

MINUTES

SUPREME COURT ADVISORY COMMITTEE ON
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, September 25, 1990, 5:00 p.m.
Administrative Office of the Courts

PRESENT

Darwin Hansen
Thomas N. Arnett
Hon. Lynn W. Davis
Lee Dever
G. Richard Hill
John Morris
Jo Carol Nessel-Sale
John Palmer
Barbara K. Polich
Hon. John Rokich
Stephen Trost
J. Frederick Voros, Jr.
Clark Nielsen

EXCUSED

Stuart Schultz
Danny Kelly
F. John Hill

STAFF

Carlie Christensen
Colin Winchester

1. WELCOME. Darwin Hansen welcomed the committee members to the meeting and expressed his appreciation to Judge Davis for serving as Chair of the Committee at the July meeting.

Carlie Christensen introduced Colin Winchester as Associate General Counsel and indicated that he would be assisting her with the work of the Supreme Court's Advisory Committees.

2. APPROVAL OF MINUTES. Mr. Hansen questioned whether the portion of the minutes identified as a discussion of Rule 2 was actually a discussion of Rule 4. He requested that Ms. Christensen review this and make appropriate changes.

Mr. Voros indicated that the committee had previously decided to delete paragraph 13 on page 13 of the proposed rules and that the minutes did not reflect this decision. He requested that the minutes be modified accordingly.

With those modifications, the minutes were approved as submitted.

3. RULE 1.5 OF THE RULES OF PROFESSIONAL CONDUCT.
Mr. Arnett referred the committee members to the proposed modification of Rule 1.5 which had been provided to the members in the committee mailing. He indicated that the proposed modification had been prepared by Mr. Trost.

Mr. Trost explained that the Bar continuously receives complaints from the public concerning attorneys' fees. He explained that Rule 1.5 currently deals with attorneys' fees but that the proposed modification to subparagraph (b) would require a written fee agreement where total expenses to a client exceed one hundred dollars.

Mr. Trost explained that the proposal was patterned after California's rule. He indicated that subparagraph (1) should read "The hourly rate or total fee to be charged plus a disclosure of reasonably anticipated costs."

Prof. Morris indicated that the Model Rule was originally submitted to the ABA's House of Delegates as a mandatory requirement, but that the House rejected the mandatory language and modified the rule to provide that a written agreement was discretionary. Prof. Morris questioned whether the rule required the detail contained in the proposal or whether the rule should simply be modified to make the requirement of a written agreement mandatory.

Mr. Trost suggested that lawyers may find the detail helpful, however, he suggested that alternatively, the detail could be included in the comments to the rule.

Prof. Morris expressed concern about drafting an agreement which sets forth the "responsibility of the attorney and client as to the performance of the contract". He suggested that may be very difficult. He also expressed concern that the rule did not encompass all the various methods which exist for calculating attorneys' fees.

Judge Rokich expressed concern about requiring a written agreement whenever the total expenses will exceed \$100.00. He suggested that the threshold dollar amount was too low.

Mr. Trost indicated that the dollar amount in California is \$1,000.00.

Judge Rokich questioned the percentage of bar complaints which are based on fee disputes.

Mr. Nielsen suggested that the proposed rule may not reduce the number of complaints, but actually generate complaints.

Mr. Hansen expressed concern about paragraph (g) which provides that failure to comply with the rule rendered an agreement voidable and the attorney thereupon is entitled to collect a reasonable fee. He suggested that the rule implies that the written agreement contained an unreasonable fee - a practice which is prohibited by the Rules of Professional Conduct. He also questioned whether the rule would give the client the ability to void the contract when the client was unhappy with the terms of the contract.

Mr. Arnett indicated that if the Supreme Court determines that a written fee agreement is required, an attorney's failure to comply with the rule may impair the attorney's ability to collect a fee.

Prof. Morris suggested that the language of subparagraph (g) may go beyond the scope of the rules which is limited to disciplinary sanctions not legal or malpractice sanctions. He suggested that the section which addresses the legal rights of clients should be eliminated.

Ms. Nessel-Sale indicated that the rule would be helpful to a client who doesn't know or can't ask what the hourly rate is. She suggested that Paragraphs (1) and (2) would go a long way toward providing information to a client.

Mr. Hansen indicated that Rule 1.5 in its current form contains 8 different elements of a reasonable fee. He expressed concern that the proposed rule could be interpreted to mean that other types of fees are prohibited.

Ms. Polich indicated that she was opposed to a mandatory requirement. She expressed concern about the detail contained in the rule which limits a lawyer's discretion. She also expressed concern about the practicality of getting a written agreement signed and returned by a client. She suggested that the anticipated costs are very difficult to estimate and questioned the consequences of an inaccurate estimate. Ms. Polich also suggested that it is extremely difficult in litigation to estimate in the abstract the responsibility of client and counsel. She indicated that fee disputes are not in the same realm as ethical violations which go to the question of fitness to practice law.

Mr. Arnett indicated that the establishment of a written fee agreement is fairly easy to do in a family law practice. He believes that the client is entitled to a written fee agreement. He also suggested that some of Ms. Polich's clients would be exempted under paragraph (e) of the proposed rule.

Mr. Hansen questioned why the rule distinguished between individual and corporate clients.

Mr. Trost suggested that the distinction was based upon the relative sophistication of the client. He further indicated that the rule is intended to create a deterrent rather than establish a standard under which sanctions are applied.

