

**PROPOSED MODIFICATION TO RULE 14-510**  
**SEPTEMBER 1, 2008, DRAFT**

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

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

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

(1) *Review and investigation.* A screening panel shall review all informal complaints referred to it by OPC counsel, including all the facts developed by the informal complaint, answer, investigation and hearing, and the recommendations of OPC counsel.

(2) *Respondent's appearance.* Before any action is taken that may result in the recommendation of an admonition or public reprimand<sup>1</sup> or the filing of a formal complaint, the screening panel shall, upon at least ~~14~~<sup>7</sup> days' notice, afford the respondent an opportunity to appear before the screening panel. Respondent and any witnesses called by the respondent may testify under oath,<sup>2</sup> and respondent may present an oral argument with respect to the informal complaint. Respondent may also submit a written brief to the screening panel prior to the hearing, which shall not exceed ten pages<sup>3</sup> in length unless permission for enlargement is extended by the chair or the chair's delegate for good cause shown. A copy of the brief shall be forwarded by OPC counsel to the complainant.

ok  
brief be  
filed at ok  
least ten  
days before  
hears

(3) *Right to hear evidence.* The complainant and the respondent shall each have the right to be present during the presentation of the evidence unless excluded by the screening panel chair for good cause shown.

(4) *Complainant's appearance.* A complainant shall have the right to appear before the screening panel personally and, together with any witnesses called by the complainant, <sup>may</sup> testify under oath with respect to the informal complaint or in opposition to the matters presented by the respondent. The complainant may be represented by counsel.<sup>4</sup> If complainant testifies at the hearing, respondent may cross-examine complainant

<sup>1</sup>Omission of public reprimand from this list appears to have been an oversight.

<sup>2</sup>Rearrangement of the phrases here is intended to make it clear that respondent's witnesses will be under oath.

<sup>3</sup>Five pages seem too short. Also, perhaps there should be a standard, such as "double-spaced, no smaller than 12-point type" or a word count.

<sup>4</sup>Allowing respondent to be represented by "some other representative" appears to condone the unauthorized practice of law. See Rule 14-802, although the exception in subsection (c)(8) of the rule may provide adequate authority to permit a non-lawyer representative.

to the subject matter of the testimony rather than the subject matter in the complaint

on the subject matter set forth in the informal complaint.<sup>5</sup>

(5) *Hearing Record.* The proceedings of any hearing before a screening panel under this subsection (b) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings. The screening panel chair shall be responsible for the assembly of the complete record of the proceedings, to be delivered to the chair of the Committee upon rendering the panel's recommendation. The record of the proceedings before the panel shall be preserved for not less than one year following delivery of the panel's recommendation to the chair of the Committee and for such additional period as any further proceedings on the matter are pending or might be instituted under this section.

Chair OK  
OK  
prepared  
outside  
reports &  
service

(6) *Screening panel determination.* Upon review of all the facts developed by the informal complaint, answer, investigation and hearing, the screening panel shall make one of the following determinations:

(A) ~~The evidence presented does not raise facts in which there is probable cause to believe that the respondent was engaged in unprofessional conduct, in which case the informal complaint shall be dismissed.~~ OPC counsel shall promptly give notice of such dismissal by regular mail to the complainant and the respondent. A letter of caution may also be issued with the dismissal.<sup>6</sup> The letter shall be signed by OPC counsel or the screening panel chair and shall serve as a guide for the future conduct of the respondent. The complainant shall also be confidentially notified of the caution;

~~establish by a preponderance of the evidence~~  
raise facts in which there is probable cause to believe  
the evidence

(B) The informal complaint shall be dismissed, conditioned upon the performance by the respondent of specified conduct which the Committee determines to be warranted by the facts and the Rules of Professional Conduct;

OK  
referred to Division pursuant to 14-533

(C) The informal complaint shall be referred to the Committee chair with an accompanying screening panel recommendation that the respondent be admonished;<sup>7</sup>

(D) The informal complaint shall be referred to the Committee chair with an accompanying screening panel recommendation that the respondent receive a public reprimand; or

(E) A formal complaint shall be filed against the respondent.

