MINUTES

SUPREME COURT ADVISORY COMMITTEE ON
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, October 23, 1990, 5:00 p.m.
Administrative Office of the Courts

PRESENT

Darwin Hansen
Thomas N. Arnett
Hon. Lynn W. Davis
Lee Dever
G. Richard Hill
F. John Hill
Jo Carol Nesset-Sale
John Palmer
Hon. John Rokich
J. Frederick Voros, Jr.
Clark Nielsen
Stuart Schultz

EXCUSED

Stephen Trost
Danny Kelly
Barbara K. Polich
John K. Morris

STAFF

Carlie Christensen
Colin Winchester

1. **WELCOME.** Darwin Hansen welcomed the committee members to the meeting.

2. **APPROVAL OF MINUTES.** The minutes of the September 25, 1990 meeting were reviewed by the committee.

MOTION: Fred Voros moved to approve the minutes as submitted.

SECOND: The motion was seconded by Judge Davis.

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

3. **DISCUSSION OF PROCESS.** The committee discussed generally the process for reviewing those rules which had been referred back to the disciplinary rules subcommittee for further modification.

The committee agreed that referral back to the subcommittee did not necessarily represent the committee's final position with respect to a particular rule.

The committee also agreed that the disciplinary rules subcommittee should determine when revised rules would be resubmitted to the committee for final action.

4. RULE 11. GENERALLY.

Mr. Hansen referred the committee to Rule 11 which sets forth the process for determining which allegations proceed by admonition, probation or declination to prosecute.

A. Screening. Ms. Nesset-Sale indicated that the screening process is the province of the prosecutor. The subsection provides that prosecution shall be declined if the facts, as alleged, would not constitute misconduct. If the facts, as alleged, would constitute misconduct, the prosecutor will conduct an investigation.

Richard Hill suggested a more specific title for Rule 11 such as "Screening and Prosecution."

Fred Voros suggested that the standard for referring complaints to another jurisdiction should be consistent with Rule 6 governing jurisdiction.

Mr. Voros questioned why there is not requirement of notification to the attorney when there is a declination to prosecute.

Ms. Nesset-Sale indicated that the attorney may never know of the complaint and that such a proposal is consistent with the current practice.

Tom Arnett suggested that a complaint could be filed where there is an ongoing relationship with a client, and that the filing of such a complaint may affect the attorney/client relationship. Consequently, he suggested that the attorney should be notified of the existence of the complaint.

Darwin Hansen questioned what an attorney would do if notified of a declination.

Fred Voros expressed concern about the bar and former clients discussing his performance as an attorney.

Darwin Hansen suggested that the bar member can do no more once the bar determines that the complaint is frivolous.

Judge Davis suggested that the attorney may decide to sever the attorney/client relationship.

Ms. Nesset-Sale suggested that the rule was drafted to streamline the process and direct the energy and resources of the disciplinary process to the most significant areas.

Mr. Arnett asked about the situation where an attorney is involved in ongoing litigation, but is not aware of the level of the client's happiness.

Ms. Nesset-Sale indicated that the most frequent type of complaint by clients is a request for information about protocol or the standard practice. She indicated that many of these complaints are received by telephone.

Mr. Voros expressed concern about a complainant talking to a regulatory agency which governs his profession. He also expressed the practical concern, that from a business standpoint, the attorney has an interest in knowing about the client's concerns so that the attorney can make appropriate changes.

Clark Nielsen suggested that at some point in time, decisions must be made as to when and what type of notice should be given to attorneys. He indicated that the purpose of the rules is to regulate the practice of law, not to provide performance feedback or CLE courses. He further commented that 99% of the time an attorney can tell when there is a problem with a client.

VOTE: The committed voted six in favor and two opposed to approved the current wording in Rule 11.A.

B. Investigation. Mr. Hansen referred the committee members to Section B. of the rule governing investigations.

(1) Ms. Nesset Sale explained that section (1) provides that disciplinary counsel may recommend an admonition, which is comparable to the current private reprimand. She indicated that the issues is whether probation should be imposed in conjunction with an admonition without disclosure to the public.

The subcommittee recommended that in appropriate cases, probation be imposed on a confidential basis.

Darwin Hansen noted that the purpose of probation is to rehabilitate the attorney. Without a provision for confidentiality, the rules are punitive.

(2) Notice to Respondent. Ms. Nesset-Sale indicated that the respondent is entitled to notice unless there is a declination to prosecute or a stay of the investigation.

(3) Ms. Nesset-Sale explained that this provision authorizes the complainant to seek review of a declination to prosecute. The ABA rules allowed disciplinary counsel, after investigation, to seek review from the chair of a hearing committee other than the one which originally reviewed the complainant's request. The subcommittee recommended that the review be conducted by the same chair that directed further investigation.

Ms. Nesset-Sale also explained that under the proposed rules, disciplinary counsel makes declination decisions and the hearing committee makes dismissal decisions.

C. Discipline by Consent or Default. Mr. Hansen referred the committee to Section C. or Rule 11 governing discipline by consent or default.

Ms. Nesset-Sale explained that the rule requires disciplinary counsel to notify respondent in writing of the proposed disposition and of the right to a formal disposition within ten days. She further explained that the phrase "delivery of written notice" is governed by Rule 13(b) which governs service of other papers.

