

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, August 18, 2003
4:30 p.m.

ATTENDEES

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

EXCUSED

Earl Wunderli
Royal Hansen

STAFF

Ingrid Westphal Kelson

1. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the members to the meeting.

Mr. Sackett made a motion to approve the minutes at the next meeting of the Committee. Ms. Smith seconded the motion, and it passed on the unanimous vote of those present. Mr. Burton asked Mr. Sackett and Ms. Smith to provide their corrections to the minutes for the next meeting.

2. DEFINITION OF THE PRACTICE OF LAW

Mr. Sackett discussed the changes made to the report, specifically the changes to Attachment "A." He also stated that he added a paragraph about the other states' approaches to defining the practice of law. Mr. Sackett stated that he made the changes requested by the Committee

from the last meeting, and this included changing some of the numbering. He discussed whether subsection 16 should be included in the Committee's definition, since the reminder that persons can represent themselves is already in the Rules of Integration and Management for the Utah State Bar.

Mr. Burton stated that Katherine Fox, General Counsel for the Utah State Bar, had some comments regarding the Definition of the Practice of Law. He asked Mr. Walker to read her comments to the Committee. Mr. Walker stated that some of the comments had already been addressed in the Committee's previous discussions and noted that Ms. Fox had reviewed a previous draft of the report. Ms. Fox's comments were as follows:

Regarding page 3, paragraph 4 of the report, the text states "direct representation of companies in small claims court," which implies that anyone could do that under current law. She stated in her memo that this is not the case under §78-6-1(5), which states that corporations may only be represented in small claims court by counsel or "authorized employees." So, a president or an officer or stockholder could not represent the corporation but a paid employee, such as an accountant, could. The Committee agreed to add the word "certain" to the language, making it read: ". . . certain representation of companies in small claims courts, and many others."

Regarding page 7, footnote 15 of the report (which is now footnote 16), Ms. Fox stated in her memo that under the Bar rules, you can be an "inactive" attorney but still be in good standing, but you cannot engage in the practice of law. Mr. Burton stated that the word "and" in the sentence "'Utah lawyer' is understood to mean one who has 'active' status and is in good standing. . ." should take care of her concern. Mr. Walker agreed.

Regarding Page A-1, subsection (c)(4), the Committee's addition of the word "ward" satisfies her concern about legally appointed guardians representing a minor.

Regarding Page A-1, subsections (c)(5) and (6), Ms. Fox asked if it makes a difference if it is another form of compensation other than money. Mr. Sackett stated that, in general, any compensation would be considered a "fee." He suggested adding a comment, however, he does not feel it is necessary. Mr. Burton asked what the other sub-committee members thought. Mr. Johnson stated that he agreed with Mr. Sackett, however, if a non-lawyer read this language, it may be easier to use the term "compensation" to avoid any confusion. Ms. Honarvar asked if the language is changed to "compensation" how will that be controlled or monitored. Mr. Sackett stated that you cannot monitor cash transactions either. Judge Howard posed the scenario of a neighbor representing you in court and taking that neighbor to lunch afterwards, is that considered a fee? Mr. Sackett stated that technically it is, but many fees cannot be monitored. Messrs. Sackett and Johnson stated that they would agree to use the term "compensation." Mr. Johnson suggested changing the language in subsection (6) to read "Representing without additional compensation . . ." He also suggested changing the word "fee" in subsections (3) and (5) to "compensation" as well. The committee then discussed the proposed language of subsection (6). Mr. Sackett stated that the language "without a fee" was targeted at natural

persons. Mr. Schultz suggested changing the language to “Representing a natural person without fee or representing a legal entity. . .” Mr. Burton asked if there was a motion to change the word “fee” to “compensation” in the document. Ms. Honarvar made a motion to replace the word “fee” with “compensation” wherever it appears in the document. Mr. Sackett seconded the motion, and it passed on the unanimous vote of those present.

Mr. Burton then asked the Committee to focus on the specific wording of subsections (5) and (6). Mr. Johnson suggested changing the language as follows: “Representing without compensation a natural person or representing without additional compensation a legal entity as an employee representative . . .” Mr. Sackett stated that the judge should be able to decide what is allowed in his or her court on a case-by-case basis. Ms. Smith stated that the courts would also be restricted by § 78-6-1, which states that corporations may only be represented in small claims court by counsel or authorized employees. Mr. Sackett suggested the following language for subsection (5): “Representing a person in small claims court subject to court approval.” The Committee discussed concerns with allowing persons to be compensated without regulation by the Bar, and the issue of the public knowing which judge will allow representation by a non-lawyer in small claims court. Judge Howard stated that the courts generally do not ask about fee arrangements. The Committee then discussed whether “additional compensation” should be added to subsection (5) with regards to an employee representative representing a legal entity. Mr. Schultz made a motion to change the language of subsection (5) as follows: “Representing without compensation a natural person or representing a legal entity as an employee representative in small claims court, subject to court approval.” Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present.