<sup>5</sup>This preserves the existing procedure that appears to allow complainant to appear at the hearing without being subject to cross-examination, but allows respondent to cross-examine if the complainant actually testifies.

<sup>6</sup>This is identified as a separate, distinct conclusion in current rule (b)(6)(B), but it seems more logical to include it as an optional supplement to direct complaint dismissal.

<sup>7</sup>Repeated provisions in (b)(6)(C) and (b)(6)(D) have been consolidated in a single paragraph in new section (b)(7).

OK = OK with change

(7) *Recommendation of admonition or public reprimand.* A screening panel recommendation that the respondent should be disciplined under subsection (b)(6)(C) or (b)(6)(D) shall be in writing and shall state the substance and nature of the informal complaint and defenses and the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should be admonished or publically reprimanded. A copy of such screening panel recommendation shall be delivered to the Committee chair and a copy served upon the respondent.

(8) *Determination of appropriate sanction.* In determining an appropriate sanction and only after having found unethical conduct, the screening panel may consider any admonitions or greater discipline imposed upon the respondent within the five years immediately preceding the alleged offense.

(9) *Continuance of disciplinary proceedings.* A disciplinary proceeding may be held in abeyance by the Committee prior to the filing of a formal complaint when the allegations or the informal complaint contain matters of substantial similarity to the material allegations of pending criminal or civil litigation in which the respondent is involved.

(c) *Exceptions to admonitions and public reprimands.* Within 15 days after service of the recommendation of an admonition or public reprimand on respondent, respondent may file with the Committee chair exceptions to the recommendation and may request a hearing. The exceptions shall include a memorandum, not to exceed 20 pages, stating the grounds for review, the relief requested and the bases in law or in fact for the exceptions.

30 OK

Make more clear that if no exception made - ethics chair make fine code

If no hearing is held,

(d) *Procedure on exceptions.*

(1) *Hearing not requested.* If no hearing is requested, the Committee chair will review the record, ~~compiled by the screening panel.~~ OK

(2) *Hearing requested.* If a request for a hearing is made, the Committee chair or a screening panel chair designated by the Committee chair shall serve as the Exceptions Officer and hear the matter in an expeditious manner, with OPC counsel and the respondent having the opportunity to be present and give an oral presentation. The complainant need not appear personally. Upon motion to the Exceptions Officer and for good cause shown, respondent may seek to augment the record before the screening panel, including a request to call complainant as an adverse witness for purposes of cross-examination if complainant was not subject to cross-examination before the screen-

Can incorporate 60(b) - inadvertence, etc. matters -3-

Billy suggests meeting w/ what the exceptions officer can do

ing panel.<sup>8</sup>

(3) *Burden of proof.* A respondent who files exceptions under this section (d) shall have the burden of showing that the recommendation of the screening panel is ~~unsubstantiated by substantial evidence, arbitrary, capricious or otherwise clearly erroneous.~~

(4) *OPC response.* The Exceptions Officer may request a written response from OPC to exceptions filed by respondent.

(5) *Record on exceptions.* The proceedings of any hearing on exceptions under this subsection (d) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings.

(e) *Final Committee disposition.* Either upon the completion of the exceptions procedure under subsection (d) or when no timely exceptions have been filed by respondent under subsection (c), the Committee chair shall issue a final, written determination that either sustains, dismisses or modifies the disciplinary recommendation of the screening panel.<sup>9</sup> Any modification of the screening panel's recommendation of discipline may be no more severe than the original recommendation of the screening panel.<sup>10</sup>

(f) *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 an admonition or a public reprimand in a matter for which exceptions have been filed by respondent under subsection (c), respondent may file a request for review with the Supreme Court seeking reversal or modification of the final determination by the Committee.

(3) A request for review under this subsection (f) will be subject to the procedures set forth in Title III of the Supreme Court's Rules of Appellate Procedure.

