

first draft

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

Law and Justice Center
645 South 200 East
Salt Lake City, UT
May 19, 2008
5:00 pm

ATTENDEES

Robert Burton, Chair
Matty Branch
Nayer Honarvar
Judge Paul Maughan
Judge Mark May
Kent Roche
Judge Stephen Roth

Gary Sackett
Stuart Schultz
John Soltis
Paula Smith
Leslie Van Frank
Paul Veasy
Earl Wunderli

EXCUSED

Gary Chrystler
Steve Johnson
Billy Walker

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee and introduced Judge Mark May as a new member. Mr. Wunderli moved for adoption of the minutes of the meeting held on April 21, 2008, subject to the correction of a misspelling of "advertising" in section 2. Ms. Van Frank seconded the motion, and it passed unanimously.

2. PROPOSED ABA MODEL RULE 3.8

Mr. Burton advised the committee that Model Rule 3.8 was pending before the ABA, and that he wanted to bring the proposed rule to the committee's attention to see if it was interested in considering a similar rule in Utah. Mr. Soltis stated that he thought there were a lot of problems with the proposed rule, and that Paul Boyden with the Statewide Association of Prosecutors (SWAP) would like to have an opportunity to present SWAP's

concerns with the rule to the committee.

Mr. Soltis said the proposed rule unfairly places responsibility on the "line" prosecutor rather than on the prosecutorial authority/entity. Mr. Soltis explained that it is the elected official (the Attorney General, City Attorney, District Attorney) who determines whether an investigation will be undertaken and sometimes such a determination has political overtones. Mr. Soltis suggested that the proposed rule could place a prosecutor in direct conflict with his or her boss.

Mr. Burton recommended that the committee defer consideration of the proposed rule pending final action by the ABA. He suggested that should the ABA approve the rule as part of the Model Rules, the Utah Supreme Court would likely ask the Professional Conduct Committee to evaluate the rule. At that point in time, Mr. Burton said Mr. Boyden would be asked to meet with the committee.

3. LAWYER ADVERTISING SUBCOMMITTEE REPORT

Mr. Schultz discussed the subcommittee's recommendation that Bar members be surveyed to determine whether advertising is an issue of significant concern. Mr. Schultz said he had spoken both with John Baldwin and Nate Alder about the possibility of a survey. Mr. Baldwin was very supportive of the idea and said the Bar would be willing to assist. Mr. Alder told Mr. Schultz that he was positive about a survey but that he felt Bar members would treat it with less suspicion if the survey came from the Supreme Court or the Professional Conduct Committee rather than from the Bar.

Ms. Van Frank questioned whether Bar members would be willing to spend Bar money to review and pre-approve ads. Mr. Veasy pointed out that complaints to OPC to date had come from attorneys and not from members of the public. Mr. Sackett said that he thought the committee's primary focus as to lawyer advertising should be whether or not there is a problem that is detrimental to the public interest. Mr. Burton said he thought a legitimate concern as to lawyer advertising was the fact that some ads denigrate the legal profession and/or the judiciary.

Judge Maughan moved that the issue of lawyer advertising be tabled until there is evidence that there is a problem with attorney advertising that Bar members want addressed, and until there is a clear indication from Bar leadership that it wants to aggressively pursue enforcement against misleading or false advertising. Mr. Sackett seconded the motion. After additional questions

were raised and discussion ensued, Mr. Burton called for a vote. The motion passed unanimously. Following the vote, Ms. Smith said she thought the advertising issue, including undertaking a survey, should be pursued by Bar leadership rather than by the Professional Conduct Committee. Ms. Honarvar wondered whether the general public could be surveyed to determine if the public has been harmed. Judge Roth said that while he is sympathetic with the issue, he does not think there is a large enough percentage of the Bar with a passion about the advertising issue, and that he does not think the Bar has the will or the resources to take on aggressive enforcement.

Mr. Burton asked committee members if they had any problem if he and Mr. Schultz worked with Bar leadership in their individual capacities, rather than as committee members, to develop possible survey questions. No members of the committee expressed concern as to this approach.

4. REPORT FROM SUBCOMMITTEE AS TO APPEAL OF DISCIPLINARY ORDERS OF THE ETHICS AND DISCIPLINE COMMITTEE

Mr. Sackett stated that the subcommittee had met and discussed the issue, and that there was a consensus that the Rules of Lawyer Discipline & Disability should be amended to provide an attorney with a right of appeal when the attorney receives an admonition or public reprimand from the Ethics and Discipline Committee. Mr. Sackett guided the full committee through the proposed changes to Rule 14-510 described in the subcommittee's written proposal.

