

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
October 27, 2008
5:00 pm

ATTENDEES

Robert Burton, Chair
Matty Branch
Nayer Honarvar
Steve Johnson
Judge Mark May
Kent Roche
Judge Stephen Roth
Gary Sackett

Stuart Schultz
John Soltis
Paula Smith
Leslie Van Frank
Paul Veasy
Billy Walker
Earl Wunderli

EXCUSED

Gary Chrystler
Judge Paul Maughan

GUESTS

Art Berger

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee. Mr. Wunderli moved for adoption of the minutes of the meeting held September 15, 2008. Ms. Van Frank seconded the motion, and it passed unanimously. Mr. Burton welcomed Art Berger, chair of the Supreme Court's Ethics and Discipline Committee, to the meeting and thanked him for his recommendations to the Rule 14-510 subcommittee.

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

Mr. Sackett said that the latest draft of the rule reflects the items the committee appeared to have consensus about at its September 15, 2008, meeting and items recommended by Art Berger and Terrie McIntosh, the chair and vice-chair, respectively, of the Supreme Court's Ethics and Discipline Committee.

Mr. Sackett reviewed each of the latest revisions with the committee. A major issue for discussion was section (b)(4) of the rule concerning cross-examination. Mr. Berger said that he supported the wording of the subsection because he felt it

appropriately balanced the right of the respondent to get information with the need to prevent the complainant from feeling intimidated by the process. Under the current rule, Mr. Berger said the Ethics and Discipline Committee does not feel either side has the right to direct cross-examination, with all questions to go through the panel chair. Mr. Walker said he supports the wording of section (b)(4) and views it as a good compromise. He said, however, that he does not think there should be cross-examination available at the exceptions level as provided in section (d)(2)(i).

Mr. Sackett said the subcommittee tried to preserve the right of direct cross-examination in the rule because the respondent's professional livelihood is at stake. Ms. Honarvar said she agreed with Mr. Sackett's position. Ms. Smith said she did not think the respondent should have the right of cross-examination at both the screening panel hearing and at the exceptions hearing because the complainant should not have to appear twice. Judge Roth said that if lawyers want the right to discipline their own, the rule must compromise to some degree respondent's cross-examination right so that the complainant is not overpowered by the process and made to feel that the discipline procedures are weighted in favor of the attorney.

Extensive discussion occurred during the review of subsection (e) concerning whether the committee chair, as part of the exceptions procedure, should be able to issue a final determination of discipline that is more severe than the original recommendation of the screening panel. Mr. Berger said that he and Ms. McIntosh did not think that the reviewing officer should be able to increase the penalty. He stated that he thought it was risky for the chair to substitute his judgment for that of the 3-person screening panel. Mr. Walker said that previous chairs of the Ethics and Discipline Committee were of the opinion that the penalty could be modified up or down. Ms. Honarvar said she thinks that there needs to be a risk to the respondent of possibly getting more severe discipline on appeal or misbehaving attorneys will always appeal.

Mr. Walker said that permitting the chair to modify the sanction provides a way to maintain consistency in the decisions of the various panels in similar fact situations. Ms. Van Frank said that consistency was somewhat impossible since screening panels were always changing and respondents were always changing.

Mr. Schultz moved for adoption of section (e) as written with the chair in an exceptions procedure not being able to impose a more severe penalty than that imposed by the screening panel. Mr. Sackett seconded the motion. The motion passed on a vote of 10 in favor, 4 opposed.

Judge Roth moved for adoption of section (d)(2)(i) as written except for the addition of "direct" before "cross-examination". Mr. Wunderli seconded the motion. Ms. Van Frank moved to amend Judge Roth's motion to provide that direct cross-examination be permitted at the exceptions hearing in the discretion of the chair if the

chair deems it will materially assist the review process. Judge Roth seconded the amended motion. The amended motion failed with 5 in favor and 9 against. A vote was then taken on Judge Roth's original motion. The motion passed, 13 in favor, 1 opposed.

Mr. Sackett moved that the following revisions be approved:

- a. Rule 14-510(4) line 8 "to" changed to "by"; line 9 "motion" changed to "request."
- b. Rule 14-510(5) line 6 "of" will be added before "the panel's recommendation."
- c. Rule 14-510(6)(A) the first sentence will be changed to read as follows "The preponderance of evidence does not establish that the respondent was engaged in unprofessional conduct, ..."
- d. Rule 14-510(f)(2) "Title III of the Supreme Court's Rules of Appellate Procedure" will be changed to "Title III of the Utah Rules of Appellate Procedure."
- e. Rule 14-510(f)(3) to be changed to read "The cost of any transcription of the record below shall be borne by the party requesting the record."
- f. Rule 14-510(5)(iv) to be changed to read "Contrary to Articles 5 and 6 of Chapter 14 of the Supreme Court Rules of Professional Practice."

Mr. Wunderli seconded the motion. The motion passed unanimously.

Mr. Burton moved that the non-substantive revisions suggested by Mr. Walker be incorporated by Mr. Sackett into the next draft of the rule, along with the revisions approved by the full committee at today's meeting. Mr. Schultz seconded the motion. The motion passed unanimously.

