

MINUTES

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

Tuesday, October 6, 1992, 5:30 p.m.
Administrative Office of the Courts

Bert L. Dart, Presiding

PRESENT:

John K. Morris
G. Richard Hill
Stephen A. Trost
Lee Dever
Bert L. Dart
J. Frederic Voros
Barbara K. Polich
Stuart H. Schultz
Clark Nielsen

EXCUSED:

Hon. John A. Rokich
Hon. Lynn W. Davis
Stephen F. Hutchinson
Danny C. Kelly
John W. Palmer
Thomas N. Arnett, Jr.
F. John Hill
Jo Carol Nessel-Sale

STAFF:

Colin R. Winchester

GUESTS:

Lisa J. Watts
Brian M. Barnard
Randy L. Dryer

1. **WELCOME.** Mr. Dart welcomed the Committee members and guests to the meeting.
2. **MINUTES.** Approval of the Minutes of the September 22 meeting was continued to October 27.
3. **STANDARD SANCTION 4.5.** Discussion and resolution of proposed Standard Sanction 4.5 was continued to October 27.
4. **DISCUSSION OF COMMENTS SUBMITTED BY BAR COMMISSION AND BRIAN BARNARD.** Mr. Dryer discussed the perceived conflict of interest created by the Commission's involvement in both the

administrative and adjudicatory aspects of lawyer discipline. He noted that if the Commission is removed from the adjudicatory process, there is no need to also remove the Commission from administration. He therefore suggested that the Commission should appoint disciplinary counsel and Committee members, and should engage in other acts of administration. Mr. Barnard stated that the Commission should not be involved in the discipline process at all, but conceded that if the Court appoints discipline counsel and Committee members, the same perceived conflict of interest exists. Mr. Barnard suggested that the Court appoint an ad hoc committee to select discipline counsel. Mr. Dryer noted that if an ad hoc committee is created solely to hire discipline counsel, that committee will have no ongoing responsibility to ensure that the discipline process works effectively. Mr. Barnard noted that judicial nominating commissions are similar to his proposed ad hoc committee.

Mr. Dryer addressed the proposed separation of disciplinary counsel and general counsel responsibilities, indicating that there was no need for separation. The Committee reviewed its prior decision, noting that the proposed rules do not address the issue. Rather, only Mr. Dart's cover letter to the Supreme Court suggests that the functions be separated. Mr. Dryer stated that Mr. Trost's "corporate counsel" work takes up only ten percent of his time. Mr. Dever suggested that general counsel should not only provide corporate-type general counsel services, but should also engage in all activities other than discipline. Mr. Dryer indicated that it would be difficult for the Commission to appropriately fund the salaries of separate, qualified counsel. Mr. Barnard noted that the general counsel who represents the Commission in a suit filed by an attorney should not be a position to prosecute that attorney in a discipline matter. Mr. Trost reported that the Division of Occupational and Professional Licensing uses a preponderance of the evidence standard.

Mr. Barnard addressed the standard of proof previously adopted by the Committee, indicating that "clear and convincing" was a more appropriate standard. He noted that the Division of Occupational and Professional Licensing uses the clear and convincing standard, that termination of parental rights cases use the clear and convincing standard, and that contempt matters are also resolved by the clear and convincing standard.

Mr. Dryer indicated that the Commission has no objection to using active senior judges as discipline judges. In addition, the Commission suggests that both the respondent and discipline counsel be entitled to one free recusal in each discipline case.

Either party could ask that the newly assigned judge be from without the district.

Mr. Dryer and Mr. Barnard agreed that a separate assessment should be imposed to fund the discipline process.

Regarding Rule 13(a), Mr. Barnard suggested that immunity should be limited to immunity from civil damages. It should not extend to immunity from actions seeking only injunctive or declaratory relief. Mr. Dryer, on the other hand, favors total immunity for volunteer lay members, volunteer attorneys, and discipline counsel. Ms. Polich suggested that total immunity should exist for volunteer attorneys and lay members, and that disciplinary counsel and judges should only be subject to suits seeking injunctive and declaratory relief. She also noted that the rule should mandate the forum in which such actions should be filed.

Mr. Barnard briefly addressed the several remaining issues in his September 28 letter.

5. **ADJOURNMENT.** There being no further business, the Committee meeting was adjourned. At its next meeting, the Committee will discuss the issues presented by Mr. Dryer and Mr. Barnard, and will vote on those issues.