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

Law and Justice Center
Salt Lake City, UT
June 20, 2005
4:30 p.m.

ATTENDEES

Robert Burton, chair
Gary Chrystler
Judge Royal Hansen
Judge Fred Howard
Steven Howard
Judge Paul Maughan
Kent Roche
Judge Stephen Roth
Gary Sackett
Stuart Schultz
Paula Smith
John Soltis
Earl Wunderli
Matty Branch

EXCUSED/ABSENT

Nayer Honarvar
Billy Walker

GUESTS

Chris Blake, Chief of Staff, Office of The Speaker of the House
Michael Christensen, Director, Office of Legislative Research and General Counsel
Gay Taylor, General Counsel, Office of Legislative Research and General Counsel
Roger Tew, Utah League of Cities and Towns

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee. Mr. Wunderli moved to approve the minutes of the May 16, 2005, meeting. Mr. Johnson seconded the motion, and the minutes were approved unanimously.

2. CONCERNS OF LEGISLATIVE LAWYERS AS TO PROPOSED CONFLICT OF INTEREST RULES

Mr. Burton asked the guests attending the meeting to introduce themselves and advise the committee as to their concerns. Ms. Taylor stated that the proposed rules legislative lawyers were concerned about were primarily the conflict of interest rules - Rules 1.7, 1.8(b), 1.9, 1.11, 1.13, and 1.18. She stated that the provisions of these rules were inconsistent with constitutional and statutory provisions governing the provision of legal services for the legislature. Ms. Taylor said their concerns arise because they are required to represent the legislature as an entity as well as representing all of its component parts, and that the informed consent requirements of the conflict of interest rules are unworkable for the attorneys for the legislature. Mr. Tew stated that he thought the proposed conflict of interest rules posed a problem for any attorneys representing

legislative bodies. He said that it is the political nature of legislative bodies that create the difficulty when attorneys are required to represent the legislative entity as well as individuals in the legislative entity.

Several members of the committee said they did not think there was a problem with the proposed conflict of interest rules because they felt the legislature and its component parts were looked upon as a single entity under the rules. Committee members also expressed concern about carving out a specific exception in the rules for legislative attorneys. Ms. Taylor and Mr. Tew stated that their concerns could be satisfactorily addressed by an additional comment to Rule 1.13 rather than by a specific carve-out in the rules themselves. It was mutually agreed that Mr. Tew and Ms. Taylor would draft a proposed comment and send it to Ms. Branch within the next two weeks for distribution to the full committee. Mr. Burton thanked the guests for presenting their concerns and indicated that the committee would review the proposed comment and get back to them the later part of July with the committee's reaction.

3. DISCUSSION AND ACTION AS TO COMMENTS RECEIVED

Rule 1.2

An attorney requested that the deleted portion of Comment 2 to Rule 1.2 be restored to the Comment. The deleted language states that an attorney is not required to pursue objectives or employ means simply because the client wants the lawyer to do so. The Committee decided that this language was unnecessary because of language in other Rules that essentially covers the same issues. Examples of this other language are as follows:

1. A new Comment 14 has been added to the Rule: "Lawyers are encouraged to advise their clients that their representations are guided by the Utah Standards of Professionalism and Civility and to provide a copy to their clients."
2. Former language of Rule 1.2(d) has been moved to Rule 1.4(a)(5): "A lawyer shall . . . consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the rules of Professional Conduct or other law."
3. Rule 4.4(a) provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."
4. Other Rules also assist in this matter: Rule 3.1 (Meritorious Claims and Contentions), Rule 3.3 (Candor toward a Tribunal), and Rule 3.4 (Fairness to Opposing Party and Counsel, and Rule 8.4 (misconduct)

Because of these factors, the Committee voted to *not* change Rule 1.2 as originally proposed to the Court.

Rule 1.6

Two changes were recommended to proposed Rule 1.6. The first suggested that the words "or is using" be added to the last phrase of Rule 1.6(b)(2) so that it reads, "(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used *or is using* the lawyer's services." The suggestion is to ensure that ongoing fraud is covered by the Rule.

The Committee felt that the words "has used" were sufficient to bring the exception up to the present time and thus covers ongoing legal services. No changes were necessary. The Committee voted to not change the proposed Rule 1.6(b)(2).

A second comment recommended that Rule 1.6(b)(6) be changed to read: "to comply with other law or a court order or when necessary to comply with these Rules," instead of "to comply with the law or court order or when necessary to comply with these Rules."