Mr. Sackett said that the subcommittee's proposal provides for an appeal to the district court, with the district court conducting a trial de novo. Mr. Sackett advised that the subcommittee felt the district court should not be able to order a more severe punishment than that imposed by the Ethics and Discipline Committee in order to prevent an attorney from being penalized for taking an appeal.

Mr. Sackett said that the subcommittee had not reached agreement as to the degree of formality or informality of the proceeding before the district court. Judge Roth suggested that, since the appeal was taken from an informal proceeding, the district court should maintain a similar level of informality by relaxing evidentiary standards.

Ms. Honarvar said she believed the reason the rules provided for informal disciplinary proceedings before screening panels was to reduce the number of disciplinary cases filed in the district courts. She expressed concern that the subcommittee's proposal would increase judicial workload because

most attorneys would choose to pursue an appeal since there was no risk that an appeal could result in a more severe penalty being imposed. Several committee members suggested that since the Supreme Court can impose a more severe sanction than that ordered by the trial court in a formal disciplinary proceeding, the district court should be free to increase the penalty in an appeal from an informal proceeding.

Ms. Smith suggested that the evidentiary standard applied by the trial court should be relaxed in the same way that the evidentiary standards are relaxed in a preliminary hearing. Mr. Burton asked if the subcommittee had considered a simpler approach such as directing an appeal from an informal proceeding to the Court of Appeals. Mr. Sackett said the informality of the record created a problem in pursuing that kind of approach.

Judge Maughan expressed concern about the district court having to undertake a trial de novo. He suggested that the district court's review should be summary in nature, with the order of the Ethics and Discipline Committee being upheld unless it can be shown that it was arbitrary or capricious.

Mr. Burton stated that further discussion of the issue was needed, including input from Mr. Walker representing OPC. Judge Roth suggested that the committee's discussion at the next meeting be focused on the following issues:

1. Should there be a right of appeal from an informal disciplinary proceeding?
2. Should the district court be able to impose more severe discipline than that imposed by the Ethics and Discipline Committee?
3. During the district court's review, should the rules of evidence be applied strictly or loosely?
4. What should be the role of the complainant in the appeal process?

Mr. Burton advised that these questions would be the focus of the June meeting.

5. NEXT MEETING

Monday, June 16, 2008, at 5:00 pm.

Matty Branch - RE: Rules of Professional Conduct Committee (0.00/3.50)

From: "Stuart Schultz" <sschultz@strongandhanni.com>
To: <bwalker@utahbar.org>, <emwunderli@msn.com>, "FRANK, LESLIE VAN" <LESLIE@crslaw.com>, Gary Sackett <GSackett@joneswaldo.com>, <glc101@veracitycom.net>, Judge Paul Maughan <pmaughan@email.utcourts.gov>, Judge Stephen Roth <sroth@email.utcourts.gov>, <kroche@pblutah.com>, Matty Branch <mattyb@email.utcourts.gov>, "May, Judge Mark" <mwmay@email.utcourts.gov>, <nayerhonarvar@hotmail.com>, <psmith@co.sl.c.ut.us>, "Soltis, John" <Jsoltis@utah.gov>, <stevejohnson5336@comcast.net>, "Veasy, Paul" <PVeasy@parsonsbehle.com>, Matty Branch <mattyb@email.utcourts.gov>
Date: 6/5/08 8:33AM
Subject: RE: Rules of Professional Conduct Committee (0.00/3.50)

One minor correction to the Minutes that I would suggest on the advertising portion. It indicates that I spoke to both John Baldwin and Nate Alder. I may have misspoke at the meeting. I did speak to Nate, but my information from John came by way of a voice message he left me. I did not directly speak with John.

