

This is the amended
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MINUTES

SUPREME COURT ADVISORY COMMITTEE ON
THE RULES OF PROFESSIONAL CONDUCT

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

Bert L. Dart, Presiding

PRESENT:

Bert L. Dart
Thomas N. Arnett
Stephen A. Trost
Hon. Lynn W. Davis
Jo Carol Nessel-Sale
Danny Kelly
G. Richard Hill
Lee Dever
Stuart Schultz
F. John Hill
J. Frederick Voros, Jr.

EXCUSED:

Clark Nielsen
Barbara K. Polich
John Morris
John Palmer
Hon. John Rokich

STAFF:

Colin Winchester

1. WELCOME AND APPROVAL OF MINUTES. Mr. Dart welcomed the committee members to the meeting and directed them to the minutes of the February 26 meeting.

A motion was made to change "Danny Voros" to "Fred Voros" on page 5 and to approve the minutes as amended. The motion was seconded and unanimously approved.

2. SUBCOMMITTEE STATUS REPORTS.

Subcommittee on Standard Sanctions Guidelines.

Mr. Kelly reported that Judge Rokich had been invited to serve as an additional member on the subcommittee. Because of that invitation, the subcommittee consists of the following: Danny Kelly, Judge Davis, Lee Dever, Fred Voros and Judge Rokich.

Mr. Kelly reported that the first subcommittee meetings were devoted to organizational matters. After that, the subcommittee met regularly and drafted "Black Letter Rules". The Black Letter Rules are based primarily

on ABA standards, and in part on standards adopted by the National Organization of Bar Counsel. The subcommittee attempted to preserve the ABA's format. Chris Burdick was invited to attend subcommittee meetings to provide the perspective of Bar Counsel. The subcommittee also invited comments from those attorneys who regularly represent lawyers in disciplinary proceedings and received comments from Brian Barnard, Jo Carol Nessel-Sale, D. Frank Wilkins, Ron Yengich and others. The subcommittee has now completed its draft of the Black Letter Rules and is ready to submit the same to the Committee as a whole. Mr. Kelly pointed out that the ABA has adopted official commentary but that the subcommittee has not yet determined whether or not to adopt commentary. Also, the ABA standards no longer contain an "admonition." The repeal of that sanction also exists in the Black Letter Rules.

Mr. Dart questioned whether the ABA or the NOBC have made amendments to their standards since the subcommittee initially reviewed them.

Mr. Trost indicated that the ABA Center for Professional Responsibility is currently studying proposed changes to the standards.

Mr. Kelly indicated that the Black Letter Rules provide the sanctions which should be imposed for specified conduct, however, the Black Letter Rules remain flexible because they allow the discipline body to consider aggravating and mitigating circumstances.

Mr. Dart indicated that such guidelines would result in uniformity among discipline panels.

Ms. Nessel-Sale stated that codification of the aggravating and mitigating circumstances is important and will be helpful to discipline panels. She pointed out that in criminal law, an unsuccessful murderer will only be charged with attempted murder, but in attorney discipline, an attorney who attempts to engage in unethical conduct should be treated the same as an attorney who actually engages in that conduct.

Mr. Kelly indicated that attendance at subcommittee meetings was excellent and that the subcommittee members debated and participated on the issues.

Mr. Dart indicated that Steve Hutchinson serves on the ABA Committee on Discipline and could be a helpful resource to the subcommittee.

Mr. Trost indicated that the McKay Commission will make recommended changes to the ABA's sanctions and discipline procedures in November of 1991.

Mr. Kelly indicated that the method of incorporating the Black Letter Rules into the discipline rules have not yet been determined.

Ms. Nessel-Sale suggested that the Black Letter Rules might be adopted as Rule 10 to the discipline rules.

Judge Davis indicated that the subcommittee had discussed whether or not to adopt official commentary to the Black Letter Rules. The subcommittee determined to simply reference the ABA's existing commentary.

