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, June 16, 2003
4:30 p.m.

ATTENDEES
Robert Burton
Royal Hansen
Marilyn Branch
William Hyde
Kent Roche
Gary Sackett
Stuart Schultz
Paula Smith
Billy Walker
Earl Wunderli
Nayer Honarvar
Judge Fred Howard

EXCUSED
Gary Chrystler
Judge Paul Maughan
Steven Johnson
Judge Stephen Roth

STAFF
Ingrid Westphal Kelson

1. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the members to the meeting.

Mr. Burton urged the Committee to refrain from making changes to the minutes unless necessary for the accuracy of the minutes. Mr. Wunderli moved that the minutes be approved as amended. Ms. Smith seconded the motion, and it passed on the unanimous vote of those present.

2. OTHER BUSINESS

Mr. Burton discussed the "Common Good" petition, which is seeking the placement of limitations on contingent attorneys fees in cases that are quickly disposed of. Ed Havas, the president of the Utah Trial Lawyers, would like to respond to this. Mr. Burton asked Mr. Havas' organization to prepare a brief and to forward it to the Committee by the end of June. Mr. Burton does not believe there is a need for a sub-committee to sift through the information. Mr. Havas would like to address the Committee and, Mr. Burton believes it would be fair to grant Mr. Densley the same opportunity. The Committee agreed to wait for these individuals to fully brief the matter and discuss it then. Ms. Honarvar asked if the Committee should have a sub-committee make its own finding before the parties make their oral presentations. Mr. Schultz

amended

asked how the Committee received the petition procedurally. Mr. Burton explained that the document was filed with the Bar and the Bar sent it to the Committee because the concept of the petition is premised on Rule 1.5. Mr. Wunderli asked if the ABA or if other states had taken a position on this matter. Mr. Burton stated that he did not believe they had. The Committee decided to ~~make their own findings on~~ discuss this matter before the parties' make their oral presentations.

Mr. Burton stated that the Committee had adopted a number of rules to date and asked the sub-committees to keep final drafts of those rules in order to go back and reconstruct what will be submitted to the court.

Mr. Burton discussed a discipline corner which appeared in the Bar Journal's May issue, regarding Rule 1.8. Ms. Honarvar stated that based on the short paragraph that appeared in the Bar Journal, she could not tell what the specifics were which warranted a public reprimand. She stated that without the details, the Committee could not determine whether or not the rule should be revisited. She also asked if Mr. Walker could provide a copy of the public reprimand since it is public record. Mr. Walker stated that his office only provides a summary for the Bar Journal and he agreed to provide a copy to the Committee. He further stated a Screening Panel of the Ethics and Discipline Committee issued this reprimand, which is not always consistent in connection with the cases that all Panels hear and the results that all Panels render. The Committee can look at the facts in this case but another Panel could have reached a different result on similar facts. Ms. Smith stated that she is interested in looking at the public reprimand because the Committee's position did not deal with a limited monetary amount but with something that was a gift as opposed to a loan so there would not be a proprietary interest in the case based upon that gift. Mr. Walker explained that the rules changed on January 1st of this year, allowing the Supreme Court's Ethics and Discipline Committee to issue public reprimands and, therefore, the Office of Professional Conduct keeps the record.

3. DEFINITION OF THE PRACTICE OF LAW

Mr. Burton stated that the discussion on the definition of the practice of law would be deferred until the next meeting. Mr. Wunderli stated that the sub-committee has prepared a draft of a definition but they would like to submit a more "polished" definition to the Committee and, therefore, asked for another month to prepare it. Mr. Walker stated that he had received an e-mail from Joni Seko who indicated that the Multi-Jurisdictional Practice Committee had completed its work on the definition of the practice of law. Mr. Walker asked her to send the draft to Mr. Burton. Mr. Burton asked Mr. Sackett to contact Ms. Seko in order to obtain a copy. Mr. Walker also reminded the Committee that he had earlier mentioned that the Bar's UPL Committee may want to weigh in on this issue and the Committee may want to hear from a representative of this Committee.

Mr. Burton asked Mr. Sackett to e-mail or fax a draft of the definition of the practice of law to the Committee.

4. ETHICS 2000

Rule 1.12 Mr. Hyde discussed the changes to the Rule.. He stated that he and Mr. Walker wanted to ~~take~~ discuss Rule 1.12 in conjunction with Rule 2.4 with the Committee because the only change to Rule 1.12 from the current rule is the addition of arbitrator/mediator/or third-party neutrals as to conflict with prior positions. He stated that Rule 2.4 is a new rule as proposed and it defines those terms. He then recommended that the Committee ~~to~~ adopt the changes as proposed by the ABA . He stated that the Committee previously discussed the concept of consent, and such consent should be obtained in writing. Mr. Burton asked Messrs. Roche and Sackett if they are recommending the adoption of Rule 2.4 as proposed by the ABA. Mr. Roche stated that they are recommending adoption as proposed by the ABA and distributed a memo regarding the rule. Mr. Hyde stated that Rule 1.12 refers to Rule 2.4 in the Comment and therefore they should be discussed simultaneously. Mr. Roche stated that Rule 2.4 is a new rule regarding an attorney serving as a third party neutral and the attorney's responsibilities as a third-party neutral.

