

Agenda

Committee on Rules of Professional Conduct

March 24, 2014
5:00 to 7:00 p.m.

Board Room
Law and Justice Center
645 South 200 East
Salt Lake City

Welcome, introduction of new committee secretary, and approval of minutes	Tab 1	Steven Johnson
Confidentiality of lawyer discipline proceedings		Steven Johnson
Subcommittee report		Billy Walker
Subcommittee report		Gary Sackett
Advertizing rules	Tab 2	
Next meeting		Steven Johnson

Tab 1

Minutes of the Committee on Rules of Professional Conduct

January 27, 2014

Draft. Subject to approval

Members Present

John H. Bogart, Thomas B. Brunker, Gary L. Chrystler, Steven G. Johnson, Chair, Vanessa M. Ramos, Gary G. Sackett, Stuart Schultz, Paula K. Smith, Leslie Van Frank, Billy L. Walker

Members Excused

Diane Abegglen, J. Simon Cantarero, Nayer H. Honarvar, Judge Darold J. McDade, Trent D. Nelson, Kent Roche, Judge Vernice S. Trease, Paul Veasy

Staff

Tim Shea

(1) Approval of minutes

The minutes of November 18, 2013 were approved as prepared.

(2) Consideration of comments to advertising rules

Mr. Johnson described the process to date. Mr. Sackett said that a subcommittee of himself, Mr. Brunker, Mr. Chrystler, Judge Trease and Mr. Veasy had examined the proposed rules and had circulated a counter proposal before the meeting. He said that advertising issues need to be addressed by creating an advisory function. But the nature of the problems do not warrant the machinery created by the proposed rules.

The subcommittee's recommendation is to establish an advisory model based on the Ethics Advisory Opinion Committee. A lawyer could submit an advertisement to OPC, which would have 30 days in which to approve or not approve the advertisement or to advise changes. The OPC decision would be binding on OPC. The OPC decision could be appealed to the EAOC, which would have 60 days in which to decide. The EAOC decision would be binding on OPC. If either the OPC or the EAOC decided after the time permitted, the decision would have prospective effect only, so the lawyer could not be disciplined for running the advertisement in the interim.

Any person could file a non-notarized complaint about advertising with the OPC, which would allow it to begin an investigation.

Mr. Walker said that fielding complaints has never been a problem. The OPC can investigate without a notarized complaint under the current rules, and can itself notarize a complaint if needed. He said that enforcement does not face any procedural difficulties, but enforcement is difficult because "false" and "misleading" are vague terms. He said that the OPC did not have adequate resources to evaluate proposed advertising and that this would expand the OPC mission beyond its traditional role of prosecuting misconduct.

Ms. Van Frank suggested that a volunteer committee, rather than the OPC, could provide the initial review of proposed advertising. Mr. Sackett said that a group of volunteers may not be able to timely consider proposed advertising. Mr. Bruner said that the lawyer would then have to decide whether to wait a little longer or to proceed with the advertisement and risk having to withdraw it.

Mr. Bogart said that the proposed rules will interfere with communication with clients and may be an unconstitutional prior restraint. Mr. Stuart described a case that struck down some parts of an earlier law, but which held that there is no constitutional right in commercial speech to make false and misleading statements.

Mr. Bruner asked for the committee's position on mandatory submission of advertising. All present were opposed. Mr. Johnson asked for the committee's position on the safe harbor provisions. All present were in favor.

Mr. Bogart said that with these regulations there will be less advertising. Ms. Van Frank said that requesting approval from the OPC or a committee should not slow down advertising. Mr. Sackett said that a lawyer can ask the EAOC for an opinion about advertising under the current rules.

Mr. Johnson and Mr. Sackett suggested that the advisory process should be established in the bar's administrative rules, and not in the rules of professional conduct.

Mr. Johnson asked for volunteers for two subcommittees. Mr. Sackett will chair a subcommittee of Mr. Bruner, Mr. Chrystler, Judge Trease and Mr. Veasy to propose safe harbor provisions. Mr. Walker will chair a subcommittee of Mr. Bogart, Mr. Johnson, Ms. Ramos, Mr. Schultz and Ms. Smith to propose changes to Rule 7.1 and Rule 7.2.

