

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 21, 2005
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

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

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-lawyer 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.

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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.

11/21/05

Professional Conduct

Excused

Billy Walker

~~Absa~~

~~Mark~~

~~Bob~~

~~Schultz~~

Present

Burton

Chrytle

Hansen

Howard

Roche

Smith

Roth

Soltis

Wunderli

Honanan

Johnson

Sackett

Maughan

Schultz

Bob - welcome - advised as to Court's praise
in committee's work

Start time - agreed 5 pm

Minutes

Earl moved approx 10 mins / Coy C.
sealer

Two changes

changes to 5.4 need to be made
clerical error

include ABA
Model Rule
7.6

Rule 7.6

we have no rule 7.6

indicate

Model Rule 7.6

Utah has not adopted

Discussion: role of lawyer/mediators in
divorce proceedings

Sacklett - Ethics opinion ^{was} most controversial
subject committee ever handled

~~majority~~
dissenting opinion - joined by five members

↑ in majority

issue - strict reading of rules didn't
majority: permit lawyer-mediators to ~~not~~ act as
lawyer in getting divorce approved

dissent - felt overly technical reading of rule

majority - then looked and said lawyer could
represent one of the parties

Bar Commission voted - adopt 1st part of
majority - but not aspect of totally lawyer
represent one party

appeal procedure - direct appeal to Bar Commission

Chambers - ADR committee discussed - no
consensus - evenly split

don't agree that non-lawyers who act as court-appointed mediators shouldn't be drafted ~~into~~ ~~into~~

Brian Florence thank 1.7 & 2.4 have
charged the playing field & that he is
free to go ahead at

Earl asked why my deal with divorce
settly - asked wouldn't rule apply to
other cases

Steve Johnson - said domestic cases where usually
miss - unrepresented parties - in other
civil cases parties are represented

legislation's intent to streamline the process -
legislators would that mediation

Diare Akiyama -

Billy wanted matter to be tabled until
he is able to debate

Johnson
Settlement or agreement - to all issues covered as
those settlement agreement covers
Rule 1.2

parties need to acknowledge and give an
informed

if have good written and consent think could it

dispute resolution section of bar - weighed in -
believes attorney can represent both parties

OPC has^{nt} polled mediators

no conflict of
interest

Judge Maughan - ^{judge} prefers having an attorney-mediator
carry matter through -

anything to make it more structured - help parties
thinks this would be vast improvement

Smith

Imp't issues

① think committee needs to decide what the policy is
(not ^{argue about} what rule provides)

② ~~shared~~ need to decide who affects

OPC thinks should be limited to court annexed
lawyer-mediators

Chapman

HB 4 permits non-lawyer mediators - it
only allow lawyer-mediators can do documents.
to arbitrate

Hanser - wonders what is happening around the
county - Burton say dissent goes into that

Sadlett say it is split around the county

Burton
asked for

Straw vote on policy:
limit to divorce

how many in favor of allowing lawyer-mediators
to draft pleadings for both parties at conclusion of

successful mediators
with full disclosure & waiver

Gary Sackett - will see of the 9 who
went with majority - who had a
policy component - rather than
strict rule

Jan 16 next meeting Spr

Jan 23 →

Practicing Law Definition

Sackett -

for purposes of definition of practice of
law - court introduces notion of lawyer
non-lawyer

Steele v. Horn don't change definition of practice of law
Second Circuit

1 absent
3 nos

— motion passed

deal with 1, 5(b) next meeting