

APPROVED MINUTES

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

June 2, 1997 - 5:15 p.m.

PRESENT

Carolyn McHugh
Robert Burton
Steve Hutchinson
Steve Cochell
William Hyde
Earl Wunderli
Gary Sackett
Hon. Ronald Nehring
Kent Roche
Steve Trost

EXCUSED

Tom Kay
Gary Chrystler
Commissioner Arnett

GUESTS

Jerry Howe
Richard Schwermer

STAFF

Peggy Gentles

I. WELCOME

Steve Trost welcomed the Committee members to the meeting.

II. AMENDING RULES TO PROVIDE FOR SUSPENSION OF LICENSE FOR FAILURE TO PAY CHILD SUPPORT

Steve Trost introduced Rick Schwermer from the Administrative Office of the Courts. Mr. Schwermer is Assistant State Court Administrator and works on legislative issues for the Judicial Council. Mr. Schwermer gave the Committee some background on the issue of suspension of professional licenses for failure to pay child support. For a number of years, legislation has been pursued by certain parties to suspend professional licenses when child support payments are delinquent. Approximately two years ago the Supreme Court stated that if the Legislature enacted provisions for the suspension of professional licenses regulated by the Division of Occupational Professional Licensing the Court would enact similar suspension provisions for attorney licenses. The federal Welfare Reform Act requires the state to provide for the suspension of professional licenses for people who are delinquent on child support obligations. Therefore, this year the Legislature passed S.B. 64 which provides for the suspension of all professional licenses. The Supreme Court

has asked Mr. Schwermer to come to the Committee to get recommendations to the Court on how to implement a process similar to that the Legislature adopted for other professions.

Steve Trost asked Mr. Schwermer if the Court had expressed any preference about the scheme that should be adopted. Mr. Schwermer replied that the Court had not given such direction to the Committee. Instead, the Court requested that the Committee develop a process. Bill Hyde noted that the portion of S.B. 64 provided to the Committee did not give much guidance to the Committee in designing a process. Mr. Schwermer agreed and noted that the statute is unclear if an administrative process without involvement by the Court may be used. Gary Sackett questioned why discipline could not be pursued under the existing Rule 9 of the Rules of Lawyer Discipline and Disability. He pointed out that under Rule 9 it is grounds for discipline for a lawyer to “willfully violate a valid order of Court.” Mr. Sackett expressed the opinion that he would prefer to pursue discipline under the existing rules rather than amending the rules of professional conduct. Judge Nehring pointed to the requirement in Rule 9 that the violation be “willful.” Steve Cochell noted that in S.B. 64 Utah Code § 78-32-17(3)(a)(I) makes the standard a failure to make a good faith effort under the circumstances. Mr. Sackett questioned whether the standard for discipline for failure to pay child support should be lower. Judge Nehring asserted that it should because failure to pay child support is a unique problem.

Mr. Trost stated that he thought the Committee could pursue one of two options. First, the Committee could amend Rule 8.4 to include failure to pay child support in the definition of misconduct. Second, the Committee could pursue a scheme of administrative suspensions similar to that used for suspension of licenses for failure to complete CLE requirements or failure to pay Bar dues. Steve Cochell stated that enforcement of administrative suspension over the years has been erratic. Peggy Gentles stated that she had contacted the three states whose rules had been provided to the Committee. Neither Florida, Georgia, nor Minnesota has pursued a suspension of license under its rule. Steve Cochell noted that S.B. 64 stated that a Court may sanction. He questioned if that was enough to allow a Bar license to be suspended. Mr. Schwermer responded that the language is not clear. The Supreme Court definitely has the inherent power to take a person’s professional license. However, the additional power to the regulatory agency may not be clear.