(3) Next meeting

The next meeting is scheduled for March 24 at 5:00. Mr. Johnson requested that the subcommittee chairs circulate proposals about 2 weeks before the meeting.

Tab 2

1 **Rule 7.1. Communications Concerning a Lawyer's Services.**

2 A lawyer shall not make a false or misleading communication about the
3 lawyer or the lawyer's services. A communication is false or misleading if it:

4 (a) contains a material misrepresentation of fact or law, or omits a fact
5 necessary to make the statement considered as a whole not materially
6 misleading;

7 (b) is likely to create an unjustified or unreasonable expectation about
8 results the lawyer can or has achieved, or states or implies that the lawyer can
9 achieve results by means that violate the Rules of Professional Conduct or other
10 law;

11 (c) compares the lawyer's services with other lawyers' services, unless the
12 comparison can be factually substantiated; or

13 (d) contains a testimonial or endorsement which violates any portion of
14 this Rule.

15 **Comment**

16 [1] This Rule governs all communications about a lawyer's services, including
17 advertising permitted by Rule 7.2. Whatever means are used to make known a
18 lawyer's services, statements about them must be truthful.

19 [2] Truthful statements that are misleading are also prohibited by this Rule. A
20 truthful statement is misleading if it omits a fact necessary to make the lawyer's
21 communication considered as a whole not materially misleading. A truthful
22 statement is also misleading if there is a substantial likelihood that it will lead a
23 reasonable person to formulate a specific conclusion about the lawyer or the
24 lawyer's services for which there is no reasonable factual foundation.

25 [3] An advertisement that truthfully reports a lawyer's achievements on behalf
26 of clients or former clients may be misleading if presented so as to lead a
27 reasonable person to form an unjustified expectation that the same results could
28 be obtained for other clients in similar matters without reference to the specific
29 factual and legal circumstances of each client's case. Similarly, an
30 unsubstantiated comparison of the lawyer's services or fees with the services or
31 fees of other lawyers may be misleading if presented with such specificity as

32 would lead a reasonable person to conclude that the comparison can be
33 substantiated. The inclusion of an appropriate disclaimer or qualifying language
34 may preclude a finding that a statement is likely to create unjustified expectations
35 or otherwise mislead a prospective client.

36 [4] See also Rule 8.4(e) for the prohibition against stating or implying an
37 ability to influence improperly a government agency or official or to achieve
38 results by means that violate the Rules of Professional Conduct or other law.

39 [\[5\] All communications concerning a lawyer's legal services should comport](#)
40 [with the Standards of Professionalism and Civility.](#)

1 **Rule 7.2. Advertising.**

2 (a) Subject to the requirements of Rules 7.1-~~and 7.3~~, a lawyer may advertise
3 services through the public media, such as telephone directory, legal directory,
4 newspaper or other periodical, billboards and other signs, radio, television and recorded
5 messages the public may access by dialing a telephone number, or through written or
6 electronic communication not involving solicitation as prohibited by Rule 7.3.

7 (a)(1) As used in these Rules, “advertisement” shall mean any communication made
8 to induce persons to use a lawyer’s services. ~~written, recorded or electronic~~
9 communication, including public media.

10 ~~(b) A lawyer shall not give anything of value to a person for recommending the~~
11 ~~lawyer’s services; except that a lawyer may:~~

12 ~~(b)(1) pay the reasonable costs of advertisements or communications permitted by~~
13 ~~this Rule;~~

14 ~~(b)(2) pay the usual charges of a legal service plan or a lawyer referral service.~~

15 ~~(b)(3) pay for a law practice in accordance with Rule 1.17; or~~

16 ~~(b)(4) divide a fee with another lawyer as permitted by Rule 1.5(e).~~

17 ~~(c) Any communication made pursuant to this Rule shall include the name and office~~
18 ~~address of at least one lawyer of the firm responsible for its content.~~

19 (a)(2) These Rules shall not apply to any advertisement that is broadcast or
20 disseminated in another jurisdiction in which the advertising lawyer is admitted if such
21 advertisement complies with the rules governing lawyer advertising in that jurisdiction
22 and the advertisement is not intended primarily for broadcast or dissemination within the
23 state of Utah.

