

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

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**From:** "Gary Sackett" <GSackett@joneswaldo.com>  
**To:** "Matty Branch" <mattyb@email.utcourts.gov>, <bobb@burtonlumber.com>, <bwalker@utahbar.org>, <emwunderli@msn.com>, "FRANK, LESLIEVAN" <LESLIE@crslaw.com>, <glc101@veracitycom.net>, "Judge Paul Maughan" <pmaughan@email.utcourts.gov>, "Judge Stephen Roth" <stroth@email.utcourts.gov>, <kroche@pblutah.com>, "May, JudgeMark" <mwmay@email.utcourts.gov>, <nayerhonarvar@hotmail.com>, <psmith@co.slc.ut.us>, "Soltis, John" <Jsoltis@utah.gov>, <sschultz@strongandhanni.com>, <stevejohnson5336@comcast.net>, "Veasy,Paul" <PVeasy@parsonsbehle.com>  
**Date:** 6/11/08 12:49PM  
**Subject:** RE: Rules of Professional Conduct Committee (0.00/3.50)

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As Matty is out of town, I am taking the liberty of distributing this update to the "Appeals Subcommittee" proposal directly. I have modified the proposal to reflect a few of the comments that were made at the last meeting and to clarify a couple of areas. The redline is a comparison to the existing rules; it makes no attempt to compare the new version with the one that was distributed last month.

See you all Monday.

--Gary

A PROPOSAL TO PERMIT RESPONDENT TO APPEAL  
A FINAL DETERMINATION OF PRIVATE ADMONITION OR  
PUBLIC REPRIMAND BY THE ETHICS & DISCIPLINE COMMITTEE  
[DRAFT JUNE 11, 2008]

**Rule 14-510. Prosecution and Appeals**

(a) *Informal complaint of unprofessional conduct. . . .*

(b) *Proceedings before Committee and screening panels. . . .*

(c) *Exceptions to admonitions and public reprimands.* Within ten days after notice of the recommendation of an admonition or public reprimand to the Committee chair, the respondent may file with the Committee chair an exception to the recommendation and may ~~also, if desired, request a hearing.~~ If a request for a hearing is made, the Committee chair, or a screening panel chair designated by the Committee chair, shall ~~proceed to~~ hear the matter in an expeditious manner, with OPC counsel and the respondent having the opportunity to be present. The complainant's testimony may be read into the record.<sup>1</sup> The complainant need not appear personally unless called by the respondent as an adverse witness for purposes of cross-examination.<sup>2</sup> The respondent shall have the burden of proof of showing that the recommendation is ~~unreasonable,~~<sup>3</sup> unsupported by substantial evidence, arbitrary, capricious ~~and otherwise~~<sup>4</sup> clearly erroneous. If no hearing is requested, the Committee chair will review the record compiled by the screening panel.<sup>5</sup> On behalf of the Committee, the Committee chair shall issue a final, written

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<sup>1</sup>It's not clear what this provision is intended to do. The verified complaint is in the nature of written testimony that can reviewed by the Committee chair; it needn't be "read into the record." In addition, the complainant will generally not have given live testimony. If complainant did give live testimony that was recorded, perhaps the provision should be modified to read, "OPC or respondent may rely on any evidence that was presented in the screening panel hearing, including transcriptions of audial recordings at the hearing."

<sup>2</sup>This is an odd provision. The rules in subsection (b) governing the procedure before a panel of the Committee do not provide a right for the respondent to call and examine (or cross-examine) the complainant. It appears only in the exception process.

<sup>3</sup>The subcommittee proposes to omit "unreasonable" as not being an independent standard of review (although, in connection with "unjust," it is used in determining the legality of utility rates under the Public Utility Code).

<sup>4</sup>The use of "and" appears to be a mistake, as it would require respondent to sustain a burden of proof on all four separate standards (five if "unreasonable" is included). "Otherwise" is confusing surplusage.

<sup>5</sup>There is no indication in the current rule of what procedure is to be followed when an ex-

(continued...)

determination that either sustains, dismisses or modifies the recommendation of the screening panel.<sup>6</sup> Any modification of a recommendation of discipline may be no more severe than the original recommendation of the screening panel.

(d) *Appeal of a final Committee determination of admonition or public reprimand.*

(1) Within 30 days after the Committee chair issues a final, written determination of a private admonition or a public reprimand in a matter for which exceptions have been filed by respondent under subsection (c), respondent may file an appeal in the district court, seeking reversal or modification of the final determination by the Committee chair.

(2) The district court shall conduct a trial *de novo* of the matter and shall either sustain, reverse or modify the final determination of the Committee chair. As used in this section, "trial *de novo*" means an original, independent proceeding and does not mean a trial *de novo* on the record.<sup>7</sup>

(3) (i) *The district court shall receive the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. The rules of evidence shall not be applied strictly. The judge may allow hearsay that is probative, trustworthy and credible. Irrelevant or unduly repetitious evidence shall be excluded. The district court shall decide the case and direct the entry of judgment.*<sup>8</sup>

(ii) Except as otherwise provided in subsection (d)(3)(i), an appeal brought under this Rule shall be subject to the procedures in Rules 14-511(b) through -(e).<sup>9</sup>

(4) Any modification by the district court of the final determination of discipline rendered by the Committee may be no more severe than the Committee's determi-

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<sup>5</sup>(...continued)  
ception is filed and no hearing is requested.

