

Approved

**MINUTES**

SUPREME COURT ADVISORY COMMITTEE ON  
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, August 28, 1991, 5:00 p.m.  
Administrative Office of the Courts

Bert L. Dart, Presiding

**PRESENT:**

Bert L. Dart  
Stephen F. Hutchinson  
Tom Arnett  
J. Frederick Voros, Jr.  
Lee Dever  
Stephen Trost  
Hon. Lynn Davis  
Clark Nielsen  
Jo Carol Nessel-Sale  
John F. Hill  
G. Richard Hill  
Stuart Schultz

**EXCUSED**

Hon. John Rokich  
John Palmer  
John K. Morris  
Barbara Polich  
Danny Kelly

**STAFF:**

Tim Shea

1. **WELCOME AND APPROVAL OF MINUTES.** Mr. Dart called the meeting to order at 5:30 p.m. The minutes of the July 23 meeting were approved as drafted.

2. **TASK FORCE.** Mr. Dart reviewed the letter he sent to the Supreme Court regarding the Task Force's preliminary report. Chief Justice Hall responded that the timetable of the Advisory Committee will not conflict with the timetable of the Task Force.

3. **REVIEW OF SUMMARY OF RULES OF ATTORNEY DISCIPLINE.** Mr. Dart stated that the summary of the rules prepared by staff and previously distributed to the committee members represented a good preliminary draft of the committee's position on the rules approved so far.

4. **STANDARD OF REVIEW.** The committee discussed the proposal of Mr. Nielsen for amendment of the subcommittee recommendation regarding the standard of review when the Board and the Court review Discipline Committee facts and conclusions on disciplinary matters. This matter had been held over from the prior meeting. Mr. Dart stated that the debate centered on whether the standard of review should be substantial evidence or clearly erroneous.

Mr. Nielsen summarized his proposal.

Ms. Nessel-Sale stated that the subcommittee recommendation would establish a clearly erroneous standard when the Board reviews the Discipline Committee's facts. There is no standard established for review by the Supreme Court. The model rule does not contain a standard of review for review by the Court.

Mr. Hutchinson stated that the ABA committee is considering including a standard in the model rule.

Ms. Nessel-Sale stated that the main purpose of the Board is to ensure uniform discipline and so the Board should have broad discretion to review the Committee's conclusions. However, the Committee's main purpose is to determine factual issues and these should be respected upon review.

Mr. Trost stated that the Committee may not respect its own responsibility to determine issues of fact if they know that the facts are subject to Board review. The cases generally being tried now are limited to those with significant factual disputes.

Mr. Dart summarized the differences between the two proposals.

**MOTION:** Mr. Nielsen moved to change the standard of review of factual issues at the Board level from clearly erroneous to substantial evidence.

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

**VOTE:** The motion failed with three in favor, six opposed and one abstention.

**MOTION:** Mr. Dever moved to change the rule to include a standard of review of factual issues to clearly erroneous at both the Board and the Court level.

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

**VOTE:** The motion carried with eight in favor, and two opposed.

5. **RULES OF PROFESSIONAL CONDUCT.** Mr. Arnett proposed the following schedule for review of the Rules of Professional Conduct:

Rules 4, 6, 8 at the current meeting  
Rules 2 and 3 in September  
Rule 5 in October  
Rule 1 in November  
Rule 7 in January

Mr. Dart directed staff to provide a copy of the Rules of Professional Conduct to each committee member.

Mr. Arnett stated that neither the ABA nor the subcommittee recommends any change to Rule 6.

Mr. Arnett stated that the ABA did not recommend any changes to Rule 4. The subcommittee recommended a change to Rule 4 and the proposed amendment was distributed.

The committee debated the amendment to Rule 4 to include the prohibition of threatening criminal prosecution in order to gain an advantage in a civil matter. Ms. Nasset-Sale asked why the word "solely" which had been included into the old Code, was not included in this draft. Mr. Arnett stated that the rule could be too easily avoided with such a restriction.

Mr. Trost stated that about one-third of the states had included a similar provision in their state rules.

**MOTION:** Mr. Arnett moved to adopt the amendment.

**SECOND:** Mr. Richard Hill seconded the motion.

**AMENDED MOTION:** Mr. Hutchinson amended the motion to return the draft to the subcommittee for further review and to obtain some history as to why the ABA did not include the old provision in their new rules.

**SECOND TO AMENDED MOTION:** Mr. Nielsen seconded the amended motion.

**VOTE ON AMENDED MOTION:** The amended motion passed unanimously.

6. **RULE OF ATTORNEY DISCIPLINE 19.** Ms. Nasset-Sale summarized the differences between Model Rule 19 and the subcommittee's recommendation.

Mr. John Hill suggested amending the definition of serious crime into two subparagraphs to make clear that any felony is a serious crime and that the qualifiers apply only to lesser

crimes. The committee approved the change by consensus. The committee also agreed to remove the phrase "as determined by the statutory or common law definition of the crime." The committee also agreed to change the verb in paragraph (A) from "may" back to the original "shall".

**MOTION:** Ms. Nessel-Sale moved the adoption of the rule as amended.

**SECOND:** Mr. John Hill seconded the motion.

**VOTE:** The committee passed the motion unanimously.

7. **RULE OF ATTORNEY DISCIPLINE 20.** Ms. Nessel-Sale stated the differences between the model rule 20 and the subcommittee recommendation. By consensus, the committee agreed to change paragraph (D) from "ten" days back to the original "two" days.

The committee debated the meaning of "sufficient evidence" in paragraph (A). The committee members stated that this would be left to a case by case determination of the Court, but that the Court should require a very high quantum of evidence.

**MOTION:** Ms. Nessel-Sale moved the adoption of the rule as amended.

**SECOND:** Mr. John Hill seconded the motion.

**VOTE:** The committee passed the motion unanimously.

8. **RULE OF ATTORNEY DISCIPLINE 21.** The committee began to discuss Rule 21, but the time set for the end of the meeting passed and discussion was suspended.

9. **ADJOURNMENT AND NEXT MEETING.** The committee will meet on September 10. Sandwiches will be available at 5:15 p.m. The next meeting will start at 5:30 p.m.

The meeting was adjourned.