

MINUTES

SUPREME COURT ADVISORY COMMITTEE ON
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, November 25, 1990, 5:00 p.m.
Administrative Office of the Courts

PRESENT

John K. Morris
Stephen Trost
Thomas N. Arnett
Hon. Lynn W. Davis
Lee Dever
Jo Carol Nessel-Sale
Hon. John Rokich
Stuart Schultz

EXCUSED

John Palmer
J. Frederick Voros, Jr.
Danny Kelly
Barbara K. Polich
Clark Nielsen
G. Richard Hill
F. John Hill

STAFF

Carlie Christensen
Colin Winchester

1. WELCOME. Judge Davis welcomed the committee members to the meeting. Judge Davis indicated that he had been asked to serve as chair of the committee until Darwin Hansen's replacement has been appointed. Judge Davis expressed the committee's regret that Mr. Hansen had resigned as chair and concern for the health of Mr. Hansen's wife.

2. APPROVAL OF MINUTES. Leon Dever suggested modification of page 5 of the minutes to indicate that committee members generally, rather than any individual committee member, expressed concern that attorneys may request a full hearing in an effort to bluff disciplinary counsel.

MOTION: Mr. Dever made a motion to approve the minutes as modified.

SECOND: The motion was seconded by Tom Arnett.

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

3. DISCUSSION OF BURDEN OF PROOF. Jo Carol Nessel-Sale reminded the committee members of the previous committee discussion concerning the burden of proof in

disciplinary proceedings. She indicated that the subcommittee recommended adoption of a "preponderance of the evidence" standard even though the ABA standard is "clear and convincing". She suggested that anything more than preponderance of the evidence smacks of self-interest. She also indicated that the proposed disciplinary rules generally follow the rules of evidence which rely on a preponderance of the evidence as the standard.

Ms. Christensen referred the committee members to some research done by Colin Winchester which indicated that 21 jurisdictions use the standard of clear and convincing, 15 jurisdictions use some variation of clear and convincing, 6 jurisdictions use preponderance of the evidence, 1 jurisdiction uses beyond a reasonable doubt; and 9 jurisdictions use miscellaneous burdens. Ms. Christensen also pointed out that both the Division of Occupational Licensing and the Judicial Conduct Commission use the standard of preponderance of the evidence.

Prof. Morris suggested that the use of a different standard only makes a difference where there is a significant factual dispute.

Mr. Dever suggested that disciplinary proceedings rarely involve disputed facts. More often, the question is whether the conduct is prohibited by the rules, not whether the conduct occurred.

MOTION: Judge Rokich made a motion to adopt the preponderance of the evidence standard.

SECOND: Ms. Nessel-Sale seconded the motion.

VOTE: The motion passed unanimously.

4. DISCUSSION OF RULE 11.

E. Review by the Board. Ms. Nessel-Sale referred the committee to Rule 11(E) which governs review by the board. She indicated that the rule ensures that review by the board includes a review of the findings, conclusions and recommendations. She suggested that it was important for the board to know what the fact-finder relied upon in aggravation or mitigation when imposing a sanction.

Judge Davis questioned who was responsible for sending notice to the respondent and disciplinary counsel that the Board would consider new evidence as provided in paragraph (2).

Ms. Nessel-Sale indicated that ordinarily the respondent would produce the new evidence. She indicated that the board does not have to remand the case to a hearing panel for consideration of any new evidence, but ordinarily the board should remand the case unless the new evidence is frivolous.

Judge Davis suggested that the rule should contain some type of device which triggers the notification procedure such as the filing of a motion.

Prof. Morris questioned whether the Board would remand the the case for the taking of new evidence separate from the question of whether there is new evidence.

Ms. Nessel-Sale indicated that the Board was not required to remand the case to take new evidence.

Judge Davis suggested that the word "receive" should be stricken from paragraph (2).

Mr. Dever suggested that the end of the first sentence in paragraph (2) from the word "except" through the word "respond" should be deleted to read as follows:

During its review, the Board shall not consider any evidence that was not presented to the Hearing Committee.

Prof. Morris questioned what the standard of review is for the Board. He questioned how much deference the Board should give the hearing panel.

Ms. Nessel-Sale indicated that the Board should not conduct a de novo review.

Tom Arnett suggested that the standard should be clearly erroneous.

Ms. Nessel-Sale suggested the following language to be inserted in paragraph (2) after "the Board serves an appellate review function":

The Board shall approve the recommendations of the hearing panel unless they are clearly erroneous.

Tom Arnett suggested that the reference to "reprimand" in paragraph (3) should be changed to "admonition".

F. Review by the Court. Ms. Nessel-Sale referred the committee to Rule 11(F) which governs review by the Court. Judge Davis questioned whether the Court's review involved review of a "report" or review of a decision.

Mr. Dever suggested that the rule be modified to indicate that the Court reviews "the findings, conclusions and recommendations" as provided in paragraph (E).

Ms. Nessel-Sale indicated that the record would not be sent to the Court unless there is an appeal of the Board's decision. Ms. Nessel-Sale also indicated that the word "report" in paragraph (1) needed to be changed.

Tom Arnett suggested that there may be a problem with paragraph (2) which provides for consideration of evidence by the Court upon notice to the respondent and disciplinary counsel.

Ms. Nessel-Sale suggested consolidating paragraphs (2) and (3).

