

AGENDA

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

February 26, 1991

5:00 p.m.

Administrative Office of the Courts

1. Welcome and Approval of Minutes Bert Dart

2. Subcommittee Progress Reports:
 - Standard Sanctions Guidelines Danny Kelly
 - Rules of Professional Conduct Tom Arnett
 - Assessing and Improving Professional Conduct
 - Rules of Discipline Jo Carol Nessel-Sale

3. Discussion of Proposed Rules of Discipline Jo Carol Nessel-Sale

4. Other Business

5. Adjournment

Approved
3/26/91

MINUTES

SUPREME COURT ADVISORY COMMITTEE ON
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, February 26, 1991, 5:00 p.m.
Administrative Office of the Courts

PRESENT:

John K. Morris
Stephen Trost
Thomas N. Arnett
Danny Kelly
Barbara K. Polich
Lee Dever
Clark Nielsen
Jo Carol Nessel-Sale
G. Richard Hill
Hon. John Rokich
F. John Hill
Stuart Schultz

EXCUSED:

Bert Dart
John Palmer
Hon. Lynn W. Davis

STAFF:

Carlie Christensen
Colin Winchester

1. WELCOME. John Morris welcomed the committee members to the meeting and indicated that he had been asked to preside in Bert Dart's absence.

2. APPROVAL OF MINUTES. Steve Trost suggested modification of page 5 of the minutes to make clear that the Calder standard of review applies in disciplinary proceedings.

MOTION: Tom Arnett made a motion to approve the minutes as modified.

SECOND: The motion was seconded by Barbara Polich.

VOTE: The committee voted unanimously to approve the minutes as modified.

3. SUBCOMMITTEE REPORTS. John Morris recommended that the progress reports from each of the subcommittee chairs be postponed until the next committee meeting.

4. John Hill suggested that the subcommittee charged with responsibility for improving the professionalism of attorneys had a confusing charge and questioned the utility of it continuing. He also indicated that since Judge Russon had resigned, a new subcommittee chair had not been appointed.

5. DISCUSSION OF PROPOSED DISCIPLINARY RULES.

Rule 13. Service. Barbara Polich indicated that Rule 13 provides for service in accordance with the Utah Rules of Civil Procedure. She indicated that the issue underlying many of these rules is whether separate procedures should be developed. The same issue is raised by Rule 15 which governs discovery.

John Morris questioned whether the rule provided for service of bar members residing out of state and wondered whether constitutional and jurisdictional issues should be addressed by the rule.

Steve Trost indicated that the Bar's policy has been to not prosecute out of state bar members but to defer prosecution to the resident state and undertake discovery on a cooperative basis.

Clark Nielsen questioned how attorneys could claim that the state bar did not have jurisdiction over their license to practice law.

John Morris questioned whether references to Rule 4 limits the Bar's authority.

Fred Voros suggested that Rule 4 does not address jurisdiction but only the process for effecting service.

Jo Carol Nasset-Sale stated that only personal service is limited by Rule 4.

Lee Dever suggested modifying the sentence to make registered mail or certified mail the first priority.

Steve Trost indicated that personal service in accordance with Rule 4 limits service by publication.

Barbara Polich suggested that the term "personal" be deleted.

Fred Voros questioned how disciplinary counsel would obtain permission for service by publication.

John Morris questioned whether it would be easier to set forth straight forward standards for service in disciplinary proceedings rather than incorporating the service provisions in Rule 4.

Fred Voros suggested that if the word "personal" remains in the rule, controversy over service by publication could be avoided.

Barbara Polich indicated that service is often a very important issue particularly where the attorney already has problems with neglect or office procedures.

Steve Trost indicated that there are situations where service by publication would be necessary.

Jo Carol Nasset-Sale questioned the underlying policy. If a bar member has the responsibility to provide a current address to the Bar, service by certified mail should be sufficient.

Judge Rokich suggested that the panel or hearing committee should retain the power to authorize service by publication rather than requiring court approval.

The disciplinary subcommittee will re-draft the rule consistent with the Committee's discussion.

Rule 14. Subpoena. Barbara Polich suggested that this rule incorporates the rules of civil procedure and the statutory witness and mileage fees.

John suggested that the subpoena rule raises different problems than the service rule because of enforcement.

Barbara Polich stated that the rule provides for enforcement of subpoenas through the district court.

Ms. Polich indicated that she had a greater concern about paragraph B. She questioned whether disciplinary counsel should have authority to issue an investigative subpoena or whether disciplinary counsel should be required to obtain authority from the chair. She suggested that a cross-reference to the rules of procedure may include more baggage than necessary and indicated that the subcommittee members needed guidance in this respect. She noted that practitioners and parties are already familiar with the Rules of Civil Procedure.

