

AGENDA

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

November 27, 1989

5:00 p.m.

Administrative Office of the Courts

1. Introduction Darwin C. Hansen
2. Review and Approval of Minutes Darwin C. Hansen
3. Subcommittee Reports
 - Disciplinary Rules Jo Carol Nessel-Sale
 - Professional Conduct Hon. Leonard H. Russon
 - Sanction Guidelines Danny C. Kelly
 - Rules of Professional Conduct Tom Arnett
4. Timetable for Completion of Subcommittee Projects Darwin C. Hansen
5. Schedule of Future Meetings Darwin C. Hansen
6. Other Business
7. Adjournment

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MINUTES

SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Monday, November 27, 1989, 5:00 p.m.
Administrative Office of the Courts

Darwin C. Hansen, Presiding

PRESENT

Darwin C. Hansen
Thomas N. Arnett
Christine A. Burdick
Hon. Lynn W. Davis
Lee Dever
Danny C. Kelly
John K. Morris
Jo Carol Nessel-Sale
Clark Nielsen
Stuart H. Schultz
J. Frederick Voros, Jr.

EXCUSED

F. John Hill
G. Richard Hill
John W. Palmer
Barbara K. Polich
Hon. Leonard H. Russon

STAFF

Carlie Christensen

1. Welcome, Introduction of Committee Chair and Members. Darwin Hansen welcomed the committee members to the meeting and introduced himself as the new committee chair. Mr. Hansen then asked the other committee members to introduce themselves.

2. Review and Approval of Minutes. Mr. Hansen referred the committee to the minutes of the March 16, 1989 meeting. Lee Dever made a motion to approve the minutes as written. The motion was seconded by Jo Carol Nessel-Sale and carried unanimously.

3. Review of Charge. Mr. Hansen reviewed the charge of the committee and the membership and responsibilities of the four subcommittees. The subcommittees are (1) Disciplinary Rules, (2) Assessing and Improving Professional Conduct, (3) Standard Sanction Guidelines and (4) The Rules of Professional Conduct. Mr. Hansen noted that the committee of the whole has only met three times and suggested that since some of the subcommittees have now formulated a written work product for committee review, the committee of the whole should meet more often.

4. Schedule of Future Meetings. Because of the need for more frequent meetings, the committee decided to meet monthly on the fourth Tuesday of every month, at 5:00 p.m., at the Administrative Office of the Courts, 230 South 500 East, Suite #300. The next committee meeting was scheduled for JANUARY 23, 1989 at 4:00 P.M.

5. Report by Sanctions Subcommittee. Mr. Hansen asked the subcommittee chairs to report on their progress. Danny Kelly introduced himself as the chair of the subcommittee on sanctions. He introduced the other members of the subcommittee as Judge Lynn Davis and Lee Dever and indicated that Chris Burdick served as an ad hoc member. Mr. Kelly indicated that the subcommittee had met nine times and kept minutes of its meetings. He explained that the initial meetings were spent refining the scope of the subcommittee's responsibility.

Mr. Kelly indicated that the subcommittee had struggled with the distinction between sanctions and acts of misconduct. Although there are no standard sanctions in place in Utah, as a starting point, the subcommittee reviewed the recommended sanctions proposed by the American Bar Association in 1986. He indicated that very few states have adopted these recommendations, and if the sanctions are approved, Utah would be one of the first states to adopt standard sanctions. Mr. Kelly also indicated that two previous committees had started working on establishing standard sanction guidelines and as part of this process, the Utah State Bar had solicited comments. Mr. Kelly reported that the subcommittee had reviewed the work of these previous committees and solicited input from "defense counsel", and Jo Carol Nessel-Sale and Chris Burdick as prosecutors.

Mr. Kelly pointed out that the National Organization of Bar Counsel (NOBC) modified the ABA recommendations and indicated that the subcommittee's recommendation is to follow NOBC's model with some variations. Mr. Kelly also indicated that the subcommittee had spent time studying aggravating and mitigating circumstances.

For purposes of consistency and predictability, the subcommittee felt it was important to have a set of standard sanctions in place as soon as possible.

After further discussion by the subcommittee on its projects, Jo Carol Nessel-Sale indicated that she would need the subcommittee's recommendations regarding the procedure for imposing sanctions. She also questioned whether the subcommittee would make recommendations as to whether the guidelines should be mandatory, presumptive or advisory.

Finally, Mr. Kelly indicated that during the process of receiving input from bar members regarding sanctions, he had also received comments from the Bar concerning the procedure

and propriety of certain conduct constituting professional misconduct. He indicated that he would provide Jo Carol Nasset-Sale with copies of these comments.

6. Rules of Professional Conduct. Tom Arnett identified himself as the subcommittee chair and introduced the other members of his committee as John Morris, Richard Hill and Chris Burdick. Mr. Arnett reported on their assigned projects and informed the committee that Richard Hill is working on a bibliography of ethics resources to be published in the Bar journal and that Chris Burdick is working on various education programs and coordinating this effort with the CLE Board. He also indicated that she would be working on technical changes to the Rules of Professional Conduct, such as renumbering.

