

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, March 17, 2003
4:30 p.m.

ATTENDEES

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

EXCUSED

John Beckstead

STAFF

Ingrid Westphal Kelson

1. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the members to the meeting.

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

2. OTHER BUSINESS

Mr. Burton notified the Committee that he received a letter from Chief Justice Durham stating that Billy Walker was now a voting member of the Committee.

Mr. Burton notified the Committee that Judge Nehring was off of the Committee and three new members had been assigned to the Committee: Judge Steven Roth, Judge Fred Howard, and Judge Paul Maughan. The new members will attend the next meeting. Mr. Burton has made new assignments: Judge Roth will work with Steven Johnson; Gary Chrystler will work with

Judge Howard; and Royal Hansen will work with Judge Maughan. The rules assigned to Judge Howard and Gary Chrystler are: 1.17, 3.5, 4.2, 5.7, 7.5, 7.6. Mr. Burton stated that he will speak to John Beckstead to see if he can continue to be on the Committee. If he cannot, Mr. Burton asked Billy Walker to work with Bill Hyde. Mr. Walker agreed.

Mr. Burton reported on the presentation made by the Committee members at the Mid-Year Meeting in St. George. He stated that he, Mr. Johnson and Mr. Sackett made the presentation, which was very well attended. Mr. Johnson stated that he had several questions from the audience after the presentation. He also performed an unofficial straw poll regarding the Pro Bono, Rule 6.1 issue. He asked the audience how many of them already did 50 hours per year and the majority of them raised their hands. When he asked the audience how many would object to doing 50 hours per year, 8-10 persons raised their hands. When he asked the audience how many would object to submitting an annual report to the Bar, about 10 persons raised their hands.

3. ETHICS 2000 PROPOSED AMENDMENTS

Rule 1.6 Mr. Hyde discussed the changes to the Rule. Mr. Hyde stated that prior to the meeting, Mr. Roche had sent him an e-mail and suggested some changes to the proposed draft of February 11th. Regarding Comment 6, Mr. Hyde proposed striking the comma after "life." Mr. Roche stated that his concern was that the sentence could be read as the "overriding value of harm from criminal or fraudulent acts." He suggested deleting the lead in and going straight to the exceptions. Mr. Johnson suggested changing the sentence to read "recognizing the overriding value of life and physical integrity, and the harm from criminal or fraudulent acts." Ms. Smith stated that the sentence would make more sense if it were two paragraphs. Ms. Honarvar suggested taking out "and" and replacing it with "as well as." Mr. Johnson made a motion to change the sentence to read "recognizing the overriding value of life and physical integrity, and the harm from criminal or fraudulent acts." Mr. Wunderli seconded the motion, and it passed on the unanimous vote of those present. Ms. Smith suggested adding an apostrophe to "publics" in the same Comment.

Mr. Walker referred the Committee to Comment 10 on page 9. Mr. Walker stated that the Model Rule 3(c) states "may reveal information" but in Comment 10 it crosses out "may" and replaces it with "requires." Mr. Walker asked why it was mandatory under the Model Rules rather than discretionary as it was under the old rules. Ms. Smith states that it was her recollection that the Committee wanted to make it an ethical violation not to comply with the court order. Mr. Walker stated this may cause some ethical confusion for the lawyer because court orders are not always clear and the law is not always clear. Mr. Walker stated that when a lawyer has to decide if he has an ethical obligation to do something, they will be conflicted in trying to determine the law. The rules have been permissive so that there is no conflict with the evidentiary standard or the attorney-client privilege when the lawyer is trying to decide whether or not they have to produce documents or produce information. In this way, the lawyer can still oppose a court order without violating his ethical obligation that might require him to do so. Mr. Hyde stated that the first

draft of 1999 of the proposed rule by the ABA made that mandatory. Also, he stated that part of the Comment speaks to the process of testing the required exposure by appropriate motion to the court and other activities to protect it and in the last instance, you would have to reveal if all those efforts failed. Mr. Walker stated that it does not add to the rule to have it be a requirement because if a lawyer can do it, they will do it and they do not have to worry about the ethical requirement, only the legal requirement. He further stated that Rule 1.6 historically has always worked better permissively. Mr. Walker suggested that the black letter law be changed to make it permissive as well as the Comment because it will make it much clearer. He further stated that this issue comes up a lot in connection with Rule 3.1 because the lawyer must decide whether or not they have a good faith defense or frivolous claim and they want to know if they can argue the case and not be in violation of their ethical obligation under 3.1. The Committee then discussed this issue. Mr. Schultz stated that he would prefer the rule to be permissive. Ms. Smith asked how the OPC goes after those attorneys in contempt of a court order. Mr. Walker responded that under Rule 8.4(d), the OPC considers contempt of a court order as conduct prejudicial to the administration of justice. Mr. Walker then made a motion to amend Rule 1.6(c) to read “may” instead of “shall.” Mr. Johnson made a substitute motion to renumber the paragraph as 1.6(b)(5). Mr. Walker stated the motion should include changes to paragraphs 10, 11 and 13. Mr. Schultz seconded the motion, and it passed on the vote of those present. Mr. Hyde was opposed.

