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

Law and Justice Center
645 S 200 East
Salt Lake City, UT
July 18, 2005
4:30 p.m.

ATTENDEES

Robert Burton, chair
Gary Chrystler
Judge Royal Hansen
Judge Fred Howard
Judge Paul Maughan
Kent Roche
Judge Stephen Roth
Stuart Schultz
Paula Smith
John Soltis
Billy Walker
Earl Wunderli
Matty Branch

EXCUSED

Nayer Honarvar
Steven Johnson
Gary Sackett

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee. Mr. Wunderli advised Ms. Branch as to two typographical errors in the minutes of the June 21st meeting. Paula Smith also stated that the second sentence of the paragraph as to Rule 5.4 should be changed to state as follows: "Paula Smith indicated that she agreed with the comment, and she agreed to provide a memo on the request for the next meeting." Subject to the changes requested by Mr. Wunderli and Ms. Smith, Mr. Wunderli moved to approve the minutes. Judge Hansen seconded the motion, and it passed unanimously.

2. DISCUSSION AND ACTION AS TO COMMENTS RECEIVED

Rule 5.4

Ms. Smith reviewed with the committee her memo as to Mr. Bennett's requested changes to Rule 5.4. Ms. Smith stated that the correct cross reference in Comment [2a] should be 7.2(b), not 7.2(c) . She also stated that reference to Paragraph 4 in the Comment should be Paragraph (a)(4) and that "prohibits" should be changed to "prohibit." Mr. Wunderli moved to make the revisions to Comment [2a] recommended by Ms. Smith. Ms. Smith seconded the motion, and it passed unanimously.

Rule 1.9(c)

Mr. Roche advised that he had reviewed the changes suggested by Mr. Bennett to Rule 1.9(c) . He stated that the committee had adopted the Ethics 2000 version of Rule 1.9(c), and that he did not think the changes suggested by Mr. Bennett were necessary since they did not add anything critical to the rule and making the changes would be contrary to the committee's policy of deviating from the Ethics 2000 rules only for compelling reasons. Mr. Roche also indicated that he thought Mr. Bennett's proposed cross-references were unnecessarily limiting. Based upon Mr. Roche's comments, Judge Hansen moved that no changes be made to Rule 1.9(c). Judge Howard seconded the motion, and it passed unanimously.

Rule 1.13

Judge Roth reviewed the memo that he and Steve Johnson prepared in response to the concerns expressed by the Office of Legislative Research and General Counsel that Rule 1.13 as proposed would make it impossible for legislative counsel to meet their obligations to the Legislature without violating the Rules of Professional Conduct. Judge Roth stated that even after a thorough review of legislative counsels' concerns he and Mr. Johnson were still of the view that such concerns were not warranted because legislative counsel have an attorney-client relationship with the Legislature as an entity, and not with the Speaker, President or any individual legislators apart from the entity. Several committee members pointed out that in a corporation or other business entity the individual constituents often disagree. Counsel for the organization may be asked by one constituent such as a board member or officer to draft a resolution or a contract. The same legal counsel could then be asked by a different constituent such as a different board member to draft an opposing resolution or contract. This situation does not give rise to a Rule 1.7 or Rule 1.13 impermissible conflict. The lawyer does not represent the individual constituents in their individual capacities, but represents the entity as a whole. Committee members suggested that the role of legislative counsel is not unlike that of counsel for a business entity, and that unless a statute provides otherwise, a lawyer for a governmental organization, such as the Legislature represents the organization and not the individual constituents, such as the individual legislators. Committee members indicated that they were not persuaded that Utah Code Annotated § 36-12-12(2)(e) changes the situation for legislative attorneys.

Judge Roth advised that the Utah Supreme Court had considered a similar issue in the case of Salt Lake County Commission v. Salt Lake County Attorney, Douglas R. Short, 985 P.2d 899 (UT 1999), and held that the county attorney has an attorney-client relationship only with the county as an entity, and not with the county commission or the individual commissioners apart from the entity on behalf of which they act. Similarly, legislative counsel have an attorney-client relationship with the Legislature as an entity, and not with individual legislators apart from the entity on behalf of which they act.