John Morris indicated that the rules also required some substantive changes. He indicated that some of the recommended changes were based upon ABA changes and U.S. Supreme Court case law. Prof. Morris indicated that although Rules 1.13 and 1.14 were deleted from the Utah Rules, he felt this decision should be re-examined. He also indicated that there were problems with Rule 2.2 regarding attorneys as mediators.

Jo Carol Nasset-Sale questioned whether the committee would address ethics advisory opinions issued by the State Bar. She indicated that old opinions conflict with new ones and with existing rules. Ms. Burdick suggested that Professor Leslie Francis, Chair of the Bar's Ethics Advisory Committee, would be the appropriate person to review the concerns of the Committee. Prof. Morris indicated that he was a member of the bar's ethics advisory committee and was aware of the problems, but indicated that the workload of the committee, limited its ability to resolve these concerns.

After further discussion, it was determined that the problems concerning the bar opinions went beyond the purview of the Committee and neither the Supreme Court nor its Advisory Committee should be involved in reviewing or adopting advisory opinions issued by the Bar.

7. Professional Conduct. Mr. Hansen indicated that Judge Russon was the Chair of this subcommittee, but that Judge Russon had apparently been detained and was not able to attend the meeting. Mr. Hansen asked Stuart Schultz if he would report on the subcommittee's activities. Mr. Schultz indicated that the subcommittee had not met since the last committee meeting.

Prof. Morris asked for clarification as to the subcommittee's responsibilities and questioned whether it involved responsibility for the rules or focused on etiquette and protocol. Ms. Christensen indicated that the subcommittee had originally been asked to focus on identifying problems of

professional misconduct and developing methods for correction. Mr. Lybbert, the former chair of the committee, suggested that one of those procedures might include a dialogue between attorneys and judges regarding their respective conduct.

8. Disciplinary Rules. Jo Carol Nessel-Sale, introduced herself as the subcommittee chair and the subcommittee members as Clark Nielsen, John Palmer and Barbara Polich. Ms. Nessel-Sale indicated that the subcommittee had studied the ABA model rules, disciplinary rules from other jurisdictions, and the existing rules. It was suggested that the existing rules be revised in accordance with the ABA model because of organizational problems and inconsistencies between existing rules.

Ms. Nessel-Sale indicated that the work of this subcommittee is complete except for a definitions section, homogenizing the rules, and coordinating with the sanctions subcommittee. She also indicated that the subcommittee is unanimous in its recommendations.

Specifically, she reported that the subcommittee recommended eliminating the role of the Board of Bar Commissioners in disciplinary proceedings. The subcommittee's recommendations were based on the following:

1. Philosophical reasons.
2. The inherent conflict in having a political body serve as an adjudicative body.
3. The ABA's recommendations.

Specific recommendations also include that bar counsel be hired by the Supreme Court or a statewide disciplinary committee rather than by the Board of Bar Commissioners, that a standard of review be established and that the rules of procedure and evidence apply to proceedings on formal complaints.

She also indicated that the recommendations would require consideration of financial issues and that the recommendations must be financially workable.

She requested that the recommendations not be discussed with the bar commission until the committee of the whole had had an opportunity to review the recommendations and make suggested modifications. She also recommended that the bar commission be given the opportunity to review the proposal and make comments prior to the time that the proposal is published and distributed for public comment.

Mr. Hansen requested that copies of the recommendations be provided to the committee members prior to

the January meeting and asked the committee members to review the existing rules. Mr. Hansen also asked Ms. Nasset-Sale to examine the issue of attorneys' fees raised by the bar commission.

Ms. Nasset-Sale stated that the format of their recommended rules will show a variation from the ABA model rules, but not from the existing rules.

9. Petition for Extraordinary Writ. Carlie Christensen advised the committee members that Brian Barnard had filed a petition with the Supreme Court challenging the bar's disciplinary proceedings. Specifically, Mr. Barnard claimed that the informal imposition of sanctions by the screening panel violated due process. Ms. Christensen indicated that the Chief Justice had contacted her and requested that this committee review Mr. Barnard's concern in light of the committee's proposed changes to the disciplinary rules.

Ms. Christensen also indicated that Chris Burdick was named as a respondent to that proceeding and therefore, should be excused from the committee meeting during this discussion.

Ms. Burdick excused herself.

Mr. Kelly expressed concern about the Supreme Court referring a matter to the committee when it had been submitted to the court for resolution. Ms. Christensen explained that the Court, in its administrative capacity, frequently called upon the expertise of its advisory committees to provide recommendations to the Court regarding proposed rules.

Tom Arnett made a motion to refer the Court's request to the subcommittee on disciplinary proceedings and to have the subcommittee report their recommendations to the Supreme Court. Fred Voros seconded the motion and the motion carried unanimously.

10. Adjournment. There being no further business, the meeting was adjourned. The next committee meeting was scheduled for **JANUARY 23, 1989 at 5:00 P.M.**