Agenda

Supreme Court's Advisory Committee on the Rules of Professional Conduct

June 15, 2015
5:00 to 7:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Salt Lake City
Judicial Council Room, Suite N31

Welcome and approval of minutes from April 27, 2015 meeting.	Tab 1	Steve Johnson, Chair
Recognition of retiring members		Steve Johnson
Comments to Rule 8.4	Tab 2	Steve Johnson
Rule 1.8(h) subcommittee report	Tab 3	Vanessa Ramos
Next meeting		Steve Johnson

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

Tab 1

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

April 27, 2015
Draft. Subject to Approval.

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.

Tab 2

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Public Comment to RPC 8.4

Alison Adams-Perlac <alisonap@utcourts.gov> Wed, Jun 3, 2015 at 10:04 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Nancy,

The comment period to RPC 8.4 has closed. The proposal received the following public comments:

I am not inclined to support the proposed amendment to Rule 8.4 (the new paragraph 3a). The proposed amendment begins by stating the obvious -- that "the Standards of Professionalism and Civility . . . are intended to improve the administraton of justice." This is so clear as to need no restatement. More troublesome, however, is the second sentence of the amendment: "An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d)." Paragraph (d) provides that a lawyer may not "engage in conduct that is prejudicial to the administration of justice." I think this second sentence contains an implication that some or all of the Standards of Professionalism and Civility are less important than others, and it is anybody's guess what is meant by the word "egregious" in the context of the proposed amendment. Paragraph (d), all by itself, is sufficient to put lawyers on notice that violations of the Standards of Professionalism and Civility may be punishable by the rule. Adding the further elucidation in the new paragraph 3a simply muddies the water and would allow attorneys to argue about what is "egregious" or not. That definitional defense would always be available to the attorney with our without the amendment. In short, paragraph 3a is unnecessary and could hamstring the efforts of OPC to enforce the Rules of Conduct in the based upon violations of the Standards of Professional Conduct.

Posted by Thomas Thompson May 18, 2015 11:38 AM

One of the problems with this rule is that the terms "bias" and "prejudice" are not defined. this looks like it will give the libs free reign to cast aspersions on anyone who doesn't adhere to the current dogma on issues like homosexuality.

For example, if a Catholic priest was on trial for child molestation after being accused by a practicing homosexual the defense lawyer would be wise to refrain from bringing up expert witness testimony about the propensity of homosexuals to lie.

Posted by anon ymous May 18, 2015 09:47 AM

The trend to regulate or force civility in the legal profession represents an effort to regulate not just morality, as our criminal laws basically do, but manners. This proposed amendment to the rule goes further than just trying to regulate or force good manners, however. It actually puts a person’s profession and very livelihood at risk for fear of not demonstrating good or proper manners. I think we have to be careful going down these roads where we give a select few the power to determine unknown and undefined standards, such as what manners are appropriate and which ones aren’t. Who is really capable of deciding such things for all the rest of us? And who is really capable of deciding whether we don’t have a right to make a living on account of not demonstrating sufficient good manners?

A second observation I have is that forcing civility has created a new breed of younger attorneys who are offended by everything, offended in fact by merely disagreeing with them. These people hold the prospect of a bar complaint over the other attorney’s head for allegedly not being “civil,” or not being “civil enough.” Rules giving birth to these kinds of young lawyers do not, in my opinion, “serve the administrative of justice.” Quite the opposite. The cure becomes worse than the disease.

I don't like the effort to regulate manners because it is the beginning of a journey down the road of regulating behavior, which sows the seeds for a more concerted effort to regulate speech and thought.

Posted by J. Michael Coombs May 16, 2015 03:57 PM

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Tab 3

SUBCOMMITTEE REPORT RE: POTENTIAL CHANGE TO RULES OF PROFESSIONAL CONDUCT RELATING TO SETTLEMENT AGREEMENTS PROHIBITING BAR COMPLAINTS

SUBCOMMITTEE MEMBERS: VANESSA RAMOS, GARY SACKETT, BILLY WALKER, DANIEL BROUGH

The subcommittee was asked to review a letter submitted to the Supreme Court requesting a possible change to the Rules of Professional Conduct relating to settlement agreements that may include provisions precluding reporting bar complaints.

