

**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
January 23, 2006
5:00 p.m.

ATTENDEES

Robert Burton, chair
Gary Chrystler
Judge Royal Hansen
Nayer Honarvar
Steven Johnson
Kent Roche

Judge Stephen Roth
Gary Sackett
Stuart Schultz
Judge Fred Howard
Judge Paul Maughan
Billy Walker
Matty Branch

EXCUSED

Paula Smith
John Soltis
Earl Wunderli

GUESTS

David Leta
Mary Corporon
Kathy Elton
Nancy McGahey

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed members of the committee and introduced guest presenters and visitors. Mr. Johnson advised as to a typographical error in paragraph 5 of the minutes, and Mr. Sackett indicated that the first sentence of paragraph 2 of Section 4 of the minutes should read:

“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 address whether the lawyer/mediator, after reaching a settlement, could represent one of the parties.”

Subject to these changes, Mr. Johnson moved to approve the minutes. Judge Howard seconded the motion, and it passed unanimously.

2. REVISITING RULE 1.5(b)

The committee considered Mr. Charles Bennett's continuing concern that a lawyer's fee agreement should be in writing. Mr. Burton and Ms. Honarvar advised that while they initially felt the fee agreement should be in writing, they now were convinced that it was not appropriate

for a lawyer's failure to provide a written fee agreement to constitute malpractice. Mr. Sackett moved that Rule 1.5(b) not be changed to require a written fee agreement. Ms. Honarvar seconded the motion, and it passed unanimously. Mr. Burton agreed to write a letter to Mr. Bennett explaining the committee's position.

3. THE ROLE OF LAWYER/MEDIATORS IN DIVORCE PROCEEDINGS

Mr. Burton introduced David Leta and Mary Corporon and advised that they were members of the Bar's Ethics Opinion Committee and had voted for the majority opinion which held that a lawyer/mediator should not be able to represent both parties in preparing the necessary legal documents to finalize the divorce following settlement. Mr. Burton advised that this committee's focus should not be upon whether the rules of professional conduct supported the majority opinion but rather whether the rules should be amended to permit a lawyer/mediator to represent both parties following settlement.

Mr. Johnson suggested that the Ethics 2000 language change in Rule 1.7 to "concurrent representation" seemed to permit the dual representation. Mr. Walker said that he felt the new language supports the majority opinion and makes it more clear that dual representation is not allowed. Mr. Sackett stated that he disagrees with Mr. Walker's position.

Mr. Leta addressed the committee and made the following points:

- a. It is a false premise that when parties in a divorce proceeding reach agreement they are no longer adverse to each other. A divorce proceeding is adversarial and a lawyer cannot ethically represent both parties. Perhaps the lawyer could represent one party with complete consent from the other party.
- b. The new rules of professional conduct do not change the result of the majority opinion. In fact, Mr. Leta thinks 1.7 is even stronger now. Rule 1.12(a) clearly provides that a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a mediator unless all parties give informed consent in writing, and he does not think a lawyer can fulfill the requirements of informed consent as it is defined. Additionally, there is nothing in the rules that says Rule 1.7 trumps Rule 1.12.

Ms. Corporon addressed the committee and made the following points:

- a. It is a sound rule that a lawyer can't represent both sides in a divorce. Ms. Corporon believes divorce proceedings are unique from other actions because they are never finished. The court has continuing jurisdiction and a lawyer can get back before the court as long as she is creative enough to fashion "changed conditions". She believes the type of attorney conflicts that occur in the divorce arena are generally not waiveable.
- b. It is impossible to draft a document for both parties because language is weighted

either towards wife or husband. She believes parties think the lawyer/mediator is their legal advisor despite the lawyer's statement that he isn't.

- c. If dual representation is permitted the "bottom feeders" of the profession will see this as an opportunity to become a mediator and exploit the rule.

Mr. Sackett stated that he is not comfortable with the legal community telling people to either go pro se or get a lawyer at the conclusion of a successful mediation. He said that just because there might be future disputes between the divorced parties doesn't mean the lawyer shouldn't be able to prepare the legal documents necessary to implement the initial settlement agreement. If a dispute arises in the future, Mr. Sackett stated that the lawyer couldn't represent either party.

Ms. Elton (ADR Director for the AOC) advised that the on-line court assistance program is developing a series of prompts and questions that will assist pro se parties to draft the documents necessary to finalize their divorce.

Mr. Walker stated that the lawyer/mediator who assists the parties to a settlement is not engaged in the practice of law. However, he believes that when one of the parties experiences "buyer's remorse" that party will claim the lawyer/mediator was a lawyer and was supposed to be neutral. Mr. Walker believes the situation presents an unwaivable conflict and that even though an attorney can limit representation, this doesn't change the lawyer's duty of loyalty.

Mr. Sackett suggested that the committee consider carving one more exception to the practice of law definition to permit non-lawyers to prepare and present documents to the court to complete a divorce.

Mr. Sackett moved to table further discussion on the issue until the February meeting. Mr. Chrystler seconded the motion, and it passed unanimously.

Next meeting: February 13, 2006, 5:00 p.m., Law and Justice Center.

