

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, March 1, 2004
4:30 p.m.

ATTENDEES

Robert Burton
Gary Chrystler
Judge Royal Hansen
Judge Fred Howard
William Hyde
Steven Johnson
Stuart Schultz
Judge Stephen Roth
Gary Sackett
Paula Smith
Earl Wunderli

EXCUSED

Marilyn Branch
Nayer Honarvar
Judge Paul Maughan
Kent Roche
Billy Walker

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 January 26, 2004. Judge Howard seconded the motion, and it passed on the unanimous vote of those present. (Mr. Burton noted that once the rest of the Committee members arrived, they would be asked whether they had any objections to the minutes.)

2. UNBUNDLING OF LEGAL SERVICES

Mr. Burton welcomed Debra Moore and Katherine Fox to the meeting. He then asked for a straw poll from the Committee regarding their views on the concept of unbundling of legal services. All of the Committee members present felt the concept was favorable.

Ms. Moore stated that unbundling already occurs in practice and that the current Rules do not prohibit it. Mr. Sackett asked why the petition was necessary if unbundling is not inconsistent with the current Rules. Ms. Moore stated that there are many clients, lawyers, and judges who are unfamiliar with the practice of unbundling and there exists a need for it in the area of family law. She further stated that lawyers are wary of ghostwriting or making an appearance for only one hearing. She then discussed the benefits of unbundling. Ms. Moore also discussed the efforts presently being made by the Utah courts to facilitate pro se litigants. She stated that the unbundling of legal services is another way to make self-representation user-friendly. Mr.

Burton asked the Committee whether they would apply unbundling to all areas of the law, or would they limit it solely to family law. The Committee stated that they would not limit unbundling solely to family law. Mr. Schultz asked if there is concern that by adopting the petition, you would be suggesting a negative, meaning that if you performed unbundled legal services before the petition was adopted then there is something improper or unethical about it. Ms. Moore stated that any type of concern of this sort could be handled through comments. Ms. Fox added that the practice of unbundling is implicitly accepted, the petition just clarifies it, and makes the parties involved more aware of it. Mr. Schultz suggested adding a comment to the petition to this effect.

Ms. Moore stated that other states have already adopted unbundling of legal services and that she is not aware of any states that have considered it and rejected it. Mr. Chrystler asked whether the same goals of the petition could not be accomplished through education instead. Ms. Moore reiterated that the petition clarifies the practice of unbundling. Ms. Fox stated that some jurisdictions treat ghostwritten pleadings differently (some require written disclosure to the court while others do not). She stated that the more direction provided through the Rules, the fewer ethical violations that will be committed. The Committee then discussed the issue of disclosure of ghostwriting pleadings.

Mr. Sackett asked how the petition would affect Ethics 2000. Ms. Moore stated that Rules 1.2 and 6.5 should be reviewed. Mr. Sackett asked if the ABA Ethics 2000 changes address the issue of unbundling. Ms. Moore stated that Ethics 2000 had addressed it, and that is why the proposed change to Rule 1.2 and the new Rule 6.5 resulted. Mr. Sackett then asked if the Committee were to adopt Ethics 2000, would this solve the problem. Ms. Moore stated that changes to the Rules of Civil Procedure must be made to address the mechanics of limited appearances, and ghostwriting. She further stated that the Rules of Professional Conduct need to be changed to address communication with a party who may have consulted with an attorney when that attorney has not made a general appearance. She also stated that the proposed changes to Rules 4.2 and 4.3 could not be handled with a comment. Mr. Burton asked whether the Court's advisory committee on the Rules of Civil Procedure had been given the petition for review as well. Ms. Moore stated that it had not. Ms. Fox added that the ethical issues of unbundling should be addressed first.

