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

April 27, 2015

The Meeting commenced at 5:00 pm.

Committee Members Attending:
Steve Johnson, Chair
Don Winder
Leslie Van Frank
Billy Walker
Gary Sackett
Simon Cantarero
Nayer Honarvar
Dan Brough
Kent Roche
Vanessa Ramos
Judge Vernice Trease
Thomas Brunker
Paula Smith
Paul Veasy
Gary Chrystler

Staff
Nancy Sylvester

Secretary
Phillip Lowry

Approval of Minutes

The minutes of the February 23, 2015 meeting of the committee were read and approved with one change in the second full paragraph on page 3, as proposed by the secretary. An additional motion was made to delete Daniel Brough as attending the February meeting from the last minutes. The motion carried unanimously.

General Business Items

Committee Administrative Matters

Chairman Johnson mentioned term limitations now being imposed by the Supreme Court, and discussed those who have been serving two terms or more. He conveyed his thanks to them on behalf of the committee.

Chairman Johnson indicated that Don Winder may be attending a future meeting.

Mr. Winder arrived after approval of the minutes. Compliance with Rule 11-101 was made. Each committee member introduced themselves with a synopsis of their practice.

Advertising Rules

Chairman Johnson reported that the Supreme Court made a motion to accept all of the rules that the committee had submitted to them, and they will all be effective on May 1, 2015. There may be some more activity on advertising rules in the near future, but that is all that is known.

Civility Standards

Ms. Van Frank reported on the activities of her subcommittee regarding the Civility Standards. The subcommittee thought that simply adding a phrase that violations of the standards constituted misconduct could be problematic by being limiting. They considered adding a whole new paragraph (g) to Rule 8.4, which they rejected because it is repetitive of what is already stated in paragraph 8.4(d) of the Rule. They then looked at the comments, which illustrated conduct prohibited by the rule. They then crafted language that added specific language which stated that a violation of the standards could amount to a violation of paragraph (d)—and nothing further. They felt that it was not up for them to define what constitutes a violation.

Mr. Winder commented that it was great language. He recited some history about how the standards were originally aspirational. As things evolved, language reflecting civility made it into the attorney's oath. He wrote an article for the *Utah Bar Journal* stating that with the swearing language came an enforceable requirement. Justice Lee has expressed concern that notice requirements mean that a more substantive requirement be properly promulgated.

Mr. Walker commented that the court also wished to impose a more substantive standard by promulgating the standards. It could have been placed in Rule 8.4 and that would have been alright.

Ms. Van Frank slightly disagreed. She cited possible instances where violations of the standards occur yet is not misconduct (for example, wearing jeans to court as impecunious counsel). Mr. Walker responded that the standards are animated by the waste of judicial resources—this is what raises them to the level of a violation. All in all, however, Mr. Walker is fine with putting standards of civility language in the comments to Rule 8.4. The comments still put attorneys on notice.

Chairman Johnson asked if "egregious" is too high a standard. Where is the line drawn? Mr. Sackett noted that "contrary to the administration of justice" is the standard, and it is a matter of degree. Ms. Sylvester and Mr. Cantarero added their comments that it was a matter of degree. The question arose as to whether egregious is the proper standard. Mr. Winder noted that egregious was a studied and reasoned standard, and was the product of

much thought. Ms. Honarvar liked the fact that OPC would assess the violation and determine if it warrants prosecution.

Mr. Sackett asked whether there was a way to accumulate incidents that constitute a pattern. Who is the clearinghouse? The counseling board? Opposing counsel? A judge? Mr. Sackett asked what the role of the board is. Counselor or prosecutor? The board does have referral authority, so it has the organic power to collect and disseminate evidence of a pattern of misconduct. Ms. Van Frank suggested that there should be a way to publicize the procedure. Mr. Winder suggested writing a bar journal article publicizing the function of the counseling board.
Mr. Walker mentioned that educational needs once prompted members of this committee to do CLEs. A number of members asked how to find information about the board on the bar website. Ms. Sylvester agreed to look at the bar website to determine what was and was not available.

Mr. Sackett moved to adopt the language proposed by the subcommittee and Ms. Smith seconded the motion. It carried unanimously.

Discussion of Do Not Sue Clauses in Settlement Agreements

There are apparently attorneys who are inserting into settlement agreements "Do Not Complain" or "Do Not Sue" clauses. California has a statute prohibiting this. A request has been made that this be prohibited by the rules. Rule 1.8(h) allows this practice with the involvement of independent counsel. Should this be broadened? Mr. Sackett commented that such bartering is improper and is a nonwaivable conflict with a current client. For former clients, he was not so certain. A client can threaten a bar complaint if a debt is not forgiven. Removing a waiver of filing a bar complaint gives the client all the leverage. He also asked why this did not go to an ethics advisory opinion committee. Why is there a knee-jerk reaction to change the rule when a hard issue like this arises?

Ms. Van Frank asked which rule this would violate. Mr. Sackett responded 8.4(d). Mr. Walker noted that a tough question is whether the client is a current client or a former client. He also noted that 8.4(d) can be nebulous. He also noted that an analogy to criminal law is better suited: such an act amounts to a type of witness tampering. Florida courts use 8.4(d) to prohibit this.

Ms. Van Frank added her comments to the situation and how such a provision would have been nice to avoid the discussion of what the bar's involvement would be.

Chairman Johnson stated that there seems to be some interest in investigating this further. Ms. Ramos noted that limiting a defendant's right to sue for habeas or ineffective assistance as part of plea deal prompted the federal OPD to seek an ethics opinion. Ms. Ramos volunteered to chair this subcommittee. Other members of the subcommittee will be Mr. Brough, Mr. Sackett, and Mr. Walker

Another facet of the discussion arose as to hinging criminal proceedings on civil settlement.

Mr. Roche indicated that such a prohibition could be counterproductive in limiting the ability to compromise with clients in client disputes. Mr. Walker added that, again, it is not always clear-whether a client is current or former client.

The next meeting shall occur on Monday, June 15, 2015 in the Matheson Courthouse. The meeting adjourned at 6:09 p.m.