paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

According to the commission's report to the delegates, these choice of rule agreements may be useful in getting lawyers and clients to talk about which conflicts rules would and should apply in a representation, and they also may provide guidance to disciplinary authorities when they are asked to consider the reasonableness of a lawyer's determination about which jurisdiction's rules apply.

In introducing the measure, former ABA president Tommy Wells, of Alabama, called it a "very modest proposal" that allows lawyers to awaken clients to an issue that may affect their relationship.

These agreements are not to say "this law applies" but rather that "we believe that this is where the predominant effect is," Wells explained. He noted that the new language provides several safeguards:

- the client's informed consent must be obtained;
- the agreement must be written; and
- the selected jurisdiction must be a reasonable choice.

As with the Ethics 20/20 proposals on foreign lawyers, the choice of law measure passed overwhelmingly by voice vote without anyone speaking against it.

Boost for Unbundling Services. Delegates also approved as revised a resolution that "encourages practitioners, when appropriate, to consider limiting the scope of their representation, including the unbundling of legal services, as a means of increasing access to legal services."

The measure also calls on bar associations, courts, and continuing legal education providers to furnish guidance to lawyers about complying with professional obligations when they provide unbundled services. It also urges bar groups, the judiciary, and practitioners to make the public aware of this option for obtaining legal help.

The delegates reworded the resolution slightly to make clear that it encourages limited scope representation "when appropriate" and is not meant to urge all lawyers to provide unbundled services with respect to all clients.

According to the commission's report, limited scope representation is a cost-effective solution for increasing access to justice, but research shows that many people who could benefit from unbundled services are not aware of this option, and lawyers lack clear guidance on how to provide limited scope representation effectively.

In introducing the measure, H. Ritchie Hollenbaugh, Ohio, said that delivering unbundled services is coming to be viewed as a key way for lower-income people to receive representation.

The purpose of the resolution is to "spread the word" about the potential utility of unbundled services, Hollenbaugh said. He chairs the ABA Standing Committee on the Delivery of Legal Services, which sponsored the resolution.

Hollenbaugh pointed out that Model Rule 1.2(c) provides a framework for lawyers to aid people who are otherwise self-represented. Bar associations can help lawyers develop a business model for delivering unbundled services, he suggested.

Studies indicate, Hollenbaugh said, that those who represent themselves could be much more successful if they have some substantive help on key aspects of their legal matter. Courts also recognize, he added, that they are assisted in many ways if pro se litigants appearing before them have had some substantive help in their case.

BY JOAN C. ROGERS

Full text of the resolutions and accompanying reports are available at http://www.abanow.org/issue/?midyear-meeting-2013&view=hod.

Advertising and Solicitation

APRL Panelists Debate What Role Regulation Of Lawyer Ads Should Play in 21st Century

DALLAS—Now that the legal profession has moved into a new century, some are asking about the continuing usefulness of rules drawn up in the last one that limit what lawyers are allowed to say to the public about themselves and their services.

At two Feb. 8 programs during their midyear meeting, members of the Association of Professional Responsibility Lawyers grappled with the difficulties of regulating lawyer advertising in the digital age.

Are Rules Even Necessary? In the session titled " 'Outlaw' or 'Artlaw'," panelist David P. Atkins declared that regulators are caught in the tension between "the strong demand from political figures, the organized bar, and judges to regulate cheesiness and tastelessness, and the federal courts who have been invalidating these attempts." Atkins is a partner of Pullman & Comley in Bridgeport, Conn.

Another participant posed a fundamental question. "Since we have quite stringent advertising laws in this country anyway, do we need legal ethics rules" regulating lawyer advertising? asked panelist Nicole Hyland of Frankfurt Kurnit Klein & Selz, New York.

Federal law already regulates truth in advertising, Hyland explained, and tries to make sure people aren't being lied to. "Would that be enough for lawyers as a profession?" she wondered. Or are the ethics rules really about "enhancing the reputation" of the legal profession? she added.

Attendees received questionnaires with a list highlighting several common lawyer advertising ethics prohibitions with potential free-speech problems. (*See box.*) Atkins explained "This is the type of checklist that a lawyer-regulator goes through when analyzing advertising for ethics rules compliance. The prohibitions are hypothetical, but they are based on rules that have recently been challenged on First Amendment grounds."

Moderator Donald D. Campbell, of Collins Einhorn Farrell in Southfield, Mich., asked the audience to consider which, if any, of the prohibitions on the checklist applied as several videos of lawyer advertising were screened. (*See box for links.*)

Pointing to the third checklist item—which asks if the ad uses "visual or verbal depictions to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the por-

trayal of lawyers exhibiting characteristics clearly unrelated to legal competence"—panelist J. Charles Mokriski commented "you can make arguments on both sides" about the propriety of each video. Mokriski is professional responsibility counsel at Proskauer Rose in New York.

