

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 she did not think consistency was the goal, and 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<sup>of</sup> 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.