

Approved 2/11/92

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, January 28, 1992, 5:30 p.m.
Administrative Office of the Courts

Bert L. Dart, Presiding

PRESENT:

Bert L. Dart
Lee Dever
Tom Arnett
Stephen F. Hutchinson
Clark Nielsen
J. Frederic Voros
Hon. Lynn Davis
G. Richard Hill
John Morris
Danny Kelly
F. John Hill
Stuart Schultz

EXCUSED

John Palmer
Barbara Polich
Jo Carol Nessel-Sale
Hon. John Rokich
Stephen Trost

STAFF:

Colin R. Winchester

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

MOTION: Mr. Morris made a motion to approve the Minutes of the January 14 meeting as prepared.

SECOND: Judge Davis seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

2. **SANCTIONS STANDARD 4.** Mr. Voros distributed a new draft of Standard 4 which was prepared based on the Committee's discussion at the last meeting.

Mr. Dever suggested that any violation of law automatically reflects on a lawyer's fitness to practice. Mr. Kelly and Mr. Morris disagreed with Mr. Dever, noting that that

approach has been rejected in current Rule of Professional Conduct 8.4(b).

Mr. Nielsen asked whether "criminal act" as used in Standard 4 is defined. Mr. Morris noted that it is the same language as that used in Rule of Professional Conduct 8.4.

MOTION: Mr. Voros made a motion that subparagraphs (a) to Standards 4.1, 4.2, 4.3 and 4.4 be approved as drafted.

SECOND: Mr. Hutchinson seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

MOTION: Mr. Voros made a motion to approve subparagraphs (b) of Standards 4.1, 4.2, 4.3 and 4.4 as drafted.

SECOND: Mr. Arnett seconded the motion.

VOTE: The Committee voted to approve the motion, nine in favor and one opposed.

3. **SANCTIONS STANDARD 8.** Mr. Voros directed the Committee's attention to Standard 8 which had been previously distributed.

MOTION: Mr. Hutchinson made a motion to approve Standard 8 as drafted.

SECOND: Mr. Nielsen seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

4. **SANCTIONS STANDARD 9.** Mr. Voros directed the Committee's attention to Standard 9, which had been previously distributed in the subcommittee's December 17, 1991 draft. He indicated that Standard 9.1 allows aggravating and mitigating circumstances to be considered after misconduct has been established, that Standard 9.2 lists factors which may be considered in aggravation, that Standard 9.3 lists factors which may be considered in mitigation, and that Standard 9.4 lists factor which are neither aggravating nor mitigating.

MOTION: Mr. Voros made a motion that Standards 9.1 and 9.2 be adopted as drafted.

SECOND: Mr. Hutchinson seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

MOTION: Mr. Voros made a motion that Standard 9.3 be approved as drafted.

SECOND: Mr. Richard Hill seconded the motion.

Mr. Voros reviewed the subcommittee's proposed changes from the ABA Model. The major changes occur in newly proposed subparagraph (i) which deals with mental disability or impairment, including alcoholism or drug abuse, and subparagraph (j) which deals with unreasonable delay which prejudices the respondent attorney. Neither of these subparagraphs are included in the ABA Model.

Mr. Voros also noted that the subcommittee recommended deletion of ABA Model subparagraph (i) (referred to as subparagraph (k) in the subcommittee's December 17 draft). That subparagraph deals with "interim rehabilitation" as a mitigating factor. The Committee discussed whether to re-insert the subparagraph in the Standard.

MOTION: Mr. Voros made a motion to re-insert ABA Model subparagraph (i) as subparagraph (k) and to re-number the subsequent subparagraphs. Subparagraph (k) should read as follows:

Interim reform in circumstances not involving mental disability or impairment.

SECOND: Mr. Morris seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

MOTION: Mr. Dever made a motion to amend the first line of newly proposed subparagraph (i) as follows:

Mental disability or impairment, including ~~alcoholism or drug~~ substance abuse when:

SECOND: Mr. Voros seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

MOTION: A Committee member made a motion to approve Standard 9.3 as amended.

