

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, February 10, 2003
4:30 p.m.

ATTENDEES

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

EXCUSED

Honorable Ronald Nehring
John Beckstead
Marilyn Branch

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. Roche seconded the motion, and it passed on the unanimous vote of those present.

2. OTHER BUSINESS

Mr. Burton notified the Committee that he had tried to reach Judge Nehring to find out what his status is. He has not been able to reach him however, he will continue to call Judge Nehring to ascertain whether he would like to continue to serve until he is formally appointed or resign from the Committee immediately.

Mr. Burton has sent Rule 1.16 to the Supreme Court. Matty Branch contacted Mr. Burton and stated that an explanatory letter was not necessary because it will go to Tim Shea and then out for comment. Rule 1.16 should be out for comment shortly.

Mr. Burton called Charles Brown in order to obtain a copy of the ABA House of Delegates Minutes. Mr. Brown will try to get a copy for him.

Mr. Burton passed around a letter from Justice Holland of the Delaware Supreme Court, who offered assistance to all states on the Ethics 2000 project. Mr. Burton stated the Committee should feel free to utilize these services.

3. ETHICS 2000 PROPOSED AMENDMENTS

Rule 1.6 Mr. Hyde discussed the February 10th draft of the rule. Regarding paragraph (b)(1), he stated he was pretty sure that the Committee did not choose to adopt "reasonably certain" as part of that language. However, on pages 6 and 7 of the comments, there was discussion about some limitations on a lawyer's need to report information unless there is a reasonably certain potential for death or substantial bodily harm. The Committee then discussed whether the language should remain or if a change to the language is necessary. Mr. Hyde then made a motion to adopt the February 10th draft of paragraph (b)(1), leaving in the "reasonably certain" language. Mr. Hyde stated that the draft is the ABA's Model Rule language. Mr. Johnson seconded the motion. Mr. Wunderli stated that he was opposed because if he believes it is necessary to prevent death, he thinks that information should be disclosed. Mr. Roche stated that he believes "likely" should be used. Mr. Sackett suggested using "likely" with regards to substantial injury to financial interests, and to prevent death. The Committee then voted on the draft leaving in the "reasonably certain" language. Ms. Honarvar and Mr. Hyde were in favor of the motion; all others were opposed. Mr. Sackett made a motion to replace "reasonably certain" with "likely." Mr. Roche seconded the motion, and it passed on the unanimous vote of those present.

With regard to paragraph (c), Mr. Hyde discussed leaving in "related to the representation of a client" and asked the Committee if it should be kept in. Mr. Hyde made a motion to adopt the language as drafted. Mr. Wunderli seconded the motion, and it passed on the unanimous vote of those present.

With regard to paragraph (d), Mr. Hyde stated that he had spoken with Roger Cutler, the Chair of the Lawyers Helping Lawyers Committee. Mr. Cutler felt that the paragraph should be kept in. Mr. Cutler further stated that their committee would like to create a diversion program to suspend potential violations of the rules to assist the lawyers in the transition phase. The Committee discussed the possible history of the language. Mr. Wunderli stated that he recalls the Committee deciding to strike the "(s)" after "lawyer." Mr. Sackett made a motion to adopt paragraph (d) as proposed with the addition of the language "For purposes of this rule. . ." at the beginning of the paragraph. Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present.

Mr. Wunderli discussed renumbering of Rule 1.6 subsections. Mr. Wunderli suggested moving (2) to (4) and vice versa in order to remain consistent with the ABA Rules. Mr. Wunderli made a motion to this effect. Ms. Smith seconded the motion, and it passed on the unanimous vote of

those present.

The Committee then discussed changes to the Comment section of the rule. Mr. Burton stated that the last sentence of the first paragraph should be reworded. After discussion as to where the language should be placed, Mr. Burton suggested that the sentence be stricken. Mr. Sackett made a motion to strike the sentence: "The Supreme Court Committee on the Rules of Professional Conduct (Committee) made several amendments to the ABA Model Rules, 2000, as further indicated in these comments." Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present.

