

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

1 change on p. 3

Law and Justice Center  
645 South 200 East  
Salt Lake City, UT  
November 21, 2005  
5:00 p.m.

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ATTENDEES

Robert Burton, chair  
Gary Chrystler  
Judge Royal Hansen  
Nayer Honavar  
Judge Fred Howard  
Steven Johnson  
Judge Paul Maughan  
Kent Roche

Judge Stephen Roth  
Gary Sackett  
Stuart Schultz  
Paula Smith  
John Soltis  
Earl Wunderli  
Matty Branch

EXCUSED

Billy Walker

GUESTS

Diane Akiyama

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee and advised as to the Supreme Court's praise for the committee's excellent work on the Ethics 2000 Project. Mr. Wunderli moved to approve the minutes. Gary Chrystler seconded the motion, and it passed unanimously.

2. CLERICAL CORRECTIONS TO RECENTLY APPROVED RULES

Ms. Smith advised that several clerical corrections to Rule 5.4 that were earlier approved by the committee did not appear in the published version of the rule. The cross-reference in Comment [2a] should be to 7.2(b) not 7.2(c) and the reference to paragraph 4 should be to paragraph (a)(4). Also, the word "prohibits" in Comment [2a] should be "prohibit." Ms. Branch agreed to make sure that these corrections were sent to the various publishers.

Mr. Sackett suggested that to avoid confusion between the Utah Rules of Professional Conduct and the Model Rules, the index to the Utah rules should indicate that Model Rule 7.6. Political Contributions to Obtain Government Legal Engagements or Appointments by Judges has not been adopted in Utah. The committee unanimously agreed with Mr. Sackett's suggestion, and Ms. Branch said she would make sure that this change was sent to the various publishers as well.

3. UPDATE ON SUPREME COURT'S ACTION ON ETHICS 2000 AMENDMENTS

Ms. Branch distributed copies of the Supreme Court's order of September 19, 2005, and highlighted the few changes ultimately made by the court to the rules submitted by the committee.

4. DISCUSSION - ROLE OF LAWYER/MEDIATORS IN DIVORCE PROCEEDINGS

Mr. Sackett explained that Utah Ethics Opinion No. 05-03, concerning the post-mediation ethical considerations of a lawyer-mediator in a successful divorce mediation, was one of the most controversial subjects the Ethics Opinion Committee had ever handled. He said there were nine members of the committee in the majority with five members joining in a dissenting opinion. Mr. Sackett advised that the majority position was that a strict reading of the Rules of Professional Conduct did not permit a lawyer-mediator, who had brought divorcing parties to a full agreement on the issues between them, to then represent both parties in preparing a formal agreement and the necessary court papers to complete the divorce. The majority opinion provided that the lawyer-mediator could represent one of the parties in the post-mediation procedures subject to certain conditions. The minority opinion concluded that with appropriate consent and other conditions, the lawyer-mediator could jointly represent both parties to the divorce and prepare the necessary documents and court papers.

Mr. Sackett stated that following an appeal to the Bar commission, the commission issued its own opinion which adopted the majority opinion except that it did ~~not~~ permit the lawyer-mediator, after reaching a settlement, to represent either party. Mr. Sackett advised that many of the Bar commissioners felt that public policy considerations support limited post-mediation representation by the lawyer-mediator but concluded that the applicable rules would need to be revised to permit such representation. Mr. Burton advised that at that point, John Baldwin wrote a letter to Chief Justice Durham requesting the court to review the issues, and the Supreme Court referred the matter to its Advisory Committee on the Rules of Professional Conduct.

*did not address  
the issue of  
whether*

Judge Hansen, who chairs the Court's ADR Committee, stated that there was no consensus on the ADR Committee as to the issue except that all members agreed that non-lawyers who act as court mediators should not be permitted to draft court pleadings.

Mr. Wunderli asked why the ethics opinion only deals with the divorce setting since it seems the issue applies to other types of cases. Mr. Johnson said that domestic cases are where the situation usually arises since there are many unrepresented parties in divorce-mediation proceedings whereas in other civil cases, the parties are generally represented in any mediation.

Mr. Walker, who was unable to attend the meeting, sent an email to all committee members advising that OPC concurs with the analysis of the majority position in Ethics Opinion 05-03 and believes the modifications to the Comment to Rule 1.7 proposed by Mr. Sackett change the meaning of the rule and permit a breach of the core value of loyalty to the client. Ms. Akiyama advised the committee that Mr. Walker wanted the issue tabled until the next committee meeting so that he could actively participate in the discussion.

Mr. Johnson stated that the Dispute Resolution Section of the Bar discussed the ethics opinion, and it believes an attorney can represent both parties without breaching the core values of being an attorney. Mr. Johnson said that he believes that a “good” waiver and an informed consent to the attorney’s dual representation would satisfy any potential conflict of interest.

Judge Maughan stated that he prefers having the attorney-mediator complete the divorce and that anything that makes the divorce process more streamlined or assists the parties would be a vast improvement over the current practice.

Ms. Smith stated that she thought the most important issue for the committee to decide was what the policy should be rather than arguing about what Rule 1.7 permits. She also indicated that the committee needs to decide who the policy covers – is it limited only to court-annexed lawyer-mediators, for example.

Mr. Burton suggested a straw vote as to how many were in favor of allowing a lawyer-mediator in divorce proceedings to draft pleadings for both parties at conclusion of a successful mediation with full-disclosure and waiver. A majority of the committee members voted in favor. However, several members said they did not feel they had enough input at this point, and that they wished to hear from someone on the Ethics Opinion Committee who had voted with the majority as to the policy considerations related to that position. Mr. Sackett said he would check with those in the majority and see who was willing to attend the next meeting.

5. DISCUSSION OF FURTHER MODIFICATION TO THE PRACTICE OF LAW RULE

Mr. Sackett reviewed his memo with the committee and discussed his concerns as to the language approved by the court in subsection (c). He advised that he thought the reference to lawyer and non-layer in the definition was problematic. Mr. Johnson moved that the committee not recommend any change to the definition approved by the court. Judge Hansen seconded the motion. The motion passed with three no votes and one abstention.

6. RECONSIDERATION OF RULE 1.5(b)

Mr. Burton said discussion of Charles Bennett's concerns as to Rule 1.5(b) would be considered at the next meeting.

7. NEXT MEETING

There will be no meeting in December. The next meeting will be on Monday, January 23, 2006, at 5:00 p.m. at the Law and Justice Center.