Judge Howard stated that he has concern with the scope of representation, i.e., the attorney may fail to give advice about things that he should have. He feels that unbundling suggests that you can provide limited work but you just need something in writing to "cover" yourself. Ms. Moore addressed Judge Howard's concerns and discussed the form agreements and language that should be included to define the scope of your work. Ms. Fox discussed the states' different approaches and the examples of the forms contained in the Committee's materials. Mr. Burton stated that an attorney may be subject to more malpractice claims and should therefore be more careful when drafting limited scope agreements. Ms. Moore stated that attorneys can get malpractice insurance for this service. She further stated that clients are generally happier with their attorney because they have more control over costs and what the attorney does. Mr. Chrystler asked what

the attorney's responsibility would be when ghostwriting a "12th hour complaint" wherein the facts of the case cannot be investigated (or when the client does not want to pay for an investigation of the facts). Ms. Moore responded that this constitutes an ethical issue. The attorney must conduct the same investigation as they ordinarily would under Rule 11. However, the client would sign the complaint and therefore be bound by Rule 11, which should be explained to the client. Ms. Fox directed the Committee to the research materials in the Petition. Judge Howard expressed concern that unbundling would lower the attorney's duties to the client as well as the attorney's ethical standard. Ms. Moore stated that the attorney is still held to the same high standard within the scope of ^{what} he or she has undertaken. She further stated that the Utah Supreme Court's Delivery of Legal Services Committee recommended adopting rules that allow more flexibility in the way that legal services are delivered. She stated that research shows that if clients feel they have more control over the client-attorney relationship, they are more likely to consult an attorney, which may lead to an increase in the use of legal services.

Ms. Moore stated that she recommends the adoption of Ethics 2000 proposed changes to Rule 1.2 and the adoption of Rule 6.5, which is a new rule. She also recommended a review of Rules 4.2 and 4.3. Ms. Fox then verified that the Committee received all of the materials.

Ms. Smith expressed concern about entities other than pro se individuals representing themselves, i.e., partnerships or corporations. Ms. Fox stated that this would be a definition of law issue.

Ms. Moore emphasized that the purpose of unbundling is to increase access to legal services. She recommended addressing the petition in the near future and isolating Rules 1.2 and 6.5 for consideration. She further stated that it would be well to know whether they would have to plan for programs to support unbundled legal services. Ms. Moore stated that unbundling is now being provided by non-profit organizations that work with the courts. She stated that Utah Legal Services would begin training on a program for attorneys to provide legal advice by e-mail, which is considered unbundling of legal services. Legal Services will have trouble getting volunteer attorneys for this program until the ethical issues are resolved.

Mr. Burton stated that since the Utah State Bar's petition regarding unbundling of legal services affects Rules 1.2, 4.2, 4.3, and 6.5, these rules should be reviewed ahead of the other remaining rules. He noted that Rule 1.2 is assigned to Mr. Johnson and Judge Roth; Rule 4.2 is assigned to Judge Howard and Mr. Chrystler; Rule 4.3 is assigned to Mr. Sackett and Mr. Roche; and Rule 6.5 is assigned to Mr. Schultz and Ms. Honarvar. He asked that these eight members form a sub-committee to review these rules. Mr. Burton stated that these rules could then be sent to the Supreme Court in advance of the others.

The Committee then discussed the timing of its review of the rules affected by unbundling. Mr. Sackett suggested reviewing these rules at the meeting scheduled for April 19, 2004. The Committee agreed to this timeframe..

3. ETHICS 2000

Rule 4.4 Mr. Wunderli discussed the changes to the rule. He stated that the ABA's proposal does not change the language of the current rule, but only changes the numbering, adding a subparagraph (b).

