

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

March 16, 1989
Conference Room, Holiday Inn, St. George, Utah

Merlin R. Lybbert, Presiding

PRESENT:

Chair: Merlin R. Lybbert
John Palmer
Christine Burdick
Thomas Arnett
Judge Lynn Davis
Stuart Schultz
Jo Carol Nessel-Sale
Richard Hill
Lee Dever
Judge Leonard Russon

EXCUSED:

Danny Kelly
John Morris
Clark Nielsen
John Hill
Barbara Polich
Fred Voros

STAFF:

Carlie Christensen

GUEST:

Justice I. Daniel Stewart

1. Welcome and Introduction of Members. Mr. Lybbert welcomed the committee members to the meeting and asked them to introduce themselves.

2. Review and Approval of Minutes. Ms. Christensen reviewed the Committee minutes from the October meeting. The minutes were approved as written.

3. Review of Committee Resources. Mr. Lybbert indicated that Justice Stewart had been invited to attend the meeting to receive the progress reports from the various subcommittees. Mr. Lybbert suggested that before Justice Stewart arrived, the committee should discuss any problems which they have encountered in their subcommittee work or their need for any resources which would assist them.

Mr. Lybbert indicated that he had forwarded to the appropriate subcommittees, copies of the ABA's recommendations regarding standard sanctions. Christine Burdick also indicated that she had forwarded information from the ABA's standing committee on professional ethics and copies of court decisions on ethical issues to the appropriate subcommittees. Ms. Burdick indicated that the bar office would allow committee members access to bar resources for research assistance.

Mr. Lybbert advised the committee that BNA had a four volume publication on the Model Rules of Professional Conduct and that the publication was available at his office if

committee members needed to do any research. Ms. Burdick advised the committee that the bar office, the Supreme Court law library and the University of Utah law library also had copies.

4. Review of Subcommittee Work. Mr. Lybbert asked whether the subcommittee members were prepared to report on their progress. Stuart Schultz indicated that he had met with Judge Russon and John Hill to generally discuss professional and courtroom conduct. Mr. Lybbert indicated that he would like the subcommittee to develop procedures which would identify the problems of unprofessional conduct and correct them. Specifically, he suggested that the subcommittee should consider developing guidelines for judges to handle professional misconduct in the courtroom.

Jo Carol Nessel-Sale indicated that the Courts and Judges Committee of the State Bar had studied the possibility of establishing a mechanism for providing constructive criticism to both the bar and the judiciary and that the bar committee's work might be helpful to the subcommittee on professional conduct.

Judge Davis indicated that his subcommittee on standard sanctions would like to coordinate its work with the subcommittee on disciplinary procedures because of the similarities and overlap between the two subcommittee projects.

Ms. Nessel-Sale indicated that her subcommittee had met regularly every three weeks to review the existing rules of discipline and concluded that the existing rules were unsalvageable. She explained that the rules appeared to have been drafted in a piece meal fashion and were internally inconsistent and confusing. She also indicated that her subcommittee had reviewed the disciplinary rules of other states and the ABA's recommendations and was now redrafting the disciplinary rules. She indicated that the new procedures would minimize the bar commission's involvement in disciplinary proceedings and streamline the disciplinary process overall.

5. Time Projections. Mr. Lybbert advised the committee members that he would like the subcommittees to have identified their focus by June of this year and have a completed definitive proposal by the following year. He also suggested that in the fall of this year, the subcommittees should have a written proposal for committee review.

6. Publication of Advisory Opinions. Ms. Nessel-Sale questioned whether the bar's advisory opinions on professional ethics could be published and made available to bar members. Ms. Burdick indicated that the bar commission would have to approve publication of the opinions but that an appropriate place might be Code-Co's Utah Advance Reports which contains the decisions of the Utah Supreme Court and Court of Appeals.

7. Subcommittee Reports. Mr. Lybbert advised Justice Stewart of the subcommittee assignments, the general progress to date and the projected time frames for completing the projects. Mr. Lybbert then asked each subcommittee to inform Justice Stewart of their activities.

a. Subcommittee on Disciplinary Rules. Ms. Nettet-Sale advised Justice Stewart that she was chairing the subcommittee on disciplinary rules and that the members of the subcommittee had varying degrees of experience with the disciplinary process. She indicated that her subcommittee had met regularly to review the existing disciplinary rules and to consider the possibility of modifying the rules in light of the available funding for disciplinary activities, the role of bar counsel, the size of the state bar and other factors. She indicated that the subcommittee concluded that the rules should be redrafted. She reported that the subcommittee had reviewed the disciplinary rules of other states which are well regarded and compared their rules to Utah's. The subcommittee had also reviewed the ABA's recommendations.

