

MINUTES

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

Tuesday, July 31, 1990, 5:00 p.m.
Administrative Office of the Courts

PRESENT

Thomas N. Arnett
Hon. Lynn W. Davis
Lee Dever
G. Richard Hill
John Morris
Jo Carol Nessel-Sale
John Palmer
Barbara K. Polich
Hon. John Rokich
Stephen Trost
J. Frederick Voros, Jr.

EXCUSED

Darwin Hansen
F. John Hill
Clark Nielsen
Danny Kelly
Stuart Schultz

STAFF

Carlie Christensen

1. **WELCOME AND APPROVAL OF MINUTES.** Judge Davis advised the committee that he had been asked to preside over the meeting in Mr. Hansen's absence. The minutes of the June 19, 1990 meeting were reviewed and the Committee noted changes suggested by Clark Nielsen. The minutes were approved with Mr. Nielsen's modifications.

2. **RULE 2. DISCIPLINARY BOARD.** Judge Davis reminded the committee members that Mr. Hansen had referred the question of the appointment of disciplinary counsel back to the subcommittee for further consideration. The subcommittee's recommendation was that the appointment be made by the disciplinary board.

Fred Voros expressed concern about paragraph 13, on page 13, which provides for disciplinary counsel to advise the disciplinary board with respect to litigation pending in the courts. He was concerned that this situation creates the same conflict for disciplinary

counsel that currently exists for bar counsel. He also indicated that this provision blurs the distinction between the role of a disciplinary prosecutor and general counsel.

The committee voted to delete paragraph 13 on page 13 from the rules.

Judge Davis reviewed for the committee the alternatives for the appointing authority:

Bar commission
Disciplinary board
Supreme Court

Steve Trost questioned why language was omitted which required the Supreme Court's concurrence in the appointment of disciplinary counsel.

Jo Carol Nasset-Sale indicated that appointment of the disciplinary board by the Supreme Court sufficiently depoliticized the appointment of the disciplinary counsel.

Barbara Polich questioned whether the Court would want involvement in the day to day responsibility of supervising disciplinary counsel.

Fred Voros suggested that having the Supreme Court serve as the appointing authority insulates the appointing authority. The Court is not as likely to be subject to criticism.

MOTION: Mr. Voros made a motion to approve the Supreme Court as the appointing authority. The motion was seconded by Steve Trost. The motion passed with seven in favor and two opposed.

3. RULE 3. HEARING COMMITTEES.

A. Appointment. The Committee had no questions on the procedure for appointing members to the hearing committees.

B. Terms of Office. The Committee agreed to delete the second to last sentence of this subsection which limited the number of consecutive terms which a committee member may serve.

Fred Voros suggested that parallel language to Rule 2 governing compensation and disqualification be included in Rule 3. He suggested the language be inserted at the end of Rule 3 to maintain consistency with uniform rules.

C. Quorum. Committee members had no comment regarding this paragraph.

D. Powers and Duties.

Judge Davis suggested deleting the word "into" in paragraph D.(1).

Steve Trost noted that the hearing committees have the authority to conduct hearings on petitions for reinstatement and readmission and questioned the role of the Character and Fitness Committee under the proposed rules.

Jo Carol Nessel-Sale indicated that disbarred attorneys would appear before the Character and Fitness Committee which would make a recommendation to the disciplinary board. If disciplinary counsel opposes reinstatement or readmission, a hearing is held before a hearing committee.

Barbara Polich recommended that discussion of this issue be deferred until the committee began its discussion of Rule 26. She also recommended that the Character and Fitness Committee be afforded an opportunity to provide input on the committee's future role prior to that discussion.

Jo Carol Nessel-Sale indicated that she would contact the Character and Fitness Committee and request its written input.

Fred Voros questioned whether other states have character and fitness committees which play the same role as proposed by the subcommittee. He also questioned whether formal input from the character and fitness committee would obligate the subcommittee to adopt its recommendation.

John Palmer commented that this issue is a political question and if the committee feels input from the Character and Fitness Committee is important, then the committee should get it.

Barbara Polich indicated that the proposed rules duplicate efforts by requiring both the character and fitness committee and hearing committee to make recommendations to the disciplinary board.

Lee Dever questioned why the character and fitness panel reports to the disciplinary board rather than the bar commission.

Jo Carol Nessel-Sale indicated that there are full blown hearings before the Character and Fitness

Committee and that the bar commission defers to its findings.

Jo Carol Nasset-Sale stated that she would contact Dennis Haslam for his recommendation regarding the future role of the Character and Fitness Committee and whether the recommendations of the character and fitness committee should go to the disciplinary board or to the bar commission.

Fred Voros questioned whether Rule 11.B(3) requires that the hearing committee review the disciplinary counsel's recommended dispositions other than declinations to prosecute. He suggested that there is some inconsistency in the rules regarding the review of recommended dispositions.

Mr. Voros also questioned whether the duty and authority of the hearing committee chair included review of recommendations beyond dismissal and declination.

Lee Dever suggested the reversal of the first two sentences in paragraph E.(1) on page nine.

Jo Carol Nasset-Sale indicated that the intent was to have the hearing committee chair review the recommendation of disciplinary counsel to file formal charges for purposes of due process.

Judge Davis suggested that the recommended changes be referred to the subcommittee.

4. RULE 5. DISCIPLINARY COUNSEL.

A. Appointment. The committee noted that the appointing authority should be changed from "Board" to "Court" consistent with its earlier decision. Mr. Arnett indicated that all references to the Board throughout the rule should be changed.

