

Approved  
1/14/92

**MINUTES**

SUPREME COURT'S ADVISORY COMMITTEE ON  
THE RULES OF PROFESSIONAL CONDUCT

Tuesday, December 10, 1991, 5:30 p.m.  
Administrative Office of the Courts

Bert L. Dart, Presiding

**PRESENT:**

Bert L. Dart  
J. Frederic Voros, Jr.  
Tom Arnett  
F. John Hill  
Jo Carol Nessel-Sale  
Clark Nielsen  
Hon. John Rokich  
Stephen Trost  
Hon. Lynn Davis  
Lee Dever  
Barbara Polich  
Stuart Schultz  
G. Richard Hill  
Danny Kelly

**EXCUSED**

John K. Morris  
Stephen F. Hutchinson  
John Palmer

**STAFF:**

Colin R. Winchester

1. **WELCOME AND APPROVAL OF MINUTES.** Mr. Dart reported that the subcommittee chairs had met to set an agenda for the evening's meeting. He indicated that the Committee would address those issues raised by the previous week's vote to use the district courts as the forum for public discipline proceedings. He noted that he had received a letter from Steve Trost which attempted to identify those issues, and distributed the same to Committee members.

**MOTION:** Judge Rokich made a motion to amend the Minutes of the previous committee meeting by changing the vote on the district court proposal to eight in favor and five opposed.

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

**VOTE:** The Committee voted six in favor of the motion and six against the motion. Mr. Dart voted against the motion to break the tie.

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

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

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

2. **RECONSTITUTION OF SUBCOMMITTEE ON RULES OF ATTORNEY DISCIPLINE.** Ms. Nessel-Sale suggested that in light of the Committee's vote to adopt the district court proposal, a new subcommittee be appointed to reconsider the Rules of Attorney Discipline. Mr. Dart appointed the following Committee members to the subcommittee: Steve Hutchinson, Chair; Steve Trost; Clark Nielsen; Stuart Schultz; Fred Voros; and Judge Rokich.

3. **REINSTATEMENT OF SCREENING PANELS.** Ms. Nessel-Sale indicated that the original subcommittee had determined to use lay members at some point in the discipline process, and that due to the demise of hearing panels, they should be used at the screening panel level.

**MOTION:** Mr. Arnett made a motion to request that the subcommittee consider reinstating screening panels.

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

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

4. **ROLE OF BAR COMMISSION.** Mr. Dart questioned, in light of the Committee's vote to adopt the district court proposal, whether a separate Board is justified.

Mr. Nielsen suggested that the subcommittee be allowed to study that issue and make recommendations back to the Committee as a whole.

Mr. Dart indicated that the Bar Commission is capable of reviewing private reprimands recommended by the screening panels.

Ms. Nessel-Sale stated that if other review or administration is needed, a separate Board is still necessary. She agreed that the issue should be referred to the subcommittee for further study.

**MOTION:** Judge Davis made a motion to refer the issue to the subcommittee for further study.

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

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

5. **COMPLAINANT'S RIGHT OF APPEAL.** Mr. Dart asked whether a complainant may appeal a decision of dismissal. Under the previous scheme, a hearing panel chair would have heard and determined the appeal. Mr. Dart determined to refer the issue to the subcommittee for further study.

6. **LOCATION OF INITIAL FILING OF FORMAL COMPLAINTS.** Mr. Trost questioned whether formal complaints should initially be filed with the Supreme Court or the District Court. He indicated that in Florida, filings occur at the Supreme Court and are then delegated to the district courts.

Mr. Nielsen expressed apprehension about direct filings in the district courts noting that district courts are controlled, to some degree, by the Legislature.

**MOTION:** Ms. Nessel-Sale made a motion that initial filings be filed with the district court and that the subcommittee draft a rule accordingly.

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

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

7. **USE OF ACTIVE SENIOR JUDGES AND COMMISSIONERS IN DISCIPLINE PROCESS.** The Committee discussed whether active senior judges and commissioners should be allowed to preside over discipline matters.