Steve Hutchinson expressed some concern about the larger policy decision to suspend any professional license for failure to pay child support. In addition, he pointed to the fact that suspensions for failure to pay child support potentially are of indefinite duration, unlike other suspensions of Bar licenses. Carolyn McHugh stated that she was concerned about that because of the relatively generous standard for compliance with a child support order. She pointed out that the attorney would have to be found to have not made a “good faith effort under the circumstances” before a professional license could be suspended under the statute. Mr. Cochell stated that he had a grave concern if the Office of Attorney Discipline was going to be required to make findings under the statute about good faith efforts to pay child support. The Bar should not be put in the position of re-litigating facts already determined by a Court or the Office of Recovery Services. The additional complexity of suspending a license after a person has paid enough child support to no longer be sixty days past due, as required by the statute, is problematic. Steve Trost agreed with Mr. Cochell and wondered whether the suspension can be pursued administratively. Mr. Cochell stated

that administrative suspension orders would probably make more sense in the Bar filing separate district Court proceedings. He stated the Bar would commit vigorous enforcement of the administrative suspensions. Gary Sackett inquired into the administrative suspension process. Mr. Cochell stated that there are rules in place for suspensions for failure to pay dues and failure to complete CLE requirements. Steve Hutchinson noted that the Bar can suspend for administrative reasons. Written notice goes out to all the judges that the license has been suspended. Similarly, the reinstatement of a person is transmitted very quickly to the judges. Rick Schwermer stated the proponents of the legislation assert that the threat of suspension of licenses is very effective. Although he has not substantiated those claims, it is possible that the need for enforcement may be minimal. He noted that he expected that most actions will be brought by the Office of Recovery Services. In the past, the agency has expressed a preference for entering into payment plans rather than pursuit of arrearages in district court.

The Committee voted unanimously to investigate designing a scheme for administrative suspension. Steve Trost asked Steve Cochell if he would prepare for the Committee's next meeting suggested rule changes to the administrative suspension rules. Mr. Trost noted that rather than following the Committee's usual process of making recommendations to the Court that the Court either accepts or does not accept, a petition to the Supreme Court will need to be made to change the rules of integration. Mr. Trost thanked Mr. Schwermer for his presentation to the Committee.

III. APPROVAL OF MINUTES

Earl Wunderli moved to approve the minutes of the April 21, 1997 meeting. Carolyn McHugh seconded. The Committee approved the minutes unanimously.

IV. CONSIDERATION OF COMMENTS RECEIVED ON THE PROPOSED COMMENT TO RULE 1.14

Peggy Gentles presented the comment from the Judicial Rules Review Committee that expressed two concerns. First, the Rules Review Committee was concerned about the adoption of a Utah specific comment to a model rule of professional conduct. Steve Trost responded that this comment was an improvement on the model comment. Carolyn McHugh noted that the comment was developed with significant input from the Disability Law Center who face the dilemmas addressed by the rule and comment with much more frequency than any of the Committee members. Kent Roche noted that the comment was modeled on the ABA formal opinion discussing the model rule comment.

The second concern expressed by the Rules Review Committee was that the terms "client" and "legal representative" are not defined. Robert Burton noted that trying to formulate a definition of the word "client" would be very difficult. He felt that the rule was clear as written. In response to the Rules Review Committee's concern about the divergence from the model rule, Carolyn McHugh made a motion to leave the comment as written but write a letter to the Rules Review Committee explaining the background of the comment. Robert Burton seconded the motion. Steve Hutchinson requested an amendment to the motion to include giving the Rules Review Committee some of the materials

that the Committee was provided in its discussion. Robert Burton seconded the amended motion. The amended motion passed unanimously.

Steve Trost then addressed the Committee's attention to the Rules Review Committee request for a definition of the word client. Judge Nehring stated that the Committee had a tradition of economy of language that militated against adding the definition. Carolyn McHugh made a motion to amend the proposed comment to include a modification of the term legal representative "such as guardian, conservator, or trustee." Gary Sackett seconded the motion. The motion passed unanimously. Carolyn McHugh moved that the rule as amended be sent to the Supreme Court recommended for adoption. Earl Wunderli seconded the motion. The motion passed unanimously.