Mr. Voros pointed out that the ABA commentary tends only to reference cases which support the rule or upon which the rules are based. The ABA commentary does not generally include cases which construe the rule after its adoption.

Ms. Nessel-Sale suggested that commentary might be included to explain the reason for the rule, but then deleted after the adoption of the rule.

Mr. Voros questioned whether the ABA's Model Rule 10 includes the Black Letter Rules.

Ms. Nessel-Sale indicated that ABA's Model Rule 10 is quite brief and does not include the Black Letter Rules.

Mr. Voros pointed out that sanction guidelines serve a different purpose than disciplinary procedure rules.

Mr. Kelly pointed out that the NOBC has extensive commentary to its guidelines.

Mr. Dart indicated that the Black Letter Rules could fit well in proposed Rule 10.

Mr. Trost indicated that the Black Letter Rules could also be a stand-alone item, and if so, commentary would be helpful. He also indicated that the Black Letter Rules should serve as guidelines and should not be mandatory.

Ms. Nessel-Sale indicated that although procedural rules should be mandatory, sanction guidelines should not be mandatory.

Judge Davis suggested that the Black Letter Rules could be adopted as an appendix to proposed Rule 10.

Mr. Dart queried the length of time it would take for the Committee to review and adopt final versions of the Black Letter Rules.

Mr. Kelly suggested that it might take two or three Committee meetings.

Ms. Nessel-Sale queried whether the Black Letter Rules allow for resignation while a disciplinary matter is pending.

Mr. Trost indicated that such a sanction would be helpful.

Rules of Professional Conduct. Mr. Arnett reported that John Hill had been invited to serve as an additional member on the subcommittee. Because of that invitation, the subcommittee consists of the following: Tom Arnett, Steve Trost, Richard Hill, John Morris and John Hill.

Mr. Arnett listed four tasks that the subcommittee had set out to accomplish: review substantive content of the rules, propose changes suggested by the ABA or other sources, re-number the existing rules back to the ABA format, and promote public relations and education.

Mr. Arnett suggested that each subcommittee should report on its progress at the beginning of each committee meeting. He also indicated that the subcommittee has a backlog of rules to revise, but because Committee meetings have been devoted to the Rules of Discipline, no opportunity has been available for the Committee to consider those rules. Mr. Arnett suggested that housekeeping type changes could be brought before the Committee for approval without waiting for the Committee to finish its work on the Rules of Discipline.

Mr. Dart suggested that up to one-half hour of each Committee meeting be set aside to consider the subcommittee's proposed changes. Mr. Dart indicated that materials to be considered, minutes from the previous meeting and the agenda should be mailed to Committee members at least one week prior to the meeting.

Mr. Hill suggested that the Supreme Court may have a preference as to whether proposed amendments to the Rules of Professional Conduct be submitted in a piece-meal fashion or in one large package. The Committee consensus was to deal with proposed changes to the Rules as needed, rather than to accumulate a great deal of changes.

3. DISCUSSION OF PROPOSED RULES OF DISCIPLINE.

Rule 16A. Mr. Dart questioned the subcommittee's proposed deletion of ABA Rule 16A(3). He cited two occasions in which it appeared that the Bar was covering up attorney discipline information which had been made known to the public.

Ms. Nasset-Sale indicated that the subcommittee believed the term "generally known to the public" to be too nebulous.

Mr. Dart proposed restoring (3) and replacing the phrase "become generally known to the public" to "disseminated through the mass media."

The Committee expressed concern regarding the use of the term "generally known to the public."

MOTION: Mr. Arnett moved to restore former (3) but to amend it to include the "disseminated through the mass media" language and to provide that only the pendency, subject matter and status of an investigation may be disclosed.

SECOND: Mr. Kelly seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Rule 16B. Mr. Dever questioned why disability proceedings should be confidential.

Judge Davis pointed out that in the medical profession, disability proceedings are public.

Mr. Dart indicated that although the cause may be different, the protection of the public is just as needed in disability cases.

Ms. Nasset-Sale stated that an attorney should not be subject to humiliation after an investigation has been conducted and a determination has been made not to discipline the attorney because of disability status.