The subcommittee reviewed several other states' ethics opinions as well as other states' Supreme Court decisions on the issue.[1]

In conclusion, the committee determined that this issue was best left as a proposal to the Ethics Advisory Opinion Committee to issue an ethics advisory opinion, should they deem it appropriate. The subcommittee proposed the following language to be submitted to the Ethics Advisory Opinion Committee.

> General Question: Where a dispute arises between a former attorney and a client, is it ethical for that attorney to enter into an agreement with the former client, releasing the attorney from all potential claims against the attorney, including the filing of a complaint with the Office of Professional Conduct?
>
> Specific Example: Assume an attorney-client relationship has been terminated, either by the lawyer or at the client's request. At termination there is an unpaid bill for legal services rendered by the client. The former client resists payment. In the course of communications to settle the dispute over the fees, the former client threatens to file a complaint with the Office of Professional Conduct unless the lawyer agrees to make a reduction in the amount to be paid.
>
> May the lawyer enter into a settlement and mutual release with the former client that includes a commitment by the former client not to initiate any disciplinary action concerning the related legal services as part of the consideration for resolving the fee dispute? Is the answer the same where the client has not made any threat to file a complaint with the Office of Professional Conduct?

[1] The subcommittee did not review every state for its opinions, so this list is not exhaustive.

SUMMARY OF OTHER STATES' ETHICS OPINIONS

New Hampshire, Ethics Advisory Opinion #2001-12/4

The question presented was whether a lawyer can condition a settlement dispute with a client upon an agreement not to file a professional conduct complaint. The opinion discussed that there was no rule of professional conduct directly related to this issue, but found Rule 1.8(h) as the closest example, which prohibits clients from *prospectively* limiting their liability for malpractice.

Conclusion: The opinion determined that a lawyer may not condition a settlement of a dispute with a client upon an agreement not to file a professional conduct complaint.

Ohio Board of Commissioners on Grievances and Discipline, Opinion #2010-3

The question presented here was whether a lawyer may ethically require a client to withdraw a disciplinary grievance or refrain from filing a disciplinary grievance as part of a settlement of a malpractice claim. The opinion addressed Rule 8.4(d) involving conduct prejudicial to the administration of justice as well as Rule 8.4(h) involving conduct adversely reflecting on fitness to practice law.

Conclusion: The opinion determined that it was improper for a lawyer to require a *current* or former client to withdraw a disciplinary grievance or to refrain from filing one as part of a settlement of a malpractice claim.

D.C. Bar Ethics Opinion 260

The question presented was similar to the above and, in part, addressed whether a lawyer can ask a client to execute a release prohibiting the client from filing a complaint with Bar Counsel as part of the settlement of a fee dispute.

Conclusion: As it related to the issue of filing a disciplinary complaint, the opinion determined that under no circumstances can a lawyer seek to execute a release that would bar the client from filing a complaint with Bar Counsel. The opinion referenced Rule 8.4(d) as conduct that "seriously interferes with the administration of justice."

Georgia Ethics Advisory Opinion No. 96-1

The question presented was whether an attorney may require a client who wishes to discharge the lawyer, enter into an agreement releasing the lawyer for all claims, including any disciplinary complaint with the State Bar, in order to obtain the client's files from the lawyer.

Conclusion: The opinion determined that a lawyer should not condition the return of a former client's files upon the execution of a release of any disciplinary complaint by the client against the lawyer. The opinion relied upon Rule 1.8(h) involving a conflict of interest and putting the attorney's interests ahead of the client's. The opinion also relied upon Canon 6 of the Canons of Ethics which states that a lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

SUMMARY OF OTHER STATES' SUPREME COURT OPINIONS

Colorado: Colorado v. Vsetecka, 893 P.2d 1309, (Co. 1995)

This was a disciplinary action against a lawyer resulting from a fee dispute with the lawyer's former firm. The former firm had also initiated an investigation which led to disciplinary proceedings being initiated. Prior to settling the dispute, the lawyer attempted to enter into an agreement whereby his former firm would withdraw the complaint filed with the disciplinary committee.