Guests

Kathy Elton Directing ADR/Mediation for Court
Nancy McGahey Exec Director of Updr Dispute Resolution

Resolution

Bryant McConkie Dispute Resolution
Office Section

1/23/06 Rules of Professional Conduct

Excused

John Solter

Paul Wunderli

Paula Smith

2 changes types
Gary Sackell

Steve Johnson moved with amendments
Howard Zee

Unanimous

Rule 1.5

Charles Bennett's e-mail he argues ^{unlike}
~~that same standard~~ requirement as to
fee agreement

Bob changed view as to fee agreement
since his memo 8/11/02

Nager also changed her view

good practice - but not functioning rule to
make it critical rule

Committee adopted that version -

Considered issue - good practice but don't
think it should be mal practice

Bob will write him letter reject Nager - 204
Sackell - more requests require unanimous

lawyer/mediators in divorce proceedings

majority op - lawyer/mediator should not be able
to represent both parties in preparing
marriage docs

Committee
not here to debate whether the rules permitted
the opinion - not revisiting whether rules allow
or not

should rules be amended to permit the
~~result~~ lawyer-mediator to represent
both parties

~~new 1.5~~

new 1.7 rule change "concurrent representation"
Johnson → ~~not in~~ may be

Billy Walker thinks ^{new} language change makes
it more clear that not allowed

supports majority op

Sackett disagrees with Billy's position

David Lefa - his perception why it is right decision
says he is mediator
Sees a brighter line in distinguishing lawyer
mediator

Doesn't think ethics of change what
has been understood forever

The parties are adverse parties ^{done} separated by vs
any divorce has consequences ^{Joe} personal; property wise

when have adversity — doesn't think lawyer can
represent both parties

think it is a false premise that when parties
reach agreement ~~it is~~ ^{the agreement} ~~not~~ adverse, equitable right
it is converting marital ^{right} interest into a
contract claim

Doesn't mean contract is fair or well balanced
mediator serves as facilitator to bring both parties to
something they can live with not role of mediator to
make sure it is fair to both — just trying to
reach consensus — there is disparate
bargaining power

~~result of agreement~~ just because have agreement
doesn't think that means they won't
dispute what agreement means in the future

Creates more problems than it solves
can't represent both parties. perhaps could
represent one party with explicit consent from other party

leta - doesn't think new rules change result
Rule 1.12(a) a neutral shall not
represent unless all parties
give informed consent, in writing

definition of informed consent -

Rule 1.7 - nothing in rules ~~whether~~ that
Sop 1.7 trumps 1.12

he thinks 1.7 is ^{even} stronger now

Mary Carporon

supports mediation - employ mediators - send
clients to mediation

realizing mediation - it doesn't always
solve the problem

observation - substantial # of people don't settle in
mediation - parties who think have settled things
in mediation - have regrets

believes it is sound rule that ^{larger} can't represent both
sides in a divorce

parties in divorce proceedings are unique because
they have emotional history together;

Continuing nature to divorce actions - never done
because of continuing jurisdiction of the courts -
if creative enough to fashion art^{ful} charged conditions

Equitable proceeding - overshadowed by best interests of
children - this is why there is not a
finished divorce case

thinks it is impossible to draft document for both
parties - language ends up weighted towards
wife or husband

thinks parties think lawyer/mediator is legal
advisor anyway

May thinks to permit this - will bring out
"bottom feeders" in the profession - will represent both
sides when shouldn't - see mediator get to
become a mediator & exploit the rule

Man's understanding

lawyers who were mediators - intended to be
mediator not lawyer in drafting documents

Gary Sacklett

what if parties don't want lawyer involved
if think deal is OK - don't
want another lawyer

in favor of mediator telling parties to get attorneys

thinks we are talking about subset of cases -
thinks conflict is waivable

he would
agree that
is best
if both sides
represented
by attorneys

Ny & Massachusetts permit single lawyer
to assist conclusion of agreement

~~unambiguously~~ ^{tell} legal community telling people

so pro se

or get lawyers

^{that there may be}
doesn't think future disputes — that's not
because there might be future disputes

joint representation for purposes of filing court
documents necessary to implement the agreement
| lawyer
can't represent either party if future
dispute arises

Kathy Elton — says OCAP System is being

will

developed that will
prompt parties to

draft their own

agreement — doesn't

finalize divorce

Billy Waller - rules don't let parties agree to everything

mediators not engaged in practice of law
excepting

when party experiences
lawyer's remorse - then will claim
lawyer/mediator - was a lawyer as
was supposed to be neutral

Billy agrees ^{if it is} unavoidable conflict

Florida, MA, NY has waived

core value \rightarrow duty of ~~lawyer~~ loyalty to client -
that is what lawyer

1.7 (c)(2) lawyer should have ^{not} personal interest -
in making sure settlement is complete

thinks even though attorney can limit representation -
this doesn't change ^{duty of} loyalty

Sackett - move to table discussion until
next month Chapter second
unanimous

Elton - public frequently doesn't understand what
mediator does

guy

could have not one more, except in
practice of law to let non-lawyer
prepare; present docs to ct
to complete divorce

next meetg Feb 13 5:00pm