Ms. Polich suggested that lawyers should treat themselves as professionals. She questioned the wisdom of establishing rules for those few who do not meet professional standards. She suggested that the bar should recognize that individual attorneys have the integrity to set their own fee agreements.

Mr. Arnett asked for a straw poll of the committee to determine whether there was a consensus that a written fee agreement should be required.

VOTE: Six committee members voted to support the concept of requiring a written fee agreement. Six committee members voted in opposition to the concept.

Mr. Hansen suggested that the subcommittee may review the proposal further and at a later date, submit it to the committee as a whole for further consideration.

4. **RULE 5. EXPENSES.** Mr. Hansen referred the committee members to Rule 5 of the Rules of Discipline governing expenses.

5. **MOTION:** Ms. Polich made a motion to adopt Rule

SECOND: Mr. Voros seconded the motion.

VOTE: The committee unanimously voted to adopt Rule 5.

5. **RULE 6. JURISDICTION.** Mr. Hansen referred the committee members to Rule 6 of the Rules of Discipline governing jurisdiction.

Mr. Nielsen explained that Rule 6 identified those individuals subject to the jurisdiction of the disciplinary board. The rule includes lawyers, judges who

have returned to practice, and incumbent judges if removed from office during the course of a discipline or disability proceeding. Mr. Nielsen indicated that the rule had been drafted to address a recent problem which occurred as the result of an incumbent judge being accused of professional misconduct which occurred while the judge was practicing law.

Mr. Voros suggested that the proposed rule would not address that problem, but instead give credence to the judge's contention that the bar did not have jurisdiction over him.

Judge Davis suggested that the disciplinary board should have concurrent jurisdiction with the Judicial Conduct Commission over violations.

Judge Rokich suggested that paragraph C. should be amended to clarify that incumbent judges are not subject to the jurisdiction of the board except if the unprofessional conduct occurred prior to assuming judicial office.

Mr. Hansen suggested that Rule 6 be referred back to the subcommittee to review the concept of concurrent jurisdiction and to ensure compatibility with the constitutional and statutory authority of the Judicial Conduct Commission.

6. **RULE 7. ROSTER OF LAWYERS.** Mr. Hansen referred the committee members to Rule 7 of the Rules of Discipline governing the roster of lawyers. Ms. Nasset-Sale indicated that there may be some question as to the legality of maintaining resident addresses and she would review recent court decisions to ensure that this was not prohibited.

MOTION: Judge Rokich made a motion to approve Rule 7.

SECOND: Richard Hill seconded the motion.

DISCUSSION: Mr. Voros questioned whether the rule would require disciplinary counsel to maintain information when a lawyer has left the state. He questioned the rule's application to a lawyer who was specially admitted to practice law.

Prof. Morris suggested that the Rule encompasses more than lawyers admitted to practice law and that the scope of Rule 7 is too broad. He suggested that the language "all lawyers subject to the jurisdiction of the board" be deleted and that the language "all members of the Utah State Bar" be inserted.

MOTION: Judge Rokich accepted Prof. Morris' amendment to his motion.

SECOND: Mr. Voros seconded the motion.

VOTE: The committee unanimously voted to adopt Rule 7 with the modifications discussed.

7. **RULE 8. PERIODIC ASSESSMENT OF ATTORNEYS.** Mr. Hansen referred the committee members to Rule 8 of the Rules of Discipline providing for the periodic assessment of attorneys. The rule proposes a separate fee from bar dues for the disciplinary process. The assessment would be imposed by the Supreme Court.

Mr. Dever questioned whether the cost of bar dues would be reduced by the discipline assessment.

Ms. Polich indicated to the committee that the subcommittee had not seriously debated the funding question, but felt that the cost would be dependent upon the final disciplinary process approved by the Court.

Mr. Voros questioned whether there was a model rule which addressed funding.

Mr. Hansen questioned whether the offender can be assessed costs and fees.

Ms. Nessel-Sale indicated that the rules contain specific provisions for the assessment of fees and costs. She further indicated that Rule 8 is the Washington variation of the model rule.

Mr. Hansen suggested that further discussion of Rule 8 be deferred until the committee completed its review of the proposed rules.

8. **RULE 9. GROUNDS FOR DISCIPLINE.** Mr. Hansen referred the committee members to Rule 9 of the Rules of Discipline setting forth the grounds for discipline.

Ms. Nessel-Sale recommended that discussion of Rule 9 also be deferred until the committee completed its discussion of the remaining rules.

Prof. Morris suggested that the grounds for discipline should track the existing provisions contained in Rule 8.4 of the Rules of Professional Conduct.

Ms. Nessel-Sale explained that Rule 8.4 of the existing rules is a catch-all provision and supplements Rules 1.5 through 8.3. She suggested that Rule 9 of the disciplinary rules serves a different purpose than Rule 8.4. of the Rules of Professional Conduct.

Prof. Morris suggested that Rules 8.4 and 9 should be integrated or parallel.

Mr. Voros questioned the reference in Rule 9(a) to other rules of this jurisdiction.

Ms. Nessel-Sale explained that violations of the attorney's oath have been used as a basis for disciplinary action and might be considered "other rules".

9. ADJOURNMENT. There being no further business the meeting was adjourned. The next committee meeting is scheduled for October 23, 1990 at 5:00 p.m. at the Administrative Office of the Courts.

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