

Approved 11/12/91
(no quorum on 10/22/91)

MINUTES

SUPREME COURT ADVISORY COMMITTEE ON
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, September 24, 1991, 5:00 p.m.
Administrative Office of the Courts

Bert L. Dart, Presiding

PRESENT:

Clark Nielsen
J. Frederick Voros, Jr.
Stephen Hutchinson
Stuart Schultz
Hon. Lynn W. Davis
Jo Carol Nessel-Sale
Bert Dart
Lee Dever
G. Richard Hill
Hon. John Rokich
John K. Morris
Danny C. Kelly

EXCUSED:

Thomas N. Arnett
Stephen A. Trost
John W. Palmer
Barbara Polich
F. John Hill

STAFF:

Richard Schwermer

1. WELCOME AND APPROVAL OF MINUTES. Mr. Dart welcomed the Committee to the meeting.

MOTION: Judge Rokich moved to approve the minutes of the September 10, 1991 meeting, as prepared.

SECOND: Judge Davis seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

2. RESPONSE TO PETER BILLINGS' LETTER. Ms. Nessel-Sale indicated that her subcommittee had not been able to formulate a response to Mr. Billings' letter. The consensus of the Committee was that the scope of the letter would not allow an appropriate response to be considered until the end of October. Therefore, Mr. Dart offered to send a letter to Mr. Billings to let him know that a response would be forthcoming at the end of October.

3. APPROACH TO COMMENTARY. The Committee deferred this issue until Mr. Winchester could be present.

4. RULES 2 AND 3 OF THE RULES OF PROFESSIONAL CONDUCT. Richard Hill distributed a letter and packet of information from the ABA in response to Mr. Trost's request for an update of modifications made to the ABA Model Rules of Professional Conduct since 1988 (when the Utah rules were adopted). Also distributed was a copy of Gentile v. State Bar of Nevada, 111 S.Ct. 2720 (1991).

Rule 3.8. Mr. Hill briefly reviewed the differences between the Model Rules and the Utah rules, and commented on those changes. The Committee focused on new subsection (f) added to the ABA version of Rule 3.8. Mr. Hill's subcommittee recommends that subsection (f) and the accompanying comment be adopted.

The Committee discussed subparagraph (f)(1)(c) relating to alternative methods of obtaining the information sought from the lawyer. The ABA's standard is "no other feasible alternative" while the Justice Department's standard is "reasonable efforts" to obtain the information elsewhere. In considering the advantages and disadvantages of the two standards, the Committee decided that input from S.W.A.P. and the U.S. Attorney's Office should be requested.

MOTION: Mr. Morris moved that the adoption of subsection (f) to Rule 3.8 be tabled until the next meeting, and that staff request that S.W.A.P. and the U.S. Attorney's Office provide written input on the matter.

SECOND: The motion was seconded by Judge Davis.

VOTE: The Committee voted unanimously to approve the motion.

Rule 3.6. The Committee discussion of Rule 3.6 centered around the difference between the ABA version and the Utah version of Rule 3.6(c). The ABA version starts off with "Notwithstanding paragraphs (a) and (b) . . . ," while the Utah version starts off the same sentence with "Subject to paragraphs (a) and (b)" The subcommittee recommended no changes to Rule 3.6, and the Committee concurred, although it was noted that 3.6(c) may require further attention in the future.

5. RULES OF ATTORNEY DISCIPLINE 21, 33, 23, 24, 25 AND 26.

Rule 21. Ms. Nessel-Sale asked that the Committee defer consideration of Rule 21 until the October 22 meeting.

Rule 33. Ms. Nessel-Sale also asked that consideration of Rule 33 be deferred, but to the November meeting.

Rule 23A. Ms. Nessel-Sale indicated that the subcommittee recommends adoption of Section A, as proposed. The Committee discussed the insertion of the words "disciplinary counsel" and the effect of allowing disciplinary counsel to determine how service shall be made upon the lawyer as opposed to the direction provided by the Utah Rules of Civil Procedure for service of an incompetent person.

MOTION: Judge Davis moved that the words "in the manner the disciplinary counsel may direct" be stricken.

SECOND: John Morris seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

VOTE: The Committee then voted to otherwise adopt the subcommittee recommendation.

MOTION: Upon reconsideration of the disciplinary counsel language, however, Judge Rokich moved to insert the words "by disciplinary counsel" where the previous language had been stricken.

SECOND: Stephen Hutchinson seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

The sentence now reads:

A copy of the order shall be served by disciplinary counsel upon the lawyer, his or her guardian, or the director of the institution to which the lawyer has been committed.

Rule 23B. Ms. Nessel-Sale recommended that Section B be accepted as proposed.

VOTE: The Committee voted to adopt Section B as proposed.

Rule 23C.

VOTE: The Committee also voted to adopt Section C as recommended.

Rule 23D. The Committee next considered the recommendation of the subcommittee respecting the deletion of Section D. Reference was made to the previous determination of the Committee regarding public notice contained in Rule 17B.

MOTION: Ms. Nessel-Sale moved to delete all references to disability in Rule 17B.

SECOND: The motion was seconded by Mr. Voros.

VOTE: The Committee voted unanimously to approve the motion.

MOTION: Ms. Nessel-Sale then moved to reinstate Section D as set forth below.

