

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 20, 2006
5:00pm

ATTENDEES

Robert Burton, chair
Matty Branch
Gary Chrystler
Nayer Honarvar
Steven Johnson
Judge Paul Maughan
Judge Stephen Roth

Gary Sackett
Stuart Schultz
Paula Smith
John Soltis
Billy Walker
Earl Wunderli

EXCUSED

Kent Roche
Judge Royal Hansen
Judge Fred Howard

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee. Mr. Wunderli moved for adoption of the minutes. Judge Maughan seconded the motion, and it passed unanimously.

2. RESULTS OF VOTE BY E-MAIL ON LAWYER/MEDIATOR ISSUE

By an e-mail sent by Ms. Branch to all members of the committee on February 17, 2006, members were asked to vote on the following motion by February 24, 2006:

Mr. Burton made the motion, seconded by Ms. Smith, that the committee do what is necessary to amend the rules of professional conduct to allow a lawyer/mediator at the end of an entirely successful mediation, with appropriate waivers, to draft the legal documents for both parties necessary to complete the divorce.

The votes received were ten in favor of the motion, with five against.

3. DISCUSSION: PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT AND THE COMMENTS TO ALLOW LAWYER/MEDIATOR TO COMPLETE DIVORCE PROCEEDING FOR BOTH PARTIES.

Mr. Burton asked Ms. Honarvar and Mr. Schultz to act as a subcommittee to examine the rules and propose any changes to them and/or the comments which they thought appropriate to implement the decision of the committee on the above motion.

Mr. Schultz advised the committee that he had researched what other states might have done to their rules to permit a lawyer/mediator to complete the divorce for both parties. His research found that the following states, whose Rules 1.2 and 2.4 are the same as Utah's version, include mediators as "third-party neutrals" in Rule 2.4 - Arizona, Arkansas, Delaware, Idaho, Iowa, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, North Carolina, Pennsylvania, South Carolina, and South Dakota. Mr. Schultz stated that Oregon was the only state he found that had modified its rules to permit a lawyer/mediator to prepare documents for filing on behalf of both parties.

Ms. Honarvar told the committee that her efforts had been directed to determining which of the rules would require revisions to clarify the attorney/mediator role. Ms. Honarvar suggested changes to the Preamble, Rules 1.2, 1.3, 1.4, 1.6, 1.7, 1.14, 1.16, 2.4 and 3.7. Mr. Sackett and Mr. Schultz stated that they thought it was not necessary to make amendments to all the rules Ms. Honarvar suggested, and that it would be adequate simply to amend Rule 2.4 along the lines of the Oregon rule.

Mr. Sackett suggested amendments to Rule 2.4 that would recognize the post-mediation activity as "representation" and would add a new section (c) to require the court to be notified of the lawyer's post-mediation role. Mr. Sackett also urged the addition of a new comment [5a] that explains that the proposed lawyer/mediator role is not inconsistent with Rule 1.7(a)(1), and that this is a variation from the Model Rule.

Mr. Soltis questioned whether the lawyer/mediator is really taking on a lawyer's role, and Mr. Chrystler wondered whether the committee intended an attorney/client relationship to be created. Mr. Burton said he thought the lawyer role existed but only for the sole purpose of drafting documents.

Mr. Johnson stated that the committee needed to decide whether the proposed rule change as to the lawyer/mediator role only applied to divorce proceedings or to

all civil proceedings. Mr. Chrystler said he thought it did not make sense philosophically or intellectually to have the rule only apply to divorce mediation. Mr. Sackett said he agreed with Mr. Chrystler. Ms. Smith said that because of the need to move divorces forward and to simplify the process for the public, she was willing to permit an intrusion into the core values, but that she does not think an intrusion into the core values is appropriate for mediations generally.

Mr. Johnson made a motion to expand the rule change to cover a lawyer serving as a mediator in any proceedings, not just a divorce proceeding. Judge Maughan seconded the motion. The motion passed, 7 in favor, 5 against.

Ms. Honarvar again stated that she felt strongly that the proposed change to Rule 2.4 necessitated changes to other rules, and that failure to do so would result in confusion among the Bar.

Mr. Johnson made a motion that Rule 2.4 be amended as Mr. Sackett had proposed in his e-mail, and that the new comment [5a] also be added. Mr. Sackett seconded the motion. Mr. Schultz then amended the motion to require that in addition to the changes included in Mr. Johnson's motion, the phrase "except as stated in Rule 2.4(c)" be added to the beginning of subpart (a) of Rule 1.12. Mr. Johnson seconded the amended motion. The amended motion passed 10 in favor, 2 against.

