

**MINUTES**

APPROVED 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

February 28, 2000  
5:15 p.m. - Judicial Council Room

**PRESENT**

John Beckstead  
Robert Burton  
Royal Hansen  
William Hyde  
Steve Johnson  
Judge Nehring  
Kent Roche  
Gary Sackett  
Billy Walker  
Earl Wunderli

**EXCUSED**

Commissioner Arnett  
Gary Chrystler  
Karma Dixon  
Paula Smith

**STAFF**

Matty Branch  
Peggy Gentles

**I. WELCOME AND APPROVAL OF MINUTES**

Bob Burton welcomed the Committee members to the meeting. With three typographical corrections, Earl Wunderli moved that minutes of November 15, 1999, meeting be approved. Kent Roche seconded the motion. The motion passed unanimously.

**II. REPORT OF SUBCOMMITTEE ON ADVERTISING RULES**

Bob Burton thanked Billy Walker and the other members of the subcommittee who had looked at issues surrounding the advertising rules. Mr. Burton noted that the report of the subcommittee had been faxed to Committee members the previous business day. Billy Walker reported that initially the subcommittee had looked at Rules 7.1 to 7.5. However, the subcommittee's consideration quickly focused on Rule 7.3 because of the questions concerning the constitutionality of regulation of targeted solicitations under the U.S. Supreme Court case Florida Bar v. Went For It, Inc. Mr. Walker noted that Rule 7.3(b) does not allow solicitation by targeted mail if any conditions in (1), (2), or (3) are met. Mr. Walker stated that the subcommittee had not expressed much concern with (2) or (3) which do not allow the solicitation if the person has asked that they not be contacted or the

communication involves coercion, duress, or harassment. Mr. Walker said that Rule 7.3(b)(1) which bars targeted communication if

the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer

was possibly unconstitutional under the Florida Bar case. He noted that (b)(1) is not in the model rule. He referred the Committee to the survey of other states included with the memorandum which found that at least seven other states have provisions similar to (b)(1).

Mr. Walker said that another problem with (b)(1) is that from the regulatory standpoint it is a difficult standard to use to prohibit people from taking action. In his opinion, the element of wanting to take advantage of someone who is vulnerable will always be present in targeted mail. Mr. Walker stated that the Committee had been provided with both the Model Rule 7.3 as well as information from the Ethics 2000 project on changes that are being considered by the ABA. Mr. Walker stated that the subcommittee had two recommendations. First, Rule 7.3 should be amended to contain a provision similar to the model rule which requires that targeted mailings have the words "advertising material" on the outside of the envelope. Second, (b)(1) should be repealed. Mr. Walker noted that the second recommendation was not unanimous. He stated that Earl Wunderli felt that the Committee should not remove any language until after the Ethics 2000 work was done.

Royal Hansen noted that the subcommittee had talked about adding a limitation that would prohibit contact with a protective client by direct mail for 30 days, a provision similar to the rule upheld by the U.S. Supreme Court in the Florida Bar case. Steve Johnson noted that the Ethics 2000 material indicated that such a prohibition is being considered but it would only apply to lawyers seeking clients in personal injury or wrongful death cases. Gary Sackett stated that he was not aware of any Ethics Advisory Opinion Committee opinions that addressed the interpretation of Rule 7.3(b)(1). In response to a question from Bill Hyde, Billy Walker stated that the Office of Professional Conduct does receive a significant number of complaints about the direct mail sent by lawyers to prospective clients. In response to a question from Mr. Sackett, Mr. Walker stated that the subcommittee was concerned about adopting a 30 day rule to apply to all types of cases because in many criminal matters the case would already be proceeding.

John Beckstead stated that he thought that the issues around Rule 7.3 were part of a much bigger problem. The Rules of Professional Conduct should seek to have prospective clients make knowledgeable decisions. He wondered whether the Committee should wait to make any changes until the Ethics 2000 report was released or should propose some interim fixes until then. Earl Wunderli stated that he would be willing to defer to Mr. Walker who feels that Rule 7.3(b)(1) was inappropriate. However, he was uncomfortable with the idea of changing the rule now and then changing it again in approximately a year when the Ethics 2000 report is available. In addition, he is concerned that the removal of (b)(1) would be viewed as implying such mailings are appropriate. Mr. Sackett stated that he thinks that, as long as prospective clients know that they are receiving

advertising materials and the lawyers comply with the other Rules of Professional Conduct, targeted mailing should be allowed. Royal Hansen moved that the Committee propose the inclusion of a requirement that targeted mailings contained language that indicate that they are advertising. Steve Johnson seconded the motion. Following discussion that made it clear that Mr. Hansen's motion did not contemplate any specific language but rather approval of the concept, the motion passed unanimously. Bill Hyde moved that the provision that the mailing indicate that it is advertising include a requirement that the inside material also indicate that it is advertising material. Royal Hansen seconded the motion. The motion passed unanimously.

Peggy Gentles informed the Committee of the pending deadline to submit rules to be published for comment. If a rule is to go out for comment for November 1, 2000, effective date, it would need to be approved by the Committee at this meeting. Judge Nehring moved that the Committee draft language that would follow three principles. First, it would address only targeted advertising. Second, it would include a requirement that the mailing be identified as advertising as detailed in the previous motions. Third, any changes would apply to written, recorded and electronic communication. Steve Johnson seconded the motion. After discussion, Judge Nehring made a substitute motion that the Committee propose adding the following language as paragraph (c) to Rule 7.3:

Every communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter and with whom the lawyer has no family or prior professional relationship shall prominently include the words "advertising material" on any outside envelope and at the beginning and the ending of the communication.

Earl Wunderli seconded the motion. The motion passed with Gary Sackett opposed. Mr. Sackett stated that he was opposed to making piece-meal changes to the rule rather than having the subcommittee come back with specific language for consideration at the next meeting. However, Mr. Sackett stated that he did not want to wait until the Ethics 2000 report was issued to make any changes. He thinks the Committee should solve the problem as it sees fit. Judge Nehring suggested that (b)(1) be moved to a comment to show that it is aspirational. Bill Hyde moved that Judge Nehring's suggestion be adopted. Royal Hansen seconded the motion. Judge Nehring stated that this suggestion was an attempt to resolve the notion that the Committee liked the prohibition on contacting clients in fragile emotional states but was concerned that the provision as drafted would not sustain constitutional challenge. Gary Sackett expressed a concern that moving the language to the comment would not fit with the existing style of the comments. The motion failed on a 3 to 5 vote.

Steve Johnson moved to refer the matter to the subcommittee to respond with language removing (b)(1) and providing for a 30 day notice. John Beckstead seconded the motion. Bill Hyde suggested that the Committee first address whether it wanted the subcommittee to consider a 30 day prohibition. Gary Sackett seconded Mr. Hyde's motion. The motion passed unanimously. Judge Nehring suggested that the subcommittee also address whether (b)(3) contained meaningful

guidance. Steve Johnson's motion passed unanimously. Gary Sackett moved to consolidate the Committee's previous decision concerning adding a new Rule 7.3(c) with the other material to be referred to the subcommittee rather than the rule being published for comment. Judge Nehring seconded the motion. The motion passed unanimously.

Peggy Gentles informed the Committee that conceivably the proposed changes discussed at the March meeting may be able to be published for comment in the Bar Journal therefore allowing a November 1, 2000 effective date.

### **III. OTHER BUSINESS**

Due to a lack of time, Bob Burton asked that the other agenda items be put over to the next meeting.

### **IV. ADJOURN**

There being no future business, the meeting adjourned.