Tab 2

July 18, 2013

Patrick W. Corum, Chair, Advisory Committee on the Rules of Criminal Procedure
Salt Lake Legal Defender Association
424 East 500 South, Ste. 300
Salt Lake City, UT 84111

Jonathan Hafen, Chair, Advisory Committee on the Rules of Civil Procedure
Parr Brown Gee & Loveless
185 South State Street, Ste. 800
Salt Lake City, UT 84111

Steven G. Johnson, Chair, Advisory Committee on the Rules of Professional Conduct
5336 West Earl Place
Highland, UT 84003

John Lund, Chair, Advisory Committee on the Rules of Evidence
Snow Christensen & Martineau
P.O. Box 45000
Salt Lake City, UT 84145-5000

Carol Verdoia, Chair, Advisory Committee on the Rules of Juvenile Procedure
Utah Attorney General Office
160 East 300 South, 6th Floor
Salt Lake City, UT 84114-0833

Joan C. Watt, Chair, Advisory Committee on the Rules of Appellate Procedure
Salt Lake Legal Defender Association
425 East 500 South, Ste. 300
Salt Lake City, UT 84111

Dear Patrick, Jon, Steve, John, Carol, and Joan:

I am writing on behalf of the Supreme Court to advise you of the court's recent amendment to Rule 11-101(4) of the Supreme Court Rules of Professional Practice. As you know, the court received an overwhelming response this year from attorneys

interested in serving on its advisory rules committees. Unfortunately, many more attorneys were willing to serve than we had vacancies.

In an effort to increase future opportunities for service, the court undertook an amendment to Rule 11-101(4) to implement term limits. The amended rule reads as follows:

> (4) Appointment of committee members and chair. Upon expiration of the application deadline, the Supreme Court shall review the applications and letters of interest and appoint those individuals who are best suited to serve on the committee. Members shall be appointed to serve staggered four-year terms. The Supreme Court shall select a chair from among the committee's members. No lawyer may serve more than two consecutive terms on the committee unless appointed by the Supreme Court as the committee chair or as an institutional or court representative (e.g. an academician, judge, recording secretary, etc.) or when justified by exceptional circumstances. Judges who serve as members of the committees generally shall not be selected as chairs. Committee members shall serve as officers of the court and not as representatives of any client, employer, or other organization or interest group. At the first meeting of a committee in any calendar year, and at every meeting at which a new member of the committee first attends, each committee member shall briefly disclose the general nature of his or her legal practice.

The new rule will go into effect immediately, but will be broadly implemented in 2014. Rotations off of the committees of members who have already served 8 or more years may be staggered to avoid hardship or undue disruption to the work of the committees.

Thank you for your continued good work as chairs of the Supreme Court's advisory rules committees.

Sincerely yours,

Matthew B. Durrant
Chief Justice

cc: Diane Abegglen
Katie Gregory
Brent Johnson
Rick Schwermer
Tim Shea

Tab 3

Rule 1.10. Imputation of Conflicts of Interest: General Rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(b)(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(b)(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(c)(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom, and

(c)(2) written notice is promptly given to any affected former client.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(f) An office of government lawyers who serve as counsel to a governmental entity such as the office of the Utah Attorney General, the United States Attorney, or a district, county, or city attorney does not constitute a "firm" for purposes of Rule 1.10 conflict imputation.

Comment

Definition of "Firm"

[1] ~~For purposes of the Rules of Professional Conduct, the term "firm" denotes 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. See Rule 1.0(c).~~ "Firm," as used in this rule, is defined in Rule 1.0(d). Whether two or more lawyers constitute a firm ~~within this definition~~ for purposes of determining conflict imputation can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

[1a] Rule 1.10(f) does not appear in the ABA Model Rules. It is intended to recognize the inherent differences between an office of government lawyers and those in a firm, as defined in Rule 1.0(d). Notwithstanding the exclusion of an office of government lawyers from the provisions of Rule 1.10, all other conflicts rules, such as Rules 1.7, 1.8, and 1.11, must be fully satisfied on an individual-lawyer basis, and the group of government attorneys must, by adopting appropriate procedures, ensure that attorneys for whom there are individual conflict issues do not participate in and are screened from the particular representation. See Rule 1.0(l) for definition of "screened."

Utah State Courts Rules - Published for Comment

Comments: Rules of Professional Conduct

Dear Members of the Advisory Committee on the Utah Rules of Professional Conduct:

I submit this comment on behalf of the lawyers in the Office of Legislative Research and General Counsel (OLRGC). OLRGC supports the proposed amendment to Rule 1.10, but asks that the Committee consider expanding the list of specifically identified government offices to include offices in the legislative and judicial branches of government. More specifically, OLRGC recommends the Committee amend the proposed language to read as follows: "An office of government lawyers who serve as counsel to a governmental entity such as the Utah Attorney General, the United State Attorney, the Office of Legislative Research and General Counsel, the Administrative Office of the Courts, or a district, county, or city attorney does not constitute a 'firm' for purposes of Rule 1.10 conflict imputation."

OLRGC supports this amendment for four primary reasons. First, imputation under Rule 1.10 would unduly interfere with a government office's ability to represent its clients. Unlike a private firm, a government office does not choose its clients.

Second, imputation under Rule 1.10 would undermine a government office's ability to recruit and hire the most qualified lawyers. As comment 7 to Rule 1.10 of the District of Columbia Rules of Professional Conduct explains, "[t]he government . . . has a much wider circle of adverse legal interests than does any private law firm . . . . the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government." Often the most qualified applicant will represent clients adverse to the hiring government office.

Third, this amendment will align Utah's Rule 1.10 with the ABA Model Rule. Model Rules of Prof'l Conduct R. 1.10 cmt. 11 ("[W]here a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.").

Finally, this amendment will promote clarity and more uniformly apply the rule to lawyers who work for all three branches of government. OLRGC respectfully requests that the Committee add OLRGC and the Administrative Office of the Courts to the proposed amendment to Rule 1.10.

Sincerely,

John Fellows
General Counsel, OLRGC

Posted by John Fellows July 3, 2013 02:29 PM

Why on earth would anybody propose this? I think I understand the reason: when these government attorneys leave the government, they want to be able to sue or represent entities that their offices prosecuted or sued.

Will the entirety of the rules be re-written so that government attorneys are each independent, solo practitioners, and the information given to each one of them is privileged and confidential to them only, and will they be sanctioned if they disclose to any other government lawyer? In the event that they cover a hearing for a colleague, or co-counsel a case, will they be required to disclose to their employing government agency that their fees are being divided?

Most importantly, wouldn't it be neat if all Officers of the Court were treated equally before the Courts and the Bar Association? What would the Rules Committee's response be to a submission that ALL attorneys who at one

time worked in a firm may just disregard any conflict of interest that interfered with the advancement of their career?

Posted by S. Hullinger May 24, 2013 04:06 PM

-------- Forwarded message --------
From: **John Bogart** <jbogart@telosvg.com>
Date: Thu, Jul 11, 2013 at 12:37 PM
Subject: Amendment to Rule of Professional Conduct 1.10
To: tims@utcourts.gov

Mr. Shea:

I was the dissenting vote in the Advisory Committee meeting concerning the proposed change in interpretation of Rule 1.10. The Court may be interested in why the vote was not unanimous. I prefer the comments not be published.

The Rules of Professional Conduct are intended to provide a limited codification of the ethical constraints on practice of law. While some special conditions apply to government lawyers as individuals and groups, a decision to treat groups of lawyers differently depending on whether the lawyers are employed by the government does not address the special conditions nor provide proper ethical guidance. The proposed Rule would effectively exempt government lawyers from most practice limits which otherwise arise for those practicing in groups. Individual lawyers would remain subject to Rules 1.7, 1.8, and 1.9 but only as individuals. There would be no imputation of duties within groups. This means that there is no ethical concern with, for example, a lawyers from the same office appearing on both sides of a contested matter, or a lawyer who is a direct report appearing opposite his or her supervisor. It also means that there is no ethical concern with a lawyer with a direct supervisory role appearing as an advocate before an administrative judge. Moreover, the change in rule would mean that client confidentiality (and loyalty) would have no application to offices of lawyers as a matter of professional ethics. I do not see how any of this could be justified on a principled basis.

