

(Includes corrections made by Bob Burton and Gary Sackett)

## 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, July 21, 2003  
4:30 p.m.

#### ATTENDEES

Robert Burton  
Marilyn Branch  
Gary Chrystler  
Royal Hansen  
Nayer Honarvar  
Judge Fred Howard  
William Hyde  
Steven Johnson  
Judge Paul Maughan  
Kent Roche  
Gary Sackett  
Stuart Schultz  
Paula Smith  
Billy Walker  
Earl Wunderli

#### EXCUSED

Judge Stephen Roth

#### 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 with the amendments suggested by Mr. Burton, Mr. Sackett and Ms. Honarvar. Judge Howard seconded the motion, and it passed on the unanimous vote of those present.

#### 2. OTHER BUSINESS

Mr. Burton mentioned that the Committee had received information from the Utah Trial Lawyers' Association and a group called Public Citizen regarding the Common Good petition.

He advised the Committee to hold on to this information until the Committee was ready to address it.

Mr. Burton congratulated Royal Hansen for his appointment to the bench. He also congratulated Gary Sackett for his award of "Distinguished Service to the Bar." Mr. Hansen indicated that he would continue to serve on the Supreme Court Advisory Committee.

### **3. DEFINITION OF THE PRACTICE OF LAW**

Mr. Sackett discussed the report prepared by the sub-committee. The sub-committee has formulated a definition of the practice of law in three steps: first, it defined what constitutes "the law" in this context; then, it defined the basic elements of "practice"; finally, it delineated those activities that could be considered the "practice of law," but which would not be the unauthorized practice of law if engaged in by nonlawyers. Although the sub-committee incorporated some of the ideas set forth in the efforts of the ABA and other states such as Washington in defining the practice of law, they did not adopt the general approach of any of them, electing to construct a definition from basic principles. The sub-committee concluded that, by first defining the practice of law broadly, without reference to whether it would be "authorized" or "unauthorized," it would be easier for the Supreme Court to react incorporate policy changes and modify from time to time the specific list of areas where nonlawyers would be authorized to practice. Mr. Wunderli emphasized that nonlawyers who perform services in the "authorized" list would not be subject to prosecution by the Bar for unauthorized practice of law. Mr. Johnson suggested that a note to this effect be added to the Comment. He further suggested that the definition should be added as new Rule 6A to the Rules of Lawyer Discipline and Disability.

Mr. Burton stated that the Committee should discuss four major points: the definition of the practice of law; the definition of law; the exceptions; and the comment. Mr. Walker asked if the report portion of the document submitted by the sub-committee would also be delivered to the Supreme Court. Mr. Sackett stated that it would be re-styled before it was delivered. Mr. Wunderli suggested changing the year cited in the case on the first page of the report from "1997" to "1995."

The Committee then discussed the definition of the practice of law. Mr. Walker discussed a scenario where an attorney would give support to a child or family member and whether that attorney is therefore practicing law. He further stated that he is now convinced that a definition is necessary. The Committee then discussed whether giving consent to representation was important. Mr. Burton asked if any of the Committee members were in favor of adopting a definition. Mr. Johnson made a motion to adopt paragraph (b)(1) of the report, which gives a definition of the "practice of law." Mr. Hyde seconded the motion, and it passed on the unanimous vote of those present.

The Committee then discussed the proposed definition of "law." Mr. Johnson discussed why the definition is important. Ms. Smith asked whether treaties are included in the definition and if

not, recommended that treaties be included in paragraph (2)(i). Ms. Smith also asked if the definition of law encompassed contract disputes as well. Mr. Sackett stated that contracts issues are encompassed within the context of the law. Mr. Walker stated that a contract would be looked at under contract law and that the Committee was looking at a body of law by elimination. Mr. Hansen asked if paragraph (b)(2) could be deleted. Mr. Sackett stated that it could not since it supports the definition in paragraph (b)(1). Mr. Johnson then made a motion to adopt paragraphs (b)(2) and (b)(3). Mr. Wunderli seconded the motion. Ms. Smith was opposed because she believes that treaties should be added to the language. Ms. Smith asked that treaties be added to paragraph (2)(i). Mr. Sackett suggested adding a Comment to the definition. Ms. Smith stated that she would prefer the language be added as part of the black letter law and proposed adding it after "constitutional provisions." Mr. Schultz suggested omitting the language "of governmental authorities." Mr. Johnson then amended his earlier motion to adopt paragraphs (b)(2) and (b)(3) with the changes proposed by Ms. Smith and Mr. Schultz. Mr. Wunderli seconded the motion and it passed on the unanimous vote of those present.

The Committee then discussed paragraph (c) of the proposed Rule 6(a) regarding those not authorized to engage in the practice of law. Mr. Chrystler asked why subparagraph (c)(15) was necessary. Mr. Johnson explained that the content of (c)(15) is a concern to the legislature and it is further explained in the last comment. Mr. Walker stated that he would prefer sub-paragraph (15) be deleted. Judge Howard suggested striking subparagraph (15) but leaving in a sentence as clarification. Mr. Schultz asked whether the word "otherwise" should remain in paragraph (c). Mr. Sackett stated that he believed it was necessary to the sentence. Mr. Hansen asked where the definition of "unauthorized practice of law" could be found. Mr. Walker stated that the "unauthorized practice of law" is not defined in the Rules. The Committee then discussed whether the word "otherwise" should remain in paragraph (c). Mr. Roche asked if it is a safe harbor and whether the exceptions are needed. Mr. Sackett stated that paragraph (c) is for laypersons. Mr. Burton stated that the report should include a comment to this effect. Mr. Johnson stated that by reading paragraph (c), a person could determine that this paragraph was not for attorneys. The Committee decided to consider whether to add a comment to paragraph (c).

