

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
February 13, 2006
5:00 p.m.

ATTENDEES

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

Gary Sackett
Stuart Schultz
Paula Smith
Matty Branch
Billy Walker

EXCUSED

Judge Stephen Roth
John Soltis
Earl Wunderli

GUESTS

Kathy Elton
Nancy McGahey
Bryant McConkie
Joshua King
Katherine Fox

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee. Mr. Johnson moved for adoption of the minutes subject to three minor corrections submitted to Ms. Branch. Paula Smith seconded the motion, and it passed unanimously.

2. DISCUSSION: PROPOSED RULE 20 OF THE RULES GOVERNING ADMISSION AS TO HOUSE COUNSEL RULE

Mr. Sackett stated that no attorneys he had talked to had received notice as to proposed Rule 20 and the comment period. Ms. Branch asked committee members if they had received notice, and no one said they had. Ms. Branch said she would check with Tim Shea of the Administrative Office of the Courts. If notice was defective, Ms. Branch said the rule would be correctly noticed and the comment period extended.

Katherine Fox was asked to provide background as to the need for proposed Rule 20, who had drafted the rule, and what entities had reviewed it. Ms. Fox stated that the Bar's Multi-Jurisdictional Practice Committee (MJP) and the Admissions Committee had drafted the rule, and that it had been approved by the Bar Commission at its October 2005 meeting. The rule had then been sent to the Supreme Court for consideration and is presently pending there.

Ms. Fox said the MJP Committee and the Admissions Committee had intentionally waited until the Advisory Committee on the Rules of Professional Conduct had finished its work on Rule 5.5 before submitting Rule 20, and that they viewed it as an outgrowth of that rule which was needed to provide guidance about what an out-of-state attorney who works in-house in a Utah business or non-profit organization is permitted to do.

Ms. Fox advised that 22 states have adopted some form of an in-house counsel rule. A minority of states have concluded that in-house counsel practice does not constitute the practice of law. Other states rely on admission by motion where reciprocity is recognized or expect the in-house lawyer to become admitted and licensed to practice in the jurisdiction.

Ms. Fox said the in-house rule provides a limited license following application and a criminal background check. Mr. Sackett stated that he thinks the proposed rule is inconsistent with the recently adopted Rule 5.5 of the Rules of Professional Conduct which opens the way for multi-jurisdictional practice. He stated that Rule 20 is too restrictive and the requirements too cumbersome, and that it is contrary to the "spirit" of Rule 5.5 which recognizes that attorneys and companies are mobile and need reasonable accommodation. Mr. Sackett questioned why in-house counsel properly admitted and licensed in a state other than Utah should have to fulfill most of the requirements a Utah lawyer has to fulfill including character and fitness.

Mr. Walker said Rule 5.5 is an ethical rule, and that he does not believe the proposed Admissions Rule 20 is in conflict with it. He advised that by passing Rule 5.5, the ABA did not intend to restrict individual states from instituting whatever restrictions they deemed appropriate as to out-of-state lawyers who practice in a systematic and regular basis within their borders. Mr. Walker pointed to comment 17 to Rule 5.5 as contemplating that individual states might impose registration and other requirements. He stated that the MJP Committee was well aware of the provisions of Rule 5.5 when it drafted Rule 20.

Mr. Johnson stated that he thought Rule 20-4(b) was in conflict with Rule 5.5(a), because failure to fulfill the requirements of Rule 20 would not constitute the unauthorized practice of law under Rule 5.5. Mr. Johnson felt some regulation of in-house counsel was appropriate but that the proposed rule was too expansive.

Mr. Sackett questioned whether an in-house attorney would be precluded from providing legal assistance to his employer while he or she was waiting for the licensing process to conclude. He also thought 180 days for the Bar to complete the licensing process was far too long. Mr. Sackett suggested that the rule should include a provision that permits in-house counsel to practice under Rule 5.5 while the registration process is in progress.

Ms. Smith expressed concern that provision 20-1(a) only prohibited house counsel

from appearing before a court of record. She said the rule, as drafted, would permit house counsel to appear in courts not of record, like justice courts, or before governmental agencies, and she thought such practice was too expansive for the limited license contemplated.

Mr. Burton asked Ms. Branch to ask the Supreme Court whether it would like the committee to provide the Court with a written comment as to Rule 20. Mr. Burton also invited committee members on an individual basis to submit whatever comments they wanted to during the comment period.

3. FURTHER DISCUSSION/DECISION: THE ROLE OF LAWYER/MEDIATOR IN DIVORCE PROCEEDINGS

Mr. Burton said he was seeking the vote of the committee as to whether the Rules of Professional Conduct should be amended to permit a lawyer/mediator upon reaching complete settlement to prepare the legal documents for both parties necessary to complete the divorce proceedings.

Judge Hansen stated that he did not believe a waiver could be drafted that was “bulletproof” enough to override the lawyer’s duty of loyalty. Therefore, he felt a lawyer/mediator could not represent both parties. Mr. Walker stated that while divorcing parties could waive the right to confidentiality in the divorce process, he did not believe the parties could waive the lawyer’s duty of loyalty and independence.

Mr. Burton said that, in his opinion, a lawyer would be capable of writing pleadings in a neutral, even-handed matter following the conclusion of a successful mediation and that the lawyer should be able to fulfill his duty of loyalty to both clients by so doing. He also stated that the lawyer’s role would be to implement the wishes of his clients and his limited service in drafting the pleadings would likely be consistent with the unbundling concept.