4. IN-HOUSE COUNSEL RULE

Several members of the committee asked whether the Supreme Court would be asking the committee to review the comments received as to the in-house counsel rule. Ms. Branch said she did not know what the court wanted to do at this point in time. She said the comment period closes on April 7, and that the court would decide after that date how it wished to proceed. Mr. Sackett said that the in-house counsel rule was an adjunct to the practice of law rule that the committee had worked on, and that it, therefore, made sense for the committee to have an opportunity to respond to the comments. Ms. Branch said she would advise the court of the committee's interest in responding to the comments.

5. NEXT MEETING

The next committee meeting will be Monday, May 15, 2006, at 5:00pm at the Law and Justice Center.

3/20/06 Rules of Professional Conduct

Excused

Kent Roche
Judge Royal Hansen
Judge Howard

Present

Earl Wunderli
Stuart Schutte
Paula Smith
Bob Buntow
Judge Maughan
Billy Walker
Steve Johnson
Gay Sackett
Gay Chrytle
Nayer Honarvar
John Soltis
Judge Roth

Add results of tax vote
on motion to track
minutes

Minutes 2/13/06 moved

approved Earl; ~~Steve Johnson~~ Judge Maughan
Sean

Stuart looked at what other states might have done
Oregon rules are very similar to Utah rules as
far as numbering

two Oregon
rules

[Rule 1.12 (a) - except as stated in Rule 2.4(b)
Rule 2.4

Gay Sackett - expanded on what ~~of~~ Oregon rules
→ double under scoring are his additions

added "formal" documents

Gay suggested new comments

to make tie with Rule 1.7

not considered adverse because
situation fully resolved

Steve Johnson wondered ~~if~~ if divorce
had to be fully resolved → sad frequently
one issue is resolved like alimony

Gay Sackett - try to Rule 1.12 address
allows if have conflict - so doesn't
need reference to 2.4

Nayer's view

expressed in her email
4:12pm

Rules of mediation require mediator to make
opening statement what is mediator's role - their role
ca.

to be a divorce mediator - have to be on roster

Sackett - didn't think rule should be limited to
divorce ~~for~~ - should be same for all
mediations

Chrysler questioned whether attorney/client
relationship was to be created ^{committee intended}

Nayer debited trial of charges 1.12;
2.4 was what Sadlet; Scholtz were
doing -

Johnson - 3.9C ^{Comment} but evidence testy
not needed

Soltis - questioned whether lawyer/mediator is
needed ^{rather than} lawyer role

Bob Burton - said he thought lawyer role
existed for sole purpose of drafting
documents - limited scope

Nayer - parties in mediation once they have
reached settlement - that's counterproductive
to advise parties should seek ~~leg~~ outside
legal advice

Chrystler -

he thought notion was only limited to
lawyer/mediators - not non-lawyer
mediator

Bob says he trusts

Johnson
Soltis

} agreed that additive
reminders - ~~direct~~ ^{recommenda-} ^{tion}

to seek independent

counsel is
a good idea -

provides some sort of

protection for lawyer/mediator

as rules do require when attorney signs documents -
attorneys for both parties

Steve ^{Johnson} - committee needs to decide whether
rule changes only apply to divorce
proceedings or all civil proceedings

Chrystler said he thought it didn't make sense ^{philosophically}
to apply only to divorce mediation ^{intellectually}

Sweett
agreed



expand proposal to all
Johnson must appear to all mediators — 7 infra
attorney / 5 against
Judge Mayhan seconded

Stuart agreed
Paula — thinks divorces are imp't to more formal Ed
that was why she voted for intrusion on
core values — doesn't think all mediators
should permit change in core values

~~Nayer~~ — thought

Nayer's suggested change to
preamble —

~~Streckhorn — intrusive motion~~

~~amend preamble part II
may reduce to writing
str~~

~~as mediator, a lawyer acts as a
neutral facilitator and reduces to writing the parties'
stipulated resold~~

Stor
Johnson motion to
amend

passed 10-2

Rule 2.4 as Sackett proposed ^{add} new comment (5a)

~~Sackett~~

Sackett seconded motion

Paula — ^{at what moment} ~~then~~ are parties not adverse

Stud add to 1.12 ^{beginning of sub(a)} 1.12(a)

except as stated

Structural	10 yrs
Here sealed	2 no

In house counsel rule -

~~Section~~ committee happy to
receive comments
at request

"thinks adjacent to practice of law rule"

May 15 next meeting

Bob Benton - get emails on original vote
minutes

minutes not unanimous