

Approved as amended
on 11-26-91

MINUTES

SUPREME COURT ADVISORY COMMITTEE ON
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, November 12, 1991, 5:00 p.m.
Administrative Office of the Courts

Bert L. Dart, Presiding

PRESENT:

Bert L. Dart
Hon. John Rokich
Stephen F. Hutchinson
Tom Arnett
Lee Dever
Stephen Trost
Clark Nielsen
Jo Carol Nessel-Sale
G. Richard Hill

EXCUSED

Barbara Polich
John F. Hill
Stuart Schultz
John Palmer
Danny Kelly
J. Frederick Voros, Jr.
John K. Morris
Hon. Lynn Davis

STAFF:

Colin R. Winchester

1. **WELCOME:** Mr. Dart welcomed the committee members to the meeting and requested that staff prepare a report of each committee members' attendance since July 1, 1991.

2. **MINUTES OF SEPTEMBER 24 MEETING.**

MOTION: Judge Rokich made a motion to approve the minutes as drafted.

SECOND: Jo Carol Nessel-Sale seconded the motion.

VOTE: The committee voted unanimously to approve the motion.

3. **RESPONSE TO TASK FORCE LETTER.** Ms. Nessel-Sale reported that her subcommittee had not yet responded to Mr. Billings' letter regarding the Task Force's proposals on discipline.

Mr. Winchester reported that the Task Force's final report has been completed, and that it would be distributed to Bar members during the last week of November.

Mr. Dart suggested that the subcommittee do nothing further with the letter at this time.

4. **APPROACH TO COMMENTARY.** Mr. Winchester reminded the committee that it had previously tabled a decision on its approach to commentary for the Rules of Attorney Discipline.

MOTION: Mr. Dever made a motion to include the committee's commentary for purposes of publication and comment, but that the commentary be deleted after the rules have been adopted by the Court.

SECOND: Mr. Arnett seconded the motion.

Mr. Hutchinson opposed the motion.

Mr. Nielsen stated that most practitioners would not have ready access to the ABA's commentary.

VOTE: The committee voted to defeat the motion, one in favor and seven opposed.

MOTION: Mr. Trost made a motion to include the ABA's commentary, as amended by this committee, in conjunction with the Rules of Attorney Discipline.

SECOND: Mr. Richard Hill seconded the motion.

VOTE: The committee voted to approve the motion, seven in favor and one opposed.

5. **RULE OF PROFESSIONAL CONDUCT 3.8.** Mr. Winchester informed the committee that he had received a written response regarding proposed Rule 3.8(f) from the U.S. Attorney's office which was distributed to each committee member. He also indicated that the S.L. County Attorney's office had opposed the proposal orally.

Mr. Hutchinson indicated that he had some ABA materials which take an opposite on the issues raised by the U.S. Attorney, and indicated that he would distribute the same to committee members through staff.

MOTION: Mr. Hutchinson made a motion to defer decision on Rule 3.8(f) until the materials were distributed and reviewed by committee members.

Mr. Richard Hill noted that although the proposal is an ethical rule, it affects federal criminal procedure.

SECOND: Mr. Arnett seconded the motion.

VOTE: The committee voted unanimously to approve the motion.

6. **RULE OF PROFESSIONAL CONDUCT 5.** Mr. Arnett suggested that ~~in Mr. John Hill's absence,~~ the discussion on Rule 5 be tabled

until a future meeting.

7. USE OF DISTRICT COURTS AS FORUM FOR PUBLIC DISCIPLINE HEARINGS. Mr. Dart introduced the subject to the committee, and noted that certain materials had been distributed prior to the meeting. He then reviewed the substance of his telephone conversation with Chief Justice Hall, indicating that Justice Hall's October 17 letter to Steve Trost was not to be necessarily construed as an endorsement of the district court proposal. Rather, the Court has asked that the proposal be studied further and that recommendations be made regarding it.

Mr. Dever noted that the exhibits to Mr. Trost's August 26 Memorandum had not been included in the mailing. Mr. Trost produced the exhibits and they were copied and distributed to committee members.

