

**MINUTES**

APPROVED MINUTES

**Supreme Court's Advisory Committee  
on the Rules of Professional Conduct**

Administrative Office of the Courts  
450 South State Street  
Salt Lake City, Utah 84114

September 21, 1998 - 5:15 p.m.

Robert Burton, Presiding

**PRESENT**

Bob Burton  
Judge Kay  
Billy Walker  
Earl Wunderli  
Kent Roche  
John Beckstead  
Karma Dixon  
Gary Chrystler  
Bill Hyde

**EXCUSED**

Commissioner Arnett  
Judge Nehring  
Gary Sackett

**STAFF**

Peggy Gentles  
Matty Branch

**I. WELCOME AND APPROVAL OF MINUTES**

Bob Burton introduced himself as the new Chair of the Committee. Kent Roche moved that the minutes from the May 18, 1998 be approved. Judge Kay seconded the motion. The motion passed unanimously.

**II. RULES OF INTEGRATION AND MANAGEMENT**

Bob Burton referred the Committee to the letter that had been sent under Commissioner Arnett's signature last spring. This letter to the Bar stated that the Committee was concerned that some items in the Rules of Integration and Management might be more appropriately included in the Rules of Professional Conduct. Mr. Burton noted that he had conversations with Jim Jenkins, President of the Bar. The Bar has assigned Billy Walker and Bar Commissioner Debra Moore to work on this issue with the Committee. Mr. Walker stated that he had also spoken to Mr. Jenkins and Ms. Moore. Mr. Walker stated that it is his understanding the Bar Commission has not discussed the substance of the Committee's concerns. Instead, it will wait for a report from Mr. Walker and Ms. Moore. Mr. Walker stated that he has begun to look at some of the issues about which the Committee has

particular concerns especially paragraph 21 of the Rules of Integration and Management. Mr. Walker has compared that provision with the Rules of Professional Conduct and preamble to the Rules of Professional Conduct, noting overlaps and differences and already has some ideas for addressing the Committee's concerns. Mr. Burton suggested that the Committee appoint two members to work with Mr. Walker and Ms. Moore. Karma Dixon moved to appoint Gary Sackett who, while he was not present at the meeting, had expressed a great deal of interest in this issue previously. Kent Roche seconded the motion. The motion passed unanimously. Ms. Dixon moved to also appoint Earl Wunderli to this group. Bill Hyde seconded the motion. The motion passed unanimously. Mr. Burton asked Mr. Wunderli to contact Mr. Sackett when he returned and hoped that there would be a report prepared for the Committee at its next meeting.

### **III. UPDATE OF DISCUSSIONS WITH JUSTICE STEWART.**

Robert Burton reminded the Committee that he had been asked to discuss a number of issues with the Supreme Court. He stated that he had contacted the court's liaison to the Committee, Justice Stewart. In discussing the role of the Committee, Mr. Burton reported that Justice Stewart had stated that the Committee should take a position that was neither overly activist/nor overly passive. In questions about proposed Rule 4.2, Justice Stewart stated that initially the rule had been on a fast track from the Conference of Chief Justices. He stated that definitely any rule that the court would consider would come before the Committee. Mr. Burton stated that he reminded Justice Stewart that the Committee had spent a great deal of time on the issue of Rule 4.2 a few years ago. Mr. Burton reported that Justice Stewart had expressed a concern about the ability of prosecutors to make deals with grants of immunity. His concern had arisen from the recent Tenth Circuit opinion in United States v. Singleton. Justice Stewart asked that the Committee look at the issue and report back.

Mr. Hyde returned to the issue of Rule 4.2. He noted that when the Committee originally started considering Rule 4.2 there had been a Bar ethics opinion. How the Bar ethics opinion would coincide with the proposed Rule 4.2 was unclear. Mr. Hyde stated that most government lawyers like proposed Rule 4.2 because of the flexibility it gives for dealing with unrepresented defendants. Mr. Burton asked that Ms. Gentles follow-up on Rule 4.2. Mr. Walker noted that there had been a great deal of discussion concerning Rule 4.2 at a recent conference he attended.