Judge Roth stated that he and Mr. Johnson felt that the proposed Rule 1.13 and its

Comment were sufficient to overcome the concerns expressed by legislative counsel. Rule 1.13(h) clearly states that a "lawyer elected, appointed, retained, or employed to represent a governmental entity shall be considered for the purpose of this rule as *representing an organization.*" The lawyer does not represent the constituents of that organization such as the individual legislators. Comment 2 states, "This does not mean, however, that constituents of an organizational client are the clients of the lawyer." Comment 13a states, "For example, *the government lawyer's client is generally the governmental entity itself*. . . ."

Judge Roth indicated that while they felt the proposed rule was adequate, he and Mr. Johnson recommended the following changes be made to the Comment:

1. Add back to Comment 13a after the first sentence, a sentence which was mistakenly deleted from the current Comment by the Committee. The sentence currently reads, "A government lawyer following these legal duties in good faith will not be considered in violation of the ethical standards of this rule." The sentence should be modified to read, "A government lawyer following the legal duties of this Rule in good faith will not be considered in violation of the ethical standards of this Rule."

2. The next sentence should be changed to read, "The duties defined in this Rule apply to government lawyers . . . ."

3. The first part of the sentence which begins, "For example, the government lawyer's client is generally the governmental entity itself, but," should be deleted. In its stead should be inserted the following:

> Just as a lawyer representing a corporation also serves the corporation's officers, directors, employees, affiliates, subsidiaries, departments and other constituents, a lawyer for a governmental entity must also serve the entity's varying constituents. In serving those constituents, the governmental attorney is nonetheless considered to be representing one client, the governmental entity. For example, a lawyer in the Office of Legislative Counsel by statute represents the interests of the majority and minority leadership of the House or Senate, individual legislators, committee members, and legislative staff, among others. A lawyer in that office is nonetheless considered to represent one client, namely, the Legislature.

The committee then specifically discussed the comment proposed by Gay Taylor and Roger Tew. In anticipation of his absence, Mr. Sackett submitted a memo to the committee opposing the addition of the Taylor-Tew proposal or any similar language. Other committee members objected to the proposed comment because it seemed to be carving an exception from the rule for legislative attorneys alone. Mr. Walker expressed concern that the proposed comment implies that it is ok for an attorney to have adverse interests, and he suggested that the

legislative attorneys seemed to be confusing their duties with respect to their client. Judge Roth stated that he was against adding the comment proposed by the legislative attorneys because it was like the committee giving an advisory opinion to one group of lawyers, and that he thought the issue was too complex to be handled in this fashion. For these same reasons, several committee members indicated they were not comfortable with the language recommended by Mr. Johnson and Judge Roth in recommendation #3 above. After full and complete discussion, Judge Roth agreed that his earlier recommendation should not be followed.

Judge Hansen moved that instead of adding the legislative attorneys' proposed comment, the committee add back to Comment 13(a), after the first sentence, the following sentence that appears to have been mistakenly deleted: "A government lawyer following these ethical duties in good faith will not be considered in violation of the ethical standards of this rule," and change the next sentence in Comment 13(a) to read: "The duties defined in this Rule apply to government lawyers . . . " Mr. Wunderli seconded the motion, and it passed unanimously.

Rule 1.8(i)

Judge Roth stated that he had spoken with Rep. David Thomas that afternoon in an effort to more fully understand the concerns raised in Rep. Thomas's comment. Rep. Thomas indicated that he felt that Rule 1.8(i) needed to make clear that attorneys are prohibited from accepting an equitable interest, rather than legal fees, in the specific real property that is the subject of their legal representation. Rep. Thomas told Judge Roth that he had been told by certain Utah real estate attorneys that the Office of Professional Conduct had approved this type of fee arrangement. Mr. Walker questioned whether his office had offered such advice because, in his view, the current rule would preclude attorneys from taking a fee in the manner described by Rep. Thomas. Judge Roth said he would suggest to Rep. Thomas that he call Mr. Walker to discuss the issue.

Judge Maughan moved that no changes be made to Rule 1.8(i). Judge Roth seconded the motion, and it passed unanimously.

3. NEXT MEETING

Monday, September 19, 4:30 p.m., Law and Justice Center.