Mr. Trost reported on the history of the district court proposal. He originally became aware of the system at an NOBC convention. Later, at the 1991 ABA convention in Atlanta, he had an opportunity to discuss the system with Bar counsel from other states. He noted that the list of states referred to in his August 26 Memorandum was not completely accurate, indicating that Nebraska, Georgia and Mississippi should be added to the list, and Washington, D.C. and Maine should be deleted from the list.

Mr. Trost then met with the Bar Commission in August. Mr. Trost referred the committee to the five problems experienced under the current system noted in his August 26 Memorandum:

1. Scheduling problems.
2. Waiver of oral argument due to scheduling problems.
3. Use of "Bar" subpoenas.
4. Use of Bar staff as clerks of court.
5. Lack of decorum, security and court reporters.

Mr. Trost indicated that the existing backlog of approximately 120 cases over three years old has not been remarkably reduced. Despite that backlog, current cases are being disposed of timely, and that 12-20 trials have occurred this year, with approximately the same number of discipline orders by consent.

After Mr. Trost's meeting with the Commission, he sent a written survey to those states which use some type of non-hearing-panel system, and followed up with telephone calls to each such jurisdiction. He then wrote an October 18 Memorandum to the Commission which he distributed to the committee.

Mr. Trost indicated that there are two models: the California model and the Florida model. Both use screening panels for probable cause determinations and the imposition of private discipline. Neither uses volunteer adjudicators, both use the Rules of Evidence and Civil Procedure, and both have a preponderance of the evidence standard of proof. The California

model uses judges who hear only discipline matters, while the Florida model uses sitting state court judges.

Mr. Trost reported that he had originally recommended the California model because he thought the Utah judiciary would be opposed to the use of state court judges. However, he now favors the Florida model. He reported that the Commission also favors the Florida model, and that he was in the process of drafting rules proposing the Florida model.

Mr. Dart noted that the effect of the district court proposal is to obviate the committee's proposed discipline system.

Mr. Trost agreed with Mr. Dart's assessment in some instances, noting that much of the committee's work would be kept in tact regardless of the system adopted.

Mr. Dart asked committee members how they wished to proceed regarding the district court proposal.

Ms. Nessel-Sale reported that Ms. Polich did not wish to continue working on the committee's model rules if the work would be meaningless, and that Ms. Polich is also opposed to sending two sets of rules out from this committee.

Ms. Nessel-Sale suggested that the committee resolve the philosophical question before continuing on the specific issues addressed in the rules.

Judge Rokich agreed that the committee should resolve the philosophical question first, indicating support for the district court proposal.

Mr. Hill also indicated that the decision should be made before additional committee time is spent refining the rules.

Mr. Trost suggested that the committee debate and vote on the issue at the next meeting.

Mr. Hutchinson indicated that he had responded to Mr. Trost's August 26 Memorandum and that he has several questions which need to be resolved. He indicated he would like to review a draft of the rules which establish the district court system.

Mr. Dever suggested that Mr. Trost supply the committee with copies of rules from those jurisdictions which use the district court system.

Mr. Nielsen indicated that the subcommittee had discussed the use of single hearing officers (rather than hearing panels) at length. He noted that regardless of the system recommended by the committee, most of the subcommittee's rules can and should be retained.

Mr. Arnett stated that the committee does not need final copies of Mr. Trost's proposed rules. Rather, the committee should review the Florida rules and debate and vote at the next meeting.

Ms. Nessel-Sale stated that the present system is flawed and that either proposal is better than the present system.

Mr. Dart asked Mr. Trost to distribute sample rules to all committee members and asked staff to distribute the materials distributed at tonight's meeting to those members who were absent. The committee will then discuss the proposal and vote at the meeting on November 26.

8. ADJOURNMENT.

MOTION: Mr. Trost made a motion to adjourn the meeting.

SECOND: Mr. Hutchinson seconded the motion.

VOTE: The committee voted unanimously to approve the motion.