

MINUTES

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

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114
Monday, April 22, 2002
5:15 p.m.

ATTENDEES

John Beckstead
Robert Burton
Royal Hansen
Nayer Honorvar
William Hyde
Steven Johnson
Hon. Ronald Nehring
Kent Roche
Gary Sackett
Paula Smith
Billy Walker

GUESTS

John Adams
Clark Arnold
Matty Branch
Debra Moore
Dane Nolan
James Lee

EXCUSED

Gary Chrystler
Karma Dixon
Earl Wunderli

STAFF

Alicia Davis

1. WELCOME AND APPROVAL OF MINUTES

Bob Burton welcomed everyone to the meeting. Kent Roche moved that the minutes be approved subject to a typographical correction. The motion was seconded, and it passed by unanimous vote.

**2. CONSIDERATION OF RULES OF LAWYER DISCIPLINE AND
DISABILITY**

Bob Burton welcomed Mr. Clark Arnold, Mr. James Lee, Mr. Dane Nolan, Mr. John Adams, and Ms. Debra Moore, members of a subcommittee formed by the Bar Commission to revise the Rules of Lawyer Discipline and Disability, to the meeting. Mr. Adams provided a history of the amendments made to the rules of Lawyer Discipline and Disability. The three objectives of the subcommittee were to: 1) promote consistency with other bodies of rules; 2) promote readability; and 3) draw upon the day to day operations of the Office of Professional Conduct. Mr. Adams communicated that the

subcommittee had largely met its intended objectives. The subcommittee and Billy Walker identified four significant areas of change in the RLDD as: (1) appealability of discipline; (2) jurisdiction over judges; (3) subpoenas; and (4) public v. private reprimands. The changes allow screening panels to issue public reprimands. (Currently, they may only issue admonitions). The standard (negligence, inadvertence) is the same for public or private reprimands. Mr. Walker indicated that the appeal process for public and private reprimands was the same; appeal to the committee chair.

Mr. Lee indicated that the Committee is comprised of 8 attorneys, 26 public members, a chair and vice-chair. 4 committees constitute 2 panels.

The committee and guests reviewed the Amended RLDD page by page as follows:

p.3: Mr. Arnold said that RLDD 2(c) should read: "Committee" means the Ethics and Discipline Committee of the ~~Utah State Bar~~ Utah Supreme Court"

p.5: The subcommittee said that RLDD 3(d) language : "In instances when an even number of screening panel members participate in a proceeding, the chair or vice-chair shall not vote unless necessary to break a tie. The chair or vice-chair shall, however, fully participate in the proceeding" should be stricken because the language was confusing, and the less people present to complicate the proceedings, the better.

p.6, Subpoena power. Mr. Walker informed the committee that judges cannot testify without a subpoena. and banks will not generally release information without a subpoena. While obtaining a district court requires a showing of cause, and can be time consuming, this gives the OPC administrative subpoena authority. These would be sought at the investigative stage, prior to a screening panel's authorization that the complaint go before district court. Mr. Walker stated that this provision was taken from the ABA's model rules on lawyer discipline. Mr. Walker indicated that the committee chair could issue a subpoena under (f)(1). Mr. Johnson recommended that this be clarified in the rule. The committee recommended that (f)(1) read: "(1) Investigatory subpoena. After the filing of an informal complaint and notice to the opposing party, before formal charges have been filed, the Committee chair may, upon application by OPC counsel either party or the screening panel, with the approval of the Committee chair, compel by issue a subpoena for the attendance of witnesses, and the production of pertinent books, papers, and documents, in accordance with Rule 45 of the Utah Rules of Civil Procedure." Mr. Walker indicated that this rule was not intended to provide for depositions prior to screening, but to compel witnesses. These are administrative hearings at this point, not full-scale trials. If the OPC were required to petition the court for a subpoena, the court could deny the request. Mr. Walker indicated that a respondent could file an objection at this stage in the proceedings. Mr. Walker indicated that respondents rarely provide information under 8.1.

p. 7, Time limits. Mr. Walker that the OPC has two internal policies that prevent complaints from disappearing into a black hole: (1) the OPC has 5-10 working days to decline to prosecute, and the OPC provides notice to the complainant; and (2) the OPC gives itself three months to resolve an investigation.

p. 9, Expungement. Concern earlier expressed was addressed by Mr. Sackett's comment.

p.10, Jurisdiction (RLDD 6): Ms. Moore indicated that the court has jurisdiction under the UPL statute.

p.10, Jurisdiction over judges (RLDD 6). The Bar Commission subcommittee concurred with the language suggested by Mr. Burton: "(b) Incumbent judges. Incumbent judges are subject to the jurisdiction of the Office only for conduct that occurred prior to the taking of office. Judges. While in office, judges are subject to lawyer disciplinary and disability proceedings only for conduct that occurred prior to the taking of office; however, after leaving office, a judge who is a lawyer is subject to the lawyer disciplinary and disability proceedings for misconduct that occurred while the lawyer was a judge and would have been grounds for lawyer discipline. however, after leaving office, a judge who is a lawyer is subject to lawyer disciplinary proceedings for misconduct he or she committed while a judge, if such conduct would have been grounds for lawyer discipline."

p.11 (RLDD 7): Ms. Honorvar expressed concern regarding access to informal discipline records that are not a matter of public record. The language was amended to read: "(h) nature, date, and place of any public discipline imposed and any reinstatements."

