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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
November 15, 2004
4:30 p.m.

ATTENDEES

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

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

EXCUSED

Kent Roche
John Soltis

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee. Mr. Wunderli moved to approve the minutes of the October 18, 2004, meeting. Mr. Johnson seconded the motion, and the minutes were approved unanimously.

2. ETHICS 2000 MODEL RULES

Rule 6.1 (pro bono service)

Ms. Smith explained the latest revisions to Rule 6.1 proposed by her and Mr. Wunderli. Ms. Smith said that they recommended the removal of the comma after "nevertheless" near the end of the first sentence in Comment [3] and making "lawyer" possessive in Comment [9](a) so that it reads "no prohibition on a lawyer's contributing . . ." The committee unanimously agreed with the two proposed grammatical corrections. Ms. Smith then recommended that the last sentence of Section (d) be set out as a separate section (e). Mr. Johnson moved to adopt this recommendation. Judge Howard seconded the motion, and it passed on a 13 to one vote.

Rule 7.6 Proposed Comment

Mr. Schultz advised that Rule 7.6 was not a new rule proposed as part of Ethics 2000 but was part of the original model rules, and that Utah had not adopted Rule 7.6. Mr. Schultz stated that he thought the rule would be difficult to enforce fairly and that it

was not needed in order to deal with criminal conduct. He recommended that Rule 7.6 continue to not be part of the Utah rules. Mr. Schultz suggested that because Rule 7.6 had never been part of the Utah rules and was not part of the proposed Ethics 2000 rules, no official comment was needed as to why the rule was not adopted. Mr. Wunderli indicated that he thought it would be a hard rule to enforce, but he felt it should be adopted as a means of establishing a high ethical standard as to political contributions. Mr. Walker stated that he did not think Rule 7.6 was necessary. Mr. Schultz moved that Rule 7.6 not be adopted. Judge Howard seconded the motion, and it passed unanimously.

Rule 7.2

Judge Hansen reviewed his memo with the committee and indicated that he continued to recommend adoption of the Ethics 2000 Rule with the exception of deletion of the last sentence of (b)(2) that references approval of a lawyer referral service by an appropriate regulatory authority. Most of the discussion related to the rule focused on whether a lawyer should only be permitted to pay the usual charges of a not-for-profit lawyer referral service rather than any lawyer referral service. Mr. Sackett moved that “not for profit” be removed from section (b)(2) and that Comment [6] be appropriately modified to reflect this change. Mr. Chrystler seconded the motion, and it passed 13 to one. Judge Hansen indicated that he will make the appropriate changes to Comment [6] and bring the revisions to the next committee meeting.

Rule 8.3

Judge Maughan suggested to the committee that he felt most of the Ethics 2000 changes to Rule 8.3 were of a housekeeping nature rather than substantive. The committee discussed what was meant by the phrase “appropriate professional authority” in Section (a). Members of the committee also questioned whether the last sentence of Comment [5] was accurate or necessary. Judge Maughan moved to adopt the Ethics 2000 version of Rule 8.3 except for the deletion of the last sentence of Comment [5]. Mr. Sackett and Mr. Chrystler simultaneously seconded the motion, and it passed unanimously.

Preamble

Ms. Honarvar reviewed with the committee the comparisons she had made between the current Preamble in the Utah Rules and the ABA Ethics 2000 Preamble. She suggested that the ABA version essentially says the same thing as the Utah Preamble, but in a more succinct way. Discussion focused on whether paragraph 1 of the ABA Preamble should include that part of the Utah Preamble that outlines the rules an attorney must observe. Mr. Chrystler moved that the ABA version of the Preamble be adopted subject to the addition of the following sentence and the Attorney’s Oath to paragraph (1): “Every lawyer shall take the Attorney’s Oath upon admission to the practice of law.” Judge Roth seconded the motion, and it passed unanimously. Mr. Schultz moved that paragraph (9) of the Ethics 2000 Preamble be amended to change the last sentence to state “within the bounds of the adversarial system” rather than “within the bounds of the law.” Mr. Johnson seconded the motion, and it passed unanimously.

Rule 5.2

Mr. Burton advised the committee that he had not assigned a review of the Ethics

2000 Rule 5.2 because that rule and the Utah rule were essentially identical. He indicated that the only change would be numbering the paragraphs of the Comment. Mr. Johnson moved to approve the Ethics 2000 Rule 5.2 and to number the comments. Mr. Sackett seconded the motion, and it passed unanimously.

Rules 6.2, 6.3, 6.4

Mr. Burton stated that the Utah version of each of these rules is identical to the Ethics 2000 versions, and that all that would be required was the numbering of the Comments. Mr. Chrystler moved to adopt the Ethics 2000 version of these rules with numbering of the Comments. Ms. Smith seconded the motion, and it passed unanimously.

Rule 8.2

Mr. Burton indicated that he had not earlier assigned a review of the Ethics 2000 Rule 8.2 because he thought it was identical to the current Utah rule. He indicated that he has since discovered that there are differences between the two rules, the most significant of which is the removal of the word “public” as modifying “statement” in the first sentence of paragraph (a). Mr. Burton indicated that despite the differences, he recommended the ABA version of the rule be adopted. There was considerable discussion as to what was meant by a “public statement” and whether or not the prohibition should apply to public and private statements. It was agreed that action on Rule 8.2 would be deferred to the next committee meeting.

3. ADJOURN

Mr. Burton indicated that there will be no committee meeting in December, with the next meeting to be held on Monday, January 24, 2005, at 4:30 p.m. Prior to the January meeting, Ms. Branch will distribute to each subcommittee final redline versions of the rules on which the subcommittee worked. Ms. Branch will get such rules to each subcommittee by January 14. Committee members should review final versions of the rules prior to the January committee meeting and make notations as to any further edits that are required.