MINUTES

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

Administrative Office of the Courts
230 South 500 East, Ste. 300
Salt Lake City, Utah 84102

December 16, 1996

PRESENT
Steve Trost
Gary Sackett
Kent Roche
Judge Nehring
Carolyn McHugh
Robert Burton
Earl Wunderli
Gary Chrystler
Bill Hyde
Steve Cochell
Tom Kay

EXCUSED
Steve Hutchinson
Commissioner Tom Arnett

GUESTS
Kim Christy

STAFF
Peggy Gentles

I. WELCOME AND APPROVAL OF MINUTES.

Steve Trost welcomed the Committee members to the meeting. Having noted two changes, Earl Wunderli moved to approve the minutes of November 18, 1996. Bill Hyde seconded the motion. The motion passed unanimously.

II. CONSIDERATION OF COMMENTS ON PROPOSED RULE 3.6.

The Rules Subcommittee met on December 4, 1996 to consider the comments received on proposed Rule 3.6. Bill Hyde noted that the Committee considered two paragraphs in the rule. Paragraph (a) limits application of the rule to a lawyer "who is participating or has participated in the investigation or litigation of a matter." The Committee's recommendation was to remove that limitation from the proposed rule. This removal necessitated the removal of (d). The other issue that the Committee considered was removal of Paragraph (c). Paragraph (c) permits a response when a lawyer's client has been the subject of "substantial undue prejudicial effect of recent publicity." The Subcommittee considered a motion to remove Paragraph (c); however, the motion failed. After considering the other comments received, the Subcommittee decided that no further recommendations were required.

The Committee engaged in extended discussion of the Subcommittee's recommendations. The majority in the Subcommittee on Paragraph (c) was concerned with first amendment issues. Gary Sackett noted that similar concerns informed the minority view on Paragraph (a). In his opinion, a lawyer on the sideline ought to be able to comment upon litigation. Therefore, the language that the Subcommittee removed should remain in the rule and the rule should apply only to lawyers involved in the case. Judge Nehring responded that the reason why the same first amendment issues were not implicated in Paragraph (a) as proposed by the Subcommittee was that members of the Bar should not be able to damage the system. Traditionally, lawyers have had limits on their conduct. Gary Chrystler agreed with Judge Nehring noting that the license to practice law is a privilege not a right. Therefore, attorneys have a fundamental responsibility not to prejudice the judicial system.

Kent Roche noted that the minority position on Paragraph (a) recognized that a lawyer should not have a license to prejudice pending litigation. However, the public needs information on the judicial system and on pending litigation. Leaving the limitation in Paragraph (a) would give a bright line rule that would allow public access to the most commentary.

Bill Hyde expressed a concern that this rule would encourage a new industry for trial commentary. Judge Nehring responded that a section in the Code of Professional Conduct encourages attorneys to educate the public. Rule 3.6 needs to balance the ability to prohibit prejudicial statements with the need to educate the public. Gary Chrystler pointed out the proposed rule does not stop a lawyer from commenting. It only prohibits prejudicial statements.

Robert Burton expressed surprise at the Subcommittee's vote on Paragraph (c). In his opinion, the inclusion of Paragraph (c) would swallow the rest of the rule. Tom Kay pointed out that Paragraph (c) only allows "a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." In his opinion, there would not be a substantial increase in comments under this version of Rule 3.6. Bill Hyde disagreed. He felt that it would encourage escalating responses. Tom Kay stated that there are two restrictions in Paragraph (c). The first is that the statement must be one that a reasonable lawyer would believe is required to protect a client. The second is that any statement must be limited to "such information as is necessary to mitigate the recent adverse publicity." In addition, he noted that the Paragraph (c) applies only in situations when there has been adverse publicity damaging to the client. Judge Nehring pointed out that the discussion is assuming that the lawyers are initiating the publicity. However, more likely the original publicity is coming from sources outside the Bar. Many members of the Committee noted that attorneys who currently follow the rule are at times disadvantaged because they are unable to respond to media inquiries. When one side has given a statement to the press and the other attorney has said "no comment," the public makes negative inferences about the responding lawyer and the lawyer's client.

Robert Burton inquired into the purpose of the rule. If it is designed to discourage pre-trial publicity, the Committee should make it more difficult for attorneys to comment and remain within the Code of Professional Conduct. Tom Kay noted that the Bar has not pursued a discipline case for violation of the existing version of Rule 3.6. Judge Nehring noted that was possibly because the majority of

prejudicial remarks are made by people over whom the Bar has no control. Gary Sackett noted that Rule 8.4 currently defines professional misconduct as engaging in conduct that is "prejudicial to the administration of justice." This provision ought to be brought to bear if an attorney goes beyond the limits in Paragraph (c) of Rule 3.6. Steve Cochell noted that an attorney has a remedy in the pending case. An attorney can go to court and request that the court address the issue of "material prejudice."