<sup>6</sup>Although it may be implicit, the existing rule does not directly state what the outcome of the Committee chair's consideration of a respondent's exceptions shall be.

<sup>7</sup>This is the language used in Utah Code Ann. § 59-1-601, which gives a taxpayer an option of a trial *de novo* before the district court on an appeal from a decision of the Utah State Tax Commission.

<sup>8</sup>This language is derived from Rule 7(d) of the Rules of Small Claims Procedures. It is rendered in italics to indicate that the Subcommittee thought it prudent to initiate a discussion in the full Committee on the relative formality or informality of the proceedings before the district court. Alternatively, the matter would be heard before the district court under the same trial procedures as used for formal complaints that are filed by OPC at the request of the Ethics and Discipline Committee. This would be effected by simply eliminating proposed § 14-510(d)(3)(i), leaving "(3) An appeal brought under this Rule shall be subject to the procedures set forth in Rules 14-511(b) through -(e)."

<sup>9</sup>Rule 14-511 gives the general procedure for a formal complaint filed by OPC after a finding of probable cause by the Ethics and Discipline Committee. Rule 14-511 is reprinted below for reference purposes; no changes are being proposed to 14-511, except in paragraph (g).

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(5) The decision of the district court after a trial *de novo* may not be appealed unless the court rules on the constitutionality of a statute or other law.<sup>10</sup>

**Rule 14-511. Proceedings subsequent to finding of probable cause.**

(a) *Commencement of action.*<sup>11</sup> If the screening panel finds probable cause to believe that there are grounds for public discipline and that a formal complaint is merited, OPC counsel shall prepare and file with the district court a formal complaint setting forth in plain and concise language the facts upon which the charge of unprofessional conduct is based and the applicable provisions of the Rules of Professional Conduct. The formal complaint shall be signed by the Committee chair or, in the chair's absence, by the Committee vice chair or a screening panel chair designated by the Committee chair.

(b) *Venue.* The action shall be brought and the trial shall be held in the county in which an alleged offense occurred or in the county where the respondent resides or practices law or last practiced law in Utah; provided, however, that if the respondent is not a resident of Utah and the alleged offense is not committed in Utah, the trial shall be held in a county designated by the Chief Justice of the Supreme Court. The parties may stipulate to a change of venue in accordance with applicable law (currently Utah Code section 78-13-9).

(c) *Style of proceedings.* All proceedings instituted by the OPC shall be styled "In the Matter of the Discipline of (name of respondent and respondent's Bar number), Respondent."

(d) *Change of judge as a matter of right.*

(1) *Notice of change.* The respondent or OPC counsel may, by filing a notice indicating the name of the assigned judge, the date on which the formal complaint was filed, and that a good faith effort has been made to serve all parties, change the judge assigned to the case. The notice shall not specify any reason for the change of judge. The party filing the notice shall send a copy of the notice to the assigned judge and to the presiding judge. The party filing the notice may request reassignment to another district court judge from the same district, which request shall be granted. Under no circumstances shall more than one change of judge be allowed to each party under this rule.

(2) *Time.* Unless extended by the court upon a showing of good cause, the notice must be filed within 30 days after commencement of the action or prior to the

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<sup>10</sup>This mirrors the language of Utah Code Ann. § 78-6-10(2), which governs the finality of appeals of small claims judgments to the district court.

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notice of trial setting, whichever occurs first. Failure to file a timely notice precludes any change of judge under this rule.

(3) *Assignment of action.* Upon the filing of a notice of change, the assigned judge shall take no further action in the case. The presiding judge shall promptly determine whether the notice is proper and, if so, shall reassign the action. If the presiding judge is also the assigned judge, the clerk shall promptly send the notice to the Chief Justice of the Supreme Court, who shall determine whether the notice is proper and, if so, shall reassign the action.

(4) *Rule 63 and Rule 63A unaffected.* This rule does not affect any rights a party may have pursuant to Rule 63 or Rule 63A of the Utah Rules of Civil Procedure.

(e) *Actions tried to the bench; findings and conclusions.* All actions tried according to this article shall be tried to the bench, and the district court shall enter findings of fact and conclusions of law. Neither masters nor commissioners shall be utilized.

(f) *Sanctions hearing.*<sup>11</sup> Upon a finding of misconduct and as soon as reasonably practicable, within a target date of not more than 30 days after the district court enters its findings of fact and conclusions of law, it shall hold a hearing to receive relevant evidence in aggravation and mitigation, and shall within five days thereafter, enter an order sanctioning the respondent. Upon reasonable notice to the parties, the court, at its discretion, may hold the sanctions hearing immediately after the misconduct proceeding.

(g) *Review.*<sup>11</sup> Any discipline order by the district court in a matter commenced under section (a) of this Rule<sup>12</sup> may be reviewed by the Supreme Court through a petition for review pursuant to the Utah Rules of Appellate Procedure.

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<sup>12</sup>Insertion of this clause addresses the point raised by Bob Burton and eliminates any ambiguity about whether there could be a further appeal of an action brought under proposed § 14-510(d).

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