

MINUTES

SUPREME COURT ADVISORY COMMITTEE ON
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, June 19, 1990, 5:00 p.m.
Administrative Office of the Courts

Darwin C. Hansen, Presiding

PRESENT

Darwin C. Hansen
Hon. Lynn W. Davis
Lee Dever
Jo Carol Nessel-Sale
Clark Nielsen
John Palmer
Stuart Schultz
J. Frederick Voros, Jr.

EXCUSED

Thomas N. Arnett
F. John Hill
G. Richard Hill
Danny Kelly
John Morris
Barbara K. Polich
Hon. John Rokich
Stephen Trost

STAFF

Carlie Christensen

1. WELCOME AND APPROVAL OF MINUTES. Darwin Hansen welcomed the members to the meeting. The minutes of the May 22, 1990 meeting were approved as submitted.

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

A. Agency. Darwin Hansen expressed concern about the phrase "judicial agency" and the connotation that it refers to a government agency. Clark Nielsen suggested that the concern be addressed by public comment.

B. Board. Clark Nielsen indicated that the rules provide for appointment of a seven-member board which consists of four bar members and three public members. The members serve staggered terms and are limited to serving two consecutive terms.

Darwin Hansen questioned why there is not a corresponding limitation on the terms of service for members of the hearing panel.

Clark Nielsen suggested that the distinction is a feature of the model rules.

Jo Carol Nessel-Sale suggested that the distinction might also be explained as a function of managing the workload since the work of all the hearing panels is funneled to a single Board.

Darwin Hansen indicated that the Board composition of 4 lawyers and 3 lay persons is a nice compromise which assures lay representation on each hearing panel.

Clark Nielsen indicated that the hearing panels are separate from the Board and lay representation on the Board does not affect the composition of the hearing panel. Mr. Nielsen suggested that the importance of the board's composition lies not only in the protection of lawyers, but in assuring the integrity of the legal system. He suggested that lay representation was important to further that interest.

Lee Dever suggested expanding the Board to nine members so that five members would constitute a quorum. He suggested that it is easier to get five of nine members than four of seven members.

Clark Nielsen indicated that the rule does not require all members to be in attendance at a meeting or a hearing to accomplish board work, but that much of the work can be done on paper.

Lee Dever suggested that a change in the composition of the Board would prevent the loss of two experienced attorneys simultaneously at the expiration of the terms.

John Palmer questioned the ratio of attorneys and lay persons. He indicated a preference for less public involvement because he believes that lawyers understand the business of lawyers better than lay persons.

Clark Nielsen commented that this idea may seem more fair to the lawyer but wondered about the concerns of the complainant.

Fred Voros indicated that he felt more comfortable with the standard of "what is fair to the lawyer" because the purpose of the proceeding is to determine the fitness of the lawyer to practice law. He also indicated that the civil remedy equalizes the interest of both the lawyer and the complainant.

Clark Nielsen suggested that in the medical malpractice area, a developing standard is not to focus on

the doctor's conduct, but to focus on what the patient could reasonably expect to be told. The same approach may be more applicable here.

Mr. Voros indicated that the problem with that analogy is that it refers to civil litigation. A lawyer's fitness to practice law should not be determined by what the client thinks is a reasonable expectation.

Mr. Nielsen indicated that he recognized a disciplinary proceeding is different from traditional civil litigation, but expressed concern that the committee was preoccupied with the lawyer's interest.

Mr. Hansen explained that the issue is not a question of fairness, but to what extent a lay person should be involved in disciplinary proceedings against attorneys.

Mr. Voros indicated that the interests in a disciplinary proceeding are not analogous to civil actions because a lawyer's license to practice law is at stake, while the complainant is merely seeking vindication of a principle.

Mr. Nielsen indicated that he disagreed with the notion that the complainant has no interest in disciplinary proceedings. He suggested that the Committee should look beyond just the lawyer's interest to the complainant's interest, and to the interests of the bar at large.

