

MINUTES
SUPREME COURT'S ADVISORY COMMITTEE
ON THE
RULES OF PROFESSIONAL CONDUCT

Utah Law & Justice Center
645 South 200 East
Salt Lake City, Utah 84111
Monday, January 27, 2003
5:00 p.m.

ATTENDEES

Robert Burton
Royal Hansen
Nayer Honarvar
William Hyde
Steven Johnson
Kent Roche
Paula Smith
Billy Walker
Gary Sackett
Stuart Schultz
Earl Wunderli
Marilyn Branch

EXCUSED

Honorable Ronald Nehring
Gary Chrystler
John Beckstead

STAFF

Ingrid Westphal Kelson

1. WELCOME AND APPROVAL OF MINUTES

Mr. Wunderli welcomed the members to the meeting.

Mr. Wunderli moved that the minutes be approved as amended. Mr. Hyde seconded the motion, and it passed on the unanimous vote of those present.

2. ETHICS 2000 PROPOSED AMENDMENTS

Rule 1.5 Ms. Honarvar recommended adopting the ABA Model Rules with a few minor changes. Ms. Honarvar discussed the changes, which include: requiring the retainer agreement to be in writing and signed by both parties; the ABA recommendation does not require a written agreement. Ms. Honarvar could not ascertain why the ABA made this recommendation. She stated that there are a few minor word changes such as striking the words "generally it is desirable to" and replacing it with "in these circumstances." Mr. Sackett stated that he doesn't see what problem is solved by requiring a written fee agreement. Mr. Hansen asked what the other states had done with regard to requiring a written fee agreement. Mr. Burton stated that he

By 2nd sentence

had researched Rule 1.5 but could not find why the delegates did not adopt the recommendations of the ethics committee. Mr. Johnson stated that his recollection was that it was not adopted because an attorney is often required to produce work for a client without having the time to obtain a written fee agreement. Mr. Burton stated that he feels the ABA's recommendations should be adopted. Mr. Wunderli made a motion to adopt the ABA's recommendations. The Committee then discussed what an "agreement" entails and whether it must be in writing and signed by the parties. Ms. Honarvar asked if the Committee should change the language "agreement" and call it a "memorandum of understanding" since it will not be a signed document. Mr. Wunderli made a motion to adopt the ABA Model Rule without changes. Mr. Roche seconded the motion, and it passed on the unanimous vote of those present.

Rule 1.16 Mr. Wunderli states Rule 1.16 was discussed at the last meeting and it was adopted with changes. A new draft was provided with the changes. Ms. Smith states the only issue she has is how to cite the ABA Model Rules. Mr. Burton discussed using "Model Rule" or "ABA Model Rule." Mr. Wunderli recalled that the Committee had agreed to use "ABA Model Rule." Mr. Wunderli made a motion to replace "Model Rule" in the Rules and the Comments with "ABA Model Rule." Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present.

Mr. Burton stated there had been a suggestion to send Rule 1.16 to the Supreme Court separate from the other rules. Mr. Sackett stated that since the client file issue regarding Rule 1.16 has been pending before the Ethics Advisory Opinion Committee, he would like to send the Rule to the Court as a separate matter for their consideration. Ms. Branch stated that the next comment period is coming up but she did not know when it was. She further stated that if the rule was sent to the Court now, it would not take effect until November 1st. Ms. Smith stated she believes this is a rule that people will be concerned about and she would not want the rule to be adopted without people recognizing the change that it will have. Mr. Johnson made a motion to send the Rule to the Court as soon as possible. Mr. Hansen and Ms. Honarvar seconded the motion, and it passed on the unanimous vote of those present. Mr. Sackett asked for a letter of explanation to accompany the rule. Mr. Burton agreed to prepare the letter.

Rule 1.6 Mr. Hyde discussed the changes to the rule. He researched why the ABA made the recommendations, but could not find an explanation. Mr. Johnson stated that the House of Delegates should have minutes. Mr. Burton agreed to contact Charles Brown in order to obtain the minutes. Ms. Smith stated that the minutes would be useful for Rules 1.6 and 1.10. Ms. Honarvar stated that it could also be useful for Rule 1.5.

