

Minutes of the Committee on Rules of Professional Conduct

November 18, 2013

Draft. Subject to approval

Members Present

Thomas B. Brunker, J. Simon Cantarero, Gary L. Chrystler, Nayer H. Honarvar, Steven G. Johnson, Chair, Judge Darold J. McDade, Vanessa M. Ramos, Kent Roche, Gary G. Sackett, Paula K. Smith, Judge Vernice S. Trease, Paul Veasy, Billy L. Walker

Members Excused

John H. Bogart, Trent D. Nelson, Stuart Schultz, Leslie Van Frank

Staff

Tim Shea

Guests

Robert Jeffs, Katherine Fox, John Baldwin

(1) Approval of minutes.

The minutes of September 16, 2013 were approved as prepared.

(2) Inquiry from Legislative Research and General Counsel

Mr. Johnson described an email from the Office of Legislative Research and General Counsel about the committee's failure to adopt a further amendment to Rule 1.10 that the office had recommended. A copy of the inquiry and of Mr. Johnson's reply were provided to the committee.

(3) Advertising rules

Mr. Johnson welcomed Mr. Jeffs and invited him to address the questions that the committee members had raised.

Mr. Jeffs said that a few years ago the Bar Commissioners had been getting pressure about the lack of prosecution for false and misleading advertising. The Western States Bar Conference also focused on the topic of enforcing the prohibition on false and misleading advertising. After conversations with OPC, the Commission concluded that the rules would not support prosecution because they are unconstitutionally vague. The Commission decided to take no action at that time because this committee was considering the topic.

The Commission conducted a survey of lawyers in which 51% said they engaged in advertising, many using webpages and social media. The survey also showed that lawyers favored the bar monitoring advertising.

The Commission met with the Supreme Court to inform the court about the Commission's deliberations. The court requested that the Commission form an ad hoc committee to further study the issues. Mr.

Sackett and Mr. Schultz from this committee sat on the ad hoc committee. The ad hoc committee drafted rules, modeled after Nevada, that were eventually published for comment. The Commission revised the drafts and approved the petition to amend the rules.

Mr. Jeffs said he is convinced that there is false and misleading advertising and that it harms the public and the profession.

Mr. Jeffs was asked whether the Commission had investigated what "monitor advertising" meant. He said that the Commission had not. He said that the Commission does not have a process for monitoring advertising. OPC waits until a complaint is filed and requests a response from the lawyer if one is warranted.

Mr. Sackett asked whether the Commission had considered giving OPC the authority to investigate false and misleading advertising without a complaint being filed. Mr. Jeffs said that a lot of advertising won't be known to OPC because it is not public. The Commission pursued the Nevada model because Nevada has few prosecutions and yet compliance with submissions is high.

Judge Trease asked what a lawyer would have to submit for approval. Mr. Jeffs described a cover sheet that would accompany the advertisement itself. These would be screened first by a paralegal and then by the Advertising Committee. He said the URL for a website would be submitted annually. Solicitation tweets would be submitted for pre-approval, but tweets that are not solicitations would not. Communication to a client is not solicitation, but it cannot be false or misleading.

Mr. Sackett said that a better approach would be to clarify what is false and misleading advertising and to use existing enforcement mechanisms. Mr. Jeffs said that regulation is better than enforcement in improving compliance.

Mr. Cantarero said that the regulations make it more difficult to make a living. Smaller and less well-established firms depend on advertising for clients in a way that larger firms do not. The regulations make it more burdensome to advertise. Mr. Jeffs said he did not think the submission requirements were too burdensome. He said that lawyers in Nevada and Texas, which have similar rules, see it as a reasonable regulation.

Mr. Walker said that most advertisements are at best vague and at worst false. He said most states take a reactive approach, but that Nevada, Texas and Florida have taken a proactive approach. He said more lawyers are advertising and that the bar and the courts want to anticipate what might happen next. The amendments help lawyers understand what is and is not permitted.

He said that nearly all complaints about false and misleading advertising come from lawyers. Clients may be drawn in by advertising, but they complain about the harm done to them by poor representation. He said that only 2 or 3 clients have complained about false and misleading advertising and that the advertising rules were involved in at most a few cases per year.

Mr. Sackett said that the comments were 26 to 1 against the proposed rules and asked whether that had given the Commission pause. Mr. Jeffs said that he would have expected more comments if the lawyers

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were opposed. Mr. Baldwin said that the comments did not raise any points that the Commission had not already considered.

Ms. Smith asked whether the regulations and increased enforcement would be a drain on OPC resources. Mr. Jeffs said that the fee for a submission would help off-set the cost. He said Nevada had hired a half-time paralegal for the initial screening and that Nevada has few prosecutions.

Ms. Fox requested a copy of the committee's recommendations so she can incorporate them in the Commission's response as requested by the Supreme Court.

Mr. Jeffs, Ms. Fox and Mr. Baldwin left the meeting.

Mr. Chrystler said that he is not convinced there is a problem. He said that guidance about what is false and misleading advertising is good, but he does not support mandatory pre-approval. He said perhaps the preapproval process could be optional. Judge Trease said that most of the comments objected to the submission requirement, not the guidance.

Ms. Smith said that the rules about the Advertising Committee and the submission process are administrative and should not be in the rules of professional conduct. Mr. Walker said that there used to be an Advertising Committee, but all they did was review yellow page ads. He said that he gives advice about advertising on the OPC hotline, but it is difficult because the rules offer little guidance.

Mr. Johnson requested that the committee send any further thoughts to Mr. Shea.

(4) Next meeting

The next meeting is on January 27, 2014 at 5:00 p.m.