Memorandum

To: The Supreme Court Advisory Committee on The Rules of Professional Conduct

From: Nayer Honarvar and Robert Burton

Date: 11/6/02

Re: Rule 1.5

We agree with both the black letter law and the comments in the ABA Model Rule 1.5. There are only two minor changes we propose. In subsection (b) of the Rule, we would strike the word "preferably." At the end of the last sentence, we would add the words "in writing." Therefore, the new subsection (b) to Rule 1.5, as we propose it, would read as follows:

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client in writing.

In paragraph [2] of the comment, we would strike the words "Generally, it is desirable to." We would replace those words with the following: "In these circumstances, the lawyer should." Therefore, as we propose it comment [2] to the Rule would read as follows:

> [2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. In these circumstances, the lawyer should furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible

> for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

Generally, we agree with almost everything the ABA did with respect to Rule 1.5. However, we believe that a lawyer's fee agreement should be in writing. In this regard, this Committee should be aware of the fact that the Ethics 2000 Committee recommended that all legal fee agreements be in writing, but the recommendation was not passed by the ABA House of Delegates. We believe that the Committee's recommendation was correct and the House of Delegates should have followed the recommendation rather than watering down the language about written fee agreements.

a defense in good faith."

A 2002 Ethics Advisory Opinion (Opinion No. 02-03, 2-27-02) recognizes this duty to the insured when it states that a lawyer may not permit insurance company guidelines or agreements to impair materially the lawyer's independent judgment in representing the insured.

For these reasons, the Committee felt that Rules 1.7 and 2.3, as they address these potential conflicts of interest issues, should *not* be changed from their recommended form.

Rule 8.4

An attorney commented that the new Rule 8.4, Comment 3, attempts to set new standards of political correctness by dictating what is or is not bias. He expressed concern that the Comment would require the Bar to become thought police or otherwise become involved in the "political correctness game."

Comment 3 is not new to the Model Rules, but it is new to Utah's Rules. Contrary to the concern of this attorney, neither the Rule nor the Comment state that held beliefs are inappropriate. The Comment only states that a lawyer should not by comment or action manifest bias *when that bias or prejudice is prejudicial to the administration of justice*. (Emphasis added.)

The Comment explicitly allows legitimate advocacy respecting the listed factors that might give rise to a claim of bias or prejudice. However, lawyers should not take action that is prejudicial to the administration of justice, regardless of their personal beliefs.

Another comment decried the removal from Rule 8.4 of the prohibition against sexual relations with a client that exploits the lawyer-client relationship. It appears that the person making the comment did not realize that this prohibition has merely been moved to a different Rule. Rule 1.8(j) now contains the prohibition against this activity.

The Committee voted to *not* change Rule 8.4 as proposed to the court.

Rule 1.5

An attorney comment expressed concern as to any relaxation in the requirement that fee agreements be in writing.

The committee felt that the phrase in Rule 1.5(b) stating "preferably in writing" provided adequate protection for the client while still giving flexibility to the attorney, and that the proposed amendment did not reduce the lawyer's responsibility to disclose fee arrangements to clients. The committee voted to *not* change the proposed rule.

From: Gary Sackett
To: bobb@burtonlumber.com; bwalker@utahbar.org; EMWUNDERLI@MSN.COM; glc101@veracitycom.net; jsoltis@co.slc.ut.us; Judge Fred Howard; Judge Paul Maughan; Judge Royal Hansen; Judge Stephen Roth; KRoche@pblutah.com; Matty Branch; nayerhonarvar@hotmail.com; psmith@co.slc.ut.us; sjohnson@norbest.com; sschultz@strongandhanni.com
Date: 12/13/2005 12:03:56 PM
Subject: Re: Minutes of November 21 Meeting

Matty: I will propose a minor modification to the first sentence of second paragraph under section 4:
Mr. Sackett stated that following an appeal to the Bar commission, the commission issued its own opinion which adopted the majority opinion except that it did not *permit* **address** whether the lawyer-mediator, after reaching a settlement, *to represent either party* **could represent one of the parties** .
(Deleted in italics and new in bold.)

>>> "Matty Branch" <mattyb@email.utcourts.gov> 12/12/05 5:05 PM >>>
Attached are the proposed minutes from the November 21st meeting. Bring any corrections or changes to the meeting on January 23 at 5:00 p.m. Happy holidays to you all.