

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

March 20, 2000 - 5:15 p.m.

ATTENDEES

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

EXCUSED

Judge Nehring

STAFF

Peggy Gentles
Matty Branch

I. WELCOME AND APPROVAL OF MINUTES

With one change, Earl Wunderli moved that the minutes of the February 28, 2000 meeting be approved. Kent Roche seconded the motion. The motion passed unanimously.

II. REPORT ON OTHER ITEMS

Bob Burton asked Peggy Gentles to report on other items that the Committee had discussed recently. Ms. Gentles stated that the Bar Commission has not yet discussed issues around the principles of civility following the Committee's recommendation to the Supreme Court that the Commission was a better body to make any decision concerning such principles. Gary Sackett reported that the Ethics Advisory Opinion Committee had issued an opinion concerning e-mail under Rule 1.6. The Bar Commission approved the opinion. Mr. Sackett stated that the opinion says that a lawyer may use e-mail to convey confidential communications unless the lawyer has reason to believe that the e-mail would not be secure. The opinion does not require an attorney to get permission from the client prior to sending confidential information by e-mail. However, the opinion does suggest that such a practice would be wise. The Ethics Committee also expressly declined to adopt a requirement that any e-mail with confidential information be encrypted. Mr. Sackett noted that the ABA adopted a similar opinion recently. Mr. Burton stated that he thought the Ethics Advisory Opinion Committee

response was similar to the response of the Committee. Ms. Gentles reported that she and Mr. Sackett had communicated with Lexis Publishing concerning the possibility of having Rules of Professional Conduct annotated with the Ethics Advisory Opinion Committee opinions. She noted that she hoped that the annotations would be in the new Utah Court Rules Annotated volume released in April.

III. REPORT OF SUBCOMMITTEE ON ADVERTISING RULES

Peggy Gentles noted that the Subcommittee material had been faxed to Committee members the day before the meeting. Mr. Burton asked Subcommittee chair Billy Walker to report on the Subcommittee's work. Mr. Walker noted that the Subcommittee had not had time to consider comments on the draft made by Earl Wunderli and Steve Johnson so they had been provided to the full Committee. Mr. Burton asked if the Subcommittee felt strongly that paragraph (c) was required. He noted that that paragraph says that a lawyer may solicit if not precluded by other parts of the rule. Mr. Walker responded that the Subcommittee had moved the language proposed in (c) from existing (a). Steve Johnson noted that he had recently received material related to the Ethics 2000 proposed Rule 7.3. He stated that the Ethics 2000 Committee had backed off many of the changes that were being considered. The proposal would add references to electronic communication and add "close personal friendship" to those relationships from which a lawyer may solicit in-person. He noted specifically that the proposal to put in a 30 day no-contact provision had been dropped. Billy Walker noted that the Committee sentiment at its last meeting had been to not wait until the Ethics 2000 process was finished and instead draft a rule that the Committee thought was appropriate. In the discussion of the 30 day rule, Bill Hyde asked if the Committee had considered including types of cases other than personal injury and wrongful death. Steve Johnson responded that the Subcommittee had been concerned that a 30-day period in a criminal case may include the initial proceedings and therefore would deprive defendants of counsel.

In response to Bob Burton's earlier question, Steve Johnson stated that he did not have a strong opinion that paragraph (c) needed to be retained. John Beckstead stated that it had been the consensus of the Subcommittee that abuse occurred in much lawyer advertising, and it should be curtailed. Therefore, the Subcommittee drafted as restrictive a rule as possible while still not exceeding what had been previously upheld by the Supreme Court. Billy Walker noted that the case which upheld a 30 day no contact provision had included research by the Florida Bar indicating that such a time frame was reasonable. Mr. Walker stated that he thought that a 30 day provision in a Utah rule, even without Utah-specific data, would be defensible under the Supreme Court case Went For It. Mr. Walker noted that the charge to the Subcommittee had been quite broad. The Subcommittee had tried to draft changes in response to the Committee's requirements. He noted that the comment to Rule 7.3 was the comment to the model rule which did not fit with the existing Rule 7.3 and would need to be changed to reflect both the existing 7.3 language and any amendments the Committee proposed.