Mr. Sackett asked if the Committee was going to discuss the "demise" of Rule 2.2, which was often neglected, misused, or mis-cited as having to do with mediators when it in fact did not. He then stated that there is a question before the Ethics Advisory Committee regarding whether an attorney acting as a mediator may draw up settlement papers for the parties and, therefore, the Committee should not be complacent about the rule. Mr. Walker added that the situation is further complicated by the UPL definition as well. He stated that a lawyer or non-lawyer would then be given free "bite" to act as a mediator and draw up papers because they would not be participating in the practice of law under the UPL definition. Further, Rule 1.12 codifies what a mediator is – they do not represent parties when they are part of the mediation. And, under Rule 1.12(a) the Ethics Advisory Committee issue described by Mr. Sackett would not be an issue because they could not represent the parties when they draw up the agreement. Mr. Walker then described a situation occurring in another state wherein the mediator drew up an agreement and then was asked to testify as to the circumstances surrounding that agreement. That issue becomes more simple when you can define the mediator's role: as not representing either party. Mr. Wunderli moved to adopt Rule 1.12 as recommended by the ABA. Mr. Roche seconded the motion, and it passed on the unanimous vote of those present.

Rule 2.2 Mr. Hansen stated that Rule 2.2 had been deleted in its entirety and some of its comments has been distributed to Rule 1.7. He stated that the term "intermediation" has been abandoned. He further stated that of approximately 15 states, all but one (Tennessee) have adopted the deletion of Rule 2.2 in its entirety. Mr. Hansen asked what should be done with the "blank" left by the deletion of Rule 2.2. Mr. Sackett recommended leaving Rule 2.2 as a blank for clarity. Mr. Hansen agreed with his recommendation. Mr. Sackett then moved to ~~adopt Rule 2.2 and~~ to indicate that it has been deleted. Mr. Wunderli seconded the motion, and it passed on the unanimous vote of those present.

Rule 2.4 Mr. Roche discussed the changes to the rule. He stated that paragraph (a) is a definition of third-party neutral. He further stated that paragraph (b) requires that a lawyer acting as a third-party neutral must explain to the parties that he is not there to represent their interests. Mr. Burton asked if there had been any debate about the ABA's recommendation. Mr. Roche stated that he was not aware of any. Mr. Wunderli asked if third-party neutral would include a judge. Mr. Walker stated that a judge is governed by the Code of Judicial Conduct. Ms. Honarvar stated that when you take the mediation course, you are instructed to explain your role to the parties and you are instructed not to use persuasive methods on either side. She believes that in a mediation proceeding the parties are more clear about the role of the mediator than they are in the adversarial process. Mr. Hyde moved to adopt Rule 2.4 as recommended by the sub-committee. Mr. Hansen seconded the motion, and it passed on the unanimous vote of those present.

Rule 1.13 Judge Howard stated that he was not prepared to discuss the rule. Mr. Hyde stated that he had prepared a memo on the rule and Ms. Smith stated she had drafted proposed language. Ms. Smith further stated that she would rather wait for Mr. Chrystler to be in attendance in order to discuss this rule. Mr. Burton stated that the Committee will defer on Rule 1.13 until the next meeting.

Rule 1.14 Mr. Burton stated that this rule had been adopted but he needed the final draft of the rule, which will be identical to the ABA's recommendation.

Rule 1.15 Mr. Burton stated that this rule had been adopted but he needed the final draft of the rule. He asked the sub-committee to provide a comment as to why the rule differs from the ABA's recommendation. Mr. Roche stated that he will provide this information to the Committee at the next meeting.

Rule 1.17 Judge Howard stated that he would like to wait for Mr. Chrystler to be in attendance in order to discuss this rule since he drafted the proposal. Judge Howard also suggested that since the sale of a practice of law is such a common practice, the Committee should read the rule carefully. Mr. Sackett asked to what extent the new Rule 1.17 differs from the Committee's management of the problem a few years back. Mr. Burton suggested deferring discussion on this rule until the next meeting. Ms. Smith stated that she had concerns about requiring notice to a client and requiring consent by that client before their file can be looked at by someone else. Judge Howard stated that he is concerned about retired attorneys selling their practice to their colleagues and then continuing to practice. Judge Howard also has concerns regarding allowing a piecemeal sale of the practice. He also stated that an attorney will also sell their interest in the firm to their partners and then take an "of counsel" position and then work on certain cases by choice. Mr. Sackett stated that if an attorney is retiring from the firm, you are not selling your practice but rather selling your interest in the firm. He suggested adding language to the comment to that effect.

