

## 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, September 15, 2003  
4:30 p.m.

#### ATTENDEES

Robert Burton  
Marilyn Branch  
Gary Chrystler  
Royal Hansen  
Nayer Honarvar  
William Hyde  
Steven Johnson  
Kent Roche  
Judge Stephen Roth  
Paula Smith  
Billy Walker  
Earl Wunderli

#### EXCUSED

Judge Fred Howard  
Judge Paul Maughan  
Gary Sackett  
Stuart Schultz

#### STAFF

Ingrid Westphal Kelson

#### 1. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the members to the meeting.

Mr. Wunderli made a motion to adopt the minutes of July 21, 2003 with the changes proposed by Mr. Sackett, Mr. Burton, and Ms. Smith. Mr. Hyde seconded the motion, and it passed on the unanimous vote of those present.

Mr. Burton made a motion to adopt the minutes of August 18, 2003 with the change proposed by Mr. Chrystler. Mr. Chrystler seconded the motion, and it passed on the unanimous vote of those present.

#### 2. DEFINITION OF THE PRACTICE OF LAW

Mr. Sackett stated that he had sent a transmittal letter dated August 27, 2003 to Justice Durham regarding the Definition of the Practice of Law. Ms. Branch stated that the Supreme Court was impressed with the work of the Committee. She further stated that the Court thought they should send the report to the Bar Commissioners and to the Board of Judges to get input. However, before it is released, they would like to discuss the legislative aspects of the report. Mr. Burton

asked about distributing the report to Debra Moore and John Adams. Ms. Branch stated that Debra Moore had received it and would probably distribute it today. Mr. Burton stated that if he receives any calls on this matter, he would refer them to Ms. Branch.

### **3. ETHICS 2000**

Rule 1.16 Mr. Burton stated that Mr. Walker had been at the Supreme Court regarding this rule and asked him how it had gone. Mr. Walker stated that he felt it had gone well. Ms. Branch stated that the Supreme Court had approved the rule. Mr. Burton stated that no comments to the rule were received. Ms. Branch stated that it is possible that some firms may not have received the e-mail asking for comment since they have spam controls blocking mass e-mails from the Bar. She asked if other Committee members could recall receiving an e-mail regarding submitting comments on the rule. Most Committee members did not recall receiving it. In any event, she stated that the rule had been adopted.

### **4. COMMON GOOD PETITION**

Mr. Burton distributed the latest information regarding the Common Good Petition. He also stated that each Committee member should have the following documents: Initial Petition dated May 6, 2003; letter dated May 6, 2003 signed by Nancy Udell; letter dated June 3, 2003 signed by Steven Lovell; Memorandum in Opposition to the Petition filed by Ralph Dewsnup with attachments (affidavits from different attorneys); letter dated July 15, 2003 from Public Citizen; letter dated July 29, 2003 from Tim Dunn; letter dated August 11, 2003 from Robert Jeffs; and cover letter from Steve Densley and Response to the Petition. Mr. Burton stated that if any of the Committee members did not receive these documents, they should contact Ingrid to obtain them.

Mr. Burton has scheduled oral arguments for October 20, 2003 and asked the Committee how they would like the presentations to be made. Mr. Burton proposed giving each side 30 minutes.

Ms. Honarvar stated that she thought the Committee should caucus before the oral argument to gather questions rather than just listening to the presentations. Mr. Burton stated that if the Committee read the information, then the presenters could have uninterrupted time with questions afterwards. Mr. Chrystler suggested giving each side 20 minutes of uninterrupted time.