Judge Davis noted that the district court proposal may increase the number of recusals.

Ms. Polich stated that the issue of case assignment should be left to the Judicial Council.

Mr. Arnett stated that the current draft of the commissioner legislation would require that the parties consent to the use of commissioners in this situation.

The Committee did not entertain a motion on the issue.

8. **APPLICABILITY OF U.R.C.P. 63.** The Committee discussed whether U.R.C.P. 63 should apply in discipline matters.

Mr. Nielsen stated that all Rules of Civil Procedure should presumptively apply.

**MOTION:** Mr. Arnett made a motion that U.R.C.P. 63 apply in discipline matter.

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

Ms. Nessel-Sale stated that U.R.C.P. 63 should not be "highlighted" but rather, that all non-jury civil trial rules should apply in the discipline process.

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

**9. DISTRICT COURT'S DETERMINATION AS RECOMMENDATION OR FINAL ORDER.** The Committee discussed whether the district court's decision should be in the nature of a recommendation to the Supreme Court, or in the nature of a final appealable order.

Mr. Trost pointed out that the Utah Constitution and In Re Knowlton may require that the district court's determination only be a recommendation.

Mr. Nielsen stated that the Supreme Court will have to review all recommendations, but that if the lower court's decision is an Order, the Supreme Court will only need to hear those matters which are appealed.

Mr. Dart and Mr. Voros suggested that the lower court's determination be a recommendation that becomes a final order if no objection is filed.

**MOTION:** Ms. Nessel-Sale made a motion that the lower court's decision be an Order, rather than a recommendation.

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

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

**10. BIFURCATION OF TRIAL AND IMPOSITION OF SANCTION.** Mr. Trost noted that the current draft of the rules apply non-jury trial rules to discipline proceedings. He questioned whether a sanctions hearing should be more like a criminal sentencing hearing, in order to allow hearsay.

Ms. Polich stated that bifurcation is not necessary and that hearsay should not be allowed in a sanction hearing. She indicated that the evidence which underlies the finding of misconduct also affects the sanction decision.

Mr. Trost stated that a prohibition against hearsay would be more prejudicial to the respondent attorney.

Mr. Kelly stated that because the sanctions presuppose a finding of misconduct, a bifurcated hearing is more appropriate.

Judge Davis noted that even though bifurcation is appropriate, the two hearings may be conducted one after the other.

Ms. Nessel-Sale noted that aggravating and mitigating circumstances are not introduced until after a finding of misconduct.

**MOTION:** Mr. Nielsen made a motion to refer the issues of bifurcation and use of hearsay at the sanction hearing to the subcommittee.

**SECOND:** Ms. Nessel-Sale seconded the motion.

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

11. **DISABILITY PROCEEDINGS AS CONFIDENTIAL.** Mr. Trost noted that the current draft of the rules provides for confidential hearings in disability matters.

Ms. Polich asked whether the Committee has decided to have disability matters handled in the district courts.

Mr. Trost noted that, pursuant to the Committee's vote, the district court is the only trier of fact provided for.

Mr. Nielsen noted that disability proceedings are not the same as discipline proceedings.

Ms. Nessel-Sale and Mr. Dever noted that the discipline board could hear and dispose of disability proceedings.

**MOTION:** Mr. Arnett made a motion that disability proceedings be confidential, and that the subcommittee recommend the appropriate forum and procedures for such proceedings.

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

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

12. **ATTORNEY'S FEES AS COSTS.**

**MOTION:** Mr. Dever made a motion that attorney's fees not be allowed as costs.

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

**VOTE:** The Committee voted to approve the motion, nine in favor and one against.

13. **RESIGNATION WITH DISCIPLINE PENDING.**

**MOTION:** Ms. Nessel-Sale made a motion that the process of resignation with discipline pending be referred to the subcommittee for study and recommendation.

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

**VOTE:** The Committee voted unanimously (with nine members present) to approve the motion.

**14.** **ADJOURNMENT.** There being no further business, the meeting was adjourned.