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, October 20, 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
Earl Wunderli

EXCUSED
Judge Royal Hansen

STAFF
Ingrid Westphal Kelson

1. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the members to the meeting.

Mr. Burton made a motion to adopt the minutes of September 15, 2003. Mr. Roche seconded the motion, and it passed on the unanimous vote of those present.

2. DEFINITION OF THE PRACTICE OF LAW

Mr. Burton distributed information regarding the Definition of the Practice of Law received from Justice Durham. Ms. Branch stated that the Court had seen the information. Mr. Burton instructed the Committee to direct their comments to Mr. Sackett.

3. OTHER BUSINESS

Mr. Burton stated that Ms. Branch was able to obtain a few Annotated Rules books for the Committee and they were distributed to a couple of the Committee members.

Mr. Burton proposed the following agenda for November's meeting: The Committee will review and discuss the new information on the Definition of the Practice of Law; Rule 1.13; Rule 1.18; Rule 3.5; Rule 3.6 and Rule 3.9.

4. ETHICS 2000

Mr. Wunderli asked when the Committee could expect to finish its review of the Rules. Mr. Burton stated that he expects to finish by June 2004. Mr. Wunderli suggested drafting a model rule that the Committee could follow. Mr. Sackett asked if the Court would like a redlined version of the Model Rules and the existing rules. Ms. Branch asked if the rules would go out for comment before the Court gets involved. Mr. Burton asked Ms. Branch to check with the Court to find out what they would like submitted. He also suggested sending all the rules together to the Court, rather than sending them piecemeal so that the Committee may come back and review rules if necessary. Mr. Burton further stated that a summary paragraph should be submitted since the redline draft and comments may not "tell the story."

5. COMMON GOOD PETITION

Mr. Burton explained how the oral argument was going to be presented and also explained the time distributions between each presenter. He also stated that a Bar article would appear in the December Bar Journal. Mr. Walker stated that Christine Critchley was planning on contacting each side and would ask them to write an article.

Mr. Burton stated that the Committee had reviewed the materials received from both sides and it was determined how Mr. Densley would distribute his allotted time.

Mr. Densley gave an introduction to the Common Good Petition and explained the basis and principles for the Petition. He stated that their proposal attempts to capture the inefficiencies and the unfairness of the litigation process and "pass those savings" onto injured parties. He further stated that the proposal would settle claims more quickly and cut defense costs. The proposal targets those types of cases that would settle quickly.

Mr. Densley and Professor O'Connell then answered questions posed by the Committee. Mr. Mr. Wunderli asked how personal injury class actions would fit into the proposal. Mr. Densley stated that class actions already have legislation that limits the way that attorney fees are awarded. He further stated that this proposal is outside of class actions. Professor O'Connell stated that a quick offer in a class action lawsuit is not likely within a few months of the lawsuit.

Mr. Sackett asked how the proposal would handle more than one defendant. Professor O'Connell stated that the proposal was devised with a single plaintiff and a single defendant in mind; however, there is nothing preventing several defendants from joining in making an offer.

Mr. Burton asked whether the proposal would spawn satellite litigation over the issue of attorney's fees. He stated that several things would be subject to interpretation, which would drag the parties into litigation. Mr. Densley stated they want to tinker with the proposal in order to limit further litigation. Professor O'Connell stated that a plaintiff's lawyer is not required to submit certain information but would provide as much as they feel necessary to encourage an early offer. The information is fairly routine to what an attorney would have when considering whether to take the case. He further stated that the language of the rule is subject to change.

Mr. Hyde asked whether there is a time limit for the Notice of Liability to the liable party. Mr. Densley stated that the plaintiff's attorney would be subject to Rule 26 of the Utah Rules of Civil Procedure but there is an incentive to provide the notice as soon as possible as the rule is written because an hourly fee will be charged until the notice is served. Mr. Hyde asked if there was concern for a plaintiff's attorney rushing to get the notice out without adequately examining the facts and circumstances of the case. Mr. Densley stated that if they do not, it is less likely to elicit an offer that is palatable to the plaintiff and less likely to be accepted by the plaintiff.

Ralph Dewsnup presented his argument in opposition the Common Good Petition. He stated that the Supreme Courts of Arizona and Alabama have rejected similar proposals submitted by the Common Good. He believes that the proposal is ill advised; it is one-sided; and that it has constitutional defects. He provided statistics regarding what cases are filed in Utah District Courts and how they were processed. He stated that there are already rules in place that address contingency fees. He stated that the Campbell v. State Farm case illustrates that insurance company conduct is not altruistic. If the proposal were adopted, the victim's attorney would have to assume the duty to investigate, thus shifting the responsibility from the insurance adjuster to the victim's attorney. The victim's attorney would then assume the costs and risks associated with the case. He then listed the constitutional impediments of the proposal. Mr. Dewsnup discussed the problem of disclosure of information by the plaintiff's attorney, which the client may not want disclosed. He discussed problems relating to due process; sufficient notice; protecting the interests of your client; and determining what materials are to be provided and obtaining experts in order to respond to an offer.

Mr. Dewsnup then answered questions posed by the Committee.

Ms. Smith asked if he was aware of any plaintiff's attorneys who are accepting what he considers an unreasonable fee. She asked for a recommendation as to what the Bar should do about it if it occurs. Mr. Dewsnup stated that he was not aware of this, however, it does not mean that unreasonable fees are being accepted. He cannot determine what is unreasonable if he does not know all of the details about a case. He believes that the public does not have a concept of what sorts of services plaintiff's attorneys render to their clients; it involves more work than one would

think. Ms. Smith asked if he could cite disciplinary cases in connection with unreasonable fees. Mr. Dewsnup stated he could not cite particular cases however, he could think of instances where the attorney was disciplined for not paying attention to their client.

