

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

May 19, 2014

Approved 09-15-2014

The meeting commenced at 5:02 pm.

Attending

Diane Abegglen, John H. Bogart, Thomas B. Bruncker, J. Simon Cantarero, Gary L. Chrystler, Nayer H. Honarvar, Steven G. Johnson, Chair, Judge Darold J. McDade, Trent D. Nelson, Vanessa M. Ramos, Kent Roche, Gary G. Sackett, Stuart Schultz, Paula K. Smith, Judge Vernice S. Trease, Leslie Van Frank, Paul Veasy, Billy L. Walker

Staff

Phillip Lowry, Tim Shea

Approval of Minutes

There are a variety of corrections made to the March minutes as the first item of business. These are noted and the March minutes are approved as amended. There is also a discussion of whether abstentions should be noted, or whether there should be a notation of the vote count.

Mr. Sackett has drafted some amendments to the April 21 minutes. The paragraphs being proposed would replace the paragraphs on page 9. There is a motion to incorporate the changes, it is seconded, and passes with one abstention.

There is also a suggestion that the present or past tense be used consistently. Present tense will be used hereafter.

1. Consideration of Rule 7.2.

Mr. Sackett has authored a new draft of the seven boxes in the advisory committee's rules of procedure that were discussed in the last meeting. This has been circulated previously, and is presented to the committee for consideration. A motion to approve the redrafted section is made and seconded.

Mr. Walker points out lines 65 and 100 where there appears to be a missing number of days.

The discussion turns back to the motion regarding the seven boxes. Mr. Sackett points out that the boxes are not to be definitive, but are a guide to public filing. This is underscored by Mr. Johnson. Mr. Walker points out that one of the options refers to an “improper” endorsement, but this is not defined.

Ms. Smith suggests including the word “unsubstantiated.” Mr. Sackett points out that the public would not likely understand this term. Mr. Johnson asks what would help the public. Incorrectly? Or should a normative term be removed completely?

Mr. Bruner raises the issue of whether a member of the public would initiate the process unless they had already concluded that something improper has occurred. Mr. Walker suggests that in the interest of consistency that the term “improper” would be better. A motion is made to keep this word. Motion carries 12-4.

Now the motion on the seven boxes arises. Motion carries 12-4 to insert them as drafted.

Mr. Shea addresses the omission of the number of days in line 65. The number of days in line 65 should be 30 days, in line 66, 30 days, in line 100, 30 days, and in line 111, 60 days.

2. Discussion of Advertising Rules with Ms. Fox and Bar Commission.

Mr. Johnson reports on the meeting with Katherine Fox about the committee’s advertising rules. Ms. Fox spoke to Mr. Baldwin of the Bar Commission regarding the issue. Today Mr. Baldwin went with the bar president and president elect to meet with the Chief Justice on the issue.

Ms. Fox has suggested that this committee file an amended petition jointly with the Bar Commission consistent with this committee’s recommendations. This will be considered by the Bar Commission.

Ms. Van Frank notes that this will be separate from the recommendations on the ABA rules. Mr. Johnson concurs.

The committee would like to move quickly on this in order to complete it before Ms. Fox retires as a professional courtesy to her.

3. Discussion of Rule 1.1.

Mr. Bunker reports that he had originally recommended that Rule 1.1 be adopted as drafted. Two concerns were raised, however, with comment six. The bracketed “see also” phrase at lines 41-43 is recommended by Mr. Bunker’s subcommittee to be stricken. Mr. Walker also notes a typographic error.

The question arises as to whether the rule applies to contract attorneys. The consensus is that it does.

There is a motion to adopt Rule 1.1 with the changes noted. The motion is seconded and carries unanimously.

4. Discussion of Rule 4.4.

Ms. Van Frank reports that her committee has recommended adoption of Rule 4.4 as drafted. Ms. Smith raised some concerns about return of documents and confidentiality or privilege (unauthorized disclosure). However, this issue is deemed difficult to address in this rule. Mr. Walker echoes this concern.

Ms. Smith notes that Page 20 Line 21 has a missing “or”, and Line 22 should read “information”, Line 23 should read “electronically stored information”, Line 27 “electronically stored information”.

Ms. Van Frank notes that the ABA’s version be adopted with the corrections noted. The Motion carries unanimously.

5. Discussion of Rule 8.5.

Ms. Van Frank reports on the activity of her subcommittee. She discusses multi-jurisdictional practices, and choice of law. There is a suggestion that with informed consent one can choose the “predominant” jurisdiction, and that the comment be changed to reflect this.

Motion is made by Ms. Van Frank that the changes consistent with the ABA draft be adopted. It carries unanimously.

6. Discussion of Rule 5.5.

Mr. Johnson reports on the two drafts of Rule 5.5, one being based on the model rule and the other as recommended by the subcommittee. Most of the changes adopted by the ABA deal with foreign attorneys. There are also references to ABA model rules that Utah has not adopted. Utah has a variety of other rules it has adopted, such as dealing with law students, pro hac vice, and foreign legal consultants. There does not appear to be much interest in changing the existing Utah rules.

Mr. Johnson is not aware of any concerns arising over international business surrounding the more strict foreign practice of law rules in Utah. The subcommittee recommends against most of the ABA model rules.

Comment 21(a) on page 33 explains the committee’s rationale.

Mr. Sackett asks why the Utah rules are more stringent. Mr. Johnson summarizes some of the requirements imposed by the Utah rules. A discussion ensues comparing the Utah rules with those of the ABA.

Ms. Smith raises the issue of hiring research lawyers at lower rates in other countries. Mr. Walker mentions that those individuals could be treated as research clerks under lawyer supervision.

Mr. Walker moves to adopt the subcommittee's recommendation. The motion carries unanimously.

7. Discussion of Judicial Evaluations.

Mr. Shea raises the issue that the judiciary is considering whether lawyers are fully aware of the judicial nominating commission surveys and evaluations. There is the discussion of whether there should be a professional conduct standard regarding lawyers' full participation. There is also a concern over lawyers' exercising independent judgment without consulting other lawyers.

Mr. Sackett voices the thought that it is not a rule of "conduct" as to whether one evaluates a judge. Ms. Honarvar also makes this point. Professional conduct is limited to attorney-client interaction, not answering judicial surveys.

8. Final Discussion on Implementation.

The discussion then turns to when the rules will be promulgated. The schedule is roughed out, with anticipation of September as a likely date for final promulgation.

The meeting is adjourned at 6:24 pm.