

**MINUTES**

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

Administrative Office of the Courts  
450 South State  
Salt Lake City, Utah 84114-0241

February 22, 1999 - 5:15 p.m.

**PRESENT**

Commissioner Arnett  
Robert Burton  
John A. Beckstead  
Gary Chrystler  
William Hyde  
Judge Kay  
Judge Nehring  
Kent Roche  
Gary Sackett  
Billy Walker  
Earl Wunderli

**EXCUSED**

Karma Dixon

**STAFF**

Peggy Gentles  
Matty Branch

**I. WELCOME AND APPROVAL OF MINUTES**

Commissioner Arnett moved that the minutes of the December 14, 1998 meeting be approved with one typographical change. Bill Hyde seconded the motion. The motion passed unanimously.

**II. RULE 4.2**

Robert Burton reminded the Committee that at its last meeting it had decided to solicit input from various prosecutors concerning the existing Rule 4.2. In the interim, the Supreme Court had adopted the Conference of Chief Justices draft of a new Rule 4.2 under its emergency rule making power. Mr. Burton reported that he had spoken with the Chief Justice concerning the Court's action. The Chief Justice indicated that a bill had been filed in the Legislature that would have addressed the issue of prosecutors' contact with represented persons. Rather than have the bill pass, the Court decided to adopt the proposed Rule 4.2. Mr. Burton stated that he had informed the Chief Justice that individual members of the Committee may want to comment on the rule. The Chief Justice stated that such comments would be welcome. Mr. Burton asked if the Committee wanted to do anything further on Rule 4.2. Matty Branch stated that the rule would be going out for comment and the Court would

be looking at all of the issues raised at the end of the comment period. Earl Wunderli mentioned that the Committee had had concerns previously that the form of the rule does not fit with the rest of the Rules of Professional Conduct and possibly that would be an area for the Committee to address during the comment period. Bill Hyde moved that the Committee wait to see what comments were received on Rule 4.2 and respond if asked by the Court. Judge Kay seconded the motion. The motion passed unanimously.

### **III. PREAMBLE**

Commissioner Arnett stated that Karma Dixon had prepared proposed changes to the preamble to the Rules of Professional Conduct. The proposed changes had been provided to the Committee with the meeting material. The proposal removed a sentence to clarify that all of a lawyer's professional responsibilities are contained within the Rules of Professional Conduct. This change is consistent with the ad hoc committee's work on the Rules of Integration and Management. Additionally, two sentences have been removed to avoid redundancy. The Committee modified some of the draft language and Judge Nehring moved that the proposed change to the preamble, as modified by the Committee, be published for comment. Earl Wunderli seconded the motion. The motion passed unanimously. Earl Wunderli moved that the proposal, including the addition of the attorney's oath, be published for comment as it reflects the rules subcommittee's work. Judge Nehring seconded the motion. The motion passed unanimously. Gary Sackett reported that he had recently spoken with Debra Moore concerning the Bar's action on changing the Rules of Integration and Management. The issue had been on the Bar Commission agenda a few months ago. Mr. Sackett stated that Ms. Moore had said that she would try to get the proposal on the Bar Commission's March agenda. Robert Burton reminded the Committee that the ad hoc committee on the Rules of Integration and Management had also recommended deleting language from Rule 9 of the Rules of Lawyer Discipline and Disability. Mr. Burton stated that his discussions with Justice Stewart had indicated that either the Committee or the Bar Commission could approach the Court with proposed changes to the Rules of Lawyer Discipline and Disability. Gary Sackett moved that the proposed change to Rule 9 that was identified in the ad hoc committee's November 12, 1998 report be published for comment. Judge Kay seconded the motion. The motion passed unanimously.

