

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

June 21, 1999 - 5:15 p.m.

ATTENDEES

Commissioner Arnett
Karma Dixon
Judge Thomas Kay
Judge Ronald Nehring
Kent Roche
Billy Walker
Earl Wunderli

EXCUSED

Robert Burton
John Beckstead
Gary Chrystler
William Hyde
Gary Sackett

STAFF

Peggy Gentles

I. WELCOME AND APPROVAL OF MINUTES

Commissioner Arnett stated that Robert Burton was out of town and had asked him to chair the Committee's meeting in his absence. Earl Wunderli moved that with one typographical change the minutes from the April 19, 1999 meeting be approved. Judge Nehring seconded the motion. The motion passed unanimously.

II. REVIEW OF RULES PUBLISHED FOR COMMENT

Peggy Gentles referred the Committee to the rules that had been published for comment including a proposed change to Rule 7.2 which removed the limit on lawyer referral services being "not-for-profit." The other two rules published for comment, the preamble to the Rules of Professional Conduct and Rule of Lawyer Discipline and Disability 9, were part of the package of amendments proposed to correspond with changes to the Rules of Integration and Management. Ms. Gentles reported that she has been told that the Bar Commission had approved the changes to the Rules of Integration and Management and that the Bar will directly petition the Supreme Court for the changes. As far as she knows, the petition has not yet been filed. In addition, at the last Committee meeting Billy Walker had indicated that the Bar Commission would be submitting a comment on the change to Rule 9 removing references to other bodies of rules. Ms. Gentles reported that no comment was received. Mr. Walker stated that the Bar's concern had been that it was relying upon the language for suspensions related to failure to pay dues or failure to comply with MCLE requirements. Since that time, the Bar has determined that it can rely on other language to impose

those sanctions. Ms. Gentles reported that no comments were received on the rules during the comment period. Kent Roche moved that the Committee recommend approval of the rules to the Court. Judge Kay seconded the motion. The motion passed unanimously.

III. PRINCIPLES OF CIVILITY

Commissioner Arnett reported that Bob Burton had spoken with the Chief Justice concerning the Committee's discussion of principles of civility. Mr. Burton presented the Committee's suggestion that all the principles of civility that were appropriate be incorporated into the rule comments. In addition, the Committee's view that violation of the principles of civility should not be grounds for discipline was presented to the Chief. Commissioner Arnett stated that Mr. Burton said the Chief was very receptive to the Committee's suggestions. However, Commissioner Arnett did not know whether the Committee's recommendation that the Court ask the Bar to consider the wholesale adoption of the ABA guidelines had been discussed with the Chief. The Committee discussed whether it should proceed before knowing whether the Bar would be adopting the guidelines, and if so, in what form. Commissioner Arnett stated that, seeing no great hurry to take action, the Committee could wait until Mr. Burton returns. If the issue has not been discussed with the Chief, a letter repeating the Committee's recommendation and offering to, if the Court so desires, contact the Bar directly about adoption of the principles could be sent. Judge Nehring suggested that the Committee should ask permission from the Court to approach the Bar directly.

IV. ELECTRONIC COMMUNICATIONS UNDER RULE 1.6

Commissioner Arnett referred the Committee to the e-mail from Toby Brown at the Bar concerning confidentiality of electronic communications. Commissioner Arnett distributed ABA formal opinion 99-413 which discussed the applicability of Rule 1.6 to e-mail communications and concluded that a reasonable expectation of privacy was afforded by unencrypted e-mail sent over the Internet. Commissioner Arnett stated that although Mr. Brown's e-mail referred to a proposed change to Rule 1.6 being available on the Internet, he had been unable to access the proposal. Judge Nehring stated that there is a risk that certain types of communication may be a waiver of the attorney client privilege if others are privy to the communication. Judge Nehring thinks it would be useful to have an express statement that certain types of communication are not waivers of the privilege. Commissioner Arnett stated that because this was a brand-new issue the Committee should have the proposed changes to Model Rule 1.6 before beginning its deliberations. Peggy Gentles stated that she will get the text to the proposed amendment for the Committee's next meeting. Commissioner Arnett asked that any other materials that could be found be provided to the Committee. Billy Walker stated that the Office of Professional Conduct had not received any complaints related to this issue.

V. CONTINUED VIABILITY OF CODE COMPARISONS

Peggy Gentles stated that she wondered whether the code comparisons that have been drafted from many rules are still viable. Commissioner Arnett stated that he was on the Greene Committee which recommended that the Court adopt the Rules of Professional Conduct. At that time, the code

comparisons were invaluable to indicate what changes, if any, were being made. For some time after, they continued to be helpful because many lawyers remembered the times when the model code was in effect. However, eleven years have passed and Commissioner Arnett wondered whether, given that they are not routinely updated, if they continue to be helpful. Judge Nehring stated that removing the code comparisons would keep with the Committee's philosophy of rule economy. Judge Kay wondered if there were any which should be kept. Billy Walker added the most important information is how the Utah rules deviated from the model rules and not how they compared to the model code. The Committee asked that this item be on their agenda for the next meeting at which time it would consider if any of the code comparison should be retained.

VI. OTHER BUSINESS

Peggy Gentles distributed to the Committee the changes to Rule 4.2 that were proposed by the Bar's ad hoc committee that reviewed the rule as adopted by the Court.

Commissioner Arnett noted that this was Judge Kay's last meeting. Judge Kay was asking for an assignment to one of the other Supreme Court Advisory Committees. Commissioner Arnett noted that Judge Kay will be missed and thanked him for his service.

The Committee scheduled its next meeting for August 23, 1999. There being no further business, the meeting adjourned.