Thanks,

Stuart

Stuart H. Schultz
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 (801) 596-1508 (fax)
 sschultz@strongandhanni.com
www.strongandhanni.com

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--- Original Message---

To: Professional Conduct Committee: bobb@burtonlumber.com, bwalker@utahbar.org, emwunderli@msn.com, "FRANK, LESLIE VAN" <LESLIE@crslaw.com>, Gary Sackett <GSackett@joneswaldo.com>, glc101@veracitycom.net, Judge Paul Maughan <pmaughan@email.utcourts.gov>, Judge Stephen Roth <sroth@email.utcourts.gov>, kroche@pblutah.com, Matty Branch <mattyb@email.utcourts.gov>, "May, Judge Mark" <mwmay@email.utcourts.gov>, nayerhonarvar@hotmail.com, psmith@co.sl.c.ut.us, "Soltis, John" <Jsoltis@utah.gov>, sschultz@strongandhanni.com, stevejohnson5336@comcast.net, "Veasy, Paul" <PVeasy@parsonsbehle.com>;
 From: Matty Branch <mattyb@email.utcourts.gov>
 Sent: 6/02/2008 12:23PM
 Subject: Rules of Professional Conduct Committee

>> Attached are the minutes from the committee meeting on May 19th. Our next meeting is Monday, June 16 at 5:00 p.m. at the Law and Justice Center. Please come to the meeting prepared to discuss the issues stated in section 4 of the attached minutes.
 >> Let me know if you are unable to attend the meeting on June 16th. Thank you.

Matty Branch - RE: Rules of Professional Conduct Committee (0.00/3.50)

From: "Gary Sackett" <GSackett@joneswaldo.com>
To: "Matty Branch" <mattyb@email.utcourts.gov>
Date: 6/4/08 2:10PM
Subject: RE: Rules of Professional Conduct Committee (0.00/3.50)

My best recollection is that it was Judge Roth -- but that's only about a 50-50 proposition.

You could use the the unstated-amendment-offeror gambit: "Judge Maughan moved to table the advertising issue until the Committee learned more from the Texas and Florida experiences under their new rules. Mr. Sackett seconded the motion. After discussion, Judge Maughan accepted a 'friendly amendment' to his original motion that the issue be tabled until there is a clear indication from Bar leadership that"

From: Matty Branch [mailto:mattyb@email.utcourts.gov]
Sent: Wednesday, June 04, 2008 10:44 AM
To: Gary Sackett
Subject: RE: Rules of Professional Conduct Committee (0.00/3.50)

After reviewing my messy notes, it looks like Judge Maughan's motion did start out the way you indicated. Unfortunately, my notes don't show who moved to amend the motion. I guess you or I could bring up the issue when we consider the minutes at the next meeting, and see if the group wants to amend the minutes.

Thanks for your review.

>>> "Gary Sackett" <GSackett@joneswaldo.com> 06/03/08 2:01 PM >>>

You should probably check this with someone else, but Judge Maughan's original motion was to table the advertising issue until we learned from the Texas and Florida experiences with their new rules. That motion was amended to get to the final motion as you describe it. (. . . naps the original motion needn't be reported, as it was subjected to a "friendly" amendment.) Other than that, they appear to capture the various swings of the group.

See you on the golf course--some day.

--Gary

From: Matty Branch [mailto:mattyb@email.utcourts.gov]
Sent: Monday, June 02, 2008 12:23 PM
To: bobb@burtonlumber.com; bwalker@utahbar.org; emwunderli@msn.com; FRANK, LESLIEVAN; Gary Sackett; glc101@veracitycom.net; Judge Paul Maughan; Judge Stephen Roth; kroche@pblutah.com; MattyBranch; May, JudgeMark; nayerhonarvar@hotmail.com; psmith@co.slc.ut.us; Soltis, John; sschultz@strongandhanni.com; stevejohnson5336@comcast.net; Veasy,Paul
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Monday, June 16, 2008, at 5:00 pm.

5/19/08

Rules of Professional Conduct

Present

Burton

Soltis

Van Frank

Wunderli

Roth

Sackett

~~Honarvan~~

Smith

Roth

Veasy

Maj

Murphy

Schultz

Wunderli, Roth

Excused

Billy Walker

Gary Crystler

Steve Johnson

Van Frank Sen

Minutes - approved subject correct
of advisory

Rule 3.0 of Model Rules
pending before ABA

Soltis says ~~"it stinks"~~ lot of problems with it
~~Paul Bayden~~ would like to be on
agenda when rule is discussed

John Threl's rule assumption that
prosecutors function with autonomy - elected
official calls the shots

Shifts responsibility to prosecutor - ^{rule} if sep prosec ~~must~~

Focus should be on prosecutorial authority/entty

city attorney

or

Attorney General

line prosecutor can make recommendation - but
depends on how elected official runs office