Passionate Attorneys. With respect to over-the-top lawyer behavior on camera, Mokriski said "It's relevant that [a lawyer] is passionate about his cause." To emphasize that point, he read from the Second Circuit's opinion in *Alexander v. Cahill*, 598 F.3d 79, 94, 26 Law. Man. Prof. Conduct 146 (2d Cir. 2010), invalidating many of New York's advertising rules:

> [W]e cannot seriously believe—purely as a matter of "common sense"—that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics. Indeed, some of these gimmicks, while seemingly irrelevant, may actually serve "important communicative functions: [they] attract[ ] the attention of the audience to the advertiser's message, and [they] may also serve to impart information directly." . . . Plaintiffs assert that they use attention-getting techniques to "communicate ideas in an easy-to-understand form, to attract viewer interest, to give emphasis, and to make information more memorable." . . . Defendants provide no evidence to the contrary; nor do they provide evidence that consumers have, in fact, been misled by these or similar advertisements.

Campbell asked whether different standards should apply to a lawyer's conduct depending on whether it occurred in an advertisement or in an office consultation. "If you come to my office and I decide I'm going to engage in pantomime, or sing a rap song, to try to induce you to retain me, is that a problem?" he remarked.

Potentially Problematic Restrictions

APRL panelists and audience members debated a list of hypothetical lawyer advertisement prohibitions, based on ethics rules that have recently been challenged on constitutional grounds:

"A lawyer's or law firm's advertisement shall not:

"Describe or characterize the quality of the lawyer's or law firm's services.

"Promise results for a client.

"Use visual or verbal depictions to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence.

"State or imply that the lawyer or law firm is a 'specialist,' 'expert' or 'authority' in a particular practice area.

"Include visual or verbal descriptions, depictions, or portrayals of persons or events that are manipulative or likely to confuse the viewer.

"Utilize any background sound other than instrumental music."

One audience member's reaction was "We are trying to regulate taste." But, another attendee pointed out, "The irony is that the rules say all sorts of things other than 'is it in good taste.' "

Advertising regulation varies not only among jurisdictions but sometimes within a jurisdiction depending on the attitudes of individual regulators, several audience members stated.

"Everybody has a different [view] of how lawyers should behave," one said. Another remarked "We are now in the 21st century. If a guy wants to market himself with a rap tune, more power to him, as long as he is not misleading anyone." A third attendee commented "Wherever you think the boundaries [of what is permissible in lawyer advertising] should be, the stark differences between what's okay and what's not okay in neighboring jurisdictions hurts us all."

Not Just About Rules. Hyland cautioned that vetting lawyer advertising videos should go beyond the ethics rules. Copyright infringement, she said, is an issue whenever the video includes images of works created by others, even as background, or music and rhythms. There's also the risk that competing lawyers will make disparagement claims if the video belittles other legal options, even if no names are mentioned, she said.

Reading the first ethics prohibition on the checklist, which asks if the ad describes or characterizes the quality of the lawyer's services, an audience member said "You would think that should be a good thing, but evidently it's forbidden."

Atkins explained that the hypothetical "was drawn from the Florida rule that was invalidated as void for vagueness" in *Harrell v. Florida Bar*, No. 3:08-cv-15-J-34TEM, 27 Law. Man. Prof. Conduct 628 (M.D. Fla. Sept. 30, 2011). But just one week before the conference, he continued, the Florida Supreme Court adopted new restrictions. (See 29 Law. Man. Prof. Conduct 97.) "The new rule prohibits characterizations unless they are 'objectively verifiable,' " he pointed out.

Who's Being Protected? Several audience members expressed skepticism about whether consumers are so ignorant or unsophisticated as to need this kind of protection. One asked "Do we really do ourselves and our clients a favor by adding disclaimers that nobody will read or understand? I think we do ourselves a disservice by overly regulating this stuff."

Another audience member said "We've never had a complaint from a consumer [about an advertisement]. It's about competitors" who don't want to see their business shift to lawyers with effective advertisements. Lawyers' fear of the time and cost of defending an ethics complaint, the attendee said, has resulted in a chilling effect. "The ads that actually help people don't get to market. . . . We dumb [our ads] down so consumers don't get to make good choices."

One attendee declared "The rules are arcane and unenforceable." He asked "Does the legal profession want to retain the authority to regulate advertising?" If it doesn't do a better job of adopting standards that meet constitutional muster, he warned, "a governmental agency such as the FTC may step in and fill the void."

Face in the Crowd. In the second program, "Running in Place," moderator Jan L. Jacobowitz said the panel would try to answer a question from the previous session: "Why do we care?" about lawyer advertising

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Additionally, he said, Hunter "argues that to reveal or disclose under Rule 1.6 means to reveal information that is not already out in the public domain. Once it's out, [Hunter contends] a lawyer is free to publicize negative information without client consent." McCauley said the Virginia Supreme Court is scheduled to hear arguments in Hunter's case this month.

