

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, March 17, 2003
4:30 p.m.

ATTENDEES

Robert Burton
Gary Chrystler
Royal Hansen
Steven Johnson
Kent Roche
Gary Sackett
Stuart Schultz
Paula Smith
Billy Walker
Earl Wunderli
Judge Paul Maughan
Judge Steven Roth
Judge Fred Howard

EXCUSED

William Hyde
Marilyn Branch

STAFF

Amy Yardley

1. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the members to the meeting and welcomed the three new members Judge Howard, Judge Roth, and Judge Maughan.

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 he received a letter from Justice Nehring officially resigning from the Committee. John Beckstead has also resigned from the Committee for different reasons. His resignation has been accepted by Mr. Burton as well as the court.

Mr. Burton notified the Committee that he met with the Supreme Court and the Justices asked the Committee to come up with the definition of the practice of law. He discussed what the Court would like to see and the timeframe for the Committee to submit a definition. Mr. Burton

asked for volunteers to head the subcommittee to draft the definition of the practice of law. Mr. Sackett, Ms. Honovar, Mr. Wunderli and Mr. Johnson volunteered. Mr. Burton asked that Mr. Sackett have some discussion points prepared for the next meeting because he would like to have a draft definition as the first agenda item for the next meeting.

Mr. Walker also suggested that as the Committee proceeds with the drafting of a proposed definition that it invite discussion from representatives of the Bar's UPL Committee and the Committee on Multi-Jurisdictional Practice. In this respect, the Multi-Jurisdictional Practice Committee is currently drafting a definition for the practice of law.

Mr. Burton confirmed with the three new members that the date and time of the meeting would still work, thus the Committee will still meet on the third Monday at 4:30 of the month.

3. ETHICS 2000 PROPOSED AMENDMENTS

Rule 1.6 Mr. Walker stated that he did not have a chance to talk to Mr. Hyde before he left, but Mr. Hyde sent a copy of a memorandum to him on Rule 1.6. The only change that was made pursuant to previous discussions was in 1.6(c) which changed "shall" to "may" and made the requisite changes to the comments. Mr. Burton questioned if the changes were consistent with what changes were discussed at the last meeting. Mr. Walker said that they were. Mr. Burton suggested the Committee approve the rule as drafted with the idea that we can always go back and revisit the issue. Mr. Walker stated that Mr. Hyde made changes to comments 10, 11, 12, and section 9 and rewrote section 18's comments. Mr. Wunderli questioned whether (c) of the rule be changed to (b)(5), if it was adopted. Mr. Walker stated that it is still (c). The model rule has our (c) under (b)(4), which is similar to (c). Mr. Johnson stated that we made (2) to (4). It was broken down in previous discussions because it is mandatory and (b) is permissive. Ms. Honovar said that her copy (b) and (c) both say "may". Mr. Johnson stated (b) is "may." Mr. Walker stated in comment 11 Mr. Hyde wrote that "(c) permits" and it would have to change to "(b)(5) will permit." There will no longer be a paragraph (d). Mr. Sackett moved the rule be adopted with changes. Mr. Walker seconded the motion and it passed on an unanimous vote of those present.

Rule 1.8 Mr. Johnson stated the only issue to discuss is subparagraph (e) as it currently stands and the alternate (e)(2) that states "and pay for litigation related expenses to the client." Mr. Johnson is concerned and hesitant about using that language because the real definitional concern is what litigation related expenses mean. Mr. Johnson gave examples of different expenses. Mr. Johnson also has a concern about lawyers buying cases creating conflicts of interest. Mr. Burton asked what Mr. Johnson makes of the comment that helps define litigation related expenses? Mr. Johnson believes that it opens more doors to bigger problems and he recommended to keep it the same as the model rule. The Committee discussed the related expenses for an indigent client. Mr. Walker agreed with Mr. Johnson. Mr. Walker further stated that attorneys are exposed when an attorney loans money to client, and tries to get the money back. In a transaction with the client they are forced to prove that they loaned the client money. The client can claim that it was

not a loan.