(4) The Supreme Court shall conduct a review of the matter on the record ~~and shall either sustain, reverse or modify the final determination of the Committee.~~<sup>11</sup>

<sup>8</sup>This modifies the somewhat curious provision in the existing rules that permits respondent to call the complainant as an adverse witness at the exceptions stage, but does not provide such an option before the screening panel.

<sup>9</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>10</sup>This provision needs a full discussion—perhaps with input from the E&D Committee.

<sup>11</sup>Perhaps the last clause of this provision is unnecessary; the Court has plenary authority to do whatever it finds appropriate.

*Back*  
*Supreme*  
*Standard in admin law*  
*Billy recommended*  
*least process*  
*or legally insufficient*

*OK*  
*skid*

*Billy doesn't like this provision doesn't think necessary if doesn't respond*

*Must proceed through accepting process to take space to S. Ct*

*(make same change as in previous rec'd section)*

*Billy said chair should be able to make more severe*

*discipline as a way of making decisions of panels uniform*

*ok*

(5) The final decision of the Committee shall be presumed valid; respondent shall have the burden of demonstrating that the Committee action was:

(i) Based on a determination of fact that is not supported by substantial evidence when viewed in light of the whole record before the Court;

(ii) An abuse of discretion; or

(iii) Arbitrary or capricious.<sup>12</sup>

*or contrary to rule* *OK*

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<sup>12</sup>These are standards from the Administrative Procedures Act, §§ 63-46b-16(g), -16(h)(i) and 16(h)(iv), respectively.

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(2) *Respondent's appearance.* Before any action is taken ~~[which]~~that may result in the recommendation of an admonition or public reprimand<sup>1</sup> or the filing of a formal complaint, the screening panel shall, upon at least 14 ~~[days]~~days' notice, afford the respondent an opportunity to appear before the screening panel. Respondent and~~[testify under oath, together with]~~ any witnesses called by the respondent may testify under oath,<sup>2</sup> and ~~[to]~~respondent may present an oral argument with respect to the informal complaint. ~~[All testimony shall be recorded and preserved so long as proceedings are pending, and in any event, not less than six months following the hearing. A written brief may also be submitted]~~Respondent may also submit a written brief to the screening panel ~~[by]~~prior to the [respondent. The brief]hearing, which shall not exceed ~~[five]~~ten pages<sup>3</sup> in length unless permission for enlargement is extended by the chair or the chair's delegate for good cause shown. A copy of the brief shall be forwarded by OPC counsel to the complainant.

~~[Text Was Moved From Here: 1]~~

~~[ (3) *Complainant's appearance.* A complainant shall have the right to appear before the screening panel personally and testify under oath, together with any witnesses called by the complainant, with respect to the informal complaint or in opposition to the matters presented by the respondent. The complainant may be represented by counsel or some other representative. ]~~

~~[End Of Moved Text]~~

~~[(4)]~~3) *Right to hear evidence.* The complainant and the respondent shall each have the right to be present during the presentation of the evidence unless excluded by the screening panel chair for good cause shown.

Text Moved Here: 1

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<sup>1</sup>Omission of public reprimand from this list appears to have been an oversight.

<sup>2</sup>Rearrangement of the phrases here is intended to make it clear that respondent's witnesses will be under oath.

<sup>3</sup>Five pages seem too short. Also, perhaps there should be a standard, such as "double-spaced, no smaller than 12-point type" or a word count.

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<sup>4</sup>End Of Moved Text

~~<sup>4</sup>If complainant testifies at the hearing, respondent may cross-examine complainant on the subject matter set forth in the informal complaint.~~<sup>5</sup>

(5) *Hearing Record.* The proceedings of any hearing before a screening panel under this subsection (b) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings. The screening panel chair shall be responsible for the assembly of the complete record of the proceedings, to be delivered to the chair of the Committee upon rendering the panel's recommendation. The record of the proceedings before the panel shall be preserved for not less than one year following delivery of the panel's recommendation to the chair of the Committee and for such additional period as any further proceedings on the matter are pending or might be instituted under this section.