MOTION:

Tom Kay made a motion to adopt Paragraph (c) of proposed Rule 3.6. Gary Chystler seconded. More discussion ensued.

Robert Burton noted the premise of the legal system is a fair, unbiased jury. Once the jury has been prejudiced, additional statements do not improve the situation. Judge Nehring countered that reputational damage can be addressed if the attorney is allowed to respond in situations where there has been substantial adverse publicity. Bill Hyde agreed with Robert Burton. In his opinion it will be more difficult to find unbiased juries as parties expand their conflict to the media. However, he noted that nothing precluded the Committee from revisiting the issue should it appear that more stringent controls were necessary. Gary Chrystler agreed with Bill Hyde's comment.

Carolyn McHugh asked Judge Nehring if in a high profile case under Rule 3.6 as proposed would the court be able to stop statements to the press if it felt it was necessary. Judge Nehring stated that the proposed rule would remove some control. Tom Kay pointed out that any judge has a right to make sure that the trial is fair. Judge Nehring stated that every judge would set out clear guidelines in high profile cases. Kent Roche stated that in the light of Gentile, it was difficult to imagine a case where the court could say sanction attorneys for out of court statements.

Earl Wunderli asked if the judges had any power to control what the attorney said prior to any statements to the press. Gary Sackett noted that a judge could issue a gag order. Carolyn McHugh noted however that the judges would possibly become subject to a suit by the media. Judge Nehring stated that all judges who have come up against such issues have not backed down. Gary Sackett asked where the rule would stand in relation to the Gentile case if the Committee voted to not include Paragraph (c). Bill Hyde stated that the court in Gentile was largely concerned with vagueness issues. Those problems have been fixed in the proposed rule. However, he could not say whether Paragraph (c) addresses other issues in Gentile.

VOTE:

The Committee voted on the outstanding motion. The motion passed on a vote of seven to two.

MOTION:

Gary Chrystler moved that the Committee approve the Subcommittee's proposal striking "who is participating or has participated in the investigation or litigation of a matter" from proposed Rule

3.6(a); removing Paragraph (d) entirely from the proposed rule; and striking discussion in the commentary to correspond with the removal of the limitation in Paragraph (a). Tom Kay seconded the motion. The Committee had further discussion.

Earl Wunderli asked if there had been any experience with Rule 3.6 as currently written. Tom Kay noted that there has been no enforcement actions by the Bar. Steve Cochell noted that the Bar has only received complaints about prosecutors calling press conferences at the beginning of cases. Earl Wunderli asked if the removal of the limitation in Paragraph (a) would include people in the rule who are currently not a problem. Tom Kay felt that the rule would have no chilling effect. Gary Sackett disagreed stating that first amendment issues were implicated. Bill Hyde stated that there are a number of restrictions on the practice of law. Judge Nehring noted that the removal of (a) is complimented by the inclusion of Paragraph (c). If lawyers outside the case are discouraged from commenting, attorneys in the case are less likely to be compelled to respond. Carolyn McHugh noted that the rule is not directed at comments in general only at irresponsible comments. Gary Sackett noted that there is already the existing limit in Rule 8.4 which defines misconduct as materially prejudicing justice.

VOTE:

The Committee voted on the outstanding motion. The motion passed on a seven to two vote.

III. CONSIDERATION OF COMMENTS ON PROPOSED RULE 1.14 AND RULE 8.4.

Peggy Gentles presented the comment from the Legal Center for People with Disabilities on the proposed change to Rule 1.14. The proposed change adds a comment that had been inadvertently omitted. After discussion, the Committee requested that Peggy Gentles contact Ronald Gardner at the Legal Center and ask if he would be willing to attend the Committee's next meeting on January 13, 1997 so the Legal Center's issues could be more fully explored.

Peggy Gentles presented comments on Rule 8.4. Michael Martinez made two comments. A first was that the rule should require disclosure by a lawyer who has had a prior sexual relationship with a client. His second comment was that the rule should set a time at which a lawyer is no longer prohibited from a sexual relationship.

MOTION:

Gary Chrystler made a motion that the Committee adopt the recommendation to include a notification requirement. Robert Burton seconded the motion.

