

Minutes of the Committee on Rules of Professional Conduct

January 27, 2014

Draft. Subject to approval

Members Present

John H. Bogart, Thomas B. Bruncker, 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. Bruncker, 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 EAO for an opinion about advertising under the current rules.

Mr. Johnson and Mr. Sackett ^{suggested} said 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. Chrysler, Judge Trease and Mr. Veasy to proposed 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.