

**MINUTES**

SUPREME COURT ADVISORY COMMITTEE ON  
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, September 10, 1991, 5:00 p.m.  
Administrative Office of the Courts

Bert L. Dart, Presiding

**PRESENT:**

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

**EXCUSED:**

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

**STAFF:**

Colin R. Winchester

1. **WELCOME AND APPROVAL OF MINUTES.** Mr. Dart welcomed the Committee to the meeting.

**MOTION:** Mr. Voros made a motion to approve the draft minutes of the August 27 meeting after striking the last sentence on page one as suggested by Mr. Dart.

**SECOND:** The motion was seconded by Judge Davis.

**VOTE:** The Committee voted unanimously to approve the motion. Mr. Winchester will prepare the August 27 minutes in final form and distribute them to the Committee.

2. **LETTER FROM PETER W. BILLINGS, SR.** Mr. Dart distributed a letter from Peter W. Billings asking the Committee to comment on several issues under consideration by the Supreme Court's Task Force on the Management and Regulation of the Practice of Law. Mr. Dart requested that Ms. Nessel-Sale's subcommittee review the letter and report to the Committee on September 24.

3. RULES OF ATTORNEY DISCIPLINE.

Rule 21A.

**MOTION:** Mr. Voros made a motion to approve Rule 21A as drafted.

**SECOND:** The motion was seconded by Judge Davis.

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

Rule 21B. The Committee began to discuss 21B, but noted that it had procedural conflicts with 21A and 21C.

**MOTION:** Mr. Voros made a motion to remand 21A, 21B and 21C back to the subcommittee for further report at the next Committee meeting. (?)

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

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

**MOTION:** Mr. Nielsen made a motion to delete the last sentence of 21B.

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

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

Rule 21D.

**MOTION:** Mr. Hutchinson made a motion to change "expressing" to "consenting to" in the initial paragraph of 21D.

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

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

The Committee agreed to change "charges" to "charge" in the initial sentence of 21D and in 21D(4).

**MOTION:** Judge Davis made a motion to approve, as amended, the initial sentence of 21D and 21D(1), 21D(2) and 21D(3).

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

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

Mr. Voros expressed concern that 21D does not prohibit the use of the consent affidavit in the disciplinary matter if the matter is not resolved by the affidavit.

Mr. Dart suggested that the paragraph be revised to prohibit the use of the consent affidavit in the current discipline matter or in subsequent proceedings.

**MOTION:** Mr. Voros made a motion to change the first sentence of 21D to read as follows:

Once an agreement has been reached, the lawyer who consents to a stated form of discipline subsequent to the filing of a formal charge shall present to the Board an affidavit consenting to the discipline and that:

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

**VOTE:** The Committee voted to approve the motion, nine to one.

Mr. Dever spoke against 21D(4), stating that there may be other reasons to consent to discipline than that the lawyer cannot successfully defend against the charge.

Ms. Nessel-Sale stated that the requirement is needed for reinstatement and readmission determinations.

Judge Davis suggested that 21D(3) covers Ms. Nessel-Sale's concerns.

Mr. Hutchinson and Ms. Nessel-Sale spoke in favor of 21D(4) because it prohibits a lawyer from later saying that he/she could have successfully defended against the discipline charge.

**MOTION:** Mr. Dever made a motion to delete 21D(4).

**SECOND:** The motion was seconded by Judge Davis.

**VOTE:** The Committee voted to oppose the motion six to four.

**MOTION:** Ms. Nessel-Sale made a motion to amend 21D(4) to read as follows:

The lawyer submits consent because the lawyer knows that if the pending proceeding were prosecuted, the lawyer could not successfully defend against the charge.

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

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

**Rule 21E.** Mr. Hutchinson noted that "reprimand" should be replaced with "admonition" in the first sentence.

Ms. Nessel-Sale noted that the first sentence is in addition to the ABA Model.

**MOTION:** Mr. Voros made a motion to delete the bracketed language from 21E.

**SECOND:** The motion was seconded by Judge Davis.

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

**MOTION:** Mr. Richard Hill made a motion to approve 21E as amended.

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

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

**Rule 21 Commentary.** The Committee discussed the commentary to Rule 21.

**MOTION:** Judge Davis made a motion that commentary not be adopted for any rules except to explain why those rules deviate from the model. The motion died for a lack of second.

Mr. Dart recommended that the issue of commentary be reserved until the next Committee meeting. At that time, the Committee will determine its approach to commentary and how to accomplish that approach within the designated time schedule previously determined by the Committee.

**Rule 33 (formerly Rule 22).** Ms. Nessel-Sale pointed out that the model for this rule came from the State of Washington.

**MOTION:** Mr. Nielsen made a motion to re-number Rule 22 as Rule 33, to delete Rule 22C, and to re-number all subsequent rules accordingly.

SECOND: Mr. Voros seconded the motion.

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

Mr. Trost pointed out that although Utah has a rule for assessment of costs, the current rule does not extend to attorney's fees. He noted that in some states, rather than impose attorney's fees, the fee for reinstatement and readmission is adjusted upward to offset such fees.

Mr. Dever expressed concern that an absolved attorney cannot recoup attorney's fees under the rules.

Mr. Nielsen pointed out that this rule is the subcommittee's attempt to fund the disciplinary system, a concern raised by the Supreme Court.

