AGENDA

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

May 22, 1990
5:00 p.m.
Administrative Office of the Courts

1.	Welcome and Approval of Minutes	Darwin C. Hansen
2.	Schedule of Summer Meetings	Darwin C. Hansen
3.	CLE Credit for Committee Work	Carlie Christensen
4.	Discussion of Proposed Rules	Darwin Hansen Jo Carol Nesset-Sale
5.	Other Business	
6.	Adjournment	

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MINUTES

SUPREME COURT ADVISORY COMMITTEE ON
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, May 22, 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
John K. Morris
Jo Carol Nesset-Sale
Clark Nielsen
Barbara K. Polich
Stephen Trost
J. Frederick Voros, Jr.

EXCUSED

Richard Hill
Danny Kelly
John Palmer
Stuart Schulz

STAFF

Carlie Christensen

1. WELCOME AND APPROVAL OF MINUTES. Darwin Hansen welcomed the members to the meeting. Lee Dever noted a correction on page 3 of the minutes where the word "reminded" was incorrectly typed twice. Tom Arnett made a motion to approve the minutes of the February 27, 1990 subject to Mr. Dever's correction. The motion was seconded by Stephen Trost and carried unanimously.

2. SCHEDULE OF SUMMER MEETINGS. The committee amended their meeting schedule to resolve conflicts with the state bar meetings and the state holiday on July 24. The committee's summer meetings will be held as follows:

Tuesday, June 19, 1990	-	5:00 p.m.
Tuesday, July 31, 1990	-	5:00 p.m.
Tuesday, August 28, 1990	-	5:00 p.m.

3. CLE COMMITTEE CREDIT FOR COMMITTEE WORK. Ms. Christensen reported that the Administrative Office of the Courts is planning to submit an application to the Utah State Bar to acquire CLE credit for members of the Supreme Court's Advisory Committees. Ms. Nesset-Sale expressed

her objection to such a proposal because she believes that committee work does not satisfy the purpose of CLE which is to enable attorneys to better serve their clients. In addition, she expressed concern about CLE credit undermining the voluntary nature of the committee's work.

Darwin Hansen suggested that the application filed by the Administrative Office with the CLE Board should allow individual committee members the option of requesting CLE credit for committee work.

4. DISCUSSION OF DISCIPLINARY RULES. Darwin Hansen commended the disciplinary subcommittee for their extensive work on the proposed rules for attorney discipline.

Mr. Hansen then questioned the committee regarding the best method for discussing the proposed rules. He suggested first, an open discussion of the philosophical aspects of the rules; and second, a discussion of specific rules.

Jo Carole Nesset-Sale indicated that her subcommittee would add a table of contents. She also indicated that Rules 7-9 were missing from the original draft, but that copies had been made and provided to the committee members. Ms. Nesset-Sale advised the committee that the proposed rules were based upon the Model Rules.

Clark Nielsen indicated that Rule 1 is not contained in the model rules. He indicated that the purpose of the rule was to make clear the Supreme Court's authority to regulate discipline.

Mr. Hansen asked if there was any further discussion regarding the procedure for discussing rules or general philosophical questions. If not, the committee would proceed with examining each rule.

5. LIMITATION PERIOD. Mr. Dever expressed concern that there was no limitation period for filing complaints of professional misconduct. He suggested that the absence of a limitation period creates practical problems for attorneys who must keep records indefinitely to defend against old complaints. He also expressed concern about the availability of witnesses such as secretaries and other attorneys when there is no limitation period.

Clark Nielsen commented that the model rule states that attorney misconduct, regardless of when it occurs, is relevant to the question of fitness to practice law. A more difficult problem is the appropriate limitations period.

Barbara Polich suggested that there are practical reasons for adopting a limitation period, as well as legal reasons. A fundamental reason being that due process requires that claims not be stale.

Ms. Nesset-Sale noted that most people report complaints very close to the time that the conduct occurred. She suggested, however, that the complexity of an issue and the client's lack of sophistication may prevent timely reporting or discovery. She analogized the limitation issue to habeas corpus proceedings in federal court, where the only limitation is the equitable doctrines of estoppel and laches which are established by case law. She reported that most jurisdictions do not have statutes of limitation governing the filing of bar complaints.