(6) *Screening panel determination.* Upon review of all the facts developed by the informal complaint, answer, investigation and hearing, the screening panel ~~in behalf of the Committee,~~ shall make one of the following determinations:

(A) ~~that the informal complaint~~ The evidence presented does not raise facts in which there is probable cause to believe that the respondent was engaged in unprofessional conduct, in which case~~}]~~ the informal complaint shall be dismissed. OPC counsel shall promptly give notice of such dismissal by regular mail to the complainant and the respondent~~}]~~ or

~~(B) that a~~ A letter of caution may also be issued with the dismissal.<sup>6</sup> The letter shall be signed by OPC counsel or the screening panel chair and shall serve as a guide for the future conduct of the respondent. ~~Thereupon, the informal complaint shall be dismissed, with the complainant and the respondent being notified of the dismissal.}]~~ The complainant shall also be confidentially notified of the caution;~~}] or~~

~~(C)B~~ [that a dismissal may be] The informal complaint shall be dismissed, conditioned upon the performance by the respondent of specified conduct which the Committee determines to be warranted by the facts and the Rules of Professional Con-

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<sup>4</sup>Allowing respondent to be represented by "some other representative" appears to condone the unauthorized practice of law. See Rule 14-802, although the exception in subsection (c)(8) of the rule may provide adequate authority to permit a non-lawyer representative.

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<sup>6</sup>This is identified as a separate, distinct conclusion in current rule (b)(6)(B), but it seems more logical to include it as an optional supplement to direct complaint dismissal.

duct; ~~or~~

~~(D)(C) [that the]~~ The informal complaint shall be referred to the Committee chair with an accompanying screening panel recommendation that the respondent be admonished~~[. Such screening panel recommendation shall be in writing and shall state the substance and nature of the]~~.<sup>7</sup>

~~(D) The informal complaint [and defenses and the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should be admonished. A copy of such screening panel recommendation shall be served upon the respondent prior to delivery of the recommendation to the Committee chair. The Committee chair shall enter an order admonishing the respondent if no exception has been filed within ten days of notice of the recommendation being provided to the respondent; or~~

~~(E) that the informal complaint] shall~~ be referred to the Committee chair with an accompanying screening panel recommendation that the respondent receive a public reprimand~~[. Such screening panel recommendation shall be in writing and shall state the substance and nature of the informal complaint and defenses and the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should receive a public reprimand. A copy of such screening panel recommendation shall be served upon the respondent prior to the delivery of the recommendation to the Committee chair. The Committee chair shall enter an order publicly reprimanding the respondent if no exception has been filed within ten days of notice of the recommendation being provided to the respondent]; or~~

~~(F)E~~ [that a] A formal complaint shall be filed against the respondent.

(7) Recommendation of admonition or public reprimand. A screening panel recommendation that the respondent should be disciplined under subsection (b)(6)(C) or (b)(6)(D) shall be in writing and shall state the substance and nature of the informal complaint and defenses and the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should be admonished or publically reprimanded. A copy of such screening panel recommendation shall be delivered to the Committee chair and a copy served upon the respondent.

~~(6)8~~ *Determination of appropriate sanction.* In determining an appropriate sanction and only after having found unethical conduct, the screening panel may consider any admonitions or greater discipline imposed upon the respondent within the five years immediately preceding the alleged offense.

~~(7)9~~ *Continuance of disciplinary proceedings.* A disciplinary proceeding may be held in abeyance by the Committee prior to the filing of a formal complaint when the allegations or the informal complaint contain matters of substantial similarity to the material allegations of pending criminal or civil litigation in which the respondent is involved.

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<sup>7</sup>Repeated provisions in (b)(6)(C) and (b)(6)(D) have been consolidated in a single paragraph in new section (b)(7).



(c) *Exceptions to admonitions and public reprimands.* Within ~~ten~~15 days after ~~notice~~service of the recommendation of an admonition or public reprimand ~~to the Committee chair~~on respondent, ~~the~~ respondent may file with the Committee chair ~~an exception~~exceptions to the recommendation and may ~~also, if desired,~~ request a hearing. The exceptions shall include a memorandum, not to exceed 20 pages, stating the grounds for review, the relief requested and the bases in law or in fact for the exceptions.