Mr. Nielsen suggested that the imposition of an admonition requires consent. If there is no response, disciplinary counsel either declines to prosecute or files a formal petition. He suggested that use of the term "delivery" is confusing.

Ms. Nesset-Sale suggested inserting after "delivery" the phrase "by certified mail."

(2) Ms. Nesset-Sale explained that this subsection requires the respondent to demand a formal hearing within fourteen days.

Lee Dever expressed concern that an attorney is at the mercy of the disciplinary counsel in formal proceedings.

Ms. Nesset-Sale suggested that an attorney is not at the mercy of disciplinary counsel because the imposition of an admonition must be reviewed by the chair of the hearing committee.

Mr. Hansen suggested that language should not be narrowed to the point where an attorney either accepts an admonition or demands a formal hearing.

Jo Carol Nesset-Sale indicated that the rule assumes that an admonition is agreed to unless a hearing is requested.

Mr. Voros suggested that the rule should specify that failure to consent to an admonition will result in dismissal of the charges or the institution of formal proceedings.

Mr. Hansen suggested that the disciplinary counsel should not offer an admonition unless they are prepared to go to the mat on formal charges.

Mr. Voros questioned the importance of the respondent's right to a hearing.

Mr. Dever indicated that the hearing represents the attorney's day in court.

Mr. Voros suggested that the term "may" should be changed to "shall" to require the institution of formal charges if the respondent does not demand a formal hearing within ten days.

Ms. Nesset-Sale indicated that the imposition of an admonition after a formal hearing may still be private but the hearing and record are public. The only practical difference between the imposition of an admonition after a hearing and the imposition of more severe types of discipline is publication in the bar journal. The problem under the existing procedures is that a disciplinary panel does not have the authority to impose a private reprimand and must remand the matter to the screening panel.

Mr. Hansen suggested that if the language is amended to require dismissal, disciplinary counsel may be subject to liability or claims of bad faith.

Committee members also expressed concern that an attorney may request a full hearing to bluff disciplinary counsel.

Mr.Hansen suggested that if an attorney is unwilling to accept a private admonition, the quid pro quo is a public hearing.

VOTE: The committee voted five in favor and one opposed to modify subparagraph (2) changing "may" to "shall," and to place a period after the word "instituted."

D. Formal Charges. Mr. Hansen referred the committee to Section D governing formal charges. Mr. Dever questioned whether the respondent has a right to argue that the rule does not apply.

Ms. Nesset-Sale indicated that disciplinary counsel and the hearing committee have determined that there is "probable cause" to believe that the rule applies.

Mr. Dever suggested that paragraph (4) provides only that the respondent may be heard by the committee on questions of fact or in mitigation, but not on legal questions such as whether the rule even applies.

Mr. Arnett suggested inserting "or law" after the phrase "material issues of fact".

Mr. Voros indicated that Rule 3 does not contemplate a responsive pleading other than an answer. He suggested that the rule should be amended to read "written answer or other responsive pleading."

Judge Davis suggested that the introductory paragraph to Section D. be amended by inserting a period after the word "misconduct" and beginning a new sentence with the words "The complaint".

Judge Davis also suggested stylistic changes to subparagraph D(2) so that it is amended to read "disciplinary counsel shall serve a copy of the formal charges upon the respondent..."

Ms. Nesset-Sale explained that subsection (4) is intended to ensure the randomness of assignment of hearing committee members.

Ms. Carol Nesset-Sale also explained that the subcommittee recommended adoption of a "preponderance of the evidence" standard, although the ABA standard is "clear and convincing". She recommended that discussion of this issue be deferred until the next meeting so that Ms. Polich would have the opportunity to present her views on this issue.

Mr. Hansen expressed concern that sanctions will deprive attorneys of their livelihood and suggested that the standard should be higher than the ordinary civil burden of proof.

Ms. Nesset-Sale indicated that the current standard is clear and convincing evidence.

Mr. Arnett suggested that it would be helpful to know what other jurisdictions have done.

(5) Ms. Nesset-Sale explained that the reasons for dismissal must be in writing and approved by the chair of the hearing committee. She also indicated that if the chair denies the motion to dismiss, the case is reassigned to a new hearing committee.

Judge Davis questioned the necessity of requiring a hearing by a different committee if a motion is denied and suggested that a judge would not be required to enter a recusal under such circumstances.

Mr. Voros expressed concern that the chair may be tainted by the prosecutor's motion which may suggest that disciplinary counsel does not believe in the case.

Ms. Nesset-Sale indicated that the intent of this rule was to avoid creating issues for appeal. She questioned whether this procedure creates any more of a problem than the denial of a motion by the district court.

Mr. Voros suggested that the difference is this is a stipulated motion to dismiss.

The committee recommended leaving in the current wording of subsection (5).

E. Review by the Board. Mr. Hansen recommended that the committee continue its discussion of Rule 11 at the next meeting after its discussion of the appropriate burden of proof.

6. **ADJOURNMENT.** There being no further business the meeting was adjourned. The next committee meeting is scheduled for November 27, 1990 at 5:00 p.m. at the Administrative Office of the Courts.

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