p.13 (RLDD 10(4)(c)): E. Wunderli had earlier commented that this provision should conform with Rule 8(b), i.e., "the designated mailing address on record at the Bar." Mr. Nolan indicated that better service should be applicable in disciplinary proceedings as opposed to administrative procedures.

p.14 (RLDD 10(6)): Mr. Walker indicated that when the OPC declines to prosecute a claim, the complainant receives a letter listing reasons for the denial, and notice that the denial can be appealed.

p. 16 (RLDD 10(b)(5)(D) and (E)). Mr. Walker indicated that the respondent currently receives notice that exception, if any, must be filed within ten days. The 20 days provision to respond did not change the existing rule. Ms. Honorvar stated that the respondent should be allowed to appeal the screening panel's recommendation to district court in the interest of due process. Mr. Walker indicated that due process was served under the existing administrative review process. Judge Nehring indicated that such a provision could give the complainant undue leverage, to expose private matters before a public forum.

p. 17 (RLDD 11(a)): Mr. Arnold indicated that the vice chair should sign the formal complaint in the chair's absence.

p. 17 (RLDD 11): Ms. Honorvar indicated that this amendment was consistent with the URCP provision against judge-shopping.

p. 18 (RLDD 13(b)): Ms. Smith indicated that the reference to "the court" as a source of immunity presupposes that a court is already involved. If the proceedings are at the investigatory stage or screening panel stage, this requirement may require a separate court filing after obtaining the "prosecuting authority's position." Utah Code Ann. § 77-22b-1 deals with immunity granted

to witnesses by the Attorney General, District Attorney, or County Attorney. Since the rule requires consultation with the prosecuting authority anyway, it may be easier to get the grant of immunity from one of the entities listed in the statute and to provide for this in the rule. Mr. Arnold suggested that 13(b) read: “the court or prosecuting agency, after having considered the prosecuting authority’s position, may grant immunity from criminal prosecution to a witness in a discipline or disability proceeding.”

p. 20 (RLDD 15): Mr. Walker indicated that RLDD 15 was difficult to follow. In fact, no substantive changes had been made to the rule, the subcommittee just tried to clarify the language. Mr. Walker indicated that this rule was infrequently used.

p. 21 (RLDD 15(h)): Mr. Walker indicated that the OPC did provide respondent with prior notice regarding the dissemination of information.

p.21 (RLDD 16): Mr. Walker and Ms. Moore indicated that it was not the intent of this rule to do away with publication in the Utah Bar Journal; such publication is required by RLDD 4. The amendment simply clarifies that the USB will disseminate this information, not the Administrative Office of the Courts. Mr. Walker indicated that only notices which would place restrictions on an attorney’s license would be published. Public reprimands do not place restrictions on an attorney’s license. Mr. Lee charged the RPC committee with deciding whether or not public reprimands should be included in the Bar Journal.

p. 22 (RLDD 17(f)): Mr. Arnold recommended that the rule read: “(f) Informal and formal complaints against members of The Office of Professional Conduct, committee members and board of commissioners. An informal complaint filed against Senior counsel, OPC counsel's staff OPC counsel, members of the Committee, or a member of the Board of Commissioners, which, upon consideration of all factors, is determined by a chair of a screening panel (appointed by the Committee chair) to be frivolous, unintelligible, barred by the statute of limitations, is being or should have been addressed in another more appropriate forum. . .”

p. 24 (RLDD 19(c)): Mr. Walker indicated that there was no definition of “convicted of a crime” to accompany the rule. RPC will further evaluate a possible definition.

p. 27 (RLDD 21). Mr. Johnson expressed concern that the rule requires that an attorney may only resign if the acts do not justify disbarment. Mr. Walker indicated that if discipline was pending, the attorney may only resign with Supreme Court approval. The committee (?) opined that (f) should be deleted.

p. 30 (RLDD 23(c)): Mr. Walker indicated that the district court had authority to decide who pays for the appointment of counsel.

p. 36 (RLDD 30): With regards to reciprocity of attorneys’ fees, the subcommittee indicated that the Bar did not want to make itself subject to a large award of attorneys’ fees, and such fees could still be awarded under URCP 11. Mr. Walker indicated that this provision also kept attorneys from one side pursuing a bad defense. Mr. Burton stated that if all procedural safeguards were observed, such

a provision would never be called upon against the OPC. Mr. Sackett indicated that inclusion of the rule would lead one to believe that URCP 11 did not apply. RPC agreed to further consider this issue.

Matty Branch indicated that the Supreme Court was waiting for the RPC committee's input before considering the amendments. Alicia Davis will further amend the annotated amended petition in light of the committee's discussion. Royal Hansen, Nayer Honorvar, Kyle Roche formed a subcommittee to make additional changes to the petition, chaired by Royal Hansen. Billy Walker will also assist the subcommittee. Judge Nehring that the committee will want to take another look at (1) attorneys' fees; (2) "ratting on" other attorneys; (3) reportable crimes; (4) subpoena powers; and (5) immunity. The subcommittee will report back at the next meeting.

3. MDP DEVELOPMENTS

Mr. Burton distributed a letter to the committee from the Supreme Court expressing appreciation for the Committee's work in studying and making recommendations on MDP.

4. ADJOURN

Mr. Burton announced that the next Committee meeting would be **Monday, May 20 at 5:15 p.m.** Rule 8.4 will be first on the agenda for 10-15 minutes discussion. There being no further business, the meeting adjourned.