Mr. Roche asked how the rule would be explained to a prospective client if the proposal were implemented. Mr. Dewsnup stated that it would present a conflict of interest. He stated that an attorney would have to challenge his own fee agreement. Mr. Roche then asked what sort of competition exists between plaintiff's attorneys over the terms of contingency fees. Mr. Dewsnup stated that he has seen a lot of competition over fees. He feels that a client should be able to hire an attorney that they feel a connection with.

Judge Howard asked whether the number of lawyers also affects contingency fees. Mr. Dewsnup stated that a review of the affidavits submitted with his materials shows that there are attorneys who have reduced their fees either to facilitate a settlement or because they do not feel the client is getting enough of the settlement. He stated that Rule 1.5 requires this.

Ms. Honarvar asked if the proposal is logistically possible. Mr. Dewsnup stated that more investigation and discovery is needed before an offer can be made. Also, attorneys would need a level of precision that is not possible.

Mr. Sackett asked if contingency fee arrangements are extracted when lawyers know the case is a "done deal." Mr. Dewsnup conceded that there are lawyers that assume it's a done deal however, they are never 100% right in their assumption and he does not have any personal knowledge of it. Mr. Sackett asked Mr. Dewsnup how he would make the public aware of excessive contingency fees. Mr. Dewsnup stated that he would suggest the Bar make public service announcements in order to educate the public. He stated that there are already mechanisms in place to supervise the activity of attorneys. Judge Howard stated that he had seen a case where the defendant's attorney had suggested impropriety and an independent lawyer reviewed the fee arrangement.

Mr. Schultz asked why a client would complain to the Bar about a fee agreement they agreed to. Mr. Dewsnup stated this may occur if the client feels the attorney did not earn the fee. He further stated that contingency fee attorneys are different from hourly attorneys in that they typically do not give unsolicited status reports to their clients. He states that he tells his clients to call him if they have questions rather than waiting for a phone call from him.

Judge Roth asked what the extent of the responsibility is to the attorney regarding the initial inquiry required before filing a claim. He asked if it goes past Rule 11, or beyond what is now required. Mr. Dewsnup stated that when you do not define specifically what a notice must contain, or if you leave it to a matter of judgment, then you invite satellite litigation. Judge Roth stated that he understood that it was up to the plaintiff's attorney according to Professor O'Connell. Professor O'Connell stated that information asked is fairly routine but, if it is not, the plaintiff's attorney could provide the information they felt necessary. Then, if the insurance company did not find it sufficient, they would not make an early offer. Mr. Dewsnup stated that

in medical malpractice there is a Notice of Intent to Commence Legal Action. He stated that he has not received any offers in response to these notices.

Mr. Walker stated that any fee agreement is a conflict, but it is a conflict allowed by the ethics rules. He asked if one could make the same constitutional arguments Mr. Dewsnup made even if Rule 1.5 were not amended. Mr. Dewsnup stated no one had ever done it as far as he is aware. Mr. Walker then asked if detail could be placed in Rule 1.5 that would address some of the issues that Common Good is talking about. Mr. Dewsnup stated that the rule allows for flexibility as to what the contingency fees can be. He stated that it would involve a lot of detail being added to the existing rule.

Professor O'Connell then offered rebuttal regarding how fiduciaries should be charging for their duties. He then took further questions from the Committee.

Mr. Johnson asked if it would be more fair if the defendant filed the good faith offer and the plaintiff collects fees. Professor O'Connell stated that an offer can be made without good faith, it's just a number. Mr. Densley added that their proposal suggests that contingency fees should not be charged where there is low risk or no risk. Mr. Johnson asked if proper education to the public would solve the problem without changing Rule 1.5 as currently constituted. Mr. Densley stated that the problem is educating new attorneys. Mr. Dewsnup added that when offers are made to an attorney, they must communicate that offer to the client.

Ms. Honarvar asked if any research was done regarding how many claimants cannot pay an hourly fee. Mr. Densley stated that no one would be denied a contingency fee agreement. The proposed modification would simply ensure that the plaintiff receives more money if the case settles quickly.

Mr. Wunderli asked if this proposal was in practice anywhere. Professor O'Connell stated that it was not.

Each presenter then gave closing statements.

The Committee then took a straw poll as to who was in favor of the Petition. No one was in favor of the Petition exactly as it was presented.

The Committee then further discussed the Petition. Mr. Walker stated that he is in favor of more education for the consumer. Mr. Burton stated the consumer often thinks that since he signed a fee agreement, then he cannot dispute the settlement. Judge Maughan stated that he believes this is a challenge to how the contingency fee system is set up. Judge Howard agreed, stating that the system is not broken but is in favor of education so that a consumer knows what his rights are with regard to fee agreements. The Committee then discussed the evaluation of earned fees based on a number of factors.

Mr. Burton stated that the Committee should continue to think about the Common Good's proposal and if the straw poll holds, the Committee will dispose of the proposal. He also stated that if any Committee members had proposals as how to address any of the issues raised by the Petition, they should come prepared to discuss it.

6. ADJOURN

Mr. Burton announced that the next meeting of the Committee would be held on Monday, November 17, 2003 at 4:30 p.m. at the Bar.

There being no further business, the meeting was adjourned.