(d) Procedure on exceptions.

(1) Hearing not requested. If no hearing is requested, the Committee chair will review the record compiled by the screening panel.

(2) Hearing requested. If a request for a hearing is made, the Committee chair~~,~~ or a screening panel chair designated by the Committee chair~~,~~ shall ~~proceed to~~serve as the Exceptions Officer and 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~~ and give an oral presentation~~.~~ ~~The complainant need not appear personally unless called by the respondent.~~ Upon motion to the Exceptions Officer and for good cause shown, respondent may seek to augment the record before the screening panel, including a request to call complainant as an adverse witness for purposes of cross-examination. ~~The respondent~~ if complainant was not subject to cross-examination before the screening panel.<sup>8</sup>

(3) Burden of proof. A respondent who files exceptions under this section (d) shall have the burden~~of proof~~ of showing that the recommendation of the screening panel is~~unreasonable,~~ unsupported by substantial evidence, arbitrary, capricious ~~and~~or otherwise clearly erroneous.

(4) OPC response. The Exceptions Officer may request a written response from OPC to exceptions filed by respondent.

(5) Record on exceptions. The proceedings of any hearing on exceptions under this subsection (d) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings.

(e) Final Committee disposition. Either upon the completion of the exceptions procedure under subsection (d) or when no timely exceptions have been filed by respondent under subsection (c), the Committee chair shall issue a final, written determination that either sustains, dismisses or modifies the disciplinary recommendation of the screening panel.<sup>9</sup> Any modification of the screening panel's recommendation of discipline may

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be no more severe than the original recommendation of the screening panel.<sup>10</sup>

(f) *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 an admonition or a public reprimand in a matter for which exceptions have been filed by respondent under subsection (c), respondent may file a request for review with the Supreme Court seeking reversal or modification of the final determination by the Committee.

(3) A request for review under this subsection (f) will be subject to the procedures set forth in Title III of the Supreme Court's Rules of Appellate Procedure.

(4) The Supreme Court shall conduct a review of the matter on the record and shall either sustain, reverse or modify the final determination of the Committee.<sup>11</sup>

(5) The final decision of the Committee shall be presumed valid; respondent shall have the burden of demonstrating that the Committee action was:

(i) Based on a determination of fact that is not supported by substantial evidence when viewed in light of the whole record before the Court;

(ii) An abuse of discretion; or

(iii) Arbitrary or capricious.<sup>12</sup>

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<sup>10</sup>This provision needs a full discussion—perhaps with input from the E&D Committee.

<sup>11</sup>Perhaps the last clause of this provision is unnecessary; the Court has plenary authority to do whatever it finds appropriate.

<sup>12</sup>These are standards from the Administrative Procedures Act, §§ 63-46b-16(g), -16(h)(i) and 16(h)(iv), respectively.

**Robert A. Burton**  
**Attorney at Law**  
P.O. Box 27206  
Salt Lake City, Utah 84127-0206  
Phone: (801) 952-3732  
Fax: (801) 952-3734

June 18, 2008

Christine M. Durham  
Chief Justice  
Utah Supreme Court  
450 South State Street  
P.O. Box 140210  
Salt Lake City, UT 84114-0210

Re: Amending the Rules of Lawyer Discipline and Disability to Provide for Judicial Review of Orders Resolved by the Ethics and Discipline Committee

Dear Justice Durham:

In February 2008, the Supreme Court Advisory Committee on the Rules of Professional Conduct received a request from the Supreme Court to consider whether the Rules of Lawyer Discipline and Disability should be amended to provide for judicial review of disciplinary orders resolved by the Ethics and Discipline Committee. The Supreme Court's request referred to the Court's recent decision in Bowen v. Utah State Bar, 2008 UT 5. The Advisory Committee has discussed this request at its meetings on April 21, 2008, May 19, 2008, and June 16, 2008. (As is often the case, this has proven more complicated than it initially appeared to be).