Gary Sackett asked what the public policy reason was for requiring both clear identification as advertising material and a 30 day no contact provision in certain types of cases. The Committee

discussed whether the no-contact provision would apply to only in-person contact or any contact. Karma Dixon stated that she was concerned that the rule would allow written communication within the 30 days. In response to Mr. Sackett's question, Billy Walker stated that the issue was that prospective clients in certain types of cases were so vulnerable to improper influence by solicitation that they should be protected for 30 days. Mr. Sackett stated that he did not think that attorney advertising was inherently bad. Paula Smith stated that she was concerned about the 30 day no-contact provision. She noted that nothing would stop defense counsel from contacting prospective plaintiffs to try to negotiate a settlement inside the 30 days. The Committee should be concerned that people have as much access to legal services as possible. Mr. Burton stated that many insurance companies will try to get a settlement as quickly as possible. Mr. Wunderli stated that in his opinion the proposed requirement that the words "advertising material" appear on communications soliciting professional employment would go a long way to protecting prospective clients. Billy Walker noted that the Committee had come full circle. Originally, the Subcommittee had proposed only removing (b)(1) and putting in the requirement of including "advertising material" on communications. He noted that Rule 7.3 is poorly worded, and to completely fix it, would need to be redrafted.

Steve Johnson made a motion to remove (b)(3), (c), and "where the lawyer has no family, close personal friendship or prior or current professional relationship with the professional client" from (b). Earl Wunderli seconded the motion. Gary Sackett stated that he assumed the motion left any format issues until a later discussion. Paula Smith stated that she was concerned about the removal of (c) because it made clear what was permissible. Royal Hansen stated that he liked the 30 day no-contact provision because it would protect prospective clients if Utah were ever to have a large disaster. Steve Johnson stated that he was concerned also about the point Ms. Smith made earlier concerning the ability of defense counsel to immediately contact prospective plaintiffs. Gary Chrystler added that many prospective plaintiffs do not realize that they need a lawyer and will sign documents greatly affecting their rights without understanding the consequences. Billy Walker noted that Rule 4.3 does require attorneys to identify themselves as adversarial to prospective plaintiffs. Gary Sackett stated that (c) could be placed into the comment therefore still giving guidance to lawyers. Karma Dixon made a motion to amend Mr. Johnson's motion to include putting language similar to (c) into the comment. Gary Sackett seconded the motion. Kent Roche stated that he was of a mixed opinion on the motion. He thought (c) should stay in the rule so that attorneys were not left with the impression that any change had been made. Karma Dixon's motion to amend Steve Johnson's motion passed with Royal Hansen, Kent Roche, and Paula Smith voting against. Mr. Johnson's motion passed with Royal Hansen voting against.

Earl Wunderli referred the Committee to his comments. He noted that the phrase "no family, close personal friendship, or prior or current professional relationship" occurs many times and he thinks it is awkward. He suggested the language be changed to "no family or prior or current professional relationship, or close personal friendship." Steve Johnson moved that Mr. Wunderli's suggestion be adopted. Kent Roche seconded the motion. Paula Smith asked what is added by having the word "personal" before the word "friendship." Karma Dixon agreed that "personal" did not add to the rule. Gary Sackett asked why "or current" had been added after "prior" when discussing professional relationships. Steve Johnson withdrew his motion.

At Bob Burton's suggestion, Earl Wunderli suggested that the language at issue be changed to "no family relationship, prior or current professional relationship, or close personal friendship." Karma Dixon moved that Mr. Wunderli's suggestion be adopted. Gary Sackett seconded the motion. Billy Walker asked that to help with enforcement the Committee explain deviations from the model rule. Ms. Dixon's motion passed unanimously. Earl Wunderli moved that in (b) "professional employment from a prospective client" be moved to have (b) read: "a lawyer may not solicit professional employment from a prospective client by any other communication directed to a specific recipient concerning a specific cause of action under the following circumstances." Commissioner Arnett seconded the motion. The motion passed unanimously.

In response to a question from Peggy Gentles, the Committee discussed whether the proposed paragraph (b) concerning indicating "advertising material" would apply to advertisements in telephone books, on television, or on radio. Billy Walker stated that he had always thought the danger is in targeted solicitation rather than general advertising. Gary Sackett agreed stating that the rule should not attempt to regulate general advertising. However, he thinks the rule as currently drafted may be that broad. Mr. Sackett made a motion to ask the subcommittee to draft a new paragraph (d) to eliminate its reach to yellow pages, newspaper ads, and similar advertising. Commissioner Arnett seconded the motion. The motion passed unanimously. The Committee discussed timing and decided that it would send its changes to Rule 7.3 out for comment in the next rule making cycle.

IV. OTHER BUSINESS

Bob Burton informed the Committee that he had recently received a letter from the Chief Justice indicating that the Supreme Court intended to have Matty Branch, appellate court administrator, act as its liaison to the Committee. The Committee decided to cancel its April meeting and then meet again in May.

There being no further business, the meeting adjourned.