Mr. Burton returned to the issue of prosecutorial deal making. At Justice Stewart's suggestion, he contacted former U.S. Attorney Scott Matheson. He also talked to former U.S. Attorney David Jordan. Mr. Burton stated that Mr. Jordan does not think any changes are required. There is sufficient statutory authority with numerous safeguards built in. Mr. Jordan pointed out that the system cannot possibly try all of people who are charged with crimes therefore plea bargains are necessary. In addition, Mr. Jordan stated that he thought addressing the issue through a Rule of Professional Conduct would be a bad idea. The issue should be addressed directly. Finally, Mr. Jordan noted that unraveling conspiracies without the ability to offer deals to certain conspirators to testify would be very difficult. Mr. Burton stated that Mr. Matheson was very interested in the issues surrounding the Singleton case. However, he had not formed an opinion about any changes. He agreed with Mr. Jordan that there are a number of safeguards in place. Mr. Matheson's suggestion

was to adopt a wait-and-see attitude because currently the area is very unsettled while the Tenth Circuit reconsiders the Singleton opinion. Mr. Hyde noted that many defendants are granted immunity at the request of defense counsel. The Committee discussed the issue further. Ms. Dixon stated that she thought it was premature for the Committee to consider the issue. Billy Walker moved to not take any action on this issue at this time. Earl Wunderli seconded. The motion passed unanimously. Mr. Beckstead stated that if the Committee considers this issue, he would like to hear from defense counsel. Mr. Hyde stated that he thought there would be a federal legislative change to address the issues of the statute raised in Singleton. Mr. Burton stated that the issue would be tabled at this time.

#### **IV. REPORT ON RULE 6.1.**

Peggy Gentles referred the Committee to her memorandum on Rule 6.1. She stated that the Supreme Court had held a hearing on the issue and had asked that the Bar make two changes to the rule. First, remove any references to judges being governed by the rule. Second, make reporting voluntary rather than mandatory. Matty Branch stated that the Bar had also restructured the rule slightly. She stated that the court had approved the second draft of Rule 6.1 as submitted by the Bar on September 18. Robert Burton noted that he attended the hearing and that Gary Sackett was one of the people who addressed the Court. Billy Walker stated that as he understood some of the concerns, they were that the rule would require reporting but was not clear what would happen if someone failed to report. Judge Kay noted that there was nothing for the Committee to do on Rule 6.1 at this point. However, he asked Mr. Burton if he felt that if similar issues came up in the future would Mr. Burton be able to contact Justice Stewart. Mr. Burton stated that he felt that Justice Stewart would welcome any contact from the Committee that the Committee wanted to make.

Earl Wunderli raised the general issue of where the proposals for changes that the Committee considers come from. Judge Kay noted that usually there are amendments to the model rules that the Committee considers. Bill Hyde stated that often the court will ask the Committee to look at something. Robert Burton referred the Committee to Rule 11-101 which governs the Supreme Court rule making process. That rule states that the rules committee can initiate changes on its own, will consider any petitions received, and will take referrals from the Court. The Committee discussed whether it wished to adopt any type of internal policy for how active to be in its review of proposals. Judge Kay stated that he felt that the Committee was currently operating fine and did not see the need for any such policy.

Karma Dixon stated that she would like to see the Committee deal with issues surrounding lawyers who lie under oath or lie in representations made to the court. Robert Burton stated that any Committee members who wish to have items on the agenda for consideration by the Committee should contact him or Ms. Gentles so that they could be placed on the agenda.

#### **V. OTHER BUSINESS.**

Peggy Gentles referred the Committee to her memorandum of miscellaneous issues that reported on

the Committee's actions on Rules 1.6, 1.12, and the sale of law practice rules. She noted that the Court had accepted all the Committee's recommendations and all those rules would be effective November 1. Billy Walker stated that he felt that the issues surrounding the lawyer advertising rule should be considered by the Committee. Judge Kay noted that this Committee had looked at the issue in the past and had not come to any resolution. He asked that if the Committee were to consider it again that the materials prepared by former Committee member Carolyn McHugh be provided to the Committee.

**VI. ADJOURN.**

There being no further business, the Committee adjourned.