

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
October 18, 2004
4:30 p.m.

ATTENDEES

Robert Burton, chair
Gary Chrystler
Judge Royal Hansen
Nayer Honarvar
Judge Fred Howard
Kent Roche
Judge Stephen Roth

Gary Sackett
Stuart Schultz
Paula Smith
John Soltis
Earl Wunderli
Matty Branch

EXCUSED

Steven Johnson
Judge Paul Maughan
Billy Walker

1. Welcome and Approval of Minutes

Mr. Burton welcomed the members of the committee. Mr. Wunderli moved to approve the minutes of the September 20, 2004, meeting. Mr. Chrystler seconded the motion, and the minutes were approved unanimously.

2. Meeting with Supreme Court as to Definition of Practice of Law

Mr. Burton advised that the meeting was held with Supreme Court justices on October 13, and that he attended along with Gary Sackett, Earl Wunderli, Steve Johnson, and Nayer Honarvar. Also in attendance were Katherine Fox, general counsel for the Bar, and Victoria Kidman, chair of the Bar's Unauthorized Practice of Law Committee. Mr. Burton advised that all of the invited guests at the meeting were in favor of the proposed definition. Ms. Fox and Ms. Kidman had some enforcement issues, but were supportive of the definition, and indicated to the Court that they thought it would be helpful to have a definition in place. Mr. Burton advised that the Court wanted the Bar Commission and UPL Committee to take one final look at the proposed definition. The justices also wanted the latest version of the definition to be e-mailed to all members of the Judiciary requesting any final comments or concerns. Mr. Sackett stated that he had spoken individually with each of the justices after the meeting, and he felt that all seemed to be in favor of it. Mr. Burton stated that he was hopeful that the Court would adopt the definition, and that perhaps it would serve as a model for other jurisdictions.

3. Board Certification/Don Winder Request

Mr. Burton shared the information he had located as to the procedure the ABA uses to certify entities. He also stated that the ABA rule provides that certification for both the applicant and the certified entity has to be renewed every five years. Mr. Sackett stated that he believed the Ethics 2000 version of Rule 7.4, which the committee had already approved, would permit the acknowledgement of certification requested by Mr. Winder. Mr. Burton moved that resolution of the court's referral should be accomplished by referring the Court and Mr. Winder to the version of Rule 7.4 adopted by the committee. Mr. Sackett seconded the motion, and it passed unanimously. Mr. Burton will send appropriate letters to the Chief Justice and Don Winder advising as to this outcome.

4. Ethics 2000 Model Rules

Comment to Rule 3.8

Mr. Schultz reviewed the comment he had drafted explaining why Utah's present Rule 3.8 was retained rather than the ABA model rule. Mr. Sackett stated that he thought the substance of the comment was accurate, but that changes to it should be made to delete any reference to the committee. Mr. Sackett distributed a revised comment. Mr. Schultz moved to adopt the language suggested by Mr. Sackett. Mr. Wunderli seconded the motion, and it passed unanimously.

Rule 6.1 (Pro Bono Service)

Ms. Smith advised the committee as to the process she and Mr. Wunderli had employed in reviewing the proposed ABA model rule. She indicated that they were basically happy with the model rule. She advised that the Utah and the ABA model rule differ in two major respects. First, the Utah rule explicitly allows the provision of \$10.00 an hour as a substitute for the aspirational pro bono hours. Second, the Utah rule has explicit reporting instructions. Ms. Smith indicated that they recommended adoption of the ABA model rule with the addition of the uniquely Utah provisions concerning reporting and the \$10.00 per hour option. They also recommended the ABA's guideline of 50 hours of pro bono services. Ms. Smith moved to adopt the first two sentences of subsection (d), and a third sentence to the subsection to read, "in addition to providing pro bono legal services, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means." Mr. Wunderli seconded the motion, and it passed unanimously. Judge Howard then moved that the aspirational hour goal be 50 hours. Judge Roth seconded the motion and it passed 6 in favor, 5 opposed. Ms. Smith then moved to adopt subsection (c) as drafted. Mr. Wunderli seconded the motion and it passed unanimously. The committee then reviewed each of the Comments to the rule individually. Comment 1 was approved as recommended, except for the elimination of the "Utah Supreme Court" and the word "administrative." Comment 2 was approved as recommended. Comment 3 was approved as recommended. Comment 4 was approved with the deletion of the phrase "meeting the requirements in paragraphs a(1) and a(2) contained in the first sentence." Comment 5 was approved as recommended except that the first two sentences (in bold type) of the comment are deleted and the word and the reference to "judges" is to be

included in the comment. Comment 6 was approved as recommended. Comment 7 was approved as recommended. Comment 8 was approved except that the phrase in the second sentence “taking part in Law Day activities, and taking part in law related education activities” was amended to “Law Day and other law related education activities.” Comment 9 was approved as recommended. The proposed Comment 9(a) was adopted with the deletion of the phrase “called for by this Rule” found at the end of the Comment, and changing the third sentence of the Comment to read as follows: “The annual contribution alternative allows a lawyer to provide financial assistance to increase and improve the delivery of pro bono legal services. . . .” Comment 10 was approved except that the phrase in the first sentence “and other groups described in paragraph (a)(2)” was deleted. Comment 11 was approved as recommended. Comment 12 was approved as recommended except that it is to be numbered as Comment 11(a). Comment 13 was approved as Comment 12, and the phrase “responsibly set forth in this . . .” is deleted. Recommended Comment 14 was deleted in its entirety.

Rule 8.1

Mr. Soltis advised that he and Mr. Walker recommended the adoption of the ABA’s proposed Rule 8.1 and Comment. Mr. Wunderli moved to adopt Rule 8.1. Mr. Roche seconded the motion, and it passed unanimously.

Rule 7.6

Mr. Chrystler stated that there was no similar provision in the Utah rules currently, so ABA Rule 7.6 is entirely new for Utah. Mr. Chrystler indicated that the committee recommended adoption of the ABA version. Mr. Sackett moved to adopt the proposed rule. Mr. Wunderli seconded the motion. Discussion ensued in which many members of the committee questioned whether the proposed rule might have a chilling effect on lawyers making political contributions. Mr. Sackett moved to withdraw his motion. Mr. Schultz agreed to draft a proposed Comment which would indicate why the proposed ABA Rule 7.6 had been rejected.

5. Agenda Items for November Meeting

Rule 7.2 - Judge Hansen and Judge Maughan

Rule 6.1 (pro bono service) - Ms. Smith and Mr. Wunderli will provide final red-line and clean versions of the rule as approved

Rule 7.6 - Mr. Schultz will present a proposed Comment describing the reasons why the ABA Rule 7.6 was not adopted.

Rule 8.3 - Judge Hansen and Judge Maughan

Preamble - Ms. Honarvar and Mr. Schultz

6. Adjourn

The next meeting will be held on November 15, 2004, at 4:30, at the Law and Justice Center. There being no further business, the meeting was adjourned.