

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, May 19, 2003
4:30 p.m.

ATTENDEES

Robert Burton
Gary Chrystler
Royal Hansen
Marilyn Branch
William Hyde
Kent Roche
Stuart Schultz
Paula Smith
Billy Walker
Earl Wunderli
Nayer Honarvar
Judge Stephen Roth
Judge Fred Howard

EXCUSED

Gary Sackett
Judge Paul Maughan
Steven Johnson

STAFF

Amy Yardley

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

2. OTHER BUSINESS

Mr. Burton confirmed that the Committee members are getting e-mails being sent. Mr. Chrystler gave the Committee a new e-mail address glc101@veracitycom.net.

Mr. Burton stated that he was given a petition concerning Rule 1.5 from Steven Densley, who is with Strong & Hanni. Mr. Densley writes on behalf of an organization called Common Good. They are petitioning a number of states to make modifications to Rule 1.5 in connection with contingent fee cases. Mr. Burton suggested that the Committee revisit Rule 1.5 in connection with the petition. Mr. Burton questioned whether the Court has been made aware of the petition.

Ms. Branch stated that it has not been filed with the Court. Mr. Walker stated that the Utah State Bar received a copy of it. Mr. Burton stated he talked to Mr. Densley telling him that the Committee would give it consideration. Mr. Burton, Ms. Honavar, and Mr. Schultz will look at it and report back to the Committee. The petition was distributed to the Committee.

3. Definition of the Practice of Law

Mr. Wunderli stated that Mr. Sackett prepared a draft of a proposed definition. The ABA had been active in developing a model definition. Most states that have adopted a definition have followed the ABA format: 1) General Statement of the Practice of Law; and 2) List of Exceptions. Mr. Wunderli feels that there are three things that the Committee needs to focus on. The three parts are definition of "law"; definition of the practice of law; and the list of exceptions.

Definition of the Law: Mr. Wunderli stated that other states have not adopted a definition of "law". Mr. Wunderli stated Mr. Sackett felt really strongly about defining "law." The other three subcommittee members have reservations about defining "law." Mr. Sackett feels that the "law" is a key term, so the Committee needs to define it. Mr. Hyde questioned the Committee's mandate. Mr. Burton stated that the Court wants an independent definition. Mr. Hansen questioned why the ABA has not defined the term "law." Mr. Wunderli stated that he did not know, but he is worried about unintended consequences. Mr. Wunderli gave an example of a person giving bad advice, i.e. engaging in the unauthorized practice of law (UPL), and the person's defense could be that he did not engage UPL because he did not give advice on the "law." Mr. Walker stated that in his view advise or assistance that affects someone's legal rights, by a non-attorney would define a practice involving UPL. Judge Roth questioned whether this definition is going to be a part of a statute with a penalty attached to it. If so, it raises potential problems of constitutional issues with respect due process. This issue suggests that "law" ought to be defined. Ms. Honavar stated that the law is constantly changing and reshaping itself. Defining the term "law" would further create boundaries and/or limitations. Ms. Honavar also suggested that the Committee go with what other states have used i.e. "application of legal principles." Ms. Smith brought up the advantages, real estate and contracts, v. disadvantages, needing training in a particular area of law such as international law. Mr. Burton suggested that the definition read "primarily include, but not limited to." Judge Howard stated that given the mandate, it is better to have some definition. Judge Roth suggested that the Committee come up with the best definition with a caveat, giving the court the option. Mr. Walker stated there could be a problem of over-defining, i.e. do we also define the terms "counseling" and "advising?" Judge Roth stated that what already is stated is useful. Mr. Burton suggested that the definition of "law" be put aside until Mr. Sackett is back and that the Committee be ready to discuss this at the next meeting. Mr. Roche stated that Mr. Sackett's definition is identifying three sources of law and agrees with Mr. Walker that it is not real helpful. Mr. Schultz stated that the Rules of Procedure and Evidence are not included, and they are the most crucial. Procedural rules are one of the most important aspects of the practice of law. Pro se parties have had problems with those rules. Mr. Burton suggested that the subcommittee look at the definition again and this will be

discussed at the next meeting.

