

Approved 5/28/91

MINUTES

SUPREME COURT ADVISORY COMMITTEE ON  
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, April 23, 1991, 3:00 p.m.  
Administrative Office of the Courts

Bert L. Dart, Presiding

PRESENT:

Bert L. Dart  
Barbara K. Polich  
Clark R. Nielsen  
Thomas N. Arnett  
F. John Hill  
G. Richard Hill  
Jo Carol Nessel-Sale  
Stephen Trost  
Stuart Schultz  
Lee Dever  
Fred Voros  
John K. Morris  
Hon. Lynn W. Davis

EXCUSED:

Hon. John Rokich  
Danny Kelley  
John Palmer

STAFF:

Colin Winchester

1. WELCOME. Bert Dart welcomed the Committee members to the meeting.

2. APPROVAL OF MINUTES. Several amendments were suggested to the minutes as drafted.

MOTION: Judge Davis made a motion to approve the minutes as modified.

SECOND: The motion was seconded by Mr. Trost.

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

3. REVIEW OF CHANGES TO RULES OF PROFESSIONAL CONDUCT. Mr. Arnett informed the Committee that his subcommittee had not been able to timely accomplish their proposed changes to the Rules of Professional Conduct. The subcommittee's report will be continued to the next meeting.

4. REVIEW OF DISCIPLINARY RULES. Ms. Nessel-Sale reported that her subcommittee had met twice since the last Committee meeting. The subcommittee had incorporated changes made by the Committee through Rule 11, and a "cleaned-up" draft of the subcommittee's rules was distributed prior to the Committee meeting.

A. Standard of Review. Ms. Nessel-Sale raised the issue of the appropriate standard of review to be used by the Board. The members of the subcommittee do not agree on the standard. Is it "clearly erroneous," is it "unsupported by the evidence and arbitrary and capricious" as stated in Calder, or is it some other standard?

Mr. Nielsen stated that the appropriate standard depends on the concept of the Board's involvement. If the Board's involvement is more akin to an administrative action, the standard should be "arbitrary and capricious." If the Board's involvement is similar to litigation, the standard should be "clearly erroneous."

Judge Davis indicated that the proposed system more closely resembles a litigation model.

Mr. Nielsen stated his belief that the Supreme Court is comfortable with its level of involvement in disciplinary proceedings and with the Calder standard of review.

Ms. Nessel-Sale stated that the standard should be "clearly erroneous." She then indicated that Calder set the standard for findings of fact as "unsupported by the evidence and arbitrary and capricious" and that it set the standard for sanction recommendations as "advisory" (meaning that the Court will reject them if they are arbitrary or unreasonable).

Mr. Voros referred the Committee to the Administrative Procedures Act, stating that the standard in that Act is "unsupported or arbitrary and capricious."

Mr. Nielsen indicated that "unsupported" is not the equivalent of "clearly erroneous." Mr. Nielsen believes that the Supreme Court does not want to be bound by a clear standard, but that it prefers to have the ability to be flexible in administering attorney discipline.

Ms. Nessel-Sale suggested that the Committee should propose an articulable standard and let the Court make a final decision on the standard at the time it considers the Committee's proposals.

Ms. Polich indicated that the Committee should not be bound by the Calder standard. Rather, the

Committee should propose the standard it believes to be the best and let the Court make the final decision. She also indicated a preference for a "litigation" model because attorneys are more familiar with that model.

Mr. Dart pointed out that the "clearly erroneous" standard has caselaw which defines it.

Mr. Nielsen indicated that only a few such cases actually exist. He also stated that a "litigation" model is too cumbersome and will therefore be more expensive than an "administrative" model.

Ms. Polich indicated that the subcommittee needs some direction from the Committee as to which model (and which standard) should be proposed.

Mr. Dart suggested that the issue be set as a specific agenda item for the next meeting. He then asked Mr. Nielsen to propose a standard of review at the next meeting which meets Mr. Nielsen's view on the issue.

B. Hiring and Firing of Chief Disciplinary Counsel. Ms. Nessel-Sale raised the issue of who will have the authority to hire and fire chief disciplinary counsel. Should it be the Supreme Court, the Court of Appeals, or the Disciplinary Board?

MOTION: Ms. Nessel-Sale moved to grant hiring/firing authority to the Board.

MOTION TO AMEND: Mr. Trost moved to amend the motion to grant hiring authority to the Board, but to require the concurrence of the Supreme Court and the Board in order to dismiss counsel.

SECOND ON MOTION TO AMEND: Judge Davis seconded Mr. Trost's motion to amend.

Ms. Nessel-Sale resisted the proposed amendment.

Mr. Trost explained the proposed amendment, stating that the Supreme Court acts as a check on Board members who may want to dismiss counsel in retaliation for counsel's pursuit of an action against the Board member's friend.

