

MINUTES

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

Tuesday, October 27, 1992, 5:30 p.m.
Administrative Office of the Courts

Bert L. Dart, Presiding

PRESENT:

Bert L. Dart
Thomas N. Arnett, Jr.
Stephen F. Hutchinson
Stephen A. Trost
J. Frederic Voros
Hon. John A. Rokich
Hon. Lynn W. Davis
Lee Dever
Stuart H. Schultz
Danny C. Kelly
G. Richard Hill
Barbara K. Polich
Clark Nielsen
John K. Morris

EXCUSED:

John W. Palmer
F. John Hill
Jo Carol Nessel-Sale

STAFF:

Colin R. Winchester

GUEST:

Lisa J. Watts

1. WELCOME AND APPROVAL OF MINUTES.

Minutes of September 22 Meeting.

MOTION: Judge Davis made a motion to approve the September 22 Minutes, subject to the following amendment to the sixth paragraph on page five:

The Committee discussed Mr. Slauch's recommendation regarding the "oath or affirmation" requirement in Rule 25(b), and determined to replace the "oath or affirmation" requirement with a "notarization" requirement.

SECOND: Mr. Voros seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Staff was asked to prepare amended minutes and distribute the same to Committee members.

Minutes of October 6 Meeting.

MOTION: Mr. Kelly made a motion to approve the Minutes of the October 6 meeting, subject to the following change in the fourth sentence of the first full paragraph on page two:

Mr. Dryer stated that Mr. Trost's "general corporate counsel" work takes up only ten percent of his time.

SECOND: A Committee member seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Staff was asked to prepare amended minutes and distribute the same to Committee members.

2. SANCTION STANDARDS. Mr. Voros discussed revised Sanction Standards 4.3 and 4.5 which had been previously distributed. The Committee discussed the revised Sanction Standards and their correlation to Rule of Professional Conduct 8.4. Mr. Dever noted that paragraph (b) of Standards 4.2, 4.3, 4.4 and 4.5 refer either to "fitness in other respects" or "lawyer's fitness to practice." He suggested that the phrase should be uniform throughout all paragraphs (b). Mr. Voros agreed that the phrase should be uniform.

Mr. Voros noted that the paragraphs (b) came from Model Sanction Standard 5.1. The Committee discussed, at length, whether to delete all paragraphs (b) or whether to revise and retain them.

MOTION: Mr. Voros made a motion that all paragraphs (b) be deleted.

SECOND: Mr. Kelly seconded the motion.

Mr. Schultz noted that deletion of paragraphs (b) would allow some crimes that do not meet the specific intent requirements of paragraphs (a) to slip through the cracks.

VOTE: The Committee voted six in favor of the motion and six opposed to the motion with one abstaining. Mr. Dart did not vote to break the tie. Consequently, paragraphs (b) will remain in the Standards at the present time. The Committee will attempt to resolve the revisions of paragraphs (b) at the next meeting. In the interim, the subcommittee was asked to meet and make a recommendation on the appropriate revisions, if any.

One Committee member left the meeting at this time.

3. ISSUES RAISED IN PUBLIC COMMENT SUBMITTED BY BAR COMMISSION.

Bar Commission as Appointing Authority for Disciplinary Counsel.

MOTION: Mr. Trost made a motion that the Bar Commission, not the Court, appoint disciplinary counsel.

SECOND: Mr. Hutchinson seconded the motion.

VOTE: The Committee voted six in favor of the motion and six opposed. Mr. Dart voted in favor of the motion to break the tie.

Separation of Bar Corporate Counsel from Disciplinary Counsel. Mr. Dart indicated that the rules, as distributed for public comment, did not address the issue of separation of functions. Rather, only the cover letter which was sent to the Court included a recommendation that the corporate counsel and disciplinary counsel functions be separated.

MOTION: Mr. Trost made a motion that a new letter be submitted to the Court recommending no separation of functions.

SECOND: Mr. Hutchinson seconded the motion.

Mr. Nielsen opposed reconsideration of the issue on the basis that it has been debated at length by the Committee on several previous occasions. The Committee discussed both Mr. Nielsen's objection and the motion at length.

WITHDRAWAL OF MOTION: Mr. Trost withdrew the motion prior to action by the Committee.