There is no reason to think that government lawyers are different than other lawyers in their motivations and susceptibility to incentives and pressures. Financial incentives are the only incentives which create ethical issues. Lawyers in the same office are under some psychological pressure to get along with the compatriots, to share views and outlooks, to avoid direct confrontations, are averse to public condemnation of or disagreement with their colleagues concerning at least work issues. All lawyers are subject to such pressures, and to the risks of compromising duties of loyalty and confidentiality, etc. A rule that supposes otherwise insults private practice lawyers through disrespect towards them and beatification of government lawyers.

Government lawyers should be treated consistent with private practice lawyers. Absent a principled explanation and differentiation, the same rules should apply. There are ample tools available for groups of government lawyers to address potential conflicts and to blunt social pressures inconsistent with their duties, the same tools available to private practice lawyers, e.g. creation of ethical walls, insulation of individuals or groups with conflicting duties of representation from direct supervision by members of opposing groups, etc.

The proposed change in Rule 1.10 undermines, if it does not destroy, the reasonableness of governmental agencies considering governmental lawyers as representing the agencies, i.e, undermines that reasonableness of agencies (or their administrative heads) having confidence that the government lawyers are engaged to serve the interests of the agency. The proposed change limits the reach of other ethical rules to individual lawyers as such. The duties do not extend into the group or office of government lawyers and so do no apply to those who supervise the lawyers. Removal or substitution of an individual lawyer is always open to the supervising person, and that decision is not governed by any duty of loyalty, etc., on the part of the supervisor to the client agency. Indeed, it is unclear whether discussion within an office of lawyers of their respective clients and cases is even permissible as the proposed Rule entails that there are no firm-wide duties of loyalty, etc., applicable to any office or unit of government lawyers. Related issues arise with access to files. If there is no imputation of loyalties across all members of an office (which I think is entailed by the change to 1.10), then it would be incumbent to limit access to files of a particular client to particular lawyers (and their staff). That is, ethical walls on information flow would need to be established as to each case.

The language proposed by the Committee (from which I dissented) is intended to apply only to lawyers employed full-time by government. More specifically, the exemption is not intended to apply to firms or individuals in private practice who are hired by a governmental entity for particular cases or projects. E.g., the firm hired by Utah to handle tobacco litigation would not be covered by the proposed rule. How the proposed change would apply to lawyers who are engaged on a part-time or on-going contract basis is unclear. I am doubtful that there is a coherent solution for such instances. As suggested above, I do not think there is a principled account that supports the

proposed change.

Application of 1.10 in its current form to offices of governmental lawyers poses some logistical problems, but they are not different in kind or difficulty from those faced by private firms. The same sets of tools appear to be available and fully adequate for the issues — ethical walls and waivers of actual and potential conflicts by clients. Use of these tools would emphasize the nature of the duties running from the lawyers to the specific agency client, and in that sense would be beneficial.

Respectfully,

John H. Bogart
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Salt Lake City, UT 84111
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jbogart@telosvg.com

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Tab 4

[UtahStateBarNews] Notice of Proposed Amendments to Utah Court Rules

1 message

Tim Shea <tims@utcourts.gov> Tue, Jun 11, 2013 at 11:15 AM
Reply-To: listserv@utahbar.org
To: Bar Postmaster <utahstatebarnews@postmaster.utahbar.org>

The Supreme Court invites comments to proposed amendments to the following court rules. The comment period expires July 31, 2013.

Summary of proposed amendments

Revises the rules to more thoroughly address problems with misleading and inaccurate lawyer advertising, both potential and existing, in order to better protect the public. The changes are designed to help lawyers comply with the new rules, as they are more specific than current requirements. The basic components of the proposed rules provide fuller definitions of what constitutes false and misleading legal service communications. The proposed rules would tie compliance requirements to the Bar's annual licensing renewal form. The new rules would require the lawyers to annually submit any Universal Resource Locator (URL) they use in advertising and to submit such advertising as mass mailings. There is no requirement for prior review of any advertising.

RPC 07.01. Communications Concerning a Lawyer's Services. Amend.

RPC 07.02. Advertising. Amend.

RPC 07.02A. Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or Other Digital Solicitations. New.

RPC 07.02B. Advertising Review Committee; Pre-dissemination Review. New.

How to view redline text of the proposed amendments

To see proposed rule amendments and submit comments, click on this link to: http://www.utcourts.gov/resources/rules/comments/. Then click on the rule number.

Utah State Courts Rules - Published for Comment

Comments: Rules of Professional Conduct

If for no other reason than its misplaced reliance on the 2010-2011 Dan Jones survey as justification for the rule changes, the Bar's Petition should be denied.

Although the Bar seems to interpret the survey as some form of mandate to solve a problem it admits does not yet exist, the connection between the relied upon survey question and the Bar's proposed rule changes is tenuous at best.

How is it possible that the Bar spends years studying the issue, takes the time to develop survey questions about attorney advertising, and then fails to ask the most important question of all: Are the current advertising rules adequate?

The leap between monitoring and establishing new rules, with a new Bar committee, is simply too far.

In this same study, 49% of responding attorneys indicated they did not advertise, but 59% indicated they had a web site. At least to me, that's a strong indication that the Bar's view of advertising and Utah attorneys' view of advertising don't correlate as well as the Bar leads the Court to believe.

Furthermore, there seems to be no accounting for the Bar resources that such an undertaking will consume. Is the Bar so lacking in meaningful work that it can devote significant resources to solving problems that don't yet exist? It seems to me that a proposal like this should require a budget and some cost-benefit analysis before being adopted? I don't believe Utah attorneys should write a blank check to solve hypothetical problems.

Posted by Eric Kamerath August 1, 2013 12:00 AM

This proposed rule imposing a new duty on all licensed attorneys to provide paper copies, and URL's, of all advertising for review, is a bad idea. Would not this additional burden create out of proportion expenses and inefficiencies in order to address a problem that does not appear to exist? Also, the new proposed process seems to ignore that advertising itself is a public act that inherently discloses itself at the very same time it springs into existence. Because advertising is by it's very nature complete disclosure of itself, further disclosure in the form of 'mass mailings' of paper copies is unduly burdensome and exceptionally redundant. The burden will be particularly hard on those seeking to work outside of last century's 'Big Firm' model. Utah's very few 'Big Firms' may be able to allocate resources and pass on the labor cost to clients, but solo practitioner's will likely be bogged down by the new requirements.

I have read that of all complaints made against Utah attorneys, only 1.8% involved issues relating to advertising. If this is true, there only a very remote need for such control by the Bar. I have also heard that this issue is arising because other states have passed similar rules, due to problems with advertising in those jurisdictions. Texas, Florida, etc., may need measures like this, but it is not apparent that Utah does with statistics this low. In general, adding additional burdensome requirements to an already burdened solo practitioner's "unbillable duties", should at the very least address an actual problem. We have done just fine with the current level of control exercised by our Bar. Is this new measure really needed? It appears the public is already protected.
There will be additional cost. Whether volunteer man hours, or paid staff, who will review the thousands of ads? Will the newfound discretion to reject ads lead to heavy litigation on advertising rights? We are opening up new areas of contention and litigation, where time and money must be allocated, rather than to something useful or helpful. Will our dues go up? Or better, can it be promised that they won't?

Most importantly, in my mind, is that the requirements are unnecessary, even if there is a problem like the one only imagined here, as it asks attorneys to provide paper copies of what is already within reach of any functionary's internet browser. An ad seeks to be found, it does not hide. If there was a misleading or false advertisement made, client's will complain, and a regulator can immediately verify the nature of the ad, and act accordingly. With this new proposed way, the functionary will spend their time reviewing huge amounts of perfectly appropriate ads, (as history makes clear) and when no false advertising appears she/he will find some to justify her position. It is human nature to do so.

To summarize this rule represents fully the phenomena of imagining a problem into existence, addressing that imaginary problem with a wasteful and burdensome 'solution' of mailing unnecessary hard copies of web pages that are easily retrieved by anyone. If the bar wants to concern itself with these matters then at least do so intelligently. Finally we attorneys are interested in caring for our clients and the public, it's our job if not our very identity, and I hope I hurt no one's feelings when I say it is not the Bar and it's threats of punishment that makes this so. This rule helps to vilify the profession and teaches the public we are not to be trusted. The public will think, well if there is rule, there must be a big problem. They will never know it was a mere 'potential', and very little actual wrongdoing.