V. RULE 1.17

Steve Trost reported that he had talked with Commissioner Arnett who, because of health problems, asked to be temporarily replaced as Chair of the Rules Subcommittee. Because the Committee was interested in pursuing changes to Rule 1.17, Mr. Trost stated that he was requesting a motion for the appointment of interim chair of the Rules Subcommittee. The Rules Subcommittee members stated that they thought Tom Kay should be asked to serve as interim chair.

VI. ATTORNEY OATH

The Committee discussed Judge Nehring's memo in which he recommended no substantive changes to the attorney oath. Judge Nehring further recommended that a letter be written to Justice Howe explaining the Committee's decision and that a recommendation be forwarded to the Bar that each year along with dues payment Bar members be requested to reaffirm the oath. Judge Nehring stated that he would write the letter to Justice Howe. Steve Hutchinson stated that about seven years ago the Bar debated a civility code. This discussion was heated. Judge Nehring stated that he was opposed to such codes.

Earl Wunderli stated that he felt that oath should not be substantively changed but had some suggested modifications to the language. First, remove the word "obey." It was his feeling that there was nothing in the Constitution that anyone was required to "obey." Second, Mr. Wunderli suggested changing the statement that the attorney will discharge the duties with "honesty and fidelity" to with "honesty and integrity". Third, he stated that the references to swearing in the oath should be changed affirming. Gary Sackett stated that he agreed with Mr. Wunderli that the word "obey" did not have much meaning in the context of the oath. However, he thought it was problematic to remove the word because it could be interpreted that attorneys were no longer required to "obey" the Constitution. Judge Nehring wondered why there was a reference to the Constitution of "this state". He stated he thought it should be changed to refer to Utah. Steve Hutchinson said that the federal oath of admission to practice a number of years ago was changed from requiring attorneys to swear to requiring that they affirm. This change was made to accommodate diverse religious beliefs. William Hyde stated that he felt that the words integrity and honesty had identical meanings. Gary Sackett stated that fidelity has no meaning in this context.

Gary Sackett made a motion that all references to swearing be changed to affirming. Judge Nehring seconded the motion. The motion passed unanimously. Gary Sackett made a motion that the words "this state" be changed to "Utah" on the second line of the oath. Judge Nehring seconded the motion. That motion passed unanimously. Gary Sackett made a motion to change the word fidelity to the word integrity. Carolyn McHugh seconded. The motion passed on a vote 6 to 2. Further discussion ensued. Steve Hutchinson stated that he felt the word fidelity tied back to the duties of the Court. Robert Burton stated he wanted to change his vote. The second vote was tied. Steve Trost voted to keep the word fidelity therefore the motion failed. Earl Wunderli made a motion to delete the word obey. The motion failed for the lack of second.

VII. OTHER BUSINESS

Gary Sackett stated he had an issue that he wanted the Committee to consider on Rule 1.6 Confidentiality. The Utah rule varies slightly from the model rule. He inquired as to the reason for that variation. Mr. Sackett's issue was referred to the rules subcommittee.

Steve Cochell stated that the Committee would have on its agenda in a future meeting an accounting standard for compliance with Rule 1.15 on the maintenance of trust accounts.

Steve Cochell also stated that the Advertising Committee has come up with draft proposed rules. They are largely based on Florida's rule and will rely on the administrative record from the Wentforth case. Carolyn McHugh asked if the Bar Commission had decided not to fund a study in Utah. It was unclear if the Bar Commission had considered that request. Mr. Cochell stated that the Advertising Committee would make recommendations to the Bar Commission. Gary Sackett inquired into whether the Advertising Committee was considering a related issue of Website advertising. Steve Cochell stated that he had provided the Committee with a similar rule. He has received a lot inquires from out-of-state attorneys about Utah's regulation of Internet advertising. He currently does not perceive a large problem.

Earl Wunderli made a motion to make a further amendment to the comment of Rule 1.14 removing a reference to "suffering" a mental disability to "with" a mental disability. Bill Hyde seconded and the motion passed unanimously.

VIII. ADJOURN

There being no further business the Committee scheduled its next meeting for July 21, 1997 at 5:15. The Committee adjourned at 6:40 p.m.