The Committee then discussed how to conduct the questioning. Judge Hansen suggested giving each side a finite period for presentation and questions. Mr. Burton stated that the questioning may be more valuable than the presentation and suggested giving 15 minutes of uninterrupted time and 20 minutes of questioning for a total of 35 minutes per presenter. Ms. Honarvar suggested telling the presenters that the Committee has read everything that has been submitted and, therefore, they should not rehash what is in their briefs but, instead they should focus on any new information that they would like to add. Mr. Wunderli agreed and stated that the presenter could decide to take less time if they would like more time for questions. Mr. Burton stated that Mr. Densley could also reserve time for rebuttal. The Committee then discussed how the questions would be presented (either individually or as a group by the chair). The Committee decided that the members should prepare their own questions. Mr. Walker stated that John Baldwin had asked him to inquire of the Committee on behalf of the Bar Commission about

soliciting a "point/counterpoint" article to the Bar Journal. The Bar Commission wants to solicit the article if that does not interfere with the work of the Committee. If this does not interfere with the work of the Committee, the Commission would like to know what would be the appropriate timing of publication of the article. Mr. Burton stated that he would prefer the article to come out after the oral presentations. If the timing can be coordinated, maybe the December issue of the Bar Journal would be appropriate.

Judge Hansen suggested tabling the Committee's decision until after the Bar Journal article appears as well, so that the Committee can take any comments into consideration. Mr. Burton asked Ms. Branch if the Committee should submit its recommendation and all of the paperwork to the Court. Ms. Branch stated that would be fine. Mr. Burton asked Ingrid to contact the missing Committee members regarding the upcoming meeting of October 20<sup>th</sup>.

## **5. OTHER BUSINESS**

Mr. Burton discussed obtaining copies of the Annotated Model Rules (Fifth Edition) for the Committee. He stated that he had contacted Richard Dibblee from the Bar, who told him the books cost approximately \$70.00 per book. Ms. Branch stated that the Court might be able to pay for a few books. Mr. Burton stated that it would be helpful for each sub-committee to read their rule before finalizing and submitting the recommendations to the Court. Ms. Branch will call Mr. Burton if she can obtain the books.

## **6. ETHICS 2000**

Rule 1.13 Mr. Johnson stated that the ABA's task force on corporate responsibility has made a recommendation to change the ABA Model Rule. He has obtained a copy of their 78-page recommendation, which affects Rule 2.3 and Rule 1.6 (the Committee has already discussed and finalized these rules). He also stated that the Washington State Bar had issued a memo stating that it was warning its corporate lawyers not to disclose client information allowed by the new Securities and Exchange Commission Regulations unless such disclosures are also allowed by the state's own professional conduct rules, and their state does not. He suggested looking at all three rules (2.3, 1.6, and 1.13) to decide how much should be disclosed and when they should be allowed to disclose. The ABA holds fast to attorney-client privilege and non-disclosure while Ethics 2000 allows for more disclosure. Mr. Burton suggested tabling the rule until the November meeting so that Mr. Johnson can digest the 78-page memorandum and make a recommendation. The Committee then discussed who was assigned to this rule. Mr. Chrystler suggested forming a sub-committee to discuss the rules involved. Mr. Burton formed a sub-committee consisting of Gary Chrystler, Steve Johnson, Bill Hyde and Billy Walker. Mr. Johnson stated that he would distribute the memo to the other sub-committee members.

Rule 1.17 Gary Chrystler supplied a final version of the rule to the Committee. Mr. Burton suggested changing the language in the second full paragraph of the Comment. He explained that the language should be written with rule language in mind rather than explaining to the

Court what the Committee had done. Ms. Smith stated that the first page contained comments that were meant to go to the Supreme Court regarding the changes, whereas the second page contained comments that had been put in the proper paragraphs. Mr. Chrystler explained that the italicized language is a comment explaining to the Court what the Committee had done. He further stated that the other comments, which are not italicized, are those which will be published in the rule. Mr. Burton suggested keeping the explanations in order to send them to the Supreme Court with the rule. He stated that the Committee had already approved the rule, subject to the clean up of the comments. Mr. Chrystler stated that he would make the changes and provide a final copy to Ingrid.