24 (b) If the advertisement uses any actors to portray a lawyer, members of the law
25 firm, clients or utilizes depictions of fictionalized events or scenes, the same must be
26 disclosed. In the event actors are used, the disclosure must be sufficiently specific to
27 identify which persons in the advertisement are actors, and the disclosure must appear
28 for the duration in which the actor(s) appear in the advertisement.

29 (c) All advertisements and written communications disseminated pursuant to these
30 Rules shall include the name of at least one lawyer or law firm responsible for their
31 content.

32 (d) Every advertisement and written communication that indicates one or more areas
33 of law in which the lawyer or law firm practices shall conform to the requirements of
34 Rule 7.4.

35 (e) Every advertisement and written communication indicating that the charging of a
36 fee is contingent on outcome or that the fee will be a percentage of the recovery shall
37 set forth clearly the client's responsibility for the payment of costs.

38 (f) A lawyer who advertises a specific fee or range of fees shall include all relevant
39 charges and fees, and the duration such fees are in effect.

40 (g) The following information in advertisements and written communications shall be
41 presumed not to violate the provisions of Rule 7.1:

42 (g)(1) subject to the requirements of this Rule and Rule 7.5, the name of the lawyer
43 or law firm, a listing of lawyers associated with the firm, office addresses and telephone
44 numbers, office and telephone service hours, and a designation such as "attorney" or
45 "law firm";

46 (g)(2) date of admission to the Utah State Bar and any other bars and a listing of
47 federal courts and jurisdictions other than Utah where the lawyer is licensed to practice;

48 (g)(3) technical and professional licenses granted by the state or other recognized
49 licensing authorities;

50 (g)(4) foreign language ability;

51 (g)(5) prepaid or group legal service plans in which the lawyer participates;

52 (g)(6) acceptance or non-acceptance of credit cards;

53 (g)(7) fee for initial consultation and fee schedule, subject to the requirements of
54 paragraphs (e) and (f) of this Rule; and

55 (g)(8) a listing of the name and geographic location of a lawyer or law firm as a
56 sponsor of a public service announcement or charitable, civic or community program or
57 event.

58 (h) Nothing in this Rule prohibits a lawyer and law firms from advertising their
59 inclusion in law lists and law directories intended primarily for the use of the legal
60 profession or such information as has traditionally been included in these publications.

61 (i) A copy or recording of an advertisement or written or recorded communication as
62 set forth in Rule 7.2A shall be submitted to the Utah State Bar, and a copy shall be

63 retained by the lawyer or law firm which advertises for 3 years after its last
64 dissemination along with a record of when and where it was used.

65 (j) A lawyer shall not give anything of value to a person for recommending the
66 lawyer's services, except that a lawyer may pay the reasonable cost of advertising or
67 written or recorded communication permitted by these Rules and may pay the usual
68 charges of a lawyer referral service or other legal service organization.

69 Comment

70 [1] To assist the public in obtaining legal services, lawyers should be allowed to
71 make known their services not only through reputation but also through organized
72 information campaigns in the form of advertising. Advertising involves an active quest
73 for clients, contrary to the tradition that a lawyer should not seek clientele. However, the
74 public's need to know about legal services can be fulfilled in part through advertising.
75 This need is particularly acute in the case of persons of moderate means who have not
76 made extensive use of legal services. The interest in expanding public information
77 about legal services ought to prevail over considerations of tradition. Nevertheless,
78 advertising by lawyers entails the risk of practices that are misleading or overreaching.

79 [2] This Rule permits public dissemination of information concerning a lawyer's name
80 or firm name, address and telephone number; the kinds of services the lawyer will
81 undertake; the basis on which the lawyer's fees are determined, including prices for
82 specific services and payment and credit arrangements; a lawyer's foreign language
83 ability; names of references and, with their consent, names of clients regularly
84 represented; and other information that might invite the attention of those seeking legal
85 assistance.