Mr. Honovar stated that subsection 1.8(e)(1) and (2) as they stand are identical. Mr. Johnson stated that in section (1) attorneys can advance court costs and in section (2) in the case of an indigent client they can pay court costs. The Committee discussed the difference between the two sections. Mr. Sackett moved that the Rule read as shown, or in the alternative, to read “and pay for related litigation assistance to the client” and with respect to the modification to 1.8(e)(2) and that the comment 10(a) include the first two sentences and eliminate the last sentence. Ms. Honovar seconded it. Mr. Burton brought a discussion point of whether anyone is aware of another state that has taken the same approach. Mr. Walker stated that other states are changing their 1.8(e) to reflect the changes in the Ethics 2000 Model Rules. In a vote 5 to 8 the motion failed. Mr. Johnson moved to accept (e) as drafted by the Ethics 2000 Committee. Mr. Walker seconded it. In a vote 7 to 6 the motion passed.

Rule 1.10 Ms. Smith stated there are some minor changes. The Ethics 2000 Committee provided for law firms to screen attorneys for conflicts. The ABA did not adopt this. If an attorney has a conflict the entire firm is disqualified. Ms. Smith discussed conflicts that could or could not disqualify law firms. The comment explains how the rule governs non-attorneys, primarily paralegals and law students who work at firms and screening is permitted in that instance. Ms. Smith and Mr. Wunderli recommended adoption of the rule as written to allow screening. Mr. Burton asked if Ms. Smith knew why the ABA overruled the Ethics 2000 recommendation? Ms. Smith stated that she had looked at the minutes from the meeting and an article that had a discussion about the purported reason that screening does not work. The purported reason given was that screening put the client at a disadvantage. The committee discussed the article and effects of screening. Mr. Chrystler moved to adopt section (c) including comments 6, 7, and 8. Mr. Roche seconded. The motion passed on a unanimous vote. Ms. Smith further moved to adopt Rule 1.10. Mr. Wunderli seconded the motion. The motion passed on a unanimous vote.

Rule 1.11 Ms. Honovar stated that the Utah version should be adopted. Ms. Honovar further stated that there are changes, but they are stylistic changes. The Committee discussed the difference between the old rule and new rule. Mr. Burton stated if there were only stylistic differences he would recommend adopting the ABA rule. Mr. Sackett moved to go with the ABA rule. Mr. Wunderli seconded the motion. The motion passed on a unanimous vote.

Rule 1.12 Mr. Walker stated that he was unable to discuss the rule with Mr. Hyde. Mr. Walker pointed out that it adds mediators and third party arbitrators to judges for potential disqualification on cases. This rule is related to Rule 2.4 which will be discussed by the Committee at a later date. Mr. Burton suggested that this rule be tabled until Mr. Hyde returns.

Rule 1.13 Mr. Chrystler stated there are not really substantive changes, but more stylistic changes. He also wants to use language in the comment (paragraph 6) to create subsection (f). The Committee discussed moving the comment into the rule. Mr. Burton stated the rule may need more work and analysis. Mr. Sackett moved to table the rule. Ms. Honovar seconded the

motion. The motion passed on a unanimous vote. Mr. Burton request that proposed language be drafted and ready to present at the next meeting.

Rule 1.14 Mr. Johnson stated that the Ethics 2000 recommended language should be adopted. There were a couple of issues that were discussed and were well addressed. Mr. Johnson cited an example of one of the issues. The Committee discussed the issues and what steps an attorney can take. Mr. Johnson moved to adopt the ABA and Ethics 2000. Mr. Roche seconded it. The motion passed on a unanimous vote.

Rule 1.15 Mr. Roche stated that the Committee should adopt the ABA amendments and add back in two sentences, one in the rule and one in the comment from 1997 that requires banks to report overdrafts to the Bar. The Committee discussed the addition of the two sentences. Mr. Hansen moved to approve the ABA rule with the two sentences. Mr. Chrystler seconded it. The motion passed on a unanimous vote.

4. ADJOURN

Mr. Burton announced that the next meeting of the Committee will be held on Monday, May 19, 2003 at 4:30 p.m. at the Bar. He notified the Committee that the Definition of the Practice of Law and Rules 1.12, 1.13, 1.17, 1.18, 3.3, 2.2, 2.3, 2.4 and 3.1 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.