"prosecutor shall" assumes prosecutor can
undertake an investigation - prob

prosecutor in situation of violation ethical rule

Shouldn't create as a burden to the "line"
prosecutor

If ABA makes it part of Model Rule - (S)SL
supercourt might tread ask

Burton - suggest
defer -

tell SNAP if committee heard then
councils will not be
taking action

could be
in conflict
with
direct boss

this time - it Model Rules get amended -
ad committee looks at it - committee
would ask SWAP/ Paul Baylens
meet with committee

Lawyer Advertising Subcommittee Report

Stuart - talked to Nafe Alder - i
message back from John Baldwin - Baldwin
said Bar would assist with survey (positive)

Nafe - positive about doing survey - sup Bar,
experience if a survey sent out by Bar members
bar treat with suspicion. If frank
coming from a sup ct committee would get a
better

Could S. Ct ask lawyers to respond to

survey
subcommittee
Schultz put together proposed survey question
Bar members

Van Frank - do we want to spend money
to review and pre-approve ads

Vleasy - complaints are not from public -
complaints are from attorneys

(A Bar Commission 1989 - has developed
a more specific definition of what
"misleading" means

Motion for subcommittee

Judge Maughan - move that we take this issue until

Second - Sackett

TX > Florida has a track ^{amade}

(with prior restraint) record until we have
indicate that Bar wants to

unanimous

demonstrate a need
and Bar wants
to reconstitute

take enforcement on it that
there is a problem in Utah that ^{attorney}
want ^{address}

Burton's concern re denigrate legal profession and
judiciary

Sackett - in support of motion - focus on
whether or not there is a problem that is
detrimental to the public interest

That should be foundation for any action
did anyone demonstrate that a member of public
has been harmed

Nayer - could survey go to general public
to determine if public harmed?

Paula Smith - thinks there are concerns about
advertising - but if Utah Bar
isn't going to get behind enforcement
~~seems~~ like spinning wheels

thinks Bar should run with issue -
not this committee

Judge Roth - sympathetic to problem but feels that
~~respectable~~ there isn't a large enough %
of Bar ~~that~~ with passion about the
interest

doesn't think Bar has the will or the
resources to take on issue

doesn't see ^{this} committee as the entity to take this a

Remedy available to respondent when
gets discipline from Ethics Committee

gov says committee met -

~~Respondent can cross examine complainant~~

Chair's

review shouldn't result in more severe discipline
that was originally contemplated

Suggest appeal goes to district ct
already handle ~~appeals~~ from
formal complaints brought by OPC

discussion as to formality or informality of
the proceeding before the district court in trial de novo

district ct couldn't render discy

so that taking an appeal doesn't jeopardize
you with threat of more severe punishment

would need change to 14-511(cg)

appeal from
Roth - concern taking informal procedure -
thought court should maintain
same level of informality

Since would be trial to bench - so there
wouldn't be difficulty insulating the jury

didn't want to replicate a formal procedure

Nayer - are we so

idea was to cut down on cases being

filed with district ct

feels like
respondent

has nothing to lose - if appeals - because can't ~~get~~ get
more severe
punishment

Sackett - not trying to

trying to give avenue for appeal on
informal procedure

Is this appeal more like civil case or
criminal case - how do want to treat?

Suppose Ct can impose more severe punishment/
sanction

Maybe district court should be able to
increase penalty

Committee concluded that shouldn't be
penalized for taking an appeal - that's
why

Smith - like way to

Rule 7 evidence 1102 - more relaxed
standard - for pretrial hearing

That's unnecessary should be left in - because it
is a separate standard in admin practice

Burton - did subcommittee consider
simpler approach - send to COA -
informality of record - creates
problem in long this

Maughan's concern — ^{wants a summary} review —

small claims appeal coming —
has

if any ^{part} ^{of} ^{the} ^{review} ^{is} ^{made} ⁱⁿ ^{the} ^{course} ^{of} ^{the} ^{appeal} —
not — ^{not} ^{de} ^{novis}

upheld if
not arbitray
i.e. opinion

judge doesn't want to substitute
his ;

What happens if complaint won't be
involved in trial de novo

Roth — what we need to consider at next meeting —

① whether ^{abstract} Ct can impose higher level
of discipline

② level of evidence — process what by
of evidentiary value

③ vote if say in this direction —
go with an appeal →

(4) what's the role of the
complaint in the process

Next meeting ^{Mon.} June 16 5pm