Rule 2.3 Mr. Johnson discussed the conflicts with Rules 1.6 and 1.13. He stated that if you have a situation where the lawyer is required by law or court order to make an evaluation, where the information in the evaluation may prevent a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, then Rule 2.3(b) conflicts with Rules 1.6(b)(1)(ii) and 1.6(c). Therefore, the lawyer is prevented from publishing an evaluation by Rule 2.3(b) but is allowed to publish the evaluation by Rule 1.6. Also, if you have a court order to publish the evaluation, then it violates 1.6(c). Mr. Johnson suggested that the following language be added to the ABA's recommendation: "Except that where the evaluation is required by law or court order, the lawyer may provide the evaluation after notifying the client of the legal requirement." He stated that the question becomes do we want to erode the attorney/client privilege at all or do we want to maintain it.

The Committee then discussed different scenarios that may cause a conflict. Mr. Roche stated that he believes an attorney would only be in conflict with 1.6(b) when a lawyer is asked to produce information, then asks the client if he wants to produce it, and the client refuses to do so. Judge Roth stated that he can imagine a situation where an attorney would be required by the court to produce information; for example, when the attorney has the only copy of the document. Ms. Smith stated that she is concerned that information that is privileged may come out under court order; it gives parties the ability to get privileged materials when it may not be necessary. Mr. Johnson made the motion to delete his proposed language in (b); change (c) to read ". . . information relating to the evaluation is otherwise subject to Rule 1.6." (instead of "protected by"); delete Comment 5(a); add a sentence to Comment 4 which indicates that it differs from the ABA's comment because we are reminding attorneys that, when they are required to do so under the rules, they must disclose material facts. Mr. Wunderli seconded the motion, and it passed on the unanimous vote of those present. Mr. Burton asked Mr. Johnson to finalize the rule and provide a copy to Ingrid.

Rule 3.3 Mr. Hyde stated that the rule follows the ABA's recommendation. He further stated that he and Mr. Walker questioned why the ABA had deleted "material" in section (a)(1). Mr. Roche suggested that perhaps it was deleted because the affirmative misrepresentation is in itself legally significant whether or not material, but the subsequent correction may not be important unless material (could not hear the rest of the sentence on tape). Mr. Walker stated that the ABA had discussed having a perjury-type standard for the first party and they decided to have the non-

perjury standard with respect to the initial act; but to have a perjury standard for rectifying that. Mr. Hyde stated that in section 3 there was some expansion of the obligation to the lawyer, which would include the offering of evidence either through the lawyer's client or a witness called by the lawyer. Judge Roth asked if lawyers are at liberty to offer perjured testimony. Mr. Hyde stated that if the lawyer knows that a defendant will give a false statement, it is still allowed. Judge Roth stated that most attorneys understand they cannot do that. Mr. Wunderli stated that the rule would also allow for the perjured testimony of third persons as well. However, Comment 7 states that the rules are subordinate to state laws. Ms. Honarvar stated she has concern with holding an attorney responsible for a third party giving false statements. Mr. Hyde stated that the attorney would only be held liable if he knew and did not take remedial action. Mr. Johnson made a motion to adopt the ABA's recommendation without change. Mr. Roche seconded the motion, and it passed on the unanimous vote of those present.

Rule 1.18 Ms. Honarvar stated that she and Mr. Schultz could not agree on a proposed draft of the rule. She stated that the rule had been brought before the Committee once before and that she had concerns regarding Comment 5 and its impact on paragraph (b). Mr. Burton stated that the rule would be tabled until Mr. Schultz could be present to address his concerns. Mr. Burton then asked Ms. Honarvar to attempt to reach a "middle ground" with Mr. Schultz and to submit a memo again.