86 [3] Questions of effectiveness and taste in advertising are matters of speculation and
87 subjective judgment. Some jurisdictions have had extensive prohibitions against
88 television advertising, against advertising going beyond specified facts about a lawyer
89 or against "undignified" advertising. Television is now one of the most powerful media
90 for getting information to the public, particularly persons of low and moderate income;
91 prohibiting television advertising, therefore, would impede the flow of information about
92 legal services to many sectors of the public. Limiting the information that may be
93 advertised has a similar effect and assumes that the Bar can accurately forecast the

94 kind of information that the public would regard as relevant. Similarly, electronic media,
95 such as the Internet, can be an important source of information about legal services,
96 and lawful communication by electronic mail is permitted by this Rule. But see Rule
97 7.3(a) for the prohibition against the solicitation of a prospective client through a real-
98 time electronic exchange that is not initiated by the prospective client.

99 [4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such
100 as notice to members of a class in class action litigation.

101 **Paying Others to Recommend a Lawyer**

102 [5] Lawyers are not permitted to pay others for channeling professional work.
103 Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications
104 permitted by this Rule, including the costs of print directory listings, on-line directory
105 listings, newspaper ads, television and radio airtime, domain-name registrations,
106 sponsorship fees, banner ads and group advertising. A lawyer may compensate
107 employees, agents and vendors who are engaged to provide marketing or client-
108 development services, such as publicists, public-relations personnel, business-
109 development staff and website designers. See Rule 5.3 for the duties of lawyers and
110 law firms with respect to the conduct of non-lawyers who prepare marketing materials
111 for them.

112 [6] A lawyer may pay the usual charges of a legal service plan or a lawyer referral
113 service. A legal service plan is a prepaid or group legal service plan or a similar delivery
114 system that assists prospective clients to secure legal representation. A lawyer referral
115 service, on the other hand, is an organization that holds itself out to the public to provide
116 referrals to lawyers with appropriate experience in the subject matter of the
117 representation.

118 No fee generating referral may be made to any lawyer or firm that has an ownership
119 interest in, or who operates or is employed by, a legal referral service, or who is
120 associated with a firm that has an ownership interest in, or operates or is employed by,
121 a lawyer referral service.

122 [7] A lawyer who accepts assignments or referral from a legal service plan or
123 referrals from a lawyer referral service must act reasonably to assure that the activities
124 of the plan or service are compatible with the lawyer's professional obligations. See

125 Rule 5.3. Legal service plans and lawyer referral services may communicate with
126 prospective clients, but such communication must be in conformity with these Rules.
127 Thus, advertising must not be false or misleading, as would be the case if the
128 communications of a group advertising program or a group legal services plan would
129 mislead prospective clients to think that it was a lawyer referral service sponsored by a
130 state agency or bar association. Nor could the lawyer allow in-person, telephonic, or
131 real-time contacts that would violate Rule 7.3.

132 [7a] Utah Rule 7.2(b)(2) differs from the ABA Model Rule by permitting a lawyer to
133 pay the usual charges of any lawyer referral service. This is not limited to not-for-profit
134 services. Comment [6] to the Utah rule is modified accordingly.

135 [\[7b\] Utah Rule 7.2 A and 7.2 B have no corresponding provisions in the ABA Model](#)
136 [Rule.](#)

137

1 **Rule 7.2A. Filing Requirements for Public Advertisements and Written,**
2 **Recorded, Electronic, or Other Digital Solicitations.**

3 (a) General Rule. Except as provided in paragraphs (c) and (e) of this Rule, lawyer
4 shall file with the Advertising Review Committee of the Utah State Bar, no later than the
5 mailing or sending by any means, including electronic, of a written, audio, audio-visual,
6 digital or other electronic solicitation communication:

7 (a)(1) a copy of the written, audio, audio-visual, digital, or other electronic solicitation
8 communication being sent or to be sent to one or more prospective clients for the
9 purpose of obtaining professional employment, together with a representative sample of
10 the envelopes or other packaging in which the communications are enclosed; and

11 (a)(2) a completed lawyer advertising and solicitation communication application.

12 (b) A lawyer shall annually submit on the licensing renewal form the URL of any
13 website(s) the lawyer uses.

14 (c) Pre-approval Requests; Advance Advisory Opinions. A lawyer who desires to
15 secure an advance advisory opinion, referred to as a request for pre-approval,
16 concerning compliance of a contemplated solicitation communication or advertisement
17 may submit to the Lawyer Advertising Review Committee, not less than thirty (30) days
18 prior to the date of first dissemination, the material specified in paragraph (a) or (b) or
19 the intended initial access page submitted pursuant to paragraph (a), including the
20 application form and required fee; provided however, it shall not be necessary to submit
21 a videotape or DVD if the videotape or DVD has not then been prepared and the
22 production script submitted reflects in detail and accurately the actions, events, scenes,
23 and background sounds that will be depicted or contained on such videotapes or DVDs,
24 when prepared, as well as the narrative transcript of the verbal and printed portions of
25 such advertisement.