Posted by Jeffrey July 31, 2013 02:40 PM

Enacting Proposed Rules 7.02A and 7.02B of the Utah Rules of Professional Conduct is unwise because they act as a prior restraint, shift the burden of proof from the government to the attorney seeking to advertise, contradict Tenth Circuit law, and are costly and unnecessary. Consequently, Proposed Rules 7.02A and 7.02B should not be enacted into law.

1) Rules 7.02A and 7.02B act as a prior restraints and the Tenth Circuit applies the doctrine of prior restraints to commercial speech

It is uncontested that attorneys may advertise their services. Bates v. State Bar of Arizona, 433 U.S. 350 (1977). It is also uncontested that commercial speech is entitled to some protection by the First Amendment. Id. (citing Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976)). The current issue is whether nearly all legal advertisements must now be subjected to a fee, subjected to review, and subjected to approval from the Advertising Review Committee of the Utah Bar Association prior to mailing or sending the advertisement "by any means." Rule 7.2A(a).

As the Supreme Court explained in Vance v. Universal Amusement Co.,"[t]he presumption against prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties. Behind the distinction is a deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." 445 U.S. 308, 316 (1980).

Although the Supreme Court has indicated that commercial speech may qualify as one of the exceptions to the bar on prior restraints, (see Central Hudson Gas & Elec. v. Public Svc. Comm'n, 447 U.S. 557, 571 n.13 (1980)), the Tenth Circuit has explicitly indicated that the requirement of procedural safeguards in the context of a prior restraint indeed applies to commercial speech. In re Search of Kitty's East, 905 F.2d 1367, 1371-72 & n.4 (10th Cir. 1990); see also, New York Mag. v. Metropolitan Transportation Authority, 136 F.3d 123, 131 (2d Cir. 1998); Desert Outdoor Adver. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996).

Thus, it would be unwise for the Utah Bar Association to enact rules 7.02A and 7.02B to bar nearly all attorneys (and likely all solo practioners and small firms) from advertising prior to paying a fee and receiving a de facto permit to advertise their services. Furthermore, it would be unwise to purport to proffer jus tertii as a defense based on the actions of the Nevada, Texas, Florida, and Washington State Bar Associations.

2)Rules 7.02A and 7.02B shift the burden of proof from the government to the attorney in multiple ways

Commercial speech is protected by intermediate scrutiny places the burden of proof on the government to show: (i) that it has a substantial interest in regulating the advertising, (ii) that the means chosen to regulate directly advance the interest, and (iii) that the means are no more extensive than necessary. Central Hudson Gas, 447

U.S. at 557. Rules 7.02A and 7.02B effectively vest the power of the courts in the Utah State Bar Advertising Review Committee to determine when an attorney's future speech is "implicitly false" and consequently shift the burden of proof from the government to the attorney seeking to advertise her services.

Additionally, the Tenth Circuit has held that for a particular mode of communication to be inherently misleading, that "concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." Revo v. Disciplinary Bd. Of the Supreme Court of N.M., 106 F.3d 929, 933 (10th Cir. 1997). Rules 7.02A and 7.02B are likewise attempting to allow the Utah State Bar Association to determine whether an advertisement is inherently misleading based solely on the concern about the possibility of deception in hypothetical cases. Consequently, this act is insufficient to rebut the constitutional presumption favoring disclosure over concealment. Id. Thus, it would be unwise for the Utah State Bar Association to enact Rules 7.02A and 7.02B.

3) Rules 7.02A and 7.02B contradict the Tenth Circuit's holding that a state bar seeking to discipline an attorney based on an allegedly inherently misleading advertisement must produce evidence that someone was actually deceived.

The Tenth Circuit has also held that for "a particular mode of communication to be inherently misleading," that the bar's disciplinary board must offer evidence that someone has actually been deceived by the ads. Revo, 106 F. 3d at 933. Proposed Rules 7.02A and 7.02B will eliminate the requirement that any individual be deceived by the ads because the bar seeks to determine the purported inchoate offense of "attempting to deceive." Thus, it would be unwise for the Utah State Bar Association to enact Rules 7.02A and 7.02B.

4) Rules 7.02A and 7.02B are costly, are guaranteed to increase bar "dues" (i.e., fees paid to engage in the practice of law in the State of Utah), and are unnecessary.

According to the ABA Division for Bar Services memorandum dated March 12, 2012, The Utah State Bar Association dues rank sixth out of all seventeen western states. Both Washington and Nevada have higher bar dues than Utah. Both of these states also have mandatory advertisement filing for nearly all attorney advertisements. (The only reason that the Texas State Bar Association does not have higher bar dues than Utah is because its bar is over eight times larger than that of Utah, not to mention it is nearly ten times larger than the Nevada bar, and more than twice the size of Washington's bar). So, it both logical and likely that the implementation of a "Advertising Review Committee" that will review nearly all advertising materials from approximately 10,500 attorneys will increase expenditures by the state bar. The argument that fees will not "increase" because the attorney seeking to advertise will have to pay a "required fee" each time she decides to change her marketing materials, is a de facto increase of "bar fees." Thus, the increase is guaranteed. Furthermore, as the cost of advertising legal services increases in an already battered legal market, of a verity, the solo practioners and small firms will be the ones to pay the lion's share of the costs associated with the proposed regulation. Ultimately, the current rules are sufficient and should not be altered.

Posted by Mark Andrus July 30, 2013 05:11 PM

The proposed rules are onerous even for large firms as the amount of material generated weekly and monthly can be substantial. The proposed system asks marketers to submit material ahead of time for a fee or take a chance of producing materials and submitting them to the Bar at the same time the materials are distributed to the intended target. If we miss the mark according to the new rules, we are punished. The Bar does not have the capacity to implement and run the proposed approval system in the promised 30 days.

The potential inability to state facts, such as lawyer accomplishments, is ludicrous and ultimately makes every lawyer seem equal in very bland ways. This is not a service to potential clients. Lawyers should be able to state their achievements and most currently do without aggrandizing.

Labeling everything as Advertising is the fastest ticket to the trash can so why would any of us bother to create print materials?

7.2 (b) states an advertisement using any actors to portray a lawyer, members of the firm, etc., must be disclosed—what? I checked this out with Bar prior to developing a new brochure and was told if I did not infer the

models in the stock photos were our lawyers, there was no problem. Do you think prospects will be upset if their lawyer does not look like one of those in a stock photo? Reasonable people are inundated with advertising message and stock photography daily and understand how it works.

I'm assuming our logo and website address adequately addresses Rule 7.2(c) to show we are responsible for the content of an advertisement. Does any firm create material that does not identify the firm? Interesting.

Comment 1 for Rule 7.2 states advertising "involves an active quest for clients," but the proposed rules tie the hands and feet of anyone honestly trying to attract new clients.

Finally, in Rule 7.2A(e)(21) —"a solicitation communication that is not motivated by or concerned with a particular past occurrence or event of a particular series of past occurrences or events and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware—I think this is exempt, but lost track so far down on the list of what was and was not exempt from the original Rule. Exactly what would be in a solicitation letter that did not include anything in (e)(21)?

There are a few, very blatant existing Rule breakers. Why not take care of these and then see what problems remain.

Posted by Deb Kirby July 29, 2013 05:11 PM

In 1977, as quoted in the May edition of the Chamber of Commerce publication, Nation's Business, Bert Lance, President Carter's OMB Director, announced that he believed the government could save money by adopting a simple motto: "if it ain't broke, don't fix it. He explains, That's the trouble with government. Fixing things that aren't broken and not fixing things that are broken."

And so, here we are in 2013, with the Utah State Bar still failing to learn that basic motto. I propose instead a simple rule that obeys that motto: No new bureaucratic proposals unless that bureaucracy is absolutely necessary to protect Utah clients and the professional nature of the Bar. The Bar's rulemaking petition, however, makes it very clear that its proposal is unnecessary to further either of those interests. Not only does it admit no current attorney advertising problems, but the 2012 Bar Counsel's report shows that of all complaints reported to the Bar that year, approximately 1.8% consisted of advertising complaints. While it may be true that attorney advertising complaints will increase in the future, is the increase in bureaucracy, the burdensome nature of filing, and the stifling of free expression the best way to deal with future hypotheticals?