Mr. Burton then asked the Committee to review each exception. No comment was made as to the first exception (subparagraph (1)). As to subparagraph (2), Mr. Hyde asked if this paragraph would bring the Committee "full circle." Mr. Wunderli made a motion to adopt subparagraphs (c)(1) and (c)(2). Mr. Johnson seconded the motion and it passed on the unanimous vote of those present.

The Committee then discussed subparagraph (c)(3). Mr. Burton asked if the language "without a fee" is significant. Mr. Johnson stated that the exceptions listed in paragraph (c) are meant to recognize current practices. The Committee then discussed whether the language "without a fee" should remain in subparagraph (c)(3). Ms. Honarvar asked whether a neighbor could help you based upon the neighbor's prior knowledge of legal processes. Mr. Hyde asked why only "harassment or domestic violence or abuse" was included. Mr. Johnson explained that these

were the most common areas of the law that use legal forms. Mr. Burton then made a motion to adopt subparagraph (c)(3). Mr. Johnson seconded the motion and it passed on the unanimous vote of those present.

The Committee then discussed subparagraph (c)(4). The Committee discussed whether the language "or ward" should be added to the subparagraph, making the subparagraph read: "Representing one's minor child or ward in a juvenile court proceeding, subject to court approval." Mr. Schultz asked what the word "representing" meant in the context of the exception. Mr. Hansen suggested replacing "representing" with "assisting." Mr. Johnson stated that the sub-committee was tempted to define "representation" as well but ultimately did not include it. Ms. Honarvar then made a motion to adopt subparagraph (c)(4) with the change proposed by Mr. Hansen. Mr. Sackett seconded the motion and it passed on the unanimous vote of those present.

The Committee then discussed subparagraph (c)(5). Judge Maughan asked if there is a court rule discussing representation of someone in small claims court. The Committee discussed using broader language. Mr. Sackett suggested changing the word "rule" to "authority" in the exception. Mr. Wunderli suggested incorporating the language "subject to court approval" rather than "to the extent permitted by court rule." The Committee also discussed adding the language "or a legal entity as an employee representative" to the subparagraph, making the subparagraph read: "Representing without fee a natural person or legal entity as an employee representative in small claims court subject to court approval." Mr. Wunderli then made a motion to adopt the requested change. Mr. Sackett seconded the motion, and it passed on the vote of those present. Ms. Smith was opposed.

The Committee then discussed subparagraph (c)(6). Mr. Johnson discussed the language of the exception. The Committee discussed whether to use the language "agent of that entity" or "employee of entity." Mr. Walker and Mr. Chrystler stated that they prefer "employee." Ms. Smith distributed the following case for the Committee to review: Tracy-Burke Assocs. v. Department of Employment Sec., 699 P.2d 687, 1985 Utah Lexis 769 (Utah 1985). She stated that at the appellate level she would prefer the public to be represented by counsel. The Committee then discussed the case distributed by Ms. Smith. Mr. Sackett stated he feels the exception is too broad. Mr. Hyde made a motion to delete subparagraph (6) and to amend subparagraph (5) to include an agent of an entity. Ms. Smith seconded the motion, and it passed on the vote of those present. Messrs. Burton, Wunderli, and Johnson were opposed. Mr. Sackett stated that a comment is necessary. The Committee then discussed whether the language "without fee" was necessary in subparagraph (c)(5). Mr. Sackett suggested making mediation open to anyone. The Committee then discussed what the difference between mediation and arbitration is and also discussed the Summerhayes case as an example. Mr. Burton suggested re-writing subparagraph (c)(6). Mr. Johnson suggested creating a new section, which discussed the representation of a person in mediation proceedings, which would become subparagraph (c)(7). Mr. Johnson made a motion to retract subparagraph (c)(6). Mr. Chrystler seconded the motion, and it passed on the unanimous vote of those present.

The Committee then discussed the language for the new subparagraph (c)(7). Mr. Johnson made a motion to allow non-lawyer representation in mediation proceedings. Mr. Sackett seconded the motion. Judge Howard and Judge Maughan discussed what they do in their courts when persons are not represented by attorneys in mediation proceedings. Mr. Sackett asked if laypersons would also be allowed to draft the paperwork that results from the mediation proceedings. The Committee then discussed how the final paperwork would be handled if the parties came to an agreement as a result of the mediation proceeding. Mr. Walker stated that he has a concern that a client will fire their attorney when the parties go to mediation. Judge Maughan stated that parties tend to mediate anyway, other than by order of the court. He also stated that parties are not likely to fire their attorneys once they go to mediation. He further stated that it is customary for the mediator to prepare the final paperwork. Mr. Walker suggested adding a comment which defines where the mediation begins and where it ends (identifying who will prepare the paperwork, etc.) so that the unauthorized practice of law does not occur. Judge Maughan suggested looking at the Alternative Dispute Resolution's definitions for use in the Committee's own language. Mr. Burton called for a vote on the motion to allow non-lawyer representation in mediation proceedings, which motion did not pass on the vote of those present. Mr. Burton then asked the sub-committee for a re-draft of the language.

Mr. Burton asked the sub-committee to finish their work on the definition of the practice of law so that the Supreme Court could have a draft by the end of the summer. Mr. Wunderli asked the Committee to e-mail any comments on the remaining exceptions to Gary Sackett, who will distribute them to the rest of the sub-committee. Mr. Sackett stated he would provide another draft for the Committee at the next meeting of August 18, 2003, at which time the Committee will finalize the definition.

#### **4. ADJOURN**

Mr. Burton announced that the next meeting of the Committee would be held on Monday, August 18; 2003 at 4:30 p.m. at the Bar.

There being no further business, the meeting was adjourned.