Regarding paragraph 18, Mr. Hyde discussed making Mr. Roche’s changes. Ms. Smith suggested adding a lead in to paragraph 18 stating that paragraph (d) is an addition to the ABA Model Rule. Mr. Roche distributed proposed changes to the language. Ms. Smith made a motion to change the language as follows: “For purposes of this rule, ‘the representation of a client’ is deemed to include a lawyer’s counseling of another lawyer under the auspices of the Bar’s ‘Lawyers Helping Lawyers’ program. Paragraph (d) subjects the lawyer/counselor to the duty of confidentiality imposed by this rule and is in addition to the ABA Model Rules.” Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present.

Rule 1.8 Mr. Johnson stated that some unresolved issues remain to be discussed by the Committee prior to preparing another draft. The Committee discussed 1.8(j) regarding sexual relations with a client and proposed changes thereto. Mr. Walker stated that the Committee should determine how 1.8(j) coincides with Rule 8.4(g). Mr. Walker further stated that cases can still be prosecuted under 8.4(g). Mr. Johnson suggested adopting the language from 8.4(g) and striking (j). He further stated that the Comment needs to be adjusted if the Committee makes the change. Mr. Sackett made a motion to take the current Rule 8.4(g) language and modify it from “It is professional misconduct for a lawyer to:” to read “A lawyer shall not,” and make that a replacement to Rule 1.8(j) and form a Comment accordingly, keeping it consistent with 1.8(j), and eliminating the Comment currently used in Rule 8.4(g). Mr. Johnson stated the motion should adapt the Comment to make sure the current Comment 17, 18 and 19 do not conflict with 8.4(g). Mr. Roche seconded the motion, and it passed on the vote of those present.

The Committee then discussed 1.8(e)(2) regarding indigent clients. Ms. Honarvar stated she

recalls the Committee had agreed to revisit this issue. She further stated that 1.8(e)(1) and (e)(2) are basically the same. She suggested using the following language: "A lawyer representing an indigent client may pay court costs and expenses reasonably connected to the litigation on behalf of the client." She stated that if the attorney is not allowed to expand some costs to the indigent client, such as transportation and communication costs, they will be denied access to the court and will not be able to continue with their case. Mr. Sackett asked what public policy is served by limiting what you can give to an indigent client? Ms. Smith stated the idea was the lawyer will pay their expenses and the client will end up owing them a lot of money so that the lawyer will not be able to make an independent decision about their case because of the financial interest invested in the case. She stated the resolution would be giving the money to the client but it seems that the rule states it is wrong to do that. Mr. Walker stated that Comment 10 talks partially about the public policy. Comment 10 states that certain types of litigation should not be funded or pursued. He further stated that it creates a situation that gets the lawyer in trouble when the time comes to collect the money back. The lawyer is forced to have a client sign a document (sometimes under claimed duress) stating that the lawyer loaned the client money. The client will then file a Bar complaint stating they never received that money. Mr. Schultz stated the basic rule is you do not provide financial assistance in order to avoid conflicts but, the rule states if you have an indigent client you are not limited to the advancement of the court costs contingent on the outcome of the case, you can actually pay them. The Committee further discussed the issues. Ms. Honarvar moved to amend Rule 1.8(e)(2) to read that "A lawyer representing an indigent client may pay court costs and expenses reasonably connected to litigation not to exceed \$100 per month on behalf of the client" with the understanding that the burden is on the attorney to prove that they are reasonably connected or adding a new paragraph (e)(3) which includes allowing the attorney to pay up to \$100 per month for costs reasonably connected. Mr. Walker then made a substitute motion to leave Rule 1.8(e) as recommended by the ABA. Mr. Johnson seconded the motion. Mr. Sackett stated he would not like to adopt 1.8(e)(2) as written but would like to try to manufacture replacement language. Mr. Hyde stated he would support the motion only if language is included in paragraph 10 that expands the ability to deal with indigent clients in a more reasonable way. Ms. Honarvar made a motion to table the matter and come back with language for the next meeting. Mr. Sackett seconded the motion, and it passed on the vote of those present. Mr. Walker was opposed. Mr. Johnson suggested that the Committee e-mail him to give guidance.

4. ADJOURN

Mr. Burton announced that the next meeting of the Committee will be held on Monday, April 21st, 2003 at 4:30 p.m. at the Bar. He notified the Committee that Rules 1.6, 1.8, 1.10, 1.11, 1.12, 1.13, 1.14, and 1.15 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.