Originally when the Committee considered this Rule, there was a decision to not treat the Rules of Professional Conduct as "law." Since the time of that consideration, the Court has defined the law to include rules. See the Court's new Rule 1.0, Authorization to Practice Law, in Chapter 13a of the Supreme Court Rules of Professional Practice. In light of this new Rule, the Committee felt that there was not a need to make a separate reference to the Rules of Professional Conduct in the Rule.

After discussion the Committee voted to simply use the language of the ABA Model Rule, which reads: "to comply with other laws or a court order." The red-lined Rule would then read: "~~To~~ to comply with ~~the Rules of Professional Conduct or~~ other law or a court order."

Rule 1.8

One comment recommended that Rules 1.2, 1.6, 1.8 and 1.9 be modified because they allow a lawyer to be disloyal to a client in certain circumstances by revealing client confidences. The Committee recognized that there are many exceptions to the duty of an attorney to maintain client confidences. To some degree these exceptions allow a lawyer to reveal client confidences when societal needs exceed those of the client.

The Rules in question, and particularly Rule 1.8, are merely permissive, and not mandatory. Rule 1.8 also complies with current law (the comment expressed concern about a lawyer disclosing to the beneficiary the misdeeds of a client-fiduciary who has breached his or her fiduciary duty). The exceptions are narrowly drafted in order to protect the interests of the client, but also to protect the interests of society.

For these reasons, the Committee voted to *not* change the Rules from that which was submitted to the Court.

Rule 1.14

A comment was made raising a concern that Rule 1.14 is too restrictive on attorneys in protecting the interests of their clients with disabilities. The Rule requires a client to be at risk of "substantial " physical, financial or other harm before the lawyer can take action to protect the client without the consent of the client. The comment suggested that the risk of harm should not have to be substantial before the lawyer takes such action.

The Committee felt that one purpose of the Rule was to protect clients with diminished capacity from lawyers who might take advantage of them in some way. For this reason, the threshold is "substantial" risk. It was felt that this is an appropriate standard. The Committee voted to *not* change the proposed Rule

Rules 1.7 and 2.3

An attorney familiar with insurance defense work raised a concern over the requirement that before a lawyer may give an evaluation to a third party where the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer must first obtain the informed consent of the client. Rule 2.3(b).

This Rule becomes a problem in third-party insurance cases where the insured is represented by counsel appointed by the insurer. The situation is workable as long as there is no conflict between the insured and the insurer. However, where a conflict arises, such as where the insured wants to settle within policy limits to avoid further personal liability, but where the insurer does not want to settle at the proposed amount, the lawyer faces a conflict.

Because of their contracts with the insurers, insurance defense counsel want to be able to give evaluations to the insurers whether or not the insureds consent to the evaluations, and even though their loyalty lies with the insureds. They have suggested adding comments to Rules 1.7 and 2.3 which provide that these Rules do not apply to defense counsel in third-party insurance litigation matters.

The Committee voted to not add the comments. The Rules as suggested follow the prevailing law which says that in cases of conflicts between the insured and the insurers, the defense counsel must be loyal to the insured. Some states such as California have even gone so far as to require that separate counsel must be obtained in such cases in order to avoid the conflict of interest. Utah has not gone so far as to require separate counsel, but it has implied that separate counsel is necessary in the case of *Spratley vs. State Farm Mutual,* 78 P.3d 603 (UT 2003). In that case the Court said, "Thus, where no actual conflict exists or is foreseeable, an attorney will ordinarily represent both the interests of the insured and the insurer. However, where actual conflict exists or is likely to arise, the attorney's allegiance is to the insured because of an insurer's duty to provide 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.

Rule 4.2

The United States Attorney, Paul Warner, and the Attorney General, Mark Shurtleff, submitted comments expressing concern about the proposed amendment which deletes the phrase "is authorized to do so by the constitution, statutes, etc." and replaces it with the phrase "in order to meet the requirements of the constitution, statutes. etc," The comments suggest such a change would produce an inconsistency between the text of the rule and the Comment and would also be inconsistent with the intention of the agreements as to Rule 4.2 reached in the 1990s between prosecutors, defense lawyers, legislators, and the Utah Supreme Court. Judge Hansen moved to delete the words "in order to meet the requirements of" (line 12) from Rule 4.2(a) and insert the words "if authorized to do so by" in their place. Mr. Sackett seconded the motion, and it passed unanimously.

