

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
September 15, 2008
5:00 pm

ATTENDEES

Robert Burton, Chair
Matty Branch
Gary Chrystler
Nayer Honarvar
Steve Johnson
Judge Paul Maughan
Judge Mark May

Kent Roche
Judge Stephen Roth
Gary Sackett
Stuart Schultz
John Soltis
Paula Smith
Billy Walker

EXCUSED

Leslie Van Frank
Paul Veasy
Earl Wunderli

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee. Ms. Smith moved for adoption of the minutes of the meeting held June 16, 2008. Mr. Johnson seconded the motion, and it passed unanimously.

2. DISCUSSION: LATEST PROPOSED CHANGES TO RULE 14-510 OF THE RULES OF LAWYER DISCIPLINE AND DISABILITY

Mr. Burton said that several years ago, the Supreme Court advised the Rules of Professional Conduct Committee that it should seek input from the Ethics and Discipline Committee whenever it recommends changes to the Rules of Lawyer Discipline and Disability. Mr. Sackett stated that he had sent the latest draft of the proposed amendments to Art Berger and Terri McIntosh, who are the chair and vice chair, respectively, of the Ethics and Discipline Committee. He said that based on his conversation with Ms. McIntosh, he suspects the Ethics and Discipline Committee will likely have more than cosmetic changes to suggest to Rule 14-510.

Mr. Sackett reminded the committee of the elements the Supreme Court had requested be part of the judicial review of orders issued by the Ethics and Discipline Committee. Those elements were: review in the Supreme Court; enhancement of requirements in order to get a good record; Supreme Court's review to be on the record; and the final decision of the Ethics and Discipline Committee should be presumed valid.

Following extensive discussion of the latest amendments proposed by the subcommittee, the full committee supported the following amendments and/or concepts:

- a. Rule 14-510(b)(2) - screening panel must provide respondent at least 21 days notice of the hearing before the screening panel.
- b. Rule 14-510(b)(2) - add requirement that respondent's brief be filed at least 10 days before the hearing.
- c. Reverse the order of 14-510(b)(3) and 14-510 (b)(4).
- d. Permit complainant to be represented by counsel- see Rule 14-510(b)(4).
- e. Rule 14-510(b)(5) - add requirement that transcript be prepared by an outside reporting service.
- f. Change first sentence of Rule 14-510(b)(6)(A) to state "The preponderance of evidence presented does not establish that the respondent was engaged in unprofessional conduct..."
- g. Change Rule 14-510(b)(6)(B) to state "The informal complaint shall be referred to Diversion pursuant to Rule 14-533."
- h. Rule 14-510(c) - provide that respondent has 30 days after service of the recommendation of an admonition or public reprimand to file an exception and request a hearing. Also, make clear that if respondent does not file an exception, the order of the chair of Ethics and Discipline Committee becomes final.
- i. Delete phrase "compiled by the screening panel" from Rule 14-510(d)(1).
- j. Add the phrase "or legally insufficient" following "clearly erroneous" in Rule 14-510(d)(3).

- k. Delete the phrase “and shall either sustain, reverse or modify the final determination of the Committee from Rule 14-510(f)(4).
- l. Add “contrary to rule” to Rule 14-510(f)(5).

There was no committee consensus as to the following provisions:

- a. the nature and extent of cross-examination available to the respondent. Mr. Burton conducted a straw poll as to approval of the provision in Rule 14-510(b)(4) that grants respondent the right to “cross-examine complainant on the subject matter set forth in the informal complaint” if the complainant testifies at the hearing. Eight committee members favored the provision, five were against it.
- b. whether the chair of the Ethics and Discipline Committee should be able to order discipline more severe than what was originally recommended by the screening panel. Mr. Burton conducted a straw poll on the issue. Six committee members supported giving the chair authority to order more severe discipline, and six committee members were opposed.

Mr. Burton asked Mr. Sackett to make the changes to Rule 14-510 that were accepted by the full committee and to get copies of the latest revisions to all committee members as well as to Mr. Berger and Ms. McIntosh. Mr. Sackett said he hopes to have input from the Ethics and Discipline Committee in advance of the next committee meeting.

3. NEXT MEETING

The next meeting will be on Monday, October 27, 2008, at 5:00 p.m., at The Law and Justice Center.

9/15/08 Professional Conduct

Need name placed for Judge Roth

Present

Solter

Honover

Smith

Johnson

Cryster

Roth

Sackett

May

Roth

Burton

Schultz

Maughan

Walker

Excused

Winkler

Van Frank

Veasey

Bob - welcome

Minutes 6/16/08

Paula moved

Steve Jones second approved unanimously

rule 14-500 Discussion

Burton - if Ethics; Discipline Committee proposes/recommends change it deals with that committee agrees - would have to revisit at a future meeting - if minor - wouldn't have committee readback

Gary Sackett -

Ducham's key elements -

review in S. Ct

enhance requirements in order to get good read
Cant's review on the record

committee's final decision should presumptively
be valid

participation of Ethics & Discipline Committee

gary sent draft to Art; Terri - they
haven't talked yet - Art said interested in reviewing
Sackett thinks E:D Committee will likely have more
than cosmetic changes & suggest - may have requests
for amendments to other E:D rules

When should brief be filed

most likely 10 days before hearing - notice
provided at least
21 days

Billy said "shall" & "may" problems/differ

in (b)(2) ; (b)(4)

(b)(4) should there be statement about
non-lawyer can assist complainant

Billy says E & D committee does pretty good job
of questioning the complainant's allegations

Billy does not favor full blown cross-examination
by respondent - ~~intimidate~~ intimidation of complainant
attack by complainant

because ~~complaint~~ usually isn't question about
what attorney did - it's whether ~~what~~ he needs
is violating the rules

Nayer but committee chair can control cross-exam
& stop it

but Nayer thinks respondent has a lot at stake?
then she should have a chance to present his or her
view - shouldn't limit respondent from testifying only
if complaint testifies

Billy doesn't think right to cross-examine respondent
is critical for

S. It said in Harding case right of cross-examination
~~not~~ ~~criminal~~ proceedings - not about screening panel level
not right at

~~Nayer & Steve think there is a presumption
that respondent~~

Maughan, Nayer, Johnson - feel respondent should
be able to testify if cross-examined

before matter goes to district CT or to
ethics & discipline

John Soltis - thinks right to cross-examination is critical
fundamental to perception of due process - thinks it is
fundamentally flawed

Current rule gives cross-exam at the exception hearing level

Paula Smith - if committee wants to give respondent
cross-exam right then put it at hearing
process, not at exception

(5) Heavy needs

Billy says transcription of audio is problem

OPC is secretary - pt then becomes prosecute

Billy suggests that OPC provides affidavit

chain of custody - al outside party

creates transcript - expense by party who gets or

appeals to 5. (t)

except

in appeals or exception heavy

Billy says OPC
puts together
the record

video -
and audios

can in August OPC bought new video camera
so you can tell who is speaking
camera is manned by person

straw in favor of
against S

Leave language
as committee
recommend

Burton
Steve Johnson
not

admit recommend that admit
of subcommittee

CROSS examination = (B)(4) (d)(2) /
Naper (e)
sec

2 fundamental issues

(1) CROSS examination
issue

(2) Can committee
chain make a PMS
a more severe
recommendation
at exception

Next meeting Oct 27 5pm

(checked
and is
correct 3
a/18/09)

Check with Ronna