Agenda

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

May 15, 2017
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.	Tab 1	Steve Johnson, Chair
Attorney Advertising Subcommittee Report and Recommendation r.e. Chairman Goodlatte's letter	Tab 2	Don Winder (subcommittee chair), Dan Brough, Timothy Merrill, Cristie Roach, Gary Sackett
Report and recommendation of ABA Model Rule 8.4(g) subcommittee	Tab 3	Simón Cantarero (subcommittee chair), Billy Walker, Vanessa Ramos, Joni Jones, and Trent Nelson
Rules 1.0 and 3.3: Review comments and final action	Tab 4	Nancy Sylvester, Tom Brunker
Paralegal Practitioner Rule Review		Cristie Roach, Gary Chrystler, Judge Darold McDade
Next meeting		Steve Johnson

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

Tab 1

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

March 6, 2017
DRAFT

The meeting commenced at 5 p.m.

Committee Members Attending:

Steven G. Johnson (chair)
John H. Bogart
Daniel Brough
Joni Jones
Thomas B. Brunker
J. Simòn Cantarero
Vanessa M. Ramos
Christie Roach
Gary G. Sackett
Hon. Trent Nelson
Billy L. Walker
Tim Merrill (phone)
Timothy Conde (recording secretary)
Padma Veeru-Collings (phone)

Excused:

Donald Winder
Gary Chrystler
Hon. Darold J. McDade

Staff:

Nancy Sylvester

Approval of Minutes

Approved without comment.

Report on 1.0 and 3.3

Chairman Johnson reported that the Utah Supreme Court accepted the committee's proposed changes to Rules 1.0 and 3.3. The Court did so with unanimous vote and will publish the proposed changes for public comment soon. Mr. Sackett inquired about whether these changes will affect other rules. Ms. Sylvester informed the committee that the Utah Supreme Court's approach is to vet any consequential changes once all public comments are received.

Chairman Johnson also reminded the committee that it is the committee's responsibility to conduct a detailed review of the rules upon making a report and recommendation to ensure that any recommended changes are consistent throughout the rules.

ABA Model Rule 8.4(g) Proposed Amendment

Mr. Cantarero provided a report of the additional recommendations raised by the ABA Model Rule 8.4(g) subcommittee. The subcommittee's recommendations are described in the subcommittee's memorandum dated March 2, 2017, which was distributed to the committee members. The committee discussed the memorandum extensively. The primary concern voiced by several committee members is the rule's scope. Specifically, the discussion centered on whether any proposed rule should include more than just conduct made "in the course of representing a client," and, if so, does a scope defined as acts "related to the practice of law" and/or "in the lawyer's professional capacity" create a rule that is overly broad. The committee also discussed how detailed the rule should be in light of the Utah Supreme Court's *Larsen* decision. Ultimately, the committee recommended that the following language be inserted as Rule 8.4(g):

> It is professional misconduct for a lawyer to:
>
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status as provided in Federal and Utah State law and jurisprudence, and that reflects adversely on the lawyer's fitness as a lawyer. This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client.

The committee also recommended that the following comments (new comments three, four, and five) be included among the Rule 8.4 changes:

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) may undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Such discrimination includes harmful conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the

conduct; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in the lawyer's professional capacity.

[4] Lawyers may engage in conduct undertaken to discuss diversity, including discussing any benefits or challenges, without violating this rule. Implementing initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers should also be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's view or activities. See Rule 1.2(b).

These changes to Rule 8.4 were voted on and approved by the committee. Chairman Johnson agreed to advise the Utah Supreme Court promptly of the committee's actions.

Paralegal Practitioner Rule Review

Committee members continue to review the rules to determine what changes, if any, must be made to the rules in light of previous changes that were made to the rules regarding paralegal practitioners.

Next Meeting

April 17, 2017 @ 5 p.m.

The meeting adjourned at 7:15 p.m.

Tab 2

ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

March 7, 2017

Billy L. Walker
Senior Counsel
Office of Professional Conduct
Utah State Bar
645 South 200 East, Suite 205
Salt Lake City, UT 84111–3834

Dear Mr. Walker,

I write to you to take immediate action to enhance the veracity of attorney advertising. The American Medical Association (AMA) recently adopted a resolution supporting a legislative or regulatory "requirement that attorney commercials which may cause patients to discontinue medically necessary medications have appropriate warnings that patients should not discontinue medications without seeking the advice of their physician . . ." The AMA's resolution notes that "[t]elevision commercials that seek plaintiffs regarding new medications are rampant on late-night television," that "[o]ften potential complications are spoken about them in an alarming way," and that "[a]s a result of these ads, some patients have endangered themselves by stopping prescribed medications without speaking to a physician." The AMA resolution concludes that advertisements "are 'fearmongering' and dangerous to the public at-large because they do not present a clear picture regarding the product." Dr. Russell W.H. Kridel, M.D., member of the AMA's Board of Trustees, explained the need for such commercials to advise patients to consult with a physician before discontinuing medications by noting that:

> The onslaught of attorney ads has the potential to frighten patients and place fear between them and their doctor. By emphasizing side effects while ignoring the benefits or the fact that the medication is FDA approved, these ads jeopardize patient care. For many patients, stopping prescribed medication is far more dangerous, and we need to be looking out for them.[271]

Indeed, much of this advertising is designed to frighten patients. After emphasizing the potential side effects of an FDA approved and doctor prescribed medication, one advertisement

[271] https://www.ama-assn.org/ama-adopts-new-policies-final-day-annual-meeting

urges patients to call 1-800-BAD-DRUG[272] -- a less than subtle suggestion that the drug in question is inherently harmful. Another commercial holds itself out to be a "medical alert,"[273] while another one states unequivocally that the FDA approved drug is "dangerous."[274] One even depicts a patient being loaded into an ambulance.[275] It is little wonder that patients are confused and concerned about such medications and that same have decided to discontinue taking their doctor-prescribed and often lifesaving medication. These deceptive advertisements have had deadly consequences.

A recent article published in the Heart Rhythm Journal reveals that numerous patients have ceased using their anticoagulant without consulting a physician after viewing negative legal advertisements. Based on incidents reported to the FDA Safety Information and Adverse Event Reporting System, the article summarizes these serious cases, including two deaths, as follows:

> In the majority of these cases (23/31, 75%), patients experienced a stroke or a transient ischemic neurologic event; 2 patients had persistent residual paralysis. One patient, a 45 year-old man receiving rivaroxaban for treatment of a deep vein thrombosis, stopped the drug and died of a subsequent pulmonary embolism, and 1 female patient, receiving rivaroxaban for stroke prevention, stopped the drug and died of a massive stroke. All these cases were considered to be serious medical events by the health care professionals that submitted the reports.[276]

These reports are extremely alarming and bring into clear focus the rationale for the AMA's resolution. Its recommendation is meant to ensure that legal advertising is not deceptive and that patients are not scared into discontinuing their prescribed medication. The legal profession, which prides itself on the ability to self-regulate, should consider immediately adopting common sense reforms that require all legal advertising to contain a clear and conspicuous admonition to patients not to discontinue medication without consulting their physician. It should also consider reminding patients that the drugs are approved by the FDA and that doctors prescribe these medications because of the overwhelming health benefits from these drugs. Given the cases noted above, lives depend on it.

Because of our concern about patient safety, we would appreciate your informing the Committee about the steps being taken to review this matter, including any amendments to your rules of professional conduct that have been made or are being considered.

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[272] https://www.ispot.tv/ad/793E/pulaski-and-middleman-xarelto-and-pradaxa-warning

[273] https://www.ispot.tv/ad/Afkx/the-sentinel-group-xarelto-and-pradaxa-alert

[274] https://www.ispot.tv/ad/ANKO/guardian-legal-network-users-of-xarelto-or-pradaxa

[275] https://www.ispot.tv/ad/AGIM/the-driscoll-firm-xarelto-and-pradaxa-linked-to-internal-bleeding. This commercial prominently displays the Driscoll firm's website address, settlementhelpers.com, which brings one to a page that contains numerous trusted logos including the logo of the American Bar Association, thereby implying an endorsement by the ABA.

[276] http://www.heartrhythmcasereports.com/article/S2214-0271(16)00014-2/abstract

Thank you for your attention to this important patient safety issue. We look forward to your response by March 21, 2017.

Sincerely,

Bob Goodlatte
Chairman

Supreme Court of Utah

450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210
Telephone (801) 238-7937

Chambers of
Chief Justice Matthew B. Durrant

April 7, 2017

Chairman Bob Goodlatte
U.S. House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Goodlatte:

Thank you very much for your letter dated March 7, 2017, addressed to Billy L. Walker, regarding the matter of attorney advertisement. We have discussed your letter, and the Supreme Court has agreed to refer it to our Advisory Committee on the Rules of Professional Conduct, along with a request that the committee study the matter and forward its recommendations to us on an expedited basis.

We will keep you advised.

