

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
December 15, 2008
5:00 pm

ATTENDEES

Matty Branch
Gary Chrystler
Steve Johnson
Judge Paul Maughan
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

Robert Burton, Chair
Nayer Honarvar

1. WELCOME AND APPROVAL OF MINUTES

Ms. Branch welcomed the members of the committee. She asked if there were any corrections to the minutes of the October 27, 2008, meeting. Mr. Wunderli pointed out a missing "of" in (e) on page 2 of the minutes. Ms. Van Frank said she did not think the comments attributed to her as to "consistency of decisions" were accurate. It was agreed that the phrase "she did not think consistency was the goal" should be deleted. Subject to these changes Judge Maughan seconded the motion, and it passed unanimously.

2. DISCUSSION: ADDITIONAL PROPOSED CHANGES TO RULE 14-510

Ms. Branch advised that a majority of committee members had voted to approve the removal from (f)(5) of the clause "The final decision of the Committee shall be presumed valid," and had agreed that the proposed rule changes, once approved, should be applicable to all proceedings as of the effective date ordered by the Supreme Court.

Ms. Branch then asked Mr. Walker to advise the committee why he believed OPC should have the right to file an appeal to the Supreme Court after an Exception hearing and why the “dismissal with condition” provision of subparagraph (b)(6)(B) should be eliminated.

Mr. Walker said, based on his experience with the screening panels, he felt that use of the “dismissal with condition” provision had not been sufficiently defined for the panels. He felt panels had received no guidance as to when the provision should be used or how it should be enforced. Mr. Walker said he thought the use of the Diversion rule was the route to go because its use and its enforceability were well-defined. He also expressed concern that the “dismissal with condition” sections could undermine the diversion option.

Mr. Sackett said Art Berger and Terry McIntosh had requested that the “dismissal upon condition” option be retained, and that he thought it was a good idea because the diversion option was quite cumbersome. Mr. Sackett said he did not believe retaining the conditional dismissal would undermine the diversion option. Mr. Johnson suggested that the conditional dismissal might be a useful approach for very minor infractions.

Mr. Sackett moved that the dismissal with condition language of (b)(6)(B) be retained. Mr. Soltis seconded the motion. The motion failed, five in favor, nine against. Judge Maughan moved that the dismissal with condition language of (b)(6)(B) be removed. Judge Roth seconded the motion. The motion passed, nine in favor, five against.

Mr. Walker said it was all right with him that OPC did not have an appeal right to an Exception hearing, but that once there was a formalized route to the Supreme Court based on an Exception filed by a respondent, he felt OPC should also have this route available. He said he thought this approach was consistent with the OPC’s “party” status in other attorney discipline appeals (i.e. from the district courts). Mr. Walker said he thought OPC would only appeal when it thought the chair had acted outside the standards. Also, he said he felt the appeal option was particularly important now that the rule does not allow a more severe sanction to be imposed at the Exception stage.

Mr. Sackett said he sees OPC as the prosecutor and that it seemed unseemly for OPC to be able to appeal what the Ethics and Discipline Committee decided. In effect, it would be like the prosecutor appealing what the jury decided.

Mr. Soltis asked what OPC wanted to accomplish by having the right to appeal. Mr. Walker said OPC would appeal to maintain a consistency of standards.

Ms. Smith said Mr. Walker's position was very much in line with the administrative licensing process. In that process, either side can appeal after the final decision is released.

Judge May expressed concern that Mr. Walker's approach permitted OPC to get around the prohibition on the Ethics Committee chair not being able to impose greater discipline.

Judge Maughan moved that OPC not be given an appeal right from an Exception hearing. Mr. Schultz seconded the motion. The vote on the motion was a tie - seven in favor, seven opposed. Mr. Walker then moved that the issue be submitted to the Supreme Court with a notation that the committee was not able to decide the issue. Judge Roth seconded the motion. It passed unanimously.

3. NEXT MEETING

Ms. Branch said she was not aware of any pending assignments for the committee. No future meeting was scheduled, with Mr. Burton or Ms. Branch to be in contact with the committee members when a meeting is necessary.

