

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

Administrative Office of the Courts
230 South 500 East, Ste. 300
Salt Lake City, Utah 84102

February 26, 1996

PRESENT

Stephen Trost, Chair
Tom Arnett
Gary Sackett
Earl Wunderli
Gary Chrystler
Carolyn McHugh
Robert Burton
Thomas Kay
Stephen Hutchinson

ABSENT

Judge Ronald Nehring
Professor John Morris
William Hyde
Kent Roche

STAFF

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES. Stephen Trost welcomed the Committee members to the meeting. Stephen Hutchinson moved to approve the minutes of the January 29, 1996 meeting. The motion carried unanimously.

Staff provided an update on the recent rules sent to the Supreme Court for its approval. Staff noted that the Supreme Court unanimously adopted Rules 4.2 and 1.16 as presented to the Court. The rules will have an effective date of April 1, 1996.

II. SEXUAL ETHICS RULE. Commissioner Tom Arnett explained that the rules subcommittee had met and had agreed on the concept for a sexual ethics rule. After a rough draft rule was submitted, Gary Chrystler and Gary Sackett had proposed changes. The proposed changes were distributed to the Committee members at the meeting. Commissioner Arnett noted that the proposed rule does not ban all sexual relations.

Gary Sackett explained the reasons for his suggested changes to the proposed rule. Mr. Sackett noted that the rules subcommittee agreed that a sexual ethics rule is desirable. Mr. Sackett stated that the proposed rule is weighted with presumptions. Under the proposed rule, a lawyer would be burdened with proving a negative.

Earl Wunderli suggested that the last paragraph in the proposed comment be eliminated. Mr. Wunderli stated that it is not necessary to list things that a lawyer can show to rebut the presumption. Mr. Wunderli suggested simply stating that the presumption is rebuttable and leave it at that.

Stephen Hutchinson reiterated his position that sexual relations should not be allowed. Robert Burton suggested the rule should ban sexual relations with certain narrowly carved exceptions. Carolyn McHugh stated that the reason sexual relations are inappropriate is because the relations compromise other obligations of the attorney, such as zealous representation, independent judgment, etc. An attorney should be allowed the opportunity to show that the sexual relations do not affect those other obligations.

Mr. Sackett stated that the Committee must avoid being paternalistic. There are sexual relationships that don't affect the representation and the Committee should not be telling clients that they must obtain another lawyer in those situations. Mr. Hutchinson suggested that the Committee is paternalistic in other areas. Mr. Hutchinson stated that if there is no harm in the sexual relationship, there will not be a complaint or sanctions.

Commissioner Arnett stated that, because the Committee appeared to be revisiting the decision not to ban all sexual relations, he had several comments. The legal profession should not presume that it is different from other professions, which have outright bans on sexual relations. Commissioner Arnett also stated that if there are harmless relationships, he sees little difficulty in banning those relationships to get at the harmful relationships. Mr. Burton noted that if the Committee proposed an outright ban, Utah would not be the only jurisdiction doing such.

Mr. Wunderli stated that he leans toward an outright ban, but in the corporate area such a rule would go too far. Commissioner Arnett suggested that the rule could define "lead responsible person" in the law firm similar to the lead responsible person for the corporation.

Mr. Sackett suggested setting the standard as that which is exploitive. Ms. McHugh agreed, but stated that is difficult to characterize. Mr. Trost suggested that the focus should be on that which is exploitive, with an attempt to define exploitive.

Ms. McHugh suggested agreeing on specific area that are exploitive, such as domestic relations and immigration cases. Mr. Trost stated that the inquiry is fact intensive and that all relationships should be presumed exploitive, with an opportunity to rebut. Commissioner Arnett noted that no other state attempts to define exploitive.

Mr. Trost suggested eliminating the last paragraph of the proposed comment which would set forth the things that a lawyer could show to rebut a presumption. The Committee agreed to this change. Mr. Trost also suggested a sentence which simply states that the presumption is rebuttable. The Committee also agreed to this change.

Mr. Sackett suggested eliminating the proposed sentence which states that a client is presumed incapable of consenting to sexual

relations. Mr. Sackett stated that the real issue is rebutting exploitation and not consent. The Committee agreed to this suggestion.

Mr. Arnett questioned the Committee on adding a spousal exception in the black letter law. Commissioner Arnett reviewed other states' rules and noted that most other states have the spousal exception in the rule. Ms. McHugh suggested putting the exception at the beginning of paragraph (g). Mr. Wunderli stated that placement of the clause at that point is awkward. Ms. McHugh suggested that Mr. Sackett's separation of paragraph (g) into separate sections improves the readability of the rule.

Mr. Sackett questioned whether Rule 5.3 would apply the sexual ethics rule to others in the office, such as paralegals, etc. Commissioner Arnett stated that the last sentence in the first new comment paragraph limits application of the rule to lawyers who assist in the representation of the client, and does not include other firm members.

Ms. McHugh suggested that the first sentence of the comment should read: "subdivision (g) proscribes exploitation of the lawyer's client." Stephen Hutchinson stated that the comment should discuss the power imbalance in a sexual relationship. Mr. Sackett noted that he had attempted to address this in his proposal, discussing the vulnerability of the client. Commissioner Arnett stated that the rules subcommittee will incorporate those concepts. Mr. Chrystler suggested also clarifying that the rule cuts both ways.

Ms. McHugh made a motion to incorporate the principles that the Committee had agreed on, namely, creating a rebuttable presumption, excepting spousal and existing sexual relationships, explaining in the comment the concepts of vulnerability and imbalance of power, deleting references to consent, and ensuring that the rule does not extend to other persons in the firm.

Prior to a decision on this motion, Robert Burton moved to approve a rule that absolutely bans sexual relationships with an exception for spousal or existing relationships, and that the presumption is not rebuttable. Thomas Kay seconded the motion. The motion was defeated five to four, with Robert Burton, Thomas Kay, Stephen Hutchinson and Commissioner Tom Arnett casting votes in favor of the motion.

After this motion, Gary Chrystler seconded Ms. McHugh's motion to incorporate the principles discussed in the meeting. The motion carried unanimously, with the Committee members agreeing that the Committee would not revisit these general principles at its next meeting.

III. ADJOURN. The next meeting was scheduled for March 25, 1996 at 5:15 p.m. There being not further business, Gary Chrystler moved to adjourn the meeting at 6:45 p.m. The motion carried

unanimously.