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**MINUTES**

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

Tuesday, May 24, 1993, 5:30 p.m.  
Administrative Office of the Courts

Bert L. Dart, Presiding

**PRESENT:**

Bert L. Dart  
Thomas N. Arnett, Jr.  
Stephen A. Trost  
J. Frederic Voros  
Lee Dever  
G. Richard Hill  
Danny C. Kelly  
Jo Carol Nessel-Sale  
Clark Nielsen

**EXCUSED:**

John W. Palmer  
F. John Hill  
Hon. John A. Rokich  
Barbara K. Polich  
Stephen F. Hutchinson  
John K. Morris  
Stuart H. Schultz  
Hon. Lynn W. Davis

**STAFF:**

Colin R. Winchester

**GUEST:**

Kim S. Christy

1. **WELCOME.** Mr. Dart welcomed the Committee members to the meeting and introduced Kim Christy of the Office of Legislative Research and General Counsel.

2. **STATUS REPORT ON COMMITTEE PROPOSALS.** Prior to the beginning of the meeting, Mr. Winchester distributed the final drafts of the Rules of Lawyer Discipline and Disability, the Standards for Imposing Lawyer Sanctions, and the Rules of Professional Conduct, all of which will be adopted by the Supreme Court effective July 1, 1993. Two draft Minute Entries were also distributed. Mr. Winchester reported that the Minute Entry addressing the Rules of Lawyer Discipline and Disability would be amended to repeal the existing Procedures of Discipline of the Utah State Bar.

The Committee discussed the affect of the new Rules of Lawyer Discipline and Disability on matters already pending in the current discipline system. The Committee determined that informal complaints in the screening panel process should be filed in the

district courts if the screening panel finds probable cause. Those matters which have been tried by a hearing panel but for which the hearing panel's decision has not been rendered should be resolved prior to July 1, 1993.

MOTION: Mr. Voros made a motion that the Committee recommend that the Supreme Court enter an Order requiring that complaints which have been voted as formal complaints but have not yet been tried by the hearing panels be removed to the district courts.

SECOND: Mr. Arnett seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

3. CONCERNS REGARDING RECUSAL OF DISTRICT COURT JUDGES. Mr. Winchester reported that at the Judicial Council meeting held May 24, Judge Harding expressed concern that district court judges would need to recuse themselves in every discipline case in which a lawyer that practiced regularly before them was the named respondent. Judge Harding would amend the Rules of Lawyer Discipline and Disability to provide that discipline matters be heard outside the district(s) in which a lawyer regularly practices. The Judicial Council has invited Steve Trost to meet with them on June 30 to discuss the concern further.

MOTION: A Committee member made a motion that the Rules not be amended at this point in time.

SECOND: Mr. Arnett seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

4. SUBCOMMITTEE REPORT: RULES OF PROFESSIONAL CONDUCT. Mr. Arnett reported that his subcommittee, originally consisting of five members, had been effectively reduced to three members. He distributed a list of Rules of Professional Conduct for which proposed changes exist. That list includes:

A. Rule 1.6(c). The Supreme Court originally adopted this amendment effective October 10, 1990, without the benefit of public comment. The amendment has now been submitted for public comment and no comments were received. The amendment will therefore be included in the Rules.

B. Rule 7.2(a). The amendment is included in the 1993 volume of Utah Court Rules Annotated.

C. Rules 7.3(a) and 7.3(b). The amendments are included in the 1993 volume of Utah Court Rules Annotated.

D. Rule 8.3(d). The Supreme Court originally adopted this amendment effective October 10, 1990, without the benefit of public comment. The amendment has now been submitted for public comment and no comments were received. The amendment will therefore be included in the Rules.

E. Rule 1.3. Mr. Arnett distributed a one page document setting forth several options. The subcommittee will discuss those options and propose a resolution to the Committee in the fall.

F. Rule 1.5. Mr. Trost distributed a multi-page document discussing proposed amendments to Rule 1.5. The two main issues are whether fee agreements should be reduced to writing, and whether referral fees should be allowed. Mr. Trost distributed rules from California, the District of Columbia, New Jersey and Pennsylvania, all of which require written fee agreements in various situations. Mr. Trost noted that some attorneys believe that referral fees benefit the public because they encourage lawyers to refer matters to experts in the field. He indicated that Bob Sykes and Jim Clegg both support referral fees and desire to address the Committee on the issue.