Rule 5.4

A comment was received suggesting that the cross-reference to Rule 7.2(c) in Comment [2a] should actually be a cross-reference to Rule 7.2(b). Paula Smith indicated that she agreed with the comment, and she moved that this change be made. Judge Maughan seconded the motion, and it passed unanimously.

4. NEXT MEETING

Monday, July 18, 2005, 4:30 p.m., Law and Justice Center.

Gay Taylor — gen'l counsel for legislature

Chris Blake — chief of staff speaker of house

Roger Tew — ores chairs cities & towns

Mike Christensen — director of office of legislative research & general counsel

6/20/05 Rules of Professional Conduct

Present
Burton
Smith
Rocke
Chrystler
Howard
Johnson
Maughan
Rothe
Sackett
Winderli
Mann
Judge Hansen

— Burton conducting

Visitors

Excused
Nayer
~~Judge Hansen~~
Billy Walker

Minutes

Carl moved to approve
Steve Johnson seconded
unanimously approved

Gary Taylor
conflict of interest rules

those rules
inconsistent with constitutional
& statutory provisions governing
legal services to legislature

1.7
1.8 sub B
1.9
1.11
1.13
1.18

represent legislature as entity
and each component entity

Committee Steve Johnson – only one legislature
only look at legislature as one
entity

political fissures – thinks this is where mischief would be
unless legislature
would claim
or ...
violat
leg. officials
legislature
response

questions
survey of other state legislatures
statutes in other states not enunciated

politics

legislative body — politically charged issues — unique dynamic

individuals within

~~Comment 11~~

Comment 13a — does it/that ~~relate~~ cover concern

Judge Roth suggested

represent individuals & the group

Ethics Advisory Committee issues ops

Gary suggests

bridge OPC — could issue an opinion on the issue to provide guidance/safe harbor

Tex prefers gen'l solution — safe for

acknowledges Govt bodies with multiple members

creating an exception to a rule that doesn't need an exception

don't want to carve out specific exceptn

└ take care of it in comment

└ Gay: Reza to draft comment to submit committee — will get to us within next few weeks

Comment to Judge Roth; Steve Johnson, rest of committee subcommittee · ok to ~~route~~

Steve recommends not change comment 2

Rule 1.2 Comment 2

Steve John's enough comments elsewhere in Rules & comment well covered even

Earl adopt Steve's recommend

Gay C. Sloan

Unanimous

Rule 1.6 Steve Johnson

wanted to keep rules of professional conduct in the rule

Steve to verify 2002 ABA change

track model rule language "1st rec "or is req" not necessary to"

Steve move pack-t

Steve motion "to comply with other law or a

Judge [illegible] seconded subject to all [illegible] — unanimous court order"

b(6) go with model rule language to comm if necessary ~~(b)(6) re~~

b(2) leave as is has used (2 opposed) 11 in favor

Use model language B4

Comments 12 & 13 ok

Rule 1.8 (also involves 1.2, 1.6, ~~[illegible]~~, 1.9)

Steve feels when it public good – rules allow lawyer to be disloyal to his client

Earl moved adopt Steve's recommen Paula 2nd

~~Steve~~ proposed to change ~~Earl~~

unanimous

Rule 1.14 (client with diminished capacity)

model rule uses "substantial"

"substantial" makes sense since allows some extraordinary cases

Steve moved to leave Rule 1.14 as is
Judge Howard 2nd
unanimous

Rule 8.4 comment 3

moved
Steve recommends no change to one
Paula 2nd
unanimous

Rule 8.4 – sexual relations

Steve moves to leave as is
Earl Seconds unanimous

Rule 1.7 & 2.3 Comments

Steve ~~thanks~~ recommends recommended by Rick Humphries

reject both comments

Both 2nd

Unanimous

Rule 1.5 Start now leave as is

~~Steve Uhlmann~~ second

leave "preferably in writing" Unanimous

Gary Sackett advised Ct adopted

definition of practice of law —

Charged now to Authorities to practice Law

Adopted framework adopted definition of "law"

Ct most significant change is (c)(12)

Rule 4.2

Hanson move adopt chgs to Rule 4.2 outlined by Shortlog: Paul

seconds

Unanimous

Rule 5.4(a)(4)

(2a) 7.2(b) rather than 7.2(c)

Pender; Judge Mayer

next meeting July 18

minutes