

**MINUTES OF THE SUPREME COURT'S ADVISORY COMMITTEE  
ON THE RULES OF PROFESSIONAL CONDUCT**

Law & Justice Center  
645 South 200 East  
Salt Lake City, UT  
March 24, 2014  
5:00 p.m.

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

**Staff:** Philip Lowry, Tim Shea

Mr. Johnson welcomed the members of the committee.

**(1) Approval of minutes**

On motion and a unanimous vote, the minutes of the previous meeting were approved as emailed to the committee.

**(2) Consideration of Advertising Rules and Comments**

Mr. Johnson described the process to date regarding the Bar's petition to amend the advertising rules. It was felt that the Bar's petition should be given consideration unless a particular provision did not make sense to the committee. The first part of the meeting was focused on the text of and comments to the proposed changes to the advertising rules.

**Rule 7.1.** The committee discussed how the comments interact with the text of the rule. In particular, comment 5 raised First Amendment concerns in the minds of some committee members. The concern was whether this comment really targeted false and misleading advertising, or merely advertising which may be in bad taste. The committee felt that it would be very unwise to make compliance with the Standards of Professionalism and Civility a rule by inserting such language as part of a comment. A motion was made to eliminate comment 5 and adopt a new comment 4a that explains the difference between Utah's rule and the ABA Model Rule. The motion carried with one dissenting vote.

A motion was made to approve the subcommittee's recommendation to adopt proposed rule 7.1, as just amended. The motion carried with one dissent.

[The following amendment is proposed by Mr. Johnson.]

~~**Rule 7.2.** Next followed a discussion of proposed changes to Rule 7.2. The subcommittee report reflects that 7.2(a) is written differently from previous versions, and has been redefined by taking out the word *advertising*. A discussion followed about what the commissioners recommended, with the focus on communications to influence the public. The subcommittee felt there was no need to define advertising in this way, so they took out the term, “advertising”. Mr. Johnson commented that some of the language did not anticipate other advertising forms besides traditional forms of advertising such as radio, TV, billboard and other printed ads.~~

Next followed a discussion of proposed Rule 7.2. The subcommittee report reflects that Rule 7.2(a) in the Bar's Petition is written differently from previous versions, in that it specifies certain forms of advertising. The subcommittee felt that listing specific forms of advertising but not others would create potential problems. Mr. Johnson commented that the language used by the Bar did not anticipate many other advertising forms. A concern was raised by Mr. Chrystler that word of mouth by third parties such as clients could be considered advertising. It was pointed out that to fall within the Rule, the advertising must originate from lawyer, so the concern was withdrawn. Mr. Sackett raised a concern that a letter to a client could be an advertisement, as it is a communication to induce retention. Mr. Bogart raised concerns about the many ways lawyers burnish their images in the community (teaching, blogs, etc.). Mr. Walker pointed out that the definition of advertising is not the problem, but rather that other standards govern the ethics of advertising.

The discussion then turned to Rule 7.3. The rule allows solicitation to attorneys without limitation (CLE, e.g.). Ms. Honarvar discussed the need to consider motivation, such as seeking pecuniary gain in order to induce persons to use the lawyer's services. Mr. Johnson raised the issue of whether there is even a need to define advertising. There was further discussion of Rule 7.2(a) and what constitutes advertising.

A motion was made to adopt the changes to Rule 7.2(a), as proposed by the subcommittee. The motion carried. In favor: 10. Opposed: 5.

The discussion then turned to Rule 7.2(b). The subcommittee recommended adopting the first part of the subcommittee's section (b), but left out “in the event actors . . .” language. A concern was raised about the uncertainty of how a disclosure about actors' participation could continue for the duration of the advertisement. It was suggested that if an advertisement is disclosed as fictional, this implies that actors are being used. Old Robert Vaughan ads were mentioned as examples. The motion was made that Rule 7.2(b) be accepted as proposed by the subcommittee. The motion carried unanimously.

The discussion then turned to Rule 7.2(c). There was a discussion regarding dissemination, and whether the rule contained a potential redundancy.

In answer to a committee member's questions, Mr. Johnson noted that the Supreme Court would like to see a joint petition from this committee and the Board of Bar Commissioners on the advertising rules.

There was additional concern over whether an attorney's address should be included in advertising. A motion was then made "to include the name of the attorney and the attorney's street address." The motion was revised on Line 8 of the Rule 7.2(c) proposal to insert "and office address" after "name." The motion carried unanimously.

The discussion then turned to Rule 7.2(d). The subcommittee reported that the rule covers contingency fees. Payment of costs has been added to payment of expenses. There was a brief discussion on requirements and advisability of flat fee arrangements.

There was little discussion on Rule 7.2(e). With respect to proposed Rule 7.2(f), a concern was raised that the list is completely unnecessary as involving obviously true and non-misleading statements. The subcommittee suggested that it's harmless and provides guidance. Mr. Sackett suggested putting them in the comments, at most. There was a motion to strike proposed 7.2(f) in its entirety. The motion carried. Favor: 12. Oppose: 4.