Conclusion: The attorney agreed that requesting his former firm withdraw the complaint which formed the investigation violated the standard of "not engaging in conduct prejudicial to the administration of justice." The court agreed and accepted the recommendation that included a 30-day suspension.

Indiana: In the Matter of Cartmel, 676 N.E.2d 1047 (Ind. 1997)

The relevant portions of this case involved a dispute between the lawyer and a former client regarding representation. The former client filed a grievance with the bar commission. The attorney included as part of the settlement a provision where the former client would withdraw the grievance against the lawyer.

Conclusion: The court concluded that such an agreement violated Rule 8.4(d) because the lawyer had "engaged in conduct that was prejudicial to the administration of justice." *See also In the Matter of Wilson*, 715 N.E.2d 838 (Ind. 1999)(same); and *In the Matter of Braun*, 734 N.E.2d 535 (Ind. 2000)(same).

Oregon: In re Boothe, 740 P.2d 785 (Or. 1987)

The relevant portions of this case involved the lawyer and a former client having a dispute over attorney fees and settlement proceeds of a case. The former client filed a bar complaint against the lawyer. The former client was represented by new counsel in the fee dispute. The former lawyer proposed a settlement which included a provision that the former client not testify against the lawyer should disciplinary proceedings continue with the Bar. This proposal was rejected by the client's new lawyer and the settlement proceeded without the offending provision.

Conclusion: Although this case involved slightly more egregious conduct in attempting to dissuade a witness from testifying, the court found this conduct violated the prohibition against engaging in conduct prejudicial to the administration of justice.

Florida: *The Florida Bar v. Frederick*, 756 So.2d 79 (Fla. 2000)

The facts of this case involve a lawyer having a fee dispute with a former client. As part of the settlement of that dispute, the lawyer proposed an agreement which contained a provision that the former client not pursue any action against the lawyer through the Bar, or if action had been initiated, that the client withdraw any action.

Conclusion: The court concluded that such an agreement that discourages Bar involvement as a condition of a release falls within conduct that is prejudicial to the administration of justice under Rule 4-8.4(d).

South Dakota: In the Matter of Eicher, 661 N.W.2d 354 (S.D. 2003)

Here, the lawyer subject to discipline was in a dispute with another lawyer in a civil matter. As Mr. Eicher's conduct progressed in the civil matter, opposing counsel filed a complaint with the bar regarding his behavior as it related to the civil matter. Mr. Eicher proposed to opposing counsel that he withdraw his bar complaint, or face an appeal in the civil matter which involved their clients. Mr. Eicher proposed a letter signed by opposing counsel agreeing to withdraw the bar complaint and Mr. Eicher would forego any appeal on behalf of his client.

Conclusion: The Court found that such conduct was a violation of 8.3(a) which involves the duty of a lawyer to report misconduct of another lawyer, as well as a violation of 8.4(d) involving conduct that is prejudicial to the administration of justice.

New Jersey: In the Matter of Wallace, 518 A.2d 740 (N.J. 1986)

This matter also arose out of a former client's complaint to the disciplinary review board in the handling of client funds and related issues. A disciplinary complaint was ultimately filed and the lawyer attempted to engage in a settlement with the former client in exchange for dismissal of any pending actions regarding discipline of the lawyer, as well an agreement not to participate in any suits or complaints against the lawyer.

Conclusion: The court found that such conduct would seriously undermine the public's confidence in the legal professions if lawyers were allowed to avoid discipline by "purchasing the silence of complainants." The court further found that such behavior shows "extreme indifference to the intent of the Disciplinary Rules."

West Virginia: Lawyer Disciplinary Board v. Duty, 671 S.E.2d 763 (W. Va. 2008)

The relevant conduct in this case involved the lawyer depositing settlement funds from a personal injury action in a personal account that was co-mingled with other monies, rather than depositing the funds in a trust account. The client filed an ethics complaint against the lawyer. The lawyer later tried to persuade the former client to withdraw the ethics complaint. Although the nature of the "attempt to persuade" was not discussed, the lawyer was also found to have falsely testified before the disciplinary board.

Conclusion: The court determined that the attempts to persuade the former client to withdraw the ethics complaint as well as testifying falsely before the disciplinary board violated Rule 8.4(d) involving "engaging in conduct that is prejudicial to the administration of justice."