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
May 19, 2008
5:00 pm

ATTENDEES

Robert Burton, Chair
Matty Branch
Nayer Honarvar
Judge Paul Maughan
Judge Mark May
Kent Roche
Judge Stephen Roth
Gary Sackett
Stuart Schultz
John Soltis
Paula Smith
Leslie Van Frank
Paul Veasy
Earl Wunderli

EXCUSED

Gary Chrystler
Steve Johnson
Billy Walker

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee and introduced Judge Mark May as a new member. Mr. Wunderli moved for adoption of the minutes of the meeting held on April 21, 2008, subject to the correction of a misspelling of "advertising" in section 2. Ms. Van Frank seconded the motion, and it passed unanimously.

2. PROPOSED ABA MODEL RULE 3.8

Mr. Burton advised the committee that Model Rule 3.8 was pending before the ABA, and that he wanted to bring the proposed rule to the committee's attention to see if it was interested in considering a similar rule in Utah. Mr. Soltis stated that he thought there were a lot of problems with the proposed rule, and that Paul Boyden with the Statewide Association of Prosecutors (SWAP) would like to have an opportunity to present SWAP's

concerns with the rule to the committee.

Mr. Soltis said the proposed rule unfairly places responsibility on the "line" prosecutor rather than on the prosecutorial authority/entity. Mr. Soltis explained that it is the elected official (the Attorney General, City Attorney, District Attorney) who determines whether an investigation will be undertaken and sometimes such a determination has political overtones. Mr. Soltis suggested that the proposed rule could place a prosecutor in direct conflict with his or her boss.

Mr. Burton recommended that the committee defer consideration of the proposed rule pending final action by the ABA. He suggested that should the ABA approve the rule as part of the Model Rules, the Utah Supreme Court would likely ask the Professional Conduct Committee to evaluate the rule. At that point in time, Mr. Burton said Mr. Boyden would be asked to meet with the committee.

3. LAWYER ADVERTISING SUBCOMMITTEE REPORT

Mr. Schultz discussed the subcommittee's recommendation that Bar members be surveyed to determine whether advertising is an issue of significant concern. Mr. Schultz said he had spoken both with John Baldwin and Nate Alder about the possibility of a survey. Mr. Baldwin was very supportive of the idea and said the Bar would be willing to assist. Mr. Alder told Mr. Schultz that he was positive about a survey but that he felt Bar members would treat it with less suspicion if the survey came from the Supreme Court or the Professional Conduct Committee rather than from the Bar.

Ms. Van Frank questioned whether Bar members would be willing to spend Bar money to review and pre-approve ads. Mr. Veasy pointed out that complaints to OPC to date had come from attorneys and not from members of the public. Mr. Sackett said that he thought the committee's primary focus as to lawyer advertising should be whether or not there is a problem that is detrimental to the public interest. Mr. Burton said he thought a legitimate concern as to lawyer advertising was the fact that some ads denigrate the legal profession and/or the judiciary.

Judge Maughan moved that the issue of lawyer advertising be tabled until there is evidence that there is a problem with attorney advertising that Bar members want addressed, and until there is a clear indication from Bar leadership that it wants to aggressively pursue enforcement against misleading or false advertising. Mr. Sackett seconded the motion. After additional questions

were raised and discussion ensued, Mr. Burton called for a vote. The motion passed unanimously. Following the vote, Ms. Smith said she thought the advertising issue, including undertaking a survey, should be pursued by Bar leadership rather than by the Professional Conduct Committee. Ms. Honarvar wondered whether the general public could be surveyed to determine if the public has been harmed. Judge Roth said that while he is sympathetic with the issue, he does not think there is a large enough percentage of the Bar with a passion about the advertising issue, and that he does not think the Bar has the will or the resources to take on aggressive enforcement.

Mr. Burton asked committee members if they had any problem if he and Mr. Schultz worked with Bar leadership in their individual capacities, rather than as committee members, to develop possible survey questions. No members of the committee expressed concern as to this approach.

4. REPORT FROM SUBCOMMITTEE AS TO APPEAL OF DISCIPLINARY ORDERS OF THE ETHICS AND DISCIPLINE COMMITTEE

Mr. Sackett stated that the subcommittee had met and discussed the issue, and that there was a consensus that the Rules of Lawyer Discipline & Disability should be amended to provide an attorney with a right of appeal when the attorney receives an admonition or public reprimand from the Ethics and Discipline Committee. Mr. Sackett guided the full committee through the proposed changes to Rule 14-510 described in the subcommittee's written proposal.

Mr. Sackett said that the subcommittee's proposal provides for an appeal to the district court, with the district court conducting a trial de novo. Mr. Sackett advised that the subcommittee felt the district court should not be able to order a more severe punishment than that imposed by the Ethics and Discipline Committee in order to prevent an attorney from being penalized for taking an appeal.

Mr. Sackett said that the subcommittee had not reached agreement as to the degree of formality or informality of the proceeding before the district court. Judge Roth suggested that, since the appeal was taken from an informal proceeding, the district court should maintain a similar level of informality by relaxing evidentiary standards.

Ms. Honarvar said she believed the reason the rules provided for informal disciplinary proceedings before screening panels was to reduce the number of disciplinary cases filed in the district courts. She expressed concern that the subcommittee's proposal would increase judicial workload because

most attorneys would choose to pursue an appeal since there was no risk that an appeal could result in a more severe penalty being imposed. Several committee members suggested that since the Supreme Court can impose a more severe sanction than that ordered by the trial court in a formal disciplinary proceeding, the district court should be free to increase the penalty in an appeal from an informal proceeding.

Ms. Smith suggested that the evidentiary standard applied by the trial court should be relaxed in the same way that the evidentiary standards are relaxed in a preliminary hearing. Mr. Burton asked if the subcommittee had considered a simpler approach such as directing an appeal from an informal proceeding to the Court of Appeals. Mr. Sackett said the informality of the record created a problem in pursuing that kind of approach.

Judge Maughan expressed concern about the district court having to undertake a trial de novo. He suggested that the district court's review should be summary in nature, with the order of the Ethics and Discipline Committee being upheld unless it can be shown that it was arbitrary or capricious.

Mr. Burton stated that further discussion of the issue was needed, including input from Mr. Walker representing OPC. Judge Roth suggested that the committee's discussion at the next meeting be focused on the following issues:

1. Should there be a right of appeal from an informal disciplinary proceeding?

2. Should the district court be able to impose more severe discipline than that imposed by the Ethics and Discipline Committee?

3. During the district court's review, should the rules of evidence be applied strictly or loosely?

4. What should be the role of the complainant in the appeal process?

Mr. Burton advised that these questions would be the focus of the June meeting.

5. NEXT MEETING

Monday, June 16, 2008, at 5:00 pm.