Mr. Arnett pointed out that this Rule effects only discipline actions arising from disability. He agreed that Ms. Nasset-Sale's concept is correct, but pointed out that an exception should not exist in discipline cases.

Mr. Trost indicated that Rule 16C covers the subcommittee's concerns about disability proceedings and that Rule 16B(3) should be deleted.

MOTION: Judge Davis moved to strike 16B(3).

SECOND: Mr. Arnett seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Mr. Arnett pointed out that the commentary regarding Rule 16 needed to be amended to conform with the Committee's amendments to Rule 16A. He suggested that the standard be changed from "widely known" to "disseminated in the media" and that the language stricken by the subcommittee be re-inserted.

✓ **MOTION:** Mr. Trost made a motion to approve Mr. Arnett's suggestion.

SECOND: Judge Davis seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Ms. Nessel-Sale queried whether judicial nominating commissions should have access to information which is confidential under Rule 16.

Mr. Dart stated that judicial nominating commissions ask for a waiver from judicial applicants. If the waiver is not given, the information should not be disclosed.

Judge Davis concurred that judicial applications request a waiver of disciplinary proceedings information.

Rule 16E. Mr. Dever asked why the Board of Bar Commissioners is listed as a party who may request the disclosure of non-public information.

Ms. Nessel-Sale indicated that it may be necessary for Committee appointments.

Mr. Arnett indicated that the Supreme Court should also be included as an entity who could get such information.

Mr. Schultz asked who the request for disclosure is submitted to.

✓ **MOTION:** Judge Davis moved to amend the initial sentence of 16E to add the words "to the Board" after the words "non-public information."

SECOND: Steve Trost seconded Judge Davis' motion.

VOTE: The Committee voted unanimously to approve the motion.

✓ **MOTION:** Mr. Dever moved to change the term "Board of Bar Commissioners" to "Bar Commission" in 16E(1).

SECOND: Mr. John Hill seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

MOTION: Mr. Dever moved to approve 16C, 16D and 16E, as amended. ✓

SECOND: Mr. Arnett seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Ms. Nessel-Sale summarized Rules 16F, 16G, 16H and 16I.

The Committee noted that the brackets around the word "twenty-one" should be deleted, and that the word "request" in the initial sentence of 16G should be "requests". ✓

MOTION: Mr. John Hill moved to adopt Rules 16F, 16G, 16H and 16I, as amended. ✓

SECOND: Mr. Trost seconded the motion.

VOTE: The Committee voted unanimously to approve the motion.

Ms. Nessel-Sale reminded the Committee that it had not yet decided what to do with the commentary after the proposed rules have been published for public comment.

Mr. Dart suggested that the commentary should remain as part of the final product.

4. SCHEDULE OF FUTURE MEETINGS. The Committee discussed its future meeting schedule and determined that it would hold two four hour meetings. The first meeting will be held April 23 from 3:00 p.m. to 7:00 p.m. with a one-half hour dinner break. The next four hour meeting will be held May 28 from 3:00 p.m. to 7:00 p.m. with a one-half hour dinner break.

5. DISSOLUTION OF ASSESSING AND IMPROVING PROFESSIONAL CONDUCT SUBCOMMITTEE. At the Committee meeting held February 26, the Committee discussed the dissolution of the Assessing and Improving Professional Conduct Subcommittee. That subcommittee has now been dissolved and its members have been invited to serve on the remaining subcommittees. Judge Rokich will now serve on the Standards Sanctions Guidelines Subcommittee. John Hill will now serve on the Rules of Professional Conduct Subcommittee. Stuart Schultz will now serve on the Rules of Discipline Subcommittee.

6. STATUTES OF LIMITATION. Mr. Winchester was asked by the Committee to review minutes of past meetings and locate all discussions relating to statutes of limitation. He was asked to compile that information and distribute it to the Committee members prior to the next meeting.

7. ADJOURNMENT. There being no further business, the Committee meeting was adjourned.

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