

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, January 26, 2004
4:30 p.m.

ATTENDEES

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

EXCUSED

Marilyn Branch
Judge Royal Hansen
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 November 17, 2003. Mr. Hyde seconded the motion, and it passed on the unanimous vote of those present.

2. COMMON GOOD PETITION

Mr. Burton stated that he had received new information from Steve Densley regarding research done on contingency fees. Mr. Burton stated that he had forwarded a copy of that information to Ralph Dewsnap. He further stated that Mr. Dewsnap had submitted a response, and Mr. Densley had then submitted a reply to Mr. Dewsnap's response. Mr. Burton then gave an overview of the information received from Messrs. Densley and Dewsnap. He asked if the Committee was interested in revisiting the issue in light of the information received from the parties involved. The Committee members were unanimously against reconsidering Common Good's petition.

Mr. Burton stated the Committee should then proceed to finalize their letter to the Supreme Court. He further stated that he prefers Mr. Sackett's draft letter to his own and would like the Committee to work from Mr. Sackett's draft. Mr. Sackett discussed the reasoning for the language contained in his draft. Mr. Hyde asked if it was the consensus among the Committee that the Legislature should "tackle" the issue. Mr. Sackett stated that Common Good's petition

seeks to change the policy that governs how attorneys and clients operate in the contingent fee area. Therefore, the Committee should not be in the business of deciding these questions. Moreover, Mr. Sackett believes these are legislative matters as to how the balance of tort law operates. Judge Roth stated that he believes part of the issue is a policy issue and part of it is a procedural issue. He further stated that the Supreme Court perhaps ought not to be making rules that change how money flows and how tort settlements are made. Ms. Smith stated that she was unaware of the Legislature deciding fee structure issues and, therefore, she believes the Supreme Court should regulate fees. Ms. Honarvar stated that Common Good only asked for a review of their petition and, therefore, the Committee should not offer direction to them. The Committee then further discussed whether to include language in their letter directing Common Good to the Legislature. Mr. Burton suggested leaving the letter as is but not inviting Common Good to address the Legislature regarding this issue. Mr. Sackett suggested deleting specific references to the Legislature and replacing them with language suggesting that since these are public policy issues, they should be addressed elsewhere.

The Committee then discussed whether to include language regarding other states' rejection of Common Good's petition. Judge Roth stated that it might be helpful since people outside of the Utah legal community may review the letter. He suggested including a footnote stating that other states have rejected the petition. The Committee discussed language for the footnote and further changes to the letter. Mr. Wunderli suggested changing the language at the top of page 2, first paragraph, from "guidelines" to "rules." Mr. Hyde made a motion to adopt the letter as amended by the Committee. Mr. Wunderli seconded the motion, and it passed on the unanimous vote of those present. Mr. Burton asked Mr. Sackett to prepare a new draft of the letter that incorporates the Committee's changes.

3. DEFINITION OF THE PRACTICE OF LAW

Mr. Burton had circulated a copy of Justice Durham's letter to the Committee, which thanked the Committee for their excellent work. Mr. Johnson stated that the Unauthorized Practice of Law Committee is making their recommendations to the Supreme Court. Mr. Johnson stated that the chair of that committee stated that the Court is in a quandary as to when to do something about this issue, whether to act now, or wait until after the legislative session before the May 6th deadline when the law becomes effective on House Bill 349. He further stated that there were no new bills from the Legislature and that they probably have the Committee's memo on the subject.

Mr. Johnson stated that the Unauthorized Practice of Law Committee is negotiating with the Legislature, who wants to increase the Small Claims Court jurisdiction to \$7500 and to allow non-attorneys to represent anyone in Small Claims Court. Mr. Johnson stated that he assumes that the Court will feel enough autonomy and will do what it wants to do but hopes that the Legislature will fix House Bill 349 so that they will not have to take action themselves.

