

**MINUTES**

**Supreme Court's Advisory Committee  
on the Rules of Professional Conduct**

Administrative Office of the Courts  
450 South State  
Salt Lake City, Utah 84114  
Judicial Council Room

December 14, 1998 - 5:15 p.m.

**PRESENT**

Commissioner Arnett  
Robert Burton  
Karma Dixon  
Judge Kay  
John A. Beckstead  
Gary Chrystler  
William Hyde  
Kent Roche  
Gary Sackett  
Billy Walker

**EXCUSED**

Judge Nehring  
Earl Wunderli

**STAFF**

Peggy Gentles

**I. WELCOME AND APPROVAL OF MINUTES**

With one change, Karma Dixon moved that the minutes from the November 16, 1998 meeting be approved. Bill Hyde seconded the motion. The motion passed unanimously.

Robert Burton reminded the Committee that he had been asked to raise two issues with Justice Stewart. Mr. Burton discussed with Justice Stewart the dual processes that had been used for promulgating changes to the Rules of Lawyer Discipline and Disability: petitions from the Bar Commission and recommendations to the Court from this Committee. Justice Stewart said that the Committee should not be proceeding through the Bar Commission but continue to directly communicate with the Court. With regard to proposed Rule 4.2, Justice Stewart suggested that the Committee address the policy issues that it sees raised by the CCJ draft if the Committee wanted to respond to that draft.

**II. RULES SUBCOMMITTEE WORK**

Because a majority of the items on the Committee's agenda for this meeting were related to Rules Subcommittee work, Mr. Burton asked that Commissioner Arnett address the issues in whatever

order the Commissioner thought appropriate. Mr. Arnett reported that the Subcommittee had met on December 3, 1998 and discussed three issues: amending the preamble to the Rules of Professional Conduct as part of the ad hoc committee's work on the Rules of Integration and Management; the proposed change to Rule 7.2 to remove the limitation on referral services being "not-for-profit; and proposed Rule 4.2.

Commissioner Arnett reported that the Subcommittee had considered inserting the oath requirement in the preamble. Karma Dixon had pointed out that some of the language in the preamble may be contrary to Utah law. Ms. Dixon has prepared several options for consideration. Those options will be considered by the Subcommittee at its next meeting. Robert Burton informed the Committee that he had sent a letter to the president of the Bar with copies to John Baldwin and Debra Moore informing them of the Committee's decision to adopt the ad hoc committee's recommendation related to the Rules of Professional Conduct. Gary Sackett reported that he had been at the most recent Bar Commission meeting on another matter. While he was there, the Bar Commission received the ad hoc committee's report but did not take any action. Billy Walker informed the Committee that the next Bar Commission meeting is at the end of January.

Commissioner Arnett reported that as the Subcommittee looked at the proposed change to Rule 7.2 the issues had become more complex than they had at first seemed. Commissioner Arnett stated that, as Judge Nehring had raised at the last meeting, there are concerns that the language allowing participation in a "referral service" would allow attorneys to take "kickbacks" for referring cases. Therefore, the Subcommittee is looking carefully at defining the term "referral service." Gary Sackett stated that the distinction would probably be between a case specific fee which would not be allowed and a fee for being on a list which would be permitted. John Beckstead inquired if the existing not-for-profit limitation was adequate to prevent the perceived problem.

Commissioner Arnett then discussed the Subcommittee's work on proposed Rule 4.2. He stated that Kent Roche had alerted the Committee to a new statute which subjects all federal attorneys to state rules and regulations. An article relating to that statute was provided to all Committee members. The Subcommittee reached a consensus that the existing Utah rule needs to be revised. However, the issue is how much change is necessary. The Subcommittee would like guidance on whether the Committee prefers the approach of the CCJ draft, presumably changed stylistically to fit with the other Utah rules, or a more minimalist approach. Commissioner Arnett noted that Bill Hyde, the only prosecutor on the Committee, had been unable to attend the Subcommittee meeting. In addition, the Subcommittee would like input from the Statewide Association of Public Attorneys. Bill Hyde noted that the state attorneys general generally support the CCJ draft as do other Utah prosecutors. He noted that the primary area of concern is the ability of attorneys to talk to investigators. Karma Dixon stated that in her opinion the issue of investigators could be addressed without all the other language in the CCJ draft. Commissioner Arnett noted that a summary of the comments received on the CCJ draft had been distributed to all Committee members. In addition, the actual comments had been distributed to Subcommittee members at this meeting. Karma Dixon noted that most of the comments to CCJ draft addressed issues of federal prosecutors. Robert Burton stated that he was persuaded by the summary of the comments that there should not be a separate standard for federal

and state prosecutors. Billy Walker stated that his concern about the CCJ draft from a regulatory point of view is that the exceptions overwhelm the rule. Gary Sackett stated that the nature of the comments received on the CCJ draft indicate that the proposal is not a compromise. All of the prosecutors who commented like the rule; all the others (defense attorneys, corporate counsel) do not like the rule. Mr. Sackett noted that the ABA is involved in further study of the rule and presumably may come up with an alternate model Rule 4.2. Karma Dixon stated that she did not think that the Committee should wait for the ABA to address this issue.

Billy Walker pointed out another potential problem with the CCJ draft. Rules 5.3 and 5.5 deal with an attorney's responsibilities regarding non-lawyers. He noted that the proposed Rule 4.2 purported to control the activities non-lawyers. In response to a question from Robert Burton, John Beckstead stated that he would like to see written comments from interested parties. Commissioner Arnett suggested letters be sent to the Utah Attorney General's Office, the U.S. Attorney for the District of Utah, the Statewide Association of Public Attorneys, and the Salt Lake County District Attorney's Office. In addition the ABA Center for Professional Responsibility should be contacted to determine where in the process that organization is. The Subcommittee would review the comments. Kent Roche suggested that the Committee should solicit comments on the existing Utah rule and the proposed CCJ draft. Commissioner Arnett pointed out that the Committee had a great deal of comments on the proposed CCJ draft. Gary Sackett responded that he would prefer to hear about the perceived problems with the existing Rule 4.2 are rather than comments on the CCJ draft. Commissioner Arnett made a motion to solicit written input from the enumerated groups asking that they identify problems with Rule 4.2 for attorneys and their interactions with investigative staff. The Committee would solicit examples and, if desired, any proposals. Gary Sackett seconded the motion. Karma Dixon made a motion to amend the motion that the Committee not solicit any proposed changes. Instead, the Committee would solicit only perceived problems with the rule. Gary Chrystler seconded that motion. The motion to amend Commissioner Arnett's motion passed unanimously. Commissioner Arnett's motion as amended passed unanimously. Commissioner Arnett stated that he would draft a letter for Robert Burton's signature.

### **III. OTHER BUSINESS**

Since the Committee expected that it would take some time to receive the comments on Rule 4.2, the Committee canceled its January meeting. The February meeting was moved to February 22, 1999 due to a holiday on the regular meeting date. The deadline for receiving comments on Rule 4.2 was set at February 10, 1999.

Billy Walker stated that he had a future agenda item for consideration by the Committee. Rule 8.4(d) currently has no provision which addresses misconduct short of a criminal act. He would like the Committee to consider putting in such a provision. At Robert Burton's request, Mr. Walker stated he would get copies of other states' rules that contain such a provision. Commissioner Arnett stated that if Mr. Walker would get those rules to him, he would see that the Rules Subcommittee considered Mr. Walker's proposal.

There being no further business the meeting adjourned.