SECOND: A Committee member seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

5. **STANDARD 9.4.** Mr. Voros reviewed Standard 9.4, indicating that the subcommittee recommended deletion of ABA Model subparagraph (b). The Committee discussed whether to re-number the remaining subparagraphs of Standard 9.4 and voted unanimously to defer a decision on that issue pending a recommendation from the subcommittee.

MOTION: A Committee member made a motion to adopt Standard 9.4 as drafted.

SECOND: Mr. Arnett seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Mr. Dart directed the subcommittee to incorporate the changes made by the Committee and to submit a final draft of the Sanctions Standards as approved. The subcommittee should also make a recommendation on the numbering format.

6. **RULE OF PROFESSIONAL CONDUCT 3.8(f).** Mr. Richard Hill stated that the concerns addressed by Rule 3.8(f) are more properly addressed in a criminal procedure rule than an ethical rule. He suggested that the matter be referred to the Advisory Committee on the Rules of Criminal Procedure for further study.

Mr. Hutchinson stated that because a rule of the Utah Supreme Court has no effect on federal criminal practice, the rule should be considered as an ethical rule.

Mr. Arnett expressed agreement with Mr. Hill's point of view, indicating that Mr. Trost also agreed with Mr. Hill. Mr. Trost had informed Mr. Arnett that it would be difficult to prosecute a violation of Rule 3.8(f).

Mr. Hutchinson stated that the Criminal Procedure Advisory Committee may elect not to study the rule at all.

MOTION: Mr. Richard Hill made a motion that Rule 3.8(f) be referred to the Criminal Procedure Advisory Committee and that that committee be requested to respond to this Committee within sixty days.

SECOND: Mr. Arnett seconded the motion.

Mr. Hutchinson stated that although the concerns addressed by the proposed rule are not currently problems in Utah, they are likely to become problems in the future.

VOTE: The Committee voted to approve the motion, nine in favor and one opposed.

7. **RULES OF PROFESSIONAL CONDUCT 1.13, 1.14 AND 1.17.** Mr. Arnett directed the Committee's attention to ABA Model Rules of Professional Conduct 1.13 and 1.14.

Rule 1.13 deals with situations in which a lawyer is employed or retained by an organization. It advises the lawyer of several measures which he or she may take when the lawyer knows that an officer or employee of an organization intends to act or refuses to act in a matter related to the representation that is a

violation of a legal obligation to the organization or a violation of law which might be imputed to the organization.

Rule 1.14 deals with situations in which the lawyer's client is under a disability, and allows a lawyer to seek the appointment of a guardian with respect to the client when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Mr. Arnett explained that these two rules had not been recommended by the committee which had originally studied the ABA Model Rules. It was felt by some members of that committee that because the rules are advisory in nature, they did not belong in the Rules of Professional Conduct.

Mr. Kelly noted that use of the word "shall" in the proposed rules goes beyond simple advice.

Mr. Arnett noted that Rule 1.13 does not authorize a lawyer to engage in "whistle-blowing" outside the organization, and that government attorneys would be bound by statutes and rules in addition to these rules if adopted.

Mr. Kelly noted that in bankruptcy law, the attorney owes a duty to the owners of the organization so long as the organization is solvent, but that upon insolvency, the attorney's duty shifts to the organization's creditors.

MOTION: Mr. Arnett made a motion that Rule 1.13 be adopted as drafted.

SECOND: Mr. Richard Hill seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

MOTION: Mr. Voros made a motion to delete the comma in Rule 1.14(b).

SECOND: Mr. Dever seconded the motion.

VOTE: The Committee voted four in favor and four opposed to the motion. The Chair cast a deciding vote opposing the motion.

MOTION: Mr. Arnett made a motion to adopt Rule 1.14 as drafted.

SECOND: Mr. Richard Hill seconded the motion.

VOTE: The Committee voted to approve the motion, seven in favor and one opposed.

MOTION: Mr. Arnett made a motion to insert Rule 1.13 and 1.14 in the appropriate order, and to re-number existing Rules 1.13

and 1.14 as 1.15 and 1.16 respectively.

SECOND: Mr. Richard Hill seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

The Chair directed that discussion and action on Rule 1.17 be deferred until Mr. Trost was present.

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