Judge Maughan stated that the paradigm of divorce proceedings needs to be changed. He said the legislature and the courts have actively urged parties to mediate rather than litigate their divorces, and that requiring them to hire attorneys to finalize the divorce after a mediated settlement has been reached is an unacceptable roadblock. Judge Maughan said not permitting the lawyer/mediator to prepare the divorce documents only angers the parties and does nothing to improve our system of justice. Ms. Honavar agreed with Judge Maughan’s position and said that if parties have reached a mediated settlement that they are satisfied with, the legal profession should not be disrupting the mediation process by requiring them to hire new lawyers or proceed pro se.

Mr. Bryant McConkie and Mr. Joshua King, who were observing the committee meeting, asked Mr. Burton if they might address the committee. Mr. Burton said they could. Both Mr. McConkie and Mr. King said they were new lawyers with less than three years of experience; that they were divorce mediators, and that prior to the issuance of the

Ethics opinion as to lawyer/mediators, they had prepared, at the request of both parties following settlement, the documents necessary to finalize the divorce. Both lawyers indicated that this approach is what the parties desired, and that when they told the parties they were now ethically unable to draft the final documents, the parties were angry and did not understand why the mediated divorce process was being blocked in this way. Mr. McConkie and Mr. King urged committee members to vote to amend the rules to allow a lawyer/mediator to draft the final documents for both parties.

Mr. Burton then made a motion that the committee do what is necessary to amend the rules of professional conduct to allow a lawyer/mediator, at the end of an entirely successful mediation, with appropriate waivers, to draft the legal documents for both parties necessary to complete the divorce. Ms. Smith seconded the motion. The vote on the motion was 6 in favor; 6 opposed (3 of which votes were by proxy when members had to leave the meeting early). Mr. Sackett questioned whether voting by proxy was appropriate. Ms. Branch advised there were no rules in place as to voting by proxy. Mr. Sackett then moved that Mr. Burton's motion be reduced to writing and submitted to all members of the committee by email for a final vote up or down, and that committee members be permitted to submit their votes to Ms. Branch via email. Judge Maughan seconded the motion. The motion passed 6 in favor; 3 against.

4. NEXT MEETING

The next meeting will be Tuesday, March 20, 5:00 p.m., at the Law and Justice Center.

Guests:

Kathy Elton

Nancy McGahy

~~Bryant~~ McConkie

Joshua King

Katherine Fox

Absent - John Soltis
Judge Roth

2/13/06

Professional Conduct Committee

changes suggested by Stuebel
In re

Rolls sealed - unanimous

Proposed rule 20 in-house counsel rule

check with
Tim
re. sta
ext
comment period

Nobody on committee recalls seeing in-house counsel
rule for comment

Katherine Fox

Bar large firm, small firm
corporate, liability

Multi-jurisdictional committee formed - 3+ years ago
in light of pending ^{rule} 5.5

looked at different proposals

changes to pro hac

creating in-house counsel rule - take
upon as an admission rule - enhanced admission
rule

Rule 5.5 ^{when} adopted - committee set in-house
counsel rule to Bar Commission

petition pending before Supreme Court

Research other states

some states due nothing

some just registration no \$

"

"

- \$1,000 annual fee

last count 22-25 states done something with
in-house registration

proposed rule:

doesn't restrict what attorneys do - just
have to say to some kind of
thing under 5.5

register - limited license

want people to say do criminal background check
don't have to take bar

Multi-jurisdictional
Admission Committee
Bar Commission

might need in-house rule

Sackett - conflict

sees it much more than
what 5.5 contemplates

rule seems to have been written before 5.5
enacted

~~comp~~ other than bar exam - have to
go through all hoops lawyers have to go through
including character & fitness

thinks 5.5 recognizes attorneys are mobile &
companies are mobile -

once you have passed bar - we aren't going to restrict
provided when limited to employer's work - within
confines & needs of employer's business
corporate counsel section not controlled

Billy Rule 5.5 is an ethical rule
doesn't think it is in conflict with
what ABA adopted didn't want to restrict
individual states from doing whatever restrictions
they deemed appropriate allows states to
control borders

Billy's rule wouldn't have passed as to
layers who are here

Comment 17 - says may be subject to registration
other requirements

MSP committee had been aware
Rule 5.5

systematic,
regular
basis

Steve thinks Rule 5.5 (a)

and 20(4)(b) are in conflict
if don't jump thru
the hoops

thinks some registration but thinks
rule is too expansive

then guilty
of unauthorized
practice law

Let's see say MSP didn't think was conflict

Sackett - doesn't think there is an evil / problem
out there that needs to be solved
~~to solve~~

wondered whether attorney has to wait 180 days - 6 months
to get limited license before can assist his or her
client

Bullet - add provision that permits to
make order Rule 5.5
while registrar process
going on

Paula - ^{rule} cred represent in courts not y recall
or formal administration - sand's like
can be doing me

Bob invites committee members to submit ^{of} comment
ask court if want to refer matter
to committee

Check on notice w/ta

Lawyer mediator issue

Bob seeking vote as to whether representation
should be allowed

only allow representation if all matters are settled
only lawyer mediator could prepare documents not
non-lawyer

Judge Hansen - couldn't draft up summary bill for
one value over ^{all}

only represent
only represent
lawyer/mediator
make
diff to justify

Collaborative divorce

financial
legal
emotional

super mediation

wave right to confidentiality

duty of loyalty & independence

Judge Maughan - thinks need to change
paradigm -

urge mediators
better way - but then throw up roadblock
mad - because they have to get a lawyer

limited to divorce
Bob moves that do what necessary to amend
rules to allow attorney present
at end of ^{entire} successful mediation

with appropriate waiver -
attorney can draft legal
do

6 in favor

Second - Paula

3 opposed

3 no vote by proxy

b-b

Sackett moves that Bob's note be
written and submitted to
entire membership

for final vote up or down
by mail or in

Judge Maughan second

motion passed 3 against
6 for

Vote pin to next meeting