Reference to "Disciplinary Counsel" as "Bar Counsel" in the Rules. The Committee determined to take no action on this recommendation at the present time.

Appointment of Ethics and Discipline Committee Members by Bar Commission.

MOTION: Mr. Hutchinson made a motion that the Bar Commission, rather than the Court, appoint the members of the Ethics and Discipline Committee.

SECOND: Mr. Trost seconded the motion.

VOTE: The Committee voted three in favor of the motion and eight opposed to the motion, with one abstaining.

Preemptory Challenges of Judges.

MOTION: Mr. Morris made a motion to allow the respondent and disciplinary counsel to each exercise one preemptory challenge of a judge, and that upon request, the new judge be assigned from without the district in which the matter is pending.

SECOND: Mr. Trost seconded the motion.

Ms. Polich opposed the motion because it gives greater rights to attorneys in discipline proceedings than are available to the public in civil litigation.

VOTE: The Committee voted to approve the motion eight in favor and four opposed.

Mr. Dart asked Mr. Trost to revise Mr. Dryer's proposed language and submit it to the Committee for review at the next meeting.

Burden of Proof. The Bar Commission had recommended that the burden of proof be standard. The Committee has already determined to replace the "clear and convincing" standard with "preponderance of the evidence." Consequently, no further action is necessary.

Separate Assessment for Discipline System. The Bar Commission had recommended that attorneys be billed separately for funding the discipline system. However, because the Committee voted to have the Bar Commission appoint disciplinary counsel, it was felt that a separate assessment was not necessary.

4. RECOMMENDATIONS MADE BY THE OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL.

Jurisdiction to Discipline Attorneys Licensed in States Other than Utah. The Committee took no action on this recommendation at the present time.

Prohibition Against Dissemination of Home Addresses. The Committee discussed the recommendation and determined to take no action at the present time.

Immunity. Having previously resolved the immunity issue in response to Paul Boyden's public comment, the Committee felt no additional action was necessary.

5. RECOMMENDATIONS MADE BY BRIAN BARNARD.

Random Assignment of Screening Panels.

MOTION: Ms. Polich made a motion that screening panels be randomly assigned, rather than the current practice which is based on the first letter of the respondent's last name.

SECOND: Mr. Dever seconded the motion.

VOTE: The Committee voted unanimously to approve the motion. Mr. Trost noted the proposed language and will present the same to the Committee at the next meeting.

Proposed Amendment to Rule 3(e).

MOTION: Mr. Arnett made a motion to amend Rule 3(e) as follows:

Subpoena. Any party or the screening panel may petition the district court for an order allowing discovery prior to the filing of a formal complaint, pursuant to the Utah Rules of Civil Procedure.

SECOND: Judge Davis seconded the motion.

VOTE: The Committee voted unanimously to approve the motion with one abstention.

MOTION: Ms. Polich made a motion that a sentence be added to Rule 3(e) to allow the district court to issue subpoenas as well as orders allowing discovery.

Mr. Winchester was asked to draft proposed language and to submit the same to the Committee for action at the next meeting.

Expungements.

MOTION: Mr. Dever made a motion to amend Rule 4(b)(12) to reduce the expungement period from seven years to three years.

SECOND: Judge Davis seconded the motion.

VOTE: The Committee voted to oppose the motion.

Treatment of Non-Meritorious Informal Complaints.

MOTION: Ms. Polich made a motion to amend the fifth sentence of Rule 10(a)(6) as follows:

The Committee chair shall conduct a de novo review of the file ~~provided by disciplinary counsel together with any documents or proffers that the complainant may offer,~~ and either affirm the summary dismissal or require disciplinary counsel to prepare a Notice of Informal Complaint for hearing by a screening panel.

SECOND: Mr. Arnett seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Burden of Proof for Admonitions.

MOTION: A Committee member made a motion that the second sentence of Rule 10(b)(5)(D) be amended as follows:

Such screening panel recommendation shall be in writing and shall state the substance and nature of the informal complaint and defenses and the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should be admonished.

SECOND: A Committee member seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

6. ADJOURNMENT. The Committee will meet again on November 10 at 5:30 p.m. At that time, the Committee will continue its discussion of Mr. Barnard's proposed amendments, beginning with his proposal regarding Rule 13(a). Until that time, the Committee is adjourned.