Sincerely,

Matthew B. Durrant
Chief Justice

cc: Steven G. Johnson, Chair, Advisory Committee on the Rules of Professional Conduct

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

RE: Letter From Chairman Bob Goodlatte, and Rule 7.1

Sasha Maart <maart@mcgiplaw.com> Mon, Apr 10, 2017 at 4:23 PM
To: "Steven G. Johnson" <stevejohnson5336@comcast.net>
Cc: Daniel Brough <dbrough@btjd.com>, Timothy Merrill <tmerrill@centralutahlaw.com>, Cristie Roach <cristier@utcourts.gov>, Gary Sackett <GSackett@joneswaldo.com>, "Nancy J. Sylvester" <nancyjs@utcourts.gov>, James Ishida <jamesi@utcourts.gov>, Don Winder <winder@mcgiplaw.com>

Steven:

Timothy Merrill, Cristie Roach, Gary Sacket and I met to discuss the letter from Chairman Goodlatte to Billy Walker, and Rule 7.1. Unfortunately, Daniel Brough was unable to attend. Your Sub-Committee considers Rule 7.1 to be clear, and that no amendment is needed.

Comment [1] to Rule 7.1 requires, in relevant part: Statement about them [a lawyer's services] must be truthful. Comment [2] states in relevant part: "A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as whole not materially misleading." Thus, any advertisement concerning a medication must be truthful, and not contain material omission.

The disclaimer proposed by Representative Goodlatte does not address truth or falsity of an ad itself. Further, it is not directed at a "lawyer's services. Rather, it appears to address medical advice. Your Sub-Committee queries what duties are owed to whom, and notes we do not have such a problem here in Utah. Finally, if the requested disclaimer was added to the Rule or Comment, then the Rule or Comment would have to be expanded in enumerable ways, to prevent any ad from being untruthful or having omissions.

While the Sub-Committee does not recommend a rule change, the Ethics Advisory Committee may want to weigh in as to whether it should issue an opinion addressing the matter raised. (All Sub-Committee members had the opportunity to review this letter before it was sent to you.)

Sincerely Yours,

Donald J. Winder

****Winder & Counsel, P.C. has merged with Magleby Cataxinos & Greenwood. Please note our new address, phone and fax numbers, and website.****

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Tab 3

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Rules of Professional Conduct Committee
From: Nancy Sylvester
Date: May 12, 2017
Re: Rule 8.4

On March 15, Steve Johnson, Simón Cantarero, and I met with the Supreme Court to go over the committee's recommendation regarding Rule 8.4.

The Court suggested the following edits to the rule:

(1) "pursuant to" in line 18; replaces "per"

(2) Redraft 2nd sentence in comment [3] per Chief Justice Durrant's suggestion

(3) Add "but not limited to" after "including" at line 56.

(4) Add "[1A]" to comment [9] after "comments"

The Court also had the following questions and comments for the committee:

(1) Reconsider whether to adopt the ABA model rule in its entirety.

(2) If not adopting the ABA model rule:

(a)

(i) Take out "as provided in Federal and Utah State law and jurisprudence" at lines 15-16 and instead rely on the statement in Comment [3] ("may guide application"), or

(ii) add "unlawful" before "harassment" or before "discrimination," or

(iii) define "harassment" and "discrimination" in Rule 1.0, or

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(iv) don't make reference at all to law. See Utah Code of Judicial Conduct, which simply defines harassment in Cannon 2.

(b) “Fitness as a lawyer:" define fitness in Rule 1.0? Come up with another phrase? I.e. "suitability," "poorly reflects on legal system," "affects the administration of justice."

(c) Reexamine adding back in the ABA Comment [5] language on peremptory challenges (someone will make the argument if this is omitted that a Batson violation alone is a violation under this rule).

The Court complimented the committee on its efforts and said it looks forward to seeing the final recommendation.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or~~.~~

(g) engage in conduct that the lawyer knows or reasonably should know is unlawful harassment or unlawful discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status~~ as provided in Federal and Utah State law and jurisprudence~~, and that reflects adversely on the ~~lawyer's fitness as a lawyer~~legal profession. This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice pursuant to Rule 2.1, or limit a lawyer's full advocacy on behalf of a client.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct or knowingly assist or induce another to do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[1a] A violation of paragraph (a) based solely on the lawyer's violation of another Rule of Professional Conduct shall not be charged as a separate violation. However, this rule defines professional misconduct as a violation of the Rules of Professional Conduct as the term professional misconduct is used in the Supreme Court Rules of Professional Practice, including the Standards for Imposing Lawyer Sanctions. In this respect, if a lawyer violates any of the Rules of Professional Conduct, the appropriate discipline may be imposed pursuant to Rule 14-605.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of

offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

~~[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

[3] Discrimination and harassment by lawyers in violation of paragraph (g) may undermine confidence in the legal profession and the legal system. In order to allege or prove a violation of this Rule, discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder. Such discrimination includes harmful conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Whether discriminatory or harassing conduct reflects adversely on ~~a lawyer's fitness as a lawyer~~the legal profession shall be determined after consideration of all the circumstances, including, but not limited to: the seriousness of the conduct; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in the lawyer's professional capacity.