With respect to Rule 7.2(g), the subcommittee broke out the subsections into (b)(1) and (b)(2). Subsections (b)(3) and (b)(4) were stricken because they are already covered by other rules.

A motion was made to approve the subcommittee's recommendations for Rules 7.2(d), (e) and (g). Further discussion followed the motion. Mr. Chrystler expressed concerns about a lawyer giving value for a recommendation. He was concerned about an intermediary having undue sway on the client's decision to hire the lawyer. Mr. Bogart mentioned excessive rates charged for legal notices. Mr. Walker expressed concern about fee splitting if an exorbitant rate is paid to a vendor.

A motion was made to adopt Rules 7.2(d), (e), and (g), as proposed. The motion carried with one dissent.

The discussion then turned to the comments on Rule 7.2. The changes recommended by the subcommittee are ABA changes. There was a discussion of comment 5. There will need to be a change to the reference to subsection (g), which now needs to be a reference to subsection (f).

Ms. Van Frank expressed concern about communication being equated with advertisement—that communication need not be made by a lawyer. Ms. Van Frank mentioned the idea of being "Gephardt approved." A lawyer can pay that fee if he chooses. Mr. Johnson raised the example of an estate planner who would pay an insurance salesman to refer clients to him. This is not permitted. Ms. Van Frank observed that putting a poster in a chiropractor's office might very well be permitted. It was decided to delete the entire line of comment 7b. The discussion then turned to whether to retain comment 8. It was resolved that it would be good attorney guidance. A suggestion was made to change 8a to remove the language "and lists certain . . ."

A motion was then made on the Rule 7.2 comments. The motion was to accept the subcommittee's recommendations as amended and to adopt Rule 7.2 comments,

except for the phrase in 8a, to delete 7b, and to change references from (g) to (f). The motion was unanimously approved.

Attention then turned to Rule 7.3. All comment changes have been proposed by the ABA in the nature of updates. The Bar's petition did not consider Rule 7.3, even though Rules 7.1 and 7.2 depend on Rule 7.3. Mr. Sackett pointed out that comment 1a is redundant. It was moved to strike 1a. This was unanimously approved. A motion was made to adopt Rule 7.3 as recommended by the subcommittee, with the elimination of comment 1a. The motion carried unanimously.

### **(3) Advertising Advisory Committee**

As chair of a subcommittee to consider an alternative to new Rules 7.2A and 7.2B, proposed by the Bar Commission, Mr. Sackett then presented a proposal to reject these two rules and replace them with an advertising advisory committee.

Mr. Sackett discussed a draft dated March 14, 2014, which provides a set of enabling rules for the creation of such an advertising advisory committee and rules of procedure for the operation of the committee. A key element of the proposal is a "safe harbor" for a lawyer who obtains a favorable advisory opinion from this body. Its function closely tracks the Ethics Advisory Opinion Committee rules.

The proposed committee's rules of procedure are also modeled after the EAOC rules. There would be two channels of approach, one for an applicant who is a lawyer seeking an advisory opinion, and one for anyone questioning an existing advertisement. An attorney request is made to the OPC or the advertising committee. The committee must act within 30 days, or the advertisement can go forward until the committee deems the advertisement to be unacceptable. The committee can approve, reject or approve with changes. A reasoned opinion is not required, and there would be no need for findings or conclusions. A denial should be explanatory, but without extensive detail.

The second channel can be from any member of the public, including lawyers. There need not be a notarized complaint. The Committee can refer the matter to OPC if it determines that the ad is "out of bounds." OPC can use its discretion at that point in deciding whether to go further. The advisory committee's finding would be analogous to the result of a probable cause hearing.

An attorney submitting under the attorney channel who receives a negative response can appeal to EAOC. A concern was raised that EAOC cannot be expected to act as quickly as 30 days.

For recommendations from the advertising committee that the OPC take further action on a subject advertisement, Mr. Walker opined that the best way to proceed is under Rule 14-504 rather than Rule 14-510, since the threshold for an OPC investigation is much lower. Particularly, the best way to proceed would be Rule 14-504(b)(2), under the OPC's general investigative authority.

An additional question was how to resolve subsection (g), which concerns a 60-day safe harbor for rejected advertisements that are appealed to the EAO. This time period allows a full cycle of EAO meetings. The practical effect is that inaction becomes a temporary reversal. This was discussed in detail. The question arose as to whether the passing of 60 days without a decision would become an affirmance. Another question arose about whether a letter response rather than a full opinion might expedite action.

Mr. Johnson proposed the matter be tabled until the next meeting, with Mr. Sackett liaising with EAO on an appellate procedure with which the EAO would feel comfortable.

#### **(4) Next Meeting**

The next meeting is scheduled for 5:00 p.m. on 21 April 2014. The committee will be addressing the safe haven provisions, confidentiality, and Rule 1.6.

The meeting adjourned at 7:00 p.m..