

**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

March 25, 1996

PRESENT

Stephen Trost
Tom Arnett
Gary Sackett
Earl Wunderli
Judge Ronald Nehring
Gary Chrystler
Thomas Kay
Stephen Hutchinson

ABSENT

Professor John Morris
Carolyn McHugh
Robert Burton
William Hyde
Kent Roche

STAFF

Brent Johnson

I. WELCOME. Stephen Trost welcomed the Committee members to the meeting and turned the time over to Commissioner Tom Arnett for a discussion on the proposed sexual ethics rule.

II. SEXUAL ETHICS, RULE 8.4. Commissioner Arnett noted that a draft rule had been distributed to Committee members. Commissioner Arnett reminded the Committee members of the consensus that had been reached at the previous meeting. The consensus concepts had been incorporated in the rule and distributed to the rules subcommittee. Several comments were received. Commissioner Arnett noted that the first comment is to eliminate the phrase "some combination thereof" at the end of the second sentence of the first paragraph of the new comment. The suggestion was to replace this with the word "both."

Gary Sackett suggested stating in the comment what is meant by "this presumption is rebuttable." Mr. Sackett felt that this phrase is sterile and suggested adding a sentence which states that the lawyer may rebut the presumption by demonstrating that the relationship had no material effect on the representation. Commissioner Arnett noted that most presumptions in the law are not defined and that further defining the presumption might limit what the parties can do. Commissioner Arnett gave the example of the child support guidelines in which the parties are free to rebut the presumption in any manner that they feel is relevant. After brief discussion, Mr. Sackett noted that there was no apparent support for further defining the presumption and determined that no motion would be made.

Commissioner Arnett made a motion to change the language "or some combination thereof" to "or both" in the second sentence of the

first new comment paragraph. The motion carried unanimously.

Earl Wunderli noted that the last sentence in the last comment paragraph was not really connected to the other concepts in the paragraph and should be a new paragraph. Mr. Wunderli also noted that the phrase "firm and members" sounds like partners and perhaps not associates, paralegals and others.

Thomas Kay suggested ending the sentence after the phrase "of the client." Mr. Kay made a motion to that effect, along with making that sentence a separate paragraph. Gary Chrystler seconded the motion. The motion carried unanimously.

Mr. Wunderli stated that the second sentence in the first new comment paragraph provides too much leeway for attorneys. Mr. Wunderli suggested that lawyers might focus on the mutual trust of the relationship to the exclusion of the exploited nature of the relationship. Mr. Wunderli suggested changing the second sentence to read: "a lawyer who commences a sexual relationship with the client during legal representation may be exploiting the client's trust in the lawyer, the client's vulnerability in a stressful situation, or the lawyer's superior professional position."

Gary Chryster suggested that the sentence should also cover the client's ability to exercise independent judgment. Mr. Wunderli stated that the comment should focus on exploitation and not the effects of exploitation.

Stephen Hutchinson stated that he agrees with Mr. Wunderli's suggested language. Mr. Wunderli moved to adopt his proposed language. Commissioner Arnett seconded the motion. The motion carried unanimously.

Commissioner Arnett then made a motion to adopt the rule as amended at the meeting. Gary Chrystler seconded the motion. The motion carried unanimously.

III. OTHER BUSINESS. Commissioner Arnett noted that the sexual ethics rule was the last precise issue before the rules subcommittee. Commissioner Arnett suggested that this would be a good a time to discuss reorganization of the subcommittees and or the tasks of the subcommittees.

Mr. Trost questioned who was currently a member of the rules subcommittee. Commissioner Arnett stated that there are seven on the subcommittee: Commissioner Arnett, Gary Sackett, Gary Chrystler, Judge Ronald Nehring, Thomas Kay, Kent Roche, and William Hyde.

Mr. Trost questioned who was currently on the subcommittee studying legal assistants. Mr. Hutchinson stated that there were five on the subcommittee: Stephen Hutchinson, Carolyn McHugh, Earl

Wunderli, Robert Burton, and Stephen Trost. Mr. Hutchinson also provided a brief report from the paralegal subcommittee. Mr. Hutchinson noted that there was a petition from the Bar to set up a division of legal assistants. Mr. Hutchinson noted that the division would have no rights, no enforcement authority, no rules, etc. Mr. Hutchinson stated that this would be confusing to legal assistants.

Mr. Hutchinson noted that there is a sentiment to have the Supreme Court take control of legal assistant practice. Legal assistant representatives are interested in this concept because regulation will increase professional standing and increase control over unprofessional practice.

Mr. Trost provided direction to the subcommittee to look at all facets of potential regulation and to address constitutional issues. Mr. Trost noted that the only person not on a subcommittee is Professor John Morris. Because of Professor Morris' time commitments, he will not be appointed to a subcommittee at this time.

Mr. Trost instructed Commissioner Arnett's subcommittee to further address a rule on attorney trust accounts. The subcommittees should find out what other states are doing and determine the American Bankers Associations position. Mr. Trost noted that most states have either a rule providing for random audits or automatic reporting.

Mr. Trost noted that the Bar would like a complete revision of the procedural rules, but this issue will wait until some of the other substantive issues are completed. Mr. Trost suggested that the advertising rule should be revisited in light of the Florida case. Mr. Trost stated that he will have Professor Morris review the Florida case to see if restrictions can be developed.

Thomas Kay suggested that the Committee also look at the rule on pre-trial publicity. Mr. Kay suggested that either the rule needs more teeth, or the rule needs to be enforced more strictly.

Mr. Trost asked the rules committee to contact to the ABA in Chicago to see if there is anything new on any of the issues discussed.

IV. NEXT MEETING, MINUTES AND ADJOURN. The next meeting of the Committee was scheduled for May 20, 1996 at 5:15 p.m. Mr. Wunderli noted that there were several typographical errors in the minutes. After the minutes were amended, Commission Arnett moved to approve the minutes. Stephen Hutchinson seconded the motion. The motion carried unanimously. There being no further business, the meeting adjourned at 6:25 p.m.