

Approved as drafted  
12-10-91

**MINUTES**

SUPREME COURT ADVISORY COMMITTEE ON  
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, November 26, 1991, 5:30 p.m.  
Administrative Office of the Courts

Bert L. Dart, Presiding

**PRESENT:**

*My notes*  
Bert L. Dart  
Stephen Trost  
Tom Arnett  
Stuart Schultz  
J. Frederick Voros  
F. John Hill  
John K. Morris  
Lee Dever  
Hon. John Rokich  
Danny Kelly  
Jo Carol Nessel-Sale  
Stephen F. Hutchinson  
G. Richard Hill  
Barbara Polich

**EXCUSED**

John Palmer  
Hon. Lynn Davis  
Clark Nielsen

**STAFF:**

Colin R. Winchester

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

Mr. John Hill noted that the November 12 Minutes made reference to him as the Committee member charged with leading the discussion on Rule of Professional Conduct 5, but that the assignment was not his.

**MOTION:** Mr. Morris made a motion to approve the November 12 Minutes, as amended by Mr. Hill's reference.

**SECOND:** Mr. Arnett seconded the motion.

**VOTE:** The Committee voted unanimously to approve the

motion.

2. USE OF STATE DISTRICT COURTS AS FORUM FOR ATTORNEY PUBLIC DISCIPLINE PROCEEDINGS. Mr. Trost reviewed the historical perspective of the proposal, indicating that he had become aware of similar systems in other states at the NOBC Conference in Seattle and the ABA meeting in Atlanta. He listed the problems with Utah's current discipline system: the scheduling of volunteers is a difficult process; he continually waives oral argument on motions due to scheduling problems; the use of bar subpoenas requires repeated explanation; the clerk of the discipline court has provided improper notice, or has failed to provide notice, in certain situations; and the discipline court lacks decorum, security and court reporters.

Mr. Trost reported that since the last Committee meeting, he had spoken with several lay members and that as a group, they felt little need for public members at the hearing panel level. All thought the district court proposal was a good idea. Mr. Trost distributed affidavits from non-lawyers Molly Sumner, Gerald Merrill, Stanford Darger, and Sandra Wilkins. The affidavits generally favored retention of the screening panel process and did not object to replacing hearing panels with district court judges.

Mr. Trost then responded to the concerns raised in Mr. Hutchinson's September 4 letter:

1. Training. Mr. Trost indicated that some states provide training while others do not. He suggested that Utah might provide some degree of training, but that overall, judges are currently capable of handling discipline matters.

2. Cost. Mr. Trost indicated that Florida has a constitutional provision regarding the governance of the practice of law similar to the Utah Constitution. The Florida system has been established by court rule, and no challenge has yet been made to the funding of the system. Mr. Trost distributed a Cost Analysis which, based upon his estimates, would fund the system at the rate of \$73.00 per hour for a net annual cost of approximately \$10,000.00. He indicated that the Bar should account to the Administrative Office of the Courts for actual time and costs incurred.

3. Consistent Sanctions. Mr. Trost indicated that the NOBC recommendation is to reduce appellate review to one level. If that model is followed, the Supreme Court, by providing appellate review, would encourage consistency among the district court judges.

4. Reticence of Judges to Impose Discipline, Contempt and Sanctions. Mr. Trost indicated that when necessary, a judge from outside the attorney's primary district of practice could be used to hear a discipline matter. Such an approach might resolve the concern that perceived conflicts of interest will arise if a

judge has been involved in an attorney's discipline process and continues to hear cases in which the attorney is involved.

5. Florida Model vs. California Model. Mr. Trost indicated that his preference is the Florida model, which uses sitting state judges rather than full-time discipline judges. He indicated that the parties and the public give great deference to "real" judges, and that the use of existing courtrooms and facilities within the state system would be more economical than providing independent discipline courtrooms.

Mr. John Hill questioned whether the proposal includes an intermediate appellate review panel.

Mr. Trost indicated that the trial court recommendation would be followed by one, and only one, level of appellate review. He proposed that the district court would enter findings of fact and conclusions of law and a recommended sanction, and that the Supreme Court would review the findings and conclusions for capriciousness and review the recommended sanction for consistency.

Mr. Voros questioned whether it would be constitutionally permissible for the trial court to enter a final sanction, rather than a recommended sanction.

Mr. Trost indicated that it may be permissible for the Court, by rule, to grant the power to the trial court to enter a final sanction.

Mr. Dart asked if the proposal will help reduce the current backlog of discipline cases.

Mr. Trost indicated that the biggest reason for the backlog is scheduling problems, and that the proposal would resolve such problems. He also indicated that the current backlog is approximately 240 cases which extends back to 1987 and 1988.