The Advisory Committee has recommendations on a number of issues but requests further guidance from the Court prior to proposing changes in the Rules of Lawyer Discipline and Disability. The Advisory Committee has reached agreement on the following recommendations:

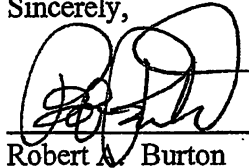
1. There should be judicial review of the Ethics and Discipline Committee through an appeal not a petition for extraordinary relief;
2. The rules regarding the procedures of the Ethics and Discipline Committee should be enhanced in connection with creating a record and possibly on other matters;
3. The procedures for appeal should spell out such normal requirements as the time limit for appeal, the grounds for review, the standard of review, the filing process; and
4. Review should be on the record created by the Ethics and Discipline Committee.

Christine M. Durham  
Chief Justice  
June 18, 2008  
Page Two

The Committee seeks guidance from the Supreme Court concerning (1) whether such review should take place in the Supreme Court or in the district courts and, (2) if in the district courts, whether there would be further review in the appellate courts. By comparison, appeals from the disciplinary orders of the district courts concerning public discipline based on a formal complaint are heard by Supreme Court. Utah Sup. Ct. R. of Prof'l Practice, 14-511(g). As stated in the Rules concerning Lawyer Discipline and Disability, Rule 14-501(b), the Supreme Court has exclusive authority over lawyer discipline under Article VIII, Section 4 of the Utah Constitution. That is a reason why the Committee concluded that appellate review in the Court of Appeals may not be appropriate.

If the Supreme Court has a preference on whether the Supreme Court or the district courts should hear initial appeals based on disciplinary orders resolved by the Ethics and Discipline Committee, the Advisory Committee believes that it would helpful to know this now before the Committee undertakes drafting any recommendations concerning changes in the existing Rules of Lawyer Discipline and Disability. (Those recommendations may be different depending upon which court hears the appeal). Accordingly, the Advisory Committee would appreciate it if the Supreme Court informed it about any preference or the lack of a preference. If the Supreme Court has no preference, the Committee is happy to consider which court it believes is appropriate for the appeal. The Committee appreciates your assistance on this matter.

Sincerely,



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Robert A. Burton

RAB/lis  
cc: Matty Branch



Marilyn M. Branch  
Appellate Court Administrator

Pat H. Bartholomew  
Clerk

## Supreme Court of Utah

450 South State Street  
P.O. Box 140210  
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office  
Telephone (801) 578-3900  
Fax (801) 578-3999  
Supreme Court Reception 238-7967

Christine M. Durham  
Chief Justice

Matthew B. Durrant  
Associate Chief Justice

Michael J. Wilkins  
Justice

Jill N. Parrish  
Justice

Ronald E. Nehring  
Justice

July 14, 2008

Robert A. Burton, Esq.  
P. O. Box 27206  
Salt Lake City, UT 84127-0206

Re: Judicial Review of Orders Issued by the Ethics and Discipline Committee

Dear Bob:

Chief Justice Durham has asked that I report back to you as to the Supreme Court's consideration of the issues raised in your letter to her of June 18, 2008, concerning judicial review of orders issued by the Ethics and Discipline Committee.

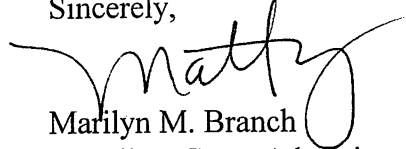
The justices discussed your letter at their court conference last Wednesday. Based upon that discussion, the Court would like the following elements included in the rule amendments developed by the committee:

1. Judicial review should be to the Supreme Court.
2. The procedures of the Ethics and Discipline Committee with regard to creating a record should be enhanced.
3. The Supreme Court's review should be on the record.
4. The decision of the Ethics and Discipline Committee and/or the chair should be presumed valid, with the burden on the respondent to demonstrate error.

Page Two  
July 14, 2008

Please let me know when you would like to schedule the next committee meeting. With summer vacations, we may get better attendance at a meeting held in September rather than one in August. Let me know your thoughts. Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Marilyn M. Branch". The signature is written in black ink and is positioned above the printed name and title.

Marilyn M. Branch  
Appellate Court Administrator

cc: Hon. Christine M. Durham