Judge Davis expressed concern about the use of the term "agency."

Lee Dever recommended changing "agency" to "disciplinary counsel."

Fred Voros commented that the substitution of "disciplinary counsel" for "agency" throughout the rule would not be accurate.

Barbara Polich recommended use of the phrase "Office of Attorney Discipline" rather than "agency".

Fred Voros suggested inserting "Chief" before disciplinary counsel since the Court will only appoint Chief Disciplinary Counsel.

Under subparagraph (A), Ms. Polich recommended the insertion of "for-profit" private practice to discourage outside work.

B. Powers and Duties.

Judge Davis suggested deleting "informal" from paragraph B(3).

The Committee reviewed subparagraph (7) and discussed the responsibility of disciplinary counsel to report disciplinary action to all jurisdictions. Jo Carol Nasset-Sale indicated that the model rules suggest reporting in all jurisdictions.

Judge Davis questioned whether subparagraph (7) would alter what the Supreme Court is currently doing to notify judges in this state.

Lee Dever explained that the term "jurisdiction" would require notification to federal jurisdictions as well.

Barbara Polich expressed concern about the mandatory nature of the reporting requirements and whether this would expose the bar to some liability.

Judge Davis also expressed concern for liability where there is a failure to notify.

John Palmer suggested that the language may not be mandatory.

Barbara Polich indicated that she agrees with the policy of notifying all jurisdictions but is concerned as to whether there are adequate resources available to do so.

Lee Dever recommended changing the reporting requirement from reporting "public discipline" to reporting only suspensions, disbarments or disqualifications.

Tom Arnett suggested placing the responsibility on the attorney to notify other jurisdictions of reinstatement or readmission.

Fred Voros suggested that subparagraph (8) governing reciprocal discipline should contain language parallel to subparagraph (7).

Barbara Polich expressed concern about mandatory reciprocal discipline where parties merely violate the certification process.

Fred Voros suggested inserting, "where appropriate" after "reciprocal discipline".

Barbara Polich recommended inserting discretionary language in the introductory phrases of paragraph B so that the reporting requirements are not mandatory.

John Morris indicated that the problem with using discretionary language is that some duties of disciplinary counsel are mandatory.

Fred Voros recommended inserting "where appropriate" after the description of each discretionary function.

Prof. Morris suggested that paragraphs 6, 7, and 8 were discretionary functions.

Judge Davis referred the Committee to Utah Code Ann. Section 77-18-2 and questioned whether the term "expunction" in subparagraph (10) is the same as the statutory term "expungement".

Jo Carol Nessel-Sale indicated that expunction will be changed to expungement for consistency.

Judge Davis questioned the need to retain records for seven years when there is a declination to proceed. Judge Davis also expressed concern about retaining documents which do not even meet a probable cause standard. He suggested that if the information is cumulative, a new complaint can be filed.

Jo Carol Nessel-Sale indicated that an attorney's response to a complaint may provide evidence of false statements.

Judge Rokich suggested reducing the time period for retaining complaints from seven years to three years.

Prof. Morris questioned whether the concern about the retention period is the practical problem of storage or the black mark on a person's record.

Ms. Polich suggested that the concern is for confidentiality.

Fred Voros expressed concern that there is not even a duty to notify an attorney that a complaint has been filed. He questioned whether under such circumstances, the attorney can indicate no complaint has been filed.

Ms. Polich suggested that the records be destroyed after the declination decision.

Tom Arnett suggested eliminating declination from subparagraphs (10) and (11).

Steve Trost suggested that destroying records of complaints which disciplinary counsel has declined to prosecute impairs the ability of disciplinary counsel to subsequently prosecute. He suggested that the prosecutor should be given a chance to tie pieces of evidence together.

Jo Carol Nessel-Sale stated that the Model Rules recommend seven years. She suggested that it is more likely that evidence will be lost than that confidential information would be unwittingly disclosed.

Barbara Polich suggested that frivolous complaints should be destroyed.

Fred Voros questioned the justification for retaining records of patently frivolous complaints where the attorney is not even notified.

Judge Rokich suggested that records of declination be retained for two years.

Lee Dever suggested that dismissals should only be kept for two years also.

John Morris suggested that there are different considerations for retaining records of dismissals.

Richard Hill suggested that the records may be subject to the Information Practices Act and that under the Act, the bar may be prohibited from destroying the records.

Ms. Christensen indicated that she would provide the subcommittee members with a copy of the proposed amendments to the Information Practices Act.

MOTION: Judge Rokich made a motion to modify the rule to provide that records of declinations be kept for two years only. The motion was seconded by Barbara Polich and carried unanimously.

Ms. Polich indicated that the motion is subject to clarification under the Information Practices Act.

Prof Morris suggested that if there is good cause for keeping the record, however, it should be kept for 7 years.

Mr. Voros questioned whether a good cause exception would defeat the rule.

John Morris indicated that it would not inasmuch as disciplinary counsel would have to give notice and show good cause before retaining records for seven years.

Mr. Arnett indicated that the rule only provides for expungement of proceedings where disciplinary action is imposed.

John Morris suggested that the issue be deferred for later discussion because the rule only refers to the authority of the disciplinary counsel.

MOTION: Barbara made a motion to approve Rule 4 as modified by the committee. The motion was seconded by Tom Arnett and carried unanimously.

5. **ADJOURNMENT.** There being no further business, the meeting was adjourned.

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