Prof. Morris suggested that the rule be modified to provide that the record is sent with the findings, conclusions and recommendations. He suggested that the record would not be that large.

Ms. Nessel-Sale indicated that neither the Board nor the Court would have a transcript, but that the intent was for the Court to give deference to the findings of the hearing panel and board.

Mr. Dever suggested modifying the first paragraph under section (F) to provide that the Board shall promptly submit its findings and recommendations and the record if requested by the Court.

Ms. Nessel-Sale referred the committee to the new language contained in paragraph (1) which provides that a synopsis of the Court's opinion and order shall be published in the official state bar publication.

Mr. Dever questioned publication of just the synopsis. He indicated that the Court would publish the full text of the opinion in the official reporter.

Stewart Schultz suggested that publication in the bar journal may be redundant.

MOTION: Mr. Dever made a motion to adopt a rule which provides for publication of the full opinion in the official reporter and publication of a synopsis in the official bar publication.

Prof. Morris questioned whether the subcommittee reviewed the rules of appellate procedure and whether it is clear that those rules apply to the disciplinary process. He also expressed concern that the rule did not set forth the Court's responsibility in unopposed matters but only in contested matters. He questioned what event would trigger the Court's responsibility to act in an uncontested case.

Prof. Morris suggested modification of paragraph (1) to read:

Upon conclusion of the proceedings or the failure of respondent or disciplinary counsel to file timely objections, the Court shall promptly enter an appropriate order.

Prof. Morris also questioned how the proposed practice differs from what the Court is currently doing. He questioned whether the process would actually shift the workload from the board and the hearing panels to the Court since the Court would now be required to issue written opinions.

Prof. Morris suggested that the committee should explain in its committee notes that the Court should not be involved in retrying cases.

Ms. Nessel-Sale suggested that the case law establishes the standard of review in other areas of the law, but not in the area of discipline. She suggested setting the standard of review in the disciplinary rules.

Prof. Morris suggested that In re Calder, a recent decision of the Utah Supreme Court, sets forth a standard of review and that the Calder standard should be included in the rules or the committee should explain why the Calder standard does not apply.

Ms. Nessel-Sale suggested that with a different disciplinary system, standard sanctions and greater uniformity, the Court might be receptive to a different standard of review.

Mr. Trost indicated his preference for the Calder standard. He suggested that the Court has greater experience with disciplinary matters and should have more latitude.

Ms. Nessel-Sale questioned whether it made any difference if the standard of review was different between the hearing panel and the board, and the board and the Court.

Prof. Morris recommended that the second paragraph on page 27 in the commentary be deleted and that the Calder standard be inserted.

Mr. Dever recommended that the first paragraph on page 27 in the commentary be deleted as duplicative of the rule.

MOTION: Mr. Dever renewed his earlier motion to adopt a rule which provides for publication of the full opinion in the official reporter and publication of a synopsis in the official bar publication.

VOTE: The motion passed unanimously.

Ms. Christensen suggested that the first sentence of the last paragraph in the commentary on page 27 should be deleted consistent with the rule.

MOTION: Tom Arnett made a motion to approve Rule 11, as modified by the committee, including the Calder standard.

SECOND: Steve Trost seconded the motion.

VOTE: The motion passed unanimously.

5. **DISCUSSION OF RULE 12. IMMUNITY.** Ms. Nasset-Sale referred the committee to Rule 12 governing the immunity of the Board, the hearing committees and disciplinary counsel. Ms. Nasset-Sale explained that the rule provides for absolute immunity from civil liability.

Mr. Dever expressed concern that the rule contained no exceptions for bad faith or fraudulent prosecutions.

Ms. Nasset-Sale indicated that exceptions may chill the filing of complaints against lawyers and compromise the confidentiality of the proceedings.

Prof. Morris questioned why disciplinary proceedings would be so different from criminal proceedings that they would warrant an absolute cloak of immunity.

Ms. Nasset-Sale suggested that the degree of harm warranted the difference.

Judge Rokich questioned whether the Supreme Court could confer immunity by rule.

Ms. Christensen indicated that currently there is a case pending before the Supreme Court involving the immunity of bar commissioners based upon a Supreme Court rule. She suggested that a determination in that case may be instructive on this issue.

Ms. Nessel-Sale indicated that the proposed immunity rule corresponds exactly with the model rule and is typical of other rules around the country.

Mr. Dever expressed concern about paragraph (2) which authorizes the district or Supreme Court to grant immunity from criminal prosecution. Mr. Dever indicated that, by statute, only the prosecutor has the authority to grant immunity.

Prof. Morris questioned why a prosecutor would cooperate in granting immunity.

Mr. Dever suggested that the rule was intended only to provide guidance to disciplinary counsel.

MOTION: Prof. Morris made a motion to include paragraph (A) in the rule and to indicate that it is part of the model rules, but that the committee questions whether the Court has the authority to confer immunity by rule.

VOTE: The motion passed unanimously.

Ms. Nessel-Sale suggested that the last two paragraphs contained in the commentary to Rule 12 should be deleted since they pertain to paragraph (B) governing immunity from criminal prosecution.

6. **ADJOURNMENT.** There being no further business, the meeting was adjourned. The next committee meeting is scheduled for January 22, 1991 at 5:00 at the Administrative Office of the Courts.

02541.46-52