

**MINUTES OF THE SUPREME COURT'S ADVISORY COMMITTEE ON THE  
RULES OF PROFESSIONAL CONDUCT**

Law and Justice Center  
645 South 200 East  
Salt Lake City, UT  
February 4, 2013  
5:00 pm

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ATTENDEES

Steve Johnson, Chair  
John Bogart  
Tom Bruncker  
Simon Cantarero (via telephone)  
Judge Mark May  
Trent Nelson  
Kent Roche  
Gary Sackett  
Stuart Schultz  
Paula Smith  
Leslie Van Frank  
Paul Veasy  
Earl Wunderli  
Diane Abegglen, Staff

EXCUSED

Gary Chrystler  
Nayer Honarvar  
Billy Walker

1. WELCOME AND APPROVAL OF MINUTES

Steve Johnson welcomed the members of the committee to the meeting and asked if there were any corrections to the minutes of the November 26, 2012 meeting. The minutes were approved without changes.

2. FOLLOW UP DISCUSSION: RULE 8.4(a)

Mr. Johnson invited Leslie Van Frank and Simon Cantarero to present their subcommittee's recommendations regarding the possible amendment of Rule 8.4(a). Ms. Van Frank explained that the subcommittee has not yet reached consensus on a course of action. Billy Walker has proposed certain amendments to Rules 8.3 and 8.4 of the Rules of Professional Conduct and Rules 14-509 and 14-605 of the Rules Governing the Utah State Bar. Ms. Van Frank is proposing amendments to Rule 8.4 and Rule 14-605, only. Following a discussion of the two approaches, Gary Sackett

asked if the Supreme Court's concerns could be addressed by amending Rules 14-509 and 14-605 and leaving the Rules of Professional Conduct unchanged. Mr. Johnson suggested that it might be sufficient to add a comment to Rule 8.4. The committee concluded that this issue warrants further study. Ms. Van Frank made a motion that this discussion be postponed to the next meeting when Mr. Walker can be in attendance and that Mr. Sackett be added to the subcommittee. John Bogart seconded the motion and it passed unanimously.

3. FOLLOW UP DISCUSSION: RULE 1.10

Mr. Johnson asked Mr. Sackett, Tom Brunner, and Paula Smith to present their subcommittee's recommendations regarding the possible amendment of Rule 1.10. Mr. Sackett reported that after reviewing and considering the Ruling on Appeal of Dismissal issued by Bruce Maak (former chair of the Ethics and Discipline Committee of the Utah Supreme Court), the 1994 Opinion No. 142 of the Ethics Advisory Opinion Committee, and practical considerations facing governmental law offices, the subcommittee recommends that Rule 1.10 and Ethics Advisory Opinion No. 142 be left unchanged. Instead, the subcommittee recommends that Comment [1] to Rule 1.10 be changed to read as follows:

~~For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0 (e). "Firm," as used in this rule, is defined in Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition for purposes of determining conflict imputation can depend on the specific facts. See Rule 1.0, Comments [2] – [4].~~

The subcommittee further recommends that a new Comment [1a] be added to clarify that governmental law offices do not come within the definition of "firm" for purposes of Rule 1.10 conflict imputation. The proposed language of Comment [1a] is:

A group of lawyers who serve as counsel to a governmental entity, such as the offices of the Utah Attorney General, the United States Attorney, a district, county or city attorney does not constitute a "firm" for purposes of Rule 1.10 conflict imputation. Nevertheless, all other conflicts rules, such as Rules 1.7 and 1.8, must be fully satisfied on an individual-lawyer basis, and the group of governmental attorneys must, by adopting appropriate procedures, ensure that attorneys for whom there are individual conflict issues do not participate in and are screened from the particular representation. See Rule 1.0(l) for definition of "screened."

Mr. Bogart asked what the principled reason was for treating government law firms differently from private law firms. Mr. Sackett explained that there are practical reasons for different treatment. Mr. Bruncker and Ms. Smith added that, unlike private law firms, government lawyers have statutory and constitutional obligations to represent their clients. Following a group discussion, Ms. Van Frank made a motion that the following clause be added to the first sentence of Comment 1[a]: “Because of constitutional, statutory and practical policy reasons, . . .” Trent Nelson seconded the motion, but the motion failed by a vote of 6 to 5.

Mr. Sackett then made a motion that the committee adopt the subcommittee’s proposal. Earl Wunderli seconded the motion, which passed by a vote of 9 to 2. Mr. Johnson will present the committee’s recommendations to the Supreme Court at a future court conference.

4. FOLLOW UP DISCUSSION: RULE 5.4(e)

Mr. Johnson asked Paul Veasy, Trent Nelson, and Judge Mark May to present their subcommittee’s recommendations regarding a possible comment to Rule 5.4(e) to acknowledge a variation in Utah’s rule. The subcommittee recommends that Comment [2a] be changed to read as follows:

Paragraph (a)4 of the ABA Model Rule was not adopted because it is inconsistent with the provisions of Rule 7.2(b), which prohibit the sharing of attorney’s fees. Rule 5.4(e) addresses a lawyer practicing in a non-profit corporation that serves the public interest. There is no similar provision in the ABA Model Rules.

Following a group discussion, Mr. Bogart made a motion that the committee adopt the subcommittee’s proposal. Stuart Schultz seconded the motion, which passed unanimously. Mr. Johnson will present the committee’s recommendation to the Supreme Court at a future court conference.

5. DISCUSSION: ROBERT HILDER’S PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

This agenda item was deferred until the next committee meeting.

6. DISCUSSION: ABA’S ETHICS 2020 PROJECT

This agenda item was deferred until a future committee meeting.

7. OTHER BUSINESS

Mr. Johnson encouraged committee members to review Robert Hilder's written materials before the next meeting. The next meeting of the committee was set for March 4, 2013 at 5 p.m. at the Law & Justice Center.