Mr. Dever questioned the type of cases which would be considered by the Board for decision. He suggested that if the case requires an attorney to understand the ramifications of the conduct, there may be a need for more attorney members. If the problems are simple, greater public involvement may be appropriate.

Ms. Nessel-Sale indicated that the Board serves as a reviewing court over hearing panels. The Board's decisions are reviewed by the Supreme Court.

Ms. Nessel-Sale also indicated that generally, lay persons are knowledgeable, competent and attend meetings regularly. She indicated that the mix of lawyers and lay persons is not sacred other than the requirement that lay persons not serve on a panel alone. She suggested that a technical application of the law is not usually the nature of disciplinary proceedings.

Mr. Hansen called for a vote as to who was in favor of the 4-3 mix: 5 were in favor and 2 were opposed.

Mr. Dever suggested that the appointment of Board members should be modified to provide that two members of the bar and one public member be appointed for initial

three year terms; one member of the bar and one public member be appointed for initial two year terms; and that one member of the bar and one public member be appointed for one year terms.

John Palmer questioned whether members of the hearing panel should be subject to the same limitations on successive appointments as Board members.

Clark Nielsen indicated that the model rule on page 8, paragraph 3b only requires a hearing committee member to sit out two years before appointment to a fourth term.

C. Board Officers. Clark Nielsen indicated that the Board's officers are appointed by the Supreme Court rather than elected by the Board's members. He also indicated that the Chair and Vice-Chair have administrative responsibilities.

D. Quorum. Mr. Dever suggested that there would be a better chance of having a quorum if the board was expanded to 9 members.

Jo Carol Nessel-Sale explained that the Board will meet at least monthly and sometimes bi-monthly and that that the more people you add to the Board, the more difficult it becomes to coordinate schedules.

Mr. Hansen called for a vote as to how many committee members felt that a seven-member panel is appropriate. Six members approved and one opposed.

E. Compensation. Mr. Nielsen indicated that Board members receive reimbursement for reasonable expenses.

Mr. Hansen questioned whether the rules authorize board members to travel around the state to conduct hearings. Mr. Nielsen indicated that there are currently no provisions in the rules which would either authorize or prohibit the Board from traveling.

F. Disqualification of Members. Mr. Nielsen explained that board members would be disqualified from hearing cases under the same circumstances in which a judge would be disqualified.

Lee Dever questioned whether the Court should appoint substitute Board members.

Clark Nielsen suggested that the Court could have a list of alternate members so that there is no suggestion of forum shopping.

G. Powers and Duties of Board.

Mr. Nielsen explained that board members are responsible for proposing rules of procedure for discipline. He suggested, however, that the Court may want its own committee.

Mr. Nielsen indicated that it was also the responsibility of the Board to appoint disciplinary counsel.

Mr. Hansen suggested that such a proposal may draw criticism that appointment by the Board does not cure the appearance of or opportunity for conflict. Mr. Hansen suggested that the Supreme Court appoint disciplinary counsel.

Clark Nielsen suggested that a conflict may still exist with a court appointment, but at a higher level. He suggested that the conflict exists not with the appointing authority but with the counsel's dual role as in-house counsel for the Bar Commission and as prosecutor before the Commission.

Ms. Nessel-Sale suggested that placing the appointing authority with the board was the most benign place. The Board does not hear trials, while the Supreme Court is the final review.

Mr. Hansen suggested that alternatively, the bar commission should make the appointment because the bar commission would now be independent of the disciplinary board and there would no longer be an inherent conflict. He suggested that it would be better to remove the appointment from the disciplinary board which will ultimately preside over those cases prosecuted by disciplinary counsel.

Ms. Nessel-Sale indicated that the Supreme Court appoints counsel to handle criminal cases on appeal. She further indicated that the model rules suggest removing the appointing authority from the political arm of the bar.

Mr. Hansen expressed concern that the same theoretical problem of conflict exists.

Mr. Voros suggested that the concern with a bar commission appointment is the appearance of fairness. There is a greater appearance of impropriety when the bar commission, which acts as an advocate for lawyers, is the appointing authority as opposed to the disciplinary board.