Mr. Burton said that after Mr. Sackett makes the latest revisions to Rule 14-510, he should send the revised rule to him for distribution to the full committee. Committee members should advise Mr. Burton as to any questions or concerns each may have as to the latest draft of the rule. Mr. Burton stated that if there are concerns raised about the latest draft, a committee meeting will be scheduled so that these concerns can be resolved. If no concerns are raised, Mr. Burton will submit the revised rule to the Supreme Court for publication and comment.

3. NEXT MEETING: To be determined.

10/27/08

Excused

Present

~~Roth~~

Maughan
Cryster

Sackett

Burton

Veasy

Wunderli

Judge May

Roché

Schultz

Walker

Van Fank

Smith

Horan

Johnson

Soltis

Roth

Quest

Art Berger

Minutes Sept 15, 2008

review Wunderli memo

approved

Van Fank Sec

unanimously

Sackett led review of latest revisions

changes reflect

- items committee appeared to have consensus about

- changes that subcommittee discussed with Art & Terrie and were recommended by Art & Terrie

#4 changes discussed with Art & Terrie

wanted to balance rights of respondent to get info - direct exam creates intimidation factor

respondent's questions have to be channeled through person who chairs hearing

discretion of chair to permit something like direct cross

remove probable cause from (A)

6(B) Art & Terrie wanted provision return despite addition of c

(d)(2) page 3

respondent may want to argue ~~that~~ real with a

a transcript

(e) p. 7 thing - Para artist
means
removed thing

(e) issue of whether removing it
can increase the penalty?

general advice from Ethics + Prof
(art / comic) didn't think
it was good idea to increase
the penalty

didn't go to if they had anything but "up" or
"down" to this part

up until now either affirm or but can

can modify to lower standard but
not more severe

Art said didn't think ~~could~~ ^{could an appeal} can

Increase penalty - fence inentible

with increasing the penalty of the person who

job is to review what occurred before

Art said he thought it was risky

to substitute your judgment for the
3 person panel

Billy walker - said some chairs thought
penalty could be modified up or down
in penalty

These appeals are not like other appeals -

S. Ct's standard is "correctness"

can make a different decision

thinkers logically ~~and~~ should be able to

go up or down

thinkers should have same standard as
discipline case that can't have direct appeal
to appeal to S. Ct

opens of
door to
more appeals
because no
downside

if you can do less - why can't you go with more
Billy thinks issue is how complete is
hearing at 'exception' level

not de novo - but respect can put
on evidence

Chair needs to be able to make discipline
consistent from panel to panel

Nayer said she thinks need to have a risk
of getting something more severe - or
mistake attorney will always push for appeal

garry - ^{at} administrative level - should

Van Frank - how can you get uniformity
since panels are always changing
all respondents are always changing

trucks ~~the~~ shouldn't ~~so~~ work towards consistency
not the goal

walker - says consistency is the point

Roche - since respect has to go through exception stage to get to Supreme Court

Committee doesn't think rules are clear now as to what ~~committee~~ can do on exception panel chair - dismiss or affirm

Paula Smith - ~~but~~ isn't just review with record - ^{repleat} gets to have cross-examine

Nayer - if you file exception - then you can get cross-examine seems inconsistent

Nayer - what about if committee chair increases penalty - then ~~appeal~~ exception provisions kick in -

(e) can chair impose more severe penalty
can chair make ~~other~~ suggest fine recommendation

4 opposed
10 favor

Schwartz - adopt (e) as written select sentence passes

Art how CRCS exam works —

work towards making process non-adversarial —

work towards both sides feel heard

thinks subcommittee has done a good job of
analyzing issues

Don't currently feel that either side has
right to cross-exam — going

require further to go to panel chair

no direct
right of
cross-examination

Belly likes way of (b)(4) — art

Says he thinks it is a good compromise

Walker —

thinks there should not be cross-examination
at exception level

~~(d)(1)~~

(d)(2)(i)

Sackett -

subcommittee tried to preserve
some right of ^{direct} cross-examination in the
rule when professional existence is at stake -
try to preserve it - not duplicate it

(d)(2)(i) -

if didn't do it at panel level - then
should get it at exception level

~~Walker -~~
~~it cross-examination at hearing level~~

Smith - thinks complainant should not
have to show up twice

J. Roh - we want the right to discipline our own -

there is ~~compromise~~ ~~going on~~ because
people participating in process who aren't
attorneys should feel ~~not~~ inhibited

usual process anyway - can't let respondent
overpower process

Both moves accept provisions as written

(d)(2)(i)

with addition of

"direct"

Send Wunderli

Amended by Sackoff

p. 1

to by

motion - to reject

6(A)

~~with~~

amended with

Smith - tanks -

camp

opposed - allots in favor

Van Frank - ~~notes~~ - sealed Judge Roth

direct cross exam^{irect} will be
permitted at discretion of chair
if he deems it will

materially assist

Reverend presumes that there is no
cross-exam

5. in favor

9 against

field — $\frac{4}{9}$

4 say

the same

except all

by ~~quest~~

~~move to adopt subject~~ Sackett
Secured

Sackett moved → approval is
approved at Sea Eal

Walker added Unanimous

subject to further news — Billy Walker
gets with Gary gets

Burton — in
Schultz — secured Unanimous

work together

no meeting scheduled — unless needed