

MINUTES

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

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

August 23, 1999 - 5:15 p.m.

ATTENDEES

Commissioner Arnett
John Beckstead
Robert Burton
Gary Chrystler
Royal Hansen
William Hyde
Steven Johnson
Kent Roche
Billy Walker
Gary Sackett
Paula Smith
Earl Wunderli

EXCUSED

Karma Dixon
Judge Ronald Nehring

STAFF

Peggy Gentles
Matty Branch

I. WELCOME AND INTRODUCTION OF NEW COMMITTEE MEMBERS

Robert Burton welcomed the Committee members to the meeting. He stated that the Supreme Court had recently appointed three new members to the Committee. Mr. Burton introduced Royal Hansen, Steven Johnson, and Paula Smith and welcomed them to the Committee.

II. APPROVAL OF MINUTES

With one change, Earl Wunderli moved that the minutes of the June 21, 1999, meeting be approved. The motion was seconded. The motion passed unanimously.

III. PRINCIPLES OF CIVILITY

For the benefit of the new members, Robert Burton reviewed the Committee's work related to the principles of civility. He stated that the Supreme Court had contacted the Committee a number of

months ago asking it to consider whether principles of civility should be adopted by either the Court or the Bar. The Committee had asked at its last meeting that Mr. Burton approach the court for permission to directly recommend the ABA guidelines to the Bar Commission for adoption. The notion was, if it so desired, the Bar Commission would adopt the principles of civility. Then, the Committee would take the principles and, where appropriate, insert references into comments to the various Rules of Professional Conduct. Billy Walker reported that the Bar had already begun the process of considering principles of civility. His impression was that the Commission was supportive of the idea of keeping principles of civility separate from disciplinary rules. Mr. Walker stated that he believed that the Commission's consideration had been prompted by the same contact from Don Winder that the Supreme Court had received. Earl Wunderli asked what the purpose of incorporating parts of the principles into the comment was if the principles were not to form a basis for discipline. Gary Sackett stated that the Committee had over the years worked to ensure that only one set of rules, the Rules of Professional Conduct, govern attorney conduct for purposes of discipline. That effort included the recent project of working with the Bar concerning provisions in the Rules of Integration and Management. He is concerned that adoption of the principles of civility by the Bar and weaving some of those principles into the comments to the rules will be a step backward. Mr. Sackett continued that if the Committee believes that the rules are deficient in some manner because they do not punish sanctionable behavior, the rules should be amended rather than relying upon the Bar's adoption of principles of civility. Commissioner Arnett pointed out that all the examples of principles of civility that the Committee had considered had been adopted by attorney organizations and not the supreme court. Billy Walker stated that putting the principles, if adopted by the Bar, in the comments has a different effect than a separate set of disciplinary rules.

Earl Wunderli moved that Mr. Burton send a letter to the Bar recommending the adoption of the ABA guidelines. Commissioner Arnett seconded the motion. Bill Hyde asked if the motion could be amended to include asking that the Bar Commission express an opinion whether any of the principles of civility should be incorporated into the Rules of Professional Conduct comments. No second to the amendment was received. Robert Burton asked if the motion included contacting the Supreme Court to ask its permission to contact the Bar directly. Earl Wunderli answered that it was included in his motion. Mr. Wunderli's motion passed unanimously.

Mr. Burton asked if the Committee wanted to table the issue of incorporating anything into the comments until seeing what the Bar Commission decided to do. Billy Walker stated that when Bill Hyde had made the motion a couple of meetings ago concerning the principles of civility, the concern of the Committee appeared to be that there was much discussion surrounding the lack of civility but no one was doing anything. While this is a hard area to deal with through a disciplinary process, tying the principles of civility, if adopted, to the comments may make that job a little easier. Bill Hyde agreed with Mr. Walker's characterization of his motion. However, since the Bar has decided to move ahead, he would now favor waiting to see what the Bar would do. Earl Wunderli moved that the issue of any changes to the comments related to principles of civility be tabled until the Bar Commission takes action. Gary Chrystler seconded the motion. The motion passed with Robert Burton and Paula Smith voting against. Mr. Burton stated that he will send a letter to Chief Justice Howe as soon as possible.