Mr. Nielsen acknowledged that the lack of a limitation period is not unusual.

Prof. Morris questioned whether conduct beyond the limitation period is relevant or whether it be admitted as evidence of aggravating circumstances. He indicated that once the limitation rule is drafted as a discovery rule, the limitation period becomes meaningless and no longer meets the objectives of practicability and fairness.

Fred Voros indicated that without a discovery provision, the rule is comparable to a statute of repose which the Utah Supreme Court has found unconstitutional.

Tom Arnett commented that the constitutionality of a statute of repose was in addressed in the civil context and not the regulatory area. He questioned whether a lawyer's fitness to practice law today should be judged against that lawyer's conduct eight years ago. Mr. Arnett suggested that remedy for such conduct is malpractice not professional discipline.

Ms. Nesset-Sale indicated that malpractice is a different remedy. There are legitimate circumstances where the conduct in question is of an egregious nature but not readily discoverable. She indicated, however, that in her experience as bar counsel, only two complaints were filed beyond the 4 year limitation period.

Steve Trost indicated that the current rule provides a limitation period of four years from the date of discovery or the date of the conduct.

Prof. Morris indicated that four years seemed like a reasonable compromise but that the rule will not satisfy both the concerns of fairness and practicality and at the same time assure that all complaints of professional conduct are reviewed.

Mr. Hansen questioned that if a person is no longer susceptible to criminal charges, why should that person be susceptible to disciplinary actions.

Ms. Nesset-Sale suggested that a criminal proceeding is different from a disciplinary proceeding in that attorneys hold a position of trust.

Mr. Hansen questioned the difference where the violation of trust constituted criminal conduct, for example the diversion of client funds.

Mr. Arnett suggested that an attorney who steals from a client is probably engaged in a pattern of behavior and not an isolated incident which would be beyond the limitation period.

Ms. Polich questioned the committee's protocol for debating issues and suggested that the committee take a straw vote on the question of whether there should be a limitation period.

Prof. Morris suggested that the criminal justice model may not be the only or best model. He suggested that the purpose of the regulatory process is to protect people in the future rather than punish people for past conduct.

John Hill suggested that the focus of protecting people in the future should be on the present capacity of a lawyer rather than the past.

Mr. Voros questioned whether the lack of diligence is truly reflective of a lawyer's fitness to practice law. He indicated that it is too broad to say that any ethical violation is an indication of fitness to practice law.

Ms. Nesset-Sale questioned whether certain types of conduct should be exempt from the limitation period.

Mr. Voros suggested that the distinction may be between intentional and neglect conduct.

Mr. Hansen then asked the committee members to participate in a straw vote as to whether they favored a limitation period. The straw vote indicated that 8 members favored a limitation period and 3 members were opposed.

6. **DISMISSALS.** Mr. Dever questioned why the dismissal of a complaint should be maintained for seven years.

John Hill questioned whether the rationale for such a provisions is the theory that where there is smoke, there is fire.

Ms. Polich suggested that if multiple complaints are filed, there should be an official record for purposes of establishing res judicata.

Mr. Hansen suggested that this issue be referred back to the subcommittee for further consideration.

Ms. Nesset-Sale indicated that the seven year formula is based upon the model rule and comment which provide for keeping a dismissal for a reasonable time.

John Hill stated that even if the complaint is not dismissed with prejudice, a new complaint is brought on its own merits and the old complaint is irrelevant.

Ms. Polich indicated that the rule should make a distinction between dismissal with prejudice and without prejudice and declination. She suggested that the distinction may justify a difference in maintaining records.

Mr. Hill asked if there was a stated philosophical position in balancing the rights of the complainant versus the accused.

Ms. Polich suggested that the philosophical tone had been debated rule by rule.

Mr. Voros questioned the meaning of the statement on page one, paragraph C, which indicates that the rules should be interpreted consistent with the spirit of professional discipline. He questioned whether this was a higher standard.

Mr. Hansen indicated that the statement was taken from the existing rule.