Ms. Nessel-Sale indicated that Supreme Court involvement in the process constitutes a vote of lack of confidence in the Board's ability to carry out its functions.

Ms. Polich indicated that Supreme Court involvement creates a process which is too cumbersome.

Mr. Nielsen indicated that one entity or the other should have complete authority, and that both entities should not be required to work in tandem. Mr. Arnett agreed with Mr. Nielsen.

MOTION TO AMEND THE MOTION TO AMEND: Mr. Voros moved to amend Mr. Trost's Motion to Amend to require Supreme Court approval of both hiring and dismissal of disciplinary counsel.

SECOND: Mr. Trost seconded the motion.

VOTE: The Committee voted five in favor and six opposed. The motion to amend Mr. Trost's Motion to Amend failed.

VOTE: The motion to amend failed, the Committee voting two in favor and nine opposed.

Ms. Polich queried who should have the authority to hire and fire disciplinary counsel.

Mr. Arnett suggested that the Court of Appeals should have that authority.

Mr. Dart disagreed with Mr. Arnett, stating that the Court of Appeals was not in a position to evaluate disciplinary counsel's performance.

Mr. Dever stated that the Board does not take evidence, it only reviews the Hearing Committee's work. Therefore, the Board does not have much opportunity to act in retaliation. Consequently, Mr. Trost's concerns about retaliation would be minimal.

VOTE: The original motion, granting the Board the authority to independently hire and dismiss disciplinary counsel, passed, the Committee voting eight in favor and three opposed.

C. Rule 17. Dissemination of Disciplinary Information. Bert Dart queried why the subcommittee had recommended the deletion of 17B.

Mr. Arnett stated that the language providing for publication of disciplinary information is similar to the provisions of Rule 11F(1).

Mr. Dart pointed out that Rule 11F(1) only addresses official opinions of the Court. It does not address the dissemination of information on private discipline matters.

Mr. Nielsen suggested that the dissemination of information language fits better in Rule 17 than Rule 11.

Mr. Trost indicated that the public is protected by dissemination of discipline information in the newspaper rather than in a legal journal.

Mr. Voros suggested that if the Committee reinstates Rule 17B, it should only require publication in a newspaper of general circulation in the district in which the lawyer maintained an office at the time of discipline.

Ms. Nessel-Sale suggested that perhaps reinstatements and readmissions should not be published at all.

**MOTION:** Judge Davis moved to reinstate Rule 17B, but to amend it to apply specifically and only to "Utah" judicial districts.

**SECOND:** Mr. Voros seconded the motion.

**MOTION TO AMEND:** Ms. Nessel-Sale moved to amend the motion by deleting the language requiring publication of reinstatements, readmissions and transfers from disability.

Mr. Dever questioned the definition of the word "published," pointing out that the newspaper might elect not to publish the information required, though provided by disciplinary counsel.

Mr. Dart suggested that "publish" means to buy an advertisement, thereby ensuring publication of the information.

**SECOND:** Mr. Arnett seconded the motion to amend.

**VOTE:** The Committee voted unanimously to approve the motion to amend. ✓

Mr. Nielsen stated that the Committee had previously determined, in Rule 16B(3) that disability proceedings are confidential.

Ms. Nessel-Sale stated that although the proceedings are confidential, the orders are public.

Ms. Polich suggested that making disability proceedings public may discourage disability as a vehicle for helping an impaired lawyer. Judge Davis agreed with Ms. Polich.

Mr. Voros indicated that the public needs to know if an attorney is disabled. He stated that if the purpose

of publication is punitive, then publication should not occur. However, if the purpose of publication is to protect the public, then publication should occur.

Mr. Nielsen asked whether there is a less "punitive" way to protect the public and the attorney's clients.

Ms. Nessel-Sale stated that attorneys do not always come forward with disability problems, so chilling probably does not occur that often. In most situations, disability proceedings are the result of a plea agreement.

**MOTION:** Ms. Polich moved to delete the word "inactive" from the phrase "disability inactive" throughout the rules.

**SECOND:** Mr. Voros seconded the motion.

✓ **VOTE:** The Committee unanimously approved the motion.

Mr. Nielsen asked whether disciplinary counsel should have discretion to publish disability orders.

Mr. Voros stated that if the problem is serious enough to result in a disability order, the public has a right to know.

**MOTION:** Mr. Arnett moved to replace the term "legal journal" with "official state bar publication" in Rule 17B.

**SECOND:** The motion was seconded by Mr. Richard Hill.

✓ **VOTE:** The Committee unanimously voted to approve the motion.

**MOTION:** A Committee member moved to amend the heading of Rule 17B as follows:

Public Notice of Discipline or Disability Status  
Imposed.