[4] Lawyers may engage in conduct undertaken to discuss diversity, including, but not limited to, discussing any benefits or challenges, without violating this rule. Implementing initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers should also be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's view or activities. See Rule 1.2(b).

[63~~a~~] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. 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).

[74~~4~~] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[85~~5~~] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[9] Paragraph (g) and comments [1a~~A~~], [3], [4], [5], and [6] are different from the ABA Model Rule.

Tab 4

RPC 01.00 Terminology. Amend. In conformity with amendments to Rule 3.3, adds the definition of "reckless or recklessly."

No comments.

RPC 03.03 Candor toward the Tribunal. Amend. In response to In re Larsen, 2016 UT 26, adds a prohibition against a lawyer "recklessly" making false statements to a tribunal and repeals and reenacts Comment [3].

Posted by Axel Trumbo

I would like a comment giving an example of what recklessness in this context would look like. If an attorney is required to Shepardize each case or risk being reckless, I think the rule goes too far. But if a lawyer sees on Westlaw or Lexis a warning that the case being cited has been negatively treated in the controlling jurisdiction and consciously chooses not to investigate, for fear of gaining knowledge which would require disclosure, I agree with the amendment.

Posted by Susan Rose

There are several problems with the proposed amendments:

1. Is the Bar going to open an office whereby lawyers, prior to submitting motions and arguments, can clear them ahead of time so the OPC will not declare them "reckless" at the behest of a solo or small firm's lawyer's opponent, to disbar them for what the small firm or solo lawyer did or said in Court?

2. It is redundant. Rule 3.3 and URCP 11 and Judge's inherent powers over lawyer conduct are sufficient.

3. Another problem is that it invites the OPC to invade a lawyer's 1st amendment rights of speech, motions and actions in behalf of unpopular or politically sensitive clients' positions in cases of first impression, or where the law is divided even at U.S. Supreme Court levels, etc.

4. The Association of Utah Cities and Counties if they don't like a federal law suit can invite the OPC to use this accusation to try to discredit lawyers hailing them into federal courts, as was done to Mr. Larsen in federal court when he was prosecuted while suing Davis County.

5. This rule will not apply to the OPC prosecutors because NO Rules provide for its enforcement against them....while at the same time....the OPC prosecutors can prosecute the judges who disagree with them as being "reckless" under rule 14-506.

6. These proposed changes — make any defenses by lawyers prosecuted by the OPC for their in court speech and motions—non existent in light of the "civil standard" used for OPC prosecutions that automatically shifts the burden to the lawyer to prove innocence when the Prosecutors admit to the lower court judge (whom they can prosecute for what the judges say and do on the bench albeit after they return to practice [14-506(c)]) that they so lack evidence to support their charges that they require a default to proceed, as occurred in my own case on June 24, 2010. See, MacFarlane, In re, 350 P.2d 631, 10 Utah 2d 217 (Utah, 1960)(J. Wade dissent explaining how "civil" standard eliminates prosecutor's burden)

7. given that Utah has no "impartial" triers who are exempt from the OPC prosecutors, no adversarial trials, no trial by jury, and no RULES, to govern "by rule" the Prosecutors for prosecutorial misconduct, these amendments make prosecuting lawyers for their court 1st amendment activities like shooting fish in a barrel.

8. If this committee, all of whom are prosecutable by the OPC Prosecutors wish to bring the U.S. Constitution to Utah, then change 14-517 "civil" standard to the U.S. Constitution's U.S. Supreme Court's "quasi -criminal" standard, adopt trial by jury as Texas does, and eliminate the Prosecutor's powers over District Court judges and place retired and inactive judges as screening panel members... all possible unless you are afraid of being prosecuted on your own licenses.

For all the foregoing reasons, these amendments are but another nail in the coffin burying Utah lawyer's rights, and further diminishing District Court Judges' powers by persons not appointed by the governor or ratified by the senate...i.e. the People.

