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

Law and Justice Center
645 South 200 East
Salt Lake City, UT
November 26, 2012
5:00 pm

ATTENDEES	EXCUSED	GUESTS
Steve Johnson, Chair	John Bogart	Robert Hilder
Tom Brunker	Stuart Schultz	
Simon Cantarero	Paula Smith	
Gary Chrystler	Earl Wunderli	
Nayer Honarvar		
Judge Mark May		
Trent Nelson		
Kent Roche		
Gary Sackett		
Leslie Van Frank		
Paul Veasy		
Billy Walker		
Diane Abegglen, Staff		

1. WELCOME AND APPROVAL OF MINUTES

Steve Johnson welcomed the members of the committee to the meeting and asked if there were any corrections to the minutes of the June 4, 2012 meeting. The minutes were approved without changes.

2. DISCUSSION: RULE 8.4(a)

Rule 8.4(a) of the Rules of Professional Conduct provides:

> It is professional misconduct for a lawyer to:
> (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

In footnote 1 of a recent Supreme Court decision, *Brussow v. Utah State Bar*, No. 20100206, the Supreme Court expressed concern about the practice of sanctioning attorneys for violating Rule 8.4(a) based solely on their violations of other rules. In the footnote, the Court directed the rules committee to consider this issue.

Mr. Johnson began the discussion by inviting Billy Walker to provide background information about the rule. Mr. Walker explained the reasons OPC charges attorneys under Rule 8.4(a) and suggested that the language of the rule could be changed to address the Court's concerns. Following a brief discussion, Mr. Johnson asked Billy Walker, Leslie Van Frank, and Simon Cantarero to draft new language and present it to the committee for consideration at the next meeting.

3. DISCUSSION: GOVERNMENT LAWYERS ISSUE

Mr. Johnson opened the discussion by referring committee members to a portion of the written report Bruce Maak, former chair of the Ethics & Discipline Committee, submitted to the Supreme Court on August 16, 2012. In his report, Mr. Maak voiced concern about certain conflicts of interest in government lawyer offices such as the Attorney General ("AG"), County Attorney offices, etc.

Specifically, Mr. Maak asked whether Rule 1.10 (which precludes different lawyers in a firm from representing a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7) applies to government law offices. He questioned under what circumstances, if any, lawyers functioning within a government law office may concurrently represent different departments, agencies, employees, etc. with divergent interests. Mr. Maak noted that Ethics Advisory Opinion 142, which the AG has relied upon since 1994, concluded that Rule 1.10 does not apply "as broadly" to the AG as to "firms" generally. He observed, however, that the Advisory Opinion does not explain the basis in Rule 1.10 for such a distinction. After considering Mr. Maak's report, the Supreme Court asked the rules committee to study this issue.

The committee discussed the practical reasons behind Ethics Advisory Opinion 142. Gary Sackett, who was chair of the Ethics Opinion Committee in 1994, acknowledged that the committee struggled with the opinion and recognized that there was not a concrete anchor for it in the Rules of Professional Conduct. Tom Brunker observed that Ethics Advisory Opinion 142 is entrenched in the AG's office. Mr. Walker commented that the Office of Legislative Counsel faced a similar issue a few years ago and the Supreme Court carved out a special exception for that office in a comment to Rule 1.13. He suggested that a similar solution might be appropriate for government law offices. Leslie Van Frank suggested that the committee might want to study the Court's analysis in *V-1 Oil Company v. Department of Environmental Quality*. Mr. Johnson asked Diane Abegglen to circulate the 1997 Supreme Court of Utah opinion to the members of the committee.

Following the discussion, Mr. Johnson asked Gary Sackett, Tom Brunker, and Paula Smith to draft a proposed comment to Rule 1.10 and present it to the committee for consideration at the next meeting.

4. DISCUSSION: COMMITTEE'S PRIOR CONSIDERATIONS OF RULE 5.4(e)

Mr. Johnson asked Mr. Sackett to introduce this agenda item. Mr. Sackett explained that earlier this fall he was contacted by a law professor from California who observed that Rule 5.4(e) of the Utah Rules of Professional Conduct is not related to any similar provision in the current ABA Model Rules of Professional Conduct. After conducting some research of his own, Mr. Sackett concluded that the law professor was correct. He also discovered that there is no comment associated with Rule 5.4(e) to explain Utah's variation from the Model Rules (a practice this committee adopted during its 2004 review of the ABA's new Model Rules).

Mr. Sackett asked whether the committee should add a comment to Rule 5.4(e) to acknowledge the variation in Utah's rule. Following the discussion, Mr. Johnson asked Paul Veasy, Trent Nelson, and Judge May to draft a proposed comment to Rule 5.4(e) and present it to the committee for consideration at the next meeting.

5. UPDATE: LAWYER ADVERTISING COMMITTEE

Gary Sackett updated the committee on the Bar Commission's lawyer advertising committee. At the present time, the Bar Commission is considering a rather comprehensive set of proposals from the committee. Ms. Abegglen reported that she expects the Bar Commission to file a petition with the Supreme Court in early 2013.

6. OTHER BUSINESS

Mr. Johnson acknowledged former Judge Robert Hilder's attendance at the meeting and informed the committee that Mr. Hilder recently proposed several changes to the Rules of Professional Conduct and related Rules Governing the Utah State Bar. Mr. Johnson asked Ms. Abegglen to distribute Mr. Hilder's materials to the committee and invited Mr. Hilder to attend the committee's next meeting to present his proposals and answer questions.

Mr. Johnson also informed the committee that the ABA's Ethics 2020 project has led to several amendments to the ABA Model Rules of Professional Conduct. He asked Ms. Abegglen to distribute certain ABA materials to the committee in anticipation of future committee discussions.

The next meeting of the committee was set for February 4, 2013 at 5 p.m. at the Law & Justice Center.