4. ETHICS 2000

Rule 1.8(e)(2) Ms. Honarvar stated that she and Mr. Walker had discussed this rule and proposed language allowing an attorney to advance funds to a client if it is a small amount of

money, and if it is connected to the litigation. She further stated that Minnesota and Mississippi had revised their rules. She then discussed the revisions these states had made. Mr. Johnson stated that he is concerned that clients may then use a lawsuit to obtain living expenses and attorneys may use a lawsuit to lure clients. Judge Howard stated that the client would then become beholden to you. Mr. Walker stated that the language defining the expense of litigation in (e)(2) should be expanded to (e)(1) as well. Ms. Honarvar stated that she would rather limit the language only to indigent clients. Mr. Walker stated that the rules do not define indigent clients. Mr. Sackett stated that the language only expands the things that you can give to your indigent client; he does not feel that the rules should define what an indigent client is. He further stated that the language in paragraph (e)(2) should be changed from “including minor expenses . . .” to read “and minor expenses. . .” Mr. Burton stated that the language in Comment 10 should be changed from “of minor sums. . .” to “and minor sums. . .” Mr. Roche stated that he is in favor of the revised rule and made a motion to adopt the changes along with the amendments proposed by Messrs. Sackett and Burton. Mr. Sackett seconded the motion, and it passed on the unanimous vote of those present. Mr. Burton asked Ms. Honarvar to prepare a final, clean copy of the rule with language in the comment about how the rule differs from the ABA Model Rule.

Rule 1.18 Ms. Honarvar stated that she and Mr. Schultz had discussed the changes to the rule and agreed to the ABA’s proposed changes except for paragraph 5, which states that a lawyer may condition the conversation with the prospective client on the person’s informed consent and whatever information is given to the attorney may be used against the client. She stated that this language contradicts the language and the spirit of the rule regarding disclosure of information. Mr. Sackett stated that if the comment were deleted, then you would destroy the protection against “forum shoppers” who want to disqualify an attorney. Mr. Burton stated that he feels forum shopping is more of an unfair practice. Mr. Johnson stated Comment 5 assumes that the lawyer forewarns the prospective client that anything they say may be used against them, and that the attorney is only determining whether or not they can take the case. Mr. Roche agreed and stated the attorney should state that he must first perform a conflicts check and the client should therefore not disclose confidential details. Ms. Honarvar stated that the language goes beyond just doing a conflicts check and gave the scenario of an adverse effect on a woman who is involved in a divorce case. Mr. Sackett stated that if there is an informed agreement with the client, he does not see a problem with the language. Judge Howard stated that he sees a problem with more complex cases, such as business transaction cases. Ms. Honarvar asked Mr. Walker how Rule 1.18 would relate to a business relationship wherein the attorney represents a partnership. Mr. Walker stated that it would be a more complex situation in that the initial consultation goes beyond just a conflict check since you would be inquiring who the parties are, etc. He further stated that in larger jurisdictions, the situation is more complex as in corporate settings. Mr. Sackett made a motion to adopt the Ethics 2000 proposed changes to Rule 1.18. Mr. Roche seconded the motion, and it passed on the unanimous vote of those present.

Rule 3.5 The Committee reviewed the final draft of the rule, which had previously been adopted. Mr. Burton made a motion to adopt the final draft. Mr. Wunderli seconded the motion, and it passed on the unanimous vote of those present.

Rule 1.13 Mr. Johnson discussed the changes to the rule. Mr. Sackett gave an overview of past changes to Rule 1.13. Mr. Johnson stated that the sub-committee should then review the rule again since the sub-committee did not follow the history of the changes. He recommended the adoption of the August 2003 amendments made by the ABA with the addition of subparagraph (f), which discusses the duties of government lawyers. He noted that subsection (f) would become subsection (h). He further suggested that in light of Mr. Sackett's overview, he would like to change the language ". . . act in a matter related to the representation that is a violation of a legal obligation to the organization . . ." to ". . . act in a matter related to the representation that is a violation of a legal obligation of or to the organization. . ." in subsection (b), line 4. Mr. Sackett discussed the reasoning behind the Committee's past change of this subsection. Mr. Burton asked what the vote was on the ABA's August 2003 vote. Mr. Johnson stated that it was his recollection that the task force unanimously recommended these changes.