Posted by Isaac Paxman

I disagree strongly with the proposed changes. In reading the Larsen case, I come away saying, why are we proposing this change in response to Larsen? The only change necessitated by the Larsen case is removal of the advisory-committee comment that Larsen rejects. Doing just that would leave the law clear and easy to apply. In my opinion, the proposed amendment would the situation murkier and less desirable. And notably, the proposed change essentially rejects the ruling in Larsen by enshrining a concept, namely that you can be nabbed for reckless conduct, that had its basis in the advisory-committee comment that Larsen rejected. The non-activist approach to rule making would be to follow Larsen by striking the advisory comment and leaving the law as Larsen found it to be.

The phrase that comes to mind when I look at this proposed change is “hard [or bad] cases make bad law.” It’s a situation we see in a variety of circumstances in life. Recently one arose at my kids’ high school. A kid organized a group to go into the school’s basement during class, have a party, and cause damage. The cops were called, and some, including the ring-leader, were arrested. The administration took action with a rule change: from now on no kid is allowed to leave class even to go to the bathroom. Wonderful (I’m being sarcastic): a kid commits a crime, and as a result, straight arrow kids now can’t go to the bathroom. I believe tailoring rule changes narrowly to fit the bad acts is a better approach.

To my knowledge, we have no epidemic of attorneys behaving recklessly. Thus, we do not find ourselves in dire need of this rule change in order to be reprimanded the masses. Rather, the prosecutor in Larsen made a major error, and, significantly, the present rules in their entirety were sufficient to nab him. In that kind of scenario, I say leave the rules alone (except for striking the advisory-committee comment that was targeted in Larsen). Don’t go making the practice of law more treacherous for every attorney because one attorney messed up in a way he was busted for.

Surely it’s one thing to knowingly mislead a court and a world apart to unknowingly do so. The word reckless as applied to these rules will needlessly open up the honorable attorney who happens to not exercise the requisite diligence to find contrary case law on a single point out of many points in a brief to the potential of harsh discipline. How was it not reckless for her to not search out and find this one case, it will be easily argued. Same goes for that one material fact mentioned in the heat of oral argument or trial that counsel, it turns out, neglected to adequately investigate.

I have a particular problem with rule change as to the reckless failure to cite contrary law. Larsen does not deal with a failure to cite contrary law at all. I imagine assurances will be given by the relevant enforcement arm that they’ll only go after really problematic cases. But it seems to me that any failure to cite contrary case law could be deemed by an enforcing arm (or fact finder) to be reckless.

But to be clear, I oppose the inclusion of the word reckless entirely. I say we leave the world as it was when this rule in its current version was adopted, minus the apparently confusing comment in the advisory committee notes. I believe there is no compelling evidence or argument that this rule has served us poorly in the past. Let's not let one outlying situation swing such a major shift.

Thank you for reviewing this input.

Rule 1.0. Terminology.

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(g) "Knowingly," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(l) “Reckless” or “recklessly” denotes the conscious disregard of a duty that a lawyer is or reasonably should be aware of, or a conscious indifference to the truth.

(~~l~~m) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(~~m~~n) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(~~n~~o) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative

agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(~~o~~p) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to

deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g, Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (b). Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to

the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

[10a] The definitions of “consult” and “consultation,” while deleted from the ABA Model Rule 1.0, have been retained in the Utah Rule because “consult” and “consultation” are used in the rules. See, e.g., Rules 1.2, 1.4, 1.14, and 1.18.

Rule 3.3. Candor toward the Tribunal.

(a) A lawyer shall not knowingly or recklessly:

(a)(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; or

(a)(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction ~~known to the lawyer to be~~ directly adverse to the position of the client and not disclosed by opposing counsel~~; or~~.

~~(a)(3)~~(b) A lawyer shall not offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(~~b~~c) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(~~c~~d) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(~~d~~e) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(~~n~~o) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph ~~(a)(3)~~(b) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false or is reckless with respect to its truth.

Representations by a Lawyer

~~[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).~~

[3] The Utah rule is different from the ABA Model Rule. In *In re Larsen*, 2016 UT 26, 379 P.3d 1209, the Utah Supreme Court held that the former rule's plain language required finding actual knowledge before an attorney could be found to have violated the rule, and that language in former Comment [3] permitted

finding a violation on something less than actual knowledge. The amendments to Rule 3.3(a) and to Comments [2], [4], [5], and [9], permit finding a violation of the rule if an attorney recklessly, as defined in Rule 1.0(l), makes a false statement of law or fact or fails to disclose controlling authority. Comment [3] is stricken because the Utah Supreme Court disavowed it in *Larsen* and because it conflicts with the amendments to 3.3(a).

Legal Argument

[4] Legal argument based on a knowingly or recklessly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph ~~(a)(3)~~(b) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph ~~(a)(3)~~(b) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially,

advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done-making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.