

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

Law and Justice Center
645 South 200 East
Salt Lake City, UT
August 30, 2010
5:00 pm

ATTENDEES

Steve Johnson, Chair
Diane Abegglen
Gary Chrystler
Nayer Honarvar
Judge Paul Maughan
Judge Mark May
Trent Nelson
Kent Roche
Judge Stephen Roth

GUESTS

Gary Sackett
Stuart Schultz
Paula Smith
John Soltis
Leslie Van Frank
Paul Veasy
Billy Walker
Earl Wunderli

Rick Schwermer
Rod Snow
John Baldwin

1. WELCOME AND APPROVAL OF MINUTES

Mr. Johnson welcomed the members of the committee and guests and introduced the new committee members. He asked if there were any corrections to the minutes of the January 11, 2010 meeting. Mr. Wunderli observed that certain language was missing from paragraph 4 under the heading "Report From Advertising Subcommittee." Proposed Rule 8.2(a) should state: "A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard **as to its truth or falsity** concerning the judicial system, or the qualifications or integrity of a judge, an adjudicatory officer or a candidate for election or appointment to judicial office." With this correction, Mr. Wunderli moved to approve the minutes. Ms. Smith seconded the motion and it passed unanimously.

Mr. Johnson informed the committee about a proposed amendment to Rule 14-802 (Authorization to Practice Law) which has been circulated to members of the Bar for comment. The proposed amendment permits a non-lawyer to represent a party in small claims court as permitted by Rule of Small Claims Procedure 13.

2. DISCUSSION OF LAWYER ADVERTISING

Mr. Johnson invited Rod Snow, President-elect of the Utah State Bar, to make a presentation to the committee about lawyer advertising. Mr. Snow played for the

committee a Florida attorney's television spot to illustrate "over the top" lawyer advertising. Mr. Snow said that the Utah Bar Commission wants to tighten up Utah's current lawyer advertising rules to avoid similar problems. Mr. Snow does not think we have the problems in Utah that they have in Florida, but the Bar Commission is concerned about "deceptive advertising creep." The Bar Commission will be asking the Supreme Court to authorize a committee to further study the problem and recommend rule changes where needed.

Mr. Snow indicated that several State Supreme Courts have adopted regulations in an effort to upgrade the quality of lawyer advertising. In Nevada, for example, the Board of Governors has created two standing lawyer advertising advisory committees (one for each district, north and south). The committees meet monthly to review requests from advertising lawyers or law firms seeking approval of their ads. The number of ads submitted monthly in Nevada varies from approximately 50 to 114. Internet ads are exempt at the moment, but advertising on Craig's List is becoming a problem in Nevada. If the committee finds that an advertisement does not comply with the advertising rules, it issues an advisory opinion to Bar counsel. If Bar counsel accepts the committee's recommendations, Bar counsel issues a notice to the advertising lawyer or law firm requesting a correction or withdrawal of the advertisement. The lawyer or law firm has 30 days to respond to the notice. If a timely response is not filed, Bar counsel may initiate disciplinary action. In 2009, the Nevada committees referred approximately 271 ads to Bar counsel. Of the attorneys contacted by Bar counsel, almost 99% complied with the request to change the ad.

Florida's advertising rules, by comparison, are very aggressive and have been challenged in court. Mr. Snow pointed the committee to a recent Eleventh Circuit opinion, Harrell v. The Florida Bar, 608 F.3d 1241 (11th Cir. 2010) where the Court held that Florida's advertising rules do not constitute prior restraint. Mr. Snow favors the Nevada approach over the Florida approach, with one exception. Florida charges fees to cover the costs of administering its program, but Nevada does not. Mr. Snow would like to see Utah charge fees to cover the costs of program administration.

Committee members asked many questions and expressed concern about the necessity of revising Utah's advertising rules. Mr. Snow invited 2-3 members of this committee to serve on the Bar Commission's committee. There was some reluctance among committee members to have any member of this committee serve on the Bar Commission's committee because of the possible conflict of interest. Mr. Johnson stated that anyone interested in serving on the Bar Commission's committee should contact John Baldwin or Rod Snow directly. Mr. Johnson will not be appointing committee members to serve on the Bar Commission's committee. This committee will reconvene, as necessary, when the Bar Commission is ready to act.

3. DISCUSSION OF COMMENTS TO PROPOSED RULE 8.2

Mr. Johnson read portions of the comments received from Bar members regarding the proposed amendments to rule 8.2. Committee members stated that many of the comments were thought provoking and persuasive. After discussion, Ms. Van Frank moved to withdraw the committee's recommendation to amend Rule 8.2. Mr. Wunderli seconded the motion, and it passed by a vote of 13 to 2. Mr. Johnson will draft a letter to Chief Justice Durham recommending that Rule 8.2 remain "as is."

4. OTHER BUSINESS

Mr. Johnson stated that there are no assignments or issues presently pending before the committee and that no future meeting will be scheduled at this time.