John Morris asked the subcommittee to look at the wisdom of incorporating rules of procedure throughout the disciplinary rules except for enforcement of subpoenas. If disciplinary counsel is required to go to someone else for permission to issue an investigative subpoena, there should be standards or criteria for granting that permission. Otherwise it makes no sense and disciplinary counsel should issue subpoenas on his or her own.

Danny Kelly questioned what authority exists for disciplinary counsel or the bar to issue subpoenas and why the district court would enforce those subpoenas.

John Morris summarized the concerns of the committee members as follows:

The authority for issuance of a subpoena;
Whether the Rules of Civil Procedure should be incorporated into the disciplinary rules;
Whether disciplinary counsel or someone else should issue subpoenas; and
What is the criteria for issuance of a subpoena.

John Morris explained that the Supreme Court has the authority to confer power on the bar to issue subpoenas pursuant to its constitutional authority.

Lee Dever indicated that subpoenas issued by administrative agencies are not limited exclusively to prosecutors but also defendants. Therefore, someone other than disciplinary counsel should have the authority to issue subpoenas.

Judge Rokich suggested that to avoid the appearance of impropriety, someone else should issue subpoenas, like the chair of the panel, but not necessarily the full panel.

John Morris asked what standards would make subpoenas more enforceable.

Barbara Polich suggested that the rule needed an additional paragraph governing the issuance of subpoenas and the criteria to be applied.

John Morris suggested that application of the Rules of Civil Procedure should be decided on a case by case basis.

John Morris also suggested that the enforcement provisions in the rule should come after the section governing the quashing of a subpoena.

John Morris requested that Rule 14 be referred back to the subcommittee for reconsideration.

Rule 15. Discovery. Barbara Polich indicated that the biggest variation from the Model Rules is the shift from alternative dispute resolution procedures to the use of discovery in accordance with the Rules of Civil Procedure and the Rules of Evidence.

Jo Carol Nessel-Sale indicated that the rules of discovery are wholly alien to criminal practitioners and

that there is some generosity and humanity in the informal processes provided by alternative dispute resolution.

John Morris indicated that the rule does not preclude informal discovery.

Barbara Polich commented that the intent of the rule is for all discovery to be conducted within 120 days except upon order of the hearing committee.

Lee Dever questioned whether 120 days is too long.

Fred Voros indicated that there is an ambiguity in the first sentence which appears to allow the hearing chair to foreclose any discovery.

Jo Carol Nessel-Sale indicated that the intent was to allow the chair to shorten or lengthen the discovery procedure, not foreclose discovery entirely.

Ms. Nessel-Sale questioned whether the rule prevents informal discovery and if not, whether the rule should specify its availability.

Fred Voros questioned whether disciplinary counsel has the ability to respond within the specified time period.

John Morris indicated that if disciplinary counsel cannot respond to discovery within the specific time period, counsel can apply for an extension of time to the committee chair.

Barbara Polich questioned whether subpoena power should be broadened consistent with the Rules of Civil Procedure.

John Morris questioned whether disciplinary counsel should go to the hearing committee or the district court for authorization to conduct a medical examination.

Rule 16. Access to Disciplinary Information.
Steve Trost questioned whether Paragraph A.3. permits disciplinary counsel to go to the county attorney with information of theft.

Fred Voros asked what is left after pendency, subject matter and status. A narrow reading of subject matter seems more appropriate.

John Morris suggested that the proposed language points out the lack of guidance for bar counsel.

Jo Carol Nessel-Sale suggested that if disciplinary counsel is precluded from reporting criminal activity, the complainant could report criminal activity.

John Morris indicated that the rules of professional conduct prevent counsel from using a third person to do what counsel cannot do directly.

John Morris also indicated that the degrees of disclosure depend upon the circumstances. Where the subject of the information waives confidentiality, anything can be disclosed. In the second circumstance disclosure should be limited to subject matter, status, etc. In the third circumstance, disclosure should be unlimited.

Stuart Schultz expressed concern about the audience to whom the information should be disclosed and whether the rule should identify those individuals entitled to the information.

Fred Voros indicated that the third circumstance is implicitly limited to those organizations which have the need.

Jo Carol Nessel-Sale expressed concern about paragraph three which states that conditions be disclosed upon need.

Barbara Polich reminded the committee of their initial determination to refrain from nitpicking the language of the Code to retain its precedential value.

6. ADJOURNMENT. There being no further business, the meeting was adjourned. The next committee meeting is scheduled for March 26, 1991 at 5:00 p.m., at the Administrative Office of the Courts.

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