IV. ELECTRONIC COMMUNICATIONS UNDER RULE 1.6

Peggy Gentles referred the Committee to the material from the ABA's Center for Professional Responsibility that she had provided in response to requests at the last meeting. The material included the proposed changes to Model Rule 1.6 and a memorandum explaining the changes. In response to a question from Bill Hyde, Gary Sackett stated that the Ethics Advisory Opinion Committee had not issued any opinion related to electronic communication. Commissioner Arnett stated that the changes to Model Rule 1.6 included many unrelated to electronic communications. Earl Wunderli stated that, in fact, the only place that he had found electronic communication addressed was paragraph 17 of the comment. John Beckstead asked why consider singling out e-mail for special treatment. Commissioner Arnett stated that the discussion was related to the types of communication in which a lawyer should have "a reasonable expectation of privacy" for purposes of keeping communication confidential. He stated that the issue had been discussed in an ABA ethics opinion which had been distributed at the last meeting. Gary Sackett added that e-mail had recently become a nascent issue in legal ethics circles. Mr. Beckstead stated that, in his opinion, the discussion was an over-reaction. Paula Smith stated that it was her understanding that e-mail may be particularly vulnerable to capture by unauthorized persons. Mr. Beckstead stated that the Committee should be discussing the "reasonable expectation of privacy" issue rather than the specific modes of communication. Bill Hyde stated the Legislature had recently passed a computer crimes bill that made accessing without authorization a computer system when the information contained on the system is confidential third degree felony. Kent Roche stated that he agreed with Mr. Beckstead that no action needed to be taken on this issue at this time.

Earl Wunderli pointed out that the Model Rule 1.6 was significantly different in many ways from the Utah Rule 1.6. Mr. Burton asked if the Committee had any interest in considering the other parts of Rule 1.6 that had been changed in the past or were proposed for change. Steve Johnson stated that some portions of the Model Rule might be an improvement upon the Utah rule. He pointed to paragraph (b)(4) of the Model Rule that expressly allowed a lawyer to reveal information relating to the representation of a client in order to secure legal advice about the lawyer's compliance with the Rules of Professional Conduct. Kent Roche asked if the ABA had taken action on proposed Rule 1.6. The Committee asked Peggy Gentles to follow-up. Mr. Roche stated that if the ABA had not yet taken action, the Committee probably would not be advised to proceed. Billy Walker stated that he doubted that the ABA had taken any action yet because proposed change was part of the "Ethics 2000" which contemplated a major overhaul of the rules. Peggy Gentles stated that it was her recollection that a few years ago the Committee had identified Karma Dixon as a contact person for the Ethics 2000 Project. She will follow-up with Ms. Dixon to see if she has been receiving any information. Steve Johnson asked that the Committee be provided with any proposed changes that were being discussed as part of the Ethics 2000 project. Ms. Gentles will bring that material to the next meeting.

V. CONTINUED VIABILITY OF CODE COMPARISONS

Peggy Gentles reminded the Committee that it had discussed at the last meeting whether the code

comparisons were viable any longer. She noted that while changes to the rules and the comments had been made since the original adoption of the Rules of Professional Conduct, no efforts have been made to keep the Model Code comparisons current. Commissioner Arnett stated that he had quickly reviewed the Rules of Professional Conduct and found that three (1.6, 1.17 and 4.2) had no model code comparison notes. In addition, many rules which the Committee had significantly changed, including 1.5, 1.15, 1.16, 3.6, 6.1, all of Rule 7 and Rule 8.4, have had no corresponding changes to the model code comparisons. In Commissioner Arnett's opinion, these could be misleading. Gary Sackett reported that occasionally the Ethics Advisory Opinion Committee will look at the code comparisons but it has been doing so less frequently. He feels that the code comparisons were useful during the transition but now that 10 years has passed they may no longer be helpful. In addition, removing the code comparisons would complement Judge Nehring's often expressed virtue of "rule economy." Commissioner Arnett made a motion that all of the model code comparisons be deleted from the Rules of Professional Conduct. Gary Sackett seconded the motion. The motion passed unanimously.

VI. OTHER BUSINESS

Peggy Gentles distributed to the Committee the rules that had been changed related to the subcommittee's work with the Bar on the Rules of Integration and Management. The Committee had taken action on the preamble and the Rule of Lawyer Discipline and Disability 9. The Court had acted on the Committee's recommendation that adopted changes effective November 1, 1999. Ms. Gentles stated that the Bar has not yet petitioned the Supreme Court for the corresponding changes to the Rules of Integration and Management. Ms. Gentles asked for direction from the Committee on whether to proceed with the changes to the Rules of Professional Conduct and Rules of Lawyer Discipline and Disability or should the matter wait until the Bar petitions the Court. Ms. Gentles stated that in her opinion the changes from the Committee stood on their own and were not dependent upon the changes to the Rules of Integration and Management. The Committee approved sending the approved rules to the publisher.

Peggy Gentles also reported that the Court was still considering the proposed changes to Rule 4.2 that had been drafted by the Bar Commission's Ad Hoc Committee.

VII. ADJOURN

The Committee decided to not meet in September. Therefore the next meeting was scheduled for October 18, 1999. There being no further business, the meeting adjourned.