Definition of the Practice of Law: Mr. Wunderli stated that Mr. Sackett included two elements in the definition of the practice of law (similar to the ABA Model Rules and the State Rules): 1) the application of the law to particular facts and circumstances; and 2) the representation of the interest of another person. The definition has to have both. The Committee compared Appendix A of the ABA model definition to Mr. Sackett's definition. Mr. Burton stated that both the ABA and Washington have things that are helpful that Mr. Sackett's definition does not have. Both definitions use the word "negotiation," both talk about the importance of a lawyer drafting and filling out legal documents. Mr. Burton also stated that the ABA rule further states that a person is practicing law when doing all of these things and Mr. Sackett's definition does not get into that. Mr. Chrystler stated that Mr. Sackett's definition is much broader. Mr. Chrystler stated that the definition is so general that all of those things are included and if the Committee starts listing things, something could be forgotten. Mr. Chrystler questioned whether drafting and/or negotiating is covered by the definition. Judge Roth stated that paragraph (C) seems to complete the definition. The rule should give a firmer view of what one can or cannot do. The committee may want to make a list of illustrations. Mr. Hyde stated that if this definition is going to be used to bring action in UPL cases, how could it be applied to a person whose defense is that the rule did not require particular knowledge, it's very subjective. Judge Roth stated that there is risk either way. The issue is which will be more profitable? Ms. Honavar suggested reducing the definition by emphasizing that engaging in conduct on behalf of another person that impacts that person's rights and liabilities is the practice of law. Mr. Wunderli questioned whether the definition is basically for the use of UPL. Mr. Walker stated that it is the main reason, for use against non-lawyers or lawyers from other jurisdictions, however it could also affect attorneys who are inactive, suspended for non-payment of fees or on administrative suspension for non-compliance with MCLE. Mr. Walker also agrees with Mr. Hyde that a closed end approach would be better. It's better to create a closed end list and not have the language "includes, but not limited to". The basis of the list should include what a person has to be trained to do to be a lawyer. Mr. Burton asked the Committee to determine who would like to see Mr. Sackett's definition with a more complete laundry list of specifics. Judge Roth suggested using a general definition of the practice of law with a non-exclusive list of exclusions and inclusions. Mr. Wunderli suggested structuring the list as a comment. Mr. Burton stated that he would like it to be more specific. Mr. Burton asked who wants to leave the list in the Rule as is or include a more complete list with comment. Judge Howard suggested keeping the definition more broad and then make the comment specific, keeping the argument with a broad rule. Judge Roth stated that there is a political component. The delivery of legal services needs to be considered. This will be examined by people outside of the legal profession. Mr. Burton stated that the Court did not give the Committee any direction, so he is not sure where the definition will end up. Mr. Chrystler questioned on pg. 6 why Mr. Sackett included "advocating for those persons appropriate application" why is appropriate in there? If it is inappropriate, the attorney is not covered by the definition.

List of Exceptions: Mr. Wunderli stated that the exceptions come from many different sources.

It is a beginning list to work with. Mr. Wunderli suggested going through each exception one by one.

- 1) *Representing oneself or preparing documents of any kind for oneself*: The consensus is for it to remain.
- 2) *Making legal forms available to the general public whether by sale or otherwise or publishing legal self help books by print or electronic media*: The consensus is for it to remain.
- 3) *Providing general legal information, opinion or recommendation about possible legal rights, remedies, defenses, options, or strategies, but not providing specific advice relative to an individual person's facts and circumstances*: Mr. Schultz questioned whether this is like someone asking over the fence. Mr. Wunderli stated that this is still not representing someone. Judge Roth suggested that it may not be an issue since the person is not compensated.
- 4) *Providing assistance to another to complete a form provided by a court for protection from harassment or domestic violence or abuse when no fee is charged to do so*: Mr. Chrystler stated that clerks at the court are offering assistance everyday. Judge Howard stated that the clerks are required to help with certain forms, protective order forms, and cannot help with domestic and divorce type cases. If the definition is broadened, it entitles people to do it. The Committee discussed online forms and legal services clinic. Judge Howard suggested keeping the language because it enables the clerks.
- 5) *Representing one's minor child in a juvenile court proceeding, subject to court approval*: The consensus is for it to remain.
- 6) *Representing a person in small claims court to the extent permitted by statute*: Mr. Hansen suggested using no. 14. Ms. Smith also suggested using no. 14 and maybe using no. 8. Ms. Smith also stated that in her experience it is more helpful to have a corporation represented by an attorney. If the person is not an attorney, it is not easy to explain the difference between a judgment against the individual or against the corporation. The Committee discussed corporations being represented by an attorney or by an officer and collection cases being started at district court level instead of small claim court. Ms. Honavar stated that there is a problem with no. 6 in that it allows compensation to a non-lawyer. It should state that a non-attorney should not be compensated. The Committee discussed the issue of compensation to a non-attorney for representation. Mr. Hyde questioned whether this will be applied to others. Mr. Schultz questioned whether no. 6 ought to be included. Mr. Hansen suggested striking no. 6. Judge Roth asked about the current statute. Mr. Chrystler stated that the rules say that an employee can represent a business. Mr. Hansen stated that the Committee didn't address the issue and let the statute or rule apply. Judge Howard stated that there are so many lay people that appear in small claims court, the issue needs to be addressed. Mr. Chrystler suggested using the language "by law or by rule." Mr. Schultz agrees with Ms. Honavar stated that someone may use it as a money making business. Mr. Burton stated that if the statute already addresses no. 14 why have no. 6. Judge Roth stated that the uncompensated neighbor seems to fall

within the policy and there are not a lot of people that are going to become professional advocates in small claims court if they are not compensated. The Committee discussed the current court rules of employees representing a corporation.

