

Approved As Prepared  
4-28-92

**MINUTES**

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

Tuesday, April 14, 1992, 5:30 p.m.  
Administrative Office of the Courts

Bert L. Dart, Presiding

**PRESENT:**

Bert L. Dart  
Stephen F. Hutchinson  
Hon. John A. Rokich  
J. Frederic Voros  
Thomas N. Arnett, Jr.  
Stephen A. Trost  
Stuart H. Schultz  
F. John Hill  
Jo Carol Nessel-Sale  
G. Richard Hill  
Hon. Lynn W. Davis  
Lee Dever

**EXCUSED:**

John K. Morris  
Barbara K. Polich  
Clark Nielsen  
Dany C. Kelly  
John W. Palmer

**STAFF:**

Colin R. Winchester

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

**MOTION:** Judge Rokich made a motion to approve the minutes of the March 24 meeting as drafted.

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

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

2. **RULES OF ATTORNEY DISCIPLINE.**

**Rule 8(a).**

Mr. Trost reviewed the subcommittee's recommended amendments. The Committee discussed whether the disciplinary fee should be separate from the bar licensing fee and whether the

licensing fee should be referenced in these rules. Mr. Voros stated that the rule is unnecessary, noting that failure to pay the annual license fee should be dealt with administratively rather than by the discipline process.

**MOTION:** Mr. Trost made a motion to retain 8(a), as amended by the subcommittee, but to delete the remainder of Rule 8.

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

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

**MOTION:** Mr. Hutchinson made a motion that the Committee Chair notify the Bar Commission of the Committee's decision to delete the reference to licensing fees in the disciplinary rules and to recommend that the Bar Commission consider adoption of similar provisions elsewhere.

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

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

#### Rule 9.

The Committee discussed proposed Rule 9 and agreed to make the following changes:

1. Delete the words "or attempt to violate" in (a).
2. Change "the Court" to "a court" in (b).
3. Delete the phrase "or knowingly failed to respond to a lawful demand from a disciplinary authority, except that this rule does not require disclosure of information otherwise protected by applicable rules relating to confidentiality" from (b).

**MOTION:** A Committee member made a motion to approve Rule 9 as amended.

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

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

#### Rule 11.

Mr. Trost provided an overview of Rule 11.

#### Rule 11(a)(1).

Ms. Nasset-Sale expressed concern that disciplinary counsel may act as the complainant in a disciplinary proceeding.

Specifically, she questioned whether disciplinary counsel has standing. Mr. Dever asked whether and under what circumstances a non-named complainant is discoverable. The Committee discussed the issues, and Mr. Dart directed concerned Committee members to present a written proposal to the Committee for action at the next meeting.

**MOTION:** Ms. Nessel-Sale made a motion to delete the last two sentences of 11(a)(1) dealing with matters filed by judicial officers.

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

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

**MOTION:** Mr. Dever made a motion to strike the words "given a number seriatim by Bar Counsel and" in 11(a)(1), and to approve 11(a)(1) as amended.

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

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

**Rules 11(a)(2), 11(a)(3) and 11(a)(4).**

**MOTION:** A Committee member made a motion to approve 11(a)(2), 11(a)(3) and 11(a)(4) as drafted.

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

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

**Rule 11(a)(5).**

**MOTION:** Mr. Arnett made a motion to change the period of time during which a respondent must answer the complaint from ten days to twenty days.

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

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

**MOTION:** A Committee member made a motion to approve 11(a)(5) as amended.

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

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

Rule 11(a)(6).

Mr. Trost suggested that a provision be added allowing the complainant to appeal a dismissal to the Committee Chair.

**MOTION:** A Committee member made a motion to approve 11(a)(6) as drafted and including Mr. Trost's proposal. Mr. Trost is to draft the proposal and bring it to the Committee for final action.

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

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

Rule 11(a)(7).

Rule 11(a)(7) includes the "three-time loser rule." Ms. Nessel-Sale spoke against adoption of the provision, noting that under the standards sanctions, prior misconduct is treated as an aggravating factor. Judge Davis noted that in certain criminal matters, the classification of the crime is enhanced based on prior convictions. Ms. Nessel-Sale stated that this is a different situation in that new independent misconduct is not a prerequisite to a disciplinary action based on prior misconduct.

**MOTION:** Ms. Nessel-Sale made a motion to delete 11(a)(7).

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

The Committee debated the motion at length. Mr. Trost noted that under the standards sanctions, three private reprimands would never result in disbarment. Mr. Dart noted that the subcommittee's proposal could be used to get an incompetent lawyer out of practice.

**VOTE:** The Committee voted five in favor of the motion and five opposed. The motion failed for lack of a majority.

**MOTION:** A Committee member made a motion to approve 11(a)(7) changing "of" to "or" in the first phrase.

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

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

Rule 11(b)(1).

**MOTION:** Ms. Nessel-Sale made a motion to delete the last sentence of (b)(1) and to approve (b)(1) as amended.

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

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

**Rule 11(b)(2).**

The Committee agreed to change the second sentence of (b) (2) to read as follows:

All testimony shall be recorded and preserved so long as proceedings are pending and in any event for not less than six months following the hearing.

**MOTION:** Ms. Nessel-Sale made a motion that (b)(2) include a minimum time period of 14 days between the notice of the hearing and the date of the hearing.

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

**VOTE:** The Committee voted to approve the motion, six in favor and three opposed.

**MOTION:** A Committee member made a motion to approve (b)(2) as amended.

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

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

**Rule 11(b)(3).**

The proposal, as drafted, refers to "direct confrontation." The Committee discussed whether direct confrontation is the equivalent of cross-examination, and concluded that "confrontation" means physical presence but not necessarily cross-examination.

**MOTION:** Mr. Hill made a motion that (b)(3) be amended to provide that all parties may be physically present during the presentation of evidence unless the panel chair, upon a showing of good cause, makes a finding to the contrary.

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

**VOTE:** The Committee voted to approve the motion, seven in favor and three opposed. Mr. John Hill was directed to draft the language and present it to the Committee for final action at the next meeting.

**VOTE:** The Committee voted unanimously to approve 11(b)(3) as amended.

Rule 11(b)(4).

**VOTE:** The Committee voted unanimously to approve 11(b)(4) as drafted.

Rule 11(b)(5). Ms. Nessel-Sale was directed to re-draft 11(b)(5) and present it to the Committee for final action at the next meeting.

Rule 11(b)(6).

**VOTE:** The Committee voted unanimously to approve 11(b)(6) as drafted.

Rule 11(c).

The Committee discussed 11(c) and agreed to change "attorney in question" to "respondent."

The second sentence is amended to read as follows:

If a request for a hearing is made, the Committee Chair or a panel chair designated by the Committee Chair shall proceed to hear the matter in an expeditious manner, with Disciplinary Counsel and the respondent having the opportunity to be present.

**VOTE:** The Committee voted unanimously to approve 11(c) as amended.

3. **NEXT MEETING.** The Committee will meet on Tuesday, April 28, 1992 from 3:30 p.m. to 7:30 p.m. at the Administrative Office of the Courts. Ms. Nessel-Sale noted that she would be absent on that date due to a trial.

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