The Committee then discussed the proposed language in subsection (6). Mr. Johnson made a motion to change the language of subsection (6) as follows: “Representing without compensation a natural person or representing a legal entity as an employee representative in an arbitration proceeding, where the amount in controversy does not exceed the jurisdictional limit of the small claims court set by the Utah Legislature.” Mr. Sackett seconded the motion, and it passed on the unanimous vote of those present.

Regarding Page A-2, subsection (c)(7), Ms. Fox suggested the following language be added: “unless otherwise prohibited by tribunal or agency rule.” Mr. Sackett suggested adding the words “or practice” to the end of the language instead and made to motion to that effect. Mr. Hyde seconded the motion, and it passed on the unanimous vote of those present.

Regarding Page A-2, subsections (c)(7) or (9), Ms. Fox asked if labor representatives from UPEA, UEA and USEA, who do a lot of employee representation in employment-type matters, would still be allowed to do this under the proposed rule. Mr. Walker stated that by adding “or practice” in (c)(7) this would cover her concern. Mr. Johnson stated that the reason he wanted to include this language is because, according to a Supreme Court case, it is acknowledged that if employees want to be represented in any kind of proceeding, they can have any employee they want come and represent them and the employer cannot prevent that.

Regarding Page A-2, subsection (c)(11), Mr. Walker stated that he had discussed this section by e-mail with Mr. Sackett. He stated that he has a problem with the comment under this section because placing it under the exceptions creates the impression that as long as you are supervised by an attorney, anything that you do could possibly be an exception. He further stated that sometimes a legal assistant or paralegal meets with the client and may cross the line and give legal advice. The Office of Professional Conduct takes the position that engaging an attorney-client relationship can only be done by an attorney; i.e., only an attorney can enter into an agreement to represent the client. He stated that he believes the ethical violations would be covered by Rule 5.3 and it does not need to be in this section. Mr. Sackett stated that some of the activities of persons who are operating under the auspices of an attorney are engaged in the practice of law according to the definition that the Committee has formulated and it is necessary to say that those things are not unauthorized. He stated that it needs to be included to be complete and it is also listed by other states. Mr. Walker stated that paralegals are also likely to give advice by giving a little more information than just taking information and passing it on to the attorney. Mr. Walker then discussed the Peterson case. Mr. Walker also stated that Rule 5.3 does not define what the traditional duties of a paralegal are, the rule only talks about supervision of the paralegal. He stated that an attorney, when faced with a breach of 5.3, could defend himself by saying that the paralegal is allowed to do this under the exceptions to the definition of the practice of law. Mr. Johnson stated that the question remains as to what has been traditionally permitted of paralegals. Mr. Sackett stated that law clerks typically would research the law and apply it with the attorney's supervision. He asked if the problem is whether the paralegal or law clerk is representing the client. He stated that the paralegal or law clerk is already taking the law and applying facts and circumstances. Judge Roth stated that a paralegal that prepares interrogatories or a first draft of a brief usually gives that document to an attorney who sends it out under his signature. He further stated that if the Committee is defining the practice of law in paragraph (b)(1) and then saying that paralegals can do things that are outside of that definition, then we are suggesting that there are other things they can do and are opening the door for an argument that we have expanded the realm in which paralegals can operate. Mr. Walker then made a motion to delete subsection (c)(11) and the corresponding comment. Ms. Smith seconded the motion, and it passed on the vote of those present. Messrs. Schultz and Sackett were opposed.

Regarding subsection (c)(12), Ms. Fox would prefer that the "multi-jurisdictional rules" be referred to as "admissions rules" in this paragraph. Mr. Walker asked what "multi-jurisdictional rules" referred to. Mr. Sackett stated that he had Rule 8.5 in mind when he stated "multi-jurisdictional rules." Ms. Honarvar asked if a reference should be made to Rule 8.5. Mr. Sackett stated that it could not since it has not been adopted yet. Judge Roth asked if Idaho lawyers could be authorized to practice under the transactional rule. Mr. Walker stated that Utah lawyers can go to Idaho but Idaho lawyers could not come to Utah and practice law under the transactional rule. Judge Roth suggested the following language: "Attorneys not members of the Bar of the State of Utah who practice pro hac vice or as otherwise authorized by rule or law." The Committee then discussed proposed changes to the language. Mr. Walker made a motion to

change the language to “Representing persons as permitted by pro hac vice rules adopted by Utah state and federal courts or under any applicable admission rules.” Mr. Sackett asked if the Committee wanted to clarify that these are applicable admission rules for those licensed in one or more jurisdictions. He stated that “admission rules” sounded too broad. Ms. Smith made a motion to change the language as follows: “Representing persons as permitted by pro hac vice rules adopted by Utah state and federal courts or under any applicable admission rules for persons admitted to practice law in other jurisdictions.” Mr. Walker seconded the motion, and it passed on the unanimous vote of those present.

