

MINUTES

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

Utah Law & Justice Center
645 South 200 East
Salt Lake City, Utah 84111
Monday, December 16, 2002
5:00 p.m.

ATTENDEES

Robert Burton
Gary Chrystler
Royal Hansen
Nayer Honarvar
William Hyde
Steven Johnson
Kent Roche
Paula Smith
Billy Walker
Gary Sackett
Earl Wunderli
Marilyn Branch

EXCUSED

Honorable Ronald Nehring
Stuart Schultz
John Beckstead

STAFF

Ingrid Westphal Kelson

1. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the members to the meeting.

Mr. Wunderli moved that the minutes be approved as amended. Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present.

2. OTHER BUSINESS

Mr. Burton notified the Committee that Stuart Schultz and John Beckstead are both excused from the meeting. He also notified the Committee that Judge Nehring had been diagnosed with cancer and would not be attending, but stated that he would be back.

Mr. Burton notified the Committee that Alicia Davis was very appreciative of the gift. She sent a card in appreciation of the gift.

Mr. Burton stated that he had contacted Scott Daniels with regard to a sub-committee studying the ABA Rule changes. He was informed by Mr. Daniels that the sub-committee consists of Billy Walker and possibly Kate Toomey.

Mr. Burton asked whether the Committee had received his multiple e-mails regarding ABA messages. The Committee confirmed that they had. He believed the problem of sending out multiple e-mails is solved.

3. ETHICS 2000 PROPOSED AMENDMENTS

Rule 1.2 Mr. Johnson discussed the proposed changes to the rule as well as the Comment added to explain the change made to the rule. Mr. Johnson stated that the two areas of concern are: client objectives, and the termination of the client-attorney relationship where the attorney discovers that the client's activities or actions have been fraudulent or criminal. As to the first concern, the ABA recommends taking out objectives and means and only limit the means. Mr. Johnson and Judge Nehring feel that the current Utah language should be retained which gives the attorney the right to exclude certain client objectives as well as means. Comment 6A was added to explain that difference. As to the second concern, Mr. Johnson discussed withdrawing from a case because an attorney discovers his client's activities were fraudulent. Mr. Johnson feels the model rule would not allow an attorney to help the client work through the problem. He feels that if a client is willing to stop the wrongful conduct, then an attorney should not be forced to withdraw. This is reflected in Comment 10 and Comment 10A. Mr. Johnson stated that if the Committee felt the language drafted by him and Judge Nehring was not necessary then it could adopt the Ethics 2000 language. Mr. Wunderli made a motion to adopt the ABA rule (Ethics 2000 rule) as written without changes. Mr. Sackett seconded the motion. Mr. Johnson was opposed. The Committee noted that the terms in the rule were not defined in Rule 1.0.

Rule 1.3 Mr. Sackett addressed paragraph 5 of the Comments regarding plans in case of death or disability of an attorney. Mr. Sackett pointed out the changes on pages A-1 and A-2. Mr. Sackett's draft proposed eliminating paragraph 5 altogether and adding a Comment stating why the Committee varies from Ethics 2000. The other option would be to change the proposed Ethics 2000 language to refer to a "lawyer's" death or disability rather than a "sole practitioner's." Mr. Roche added that the reporter's explanation of changes had been attached to the memo, as well as the formal ethics opinion cited at the end of Comment 5. Mr. Roche suggested keeping Comment 5 and changing the language to make it applicable to all lawyers. Mr. Hyde made a motion to adopt Rule 1.3 as drafted, including paragraph 5, and the language applying to all lawyers (the recommended language). Mr. Johnson seconded the motion. Mr. Burton suggested an amendment to the motion: changing the language from "the Ethics 2000 Comment" to the "the ABA Model Rule Comment." Mr. Hyde accepted the amendment. Mr. Johnson seconded the motion with the amendment. Mr. Sackett was opposed.