SECOND: Mr. Morris seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

The reinstated Section D would then read as follows:

Section D. Public Notice of Transfer to Disability Inactive Status. The Board shall cause a notice of transfer to disability ~~inactive~~ status to be published in the official State Bar ¹¹³⁰ publication and in a newspaper of general circulation in each Utah judicial district in which the disabled lawyer maintained an office for the practice of law.

Rule 23E.

MOTION: Ms. Nessel-Sale moved that what would now be Section E be accepted as proposed, except that each time the word "respondent" is used, the word "lawyer" should be substituted.

SECOND: Mr. Morris seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

MOTION: Mr. Dever moved to insert the words "related to the disability" in subsection (4) after the words "has been examined or treated." That part of the sentence now reads:

. . . by whom or in which the respondent has been examined or treated related to the disability since the transfer to disability inactive status.

SECOND: Mr. Voros seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

The Committee also that the Committee notes for Rule 23 listed at the bottom of page 78 and at the top of page 79, and numbering one through four, should be deleted in future drafts.

Rule 24. Ms. Nasset-Sale recommended that the Committee adopt Rule 24 as proposed.

VOTE: The Committee voted to adopt Rule 24 as proposed.

Rule 25A. Ms. Nasset-Sale recommended that the Committee adopt Section A as proposed.

VOTE: The Committee voted to adopt Rule 25A as proposed.

Rule 25B. Ms. Nasset-Sale recommended adoption of Section B as proposed, with two minor changes. In the second line, the word "or" should read "of," and in the second line from the bottom, of Section B the words "he or she" should be replaced with "the lawyer."

VOTE: The Committee voted to adopt Rule 25B as amended.

Rule 25C. Ms. Nasset-Sale recommended that the Committee adopt Section C as proposed.

VOTE: The Committee voted to adopt Rule 25C as proposed.

Rule 25D. Ms. Nasset-Sale recommended that the Committee adopt Rule 25D as proposed.

VOTE: The Committee voted to adopt Rule 25D as proposed.

Rule 25E. The Committee considered subsection (3)(b) and (c), and expressed concern that the language accurately reflect drugs which would be prohibited, but agreed that the ABA's term "non-prescription drugs" was insufficient.

MOTION: Mr. Schultz moved to change the language in both subsections (b) and (c) by inserting the words "the unlawful use of a controlled substance" and deleting reference to drugs or illegal drugs.

SECOND: The motion was seconded by Judge Davis.

VOTE: The Committee voted unanimously to approve the motion.

MOTION: Ms. Nessel-Sale moved to strike the word "under" from (3), and substitute the word "from." The beginning of that section would then read "If a lawyer was suffering from a physical or mental disability"

SECOND: Judge Rokich seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Mr. Nielsen then raised the appropriateness of the language on the fourth line down on page 83 related to the weight given to the recommendations of the Character and Fitness Committee. It was concluded that the language was not useful.

MOTION: Judge Rokich moved to delete the entire fourth line of section (6) on page 83. The paragraph would then end with the words "assigned to the petition."

SECOND: The motion was seconded by Mr. Morris.

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

Rules 25F, 25G and 25H. Ms. Nessel-Sale recommended adoption of the language proposed for Sections F, G and H respectively.

VOTE: The Committee voted to adopt Rules 25F, 25G and 25H as proposed.

Rule 25I. Ms. Nessel-Sale recommended adoption of Section I as proposed.

Mr. Dever suggested that reference to a specific alcohol or drug program was inappropriate.

MOTION: Mr. Dever moved to delete the reference to Alcoholics Anonymous in the middle of page 85. That part of the sentence would therefore read "active participation in an alcohol or drug rehabilitation program;".

SECOND: Judge Davis seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

The Committee then discussed whether or not the conditions listed in Section I were intended to be exclusive, and concluded that they were not.

MOTION: Judge Rokich moved to insert in the fifth line down on page 85, after the word "include" the words "but are not limited to." The sentence would then read, "The conditions may include, but are not limited to, any of the following."

SECOND: The motion was seconded by Judge Davis.

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

VOTE: The Committee voted to adopt Rule 25I as amended.

Based on the discussion respecting the inclusiveness of Section I and the appropriateness of listing certain items in Section I versus Section E of the same rule, Mr. Dart asked that Ms. Nessel-Sale's subcommittee revisit additions or changes to Sections E and I to be sure that they are consistent. Any proposed changes should be considered at the October meeting. (?)

Rule 25J. Ms. Nessel-Sale recommended adoption of Section J but noted two changes. First, the word "generally" on the fourth line of page 86 should be deleted, and the sentence should begin with the word "Unless". Also, the rule ends at the end of that same paragraph. The paragraph beginning with the words "Readmission occurs" and the following paragraphs should be indicated as commentary.

VOTE: The Committee voted to adopt Rule 25J as amended. ✓

Rule 26. Ms. Nessel-Sale recommended that the Committee delete the rule, as proposed by the subcommittee.

VOTE: The Committee voted to adopt the subcommittee's proposal with the addition that a reference back to Rule 25B be made in its place. (?)

6. **OTHER BUSINESS.** The Committee asked that for purposes of simplicity, a version of the rules as modified by the Committee to date be prepared and distributed.

The Committee also considered the November and December meeting dates, and concluded that November 26 should remain as the regularly scheduled meeting, but that the December meeting should be moved to December 17.

7. **ADJOURNMENT.** There being no further business, the Committee was adjourned.