Difference of Opinion. Julin said the effect of Florida's new advertising rules is unclear. "The rules don't do enough to hurt the websites to make us go ahead and challenge them before they're effective [in May 2013]," he stated.

He noted that two justices published "stinging dissents" to the new rules and a third dissented in part without filing an opinion. For that reason, Julin said, "I wouldn't be surprised to see someone file a [42 U.S.C.] 1983 action to challenge them before they go into effect."

"The Florida Supreme Court does acknowledge that some commenters thought the rules were objectionable," Jacobowitz noted. She added that the court's response was, in essence, "They're wrong."

An audience member asked whether ethics rules on advertising should be simpler and easier to enforce.

"The ABA rules are not that bad," Alston opined. Julin said "All these rules serve very diverse interests. The big firms had a hard time coming together in Florida because we like restrictions. We hate to see [small firms or solo practitioners] coming in and taking work away from us. It's the haves versus the have-nots. The haves like the restrictions."

McCauley said "Maybe we should hone down the regulations to the 'false and misleading' standard. We could have takedown rules. Maybe there should be no disciplinary consequences unless there's some harm to people." He noted that there is no such thing as a "no harm, no foul" rule in discipline. "Maybe," he said, "this is one area where there should be."

One audience member suggested the ethics rules on advertising are obsolete, stating: "We should just eliminate the series seven rules and add to Rule 8.4 that false or deceptive advertising is a violation. Everything else is just protectionism. We're not serving the public at all with other restrictions."

BY HELEN W. GUNNARSSON

Malpractice

Lawyers Who Counsel Other Lawyers Should Give This Advice, Judge Suggests

DALLAS—Professional responsibility lawyers could learn something from hospitals, according to Judge Catharina Haynes of the U.S. Court of Appeals for the Fifth Circuit.

Hospitals send patients home with instructions to follow so they won't wind up back in the emergency room. Haynes said a similar process strikes her as "a good idea" for the legal profession. Couldn't professional responsibility lawyers help their lawyer-clients avoid another trip to the ethics ER by giving them their own "discharge instructions" designed to reduce their practice risks? she asked.

Haynes offered her views Feb. 9 as the closing remarks at the Association of Professional Responsibility Lawyers' midyear meeting in Dallas. She urged APRL members to consider this set of instructions to give their lawyer-clients to lessen their chances of running into malpractice or disciplinary trouble:

"Proofread." Haynes said that when she was a summer law clerk, a lawyer in the firm left out an exceptions clause from a real estate deed. She still remembers the trouble it caused.

"Follow the advertising rules." In Texas, Haynes said, the rules are "quite byzantine and a little bit dense." But for a disciplinary respondent to challenge them takes a lot of time and expense, she warned. So "suggest to your clients that they not be the cutting-edge First Amendment guys."

"Don't overload yourself." Haynes recalled a particular lawyer who ended up being suspended for neglecting a client matter. "Once a month he would be in my courtroom with the saddest story about why everything was a day late and a dollar short. Nice guy, gentlemanly, courteous, but he could not get anything done on time." Haynes said she warned the lawyer he was overloaded, but said she assumes he "didn't take my advice."

"Keep your calendar carefully." If there's a 30-day time limit, she advised, "count the 30 days twice. If you get two different results, take the earlier one." And "never, ever, ever wing it on adding [numbers] in court. Lawyers cannot add to save their lives, especially in court," she said. Haynes also recommended keeping an old-fashioned paper calendar as a backup. "I heard a lot more people with computer crashes than whose dog ate their [paper] calendar," she remarked.

"Obtain a written fee agreement." "Even if it's not signed in blood at high noon, at least have a letter confirming" the terms of representation, she advised. "It can save so many heartaches. People get kind of jumpy about money."

"Stay on top of your health." Many professional problems, Haynes said, "can be traced to some health problem." "We are really smart as a profession and should be in a position to take note of [health troubles] in ourselves and our colleagues. Take those few weeks off and get treatment, whether for substance abuse, a heart issue, whatever."

"Communicate with your clients." Haynes analogized good client communication skills to a good bedside manner. "It happens with both doctors and lawyers that if they're communicative, responsive, and seem to be trying their best, there's less chance of a malpractice lawsuit than if [the client's] phone calls are not returned and their dignity is ignored. It can be the reason why a violation becomes a grievance or a lawsuit."

"Practice meticulous accounting." "People get edgy about money," she commented. And sloppy accounting "can also give rise to a breach of fiduciary duty" claim. "I'd rather get sued for negligence than breach of fiduciary duty," she told the audience.

"Check conflicts." Haynes explained that "Successful breach of fiduciary duty claims come from conflicts."

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