VOTE:
The Committee voted five to three to refer the issue to the Subcommittee for drafting of the additional language. Discussed ensued.

Steve Cochell noted that in previous situations the Office of Attorney Discipline has invoked conflict of interest rules in these situations. The Committee discussed how the additional language should read. Bill Hyde felt that the language was unnecessary.

MOTION:

Tom Kay made a motion to reconsider the previous motion. Gary Chrystler seconded. Discussion ensued.

Tom Kay noted that as the Committee struggled with this rule exceptions ballooned. Gary Sackett added that a list was too unwieldy.

VOTE:

The motion for reconsideration of the vote passed on eight to one.

MOTION:

Gary Sackett moved that no change be made in response to Mr. Martinez's comment about a requirement for notice. Tom Kay seconded.

VOTE:
The motion passed on a vote of seven to two.

MOTION:

Robert Burton moved that the Committee make no change in response to Mr. Martinez's second comment about the duration of the prohibition against sexual relations with clients. Earl Wunderli seconded.

VOTE:

The motion passed unanimously.

Peggy Gentles presented a letter to the Committee from Matthew Hilton.

MOTION:

Judge Nehring made a motion that the Committee should make no changes in response to Mr. Hilton's letter. The motion was seconded.

VOTE:

The motion passed unanimously.

Peggy Gentles presented a comment from James Taylor at the Utah County Attorney's Office. Mr. Taylor stated that the rule should be clarified to indicate that the rebuttable presumption as it appears in proposed Rule 8.4(g)(3) should clearly apply only to the presumption in (g)(2).

MOTION:

Earl Wunderli moved that Rule 8.4 be amended to put the statement that the presumption is rebuttable in a new Paragraph (g) (2). Discussion followed.

Steve Cochell inquired into the scope of the lawyer client relationship under this rule. Gary Sackett noted that the comment addresses that question.

VOTE:

The Committee voted in favor of the motion unanimously.

IV. UPDATE ON RULE 1.15.

Steve Cochell noted that he had two meetings with the Banker's Association. The uniform agreement between the attorney and the bank is being drafted. The banks had identified two primary problems. First, the banks are involved currently in year-end reporting which is very time consuming and does not allow for programming changes necessary to effect NSF reporting. The second issue for the banks is the training of employees in outlying locations. In reference to the first request, Steve Cochell recommended that the bankers petition the Supreme Court to extend the effective date for the reporting requirement. He believed that such a petition was filed today. Steve Cochell intends to correspond with the Supreme Court that the Office of Attorney Discipline is in agreement with the request from the bank. In response to the question from Earl Wunderli, Steve Cochell said it was expected that the banks would be charging a startup fee and/or a fee for each NSF report.

Steve Cochell noted that an additional concern related to trust accounts. The Committee a few years ago had addressed accounting standards on trust accounts but had made no formal recommendation. Mr. Cochell would like the Committee to consider adoption of such trust account standards. Steve Trost noted that implementation such standards would be a problematic.

V. RULE 7.2 (FOLLOW-UP).

Carolyn McHugh reported on conversations with Mike Lawrence from the Advertising Committee of the Bar. He has provided a proposed Rule 7.2 which in Ms. McHugh's opinion goes farther than the *Shapiro* case. Ms. McHugh discussed the draft of Rule 7.2 and discussed how it fits with the Supreme Court's opinion in *Shapiro*. Steve Cochell stated that the Bar is not currently receiving

complaints about solicitation of personal injury clients. Steve Trost asked Steve Cochell if he would ask for a recommendation from the Bar Commission. The Committee suggested that the Bar Commission recommend either adoption of a 30 day rule or fund a study for Utah-specific data

VI. LEGAL ASSISTANTS.

Steve Trost called the Committee's attention to the memo from Earl Wunderli. Mr. Trost had spoken to Toby Brown at the Bar. Mr. Brown staffs the Bar's Access to Justice Task Force. The Chief Justice has also spoken with Mr. Brown and asked that the Task Force consider the issue of legal assistants.

MOTION:

Carolyn McHugh moved that the Committee refer the discussion of the legal assistants issue to the Bar's Task Force. The motion was seconded by Earl Wunderli.

VOTE:

The motion passed unanimously.

VII. OTHER BUSINESS

The Committee scheduled its next meeting on January 13, 1997, 5:15 p.m. at the Administrative Office of the Courts. For 1997, the Committee would generally meet on the third Monday of each month unless such date is a holiday.

VIII. ADJOURN

There being no further business the meeting adjourned at 7:10 p.m.