

**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  
May 17, 2004  
4:30 p.m.

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ATTENDEES

Robert Burton, chair  
Steven Johnson  
Judge Paul Maughan  
Kent Roche  
Judge Stephen Roth

Gary Sackett  
Stuart Schultz  
Billy Walker  
Earl Wunderli  
Matty Branch

EXCUSED

Gary Chrystler  
Judge Royal Hansen  
Nayer Honarvar  
Judge Fred Howard  
Paula Smith

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee. Mr. Wunderli announced that the minutes were "perfect," and he moved to approve them. Mr. Johnson seconded the motion, and it passed unanimously.

Various members of the committee expressed appreciation to Mr. Burton for the lovely letter he prepared on behalf of the committee and sent to Bill Hyde's widow, Karen.

2. UNBUNDLING OF LEGAL SERVICES

Mr. Burton distributed a draft of a letter he proposed to send to Chief Justice Durham advising as to the status of the committee's review of the Utah State Bar's petition regarding the unbundling of legal services. The committee unanimously approved sending the letter to Chief Justice Durham.

3. FOLLOW-UP ON DEFINITION OF PRACTICE OF LAW

Mr. Sackett advised that the comment period had either expired, or would shortly expire, as to the proposed Rule 6.1 on the definition of the practice of law. Ms. Branch confirmed that all comments received as to the proposed rule will be sent back to the committee for review. Mr. Sackett suggested that the comments first be sent to the subcommittee for review and recommendations as to further changes to the rule. Mr. Burton agreed with this approach and stated that this would likely be an agenda item at the June meeting.

4. FOLLOW-UP MATTERS FROM APRIL 19 MEETING

The versions of Rule 1.13 and Rule 4.3, as approved at the April meeting, were distributed to committee members. The committee felt the versions distributed reflected the final action taken by the committee.

5. LETTER OF INMATE JOHN W. MAGNESS

The committee reviewed Mr. Magness's letter as well as the response prepared by Ms. Honarvar. The committee approved sending the proposed letter to Mr. Magness.

6. ETHICS 2000 MODEL RULES

Rule 3.8

The committee reviewed the memo provided by Ms. Honarvar and Mr. Schultz. Mr. Schultz advised that he had no experience in the area of the prosecution of criminal cases, but that he felt the proposed model rule 3.8 was preferable to the present Utah rule because it was more comprehensive and afforded prosecutors some discretion. Mr. Sackett directed attention to subsection (d) that required disclosure to the tribunal. He questioned whether a judicial procedure imposed on lawyers should be included in an ethical rule. Mr. Sackett also stated that he didn't see why the prosecutor had the responsibility of making a specific disclosure to the tribunal since the defense would likely make whatever disclosures they felt helpful to their case. Judge Roth expressed concern about subsection (e) stating that subpoenaing lawyers has always been a touchy issue. He suggested that the committee get input from prosecutors on the state and federal level as to whether they see any problems with the proposed model rule. Mr. Burton suggested that Mr. Schultz check the "Reporter" to determine the rationale for section (e), and that he also contact local prosecutors. It was agreed that action on Rule 3.8 would be deferred until the June meeting when Mr. Schultz could present the additional information.

Rule 4.1

Mr. Burton stated that Judge Hansen had advised him that he was not able to complete his review of Rule 4.1 in time for the May meeting. Review of the rule was deferred to the June meeting.

Rule 5.4

Judge Maughan led the discussion as to Rule 5.4. He indicated that according to the Ethics 2000 Report, the amendment was proposed to permit sharing of court-awarded fees with non-profit organizations. Mr. Walker raised the issue of whether Rule 5.4(a) conflicts with the prohibition on kickbacks contained in Rule 7.2(c). Committee members were basically in agreement that the phrase "recommended employment" contained in (a)(4) was the problematic part of the proposed amendment. Mr. Wunderli further questioned why the amendment to

5.4(a)(2) had eliminated the provision related to completing the unfinished legal business of a deceased lawyer. It was the general consensus of the committee that this provision makes sense and should not be eliminated from the rule. Judge Maughan stated that he would further review the proposed amendment in light of the concerns raised at the committee meeting. Further action on Rule 5.4 was deferred to the June meeting.

### Rule 7.3

Mr. Johnson led the discussion as to the Ethics 2000 amendments. He stated that the professional conduct committee had spent a lot of time in making revisions to the rule in 2001, and that it was his view that the Utah version and the model rule were reasonably similar, and that the model rule version could be adopted with minor changes. Mr. Johnson suggested that the definition of “real-time electronic contacts” in the current Utah rule should be kept, but instead of placing them in the actual rule, they should be placed in the Comments as a new comment, (1)(a). Mr. Sackett stated that the committee had spent a long time deciding on what the definition of “real-time electronic contacts” is, and he questioned whether the committee really wanted to undo what they had done before in this area. Mr. Sackett then raised the issue of what public policy was being served by requiring a lawyer to include the words “Advertising Material” on the outside envelope of certain communications. Mr. Walker stated that he felt the rule had been designed for the low-level, unsophisticated client who might be easily misled. However, Mr. Walker indicated that he doesn’t think the notation really does any good. Mr. Sackett felt the requirement on the envelope demeaned the communication, and that if the solicitation was coercive or misleading, that could be dealt with under other of the ethical rules. Mr. Sackett made the motion to eliminate subsection (c). Mr. Schultz seconded the motion. The motion failed, with three in favor and four opposed. Mr. Wunderli questioned why the language “known to be in need of legal services” in section (c) was not included in (a). Mr. Johnson said that he would make further revisions to the rule and bring it back for discussion at the June meeting.

### Rule 5.5

Mr. Roche led the discussion as to the proposed model Rule 5.5. He indicated that most of the changes to the model rule addressed MJP issues and built in safe harbors for situations that regularly occur in litigation and transactional work. Mr. Roche and Mr. Sackett recommended adoption of the model rule other than a modification to Comment (2). They indicated that, assuming the Supreme Court adopts the 6.1 definition of the practice of law, the second sentence of Comment (2) of the model rule would not be accurate. Mr. Johnson moved to adopt the Ethics 2000 version of the rule subject to appropriate changes to Comment (2). Judge Roth seconded the motion, and it passed unanimously.

Rule 5.7

Since Judge Howard and Mr. Chrystler were both unable to attend the meeting, discussion and action as to Rule 5.7 was deferred until the June meeting.

7. OTHER BUSINESS AND ADJOURN

Mr. Burton made the following assignments for the upcoming June 21 meeting:

- Mr. Sackett, Mr. Chrystler, Judge Howard and Ms. Smith will make recommendations with respect to Rule 4.2.
- Mr. Walker will examine Rules 5.1 and 5.3 and will work with Ms. Honarvar and Ms. Schultz as needed.
- Mr. Sackett and his subcommittee will examine the definition of the practice of law in light of comments submitted during the comment period.
- Ms. Honarvar and Mr. Schultz will make recommendations with respect to Rule 3.8.
- Judge Hansen and Judge Maughan will address Rules 5.4 and 7.2.
- Judge Roth and Mr. Johnson will address Rule 7.3.
- Mr. Sackett will present proposed language that explains why Comment [1] of Utah Rule 8.5 is different from the ABA's Comment.
- Judge Howard and Mr. Chrystler will make recommendations regarding Rule 5.7.
- Mr. Burton asked committee members to get their written materials to Ms. Branch by no later than June 14.

The next meeting will be held on June 21, at 4:30 p.m., at the Law and Justice Center. There being no further business, the meeting was adjourned.