Rule 3.7 Ms. Smith discussed the changes to the rule. She stated that the changes to the rule and to the Comment were minor. She made the recommendation to adopt the ABA's recommended changes. Mr. Burton asked if an attorney could act as an advocate when a member of the firm is involved in the case (i.e., as a witness). Ms. Smith stated that there is nothing in the rule, nevertheless, you have to look at the conflict rules. Mr. Walker asked if a lawyer is acting as a witness, can he stay on the case until he knows that he will be needed as a witness. Ms. Smith stated that it is the lawyer's responsibility to determine at the beginning if there is a conflict. Mr. Hyde stated that at the County Attorney's Office they are often involved in the investigative phase of the case, i.e., getting a search warrant, etc. He further stated that they might avoid a conflict by having police officers testify. Mr. Walker stated the OPC also does its own investigation and they try to have everything memorialized and have witnesses testify to the memorialized document in order to avoid the conflict. Mr. Roche made a motion to adopt the ABA's proposed changes. Judge Hansen seconded the motion, and it passed on the unanimous vote of those present.

Rule 3.4 Mr. Johnson stated that there were minor changes to the rule and they were mostly grammatical changes. He further stated that two sentences have been added to Comment 2, which talk about applicable law permitting a lawyer to take temporary possession of physical evidence for the purpose of conducting a limited investigation. In such a case, applicable law may require the lawyer to turn the evidence over to the police or the prosecuting authority depending on the circumstances. He stated that Judge Roth was concerned that we are suggesting that attorneys can do this sort of thing when there is not a law that specifically allows them to do it. With regard to the term "computerized information" in the prior sentence in the

existing Comment, he proposed using “computerized information in whatever form it may exist and on whatever medium it may be found” in paragraph (a). The Committee then discussed the deletion of the word “the” in Comment 2. Mr. Burton made a motion to adopt the rule as drafted, with the insertion of the word “the” back into Comment 2. Mr. Walker seconded the motion, and it passed on the unanimous vote of those present.

Rule 3.5 Mr. Chrystler discussed the changes to the rule. He stated that in the Utah rules, paragraph (b) separates those that you ought not to influence into two categories. He believes that there is no need to separate the two categories and, therefore concurs with the ABA’s recommendation to keep those in paragraph (b). He also recommended keeping the following language from the Utah rule in paragraph (b): “Communicate or cause another to communicate ex parte in an adversarial proceeding as to the merits of the case with such a person during the proceeding unless authorized to do so by law, rule or court order.” He also stated that the subcommittee favors ending the prohibition at the “conclusion of the proceedings” as recommended by the ABA, rather than the Utah rule’s provision for ending the prohibition at the “discharge of the jury.” He also recommended adopting the ABA’s recommendation as to paragraph (c) of the rule. As to the Comment, Mr. Chrystler suggested using the term “comment” rather than “commentary.” As to the first comment, Mr. Chrystler suggested making reference to the Code of Judicial Conduct as well. As to the second comment, Mr. Chrystler stated there might not be a need to have this comment. As to the third comment, Mr. Chrystler stated he believes this paragraph has been added to clarify that the rule allows post-discharge ex parte communications, but that communication right is not absolute. Mr. Chrystler further stated that the fourth comment has been renumbered, and the fifth comment adds language regarding inappropriate disruptive conduct in any tribunal, as well as other proceedings such as depositions. Mr. Chrystler indicated that the italicized comments are addressed to the Court and explain why the changes were made. Mr. Wunderli suggested adding a comment regarding paragraph (b) to explain why it was retained from the current Utah rule. The Committee then discussed possible language for paragraphs (b) and (c) and the location of such language.

Mr. Roche proposed adopting the ABA’s recommendation. He further stated that the proposed changes suggested by the Committee would “soften” the rule. Mr. Wunderli agreed; he stated that making modifications would weaken the rule. Mr. Chrystler proposed not making a decision on the rule until Judge Howard could be present, since he has an interest in the rule. Mr. Burton stated that the Committee would table the rule until its November meeting.

## **7. ADJOURN**

Mr. Burton announced that the next meeting of the Committee would be held on Monday, October 20, 2003 at 4:30 p.m. at the Bar and that the only agenda item would be the oral presentations regarding the Common Good Petition. Mr. Burton also announced that the Committee should take the month of December off.

There being no further business, the meeting was adjourned.