

(No quorum in June 91)  
Approved 7/23/91

MINUTES

SUPREME COURT ADVISORY COMMITTEE ON  
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, May 28, 1991, 3:00 p.m.  
Administrative Office of the Courts

Bert L. Dart, Presiding

PRESENT:

Bert L. Dart  
Judge John Rokich  
Stephen Trost  
G. Richard Hill  
Tom Arnett  
Clark Nielsen  
Danny Kelly  
Lee Dever  
Jo Carol Nessel-Sale  
Stuart Schultz  
Hon. Lynn W. Davis  
J. Frederick Voros, Jr.

EXCUSED:

John K. Morris  
John Palmer  
Barbara Polich  
John Hill

STAFF:

Colin R. Winchester

1. WELCOME. Bert Dart welcomed the Committee members to the meeting.

2. APPROVAL OF MINUTES:

MOTION: Judge Rokich made a motion to approve the minutes as drafted.

SECOND: The motion was seconded by Lee Dever.

VOTE: The Committee voted unanimously to approve the minutes as drafted.

3. REPORT FROM SUBCOMMITTEE ON RULES OF PROFESSIONAL CONDUCT. Mr. Arnett reported that when the subcommittee met, it did not have the current ABA materials. He has since received the updated materials, but the subcommittee has not yet reviewed them. He will provide an additional report at the next Committee meeting.

4. FUTURE MEETING SCHEDULE. Mr. Dart suggested that the Committee meet again on June 25 from 5:00 p.m. until 7:00 p.m. He also suggested that the committee no longer take time to eat dinner, but that refreshments be provided at each meeting.

5. OVERVIEW REPORT FROM SUBCOMMITTEE ON SANCTIONS STANDARDS. Mr. Kelly distributed a package of materials developed by the subcommittee. The package included proposed sanctions, which generally mirror the ABA sanctions. Mr. Kelly noted that the subcommittee also studied the NOBC sanctions and adopted them where the subcommittee felt them to be more appropriate.

Mr. Kelly reported that the sanctions are based upon the answers to the following four questions:

1. What duty has been violated?
2. To whom is the duty owed?
  - a. Client
  - b. Public
  - c. Legal system
  - d. Profession
3. What was the attorney's mental state?
4. Are there aggravating or mitigating circumstances?

Mr. Trost, noting that most of the violations listed in the subcommittee report deal with violations of duties owed to clients, questioned whether the duties owed to clients outweigh duties owed to the public, the legal system or the profession.

Mr. Voros noted that the attorney/client relationship is a special one, based on trust and often trust funds. He also noted that of the four parties to whom a duty may be owed, the client is the most vulnerable.

Ms. Nessel-Sale indicated that the attorney/client relationship also has a confidentiality aspect.

Mr. Kelly noted that the violation of a duty owed to a client does not necessarily get a greater sanction than a violation of a duty owed to some other entity.

Mr. Trost noted that probation is not listed as a possible sanction in the standards.

Mr. Voros indicated that because the standards speak in general terms, a tribunal is free to use alternative sanctions like probation.

Ms. Nessel-Sale stated that probation, standing alone, is ineffective. It needs to be linked to some other sanction. Mr. Trost agreed.

Mr. Kelly noted that the standards are based on the ABA's 1986 model, and that although the ABA is working on new standards, the revisions will not be considered by the House of Delegates until February of 1992.

Mr. Trost reported that the current sanctions available in Utah are: caution (not codified), admonition, private reprimand, public reprimand, suspension and disbarment. He noted that probation, costs and restitution, though not sanctions in and of themselves, can be linked to the current sanctions.

**6. STEP-BY-STEP ANALYSIS OF PROPOSED SANCTIONS STANDARDS.**

Sections 1.1 and 1.2. Mr. Kelly reported that the subcommittee had basically adopted the ABA's Section 1.1, but recommended inclusion of the word "fundamental" as outlined in the subcommittee report.

The Committee then discussed the apparent overlap between Sections 1.1 and 1.2 and their corresponding provisions in the proposed Discipline Rules.

**MOTION:** Judge Rokich made a motion to have Mr. Kelly and Ms. Nessel-Sale (the two subcommittee chairs) meet and prepare a resolution to the overlap problem, bringing a proposal back to the Committee for final approval at the next meeting.

**SECOND:** A Committee member seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion.

Section 1.3. Mr. Voros noted that the standard refers to the "clear and convincing" standard of evidence. He noted that the Committee has voted to lower the standard to "preponderance of the evidence" in the Discipline Rules.

**MOTION:** Mr. Voros made a motion to delete the words "by clear and convincing evidence" from Section 1.3.

**SECOND:** Ms. Nessel-Sale seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion.

Sanctions as Stand Alone Portion of Discipline Rules. Ms. Nessel-Sale reminded the Committee that the treatment of the overlap in Sections 1.1 and 1.2 depends on whether the Committee votes to treat the sanctions as a stand alone set of rules or as part of the Discipline Rules.

MOTION: Mr. Arnett made a motion that the Committee treat the sanctions as a stand alone set of rules, at least for the purposes of discussing them in the Committee.

SECOND: Mr. Richard Hill seconded the motion.

Mr. Voros indicated that he was in favor of treating the sanctions as a stand alone set as the ABA has done.

Mr. Nielsen noted that he was neither in favor of, nor against, the motion. However, because the sanctions had only been distributed at the Committee meeting and he had not had an opportunity to review them prior to the meeting, he felt uncomfortable casting his vote.

VOTE: The Committee voted unanimously to approve the motion.