**SECOND:** Mr. Morris seconded the motion.

✓ **VOTE:** The Committee unanimously voted to approve the motion.

**MOTION:** Ms. Nessel-Sale moved to strike the words "the legal journal and in" from Rule 17B, and to add the last two sentences of Rule 11F(1) to Rule 17B.

**SECOND:** The motion was seconded by Ms. Polich.

Mr. Dever spoke against the motion, stating that the effect would complicate the language of 17B.

Mr. Nielsen queried whether Ms. Nessel-Sale's motion would result in the deletion of the last two sentences of Rule 11F(1) from that Rule. Ms Nessel-Sale stated that it would result in such a deletion.

**VOTE:** The Committee voted unanimously to oppose Ms. Nessel-Sale's motion.

**VOTE:** The Committee voted unanimously to approve Judge Davis' original motion to reinstate Rule 17B and to specify "Utah" judicial districts.

**MOTION:** Judge Davis moved to delete the words "a certified copy" from Rule 17C and insert "notice."

**SECOND:** Mr. Morris seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion.

Regarding Rule 17A, Ms. Nessel-Sale queried whether disciplinary counsel should be required to notify other jurisdictions of readmission, reinstatement and transfer from disability. Mr. Dart suggested that the duty is not that onerous and that it is fair to report reinstatements as well as sanctions.

**MOTION:** Regarding Rule 17C, Judge Davis moved to strike the entire second sentence of that paragraph.

**SECOND:** The motion was seconded by Mr. Dever.

**VOTE:** The Committee voted unanimously to approve the motion.

Mr. Voros queried whether Rule 17C requires disciplinary counsel or the Court to provide the required notice. Mr. Dever pointed out that disciplinary counsel would not be involved for suspensions regarding the non-payment of dues.

**MOTION:** Mr. Voros moved to strike the words "disciplinary counsel" from throughout Rule 17C and to replace them with "the Supreme Court."

**SECOND:** Mr. Morris seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion.

**MOTION:** Ms. Nasset-Sale moved to delete the phrase "opinion and order" from the second to the last sentence in Rule 11F(1) and to insert "order of discipline and opinion, where issued,".

**SECOND:** Ms. Polich seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion.

**D. Rule 18. Additional Rules of Procedure.** Mr. Nielsen, referring to paragraph 18I, asked whether there are other rules regarding time limitations which are contrary to these rules. Mr. Nielsen pointed out that time limits are jurisdictional in the appellate rules.

The Committee discussed the issue and determined that the Rules of Appellate Procedure dealing with time limitations do not control the appeals of disciplinary proceedings. The Committee then discussed whether other Rules of Appellate Procedure apply to disciplinary appeals. Mr. Schultz specifically asked whether the appellate rules regarding time limits for filing of briefs would apply to disciplinary appeals.

Mr. Dart suggested that the matter be referred back to the subcommittee to establish appellate procedures.

**MOTION:** Mr. Voros moved to remand Rule 11F(1) back to the subcommittee for the establishment of appellate procedure rules.

**SECOND:** Judge Davis seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion.

**MOTION:** Mr. Morris moved to amend Rule 18I to read as follows:

**I. Effect of Time Limitations.** Except as is otherwise provided in these rules, [~~time is directory and not jurisdictional~~] failure to observe prescribed time intervals may result in sanctions against the violator but does not justify abatement of any discipline or disability investigation or proceeding.

**SECOND:** Mr. Voros seconded the motion.

**VOTE:** Eight members of the Committee voted in favor of the motion, and one Committee member opposed the motion.



**MOTION:** Ms. Polich moved to delete additional language from Rule 18I so that the paragraph reads as follows:

I. Effect of Time Limitations. Except as is otherwise provided in these rules, time is not jurisdictional.

**SECOND:** Mr. Morris seconded the motion, but pointed out that sanctions, as provided in the latter part of Rule 18I, might be more properly placed in some other rule.

**WITHDRAWAL OF MOTION.** Ms. Polich withdrew the motion.

**MOTION:** Ms Polich moved to change the title of Rule 17J to "Complaints Against Members of the Office of Attorney Discipline." No action was taken on the motion by the Committee.

Mr. Voros suggested that (2) and (3) of Rule 18J, proposed to be deleted by the subcommittee, should be reinserted and that the word "shall" in each of those subparagraphs should be changed to "may." He stated that the word "shall" in (1) should remain.

Mr. Dever suggested that if those changes are incorporated, the entire paragraph should be rewritten with separate subparagraphs for clarity.

Mr. Dart remanded Rule 18J to the subcommittee for additional work.

**MOTION:** Mr. Morris moved to adjourn the meeting.

**SECOND:** The motion was seconded by a Committee member.

**VOTE:** The Committee voted unanimously to approve the motion.

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