Mr. Wunderli and Ms. Smith recommended adopting the ABA's proposed rule, however, there are two issues that the Committee should address: First, under subparagraph (a) of the Comment, a clause has been added which states: ". . .unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." Mr. Wunderli stated that he has ^{no} an issue with the term "unwarranted," since he believes that there may be reason for a warranted intrusion. Mr. Burton stated that if the lawyer and client waived the privilege and there was evidence to support the waiver, this would be a warranted intrusion to the relationship. Mr. Wunderli suggested that the Committee adopt the ABA's proposal assuming that there might be a warranted intrusion that is permitted under the Rules; they could leave that determination as the need arises. Mr. Wunderli then discussed the language in the new paragraph (b). He stated that there exists an ABA Opinion regarding receipt of documents not intended for the lawyer. This opinion was rejected by Ethics 2000 in favor of the present rule, which simply states that the lawyer must notify the sender. Judge Howard stated that sometimes it is necessary for the lawyer to thoroughly read the document received in order to realize it is not intended for him or her, examples being handwritten notes and forms. Messrs. Burton and Johnson both described situations in which they had received information or communications not intended for them. Ms. Smith stated that she had spoken with persons in her litigation section and found that it is not always wise to send back the document. It is better to notify the sender and discuss the matter first. Mr. Chrystler made a tentative motion to adopt the ABA's proposed rule. Mr. Johnson seconded the motion, and it passed on the unanimous vote of those present. Mr. Burton reiterated the motion after the Committee had a quorum, and it passed on the unanimous vote of those present.

Rule 1.13 Ms. Smith stated that she faxed the former draft of the rule with her comments to Mr. Walker, however, they had not met to discuss the language yet. Mr. Burton asked for a final draft to be provided to the Committee for the next meeting. Mr. Johnson stated that Mr. Walker had forwarded Ms. Smith's comments to him. Ms. Smith stated that she would fax her changes to Mr. Johnson so that he could prepare a final draft for the Committee to review.

Rule 1.6 Mr. Johnson discussed the draft sent to the Committee, which shows the language from the last draft approved by the Committee versus the August 2003 ABA version. He then discussed the three changes to the rule: The first change is replacing the word "likely" to "reasonably certain." Second, with regard to subparagraphs (b)(2) and (b)(3), the ABA recommended adding the phrase ". . . and in furtherance of which the client has used the lawyer's services." Third, a new paragraph (3) was added by the ABA in August, therefore the numbering has changed. The Committee then discussed the changes to subparagraphs (b)(2) and (b)(3), specifically, the concern expressed by Ms. Smith regarding representing a client in a criminal

matter and being able to disclose information about that client's prior criminal acts. She stated that a criminal defendant or corporate client might believe that if they tell an attorney about a past crime or fraud, the attorney will not reveal that information. Mr. Hyde stated that he had discussed the proposed changes with John Hill of the Legal Defenders Association, who did not seem concerned with the changes (leaving the language off as discussed by sub-committee). Ms. Smith stated that if the client tells the attorney of a past crime, the attorney may be able to talk the client into rectifying it themselves, which option might be lost if the client cannot confide in his attorney. Mr. Hyde noted that Rule 1.13 does not have the qualifying language in it. The Committee then discussed whether to eliminate the attorney-client privilege or keep the attorney-client privilege as broad as possible. Mr. Wunderli suggested changing the language "financial interest" to "financial interests."

Mr. Johnson made a motion to adopt the ABA's August 2003 Model Rule with the language ". . . and in furtherance of which the client has used the lawyer's services" remaining in subparagraphs (b)(2) and (b)(3). Mr. Wunderli seconded the motion, and it passed on the vote of those present. Mr. Hyde was opposed.

4. OTHER BUSINESS AND ADJOURN

Mr. Burton discussed the possibility of meeting another day of the week in order to accommodate the Committee members' schedules. He stated that he had spoken with Judge Hansen, whose court calendar on Mondays makes it difficult for him to arrive by 4:30 p.m. Judge Howard stated that his criminal calendar is on Tuesdays, Wednesdays and Thursdays, therefore, Monday is a good day to meet for him. The Committee discussed moving the time to meet to 5:00 p.m. Ultimately, the Committee decided to keep the date and time of the meeting as is.

Mr. Burton announced that the next meeting of the Committee would be held on Monday, March 15, 2004 at 4:30 p.m. at the Bar. He asked the Committee to choose their most simple rule to address for that meeting.

There being no further business, the meeting was adjourned.