Mr. Wunderli asked if there was already a rule that relates to government lawyers that would cover these issues. Mr. Hyde stated that there was not and there is no reason why this rule should not apply to government lawyers. Mr. Hyde stated that with regard to paragraph (h), the references to subsections (b) and (c) should be expanded to be consistent with subsections (d), (e), (f), and (g). Ms. Smith discussed the language of Comment 9 regarding government agencies and stated that it would need minor changes since it is not consistent with the rest of the rule. Mr. Walker and Ms. Smith will meet in order to make changes to Comment 9. Mr. Sackett asked why the language in subsection (c) regarding withdrawal as counsel was deleted. Mr. Johnson stated that the language is now in 1.16. Mr. Walker stated that an attorney could still withdraw as counsel in compliance with Rule 1.16. The Committee further discussed whether this language needed to be clearer. Mr. Johnson stated that he felt the ABA had stricken the language because it was redundant. Mr. Sackett stated that the new Rule 1.16 provides a broader collection of situations under which an attorney may withdraw and therefore, he is not troubled with the language. Mr. Sackett asked about subsection (g) regarding who can give consent to withdraw, specifically, the removal of the word "entity" from the language. The Committee then discussed the language in this subsection.

Mr. Johnson made a motion to accept the ABA's August 2003 recommendations to the rule with the addition of the old subsection (f), which is now subsection (h); with the addition of new references to other subsections ("(b) through (g)"), and the changes to be made by Mr. Walker and Ms. Smith to the government comment section. Mr. Hyde seconded the motion, and it passed on the unanimous vote of those present.

Rule 1.6 Mr. Johnson discussed changes to the rule and stated that the ABA is trying to make this rule consistent with Rule 1.13. He further stated that there is a higher standard to disclose information (changed to "reasonably certain" from "likely certain"). Mr. Johnson stated that the sub-committee felt that some of the restraints in the rule were inappropriate, for example, if an attorney learns of fraud occurring before he represented a client, he should have the option to disclose that information if it is necessary to prevent substantial injury to persons or property.

Ms. Smith stated she is concerned with disclosure to mitigate or rectify injury in the past inasmuch as a criminal defense attorney may be allowed to disclose such information. The Committee then discussed this issue. Mr. Roche stated that since Rules 1.13 and 1.6 are being presented as a package, he would hate to adopt one and change the other. He then made a motion to adopt the ABA's August 2003 recommendations. Ms. Honarvar seconded the motion. Mr. Sackett stated that there is not a definition of "reasonably certain" in the rules. Mr. Johnson stated that "reasonably certain" is used in other rules as well. Mr. Hyde discussed the earlier changes to the rule and the language used in the proposed draft. Mr. Walker stated that removing the language "use of lawyer services" from the language would make it more consistent with Rule 1.13. He further suggested addressing this matter differently with regards to financial fraud versus the crime part. Ms. Honarvar stated that the language in subsections (a) and (b) implies the activity was that which an attorney was already engaged in. Mr. Walker stated that even though you represent the client, it does not mean you are involved in all aspects of what the client is doing. Judge Howard stated that you might learn of information that is disclosed during the process of determining whether you will represent the client. Mr. Johnson will prepare a draft of the language the Committee has already adopted versus the additional aspects of Rule 1.6. Mr. Burton stated he would like to retain what the Committee has already agreed to and incorporate the ABA's August 2003 changes for the Committee to review. He then made a motion to table the motion on the matter. Mr. Sackett seconded the motion, and it passed on the unanimous vote of those present.

5. ADJOURN

Mr. Burton announced that the next meeting of the Committee would be held on Monday, February 23, 2004 at 5:00 p.m. at the Bar. Mr. Burton directed Ingrid to find out whether the boardroom will be available since the Bar exam will be held the following day (February 24, 2004).

Mr. Burton stated that the Committee had received a new assignment of reviewing the Utah State Bar's petition regarding unbundling of legal services. He then asked the Committee whether they would like to look at the petition now or later on. Mr. Walker recommended considering the petition now because it would affect the Committee's discussion on Rules 1.2, 4.2, 4.3, and 6.5. Mr. Burton also recommended considering the petition now. Mr. Chrystler asked what the petition involved. Mr. Walker gave an overview of the petition. Mr. Johnson stated that it would allow clients to take more control of their cases and they would only have to hire an attorney for the areas they are not comfortable with. The Committee agreed to discuss the petition at the next meeting.

Mr. Burton stated that the following matters would be discussed at the next meeting: the Utah State Bar's petition regarding unbundling of legal services; Rule 1.6; and Rule 4.4.

There being no further business, the meeting was adjourned.