Regarding page A-3, Comment to subsection (c), Ms. Fox is concerned that ADR practitioners and estate and financial planners are not necessarily “subject to some form of government regulation or occupational certification or accreditation.” Mr. Walker stated that the language “subject to professional oversight” in the new section (12) solves Ms. Fox’s concern.

Regarding page A-2, subsection (c)(13), Ms. Fox noted in her memo that there already exists a Foreign Legal Consultant Rule in the Rules Governing Admission and, therefore, this subsection is not necessary. Mr. Sackett stated that he feels that the Bar should not stop someone from advising another on foreign law, i.e., if a person wants to start a business based on giving advice on Polish law (while residing here in Utah); the person should not be required to go through hoops to give an informal consultation. Mr. Walker stated that if a person wants to advise someone on foreign law, there should still be a level of expertise or certification required by the Bar. Mr. Hyde made a motion to delete subsection (c)(13). Mr. Walker seconded the motion, and it passed on the vote of those present. Messrs. Burton, Schultz, Sackett and Judge Roth were opposed. Mr. Johnson abstained from voting.

Regarding page A-2, subsection (c)(16), Mr. Sackett asked whether this subsection should be deleted. Mr. Johnson stated that it should remain because, in light of House Bill 349, it will make it clear to the legislature that it is allowed. Mr. Walker suggested leaving the comment and deleting the rule. Mr. Sackett made a motion to this effect, Ms. Honarvar seconded the motion, and it passed on the unanimous vote of those present.

Regarding subsection (c)(4), Mr. Hyde stated that he believed the Committee had agreed to change the word “representing” to “assisting” in this section. The Committee discussed their recollection of the discussions regarding the proposed change and agreed to make the aforementioned change.

Mr. Burton asked Mr. Sackett to submit a final draft, which he will forward to the Supreme Court with a letter. Mr. Burton asked Mr. Sackett to forward the final version of the Definition of the Practice of Law to Ingrid, who would in turn forward it to the rest of the Committee members for comment. The Committee could then make note of typographical errors in the document. Mr. Burton stated that the deadline to submit the report is August 25, 2003.

3. ETHICS 2000

Rule 1.8 Ms. Honarvar discussed the case provided to the Committee by Mr. Walker. She stated that it does not provide enough information about the case and asked that the Notice of Informal Complaint be provided to the Committee. Mr. Walker stated that it could not be provided because it is not clear under the Rules of Lawyer Discipline and Disability if the Notice of Informal Complaint is public information. He then discussed the circumstances surrounding the case. He suggested that the Committee look at more cases, since this may be an isolated case wherein the Ethics and Discipline Committee found a public reprimand was warranted. Mr. Burton asked Ms. Honarvar to talk to Mr. Walker informally about getting the information she needs to make her argument regarding Rule 1.8.

Rule 1.13. The Committee determined who was responsible for the rule (Mr. Chrystler and Mr. Hansen). Mr. Burton stated that the ABA had a problem with this rule and deferred discussion on the rule until the next meeting.

Rule 1.17. Mr. Chrystler discussed the changes to the rule. He stated that the major changes to the rule allowed for sale of an area of practice to individuals. There is also an option to decide how to define the area you practice in (jurisdiction or geographic area). Mr. Chrystler stated that he and Judge Howard believe that the geographic area was a better definition, ~~which is a departure from the ABA's recommendation.~~ The Committee then discussed the required notice to clients. Mr. Chrystler stated that the date the notice is sent is a better timing mechanism than the date the notice is received. He stated that it is harder to prove when a document is received and more costly as well. Mr. Chrystler also discussed the provision for giving notice to a client that cannot be located. He stated that requiring an order from the court to excuse the notice would not be a good idea and this would in turn bog down the courts. Judge Howard stated his concern regarding a retiring partner selling his interest in the law firm but remaining with the firm. He further stated that the comment to the rule states the difference between the sale of a law practice versus the sale of an interest in a law practice. The comment in the Ethics 2000 recommendation also requires that the name of the buyer is listed in the notice, which Mr. Chrystler and Judge Howard felt should be noted in the body of the rule rather than in the comment. Mr. Burton noted that there was not a comment included which explained why the proposed rule differed from the ABA Model Rule and asked that it be added. Mr. Sackett asked for the comments to be renumbered and stated that any deleted comment should state that it has been deleted. Mr. Schultz asked whether the insertion in paragraph 6 of the comments should be moved, or if the language "For example" at the beginning of the insertion should be deleted. Judge Howard stated that he and Mr. Chrystler would look at the language again to determine where it should be placed. Mr. Burton asked Mr. Chrystler and Judge Howard to provide a clean version with the changes discussed. He then made a motion to adopt the rule as written, with the addition of a comment stating why it differs from the ABA model rule, renumbering of the rule and the change to paragraph 6 of the comments. Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present.

4. ADJOURN

Mr. Burton announced that the next meeting of the Committee would be held on Monday, September 15, 2003 at 4:30 p.m. at the Bar.

There being no further business, the meeting was adjourned.