

MINUTES

SUPREME COURT ADVISORY COMMITTEE ON  
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, February 27, 1990, 5:00 p.m.  
Administrative Office of the Courts

Darwin C. Hansen, Presiding

PRESENT

Darwin C. Hansen  
Thomas N. Arnett  
Hon. Lynn W. Davis  
Lee Dever  
F. John Hill  
G. Richard Hill  
Danny C. Kelly  
Jo Carol Nessel-Sale  
Clark Nielsen  
Barbara K. Polich  
Stuart H. Schultz  
Stephen Trost  
J. Frederick Voros, Jr.

EXCUSED

John K. Morris  
John W. Palmer  
Hon. John Rokich

STAFF

Carlie Christensen

1. WELCOME AND INTRODUCTION OF NEW MEMBERS.

Darwin Hansen welcomed the members to the meeting and introduced Stephen Trost as one of the new committee members appointed by the Supreme Court. Mr. Hansen explained that the other new appointee, Judge John Rokich, replaces Judge Leonard Russon.

2. APPROVAL OF THE MINUTES. Judge Davis made a motion to approve the minutes of the January 23, 1990 meeting. The motion was seconded by Lee Dever and the minutes were approved as submitted.

3. REPORT OF DISCIPLINARY SUBCOMMITTEE. Jo Carol Nessel-Sale referred the committee to the report prepared by the ad hoc committee of the bar in response to the ABA report. She indicated that the circumstances are different now than when the report was first prepared. Specifically, she indicated that the bar's disciplinary program has fiscal and workload problems now which did not exist at the time of the ad hoc committee report.

A. Removal of Bar Commission and Bar Counsel from Disciplinary Process. Ms. Nessel-Sale referred the committee to page 3 of the ad hoc report which discusses

the removal of bar commissioners from disciplinary proceedings. The report indicates that any person who wanted to be heard by the bar commission at the time disciplinary action was recommended, would be heard. This is no longer the case. The current rule now provides that the bar member may be heard by the bar commission after its decision is made.

Ms. Nasset-Sale also reported on a conference she attended in Los Angeles where she learned that the national trend is to eliminate probable cause determinations by a disciplinary panel and to place responsibility with a single person for the probable cause determination or the issuance of a complaint.

Clark Nielsen indicated that the minority portion of the ad hoc report prepared by Brian Barnard was revealing in terms of the interaction between the bar commission, lawyers and bar counsel.

Darwin Hansen indicated that he had a conversation with Steve Hutchison of the Utah State Bar. Mr. Hutchison had indicated that if bar counsel is removed from the bar, an increase in cost will occur because of the need to duplicate support services and capital costs. He was also concerned that separation of bar counsel would cost the bar members more money.

Clark Nielsen indicated that the Supreme Court's direction to the committee was to provide the fairest and best procedure and that the Court would deal with any political or fiscal consequences. Mr. Nielsen also explained that unfortunately, the disciplinary system competes heavily with other bar programs for financial support. He suggested that although increase in bar dues may be inevitable, the Supreme Court could reallocate dues to operate bar and disciplinary functions.

Darwin Hansen questioned if removal of the bar commission necessitates an increase in expenses and whether or not the disciplinary counsel could be housed at its current location and utilize the same staff.

Ms. Nasset-Sale indicated that reallocating responsibilities general counsel and disciplinary counsel may refine job responsibilities and result in savings. She suggested, however, that co-location would require separate storage areas and computer files to maintain the integrity of the separate functions.

Ms. Nasset-Sale identified other inherent conflicts which exists between bar counsel and the bar commission.

1. Bar counsel is responsible for prosecuting disciplinary matters. The bar commission is responsible for raising adequate funds to operate the bar. This situation allows attorneys to seek preferential treatment in disciplinary matters in exchange for financial contributions to the bar association and places the bar commission in a conflict as the body responsible for adjudicating disciplinary matters and managing the finances of the bar.

2. A potential buyer of the bar association's former offices had a disciplinary matter pending. Bar counsel was contacted by commissioner members and reminded of the sensitive nature of such a disciplinary proceeding.