Rule 1.16 Ms. Smith discussed the changes to Comment 9 with regard to what needs to be returned as part of the client file. The only items not to be returned to the client are attorney's work product, such as: recorded mental impressions, research notes, legal theories, internal memoranda, and unfiled pleadings because they are not determined to be part of the client file. Ms. Smith also proposed deleting the sentence in Comment 9 "The lawyer may retain papers as security for a fee only to the extent permitted by law" or making it clear that the language is subject to Comment 9A. Mr. Sackett stated that his Ethics Advisory Opinion Committee worries that if the rules are adopted by the Supreme Court then they will be contrary to the legislature's lien laws. He stated that persons [attorneys] need guidance with respect to collecting their money and attorneys should have a means to comment on the rule. Mr. Johnson stated that the court will provide a comment period. Ms. Smith stated that the only difference from the prior rule is that some of the things that are not paid for are now required to be turned over. Mr. Burton stated that since changes are being made only to the Comment and no changes are being made to the rule, it may not make sense. Mr. Wunderli stated that to some degree the rules and comments are disjointed. Mr. Burton suggested that it would be easier to take the language out of the rule and perhaps the following language should be incorporated: "The lawyer must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies..." and Comment 9 will define what "file" means. Mr. Sackett stated that the EAOC would like the Committee to get rid of language that does not make sense. Mr. Sackett described a scenario wherein an attorney prepares attorney work product and the client has paid for the hours spent on the work product. Does he have to turn it over to the client? Mr. Johnson stated that if it is an unfiled pleading, then it does not need to be turned over. Mr. Sackett stated that his Committee has determined that you need to turn over things that are necessary for the client to protect his interests on an ongoing basis. Ms. Smith stated that it would be difficult to enforce since it would be hard to show that the attorney has held on to something that is necessary. Further discussion ensued regarding the specific language to be changed in Comment 9. Mr. Johnson asked whether the case needed to be cited in the Comment. The Committee agreed that it was not necessary to cite. Mr. Johnson made a motion to accept the recommendations of the sub-committee with the modification of the next to last sentence of paragraph (d) of the black letter rule, which should read "The lawyer must provide, upon request, the client's file to the client;" and with the modification to Comment 9A – eliminating the last sentence which begins "In Jones, Waldo, Holbrook & McDonough." Mr. Wunderli suggested also taking out the last sentence of Comment 9. Mr. Johnson stated "See Comment 9A" should be added.

Mr. Sackett asked if the language "notwithstanding any other law including attorney lien laws" should be left in. He feels that the language suggests a legal conclusion. A discussion ensued as to whether or not the language should remain. Mr. Burton asked Mr. Johnson if he were willing to withdraw his motion and to make a new motion that includes all of the amendments. Mr. Johnson agreed, and also asked whether the language "unique to Utah" was intended to be part of the black letter rule. Ms. Smith stated it was not. Mr. Johnson made a new motion to accept the recommendations of the sub-committee with the following exceptions: the words in paragraph (d) "may retain papers relating to the client to the extent permitted by other law, but" would be eliminated; in Comment 9, the sentence "The lawyer may retain papers as security for a fee only

to the extent permitted by law and the provisions of this rule. See Comment 9A” would be eliminated; the word “also” in the next sentence would be eliminated; the words “client file” would be eliminated and the proposed Comment 9A would become part of Comment 9; and the last sentence would be eliminated. Mr. Wunderli seconded the motion. Ms. Honarvar asked if the word “regardless” could be replaced with “notwithstanding” in the last sentence of Comment 9A. Mr. Johnson accepted that amendment. Mr. Wunderli seconded the amended motion and it passed on the unanimous vote of those present. *Gray Sackett abstained.*

Rule 1.5 Mr. Burton noted that a new draft was not submitted to the Committee. The Committee referred to the November 6th draft of the rule. A discussion ensued regarding the current rule that does not require a written agreement. (The rule does require written contract of the fees if the expected fees will exceed \$750.00.) The Committee then discussed whether to require fee agreements in all circumstances. Mr. Burton stated that it is better practice to have a fee agreement, however, there are situations where the attorney cannot get a written fee agreement before the work must be completed. Ms. Honarvar asked Mr. Walker how often it becomes an issue when the fee agreement is not in writing. Mr. Walker stated that in cases where there is a fee dispute, the OPC looks for a written fee agreement. However, unless a written agreement is required, there is only a written agreement in a small percentage of cases. Further, Mr. Walker stated it is less of an issue for the client than it is for the OPC, who must investigate when there are conflicting accounts between the client and the attorney of what the attorney has agreed to do for the client and for what amount. Mr. Burton asked for more information on why the ABA rejected the recommendation from Ethics 2000 for the next meeting.

4. ADJOURN

Mr. Burton announced that the next meeting of the Committee will be held on Monday, January 27 at 5:00 p.m. at the Bar. He notified the Committee that no new assignments were made for the next meeting. However, Mr. Burton asked the Committee to re-read their materials and to come prepared to discuss it. Also, if any of the Committee members feel that what they have submitted needs to be supplemented, please do so. Further, Mr. Burton asked everyone to prepare memos for submission regarding the next column of rule assignments on January 27th for distribution and discussion on February 10th. There being no further business, the meeting was adjourned.