

## 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, November 17, 2003  
4:30 p.m.

#### ATTENDEES

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

#### EXCUSED

Judge Paul Maughan

#### STAFF

Amy Yardley

#### 1. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the members to the meeting.

Mr. Wunderli made a motion to adopt the minutes of October 20, 2003 with the suggested changes from the Committee. Mr. Burton seconded the motion, and it passed on the unanimous vote of those present.

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

Mr. Burton stated that Justice Durham had returned the proposed Definition of the Practice of Law to him for review in light of Debra Moore's suggestions. He further stated that the sub-committee has reviewed the suggestions and has prepared a memorandum.

Mr. Sackett stated that the first concern was whether the Committee had appropriately considered the most recent version of the ABA's report on the issue of the Definition of the Practice of Law.

He stated that Mr. Wunderli had taken a close look at the ABA's report and this should not be a concern. The second and more substantive concern was with regards to the "exception (c)(12)" and whether it is too broad. This section has generally tried to provide for the variety of people who are not lawyers but who, in some broad sense, apply the law to their professions. He further stated that it does raise the question whether the legislature could expand the number of kinds of professions that could become regulated by DOPL, and thereby expand the sphere outside of the Supreme Court's authority where lay people could practice law in the generic sense. Mr. Sackett stated that the sub-committee does not have a majority view to present – Ms. Honarvar suggested deleting the subsection; and Mr. Johnson suggested defining the activities so that the legislature could not tinker with it. Mr. Sackett suggested submitting alternatives to the Court. Mr. Walker suggested adding language "as of the date of this rule" so that if something comes in after the fact that is not covered by this rule, then it will have to be revisited under the standards set forth in the rule. Mr. Johnson stated that the present language could lead to the legislature creating an agency to govern those who draft wills and estates, or those who practice in small claims court, etc. The cut-off date would eliminate that concern. Mr. Burton asked Mr. Johnson if he would prefer this alternative approach rather than his proposed language. Mr. Johnson stated that he was concerned whether his proposed language had included everything that needed to be included. Mr. Sackett stated that Mr. Walker's suggestion would allow the Committee to retain the general structure that has already been approved. Mr. Johnson stated that if his proposed language were accepted, the Comment would also have to be changed as well. Ms. Honarvar stated the occupations should not be listed as exceptions because the subsection cannot include all occupations and there are many which could be overlooked. Mr. Burton asked Mr. Walker to suggest language.

The Committee then discussed the proposed language. Mr. Walker made a motion to amend the language in 6.1(c)(12) to read: "Advising or preparing documents for others by persons whose occupations (1) involve applications of one or more areas of the law and as established by regulations as of January 1, 2004, and (2) are regulated or subject to professional oversight by an administrative agency of the State of Utah." Mr. Johnson suggested eliminating the language "applications of one or more areas of the law" and replacing it with "the practice of law as defined above in subsection (b)(1)." The proposed language would then read as follows: "Advising or preparing documents for others by persons whose occupations (1) involve the practice of law as defined in subsection (b)(1) above and as established by regulations as of January 1, 2004, and (2) are regulated or subject to professional oversight by an administrative agency of the State of Utah." Ms. Smith stated that regulations could be changed by an agency relatively quickly without an act by the legislature and perhaps a statute should be referenced or the language "as of January 1, 2003" could be included instead. Mr. Walker suggested using "as of July 1, 2003" instead. Mr. Johnson seconded the amended motion, and it passed on the unanimous vote of those present. Mr. Burton asked Mr. Sackett to write a letter to Justice Durham regarding the proposed language.

### 3. COMMON GOOD PETITION

Mr. Burton asked if the Committee is supportive of the petition as filed. No one was supportive of the petition. He then asked if the Committee agreed with all portions of Mr. Dewsnup's opposition brief. The Committee was not completely in agreement with the brief.

Mr. Burton suggested drafting a letter to Justice Durham and sending it to the Committee by e-mail for comment. Mr. Burton asked for the Committee's comments on the following issues: The proposed petition would spawn satellite litigation on the issue of attorney's fees; pit the lawyer against his client and create a new conflict of interest with regard to attorney's fees; and the proposal is too broad in that it would be applied to all personal injury cases, other than those where liability and damages are straightforward and those which involve multiple defendants. Mr. Sackett stated that the petition should be rejected on foundational grounds, i.e., it is tort reform and should be done through the legislature not through the Rules of Professional Conduct.

Mr. Johnson stated that the Rules of Professional Conduct already provide a sufficient basis for eliminating inappropriate fees. Mr. Burton added that another issue is that no other jurisdiction has adopted it and if we did we would be in uncharted waters. Ms. Smith stated that the proposal was too broad should not be included and the Committee was in consensus with this. Mr. Burton added that he also had an issue with the giving of notice aspect of the proposal. Judge Howard suggested that the Committee not specify its objections but rather keep the objections generalized. He further stated that perhaps the constitutional problems could be listed. Mr. Schultz suggested not questioning the motives of those who have put the petition before them to the point that it comes across as though the Committee is endorsing the present system as being "this is the way it is and the way it always should be." Mr. Sackett agreed with Mr. Schultz, stating that the Committee should note that this is not the place to advance policy goals of that kind.