Ms. Nasset-Sale indicated that such conflicts of interest are inherent in the dual roles of bar counsel and bar commission.

She indicated, however, that the proposed rules maintain the concept of self-regulation and do not transfer disciplinary responsibility to a non-lawyer body.

Stephen Trost indicated that commissioners are sensitive to these conflicts and recuse themselves where conflicts exist. Mr. Trost acknowledged that conflict is inherent in the system yet suggested that operationally the system works.

Barbara Polich questioned whether the bar commission is able to fairly review disciplinary matters involving an attorney who litigates against the bar commission. Ms. Polich indicated that it would be better to have an apolitical group review disciplinary matters. As a member of the disciplinary panel, she expressed concern about dealing with bar counsel, about the executive director's issuance of subpoenas and about the interchange between disciplinary panels and disciplinary counsel at all levels. She also suggested that due process should be afforded to attorneys at the same level provided by the court.

Lee Dever questioned whether removal of the disciplinary process from the bar would be the first step toward a non-integrated bar. If so, mandatory membership in the bar may no longer be justified.

Mr. Nielsen indicated that this conclusion was not inevitable and that the first step toward non-integration has already been taken in that the CLE committee is not funded by the bar. He suggested that the Supreme Court has the ability to make membership optional at any time.

Ms. Nessel-Sale expressed concern that the bar commission's authority for discipline may chill bar members' freedom to object to the commission's management decisions.

Richard Hill questioned the message being sent to the public. He suggested that the message may be disintegration, but that providing the disciplinary process with some independence may increase public confidence in the bar.

Judge Davis questioned the extent of the bar's financial commitment for discipline.

Steve Trost indicated that the Office of Bar Counsel is well funded except for investigative resources. He also indicated that the disciplinary system is a totally reactive system.

Mr. Trost reported that there is a backlog from 1986-87 on serious cases which could result in suspension or disbarment. Minor cases however are handled efficiently. He also reported that during February, 75% of bar counsel's time was spent performing general counsel work. 25% of the time was spent on disciplinary matters. He acknowledged that a conflict between the two roles necessitate separation but there would be an inevitable increase in cost.

Ms. Polich indicated that a problem exists with allocating workload because of the inexperience of disciplinary attorneys on staff. The problem could be resolved by hiring attorneys with more litigation experience. Mr. Trost suggested that the factor of cost would still be an issue because experienced attorneys would require more money.

Jo Carol Nessel-Sale suggested that in appropriate cases, disciplinary costs could be assessed on a sliding fee scale which may offset increased expenses for attorneys.

John Hill questioned whether bar commissioners had expressed concerns, other than financial ones.

Mr. Hansen responded that the bar commission was concerned that removal of the disciplinary function may have an adverse effect upon the integrated bar. In addition the commission indicated that if the committee's concern is about the bar commission's ability to adversely influence bar counsel, the problem may not be cured by housing disciplinary counsel with the Supreme Court.

Ms. Nasset-Sale indicated that the subcommittee is not concerned with undue influence exercised by the bar commission but the inherent conflict which exists on a day to day basis.

Ms. Nasset-Sale also indicated that the existing rules do not provide the complainant with the right of appeal and expressed concern that the public may be given short shrift in the disciplinary process. She indicated that the proposed rules recognize the right of the public to play a greater role in the disciplinary process.

Mr. Hansen suggested that lawyers are more secure having lawyers judge them than non-lawyers. He also questioned where additional funding would come from if needed to finance the disciplinary process. He indicated that additional funding must come from either an increase in bar dues or a legislative appropriation to the Supreme Court.

Ms. Nasset-Sale indicated that the Court can allocate existing dues and that the increase in cost will result in a better system.

Danny Kelly suggested that financial considerations should be kept in mind to the extent that the committee's recommendations should be feasible, but if the committee is assured that the proposed changes are required, the committee should not let financial considerations be the overriding concern.

Ms. Nasset-Sale indicated that Justice Stewart wants the committee's best proposals without regard to financial or political costs.