Ms. Polich acknowledged that scheduling is sometimes difficult, but stated that many of the problems could be alleviated by better administration of the discipline system. As a hearing panel chair, Ms. Polich exercises control over the cases assigned to her panel. She suggested that hearing panel chairs be given the authority to exercise more control over pending matters in order to expedite the process. Ms. Polich indicated that an additional reason for the backlog may be the understaffing of bar counsel's office.

Ms. Polich queried whether this Committee's actions and recommendation are futile in light of the Chief Justice's letter to Steve Trost. She indicated concern about the Committee having spent a great deal of time over the last few years developing one system while the Bar Commission and the Task Force were considering other systems. She also expressed concern about the fact that Mr. Trost has developed the district court proposal outside of the

Committee.

Mr. Morris noted that much of the Committee's work will be needed regardless of the discipline system recommended.

Mr. Hutchinson noted that the proposal may have arisen during the Committee's comment period and that the Committee should acknowledge and deal with it at this time. He stated that many of the scheduling problems could be cured through administration, that the screening panels should be retained, that Mr. Trost's Cost Analysis was too conservative and that judges are removed from the discipline system. He also noted that the lawyer population in Florida and California greatly exceed the lawyer population in Utah and that consequently, judges in those states are less likely to personally know the lawyers that practice before them. He indicated that motion practice could be heard and determined by the panel chair, that pre-trial matters could be streamlined, that any system which possibly opens the door to legislative control over attorney discipline should be avoided, and that court security issues occur only very infrequently. Finally, he indicated that not all lawyers are trial lawyers, and requiring them to attend discipline proceedings in the district court may force them to stipulate to sanctions, rather than proceed with a trial.

Ms. Polich stated that regardless of the system used, interplay with the Lawyers Helping Lawyers Committee and other diversion programs should be maintained.

Mr. Trost indicated that he had tried four or five discipline trials in 1990 and an additional four or five discipline trials in 1991. In addition, associate bar counsel tries some discipline trials. When Mr. Trost took office, there were 127 formal discipline proceedings pending, and about 75 formal proceedings are "voted" each year. There are now approximately 140 pending matters. He indicated that with present resources and the present system, the backlog will not be reduced. He noted that a proposal has been made to allow an attorney to resign with discipline pending, and indicated that if the Court adopts the proposal, 28 additional cases will be disposed of.

Mr. Dever questioned whether the district court system is necessary to relieve the backlog.

Ms. Polich indicated that she is available to try cases, but has not been contacted, and that the current system can be administered in such a way that faster resolution of matters is possible.

Mr. Trost noted that the backlog is not the only reason he proposes a change in the system, and that special prosecutors have not been very effective in reducing the backlog.

Ms. Nessel-Sale noted that part of bar counsel's problem is that bar counsel serves both as general counsel and discipline

prosecutor. There must be more trials in order to reduce the backlog. She also expressed concern about the likelihood that district court judges will not desire to be involved in the discipline system, noting that they have not been willing to report disciplinary matters in the past. Given a choice, Ms. Nessel-Sale would select the California model over the Florida model so that discipline judges will have a large enough caseload to develop some expertise in the area. She also expressed affinity for public member involvement and concern that court commissioners would hear most discipline matters.

Judge Rokich indicated that judges need no special training to hear discipline matters, and that the district court option would be more efficient than the present system.

Mr. Voros asked whether it is easier to schedule a screening panel than a hearing panel.

Mr. Trost indicated that screening panels meet every Thursday night, and that it is not necessary to schedule them for lengthy trials.

Mr. John Hill asked whether there will be an independent prosecutor under the district court proposal.

Mr. Trost indicated a preference to separate general counsel and prosecutor duties.

Mr. Kelly spoke in favor of the district court proposal, indicating that the creation of an independent discipline system may simply be too costly, and absent compelling reasons to create such a system, the existing district court system should be used.

Mr. Richard Hill indicated that he had conducted a straw poll of citizens, and that the main concerns of those citizens were that "the fox is guarding the hen house" and that lawyers might take discipline more seriously if they were forced to appear before a judge.

Mr. Dever indicated that because only 75 formal discipline proceedings are "voted" each year, the fox still guards the hen house for approximately 85 percent of discipline referrals.

**MOTION:** Mr. Trost made a motion to substitute district court judges as the triers of fact in lieu of hearing panels in the Committee's proposed rules.

**SECOND:** Mr. Morris seconded the motion.

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

3. **FUTURE MEETINGS AND ADJOURNMENT.** Mr. Dart indicated that the subcommittee chairs will meet to revise the Committee's meeting

calendar and agenda. The Committee will meet on December 10 and December 17 at the Administrative Office of the Courts. There being no further business, the meeting was adjourned.