Section 2.1. The Committee reviewed proposed Section 2.1 and made no changes to the subcommittee's proposal.

Section 2.2. The Committee discussed Section 2.2 dealing with disbarment and readmission.

Ms. Nessel-Sale suggested that a disbarred attorney should be required to take the MPRE prior to readmission.

Mr. Trost indicated that a disbarred attorney should also be required to comply with other Court orders prior to readmission.

Ms. Nessel-Sale warned against such a broad statement, indicating that a disbarred attorney, now working as a shoe salesman, would not make enough money to pay a large restitution order prior to readmission.

Mr. Arnett noted that the Character and Fitness Committee could make a recommendation in such a case.

Judge Davis and Mr. Dever indicated agreement with Mr. Trost's position.

**MOTION:** Mr. Trost made a motion to include a requirement that a disbarred attorney seeking readmission must comply with all other orders of the Court, and that the other provisions of the subcommittee's proposal be adopted.

**SECOND:** Judge Davis seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion.

**Section 2.3.** The Committee discussed Section 2.3 dealing with suspension and reinstatement from suspension.

Ms. Nessel-Sale noted that pursuant to Section 2.3(2), an attorney suspended for a period in excess of six months cannot apply for reinstatement until the expiration of the six month period. Consequently, a six month suspension could result a nine month or more period of time during which the attorney could not practice.

Mr. Trost noted that if the tribunal ordering the suspension knows that the readmission process will take additional time, it may set a shorter period of suspension up front.

Ms. Nessel-Sale proposed that lawyers should be able to apply for readmission at least thirty days prior to the expiration of the suspension period.

Mr. Trost suggested that the Committee should advise and request the Character and Fitness Committee to handle reinstatements from suspension expeditiously.

**MOTION:** Mr. Arnett made a motion to delete the words "after the expiration of the period of suspension" from Section 2.3(2).

**SECOND:** Mr. Voros seconded the motion.

Ms. Nessel-Sale noted that by simply deleting the proposed language, without replacing it with some other period of time, the reinstatement application date would be left open to interpretation.

**VOTE:** Seven Committee members voted in favor of the motion. Two Committee members voted against the motion.

Mr. Schultz asked what is involved in the "reinstatement process" referred to in Section 2.3(2).

Mr. Nielsen noted that the "reinstatement process" is defined in the Disciplinary Rules, but asked whether the Disciplinary Rules conflict with the standards, and if so, how the conflict will be resolved.

Mr. Dart referred Mr. Nielsen's concern to Mr. Kelly and Ms. Nessel-Sale for resolution.

Mr. Voros noted that the Discipline Rules state that a suspended attorney may apply for reinstatement up to three months prior to the expiration of the suspension period, and that the ABA Model Rules allow the reinstatement process to begin up to six months prior to the expiration of the suspension period.

**MOTION:** Mr. Voros made a motion to approve the concept that reinstatement may not occur unless the "reinstatement process" has been completed as required by Discipline Rule 25.

**SECOND:** Judge Davis seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion.

**MOTION:** Mr. Nielsen made a motion to refer Section 2.3(1) to Mr. Kelly and Ms. Nessel-Sale to work out any conflicts with Discipline Rule 24.

**SECOND:** Mr. Voros seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion.

**MOTION:** Judge Davis made a motion to strike the word "Generally" from the second sentence of Section 2.3 and to change "should" to "shall" in that same sentence.

**SECOND:** Mr. Trost seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion.

Ms. Nessel-Sale asked whether, as a matter of policy, there should be a minimum allowable period of suspension. She indicated that a short term suspension is only slightly more severe than a reprimand. In her opinion, the sanction of suspension should be stronger. She recommended that a ninety day period be the minimum allowable suspension period. She also suggested that suspended lawyers should be required to notify their clients of suspensions.

Mr. Dart questioned whether a short term suspension option should be taken away from the tribunal imposing the discipline.

Mr. Trost noted that in certain situations, a thirty day suspension without notice to clients is appropriate, and that the tribunal should have the flexibility to impose such sanctions.

Mr. Voros and Mr. Dever agreed that lawyers should be required to notify clients of all suspensions regardless of the length of the suspension period.

Mr. Voros suggested including a client notification provision in Section 2.8(g).

Mr. Dart indicated that the matter could be covered by the catch-all language stricken by the subcommittee from the ABA's Section 2.8(g).

Ms. Nessel-Sale noted that minimum suspension terms and notice requirements may result in fewer suspensions. She also noted that the ABA sanction guidelines assume that suspension means a period in excess of six months.

Mr. Dart recommended that the Committee leave Section 2.3 as amended by the motions made, and revisit it if necessary in the future.

Section 2.4.

**MOTION:** Judge Davis made a motion to change the word "is" to "causes" in Section 2.4(b).

**SECOND:** Mr. Voros seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion.

Mr. Nielsen noted that the term "serious crime" in Section 2.4(a) must coincide with the definition of "serious crime" in Discipline Rule 19C.

The Committee then discussed and compared Discipline Rules 19D and 20 with Sanction 2.4. Mr. Voros indicated that the provisions should be consistent, but in his opinion, they are not.

Mr. Nielsen indicated that he is unsure whether to rely on the Discipline Rules or the Sanctions.

**MOTION:** Mr. Voros made a motion to remand Section 2.4 to Mr. Kelly and Ms. Nessel-Sale for resolution. Rather than vote on the motion, Mr. Dart entered an executive order to that effect.

7. **ADJOURNMENT.** The Committee voted to adjourn the meeting.

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