

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
June 21, 2004
4:30 p.m.

ATTENDEES

Robert Burton, chair
Gary Chrystler
Judge Royal Hansen
Nayer Honarvar
Steven Johnson
Judge Paul Maughan

Kent Roche
Judge Stephen Roth
Gary Sackett
Paula Smith
Billy Walker
Matty Branch

EXCUSED

Judge Fred Howard
Stuart Schultz
Earl Wunderli

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee and moved to approve the minutes of the May 17, 2004, meeting. Mr. Roche seconded the motion, and it passed unanimously.

2. RULE REVIEW STATUS

Mr. Burton suggested October 1, 2004, as a target date to have completed committee review of the Ethics 2000 model rules. Ms. Branch indicated that she will determine in what format she needs to deliver proposed rule amendments to Tim Shea for official publication purposes. She will also review the files, electronic or otherwise, and determine if she has the final version of those rules approved by the committee.

3. ETHICS 2000 MODEL RULES

Rule 8.5 Comment

Mr. Sackett distributed proposed Comment (1)(a) to Rule 8.5 which explained why the committee made the changes that it did to the rule. Mr. Sackett moved to approve the language of the comment. Mr. Roche seconded the motion, and it passed unanimously.

Rule 3.8

By e-mail, Mr. Schultz advised the committee that Dave Schwendiman, of the U.S. Attorney's office, had reviewed the proposed rule and forwarded it to the Justice Department in Washington for review and comment. Mr. Schwendiman is interested in providing input to the committee as to the rule. Therefore, consideration of Rule 3.8 was deferred until the July meeting. Ms. Smith indicated that she had contacted a number of attorneys in the Attorney General's office and the District Attorney's office and that they had expressed opposition to the proposed rule changes. Ms. Smith indicated that she will get a memo to Mr. Schultz and Ms. Honarvar detailing the comments in opposition.

Rule 5.4

Judge Maughan stated that based upon discussion at the last committee meeting, he and Judge Hansen recommended that subparagraph (4) not be included in the rule. He also recommended that the originally deleted opening sentence to subparagraph (2)(a) be included, with the subparagraph being divided into two separate subparts. Mr. Sackett moved to adopt Judge Maughan's recommendation as to subparagraph (a)(2) so as to retain the old language, add the new language, and to separate the subparagraph into subsections (i) and (ii). Mr. Chrystler seconded the motion, and it passed unanimously.

Mr. Sackett moved to adopt the language of subparagraph (4), with the deletion of the word "recommended." Mr. Johnson seconded the motion. Three committee members voted in favor of the motion, six opposed, resulting in subparagraph (4) being deleted from Rule 5.4. Mr. Burton moved to adopt Comment (2) as proposed. Mr. Chrystler seconded the motion, and it passed unanimously.

Rules 5.1/5.3

Mr. Walker stated that he basically agreed with the Ethics 2000 changes to both rules but had concern as to those changes which suggested law firm discipline. Mr. Walker indicated that proposal (b) as to Rule 5.1 reflected the suggestions of the National Organization of Bar Counsel. Mr. Walker moved for approval of 5.1 as contained in proposal (b) with the deletion of "shareholder" in subpart (a) and the deletion of the phrase "although a law firm may also be disciplined from Comment (2) as well as the deletion of the word "still" and the word "shareholder." Mr. Sackett seconded the motion, and it passed unanimously.

Mr. Walker moved for the approval of proposal (b) as to Rule 5.3, as to the same deletions as approved in Rule 5.1. Mr. Johnson seconded the motion, and it passed unanimously.

Rule 7.3

Mr. Johnson reviewed the changes in Rule 7.3 that he and Judge Roth were recommending after considering the comments at the last committee meeting. Mr. Johnson indicated that they had made the “in person or other real-time communication” language consistent throughout the rule and the comments. The committee initially focused on the issue of whether the rule should require the designation of certain communications as “advertising materials.” Mr. Burton made the motion that communications from a lawyer soliciting employment should be required to include such notation. Mr. Walker seconded the motion, and it passed on a 6 to 4 vote.

The committee then focused on subpart (c). Mr. Johnson moved that the subpart be approved as recommended subject to the deletion of the phrase “who is not an organization and who is . . .” and deleting the requirement that the words “advertising material” be at the ending of any communication. Mr. Sackett seconded the motion, and it passed on an 8 to 2 vote. Special consideration was given to Comment (7). Mr. Johnson moved to approve Comment (7) as presented, with the deletion of the underlined portion of comment (7)(a) and the placement of the first sentence of comment (7)(a) to the end of comment (7). Mr. Walker seconded the motion, and it passed unanimously.

Finally, Mr. Johnson moved for overall approval of Rule 7.3 subject to the specific changes described above. Mr. Burton seconded the motion, and it passed unanimously.

Rule 6.1

Mr. Sackett advised that he had reviewed all the comments that had been submitted in response to the publication of Rule 6.1 - definition of the practice of law. He indicated that none of the comments indicated a substantive complaint as to the style and/or method of defining the practice of law. Further, Mr. Sackett stated that subpart (c)(12) got the most attention in the comments, and that the Bar Commission had suggested elimination of the subpart in favor of the Supreme Court setting up an oversight group. Mr. Sackett distributed a draft outline at the comments as to the rule. Mr. Burton requested that the Rule 6.1 subcommittee present any suggested revisions to the rule based on the comments received at the July committee meeting.

4. AGENDA ITEMS FOR JULY MEETING

Rule 3.8 - Ms. Honarvar and Mr. Shultz

Rule 4.1 - Judge Hansen

Rule 4.2 - Ms. Smith, Mr. Sackett, Mr. Chrystler and Judge Howard

Rule 5.7 - Mr. Chrystler and Judge Howard

Rule 7.2 - Judge Hansen and Judge Maughan

Rule 6.1 - Definition of the practice of law - Mr. Sackett, Mr. Johnson, Ms. Honarvar and Mr. Wunderli

5. ADJOURN

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