26 (d) Binding and non-binding effects of Advance Advisory Opinions. If a lawyer
27 submits an advertisement or solicitation communication for pre-approval, a finding of
28 noncompliance by the Advertising Review Committee is not binding in a disciplinary
29 proceeding or disciplinary action, but a finding of compliance is binding upon OPC in
30 favor of the submitting lawyer as to all materials actually submitted for pre-approval if

31 the representations, statements, materials, facts, and written assurances received in
32 connection therewith are true and are not misleading and OPC shall not prosecute a
33 lawyer for advertising that is in compliance with an advisory opinion.

34 (d)(1) No court is bound by the Advertising Review Committee's interpretation of the
35 Utah Rules of Professional Conduct. The OPC may at any time request the Advertising
36 Review Committee to review, modify or withdraw a decision on pre-approval of an
37 advertisement.

38 (d)(2) The OPC may also request the Supreme Court to review, affirm, reverse or
39 otherwise modify an advisory opinion on the pre-approval of an advertisement. The
40 finding of compliance constitutes admissible evidence if offered by a party.

41 (e) The filing requirements of paragraphs (a) and (b) do not extend to any of the
42 following materials, provided those materials comply with Rule 7.2 (a) through (c) and,
43 where applicable, Rule 7:

44 (e)(1) an advertisement in the public media that contains only part or all of the
45 following information,

46 (e)(2) the name of the lawyer or firm and lawyers associated with the firm, with office
47 addresses, electronic addresses, telephone numbers, office and telephone service
48 hours, telecopier numbers, and a designation of the profession such as "attorney,"
49 "lawyer," "law office," or "firm";

50 (e)(3) the particular areas of law in which the lawyer or firm specializes or possesses
51 special competence;

52 (e)(4) the particular areas of law in which the lawyer or firm practices or concentrates
53 or to which it limits its practice;

54 (e)(5) the date of admission of the lawyer or lawyers to the Utah State Bar, to federal
55 courts, and to the bars of other jurisdictions;

56 (e)(6) technical and professional licenses granted by this state and other recognized
57 licensing authorities;

58 (e)(7) foreign language ability;

59 (e)(8) fields of law in which one or more lawyers are certified or designated, provided
60 the statement of this information is in compliance with Rule 7.4;

61 (e)(9) identification of prepaid or group legal service plans in which the lawyer
62 participates;

63 (e)(10) the acceptance or non-acceptance of credit cards;

64 (e)(11) any fee for initial consultation and fee schedule;

65 (e)(12) other publicly available information concerning legal issues, not prepared or
66 paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial
67 opinions, or other legal developments or events, such as proposed or enacted rules,
68 regulations, or legislation;

69 (e)(13) in the case of a website, links to other websites;

70 (e)(14) that the lawyer or firm is a sponsor of a charitable, civic, or community
71 program or event, or is a sponsor of a public service announcement;

72 (e)(15) any disclosure or statement required by these rules;

73 (e)(16) any other information specified from time to time in orders promulgated by
74 the Supreme Court of Utah or

75 (e)(17) an advertisement in the public media that:

76 (e)(17)(i) identifies one or more lawyers or a firm as a contributor to a specified
77 charity or as a sponsor of a specified charitable, community, or public interest program,
78 activity, or event; and

79 (e)(17)(ii) contains no information about the lawyers or firm other than names of the
80 lawyers or firm or both, location of the law offices, and the fact of the sponsorship or
81 contribution.