Mr. Burton stated that another issue is that the Committee does not believe the petition met the burden of proving there is a problem in Utah.

The Committee continued to discuss how to address their objections to the proposed petition. The Committee decided not to provide an analysis on the merits of the petition but rather it will reject it on broad terms.

Mr. Burton asked how the petition came to the Committee's attention. Ms. Branch stated that the petition was never filed with the Supreme Court. She believes that the Administrative Office of the Court received it and then delivered it to the Committee. Therefore, the Committee decided to address its response to the Petitioner and also include a cover letter to the Supreme Court. Mr. Burton stated that he would prepare a working draft for the Committee to review in advance of the January meeting.

Mr. Johnson asked when an article on the subject would be published in the Bar Journal. Mr. Walker stated that it would probably not be published until at the earliest the January/February issue.

#### 4. ETHICS 2000

Rule 3.6 Mr. Roche discussed the changes to the rule, which covers trial publicity. The current version was adopted in 1997, which adopted the 1994 ABA Rule. The ABA's amendment has three minor changes but only one is substantive: it applies a reasonable lawyer test rather than a reasonable person test to the issue of whether or not a lawyer should understand that comment may be disseminated publicly. He proposed adopting those changes, which were not adopted in 1997 from the 1994 ABA Rule, as well as the minor changes that were made as part of Ethics 2000. Mr. Chrystler suggested changing the "Commentary" section to "Comment" to remain consistent. Mr. Roche made a motion to adopt the proposed changes, including Mr. Chrystler's suggestion. Mr. Walker seconded the motion, and it passed on the unanimous vote of those present.

Rule 1.18 Ms. Honarvar discussed the changes to the rule. Comment 5 was stricken and a revision was made to subparagraph (b) pursuant to Mr. Roche's suggestion. The language in subparagraph (d) will be stricken as well. Comment 9 has been added which allows the lawyer to review a case which he has received unsolicited without being penalized. The Committee decided to revisit the rule after a new draft was distributed. Mr. Burton asked Ms. Honarvar and Mr. Schultz to provide a new draft which outlines the changes to the rule.

Rule 3.9 Mr. Hyde discussed the changes to the rule, which discusses non-adjudicative proceedings. Mr. Hyde stated that the current rule seems to eliminate sections of Rule 3.3 that may be relevant for adjudication before a non-adjudicative body. Ms. Smith stated that she had concerns about the language "... or in connection with an application for a license or other privilege." She believes that the language may imply an adjudicative body or a quasi-adjudicative body. Mr. Hyde stated that there are government bodies that deal with quasi-adjudicative issues, in which case you would have to refer back to the other rules. The Committee then discussed the issue of ex parte proceedings. Mr. Hyde made a motion to adopt the changes as proposed by the ABA. Mr. Sackett seconded the motion, and it passed on the unanimous vote of those present.

Rule 3.5 Mr. Chrystler stated that this rule had been discussed by the Committee two months ago, and the Committee deferred discussion until Judge Howard could be present. He then discussed the changes to the rule. Mr. Schultz asked whether "such a person" in subsection (b) should be identified; he suggested substituting this language with "judge, juror, prospective juror or other official." Mr. Chrystler agreed to this change. Mr. Sackett asked why the language "or cause another to communicate" is necessary. Mr. Chrystler agreed that the language was superfluous and agreed to strike it. Mr. Sackett also suggested identifying the Code of Judicial Conduct as the "Utah Code of Judicial Conduct." Mr. Schultz asked whether it would be considered a violation of the rule if a judge told the lawyer that the jurors did not want to have any contact with him, and then the lawyer proceeded to contact the jurors. Mr. Schultz also gave a scenario to illustrate his question. The Committee further discussed this issue and proposed changes to the language. Judge Roth suggested Mr. Schultz's scenario is a narrow enough issue

that it does not fit within what is contemplated in this rule. Mr. Sackett suggested changing "Code of Professional Conduct" in the Comment section to "Rules of Professional Conduct." He also suggested the language ". . . prior to full discharge of that person's duties in the proceeding" and striking "therein." Also, Mr. Wunderli stated that the Comment stating why the Committee deviated from the Model Rules should be numbered 2(a) and 3(a). Mr. Wunderli made a motion to adopt the rule with the Committee's proposed changes. Mr. Roche seconded the motion, and it passed on the unanimous vote of those present.

Rule 1.8(e)(2) Ms. Honarvar stated that she had met with Mr. Walker regarding this rule. The rule involves the costs of litigation. She stated that she will draft language for the rule, e-mail it to Mr. Walker, and then prepare a memo for the Committee's review. Mr. Burton stated that he would put the rule on the agenda for the next meeting.

## **5. ADJOURN**

Mr. Burton announced that the next meeting of the Committee would be held on Monday, January 26, 2004 at 4:30 p.m. at the Bar.

Mr. Burton stated that the following matters would be discussed at the next meeting: Common Good Petition, Rule 1.6, Rule 1.8(e)(2), the final version of Rule 3.5, Rule 1.18, and Rule 1.13.

There being no further business, the meeting was adjourned.