G. Rule 1.13. Mr. Arnett distributed three documents discussing Rule 1.13. The three issues are record keeping, random audits of trust accounts, and automatic notification by the bank to the Bar when a trust account is overdrawn. The subcommittee will discuss and propose suggested amendments to the Committee in the fall.

H. Rule 1.14. Mr. Arnett noted that a recent advisory opinion of the Bar's Ethics Advisory Opinion Committee discussed the retention of files by an attorney upon termination of representation. Mr. Arnett supports an amendment that would not allow attorneys to retain files. The subcommittee will discuss and propose suggested amendments to the Committee in the fall.

I. ABA Model Rules 1.13 and 1.14. These rules were submitted by the Committee to the Supreme Court, after a public comment period, for adoption. The Supreme Court declined to adopt the rules, and has remanded them to the Committee for further study. Mr. Arnett explained that these two rules were never recommended by the Green Committee because Jim Lee, a member of the Green Committee, was opposed to including aspirational statements in the rules. The Supreme Court has never previously considered

these two rules. That recollection is contrary to Justice Zimmerman's and Justice Durham's recollection. The subcommittee will address these rules further in the fall.

J. Rule 1.17. Mr. Arnett noted that the ABA was reconsidering the rule, and suggested that the Committee postpone action on the rule pending resolution by the ABA.

K. Rule 2.1. Mr. Arnett distributed a letter from Randy Dryer to Hardin Whitney dated September 14, 1992. The letter discusses Colorado's recent amendment to Rule 2.1 which would require a lawyer to advise the client of alternative forms of dispute resolution. The subcommittee will discuss the proposal further in the fall.

L. Rule 4.4. Mr. Trost suggested that additional information be obtained from the ABA before considering this rule further.

M. Rule 5.7. Mr. Arnett noted that this rule is also being reconsidered by the ABA, and suggested that the Committee postpone consideration until the matter is resolved by the ABA.

N. Rule 6.1. Mr. Arnett noted that the ABA has proposed language that would require lawyers to "attempt" to provide 50 hours of *pro bono publico* service per year. The subcommittee will address this rule further in the fall.

O. Rule 7. Mr. Arnett distributed a letter from David B. Watkiss to Bert Dart dated March 29, 1993. According to Mr. Arnett, this rule needs the most work. The Committee will study the rule throughout the summer and report back in the fall.

P. Rule 8.5. Mr. Arnett distributed a copy of the amendment proposed by the ABA's Standing Committee on Ethics and Professional Responsibility. The rule addresses jurisdictional questions which arise when a lawyer practices in more than one jurisdiction. The subcommittee will study the proposal further and report back in the fall.

Q. Sexual Ethics. Mr. Arnett reported that both Florida and California have adopted rules addressing the propriety (or lack thereof) of lawyers having sex with their clients. The subcommittee will review those rules, study the issue further and report back in the fall.

Mr. Arnett noted that this list is not inclusive, and that the subcommittee welcomes input from Committee members about other rules needing consideration.

Ms. Nessel-Sale suggested that the Committee determine, from a philosophical point of view, whether it wants aspirational statements included in the Rules.

5.           **EXPIRATION OF COMMITTEE TERMS.** Mr. Winchester noted that May 28 is the deadline for seeking re-appointment to the Committee. A Committee member noted that Gary Sackett, co-chair of the Bar's Ethics Advisory Opinion Committee, is interested in serving on the Committee and asked Mr. Winchester to contact him directly.

6.           **FUTURE MEETINGS.** Mr. Dart recommended that no meetings be held until September, 1993. The Committee concurred in that recommendation.

7.           **OTHER BUSINESS.** Mr. Dart thanked the Committee members for their hard work and diligent efforts in completing the Rules of Lawyer Discipline and Disability and the Standards for Imposing Lawyer Sanctions. The Committee, in turn, thanked Mr. Dart for his efforts in chairing the Committee.

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