Mr. Hyde discussed the changes to paragraphs 1(a). Mr. Hyde recommends adopting the ABA's recommended changes. Mr. Hyde then discussed the changes to paragraph (a) of the draft and recommended adopting the ABA's recommended changes. Mr. Hyde then discussed the changes to paragraph (b) of the draft and recommended adopting the ABA's recommended changes. Mr. Hyde then discussed the changes to paragraph (b)(1) regarding limiting the disclosure for prevention of reasonably certain death or substantial bodily harm. The ABA has removed the

clause discussing substantial injury to the financial interest or property of another. Mr. Hyde suggested keeping the current language. Mr. Sackett stated that a past opinion had discussed this topic, and this may be why a crime does not have to be a prerequisite to saving someone's life. Mr. Johnson proposed new language for the rule: "To prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal or fraudulent act a lawyer believes is likely to result in a substantial injury to the financial interest." Ms. Smith stated that this would have a more stringent requirement for death or bodily harm, it would not be just "likely" death or bodily harm, it would be "to prevent reasonably certain" death or bodily harm. Mr. Johnson amended the proposed language to read: "Is likely to result in death or substantial bodily harm or to prevent the client from committing a criminal or fraudulent act the lawyer believes is likely to result in substantial injury to the financial interest or property of another." The Committee suggested breaking the sentence into two sub-sections and change the language to as follows: "(b)(i) To prevent death or substantial bodily harm, or (ii) To prevent the client from committing a criminal or fraudulent act that is likely to result in substantial injury to the financial interest or property of another." Mr. Hyde made the motion to divide the language into two sub-sections (i) and (ii). Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present. Mr. Wunderli then made a motion on the proposed language made by Mr. Johnson as to subsection (i). Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present. Mr. Johnson made a motion on the proposed language made by Mr. Johnson as to subsection (ii). Mr. Wunderli seconded the motion, and it passed on the unanimous vote of those present.

Mr. Hyde discussed the changes to section (b)(2) of the draft. Mr. Sackett asked why the ABA would like to make the changes. Mr. Johnson suggested that the language was stricken because it is covered in Rule 1.2 (Comment 10). Mr. Burton suggested keeping the old language and adding the proposed ABA language. Mr. Hyde states that the new language is a different subject. Mr. Wunderli made a motion to keep the current rule but renumber it as (b)(5), and to adopt the changes to (b)(2). Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present.

Mr. Hyde discussed the changes to section (b)(3) of the draft. Mr. Johnson moved to adopt the ABA proposed changes to section (b)(3). Ms. Honarvar seconded the motion, and it passed on the unanimous vote of those present.

Mr. Burton suggested to the Committee that it vote on sections 1(a) and 1(b) of the draft. Mr. Johnson moved to adopt the ABA proposed changes to these sections. Mr. Wunderli seconded the motion, and it passed on the unanimous vote of those present.

Mr. Hyde discussed the changes to section (b)(4) of the draft. Mr. Sackett discussed taking out the language "or a former client." Mr. Sackett made a motion to adopt paragraph (c) of the 1999 discussion draft with the deletion of the language "or a former client" so that the language would read "A lawyer shall reveal information to the extent required by law or a court order ~~only~~ when necessary to comply with these rules." Mr. Hyde seconded the motion, and it passed on the unanimous vote of those present. Mr. Schultz asked what "relating to the representation of a

client” means. Mr. Sackett stated that any information that you obtain during your representation is included. A discussion then ensued regarding an attorney who has not complied with a court order which requires disclosure of discovery, and would this result in a Bar complaint against the attorney.

Mr. Hyde discussed the changes to section (c) of the draft. The Committee then discussed the problem of deleting this section. Mr. Burton asked whether the language could be included as a Comment. Mr. Wunderli suggested adding “for purposes of this rule” to preface the language. Mr. Sackett suggested taking out “(s)” after “lawyer.” The Committee discussed the scope of the language of the rule, defining who is the client and who is the attorney in this scenario. Mr. Hansen proposed that the language be adopted with the provision that the Committee revisit the rule. Mr. Schultz seconded the motion, and it passed on the unanimous vote of those present. Mr. Hyde will follow up. Mr. Burton then asked Mr. Hyde to re-type the rule as to the Committee’s approved changes as well as the Comments.

3. OTHER BUSINESS

Mr. Burton stated that the Committee applauds Judge Nehring’s appointment to the Supreme Court and that he will be an excellent justice. Mr. Burton made a motion to that effect. Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present.

Mr. Burton stated he would speak to those participating in the Mid-Year Meeting before then.

Mr. Sackett suggested allowing more time for the meetings. Mr. Hansen stated that Mr. Walker had suggested having an ABA member or a state who has completed the rule changes come in to speak to the Committee in order to focus on certain rules. Mr. Burton has received a letter from the ABA who has offered to come in with that assistance. Mr. Burton suggested starting future meetings at 4:30 p.m. The Committee agreed to the time change.

The Committee discussed having the Supreme Court appoint a new member and suggested that he or she be a judge.

4. ADJOURN

Mr. Burton announced that the next meeting of the Committee will be held on Monday, February 10 at 4:30 p.m. at the Bar. He notified the Committee that Rules 1.6, 1.4, 1.7, 1.8, 1.9, 1.10, and 1.11 would be discussed at the next meeting and asked the Committee to come prepared to discuss these Rules.

There being no further business, the meeting was adjourned.