If the Bar and the courts are truly concerned with reducing Bar complaints in the present or in the future, then perhaps they should proffer a rule that requires attorneys to file with the Bar each time they make a withdrawal from a trust account. This makes more sense since trust account violations account for many times the number of complaints than advertising does. Indeed, those violations appear to have been present in almost all disciplinary actions published last year. (Perhaps this is just another example of fixing things that aren't broken and not fixing things that are broken). If requiring the filing of advertising is presumed to lead to a decrease in already non-existent attorney advertising violations, then requiring the filing of trust account withdrawals will surely reduce the villainy associated with that type of activity.

The Petition asserts that its proposal was spurred on by actions taken by the high courts of Florida, Texas, and Nevada, all of which require filing of attorney advertisements. According to the Petition, those states' regulators noted that their systems were mandated due to an "uptick" in complaints. This begs the fundamental question of why would Utah want to look at Florida's advertising regimen as a model in any manner? This is a state that disciplined lawyers for using a pit bull in an advertisement. The Florida Bar v. Pape, et al., 918 So.2d 240 (Fla. 2005). It is also a state that has a general population of 19 million and almost 100,000 lawyers. The numbers alone, over and above that state's generally aggressive response to advertising helps explain why it chose mandatory filing. The numbers also highlight that it is nothing like Utah. Similarly, Texas has approximately 84,000 lawyers and a population of 26 million. Larger numbers and an equivalently large number of complaints (the reported "uptick") may justify additional bureaucratic responses, but such a response is not justified where those numbers and complaints are not present.

Though Nevada's population, both generally and of lawyers, is equivalent to Utah's, that similarity does not mandate or justify an identical approach. Before its filing requirement, Nevada's advertising rule was a First Amendment violation waiting to happen (this conclusion is based not only on my personal review of the rule, but a comment made to me by Kristina Marzec, the reporter for the committee that approved the original filing rule). Given that the Nevada Supreme Court had already evidenced a desire to closely scrutinize attorney advertising for

taste and decorum, the decision to approve a filing requirement substituted for the constitutional invalidities of that prior system while allowing for more monitoring.

Utah's current rules do not suffer from similar constitutional problems. The advertising rules here do not unconstitutionally impose standards of taste and decorum and, thus, there is no need to replace those written rules with the unwritten preferences of a committee of fellow lawyers (who, simply because they are people, will use their own preferences in making decisions). Regarding Utah's attorney advertising rules, they are on the other side of the chart in terms of regulation from those issued by Nevada (especially pre-filing), Texas, and Florida. I note, however, that Nevada's rules, as defined by that high court's guidance (again according to Ms. Marzec) do not mandate filing of websites or other Internet ads while Utah's, though requiring only filing of the URL for the website, would appear to enjoin attorneys from publishing other types of Internet advertising without concurrent review. Despite this inconsistency, Utah's current rules are far closer to those issued by the Washington Supreme Court, which the Petition presents as an example, apparently, of what not to do since, one must assume, Washington State is a cesspool of attorney advertising horrors much like Utah will soon be.

Attorney advertising rules are in a nationwide state of flux. While some states are adopting filing requirements and, like Florida, instituting draconian regulations, the American Bar Association, with its Ethics 20/20 Commission appears headed in the other direction – toward a more libertarian approach. Over the past few years, circuit courts of appeal have issued decisions over rules issued in New York, Louisiana, and Florida. These court fights have cost both state regulators (in other words, taxpayers and Bar members) and a similar potential in Utah should be considered when calculating the costs and benefits of this proposal. Because even if the proposal gets federal court approval, fighting the battle will cost.

Perhaps a better approach than emulating Florida, Texas, and Nevada, is to wait until the ABA has finished its overall review so that it can give equal credence and consideration to that nationwide assembly of experts in the field of professional ethics. At that time, Utah will have the benefit of listening to all sides and gaining the perspective of comprehensive approaches.

Finally, the Petition heralds a survey result showing that 58% of attorneys believe it is important to "monitor advertising." While an interesting number, it is naked and devoid of context. First, were the questioned attorneys informed what "monitor" meant? Did they know it meant filing and scrutiny of almost all pieces of advertising material or did they assume that "monitor" meant that the Bar should simply keep an eye out for blatant advertising problems, which are readily apparent on billboards, newspapers, and other media channels. Thrown in without context, the 58% statistic may mislead the reader into believing that this percentage of attorneys support mandatory filing. (Perhaps the Bar should read its own rules about misleading material). Second, and perhaps more fundamentally, if advertising rules are to be decided by majority vote of the Bar membership then the rules should be open to voting by all members, not just the selected survey participants.

In sum, changes in Utah's rules should await the ABA's exhaustive and comprehensive study and should not be guided by decisions made in states that have problems and aggressive regulatory traditions that Utah has not shared. The Petition should be rejected in its entirety.

Posted by James H. Beadles July 29, 2013 01:07 PM

I add my opposition to the proposed amendments for reasons others have explained. The proposed submission requirement creates an undue, unnecessary, time consuming, and expensive burden. Micromanagement is discouraged in almost all contexts. The rules should be based on general principles, and the members of the bar should be entrusted to manage their advertising based on those principles. Specifics can be addressed via advisory opinions, contacting the bar, complaints, case law, education, etc. Any amendment ultimately added to the existing advertising rules should be simple and should not require submission of advertisements to the bar. I do not object to the submission of the url of one's firm or practice.

Posted by Jeremiah Taylor July 3, 2013 11:33 AM

Rule 7.2A(b) is broadly written to require reporting of any website that the lawyer "uses." Does this include Facebook? Twitter? LinkedIn? Avvo? Justia? LawQA? What about sites that re-post this information. Any attorney with a listing on Justia is also listed on it's sister site through Cornell. Anyone who has ever answered a question for the LawQA site has probably had their posting re-posted on one of LawQA's many sister sites. Is reporting of these sister sites' URL's required?

Rule 7.2A(a) requires that copies of any "solicitation communication" be filed with the bar "no later than the . . . sending by any means, including . . . digital. . . . " Does this mean that anytime a person posts a blog or publishes a new page on a website, that such "communication" has been sent to the entire online world. Does this rule require the submission of any of these communications that are posted online?

The current rules seem adequate to address current advertising abuses . . . if the current rules were enforced. The new reporting requirements seem excessively burdensome, especially for small firms and solo practitioners who do not have the benefit of having an IT department and a large advertising budget.

Posted by Stephen Howard June 27, 2013 04:45 PM

I join those who have expressed opposition to the proposed new rules regarding lawyer advertising. These new proposals, if adopted, will no doubt prove to be extremely onerous and burdensome, particularly upon solo practitioners and small firms. I am also concerned about imposing further restrictions upon the free speech rights of attorneys. Let's work within the existing rules. If someone has an objection to a particular lawyer advertisement, let them file a complaint and have it reviewed. Otherwise, let's not change the rules to make them extremely onerous and burdensome to comply with. Finally, as others have stated, these new proposed rules are extremely confusing and poorly drafted.

Posted by Will Morrison June 25, 2013 08:33 AM

I am against Rule 7.02A, specifically the portion requiring every lawyer to submit every advrtizing to the Bar. It seems that such an obligation will be really burdensome on the law firms and will take a lot of resources of the Bar. There is a process when lawyers can complain about other lawyers' ads if they violate the Rules. However, I do not see the need to police all advertizing in a broad sweep. How much really will it cost? Did anybody calculate? What are the benefits versus the cost? I think cost-benfit analysis is important to perform.

Posted by Victoria Cramer June 24, 2013 01:22 PM

For the same reasons as already articulated in other comments to these proposed rule changes, I add my opposition to these changes due to their confusing and overreaching nature.

Posted by J. RobRoy Plaat June 24, 2013 12:20 PM

Frankly, the rule is very confusing to me. I am not sure if I am just lacking in sufficient intelligence to understand it (which I take the risk of exposing by sending this post) or it just does not make sense.