Mr. Nielsen suggested that the bar commission has no more authority to appoint disciplinary counsel than the Supreme Court gives it. He suggested that the bar association and commission exist and collect dues at the pleasure of the Supreme Court.

Mr. Hansen suggested that if the appointing authority is transferred from the bar commission, it should be for better reasons than simply because someone has to do it.

Mr. Voros questioned whether the appointment of bar counsel by the board was clearly the basis of the ABA's criticism. He suggested that the gravamen of the ABA's criticism was that the bar commission was bar counsel's client. This distinguishes the committee's proposal from the existing system.

Mr. Hansen called for a vote as to who was in favor of appointment by the disciplinary board:

4 members voted in favor
4 members voted in opposition

Mr. Hansen recommended that the matter be referred back to the subcommittee for consideration.

Ms. Nessel Sale indicated that there would be less impact if the Board makes the appointment. The Board acts as a pass-through body. She suggested that complainants judge the disciplinary setting by the personality and competence of the counsel, not by the appointing authority.

Mr. Hansen suggested that the subcommittee consider the following alternatives for the appointing authority:

Court of Appeals
Supreme Court
Bar Commission or
Independent selection commission

If an independent commission is recommended as the appointing authority, disciplinary counsel would be supervised by the disciplinary board. The selection commission would not have the ability to discipline, supervise or remove.

Mr. Nielsen questioned whether the Judicial Council might be considered as an alternative.

Mr. Palmer indicated that regardless of the method used, the procedure would be subject to criticism. He suggested that there is little difference between the Supreme Court and the disciplinary board, except that the disciplinary board is a bit more removed.

Ms. Nessel-Sale indicated that Minnesota's disciplinary counsel is appointed by the Supreme Court.

Disciplinary counsel's performance is reviewed by the disciplinary board and reported to the Court. She indicated that the Pennsylvania Supreme Court appoints its disciplinary board and the board appoints its chief disciplinary counsel.

Mr. Hansen again suggested that this matter be referred back to the subcommittee for further consideration. He expressed concern that the same criticism will be directed at the committee proposal that is directed at the existing system where the appointing authority can manipulate the prosecution.

Mr. Nielsen went on to review the authority of the board. He indicated that the board had the authority to appoint hearing panels and make random panel assignments.

Ms. Nessel-Sale indicated that the assignment procedure is left to the discretion of the Board as long as the assignment procedure assures randomness.

Mr. Voros suggested that the language in paragraph (4)(iii) be changed to "assign in rotation a chair to review.... "

Mr. Voros suggested that paragraph (5) implies that the Board can take evidence. If so, the rule should be made clear.

Ms. Nessel-Sale stated that the Board does not take evidence. If further evidence is necessary, the matter is remanded back to the panel.

Mr. Nielsen indicated that Rule 2B authorizes the board officers to rule on the admissibility of evidence. He suggested that the board's ability to take evidence and the scope of review should be clarified. The rule does not contemplate a new trial but the taking of further evidence where appropriate.

Ms. Nessel-Sale indicated that subsequent rules provide that review by the Board shall be limited to a review of the record. The Board does not take new evidence but remands the matter to the hearing panel as the final trier of fact.

Mr. Palmer indicated that the concept of the Board taking evidence was new and suggested that the Board's review should be limited to the record.

Mr. Nielsen indicated that reviewing the sufficiency of findings is reviewing for legal error and does not constitute making findings. He suggested that the rules should make clear whether the standard of appellate review should govern.

Mr. Nielsen reviewed paragraphs (6) and (7) governing sanctions and probation, but suggested that those rules should be discussed in conjunction with the subsequent rules which address these subjects more fully. He indicated that paragraph (6) provides for imposition of the lowest sanction without court approval because it is done by stipulation of the parties and with the consent of the panel chair. Paragraph (7) authorizes the imposition of probation as a sanction. Paragraph (8) authorizes the Board to appoint and supervise staff. Paragraph (9) leaves discretion to the Board to inform the public of all disciplinary and disability matters.

3. ADJOURNMENT. There being no further business, the meeting adjourned.

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