Mr. Trost indicated that the language and the rule changes appear to reflect an emphasis on public protection rather than the rights of a lawyer. He suggested that the change in the burden of proof reflects this philosophy.

7. RULE 1. PURPOSE, AUTHORITY AND SCOPE OF ATTORNEY DISCIPLINARY PROCEEDINGS. Mr. Nielsen indicated that this rule was intended to reflect the same purpose and scope as the current rules. It was modeled after the existing rule. The only change is in subparagraph B which talks about the court's constitutional authority. He explained that Rules 1 through 5 were not red-lined, but that these rules generally track the model rules.

Judge Davis questioned the change in terminology from members of the Utah State Bar to the Bar of the Supreme Court of Utah.

Mr. Trost suggested that the change may politicize the issue.

Mr. Arnett questioned whether the Utah State Bar is broad enough to encompass lawyers that are not members of the Utah Bar but admitted to practice law pro hoc vice.

Prof. Morris suggested that the reference to "members of the bar" in paragraph A be deleted and simply insert "attorneys". He also questioned the meaning of "spirit of professional discipline" in paragraph C and questioned if this statement should be deleted.

Mr. Nielsen suggested that some interpretative statement should be included in either the rule or a committee note.

Mr. Voros suggested that paragraph C should be modified to delete the language "the spirit of professional discipline of the members of the Bar and to ..." and the paragraph should read as follows:

> C. All disciplinary proceedings of the Bar shall be conducted in accordance with the rules and proceedings described herein. These rules shall be construed so as to achieve substantial justice and fairness in disciplinary matters with dispatch and at the least expense to all concerned parties.

In reference to paragraph D, Prof. Morris suggested that disciplinary proceedings are undertaken not construed.

Ms. Polich questioned if the statement in paragraph D is repetitive of paragraph C.

Mr. Dever suggested referring subparagraph D to the subcommittee for consideration in light of paragraph C.

8. **RULE 2. THE STATE DISCIPLINARY BOARD OF THE UTAH SUPREME COURT.**

Mr. Nielsen indicated that this rule provides for creation of a statewide disciplinary board responsible to the Supreme Court. Paragraph A discusses the role of the agency. He suggested that some of the rule may be more appropriate for committee note or comment rather than rule.

Mr. Voros asked if the subcommittee had tried to follow the model rules and number them accordingly.

Ms. Nesset-Sale explained that the subcommittee tried to conform with the model rules and retain numbering except where the size of the bar or geographic considerations were an issue.

Mr. Voros questioned whether the model rules should be afforded a presumption.

Mr. Arnett indicated that the recommendation of the professional conduct rules subcommittee is to modify Utah's rules to conform with the numbering of the ABA rules.

Ms. Nesset-Sale indicated that the subcommittee tried to follow the numbering of the ABA model rules except for the last four or five rules.

Mr. Hansen asked how disability fits within the disciplinary rules and questioned whether disability should be included in the purpose statement.

Ms. Nesset-Sale indicated that the current rules provide for bar counsel to deal with disabled attorneys.

Mr. Hansen questioned whether disability is a mitigating factor in disciplinary proceedings.

Ms. Nesset-Sale indicated that a disability determination may operate as a stay of a proceeding to determine fitness to practice law. An attorney can request placement on disability status to avoid ethical violations.

Prof. Morris commented that the grounds for finding disability may also be mitigating circumstances, and that disability does not involve the moral culpability of discipline.

Ms. Nesset-Sale referred the committee to Rule 23 which deals exclusively with disability.

Mr. Hansen question whether the commentary to Rule 2 should make a reference to the distinction and to Rule 23.

Prof. Morris suggested that the commentary should make clear that disciplinary and disability are different.

Mr. Dever suggested changing the term "agency" to another term and "disciplinary board" to panel or committee. He commented that the term "agency" implies public agency and government and that "board" may be confused with the Board of Bar Commissioners.

Mr. Hill suggested that the committee should limit its concerns to substantive concerns and allows the subcommittee to address procedural problems.

Mr. Hansen suggested that the distinction between substance and procedure could be the subject of further debate and that committee members should identify both substantive and procedural concerns.

5. **ADJOURNMENT.** There being no further business, the meeting adjourned.

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