It seems that Rule 7.2A sets forth a requirement that all advertising be submitted to the "Advertising Review Committee." However, it then turns around under paragraph (e) and says that you don't have to submit advertising as long as it contains only part or all (whatever that is supposed to mean) of a laundry list of types of advertisings/information and if it also complies with the requirements of Rule 7.2 (a) through (c) (note that this is 7.2, not 7.2A) and all of Rule 7 if it is applicable (again, I am not sure what that is supposed to mean, but it seems pretty lazy on the drafter's party).

But 7.2(a) through (c) only defines the word "advertisement," exempts advertisements in other jurisdictions (leaving us free to exploit the hapless folks across state lines since they are not worthy of the apparently necessary higher protections offered by Utah), describes what must be done if you use a really handsome (or pretty) substitute for your ugly mug (speaking of my own mug here only and not implying anything to any of you), and requires that the advertising contain your name or firm's name.

So, if I am reading this right, if you are willing to put your name and your face (if applicable) on the ad, you don't have to go through the hassles of submitting all your ads to committee (unless of course you are violating some other provision of the entire Rule 7). Am I understanding this correctly? Probably not since that would seem like much ado about nothing and I doubt that someone would have put this much thought into something so

pointless. But then again, perhaps I am mistaken about the "much thought" part.

Posted by Eric Barnes June 17, 2013 01:19 PM

I am opposed to the proposed advertising rules 7.02A and 7.02B. I believe they are burdensome, overreaching, and unnecessary.

Posted by Greg Misener June 14, 2013 06:14 PM

The proposed changes to the advertising rules for attorneys appears to be designed to push us back to the days when advertising was limited to "name, rank and serial number," a giant step backward for attorneys and consumers of legal services alike. Many attorneys provide legal information, free to the public, via websites, Facebook or Twitter accounts, and similar media, which appear to be "advertising" under the proposed rules. The number of posts (ie, advertising) can be substantial even for a sole practitioner or small firm. Demanding submission to the committee prior to publication is tantamount to prohibiting timely communications in a public forum by attorneys. This is an impermissible prior restraint of speech, even commercial speech.

The cost of compliance and enforcement will undoubtedly result in substantial increases in bar fees to fund this paternalistic undertaking, with no real positive impact on the profession or the public. Just managing the required filings will be an undertaking of substantial financial proportions. When those costs get passed on to the bar, we will, naturally, have to pass the increases along to our clients. I imagine we'll all tell them why – after submitting our proposed communications for preapproval.

The pre-approval process will be of no value to the electronic poster. The turn-around time of 30 days is far too slow – today's current topic can be very old news in 30 days. Small firm and solo practitioners, particularly those just starting out, will be especially affected. They may be forced to choose between serving the rules or serving their clients. If they choose the rules, they may have no clients. If they choose the client, they may have no license. Horrible choices.

It is currently a violation of the Rules of Professional Conduct to publish and distribute false or misleading advertising. Yes, we do have a few that persist in doing so anyway. We also have a few with distasteful or even repugnant advertising. We cannot legislate good taste; the distasteful and repugnant will remain. The rules haven't prevented false or misleading statements, and the new rules will not do so either. Enforcement will undoubtedly continue to be by complaint, despite the requirement that attorney's deluge the bar with advertising material daily. Most violators will continue to escape detection.

Bottom line? I see a substantial increase in costs with no real benefit to anyone, except, of course, the new employees hired to manage this morass.

Posted by Celeste Canning June 13, 2013 04:05 PM

Why not just have the attorney certify each year that his/her electronic advertisement is true and accurate? It may be certified in the same manner as the trust account certification. I have no objection to listing the URL.

Posted by Randall Skeen June 13, 2013 10:24 AM

Are the amendments and additions being made to clarify or address a problem. If to clarify, there is no reason for such clarification. The current rules are clear. To the extent and attorney is confused and unable to determine whether their advertising conforms to the rules, advisory opinions are available through the bar. To the extent that the changes are aimed at clarifying existing rules, they are a solution without a problem. If the changes are aimed at actual abuses in the market place, the problem lies not with the current rules but with enforcement of those rules. I urge the committee to specifically state openly the reason(s) for the proposed changes so that we may all discuss whether the changes actually address a problem.

The changes seem very unrealistic in the modern age and seem based on a serious misunderstanding of SEO and social media. As an attorney with a web site who actively engages in social media, must I submit copies of every post whether it be to my own blog, others' blogs, Facebook, Tweet, Pinterest, etc.? Given the lightening speed with which modern media changes, updates, self corrects, and becomes antiquated,it seems the the requirement is akin to taking a snap shot of water flowing down a river--or does the bar really wish the flood waters to run so deep that any regulation will be impossible?

I also see that the changes put solo and small firms at a disadvantage to the large firms--who have dominated the field.

Posted by Darwin Overson June 12, 2013 06:00 PM

I think the proposed new rules involving getting permission to publish something in advertising and having the Bar approve my website is - well - clearly a First Amendment violation. I see this as a make work project that is a remedy for an illness that does not exist. I do not have an IT department. I have to do all of this work myself. If someone is doing false advertising turn it over to the Attorney General's office for prosecution.
"Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. Carroll v. Princess Anne, 393 U.S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint "

Posted by Aric Cramer June 12, 2013 04:59 PM

I object to the filing requirements for advertising for small firms. It appears that the rule will unnecessarily burden too many attorneys without a complaint even being filed. If there is a specific complaint about a specific attorney, let that attorney respond. It makes more sense for both the bar and the attorneys. Moreover, this seems to unfairly target smaller offices who are less equipped to do this than the larger offices are.

I was on the advertising committee (and never been informed that I'm not) and I guess it's a bit frustrating that that committee never really functioned, and felt that it had no ability to do anything, despite known examples of violations of the advertising rules. Now, we're facing a rule that penalizes a lot of attorneys who have not necessarily done anything wrong.

Posted by Michael Bouwhuis June 12, 2013 04:37 PM

As I read this rule I envision a small advertising ethics committee locked in a dark room in the basement of the Utah Law and Justice Center with no windows, televisions, radios, newspapers, access to the Internet, or any other print or electronic media. Catered food is slid under the door 3 times a day and all the committee's human needs are met. However, this committee is the scorn of the bar because it seems to consistently fail in its mission. Unethical advertising is rampant and the public is being deceived and taken advantage of by lawyers all over the great State of Utah. It is like Gotham City right here. Bar administrators are beside themselves as to what to do with this committee because they believe they have tried everything. They decide to form a think tank. The think tank struggles for many hours about one big problem that seems to be at the heart of the Committee's failures—just how to find those many violations that are so rampant. Finally, when the problem seems beyond hope of a solution, someone has an idea! "Why don't we get the lawyers to submit all their advertising to the Committee just like the IRS does with taxes? We could then slide the information underneath the door with the food and the committee could review it for possible violations."
Well, for obvious reasons this idea is roundly accepted by the think tank and new regulations are written and proposed. These new rules may not punish evil doers, but at least now we will know who they are just in case there are enough resources to go after them some day.

Posted by Eric Barnes June 12, 2013 04:30 PM

Rules 7.02 is unnecessary. The current rule is adequate.

Rule 7.02A should be rejected in its entirety. The current rules give the bar all the teeth it needs to enforce professional standards in advertising and forcing an attorney to get an advisory opinion and go through a pre-approval process for ads will simply force that attorney to spend more hard earned money on something required by the bar that will benefit no one. If there is a complaint from a member of the public about an ad, the bar has all it needs to take care of the problem as it is.

Additionally, having to spend time on a pre-approval process will hurt the public because it will take attorneys' time, unnecessarily, that could otherwise be used to provide low-bono and pro-bono services.

Finally, it will have a substantial and disparate negative impact on the solos and small firms who rely heavily on advertising for there business model, as opposed to the larger firms which do not have to dedicate as much of their resources on advertising.

Posted by Jerry Salcido June 12, 2013 04:26 PM

RPC 7.01: (d) regarding testimonials: it needs to be clearer on whether a testimonial, per se, is prohibited. The appendix containing what several other states are prohibiting lists a testimonial as a per se violation of the ethical rules and is per se "misleading" by its very nature. I respectfully disagree. If a client wants to provide a testimonial about how passionate I was about their case, and about how I was willing to go the extra mile, and how I was a great listener, etc., what is wrong with that? If anything, that type of comment should be welcomed. It gives the public an opportunity to see what others think of my services. Would this mean that any comments an attorney welcomes that are posted on his website cannot be posted, good or bad?