Mr. Burton asked the Committee if they had a problem with the language as proposed by the ABA and as recommended by Mr. Hyde. Mr. Hyde then described the changes to paragraph [6] of the Comment. Mr. Sackett suggested changing "reasonably certain" to "likely." The Committee then discussed the particular language to be used. The Committee discussed breaking the paragraph into two sentences: (b)(1)(i) and (b)(1)(ii), changing "reasonably certain" to "likely," and removing "it will be suffered imminently." Mr. Burton asked Mr. Hyde to redraft the Comment with the Committee's input.

The Committee then discussed the next portion of italicized language in paragraph [6] of the Comment. Mr. Hyde suggested adding language about why the Committee changed "reasonably certain" to "likely." Ms. Smith suggested adding language to the effect that lawyers should be permitted to take action to prevent serious bodily harm or death when it is likely rather than waiting until it is reasonably certain because we believe that is more protective of the public. Mr. Hyde stated he would redraft some of the paragraphs since the draft contained some language that should have been stricken.

Regarding paragraph [11] of the Comment, the Committee discussed adding language to the Comment which would address why there is a change from "permits" to "requires." The Committee also discussed language regarding disclosure by court order. Ms. Smith stated her recollection is that they were focusing on complying with a court order.

Regarding paragraph [18] of the Comment, Mr. Burton suggested deleting up to "The relationship established by the Bar for the Committee, Lawyers Helping Lawyers, provides for confidentiality of information between the lawyers involved. Mr. Johnson suggested adding "In paragraph (d)" at the beginning of the section. Mr. Burton asked Mr. Hyde to prepare a draft with the Committee's changes for the Committee to review at the next meeting.

Rule 1.4 Mr. Wunderli discussed the changes to the rule and recommended adopting the ABA Model Rule. The rule lists five areas where an attorney should communicate with the client. Mr. Wunderli Hyde stated the Comment remains the same with the exception of some rearrangement. He further stated that everything in the Utah Rule 1.4 is in the ABA's Model Rule, and Mr. Hyde made a motion to adopt the ABA Model Rule as proposed. Mr. Johnson seconded the motion. The Committee discussed the cross-references between Rule 1.4 and Rule 1.2. Mr. Wunderli

stated he did not recall any changes that were made to 1.2 that would affect Rule 1.4. Mr. Wunderli asked Mr. Walker if Rule 1.4 was a frequent problem. Mr. Walker stated that Rule 1.4 is a common ethical problem and that the recommendation, which gives more specificity than just reporting the status of the case, is an improvement of the current rule. Mr. Burton stated there was a motion by Mr. Wunderli and a second by Mr. Johnson and asked for a vote by the Committee. The motion passed on the unanimous vote of those present.

Rule 1.7 Mr. Hansen discussed the changes to the rule. He stated the most controversial part is the "informed consent confirmed in writing" language, which the old rule did not provide for. Mr. Hansen proposed adopting the ABA's recommendation, which is a re-write of the old rule. He stated that nothing substantial had been added or omitted. Mr. Sackett asked Mr. Walker if the addition of confirming in writing would solve some problems seen by the OPC with regard to this rule or is the change overly burdensome. Mr. Walker stated that it would, although usually if the attorney can see a conflict at the outset, he usually does get something in writing. The OPC usually sees cases in which an attorney may not have an actual conflict but may have a potential conflict and if he gets something in writing, it would help them. Mr. Walker stated that the focus of the rule had changed: it used to focus on deciding whether or not there was a conflict by looking at confidentiality and loyalty. Now the rule focuses on competence and diligence. The Committee discussed the Comment section of the rule. Mr. Hyde stated that he found the last sentences of Comment [35] useful and questioned its deletion. Mr. Sackett stated that it is his theory that this issue could be decided by the courts. Mr. Burton suggested the Committee pay particular attention to the rules which they are assigned so that when other rules are discussed, the Committee may recognize anything in later discussions that may impact the Committee's thinking on rules which have been previously discussed. Mr. Roche made a motion to adopt the ABA's recommendation Mr. Wunderli seconded the motion, and it passed on the unanimous vote of those present.

