

# APPROVED MINUTES

## 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

May 15, 2000 - 5:15 p.m.

#### ATTENDEES

John Beckstead  
Robert Burton  
Gary Chrystler  
Steven Johnson  
Kent Roche  
Paula Smith  
Billy Walker  
Earl Wunderli

#### EXCUSED

Thomas Arnett  
Matty Branch  
Karma Dixon  
Royal Hansen  
Judge Nehring  
Gary Sackett

#### STAFF

Peggy Gentles

### I. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed Committee members to the meeting. Earl Wunderli moved that the minutes of the March 20, 2000, meeting be approved with typographical corrections. Steve Johnson seconded the motion. The motion passed unanimously.

### II. REPORT ON OTHER ITEMS

Steve Johnson followed-up on an item discussed at the previous meeting concerning the Bar Commission's action on principles of civility. Mr. Johnson noted that at a meeting he recently attended, Dave Nuffer, incoming Bar president, participated in the discussion. Mr. Nuffer stated that he perceived a concern among members of the Bar that lack of civility was an increasing problem. Mr. Nuffer stated that he may be convening a summit on the issue in the fall. Kent Roche noted that in the most recent president's message in the Bar Journal, Charles Brown also stated that he wanted to do something on this issue. Bob Burton asked whether the ethics opinion annotations to the Rules of Professional Conduct as discussed at the last meeting had been published in the 2000 rules volume. Peggy Gentles stated that the annotations had not been published. She contacted a representative from Lexis Publishing and was told that Lexis had not had enough time to prepare the annotations.

### III. REPORT OF SUBCOMMITTEE ON ADVERTISING RULES

Billy Walker reported that the Subcommittee had drafted changes to Rule 7.3 in response to the Committee's previous discussion. He noted that the Committee members had been provided a clean draft of a Rule 7.3, a new comment, and a discussion about a possible paragraph (d) for Rule 7.3. In the proposed rule, paragraph (a) addresses "in person" solicitation. Paragraph (b) addresses all solicitations. Paragraph (c) requires that "advertising material" be placed on written communications. Mr. Walker noted that the existing comment to Rule 7.3 is the same as the comment to the Model Rule. However, the Utah Rule 7.3 varies from the Model Rule and therefore the comment is not appropriate as written. The Subcommittee suggests removing the entire comment and replacing it with the proposed new comment. Mr. Walker stated that the Subcommittee had begun with making changes to the existing comment but decided that the proposed comment from Ethics 2000 was a better starting place. Mr. Walker noted that the Subcommittee had not suggested inclusion of a paragraph (d) which is part of the Model Rule but does not have a counterpart in the current Utah rule. Paragraph (d) to the Model Rule addresses participation in prepaid or group legal services plans. Mr. Walker stated that the Subcommittee did not have an opinion about inclusion of paragraph (d) and had provided both the text of that paragraph and the corresponding portions of the comment. Mr. Walker noted that one oversight by the Subcommittee had been the inclusion of a paragraph from the draft of Rule 7.3 that had been discussed at the previous meeting in the comment. This paragraph read:

Notwithstanding Rule 7.3(a) and (b), a lawyer may solicit professional employment by written, recorded or other electronic communications to persons not known to need legal services of the kind provided by the lawyer in a particular matter but who are so situated that they might in general find such services useful.

("Old (c)"). Mr. Walker stated that the Committee will need to decide where to place Old (c) in the comment. He stated that in the existing rule Old (c) is part of paragraph (a). That portion of the rule is designed to make clear that an attorney may provide general information to groups of people who may be in need of services, for example estate planning.

John Beckstead asked if the proposed rule was intended to not require advertisements in newspapers which encourage people who have used certain drugs to contact a particular lawyer to include "advertising material." The Subcommittee replied in the affirmative. Billy Walker noted that the concern is largely that a prospective client will find communication directed to the person at the person's home particularly oppressive. The Subcommittee would expect that the average reader of the newspaper would understand information such as that to which Mr. Beckstead referred to be an advertisement. Mr. Beckstead replied that he was concerned that the average reader was not as sophisticated as the Subcommittee was assuming. Such an ad may imply that a person needed to go to a particular law firm to protect the person's rights. Mr. Walker stated that such issues would be addressed by the prohibition on deceptive and misleading advertising. Steve Johnson also noted that, as stated in paragraph 3 of the proposed comment, anything that is published in the public media is easier to police than directed, in-person communication.

Steve Johnson asked whether the organization of Rule 7.3 should be changed switching paragraph (a) and paragraph (b). He noted that that organization would have the general prohibition first followed by regulation of specific in-person and written communication. Paula Smith stated that she perceived the in-person contact to be the greatest evil, and therefore it should come first. John Beckstead noted that the existing organization of the proposed rule was more similar to the Model Rule and would probably facilitate comparison with other states' rules.

John Beckstead noted that the in-person contact provision of paragraph (a) would apply equally to a law firm meeting with decision makers in a company. Billy Walker agreed saying that solicitation of particular business in such situations would be prohibited similarly to solicitation of individuals. Steve Johnson stated that the Massachusetts Supreme Court had recently clarified its advertising rules stating that the rules did not prohibit solicitation from "persons engaged in trade or commerce." The Supreme Court stated that it was not changing the rule but making clear the scope of the existing rule. Billy Walker stated that he did not perceive a problem currently that would require a similar exemption in the language of Rule 7.3. Gary Chrystler noted that he thought the most common implication of Rule 7.3 is an invitation to a seminar on a particular topic. When people attend such seminars, they are given lists to sign up if they would like further information or help with a particular problem.

Bob Burton asked for a general sense from the Committee about the proposed rule. Steve Johnson stated that he was in favor of the draft rule without adding a paragraph (d). Gary Chrystler asked about the provision in paragraph (a) that prohibited solicitations only "when a significant motive for the lawyers doing so is the lawyer's pecuniary gain." Steve Johnson noted that the limitation was designed to allow lawyers to pursue non-pecuniary interests in representation without being concerned that contacting prospective clients would be barred by paragraph (a). Steve Johnson moved that the Committee publish the draft Rule 7.3 for comment without paragraph (d). John Beckstead seconded the motion. The motion passed unanimously. The Committee then discussed changing the proposed comments. The Committee suggested a structure for including Old (c) restructuring some the paragraphs, and ensuring that the terms "prospective client" is used throughout the comment. Steve Johnson moved that the Committee publish the proposed comment as discussed. John Beckstead seconded the motion. The motion passed unanimously. The Committee asked that Peggy Gentles draft the rule and comment with the changes discussed at the meeting and fax the rule and comment out to all Committee members for review. The Committee members should review the material and respond with any requested changes.

#### **IV. OTHER BUSINESS**

Bob Burton noted that other Supreme Court committees sometimes do not meet in the summer. He stated that he thought the Committee currently did not have enough business to justify meeting over the summer and could expect significant amounts of work when the Ethics 2000 process was finished. He suggested that the Committee not meet during the months of June, July, and August unless necessary. The Committee will meet on the regularly scheduled September 18th. He asked any Committee members who wanted to meet before September to please contact him or Peggy Gentles.

Mr. Burton noted that having Billy Walker bring issues to the Committee that he sees in his regulatory work has been very helpful and he asked Mr. Walker to continue to do so as he desired.

There being no further business, the meeting adjourned.