I advertise "STAY OUT OF JAIL". Does this mean I am in violation of the rules? When my clients come into my office I explain to them the best ways to stay out of jail. They contact me initially to find out how they can accomplish this, as this is their primary objective. I try to be realistic with them and let them know if I think they have a realistic chance, based on the facts of their case, but also tell them what we can do to increase our chances of an alternative form of punishment in lieu of jail.

I have a section on my website that compares my services to other attorneys, distinguishing my awards and experience to other attorneys and pose the question: does the other attorney have this experience? (to get the potential client thinking about what the proper questions are to ask while in the process of selecting an attorney). Is that a violation under the proposed rules since I am technically comparing my services to other attorneys, albeit in a general manner?

Rule 7.02: subsection (i) should be omitted. Placing the burden on every criminal attorney that advertises is onerous on those attorneys as well as the overseeing agency. Alternatively, please consider simply having any person that is complaining against the offending attorney to report that attorney and provide copies of the offending advertisement. This will minimize needless paperwork submitted to the overseeing agency, as well as minimize the onerous duty to print every single ad placed, which will kill the small solo practicing attorney that already has trouble getting everything done to just survive. Please!!!!

The intermediate standard proposed in Harrell v. Florida requires the government to prove that an imposition on commercial speech "(1) promotes a substantial gov't interest, (2) directly advances the interest asserted, and 3) not more extensive than necessary to serve that interest (in protecting the public from misleading advertising)." The third prong is not met here: asking attorneys to send documentation and a report to the Bar Ass'n or whomever is overseeing the ads before the ad hits is much more burdensome that simply having the complaining party provide the offending material. If the attorney has, in fact, violated the ethical rules, they will be sanctioned immediately and be required to pull the ad. If it happens again they can be disbarred. The offending attorney can also be reprimanded in the bar journal, which will have a deterring effect on others. The public will not be prejudiced in seeing an offending ad if it is only run once or twice before it is caught. The head ache to attorneys in dealing with this, and even the very likely possibility that the attorneys will INCREASE their legal fees to deal with the additional headaches and time required to file this documentation, can only be assumed to pass on to the client/public, which, arguable, ultimately ends up hurting the client/public.

Posted by Sean Druyon June 12, 2013 02:12 PM

I welcome the requirements regarding identification of non-Utah attorneys. It is also appropriate that firms explain whether the client retains responsibility for costs if the case is not successful. Further, I don't have a problem with listing my URL's on a licensing form.

The problems I see are 1. The analysis; 2. The requirements for keeping and providing, as I understand it, copies of our webpages; and 3. Charging a fee to ensure we are in compliance with Bar's new rule.

The Bar first claims they are filing this to address problems. They then admit there are no problems in this state.

They allege this has been discussed for several years. However, they indicate it was only from early 2010 through late 2012, or less than three years.

The Bar implies they cannot take action without a complaint in these matters. That does not appear to be fully accurate.

The Bar indicates a great majority, i.e., 58%, find lawyer advertising important. Actually, 58% of those surveyed found it important. However, that begs the question of whether the attorneys find changes to lawyer advertising important. We find a great many of our rules important. That does not imply we support changing them.

The petitioners wish to charge a fee for pre-approval, not simply because of cost of administration, but to discourage attorneys from seeking pre-approval. Discouraging attorneys from ensuring they are in compliance with any ethical rule, let alone a new rule, seems a strange stance for the Bar to take.

As I understand it, we are to forward the Bar a printed copy of our web pages. Does this include Facebook, LinkedIn, Google+, Manta, and the many other free pages? Does the Bar understand how much material they will receive each year?

What is the purpose in sending a copy if the Bar is purportedly unable to make a complaint without a notarized complaint?

Why does the attorney need to keep a copy of the advertisement if it is sent to the Bar? Isn't that a duplication of effort, space and paper?

The bar recognizes that web sites may be constantly tweaked. How does providing a copy of a website once a year demonstrate the status of the site at the time a complaint arises?

Wouldn't it be easier to put the onus on the attorney to provide proof s/he didn't violate the rules if a complaint is made?

The petition should be denied and the matter returned to the Bar for fuller, broader consultation.

Posted by Glen A Cook June 12, 2013 01:36 PM

I find the proposed new rules requiring lawyers to annually submit any Universal Resource Locator (URL) they use in advertising and to submit such advertising as mass mailings to be onerous and condescending.

Posted by Thomas Weber June 11, 2013 05:20 PM

I am not sure how the addition to comment 6 of Rule 7.2 accomplishes anything beyond further restricting attorney (and non-attorney) speech without furthering any legitimate interest of the Bar or the general public. The only risk of the type of relationship envisioned by the addition to comment 6, that I can foresee, is that it could deceive the public into thinking the referral service is objective in its referral decisions. But that very risk is already addressed by the very next comment (#7) which requires attorneys receiving referrals from referral services to assure that the referral service's activities "are compatible with the lawyer's professional obligations." If a referral service is deceptive and a knowing attorney accepts a referral from it, the Bar can take action under comment 7.

So, if comment 7 already mitigated the risks involved with the type of relationship prohibited by the addition to

comment 6, without prohibiting those relationships, what legitimate interest of the Bar or the general public is the addition to comment 6 serving?

Therefore, my recommendation, obviously, is that the addition to comment 6 not be implemented.

Posted by Ben Pollock June 11, 2013 02:32 PM

Rule 7.1(c)- Not only is this rule extremely poorly written, and is extremely unspecific, but opens up a lawyer to RPC violation allegation as a method of competition between attorneys. It does not specify that comparing one's services to other attorneys generally, based on general experiences, is clearly different than comparing to a specific attorney by name. This also appears to be an attempt to control commercial speech in a way that far overreaches, especially considering that the rest of the rule already clearly prohibits false and misleading speech.
Rule 7.2, 7.2A, 7.2B- These rules seem to do nothing more than create an additional burden on lawyers actively competition in this jurisdiction, while allowing an Laise faire attitude outside. It creates a brand new committee to review, at it's leizure, and at bar members expense, to make sure that advertising is how the bar wants it. Again, it appears that the bar is using the big firms to squash small and independent businesses, here by dictating speech. 7.2A allows for use of "new articles", which may have been part of a concerted effort of an attorney by making inquiry or providing calculated information to the journalist, but a firm's slogan might violate the rule. Any rule such as this should be specific as to individuals, based on specific complaints. Instead it requires attorney already burdened with licensing costs, and regulation (for which is applied in the most political of fashion, and has had no effect on actual professionalism or civility in this state) to be further burdened by a new committee likely to be packed with shareholders at large multi-state law firms or Salt Lake, which will further cause attorneys to be repeatedly submitting new proposals for their advertising each time they want to change something on their website. This will drastically increase already high advertising costs, and will clearly add fees to both the submission of approval of advertising, as well as to bar fees.

Posted by Robert W. Ickes June 11, 2013 12:42 PM

I've reviewed the changes to the advertising rules and believe the changes are for the good of the public. I have been troubled by some of the lawyer advertising I've seen on television and felt that it likely violated existing rules. These changes make the matter clear.

Posted by Brad Bowen June 11, 2013 12:36 PM

First, I don't believe that the proposed RPC 07.02A and 07.02B are warranted. Attorneys are capable of producing advertising that complies with the RPC without supervision.
Second, I highly doubt that the proposed committee will be capable of reviewing all of the proposed attorney advertising. This is particularly true with respect to websites that involve blogging. Much of the legal content on the internet is being produced for the purpose of building the authority of the attorney creating it. It is a form of advertising with the proposed rule. The volume of that content is huge.
Third, the burden on attorneys is too high. Submitting applications for approval of content will be time consuming, and therefore very costly to attorney who sell their time to make a living. The inconvenience of submitting copies of all public adverting will certainly have the effect of reducing what attorneys are willing to produce in the form of content that may be made available to the public.
Therefore, at a minimum, submitting any material for review by the proposed committee should be entirely optional. Compliance with RPC 07.01 can best be enforced through the process of reviewing complaints alleging violations.