Mr. Walker suggested using “permitted by court rule” if no. 6 is going to be left in.

- 7) *Serving as a court house facilitator pursuant by court rule:* The consensus is to take no. 7 out.
- 8) *Acting as a lay representative as authorized by administrative agencies or administrative tribunals:* Ms. Smith stated that some administrative tribunals do not require attorneys until district court; however, it varies by agency. Mr. Hansen questioned whether no. 8 needs to include “by statute.” Ms. Smith stated that it is the rules of the entity. Mr. Walker suggested that the agencies should adopt rules in this area. The Committee discussed the issue of agencies having consistent rules. Judge Roth suggest putting “by rule” at the end.
- 9) *Serving in neutral capacity as a mediator, arbitrator, conciliator or facilitator:* Mr. Walker stated mediators are in a neutral capacity. They fall in the same category as no. 1 and 2, since mediators do not really represent anyone. Mr. Walker stated that a mediator or arbitrator could prepare documents, which could be considered the practice of law. Thus while serving in a neutral capacity, they may do things that are considered the practice of law. The Committee discussed mediation agreements in small claim court and mediators. The consensus was to leave no. 9 in.
- 10) *Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements or as otherwise allowed by federal law:* Mr. Wunderli questioned why federal law, and why not state law. Mr. Walker stated that this might be aimed at federal preemptive issues, whereas no. 8 addresses the state level. Mr. Hyde stated that in many labor agreements it states that a person does not have to be an attorney to represent the person in front of the labor commission. The Committee discussed whether the exception needs to be expanded to include state law. Mr. Burton suggested discussing it further at the next meeting.
- 11) *Acting as a legislator lobbyist:* The consensus is to strike it.
- 12) *Selecting, drafting, or completing loan documents by banks or real property sales documents by title companies or other real estate firms:* Mr. Burton agreed with Mr. Johnson that it is not just banks, but all kinds of financial institutions. Ms. Honavar suggested that no. 18, 12, and 13 could all be combined because these are all regulated industries. Mr. Wunderli stated in no. 12 that banks, in lending, are not limiting themselves to selecting, and drafting documents because they discuss the options with the client. Mr. Walker stated it is the same with no. 13. Mr. Wunderli stated the subcommittee will work on those three, maybe combining them
- 13) *Preparing tax returns for another person or entity:* The Committee agreed this will be worked on with no. 12 and 18.
- 14) *Representing an entity while employed by that entity in any court hearing, arbitration hearing, mediation, or any other adjudication hearing where the amount in controversy does not exceed the sum of \$10,000, exclusive of costs of court and attorney’s fees:* Ms. Smith stated that by the time she gets to district court there

already have been two to three levels of review. Mr. Hansen suggested going back to no. 6 to allow lay representatives. The Committee discussed the employee representing the entity where the party collecting chooses district court over small claims court. Mr. Wunderli suggested adding "as defined by the rule." Judge Roth suggested taking it out and leaving it to the courts to deal with. Ms. Honavar suggested leaving it in and articulate the concerns of the Committee and the Court can choose how they would like to have it. The Committee also discussed making the amount consistent with the small claims court jurisdiction amount. Judge Roth suggested adding language that the action can otherwise be brought in the small claims court.

- 15) *Conducting legally related activities under the supervision of a person who is authorized to engage in the practice of law under these Rules:* Mr. Walker stated that this may be a cost of legal services issue. It seems that it authorizes employees of attorneys to give legal advice to a client out of the presence of the attorney. Mr. Schultz stated that Washington's definition has a separate sub-section for legal assistants, which directs to the Rules of Professional Conduct. This seems to make sense rather than making an exception to the practice of law. The Committee agreed.
- 16) *Practicing law as permitted by the pro hac vice rules adopted by Utah stated and federal courts:* The Committee agreed that this is not necessary and not an issue.
- 17) *Practicing law as permitted under the multi-jurisdictional practice rules adopted by the court:* The Committee agreed that it is the same thing as no. 16.

Mr. Wunderli stated that 12, 13, and 18 will be combined together. Mr. Chrystler brought up a discussion point concerning no. 6 in representing a person in small claims court to the extent permitted by court rule. Mr. Chrystler stated that you cannot represent a person in small claims. He also suggested changing it to "a business entity". Judge Roth suggested limiting no. 6 to an entity, an employee representing an entity in small claims court, this will take care of the problem of no. 6 and 14 when they are combined.

4. ADJOURN

Mr. Burton announced that the next meeting of the Committee will be held on Monday, June 16, 2003 at 4:30 p.m. at the Bar. He notified the Committee that the Definition of the Practice of Law would be discussed at the next meeting and asked the Committee to come prepared to discuss the definition.

There being no further business, the meeting was adjourned.