82 (e)(18) a listing or entry in a regularly published law list;

83 (e)(19) an announcement card stating new or changed associations, new offices, or
84 similar changes relating to a lawyer or firm, or a tombstone professional card;

85 (e)(20) in the case of communications sent, delivered, or transmitted to, rather than
86 accessed by, intended recipients, a newsletter, whether written, digital, or electronic,
87 provided that it is sent, delivered, or transmitted mailed only to:

88 (e)(20)(i) existing or former clients;

89 (e)(20)(ii) other lawyers or professionals; or

90 (e)(20)(iii) members of a nonprofit organization that meets the following conditions:
91 the primary purposes of the organization do not include the rendition of legal services;
92 the recommending, furnishing, paying for, or educating persons regarding legal services
93 is incidental and reasonably related to the primary purposes of the organization; the
94 organization does not derive a financial benefit from the rendition of legal services by a
95 lawyer; and the person for whom the legal services are rendered, and not the
96 organization, is recognized as the client of the lawyer who is recommended, furnished,
97 or paid by the organization;

98 (e)(21) a solicitation communication that is not motivated by or concerned with a
99 particular past occurrence or event or a particular series of past occurrences or events,
100 and also is not motivated by or concerned with the prospective client's specific existing
101 legal problem of which the lawyer is aware;

102 (e)(22) a solicitation communication if the lawyer's use of the communication to
103 secure professional employment was not significantly motivated by a desire for, or by
104 the possibility of obtaining, pecuniary gain; or

105 (e)(23) a solicitation communication that is requested by the prospective client.

106 (f) If requested by the Advertising Review Committee, a lawyer shall promptly submit
107 information to substantiate statements or representations made or implied in any
108 advertisement in the public media and/or written solicitation communication by which
109 the lawyer seeks paid professional employment.

110

1 **Rule 7.2B. Advertising Review Committee; Pre-dissemination Review.**

2 (a) Advertising Review Committee. The Board of Bar Commissioners shall create an
3 Advertising Committee, to review filings submitted under Rule 7.2A and to respond to
4 written requests from an advertising lawyer or law firm voluntarily seeking an advance
5 opinion regarding that lawyer's compliance with the advertising rules.

6 (b) The Board of Bar Commissioners may promulgate bylaws, rules of procedure,
7 and reasonable fees for advance opinions to offset the administrative costs of these
8 committees, as it deems necessary and proper. A Bar staff member(s) shall be
9 designated to assist with implementing this Rule, including but not limited to providing
10 administrative support to the standing committees, and receiving and coordinating
11 requests submitted under subparagraph (c)(1) of this Rule.

12 (c) Advertising Review Committee composition. The Advertising Review Committee
13 shall have a minimum of 5 volunteer members, 4 of whom shall be members of the Utah
14 State Bar and 1 of whom may be a non-lawyer. The committee shall also have a
15 minimum of 5 members to serve as ad hoc or conflict replacements when needed.

16 (c)(1) Appointment. Members shall be appointed by the Board of Bar Commissioners
17 and serve 2-year terms, subject to reappointment at the Board's discretion. No member
18 shall serve a lifetime total of more than 12 years. Members may be removed by the
19 Board of Bar Commissioners for cause.

20 (c)(2) Minimum duties. The committee shall meet at least monthly on a
21 predetermined date, and as often thereafter as necessary, to review all matters before it
22 in a timely fashion. Advance opinions shall be provided within 30 days of submission of
23 the request or sooner. Requests to expedite review of advertisements shall be granted
24 whenever possible within reason. The Board of Bar Commissioners may promulgate a
25 procedure and attach an added fee for expedited requests.

26 (d) Review of filings; advisory opinions to OPC. The committee may issue advisory
27 opinions on any advertisement filed with the Utah State Bar. If the committee finds that
28 an advertisement does not comply with these rules, it may issue an advisory opinion to
29 OPC within 30 days of its review. The opinion must include the basis for the

30 Committee's finding of noncompliance and a recommendation that OPC issue a notice
31 to the lawyer or law firm requesting a correction or withdrawal of the advertisement.

32 (d)(1) If OPC accepts the committee's recommendation and issues the notice, the
33 advertising lawyer or law firm has 30 days to respond to OPC's notice. OPC may initiate
34 appropriate disciplinary action if the lawyer or law firm fails to file timely response.

35 (d)(2) The committee is also authorized to monitor all advertising submitted by a
36 member of the Bar or public, or personally observed, and file a complaint with OPC. The
37 resulting complaint shall constitute a valid written complaint as required by the Rule 14-
38 510 of the Rules of Lawyer Discipline and Disability.

39