Posted by Thor Roundy June 11, 2013 12:32 PM

These new provisions requiring submission of url's and advertising material etcetera are unnecessary and overly burdensome overreach. They will harm the public by increasing the demands on attorneys' time and firms' resources especially at small, solo, and growing firms--contributing to higher fees without any corresponding benefit in legal services. But I guess that's what we should want the most as attorneys. So congrats.

Posted by Timothy Dudley June 11, 2013 12:07 PM

Utah State Courts

Diane Abegglen <dianea@utcourts.gov>

Comment on Advertising Rules

1 message

Katherine Fox <kfox@utahbar.org> Mon, Aug 5, 2013 at 4:08 PM
To: Diane Abegglen <dianea@utcourts.gov>

This was an email sent to Rob Jeffs re the advertising rule proposals.

From: Print Services
Sent: Monday, August 05, 2013 4:08 PM
To: Katherine Fox
Subject: Your Requested Scan from the USB Copier

3509_001.pdf
109K

From: Matthew Driggs [mailto:mdriggs@lawdbd.com]
Sent: Thursday, July 25, 2013 5:06 PM
To: rljeffs@jeffslawoffice.com
Subject: proposed changes to rule 7.2, 7.2A advertising

I enjoyed meeting with you the other day regarding the proposed rule changes. Thank you for your time and efforts regarding this important matter. I can only imagine the amount of time that has gone into putting all of this together. I am totally supportive of enacting a rule that has some teeth and do not want to get in the way of accomplishing that goal. After our meeting you asked that I jot down a few concerns and get them over to you.

As you can imagine, I spend quite a bit of my time thinking about marketing in the very competitive niche of personal injury law. I try many different types of marketing and am concerned that a strict reading of rule 7.2A will be almost impossible to comply with. I understand the need of having a rule that can be enforced and I am all in favor of that but 7.2A may be difficult to manage. The following is a list of marketing methods that I use or I know other lawyers use in their attempts to get more clients. With the expanse of the internet the number of ways to market will only increase with time. I genuinely want to be in compliance with the rule but the following list might give you an idea of how much marketing is being done. I could think of abuses occurring in all of these examples. It would be almost impossible to submit all of these marketing strategies to the bar, retain them for three years, and keep a record of when each of these marketing strategies were used.

1. Owning and managing several websites, legal and non legal sites. Issues relating to backlinks and anchor text.
2. Pay per click. Issues related to landing pages (non necessarily seeable on websites) and text ads.
3. Videos. Video directory sites such as Youtube or even videos on your own website or other sites such as Dex.com.
4. Press releases. Controlling what you or others are saying about your firm.
5. Online directories such as city search, yelp, superpages, etc. Each of these directories has a profile that is an advertisement.
6. Blog posting. Every blog post is arguably a "communication to induce people to use a lawyer's services"
7. Forum post online or comments to other's postings.
8. Social media. Facebook, Twitter, pinterest, snapchat, etc. Will every tweet or post need to be sent to the Bar?
9. TV/Radio
10. Internet display ads. These ads pop up all over the internet including social media sites.
11. Client testimonials/ reviews
12. Text marketing
13. Online seminars, webinars, podcasts, etc.
14. Flyers and handouts.
15. Tradeshows and event booths including signage at the booth and promotional items or giveaways.
16. Promotional products such as pens, balls, folders, flashlights, etc.
17. Sporting event sponsorships and signage
18. Books, Ebooks and articles (print and electronic)

19. Phone hold messaging
20. Direct mail
21. Public speaking and seminars
22. Email marketing
23. Groupons – internet coupon marketing
24. Print – newspapers, magazines, phonebooks
25. Outdoor signage – billboards, bus stops, high school banner, etc.
26. Online directories, dex online, yp.com, superlawyers, lawyers.com, etc. Each of these online directories has profiles, blogs and more.

The list could go on and on as new marketing mediums come up. I am totally supportive of putting together a rule that can be enforced and I will certainly comply with the rule if it becomes adopted. I just don't know how serious 7.2A will be enforced as all lawyers will probably be engaged in many of these types of marketing methods but will not retain copies of everything for 3 years let alone send it to the Bar as required by the rule.

These are just some of my thought that I wanted to pass on to you for your consideration. I am happy to discuss these in more detail if you would like. I am also happy to serve on any committee that comes about because of the adoption of the rule. I really see the need of a committee that has the power to refer lawyers to the OPC for advertising rule violations.

All in all I would love to help make our Bar more ethical and help take things to a higher level. Thanks again for your efforts and thanks for meeting with me.

Sincerely,

Matthew W. Driggs

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August 9, 2013

Chief Justice Matthew Durrant
Utah Supreme Court
PO Box 140210
Salt Lake City, UT 84114-0210

Re: Petition to Revise the Utah Rules of Professional Conduct On Advertising Rules

Justice Durrant:

The Utah Association of Criminal Defense Lawyers ("UACDL") opposes the proposed changes to lawyer advertising rules that the Utah State Bar recently announced because the proposals unduly burden small firms and sole practitioners, are unnecessary to protect the public, and implicate fundamental free speech rights. The proposed rules would exact a large financial and time burden on lawyers and would disproportionately affect attorneys with modest or few resources. Further, the State Bar candidly admits in its proposal that current problems with lawyer advertising result due to the Bar's own failure to enforce existing rules. Given this reality, the Bar should adopt less onerous measures to improve compliance with the current rules rather than imposing unnecessarily heavy burdens on members of the Bar. In addition, the proposals face possible court challenges and resulting litigation expenses because they directly implicate the First Amendment. For these reasons, the Supreme Court should reject the proposals and direct the State Bar to implement less drastic measures

The scope of the proposed advertising rules causes UACDL leaders and its members grave concerns about the financial and time burdens that will result if the proposals are adopted. UACDL consists mainly of about 500 small firm attorneys and sole practitioners who earn a modest living. In essence, these attorneys are small business owners who not only practice law but also operate a small business complete with bookkeeping duties, tax and licensing obligations, personnel and benefits expenses, and ethical and liability concerns. UACDL's membership largely reflects the majority of the members of the Utah State Bar who struggle to make a living while complying with all of the other duties and burdens associated with a small business.

The proposed rule changes would significantly add to these existing burdens by requiring lawyers to submit all new advertising to the Bar for review, regardless of where or how the advertising occurs. Specifically, proposed Rule 7.2A(b) is broadly written to require reporting of any website that a lawyer "uses." Although the petition for the rule changes explains that a lawyer need only submit this information once a year, the remaining provisions of proposed Rule 7.2A indicate that

updates to websites may require continual reporting. Rule 7.2A(a) requires that copies of any "solicitation communication" be filed with the bar "no later than the . . . sending" of the information regardless of the means sent. Read strictly, this proposal would conceivably apply any time a lawyer adds information to his or her business website when the information could be construed as soliciting clients. For example, anytime a lawyer posts a blog comment on a recent development in the law that suggests the lawyer possesses expertise in a specific area of the law, the lawyer may be required to submit the blog for approval with the Bar. Similarly, all posts on social networking websites may be affected including, Facebook, Twitter, Instagram, etc. if they are viewed as solicitations or representations of expertise.

The new rules may even encompass third parties who independently post lawyer information on their own such as Avvo, Justia?, LawQA.com, etc. Given the information sharing nature of online activity, information contained on one website is commonly re-posted on other websites. For example, any answers to legal questions that an attorney has posted on the LawQA.com site, is likely automatically re-posted on one of LawQA's many sister sites. And, any attorney with a listing on Justia.com is also listed on that site's sister site with law.cornell.com.

The potential burdens on small firms and sole practitioners under these rule changes would be overwhelming. They would be required to track others' activities to ensure that information about their services is not considered solicitation. UACDL members are already struggling financially in a still sluggish economy that is just emerging from a deep recession. Competition for business has resulted in attorneys drastically cutting their fees. The lack of available jobs has further resulted in newly admitted attorneys establishing their own law practices and creating even more competition for business. The proposed rule changes would add to these financial pressures and require significant time commitments from attorneys who already work long hours just to pay their bills.

