

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

April 19, 1999

PRESENT

Commissioner Thomas Arnett
John Beckstead
Robert Burton
William Hyde
Judge Thomas Kay
Judge Ronald Nehring
Kent Roche
Gary Sackett
Billy Walker
Earl Wunderli

EXCUSED

Gary Chrystler
Karma Dixon

STAFF

Peggy Gentles

I. WELCOME AND APPROVAL OF MINUTES

Earl Wunderli moved that the minutes of the February 22, 1999 meeting be approved with typographical changes. Bill Hyde seconded the motion. The motion passed unanimously.

II. RULE OF LAWYER DISCIPLINE AND DISABILITY 9 (AS PUBLISHED FOR COMMENT)

Billy Walker reported that the Bar Commission was concerned about the proposed removal of language in Rule 9 that stated it was grounds for discipline for any lawyer to violate "any other rules of this jurisdiction regarding professional conduct of lawyers." Apparently, this is the only language upon which the Bar relies to discipline lawyers for failure to pay their Bar dues or complete MCLE requirements. Mr. Walker reported that the Bar Commission was going to discuss proposed Rule 9 at its next meeting and would presumably send a comment to the Committee by the comment deadline.

III. PRINCIPLES OF CIVILITY

Bob Burton referred the Committee to the materials sent by Chief Justice Howe concerning principles of civility. The Court asked the Committee to examine the provided examples and any other materials and consider whether the Court should adopt principles of civility to supplement the Rules of Professional Conduct. Mr. Burton asked how the Committee felt about the concept of principles of civility. Commissioner Arnett stated that the other principles of civility with which he is familiar have been promulgated by an organized group of attorneys rather than the state's highest court. In his opinion, any adoption of the principles should be done by the Bar rather than the Court. Commissioner Arnett continued that the Rules of Professional Conduct are disciplinary or provide guidance for lawyers' behavior. In contrast, principles of civility, however written, are aspirational only. Judge Kay referred the Committee members to an article in the most recent Bar Journal. Judge Kay stated that in his opinion the "Guidelines for Conduct of the Section Litigation of the American Bar Association" included as an appendix to the article are better than the other examples with which the Committee was provided. Peggy Gentles noted that some principles of civility address the behavior of judges. Neither the Rules of Professional Conduct nor the State Bar rules would be the appropriate place to address judicial behavior.

Judge Kay questioned how any principles would be used. In his opinion, a three tier approach would be necessary. First the Bar Association would need to have an aggressive education program. Second, firms would need to be similarly committed. Third, the courts would need to enforce. In Judge Kay's opinion, most of the behaviors to which these principles are addressed would not be seen in the context of a court proceeding. Therefore, the court's role in any enforcement would be minimal. Gary Sackett stated that, while he thinks the principles are a good idea, he did not see how they could be used in any way other than training. John Beckstead stated that he feels that there is value in prompting discussion about civility issues. Judge Nehring asked if the Office of Professional Conduct currently addressed civility issues under existing rules. Billy Walker replied that the Office has used the Rules of Professional Conduct, specifically Rule 4.4 and Rule 8.4(d), and the Rules of Integration.

Bill Hyde suggested that the Committee consider placing some of the guidelines in the comments to the Rules of Professional Conduct where appropriate. Judge Nehring stated that he liked the idea of having a tool short of contempt to admonish attorneys for uncivil behavior. Kent Roche, in response to Mr. Hyde's suggestion, reminded the Committee that the preamble to the guidelines stated that the guidelines should not be used as a basis for litigation or for sanctions or penalties. Judge Nehring stated that possibly such language was placed in the preamble as part of political compromise. Commissioner Arnett stated that traditionally the comments to the rules have explained the black letter law that appears in the text of the rule. He would not be in favor of expanding the role of the comments. Billy Walker stated that some of the guidelines include behavior that would otherwise violate the Rules of Professional Conduct. Mr. Walker likes the suggestion of putting at least some of the guidelines in the comments where appropriate. In response to Mr. Roche's concern about the language of the preamble, Bill Hyde asked if such language is hypocritical: is the organized Bar saying that it wants to advance the ideal of civil behavior but is not willing to hold lawyers whose behavior

is uncivil accountable. Mr. Sackett stated that his problem is definitional. The language in the guidelines is so subjective that he does not feel that there would be any teeth to the guidelines for enforcement purposes.

Bill Hyde moved that Mr. Burton tell the Supreme Court that the Committee is considering putting some of the guidelines in the comments to the rules and would encourage further communication with the Bar. Judge Kay seconded the motion. Judge Nehring asked that the communication with the Court indicate that the Committee's cursory review of the proposed guidelines had determined that the ABA's were the most promising. Bill Hyde accepted the amendment to his motion to include the ABA guidelines as the starting point. Earl Wunderli stated that he did not think that the Committee was making a crisp recommendation to the Court. Judge Nehring stated that he thought the Court should be informed that the Committee was questioning the assumption in the Chief Justice's letter that the guidelines would not be the basis for sanctions. The motion passed with Commissioner Arnett, Gary Sackett, and Earl Wunderli voting against.

John Beckstead asked the other Committee members how widespread they thought the problem was. Commissioner Arnett said that he sees what he would characterize as uncivil behavior between lawyers almost everyday. Judge Nehring concurred stating that he sees it far too much. Bill Hyde said that the public perception of the profession is hurt a great deal by uncivil behavior. Billy Walker stated that by the time the lawyer's behavior is reported to the Office of Professional Conduct it is usually egregious. Judge Nehring and Commissioner Arnett stated that they have a specific concern about the frequency with which lawyers are uncivil to court clerks.

Robert Burton asked if the Committee thought it was premature to assume that the Court's response would be favorable and to refer the guidelines to the Rules Subcommittee. Commissioner Arnett pointed out that, while the Committee has a number of subcommittees, the Rules Subcommittee is the only one that has consistently been active. He would suggest forming a separate subcommittee to deal with this issue.

Judge Nehring asked that when Mr. Burton communicated with the Court he indicate that the Committee is divided over its proposal. Gary Sackett stated that he had an philosophical problem. The system is adversarial and therefore does not generate civility. To adopt a system that would allow sanction for uncivil behavior would be problematic. Mr. Burton asked if those members who had voted against the motion would explain their reasons for opposition so that he could inform the Court of the nature of the Committee's division. Commissioner Arnett stated that he does not like the idea of putting the guidelines in the comments to the rules. Both Gary Sackett and Earl Wunderli did not see any reason to go to the Court at this time. In addition, Mr. Wunderli stated that he does not like the idea of allowing the guidelines to become the basis for sanctions. In Mr. Wunderli's opinion, the first step should be adoption of some code of civility by the Bar. Kent Roche stated that the guidelines as a whole have more impact than if they are broken up into different comments. Judge Kay moved that the Committee recommend to the Court that it communicate with the Bar to adopt the ABA guidelines as a whole and the Committee would amplify those guidelines in comments as appropriate. Bill Hyde seconded the motion. The motion passed with Gary Sackett opposed.

IV. OTHER BUSINESS

Bill Hyde reported that the Bar has created an ad hoc committee to address Rule 4.2. This committee is made up of prosecutors and defense attorneys. The Bar has asked that the Court extend the comment period on Rule 4.2 to July 15th. The Committee tentatively canceled its May meeting. The Committee members were to assume it was canceled unless contacted by the chair. The next meeting would be the regularly scheduled June 21st meeting.

V. ADJOURN

There being no further business, the meeting adjourned.