### **IV. RULE 7.2**

Commissioner Arnett reported that the subcommittee had reached a consensus on a concept surrounding for-profit lawyer referral services. Commissioner Arnett had been assigned the task of drafting proposed changes to Rule 7.2 that would reflect the Subcommittee's consensus. However, the subcommittee had not approved the specific language included in the draft sent to the entire Committee. Commissioner Arnett reported that he had taken a minimalist approach to the changes. He noted that the Subcommittee had looked at a number of other states' rules of lawyer referral services most of which were much more extensive. Kent Roche noted that the ABA had done extensive amounts of work on the area of lawyer referral services but had not proposed any model rule changes. Judge Nehring stated that the Subcommittee had spent significant time looking at Florida's rule, which had been viewed as the best rule from other states, but still the Committee did

not like the approach. Earl Wunderli asked about the addition of the language in the comment “a lawyer is allowed to pay for advertising permitted by this rule, but otherwise is not permitted to pay another person for channeling professional work on a case-by-case basis.” Mr. Wunderli questioned whether the language “case-by-case basis” really addressed the issue with which the Committee was concerned. He suggested possibly substituting “individual case basis.” Judge Nehring suggested changing the language to “a fee-per-case basis.” Judge Kay moved to publish the proposed changes to Rule 7.2 for comment with the unit modifier “fee-per-case” replacing “case-by-case” and an additional typographical change. Gary Chrystler seconded the motion and the motion passed unanimously.

## **V. PROSECUTORIAL DEAL MAKING**

Robert Burton reminded the Committee that Justice Stewart had expressed a concern about prosecutors use of granting immunity in return for testimony. The issue had been raised on the federal level in the Tenth Circuit case of U.S. v. Singleton. The Committee had been provided the Court of Appeals en banc decision which reversed the prior panel’s decision. After discussing the opinion, Mr. Burton stated that he recommended that, based on his previous discussions with former U.S. Attorneys Jordan and Matheson, the arguments of the majority and concurring opinions in Singleton, and the statutory framework outlined in the Singleton opinions, the Committee should not pursue the issue further. Earl Wunderli made a motion to communicate with Justice Stewart that the Committee had considered the policy issues surrounding the Singleton decision and decided not to take any action. Bill Hyde seconded the motion. The motion passed unanimously. Mr. Burton indicated that he would write a letter to Justice Stewart informing him of the Committee’s action.

## **VI. PETITION TO AMEND RULES OF LAWYER DISCIPLINE AND DISABILITY 15 AND 25.**

Robert Burton referred the Committee to a petition from the Washington Legal Foundation the thrust of which was to make Bar disciplinary proceedings more open. Judge Kay asked Billy Walker which approach is better for the Bar. Mr. Walker responded that the current mix of public and private allowed the Office of Professional Conduct to pursue cases without giving the public a misleadingly negative view of the profession. The public aspects of the Bar’s disciplinary proceedings allow the Office of Professional Conduct to request information from others and also act as a deterrent to other lawyers. The problem that Mr. Walker sees with the proposal is that all of the attention is on the Office of Professional Conduct. The proposal does not seem to recognize that the Bar’s Ethics and Discipline Committees decide which cases will be pursued. In response to a question from Judge Nehring, Commissioner Arnett stated that the issue of closed versus open proceedings was extensively debated when the change was made to place many discipline proceedings in the district court. Because the issue has been looked at recently, in Commissioner Arnett’s opinion, there is no reason to change. Robert Burton stated that while the cover letter from the Foundation indicated that a number of Utah citizens had concerns about the process, those citizens were not identified and had not approached the Committee. John Beckstead stated he would prefer to wait until Utahns raise the issues with the Committee. Mr. Walker pointed out that the petition had inaccurate information

concerning Rule 25 which does have a public component. Judge Kay moved that the petition be denied. Judge Nehring seconded the motion. The motion passed unanimously.

## **VII. OTHER BUSINESS**

Billy Walker reported that he will be preparing proposed changes to Rule 8.4. Peggy Gentles distributed information that had been provided the Bar Commission at its December meeting. In response to the petition from Bruce Baird that the Committee had considered last year, the Bar Commission had authorized a voluntary question concerning whether attorneys carry malpractice insurance. The responses had been prepared. Judge Kay stated that the response from Bar members was similar to nationwide statistics. Commissioner Arnett stated that he recalled the Committee's discussion of Mr. Baird's petition to be that the issues were a policy decision that would better addressed by the Bar Commission rather than this Committee. The Committee decided to not meet in March and tentatively schedule its April meeting on April 19, 1999. Committee members will be contacted if the chair decides that the April meeting will not be necessary.

## **VIII. ADJOURN**

There being no further business the meeting adjourned.