Mr. Voros expressed concern that lawyers set up a disciplinary process for themselves which has conflicts, does not protect individual rights, and does not provide due process. Yet, financial considerations appear to be an overriding consideration.

Mr. Trost indicated that the existing system is not totally unwieldy. The disciplinary panel provides a solid record which is reviewed by the commission and subject to further review by the Court. He questioned whether the committee had considered appointment of an administrative law judge to hear disciplinary matters.

Ms. Nasset-Sale explained that her subcommittee believed a voluntary system which includes a three member panel with one lay person is the best approach for handling disciplinary proceedings.

Mr. Nielsen questioned whether the committee members had other concerns.

Ms. Nasset-Sale indicated that the proposed subcommittee rules would be available by the next meeting. The rules are patterned after the model ABA rules.

MOTION: Richard Hill made a motion to approve, in concept, the removal of the bar commission and bar counsel from the disciplinary process.

The motion was seconded by Judge Davis. The motion passed with 11 committee members voting in favor and 1 member abstaining.

B. Screening Panels. Lee Dever expressed concern about elimination of the screening panel because the complainant will now have the burden of convincing disciplinary counsel. This is the complainant's "single shot". The complainant will have the right to appeal but most likely will not pursue it.

Mr. Nielsen indicated that currently each screening panel has a non-lawyer who makes it easier for a complainant to express concerns. Mr. Nielsen questioned how many people appear before the screening panel and suggested that if only 1 out of 1,000 people appear, the impact of eliminating the screening panel may not be significant.

Lee Dever questioned why an attorney should be subject to a public disciplinary proceeding if the complaint is not meritorious but the credibility of parties is at issue.

John Hill indicated that Legal Defenders' client contact is often harried and the opportunity for misunderstanding is great. He noted that the integrity and pride of an attorney is significant and that the existence of the screening panel provides a good process for airing issues and achieving speedy resolutions. Appearing before an impartial panel is far different than meeting with a prosecutor who is a "gearing up the prosecutorial machinery." There is a need to respond to both the interests of the complainant and the accused attorney as soon as possible.

Ms. Nasset-Sale indicated that a full airing can now be achieved prior to the screening panel if attorneys respond. Under the proposal, disciplinary counsel can still resolve conflicts by confidential disciplinary proceedings. Otherwise, disciplinary counsel will issue a

complaint and set the matter for hearing. The chair of the hearing panel must concur in the judgment of the disciplinary counsel.

Ms. Nessel-Sale also indicated that the complainant and accused attorney are limited to making paper presentations to disciplinary counsel. No personal appearance is permitted under the proposed rules.

Mr. Nielsen expressed concern about the committee's discussion of the proposed rules in the abstract without a review of the specific proposals.

John Hill explained that the accused attorney and/or complainant should have the right to petition for a screening panel and attach affidavits explaining why the screening panel should be convened. The complainant should also have the right to appeal dismissal of the complaint to the chair of the disciplinary panel.

Lee Dever questioned the need to eliminate the screening panel if the backlog is not at the screening panel level.

Mr. Nielsen indicated that at some point, economics should be considered.

Ms. Nessel-Sale suggested that the committee cannot ignore decisions of the Supreme Court regarding problems with screening panels. A system should be devised which is fair and cognizant of the parties' rights.

Ms. Polich indicated that the proposal reallocates resources to place greater emphasis on the formalized process.

Ms. Nessel-Sale stated that under the proposal, confidential disciplinary proceedings will depend upon consent of the attorney.

Mr. Dever indicated that approximately 40% of complaints are dismissed by the screening panel.

Mr. Voros suggested that it is unlikely for the chair of the screening panel to act independently and dismiss many complaints. When someone is laying out facts for the screening panel, it is more likely to exercise independent judgment or investigate the complaint further.

Mr. Hansen summarized the committee discussion, noting that the committee determined there is a need to change the current disciplinary procedures and had provided the subcommittee will valuable input regarding the screening panel. Mr. Hansen indicated that the issue will be considered further.

4. ADJOURNMENT. There being no further business, the meeting was adjourned. The next committee meeting was scheduled for **Tuesday, March 27, 1990, at 5:00 p.m.**

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