mr. Johnson thought the tone of the emailed suggestion was to allow non-disparagement agreements that would include the ability to

contract around OPC complaints. Mr. Johnson said his impression on a first read was that, no, Mr. Bogart meant the opposite. He didn't think it should be allowed.

Mr. Sackett said from his reading of the opinions the subcommittee considered, none identified directly the extortionate approach of matters by a former client. He said the tone of the subcommittee's letter to the Ethics Advisory Opinion Committee is neutral in that it doesn't argue what should be done. Nonetheless, most of the opinions issued in other states said it was not appropriate to contract around complaints to the OPC.

Mr. Sackett then noted that when then-Judge Nehring was on this committee, an issue similar to this one arose and someone said, why don't we change the rule? Mr. Sackett remembered Judge Nehring saying, with issues that are in the gray area, let the Ethics Advisory Opinion Committee develop the common law of the rules. Mr. Sackett said when he was chair of that committee, he didn't remember turning any requests for opinions down. The committee sometimes got frivolous requests, but given the tone of the letter, he didn't think they would turn this one down.

Regarding the non-disparagement provision, Mr. Walker said he had seen more and more cases of former clients bad-mouthing attorneys on websites like Yelp. There has arisen a question of whether the attorneys can respond under rule 1.6. Mr. Walker said he would hate to lump non-disparagement provisions and the rule violations together.

Mr. Johnson said when he first read the email, he thought the tone was, I can't prohibit you from filing complaints with OPC, but I can prohibit you from disparaging me, which can include the OPC complaint.

Mr. Walker and Mr. Cantarero both echoed their feelings that attorneys are worried about things going into the public sphere. Mr. Cantarero said people's reputations are money makers. There might be a perfectly good attorney that has an OPC complaint against them and it may not really affect them. But when an attorney has something out in the public sphere, that complaint can affect their business. Mr. Johnson suggested that OPC complaints *can* affect an attorney when they apply to renew their professional liability insurance. The insurance company asks about OPC complaints.

Mr. Cantarero then asked if Ms. Ramos's search included any changes to rules of professional conduct in other states. Ms. Ramos said it wasn't exhaustive in that they had not surveyed every state, but, she said, there were a lot of states that had dealt with this issue. Mr. Johnson asked if it would be helpful to include the other state's cases with the request for an ethics opinion. Ms. Ramos said her office did that before on another related question, but she is not sure how helpful it was.

Mr. Johnson then asked who the committee proposed should submit this to the Ethics Advisory Opinion Committee. The members present all agreed that Mr. Johnson should submit it on behalf of the committee. Mr. Johnson noted that this was unprecedented. Usually requests for ethics

advisory opinions come from individuals or a law firm, not a committee. The members agreed that it was unprecedented but did not think that would affect the overall outcome.

Mr. Johnson then asked for a motion on this action. Mr. Chrystler moved to submit the letter from the committee to the Ethics Advisory Opinion Committee. Mr. Sackett seconded the motion and the committee unanimously approved the action.

Mr. Johnson then asked if there was other business. Ms. Sylvester discussed the progress on the Professionalism Counseling Board webpage. The webpage would be hosted on the utcourts.gov webpage under "Boards and Committees," and from that page, which lists the Board members, there would be a link to a web blog like the one that now hosts this committee's agendas. She said Mr. Shea will be working with the courts' webmaster to have a fillable form for the public to use in making complaints. She said he will also be working with the Board to get in better compliance with Standing Order no. 7, including making sure the Board has all of its positions filled and having a place for publishing its advisories. Mr. Sackett suggested that having a link to the web blog on the Bar's website would be helpful.

Mr. Johnson then thanked everyone for their contributions and asked Ms. Sylvester if there was any other business for the committee. Ms. Sylvester confirmed that there was not. Mr. Johnson informed the committee that there would not be any other meetings until something new was brought to the committee's attention. He said to watch for emails from Ms. Sylvester.

The meeting adjourned at 5:32pm.