Rule 1.18 Ms. Honarvar stated that this is a new rule and the language contained therein is the

same as the ABA Model Rule and Ethics 2000. She explained that the rule deals with a prospective client and trying to reach a balance between giving the client the freedom to go to an attorney to discuss their confidential concerns, and the attorney being able to subsequently take on the other party's case, even if the case deals with the same information that the prospective client has given them. She stated that she has a concern regarding Comment 5, which she feels is more in favor of the attorney rather than the client. Aside from that, Ms. Honarvar recommended adoption of the rule as proposed by the ABA. Mr. Roche stated that the Comment is useful so that an attorney can protect himself from being disqualified by a client who has discussed his case with several attorneys. Mr. Walker stated that if you do not make disclosure then paragraphs (c) and (d) are undercut; the comment gives some guidelines as to what needs to be disclosed to the potential client. He explained that the comment provides guidelines as to what will be held in attorney-client confidentiality.

Ms. Honarvar stated that she thought informed consent came after the initial consultation but that Comment 5 is talking about guidelines for the beginning of the consultation. Mr. Walker stated that in a small rural community with a small number of attorneys, if a petitioner speaks to both of the domestic attorneys in town, then the opposing party may not hire either of those attorneys. He also stated that informed consent comes first not after, and it forces the attorney to decide whether he will take the case. Mr. Schultz stated that if you look at it, subparagraph (b) is premised on the assumption that you have had a discussion with the client and you do not form a client-lawyer relationship. Further, outside of compliance with the provisions of Rule 1.9 where you can use the information, then you cannot use the information. Ms. Smith stated that she is concerned with conditioning conversations as the proposed rule states; she considers informed consent to be a mutual discussion and not a conditioning. The Committee further discussed the informed consent aspect of the rule.

Mr. Sackett asked if Comment 5 trumps paragraph (d) of the rule. Mr. Hyde stated that he had a concern that the rule did not make reference to Rule 1.6, since it is the real test as to what type of information can be given. Mr. Walker stated that Rule 1.9 refers back to 1.6 under subpart (b) of 1.9. Mr. Burton asked for Mr. Schultz and Ms. Honarvar to research if there was debate at the ABA level. Mr. Roche suggested adding language "except as provided in paragraph (d)" to the rule, otherwise the comment is inconsistent to the black letter rule. Mr. Sackett stated that subpart (b) is conditioned upon subparts (c) and (d). The Committee further discussed the consistency of the rule. Ms. Honarvar and Mr. Schultz agreed to do further research and the Committee agreed to table the matter until the next meeting.

Rule 2.3 Mr. Burton stated that he had received an e-mail from Mr. Johnson with regard to this rule, and the sub-committee members recommended adoption of the rule as recommended by Ethics 2000. Mr. Burton suggested reviewing Rule 2.3 and perhaps adopting it. Mr. Sackett stated that he would like to hear from the sub-committee. Mr. Burton stated that discussion on this rule would be deferred until the next meeting.

Rule 3.1 Mr. Wunderli discussed the rule changes and recommended adoption of the ABA's changes. Mr. Burton asked if the language in the comments is inconsistent, noting that in

paragraph 1 of the Comment the ABA struck the word "case" and used "cause". He further stated that in paragraph 2 of the Comment new language is inserted that talks about cases. Mr. Schultz noted that cause was being used as shorthand for "cause of action." Mr. Roche asked if Comment 3 allows criminal defense attorneys to make up defense theories. Mr. Hyde stated that there is a body of federal and state law that would be broader than this rule would otherwise permit. Mr. Sackett moved to adopt the rule as per the sub-committee's recommendation. Ms. Smith seconded the motion, and it passed on the unanimous vote of those present.

Rule 3.2 Mr. Burton suggested deferring discussion on this rule until the next meeting. Ms. Honarvar and Mr. Schultz agreed to go ahead and discuss the rule today. Mr. Walker stated that the comments will "swallow" this rule because the rule is not specific enough. Mr. Sackett asked if Mr. Walker received complaints that translate into violations of Rule 3.2. Mr. Walker stated that he rarely does. The Committee reviewed the rule and the changes thereto. Mr. Schultz asked who the rule was written to protect; it seemed that it would be used against you by your opponent rather than your client. Mr. Walker stated that if your client intends to drag out the case, an attorney can point to this rule. Mr. Sackett stated that even if the rule is adopted, he would request that the first sentence of the second paragraph be deleted since it is an editorial comment. He also requested changing the language "the question" to read "the standard" in the same paragraph. Mr. Sackett moved to adopt the rule with the changes recommended by the Committee: deleting the first sentence of the second paragraph of the Comment and changing "the question" to "the standard." Ms. Honarvar seconded the motion, and it passed on the unanimous vote of those present.

Rule 3.7 The Committee decided to discuss this rule at its next meeting.

5. ADJOURN

Mr. Burton announced that the next meeting of the Committee would be held on Monday, July 21, 2003 at 4:30 p.m. at the Bar. He notified the Committee that the Supreme Court wants the definition of the practice of law by the end of the summer and, therefore, he believes the Committee cannot afford to take a month off. He suggested taking December off instead. Mr. Burton also set the following meeting of the Committee for August 18, 2003 at 4:30 p.m. at the Bar.

There being no further business, the meeting was adjourned.