

**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
March 25, 2013
5:00 pm

ATTENDEES

Steve Johnson, Chair
John Bogart
Tom Brunker
Simon Cantarero
Nayer Honarver
Kent Roche
Gary Sackett
Paula Smith
Leslie Van Frank
Billy Walker
Diane Abegglen, Staff

EXCUSED

Gary Chrystler
Judge Mark May
Trent Nelson
Stuart Schultz
Paul Veasy
Earl Wunderli

GUESTS

Robert Hilder

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 February 4, 2013 meeting. The minutes were approved without changes.

2. DISCUSSION: ROBERT HILDER'S PROPOSED AMENDMENTS TO THE
RULES OF PROFESSIONAL CONDUCT

Mr. Johnson invited Robert Hilder to present his proposals regarding changes to or further study of the Rules of Professional Conduct and related Rules Governing the Utah State Bar. Mr. Hilder provided the committee with four distinct proposals.

Proposal #1 relates to due process in the informal discipline process. Specifically, Mr. Hilder questioned whether current informal discipline procedure is fair in the context of cases where public reprimands may be ordered. He also questioned whether the Office of Professional Conduct's (OPC) role in the informal discipline

process is that of prosecutor or staff to the Ethics and Discipline Committee and recommended that OPC's role be clarified.

Proposal #2 relates to the judicial proceedings privilege in Utah. Mr. Hilder proposed that the committee review the judicial proceedings privilege in the context of Bar disciplinary proceedings. Among other things, Mr. Hilder would like to see the committee recommend to the Supreme Court that the judicial proceedings privilege be extended to professional conduct proceedings absent "abusive and frivolous litigation tactics" on the part of the attorney whose conduct is under review.

Proposal #3 relates to bifurcation in the informal discipline process. Mr. Hilder suggested that the informal discipline process be bifurcated to avoid improper overlap between determination of misconduct and determination of sanctions, and that mitigating and aggravating factors be considered in all lawyer discipline proceedings.

Proposal #4 relates to Rules 4.1 through 4.4 of the Rules of Professional Conduct. Specifically, Mr. Hilder questioned to whom Rule 4.4 is meant to apply and suggested that the rule is subject to being applied unevenly because its intent is not presently clear.

Mr. Johnson invited committee members to ask questions of Mr. Hilder and then asked Mr. Hilder if he would be willing to flesh out his concerns and any proposed rules changes in the coming months. Mr. Hilder agreed to do so. Mr. Johnson will form a subcommittee or series of subcommittees to study Mr. Hilder's proposals once he presents the committee with his supplementary proposals.

3. CONTINUED DISCUSSION: RULE 1.10

Mr. Johnson reported that he met with the Supreme Court on February 27, 2013 to discuss the committee's proposed comments to Rule 1.10. While the Court was receptive to the proposed comments, the justices observed that the comments represented a substantive change to Rule 1.10. The Court asked the committee to revisit the issue and draft an amendment to Rule 1.10 along with any necessary comments. Following his meeting with the Court, Mr. Johnson asked Gary Sackett, Tom Bruner, and Paula Smith to draft an amendment for consideration at today's meeting.

Following the committee's discussion, Leslie Van Frank made a motion that Rule 1.10(f), set forth below, be presented to the Supreme Court as a proposed rule change. Mr. Sackett seconded the motion, which passed by a vote of 5 to 1, with 3 committee members abstaining.

Rule 1.10. Imputation of Conflicts of Interest: General Rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(b)(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(b)(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(c)(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom, and

(c)(2) written notice is promptly given to any affected former client.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(f) An office of government lawyers who serve as counsel to a governmental entity such as the office 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.

Comment

Definition of “Firm”

[1] “Firm,” as used in this rule, is defined in Rule 1.0(d). Whether two or more lawyers constitute a firm for purposes of determining conflict imputation can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

[1a] Rule 1.10(f) does not appear in the ABA Model Rules. It is intended to recognize the inherent differences between an office of government lawyers and those in a firm, as defined in Rule 1.0(d). Notwithstanding the exclusion of an office of government lawyers from the provisions of Rule 1.10, all other conflicts rules, such as Rules 1.7, 1.8, and 1.11, must be fully satisfied on an individual-

lawyer basis, and the group of government 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. Johnson will prepare a letter to the Supreme Court recommending that proposed Rule 1.10(f) be sent out for public comment.

4. CONTINUED DISCUSSION: RULE 8.4(a)

Mr. Johnson invited Ms. Van Frank, Mr. Sackett, Billy Walker, and Simon Cantarero to present their subcommittee’s current proposals to address the Supreme Court’s concern about sanctioning an attorney under Rule 8.4(a) based solely on that attorney’s violation of other Rules of Professional Conduct. Ms. Van Frank began by indicating that the subcommittee has “agreed to disagree” at this point in time. She briefly summarized Mr. Sackett’s and Mr. Walker’s proposals and then asked the two of them to explain their distinct approaches.

Mr. Sackett suggests renumbering and amending Rule 14-605 of the Rules Governing the Utah State Bar to include the following new subsection (b):

(b) For purposes of this rule, sanctions may be based on a violation of Rule 8.4(a) only in connection with (i) a violation of, (ii) an attempt to violate, (iii) knowingly assisting or inducing another to violate, or (iv) violating through the acts of another one or more of the other Rules of Professional Conduct. A violation of Rule 8.4(a) without reference to another Rule of Professional Conduct does not provide a separate basis for imposing or increasing sanctions.

Mr. Walker recommends a much broader approach; namely, amending 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. The committee discussed the pros and cons of both approaches. Following a straw poll which indicated that further discussion would be beneficial, Mr. Johnson asked that this agenda item be placed on the May 20, 2013 meeting agenda.

5. DISCUSSION: ABA’S ETHICS 2020 PROJECT

This agenda item was deferred until the April 29, 2013 meeting.

6. OTHER BUSINESS

The next 2 meetings of the committee were set for Monday, April 29, 2013 and Monday, May 20, 2013 at 5 p.m. at the Law & Justice Center.