Mr. Hutchinson noted that the proposed rule disadvantages lawyers who are unable to bear the risk of extenuated discipline proceedings.

Mr. Dart noted that in criminal law, the fine does not increase simply because a defendant takes advantage of the trial process.

Ms. Nessel-Sale noted that discipline proceedings follow a civil litigation, rather than a criminal litigation, model. Like civil litigation, money can be saved by resolving the matter at an early stage.

Judge Davis asked whether other states have similar attorney's fees rules.

Ms. Nessel-Sale stated that Virginia and other states have similar rules.

Mr. Dart expressed dissatisfaction with the attorneys' fees portion of the rule. He preferred the large reinstatement/readmission approach mentioned by Mr. Trost. He expressed approval for the portions of the rule which deal with costs.

Ms. Nessel-Sale suggested that she would rather see some type of alternative funding, rather than completely delete all references to attorney's fees. She expressed concern about funding the discipline system.

It was determined that the Committee would review the rule, striking all references to attorney's fees for the present, and that Mr. Hutchinson and Mr. Trost would review similar rules from other states and report back to the Committee in November.

Rule 33B. "Agency" should be changed to "Office" throughout Rule 33. ✓

Rule 33B(1) should be amended as follows:

Charges of court reporters in attending and transcribing depositions or hearings; ✓

Rule 33B(8) should be deleted, and (9) should be re-numbered as (8).

**MOTION:** Mr. Nielsen made a motion to adopt Rule 33B as amended.

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

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

Rule 33C.

Rule 33A and 33D.

**MOTION:** Mr. Hutchinson made a motion to approve 33A and 33D, as amended, by striking all reference to attorney's fees and changing "Agency" to "Office." ✓

**SECOND:** A Committee member seconded the motion.

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

Rule 33E.

**MOTION:** Mr. Nielsen made a motion to amend 33E(1) as follows:

Request for Review by Board. Within 10 days of service on the respondent lawyer of the order assessing costs, the lawyer may file with the Office a request for Board review of the order. Upon the timely filing of such a request, the Board shall review the order assessing costs. ✓

**SECOND:** A Committee member seconded the motion.

**VOTE:** The Committee voted unanimously to approve the motion. The Committee then voted unanimously to approve 33E as amended.

Rule 33F.

**MOTION:** Judge Davis made a motion to amend the last sentence of 33F as follows:

Upon filing of an opinion by the Court imposing a sanction, costs may be assessed in favor of the Office pursuant to the Rules of Appellate Procedure.

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

Mr. Voros questioned whether there should be a reciprocal cost provision, allowing an absolved attorney to recoup his/her costs from the Office.

Mr. Trost and Judge Davis stated that such a provision would create a chilling effect.

Mr. Dart directed those who wished to have the Committee consider a reciprocal cost provision to draft the same for discussion at the next meeting.

**VOTE:** The Committee voted unanimously to approve Judge Davis' motion. ✓

**Rule 33G.** Mr. Dart expressed dislike for 33G, noting that the waiver provision contains no standard by which it should be used.

**MOTION:** Mr. Voros made a motion to delete 33G.

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

Mr. Hutchinson noted that 33G is unnecessary because Rule 33 provides for the discretionary, rather than mandatory, assessment of costs.

**VOTE:** The Committee voted to delete 33G, six to four. ✓

**Rule 33H.**

**MOTION:** Mr. John Hill made a motion to approve 33H by striking "expenses" throughout, and by changing "state bar counsel" to "disciplinary counsel" throughout. ✓

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

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

**Rule 33I.**

**MOTION:** Mr. Nielsen made a motion to approve 33I after striking "expenses" throughout, and striking "state" from "state disciplinary counsel."

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

Mr. Trost noted that currently, a failure to pay costs is not grounds for separate, additional discipline action.

Judge Davis noted that in a criminal matter, failure to pay fines or restitution does not constitute an additional charge, but may result in contempt charges.

**AMENDED MOTION:** Mr. Voros made a motion to approve 33I as follows:

Failure to Comply. Willful failure of a lawyer to pay costs when ordered to do so or willful failure of a lawyer to comply with the terms of a periodic payment plan entered into by agreement between the lawyer and disciplinary counsel may constitute grounds for discipline.

**SECOND:** A Committee member seconded the amended motion.

**VOTE ON AMENDED MOTION:** The Committee voted unanimously to approve Mr. Voros' amended motion.

**Rule 33J.** The Committee voted unanimously to approve 33J as drafted.

**Rule 22 (formerly Rule 23).** The Committee discussed Rule 23. The following changes were made:

1. First sentence of 22A. Upon being publicly disciplined in another jurisdiction . . . .

2. First sentence of 22B. Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in the State of Utah has been publicly disciplined in another jurisdiction . . . .

3. 22D. Upon the expiration of thirty days from service of the notice pursuant to the provisions of paragraph B, disciplinary counsel shall petition the court to impose identical discipline in this jurisdiction, which discipline shall be imposed unless the lawyer demonstrates to the Court that it clearly appears upon the face of the record from which the discipline is predicated that . . . .

4. Last sentence of 22D. The burden is on the ~~respondent~~ lawyer to demonstrate that the imposition of the same discipline is not appropriate.

**MOTION:** Mr. Dever made a motion to approve Rule 22 as amended.

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



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

4. ADJOURNMENT. There being no further business, the Committee adjourned.

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