

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  
April 19, 2004  
4:30 p.m.

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ATTENDEES

Robert Burton, chair  
Gary Chrystler  
Nayer Honarvar  
Judge Fred Howard  
Steven Johnson  
Kent Roche

Judge Stephen Roth  
Gary Sackett  
Stuart Schultz  
Billy Walker  
Earl Wunderli  
Matty Branch

EXCUSED

Judge Royal Hansen  
William Hyde  
Judge Paul Maughan  
Paula Smith

I. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed the members of the committee and introduced Patrick Nolan from the Attorney General's office, who is interested in rule 4.2.

The following corrections to the minutes of the March 15, 2004, committee meeting were proposed:

P. 1 correct spelling of Nayer's last name

P. 2 section III/Rule 2.1 change second sentence as follows: They recommended adoption of the text of the rule as proposed by Ethics 2000 which made the following changes in the existing Comment . . . .

P. 2 change first sentence of fourth paragraph to read "Ms. Smith made a motion to adopt the Ethics 2000 Rule 2.1 and Comment," and delete the rest of the original first sentence.

P. 4 replace reference to Rule 4.5 with Rule 4.3 and correct spelling of Nayer's name.

With the above stated amendments, the minutes were approved unanimously.

II. FOLLOW UP MATTERS FROM MARCH 15 MEETING

Mr. Johnson will bring the form of Rule 1.13 approved at the March 15<sup>th</sup> meeting to the May meeting. Mr. Sackett will bring proposed language to the May meeting that explains why the Utah Comment [1] to Rule 8.5 is different from the ABA version of the Comment.

### III. UNBUNDLING OF LEGAL SERVICES

#### Rule 1.2

Mr. Schultz led the discussion as to those rules the State Bar had asked be amended to permit the unbundling of legal services. He stated that Mr. Johnson had advised that the Ethics 2000 version of Rule 1.2 had already been approved by the committee, and that section (c) of the approved rule contained provisions that allow unbundling. Therefore, Mr. Johnson suggested there was no reason for the committee to revisit Rule 1.2.

#### Rule 4.2

Mr. Chrystler led the discussion of Rule 4.2. He indicated that it was his recommendation, and that of Judge Howard, that Utah's current Rule 4.2 not be replaced by the Ethics 2000 Rule 4.2. Mr. Sackett questioned whether the committee might want to revisit Utah Rule 4.2 so as to bring it more in line with the Ethics 2000 rule. Mr. Sackett also expressed the view that he thought that, at the time Utah adopted its form of the rule, it was one of the few states that had gone in that direction. Mr. Walker suggested that the committee might want to check with the Supreme Court as to whether it was interested in the committee looking at a total revision of the rule since the court had implemented Rule 4.2 in its present form without committee involvement. Mr. Nolan, from the Attorney General's office, distributed a letter from Attorney General Shurtleff and a letter from Creighton Horton, to the members of the committee. These letters provide background as to the history of the wording of Rule 4.2. Mr. Nolan emphasized that the Ethics 2000 version of Rule 4.2 goes in the opposite direction from Utah Rule 4.2, and that he felt to return government lawyers to a "no-contact" rule with respect to represented criminal defendants would be unwise and would unduly tie prosecutors' hands.

Mr. Sackett stated that he would like the committee to focus on section (d)(3) of Rule 4.2 which deals with the application of the rule to communications with government parties, employees or officials. Mr. Sackett indicated that this section essentially reversed opinions of the Bar Ethics Committee as to such communications, and that he felt the change had been made in the rule without adequate discussion. Mr. Burton asked the committee whether they were interested in looking at Rule 4.2 generally or only as to the unbundling issues. The consensus of the committee was that they were not interested in recommending the adoption of the Ethics 2000 version of Rule 4.2, but that they did want to examine the unbundling issue as well as section 4.2(d)(3). Mr. Burton indicated that Rule 4.2 will be revisited at the May meeting. Mr. Chrystler stated that he would bring a corrected red-line version of the rule to the May meeting.

### Rule 4.3

Mr. Sackett and Mr. Roche presented their recommended modifications to Rule 4.3 to accommodate “unbundling.” Mr. Sackett stated that he felt the rule should place the burden on the attorney providing the partial representation to let the other attorney know the scope of such representation. Mr. Chrystler suggested two minor corrections to section (b) – the capitalization of Rule in the third line and the addition of the word “be” so that the phrase is “person considered to be represented by counsel.” Mr. Sackett moved to approve the proposed Rule 4.3 with Mr. Chrystler’s revisions. Mr. Wunderli seconded the motion, and it passed unanimously. Several committee members suggested that the language in Rule 4.2 and 4.3 relating to unbundling should use the same phrasing and terminology. Mr. Johnson moved that 4.2(b) be amended so that it reads like 4.3(b). Judge Howard seconded the motion, and it passed unanimously.

### Rule 6.5

Mr. Schultz led the discussion as to Rule 6.5. He indicated that this is a new rule that is aimed at dealing with those situations where lawyers provide limited legal services such as advice-only clinics or pro se counseling. Mr. Schultz moved to adopt Rule 6.5 as proposed. Mr. Johnson seconded the motion, and it passed unanimously.

### Ghostwritten Pleadings

Ms. Honarvar expressed concern about unbundling in the specific area of ghostwritten pleadings. She indicated that she is concerned that if a lawyer does not have to disclose his or her name or sign the pleading, he or she will be insulated from the constraints of Rule 11 and Rule 3.3. Judge Roth stated that he understood the concern, but that he felt sanctioning a way for pro se individuals to have some legal assistance outweighed the risks associated with ghostwriting and Rule 11 violations. Mr. Burton indicated that he thought it would be appropriate to have further committee discussion about the concept of ghostwriting without disclosure, and that such topic would be scheduled at a future committee meeting.

### Unbundling Generally

Mr. Burton asked committee members to ratify their earlier straw vote in which they indicated that they supported the concept of unbundling, applied broadly. Mr. Burton further stated that he would like to indicate in any cover letter sent to the court, that this is the position of the committee as to the unbundling of legal services. Mr. Schultz made the motion that this position be endorsed by the committee. Mr. Johnson seconded the motion, and it passed unanimously.

IV. OTHER BUSINESS AND ADJOURN

Mr. Sackett updated the committee as to the status of the definition of the practice of law recommended to the Supreme Court by the committee. He indicated that the Court had published the definition for comment on the court's web page, and that to date eleven comments had been received, most of which were supportive of the proposed definition.

Mr. Burton made the following rule assignments for the May 17<sup>th</sup> meeting:

Rule 3.8 Stuart Schultz, Nayer Honarvar  
Rule 5.3 Bill Hyde, Billy Walker  
Rules 4.1, 5.4 Judge Hansen, Judge Maughan  
Rule 7.3 Judge Roth, Steve Johnson  
Rule 5.5 Gary Sackett, Kent Roche  
Rule 6.1 Paula Smith, Earl Wunderli  
Rule 5.7 Judge Howard, Gary Chrystler

Mr. Burton requested that committee members get their written information regarding those assignments to Ms. Branch at least 10 days before the May meeting.

The next meeting will be held on May 17, 2004, at 4:30 p.m., at the Law and Justice Center. There being no further business, the meeting was adjourned.