Rule 1.9 Mr. Sackett discussed the changes to Rule 1.9. He stated that this rule was never modified to reflect the ABA's changes of 1989 in which they took Rule 1.10(b) and made it part of Rule 1.9. However, a vote on adoption of this rule would be contingent on adoption of Rule 1.10 since it would require adoption of the 1989 changes to both rules. The only substantial change is adding the word "factually" to the language. Mr. Sackett feels it should be stricken in order to make the rule consistent with the proposed Ethics 2000 rule. Also, he states there is a new paragraph 3 in the Comment, which indicates what "substantially related" means. He is recommending that the Committee adopt the ABA rule and the Comment. Mr. Hyde stated that an explanation speaking to the "factually related matters" could be found in the Houghton case. Mr. Walker stated that he agrees with Mr. Sackett that the case does not add relief to the confusion of the term. Mr. Sackett made a motion to adopt the ABA rule and Comment as it is written. Mr. Wunderli seconded the motion, and it passed on the unanimous vote of those present.

Rule 1.8 Mr. Johnson stated that he had reviewed the minutes of the Ethics 2000 meetings and the hot topics discussed were whether lawyers may solicit or receive gifts from clients and whether lawyers can have sexual relations with clients. Mr. Johnson discussed the substantive

changes to the rule which include: any attempt to clean up ethical concerns heard in the past need to be in writing; the prohibition for receiving gifts is a little broader; the attorney may not prepare documents effectuating a gift from a client or soliciting a gift from a client; completely eliminates the prohibitions against attorneys serving as opposing counsel in a close family relationship by husbands and wives who are on opposing sides; and prohibits sex with clients unless it was pre-existing before the client-attorney relationship. Mr. Johnson stated that he and Judge Nehring had concerns over the definition of "close familial relationship." They suggested using the phrase "co-habiting partners" instead. Ms. Honarvar stated she would like to see a change to the language in subsection (e)(2), which discusses a lawyer who represents an indigent client may pay court costs and expenses. She would like the language to read "expenses reasonably connected to litigation on behalf of the client" and made a motion to that effect. Mr. Wunderli seconded the motion. Mr. Walker discussed the enforceability of the rule. He stated that the rule is there to protect lawyers from themselves because the attorney can get into trouble in connection with advancing expenses because when the client does not pay the attorney back or refuses to pay for costs advanced by the attorney, the attorney is left paying those costs. He further stated that this is an issue in several states; Utah has been consistent in enforcing the provision as it is. Mr. Walker stated he feels there are legitimate litigation expenses and if you pay for things outside of that, you are essentially loaning the client money. The Committee then discussed possible language that could be added, how other agencies handle the problems associated with indigent clients, and whether the Committee wants to adopt the language change. Mr. Burton asked for a vote on the outstanding motion. Mr. Hyde stated that a Comment would also need to be added explaining the change in language. Ms. Honarvar and Mr. Wunderli voted in favor of the motion; all others were opposed. Mr. Burton stated he had a concern regarding the "familial relationship" where there are persons who do not fit into the category or into the "co-habiting partner" category. Mr. Johnson stated he would like to narrow the definition, and the exception to the rule that says you cannot ask for gifts from a client. Mr. Chystrler asked for clarification on subsection (i) of page 42 regarding sexual relations with a client and stated a scenario wherein an attorney is engaged to the client. He stated that it should be defined. Mr. Walker stated that Rule 8.4(g) provides a definition which states that "except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between a lawyer and a client shall be presumed to exploitative." Mr. Chystrler suggested referencing Rule 8.4(g). Mr. Walker stated that most states that have a Rule 1.8 do not have an 8.4(g). Mr. Burton suggested that a supplemental draft be prepared for the Committee to review.

4. ADJOURN

Mr. Burton announced that the next meeting of the Committee will be held on Monday, March 17, 2003 at 4:30 p.m. at the Bar. He notified the Committee that Rules 1.6, 1.8, 1.10, 1.11, 1.12, 1.13, 1.14, and 1.15 would be discussed at the next meeting and asked the Committee to come prepared to discuss these rules.

There being no further business, the meeting was adjourned.