

MINUTES OF THE SUPREME COURT'S
ADVISORY COMMITTEE ON THE
RULES OF PROFESSIONAL CONDUCT

Utah Law & Justice Center
645 South 200 East
Salt Lake City, UT 84111
March 15, 2004
4:30 p.m.

ATTENDEES

Robert Burton, chair
Judge Fred Howard
Steven Johnson
Judge Paul Maughan
Stuart Schultz
Kent Roche

Judge Stephen Roth
Gary Sackett
Paula Smith
Billy Walker
Earl Wunderli
Matty Branch

EXCUSED

Gary Chrystler
Judge Royal Hansen
Nayer Hornavar
William Hyde

1. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the members to the meeting. He advised that Ingrid Kelson's responsibilities and workload in the OPC office have made it necessary for her to be relieved of providing clerical support to the committee. Matty Branch has agreed to keep the meeting minutes. Ms. Branch indicated that Supreme Court staff will assist her in copying materials and mailing them to committee members each month.

The following corrections to the minutes of the March 1, 2004, committee meeting were proposed:

- p. 1 show Judge Stephen Roth as excused rather than in attendance
- p. 2, second paragraph, "ghostwriting" be changed to "ghostwritten"
- p. 3, 9th line from top, insert "what" before "he or she has undertaken"
- p. 4, 4th line of second paragraph, change "an" to "no" to state that "Mr. Wunderli stated that he has no issue . . ."

With the above stated amendments, Mr. Wunderli made a motion to adopt the minutes. Mr. Johnson seconded the motion, and it passed unanimously.

2. REAPPOINTMENTS TO COMMITTEE

Mr. Burton indicated that the following committee members' terms had technically expired, July 2003: Robert Burton, Judge Royal Hansen, Paula Smith, Kent Roche, Steven Johnson and Earl Wunderli. Because the committee is in the midst of its review of the Ethics 2000 rule amendments and the unbundling of legal services concept, Mr. Burton expressed his hope that those whose terms had expired would be willing to

continue to serve, at least until these two projects are completed. Ms. Branch said the Supreme Court would consider the reappointments at its court conference on March 24, 2004, and that any members who are not willing to be reappointed should let her know immediately.

3. ETHICS 2000

Rule 1.6. Mr. Johnson advised that the version of the rule in the packet had been approved at the March 1st meeting, but that he wanted the committee to take a look at the latest redline. Mr. Wunderli questioned whether the word “consummated” in Comment 8 should instead be “committed.” Mr. Johnson indicated that he felt the use of the word “consummated” was intentional based upon the distinction between 1.6(b)(2) and (b)(3). Following Mr. Johnson’s explanation, Mr. Wunderli withdrew his suggestion.

Rule 1.13. Mr. Johnson advised that the subcommittee was recommending adoption of the Ethics 2000 version of the rule with the exception of adding subparagraph h. There was discussion as to whether the restrictions on disclosure in paragraph (c) were applicable to government lawyers. It was suggested that the second to last sentence of the comment on “Government Agency” that reads “[T]he remedial option under paragraph (c) concerning resignation under Rule 1.16 may be inconsistent with the government lawyer’s duties under the law” be stricken. Mr. Sackett suggested that Comment (9) should be placed as the last comment, and the comments be renumbered as appropriate. Mr. Sackett made a motion to adopt the Ethics 2000 Rule 1.13 with the deletion of the above-stated sentence from Comment (9) and a renumbering of the comments. Mr. Roche seconded the motion, and it passed unanimously. Mr. Johnson said he would bring the approved form of the rule to the next meeting. Mr. Sackett suggested that the second sentence of Rule 1.13(g) should not simply identify “shareholders” but should include other organizational entities. It was generally agreed that this issue could be dealt with as part of the final rule review and clean-up.

Rule 2.1. Ms. Smith and Mr. Wunderli led the discussion of Rule 2.1 as proposed by Ethics 2000. They recommended adoption of the text of the rule as proposed, ^{by Ethics 2000} with ^{which made the} several ^{following} changes to the Comment. The recommended changes to the Comment are:

Paragraph [2] change “narrowly” to “narrow” and “costs” to “cost”
Paragraph [5] insert “the lawyer’s” preceding “duty” in line 3; change “act” in line 4 to “offer advice,” and after second sentence, insert this sentence - “similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.”

Ms. Smith made a motion to adopt the Ethics 2000 Rule 2.1, with the above-stated ^{and comment} comment changes. Mr. Wunderli seconded the motion, and it passed unanimously.

Rule 5.6. Mr. Johnson briefly discussed the revisions to the rule as proposed by Ethics 2000 and recommended that the committee adopt the proposed amendments.

Mr. Johnson made the motion to approve. It was seconded by Mr. Wunderli, and unanimously approved by the committee.

Rule 7.4. Mr. Sackett led the discussion and advised that the Ethics 2000 version of Rule 7.4 has few substantive changes but has been simplified for the better. The subcommittee recommended adopting the Ethics 2000 Rule 7.4 and comment as written except that the phrase “an appropriate state authority” in (d)(1) and in Comment 3 should be replaced with “Utah Supreme Court.” Mr. Walker advised that the prohibition on advertising as a “certified” specialist unless the certification comes from the ABA or state supreme court is a “hot” issue for lawyers nationally. Many believe the prohibition is an infringement on First Amendment rights. The committee indicated it was comfortable with the idea of the ABA being able to accredit organizations.

Mr. Wunderli made a motion to adopt the Ethics 2000 version of Rule 7.4 with the substitution of “Utah Supreme Court” for “an appropriate state authority” in paragraph(d)(1) and in Comment [3]. Mr. Sackett seconded the motion, and it passed unanimously.

Rule 8.5. Mr. Sackett advised the committee that the proposed Ethics 2000 Rule 8.5 is a good way to deal with multi-jurisdictional practices. There was discussion as to the reference in Comment [1] as to the designation of an official to receive service of process. This was felt to be a procedural rule that is not properly located in the Comment. Mr. Sackett moved to adopt the proposed rule subject to the deletion of the last two sentences of Comment [1] and the substitution of the appropriate numbers of the Utah rules that correspond with Rules 6 and 22 of the ABA rules as referenced in Comment [1]. Judge Roth seconded the motion, and it passed unanimously. Mr. Sackett agreed to bring proposed language to the next meeting that explains why the Utah Comment [1] is different than the ABA version.

Rule 7.5. Judge Howard advised that the existing Utah Rule 7.5 is very close to the Ethics 2000 Rule 7.5, and he recommended adoption. Mr. Roche moved to adopt the Ethics 2000 Rule 7.5. Mr. Johnson seconded the motion, and it passed unanimously.

4. OTHER BUSINESS AND ADJOURN

Mr. Burton asked Mr. Schultz to chair the Unbundling Subcommittee and to determine if the Subcommittee needs to meet before the next meeting. Subcommittee members were requested to get materials on their specific rule to Mr. Schultz by April 6, with Mr. Schultz to get written materials from the Subcommittee to Ms. Branch by April 12. Mr. Burton stated that the next meeting would be spent discussing the amendments to the rules necessitated by the proposed unbundling of legal services. Assignments are as follows:

Rule 1.2 Judge Roth, Steve Johnson
Rule 4.2 Judge Howard, Gary Chrystler
Rule ~~4.5~~^{4,3} Gary Sackett, Kent Roche
Rule 6.5 Stuart Schultz, Nayer Hoffmann

The next meeting will be held on April 19, 2004, at 4:30 p.m. at the Law and Justice Center. There being no further business, the meeting was adjourned.