These burdens would also have a disproportionate, detrimental effect on small firms and sole practitioners. Lawyers who work for bigger law forms would not feel the burdens imposed by the new advertising rules because those firms have the financial resources to cover the financial and time costs of submitting advertising to the State Bar. These firms can use existing staff or hire others to comply with the requirements. In contrast, smaller firms and sole practitioners will be forced to add to their already heavy workloads and draw time away from representing clients.

These added demands on small firms and sole practitioners will, in turn, negatively affect the very persons that the new rules purportedly seek to protect: the public. The rules create added pressures on attorneys who are being forced to accept less money for the same amount of work that needs to be done. These pressures then risk the adequacy of the representation the attorneys are able to provide. Persons accused of even minor crimes face serious repercussions that include lost employment, incarceration, fines, and the resulting life disruption associated with an arrest and possible conviction. In essence, the very people that the proposed rule changes would appear to be targeted to protect from misleading or overreaching advertisements may suffer from less time that attorneys have to devote to their clients' cases.

Although the rule changes include a safe harbor provision, the process for obtaining this protection is even more burdensome than the general reporting requirements. Under the proposal, lawyers may seek approval of advertisements beforehand for an as yet undetermined fee. Rule 7.2A(c). The Bar's petition suggests that the fee may be as low as the $150 charged in other states. A newly proposed committee would then have 30 days to render a decision on the solicitation. If the committee concludes that the advertisement complies with the new rules, lawyers would be protected from a bar complaint.

But, this proceeding is impractical and expensive for small firms and sole practitioners who wish to protect themselves from bar complaints. If, as suggested above, a lawyer solicits business every time he or she comments on a blog or posts a victory on a website, obtaining pre-approval to post the information would require considerable time and money. Lawyers seeking to provide the public up-to-date information would be required to delay posting the information for several weeks. Moreover, multiple changes to websites throughout the year would pose an undue financial hardship on attorneys.

As with the general proposals for all solicitations, the safe harbor provisions would also disproportionately affect small firms and sole practitioners who lack the time and resources to seek pre-approval. Ironically, these lawyers are the ones who can least afford to risk a bar complaint over advertising because bar proceedings would devastate lawyers who lack the time and resources to defend themselves. The Bar's proposed safe harbor thus turns out to be illusory for these lawyers and instead creates an inconvenient, expensive burden.

The sting of these rules increases when the Bar implicitly recognizes itself that the existing rules on advertising adequately address current problems and that rule violations are far less common compared to other states. First of all, the petition acknowledges that the Utah Bar "has not been experiencing the degree of problems" in other states with lawyer advertising. Petition at 3. Rather, the proposals were intended to "head off" potential problems that have arisen in far more populous states such as Texas and Florida. Petition at 1. The Bar's justification for the rules changes, instead, centers on the absence of enforcement under current rules. According to the Bar, advertising rules are only enforced if someone files a notarized complaint against a lawyer. Petition at 3.

But, the absence of enforcement by the Bar of its own rules does not necessitate imposing burdensome requirements on all attorneys, especially when the Bar concedes that few problems exist in Utah. Logically, the Bar could implement less drastic measures to encourage compliance with existing rules than demanding that all lawyer solicitations be sent to the Bar. UACDL recognizes that some Utah lawyers abuse existing rules and should be corrected. But, punishing the entire Bar membership for the abuses of a few lawyers is overkill.

In addition, comparing the Utah Bar to Texas, Ohio, and Florida attorneys provides little or no support for the need for additional rules. Those states' populations far exceed Utah's and no evidence supports that the culture of those Bars serves as any prediction for how Utah attorneys will behave as the Bar membership grows. Obvious differences exist between Utah and those states including, the presence of multiple large media markets, numerous law schools in both states that produce new lawyers annually, elected as opposed to appointed judges, and civility problems that simply do not exist in Utah. Although

the Bar's petition to change Utah's rules models the proposals after Nevada, the petition does not discuss the level of problems in that state that prompted the Nevada Bar to change its rules. Thus, Nevada serves as no support to adopt rule changes in Utah especially when the Bar admits that few problems currently exist here.

Finally, the proposed rules raise potential First Amendment problems that risk protracted, expensive litigation. Although the Bar claims in its petition that the rule changes do not create a prior restraint, the law in this area is unclear. As explained above, the new rules would require attorneys to present solicitations to the Bar before being sent to the public. Rule 7.2A(a), (b). Were the Bar to try to prevent lawyers from distributing the information, a prior restraint would result. *Shapero v. Ky. Bar Ass'n.*, 486 U.S. 466 (1988). Because the Supreme Court and lower federal courts have not specifically defined the contours of prior restraint law in this context, the law is uncertain. *Harrell v. Florida Bar*, 608 F.3d 1241, 1269 (11th Cir. 2010) (although Supreme Court has "strongly suggested" that pre-distribution submission to the Bar is constitutional, the question remains undecided).

In sum, the proposed rules are unnecessary because less onerous measures are available to the Bar to increase compliance with existing rules on lawyer advertising. Rather than the sledgehammer approach adopted by the Bar, a more refined response is warranted to increase awareness, root out abuses, and avoid future problems. The extensive burdens that would follow implementation of the proposed rules are not justified when few problems currently exist. UACDL requests this Court not to impose undue hardships on the compliant members of the Bar who make up the vast majority of attorneys on the state. Rather, the Bar should target those attorneys who are not following existing rules and not punish ethical, diligent attorneys who are a credit to the Bar and who serve the public.

Sincerely,

Debbie Hill, President

CC: Bar President Curtis M. Jensen; John Baldwin

Utah State Courts

Advertising rule comments

Katherine Fox <kfox@utahbar.org> Mon, Aug 12, 2013 at 4:14 PM
To: Tim Shea <tims@utcourts.gov>, Diane Abegglen <dianea@utcourts.gov>

I have two comments (from Loren Lambert and Craig Bainum) on the advertising rules that don't appear on the court's website for comments. Did they come from you?

Katherine A. Fox
General Counsel
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111
Telephone: 801.531.9077
Fax: 801.531.0660

Comments to Advertising Rule Amendments

To Whom It May Concern,

I intensely dislike some law firm adds, especially with actors pretending to have been severely injured in an accident, I see and hear, but I more intensely dislike governmental/bar intrusion into advertising.

It is pathetic and ridiculous that the power house lawyers and firms, that are able to place themselves in positions of authority, or those that see themselves as the anal protectors of all things good and pure, see fit to baby sit and squash their competitors by eliminating marketing that is direct and inexpensive and must find a free and easy way to see what their competitors are doing by making them submit copy of advertising. This is an inappropriate, over reaching, unnecessary and an unfair conversion of business practices.

It is also ironic that more government/bar intrusion is sought in a State that prides itself for being conservative and claiming they want less government.

Stop babysitting and imposing old fashion notions created to squash competition but passed in the guise of protecting our standards of ethics.

Sincerely Loren M. Lambert

ARROW LEGAL SOLUTION GRP, PC

Attorney Loren M. Lambert

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Midvale, Utah 84047

(801) 568-0041

I am opposed to this proposed rule. Websites have to be constantly updated to be effective. Sometimes those updates need to be instantaneous and always at least rapid. It will also be time consuming to file these reports—time I would rather spend elsewhere.

How about we submit our URL's, and the committee can review the content on its own.

I wonder if the proponents have any idea how much work this is going to generate for the committee who reviews the materials we will have to send in for their review.

Finally, what is the ill that this treatment will cure?

Please call if you would like to discuss this further. I would be happy to do so.

Craig M Bainum

Attorney at Law

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Tab 5

Utah State Courts

Diane Abegglen <dianea@utcourts.gov>

A triviality

1 message

Gary Sackett <GSackett@joneswaldo.com> Tue, Jul 23, 2013 at 12:04 PM
To: Diane Abegglen <dianea@utcourts.gov>
Cc: "Steven G. Johnson" <stevejohnson5336@comcast.net>

Diane,

As the Rules committee slogs through possible changes to the Rules of Professional Conduct, we have started to accumulate a list of minor stylistic and technical "fixes" to incorporate in the final submission to the Court.

Here's another one that I noticed some time ago: The comment numbers in Rule 1.16 are in a style different from all the other rules. The ABA standard and all but one Utah rule uses this style: [1], [2], etc. Our Rule 1.16 uses 1., 2., etc.

—Gary