

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

October 16, 2000 - 5:15 p.m.

ATTENDEES

Commissioner Arnett
Robert Burton
Gary Chrystler
Karma Dixon
William Hyde
Steve Johnson
Gary Sackett
Paula Smith
Billy Walker
Earl Wunderli
Matty Branch

EXCUSED

John Beckstead
Royal Hansen
Judge Ronald Nehring
Kent Roche

STAFF

Peggy Gentles

I. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the Committee members to the meeting. Earl Wunderli moved that the minutes of the September 18, 2000 meeting be approved with changes. Commissioner Arnett seconded the motion. The motion passed unanimously.

II. ATTORNEY LIEN ISSUE

Karma Dixon noted that there had been a presentation at a recent family law seminar which raised ethical concerns about attorneys asserting liens. Also, there has been a request for an ethics advisory opinion committee opinion on similar issues. Ms. Dixon stated that the critical issue is the assertion of attorneys liens against child support. She noted that the Court of Appeals in the Eastman v. Earl, case, relying on the 1935 case of Hampton v. Hampton, has held that an attorney can collect a lien out of child support. Ms. Dixon also stated that the case State v. Irizarry states that past due child support is a debt owing to the parent and ongoing child support belongs to the child. Under the Utah statutory scheme, child support is designed to calculate the amounts needed to meet the basic needs of the child. Ms. Dixon stated that her office currently has two relevant cases pending. In one a lawyer is asserting an attorney lien against money being collected by ORS for child support. The

second relates to the enforcement of an attorney lien when the client files bankruptcy and ORS is collecting child support. In Ms. Dixon's opinion, attorneys who assert liens against child support are asserting an interest in something which they do not own. She does not think that such a practice should be ethically allowed.

Gary Sackett stated that, while he is sympathetic to the issue, he wondered if the issue was one for the Legislature rather than the Advisory Committee on the Rules of Professional Conduct. Ms. Dixon replied that she thought the Committee could propose amendments to the rules that would say that you cannot lien funds that do not belong to you. Billy Walker stated that the existing rules are not clear. Rule 1.8 allows liens as otherwise allowed by law. He noted that some states address attorneys liens under Rule 1.5 Fees. Steve Johnson stated that he thought the best course was an amendment of the attorney lien statute rather than the Rules of Professional Conduct. Paula Smith stated that a review of the list of prohibited fee arrangements in Rule 1.5 does not only include illegal transactions. Instead, they reflect a value judgment about what is appropriate for an attorney to do. In response to a question from Gary Sackett, Karma Dixon stated that she would propose an amendment to Rule 1.5 that would clarify at least that ongoing child support does not belong to the client. Commissioner Arnett stated that he agreed that the practice was wrong but thought that a better way to address it was statutory change. Karma Dixon stated that she thought the role of the Committee was to advise the Supreme Court against practices that are not in the public interest. In her opinion, the issue before the Committee was an appropriate area for Committee action.

Gary Sackett noted that the Ethics Advisory Opinion Committee had been asked how the ethical rules apply to liens in domestic cases generally. He stated that the Committee had not yet released an opinion. Billy Walker stated that in New York a rule had been adopted which defines a lien as a contingency fee under the equivalent of Rule 1.5. Gary Sackett asked why the Office of Professional Conduct did not review such cases under Rule 8.4 asserting that the behavior is "prejudicial to the administration of justice." Billy Walker replied that because the lien is authorized by statute and some case law states that the assertion of the lien against the child support is appropriate, he feels such a case would be difficult to make under the existing rules. Steve Johnson stated a concern that if attorneys liens were not available against child support, the number of attorneys willing to take cases may go down and consequently provide fewer people with representation in domestic cases.

Bill Hyde moved that the Committee continue to consider the issue. Specifically, he asked that at next meeting the Committee be provided with the New York ethics rule as well as any other information on other states. Commissioner Arnett seconded the motion. Gary Sackett stated that he would like to see a concrete proposal to change the rules for discussion. The motion passed unanimously. Bob Burton added that he thought it would be helpful to see an analysis of why this matter should be addressed by the Committee rather than someone pursuing a change to the statute. He asked that Karma Dixon, Steve Johnson, and Billy Walker act as a subcommittee on this issue.

III. ETHICS 2000 PROPOSED AMENDMENTS TO RECENTLY DISCUSSED UTAH RULES

The Committee discussed its timetable for looking at the Ethics 2000 proposals. Steve Johnson suggested that until the ABA House of Delegates takes final action, the Committee members could possibly split-up the rules to review so that the Committee could be prepared when the time for review of the entire package comes. Gary Sackett stated that he was concerned that the Committee would be wasting its time until it knew the specific text of the new model rules. However, he was not opposed to addressing specific problems as needed. Paula Smith stated that some of the proposals may contain issues that the Committee had not considered before and may be worthy of independent study. Commissioner Arnett suggested that each Committee member voluntarily look at the proposals related to issues in which the member was particularly interested. He noted that when the model rules were first adopted in Utah, a committee worked for four years prior to their adoption. Bob Burton asked that any Committee member who, having reviewed an Ethics 2000 proposal, wanted to have the Committee discuss an issue contact Peggy Gentles to have the matter put on the agenda for the meeting.

IV. OTHER BUSINESS

Bob Burton noted that the Committee would need to meet in December due to the comment period ending for proposed changes to Rule 7.3 on November 30, 2000. The Committee decided to meet on December 11, 2000, at 5:15 p.m. Earl Wunderli stated that he had had a recent conversation with someone concerning prepaid legal services and wondered whether it was an issue the Committee should consider. He thought that possibly it could have significant implications to the Bar. The Committee asked that Mr. Wunderli review the material that he had received and report to the Committee at the next meeting about whether he thought any further discussion by the Committee was appropriate at this time. There being no further business, the meeting adjourned.