She explained that the most far reaching and fundamental proposal for change was to transfer the bar commission's role in disciplinary proceedings to a separate statewide disciplinary panel appointed by the Supreme Court. She also indicated that the subcommittee's proposal would result in greater use of the Chair of the Ethics Committee and include the continued involvement of bar counsel. She indicated that the proposed changes were consistent with the ABA's recommendations concerning the role of bar commissions in disciplinary proceedings and that the bar commission with its involvement in the day to day management, policy making and politics of the bar should not be involved in discipline.

Ms. Nettet-Sale also indicated that the proposals would result in a more streamlined disciplinary process with certain discipline, greater use of bar counsel and quicker resolution of non-meritorious claims.

b. Subcommittee on Professional Conduct. Stuart Schultz advised Justice Stewart that his subcommittee had met once and was still formulating its agenda. He informed Justice Stewart that he had been advised that the activities of the Bar's Courts and Judges Committee may have information which would be helpful to his subcommittee regarding the courtroom conduct of attorneys and judges. He also indicated that Mr. Lybbert had suggested the subcommittee focus should be on identifying conduct problems and developing methods for correction. Mr. Lybbert suggested that one of those procedures might include a dialogue between attorneys and judges regarding their respective conduct.

c. Subcommittee on Rules of Professional Conduct. Tom Arnett advised that the primary focus of his subcommittee was education. His subcommittee would like to develop education programs reviewing the new rules of professional conduct and the ethics advisory opinions issued by the State Bar. He also indicated that his subcommittee would like to survey selected members of the bar and judiciary who have experience in the area of professional ethics concerning education programs, problems in professional ethics and recommendations for improvement.

Richard Hill indicated that his responsibility on the subcommittee was the preparation of an Article for the bar journal which would contain an expanded bibliography of the resources available in professional ethics and the extent of coverage provided by such resources.

Mr. Arnett indicated that his subcommittee's work may overlap with the state bar's CLE committee in that the subcommittee was considering a proposal for three hours of mandatory CLE in the area of professional ethics.

Ms. Burdick indicated that her responsibility was to review the numbering problem which existed with the Utah Rules of Professional Conduct. She recommended that the rules correspond to the national reporting system and that the rules which had not been adopted in Utah be identified as such without changing the numbers of the remaining rules.

Ms. Burdick also suggested that a speakers' bureau on ethics could be developed and that law firms and bar members could be advised of available speakers and topics.

Finally, she indicated that a format should be developed for a CLE program on ethics which would include a general session reviewing the rules of conduct and break out groups focusing on high risk areas of conduct. She also suggested that the survey proposed by Mr. Arnett should include questions concerning law firms' compliance with the requirement that firms train their employees on professional ethics.

d. Subcommittee on Standard Sanctions. Judge Davis indicated that his subcommittee did not have a great deal of experience in discipline and that Ms. Burdick had provided the subcommittee members with some background in that area and had agreed to work with the subcommittee as an ad hoc member. He indicated that the subcommittee had reviewed the ABA's recommendations concerning standard sanctions, the work of the previous bar committee and the recommendations and work of the National Office of Bar Counsel. He indicated that his committee would like input from prominent members of the local disciplinary defense bar, bar counsel and members of the prior bar committee before submitting its recommendations for sanctions.

8. Discussion with Justice Stewart. Justice Stewart commended the committee for their dedication, commitment and personal sacrifice. He requested that the committee members keep track of the hours which they spent on their subcommittee and committee work so that at the appropriate time the legislature and the public could be informed about the voluntary work of the bar and the benefit received by the state. Justice Stewart suggested that those hours be submitted to the Administrative Office of the Courts periodically for compilation. He also recommended to Ms. Christensen that other advisory committees keep track of the time spent on Supreme Court rulemaking activities.

Justice Stewart encouraged the committee members to "think big" about the problems and not to limit their thinking to subcommittee problems. He suggested that the committee work had both positive and negative aspects. The negative aspects were the development of standard sanctions and the revision of the disciplinary rules. The affirmative aspects were the improvement of the practice through improved attorney conduct and education.

Justice Stewart congratulated the committee on its dedication and hard work and indicated that he looked forward to receiving the final product.

9. Adjournment. There being no further business, the meeting was adjourned. The next committee meeting was scheduled for June.

0479q/6-10