AGENDA

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

**LAW AND JUSTICE CENTER
BOARD ROOM**

December 15, 2008, 5:00 p.m.

Welcome and approval of October 27, 2008, minutes

Bob Burton

Discussion and final action on Rule 14-510 of
the Rules of Lawyer Discipline & Disability
(latest drafts of rule sent by prior e-mails)

Gary Sackett, Billy
Walker

- * removal from (f)(5) of clause "The final decision of the Committee shall be presumed valid."
- * application of rule to all existing cases and all new cases
- * Billy Walker's issues
 - granting OPC right to file an appeal to the Supreme Court after Exception hearing
 - removing "dismissal with condition" provision from (b)(6)(B)

Other business

12/15/08

Rules of Professional Conduct

Present

- Earl Wunderle
- Steve Johnson
- Kent Roche
- Gary Crystler
- Paula Smith
- Judge Mark May
- Leslie Van Frank
- Gary Sackett
- Judge Paul Maughan
- Billy Walker
- Paul Veary
- Stuart Schultz
- John Soltis
- Judge Stephen Roth
- Earl Mowbray
- Judge Maughan second

Excused

- Nayer Honarvar
- Bob Burton

two changes -

approved with

1st no issues -

Billy's issues

dismissal ^{upon} with condition - no standards

not used often by committee

Thinks disbarment rule covers discipline by committee

Thinks need
on disciplinary
at 500

didn't think retaining would undermine diversion provision
gay

Art: Ter: - subcommittee meeting with them

they want to retain provision dismissed upon

condition - thought diversion was pretty involved
sackett ~~was~~ wanted to feel able to do something
other than go through diversion
want digressing

Steve Johnson - thought they would dismiss but
there was a minor condition they wanted to impose
(low degree that diversion)

Diversion process (consensual)

Screening panel level - imposes diversion
respondent has to agree to diversion

Criteria - can't be conduct that would be
greater than public reprimand / or administrative
can't have prior discipline in last 5 years for
same kind of behavior

Gay Sackett motion moved but ~~leave in~~
dismissed with condition
(b) (6) (D)

motion failed

Solter - secured

leave in 9 against
place against
rewards

Magham road removal of pylons ^{cabble}

Northwood 9 in favor

passed

7 opposed

Billy Walker - if regret to

right to appeal following

exceptions being, then OPC should have right to

OPC can appeal cases that go

appeal to S, Ct

though deduct it

Thinks OPC used appeal would be

when think chair ^{exceptions} acted outside

the standards ^{and} exceptions to the standards

Thinks it would be fine if OPC withdrew to appeal

Chair's hands could be tied -

Since chair can't impose anything greater

than governing panel do

if OPC has right to appeal,
may be disincentive
for lawyer to appeal
for trial.

Sadlett - Thinks OPC is prosecutor & seems
unseemly that OPC could
appeal what Ethics +

~~Discipline Committee~~

Discipline Committee
decided (in effect
prosecutor appeals
what judge
decided)

"have dog in the hunt" in district ct.

Billy doesn't see why OPC should be
able to appeal from district ct
decisions - but not from

exceptions hearing

OPC is to give the S. Ct the whole
picture - for consistency standpoint

Bablis case

Solter's - asked what OPC ~~wants~~ wants to
accomplish by having right to appeal - thinks it isn't
consistent with ^{consistency} _{play}

Billy says OPC would appeal
to pursue consistency of standards

Paula Smith - thinks ^{what Billy repeats} system is very much
like administrative process / hearing
either side can appeal after
final decision is released

Judge May - ^{doesn't} ~~isn't~~ this approach gives
OPC opportunity to ask for greater
discipline - getting around
chain not being able to impose
greater discipline -

~~Judge~~ ~~(Bill)~~ says ~~it is~~ ~~(Bill)~~ ^{it does give that opportunity}

Judge May says he is comfortable with
OPC being able to appeal, but doesn't
think it should be able to ~~happen~~.

power and ask for more severe
discipline

OPC ~~started to withdraw decision to~~
~~confront with statute~~

would always appeal for greater sanction

Crystal asked if there would be merit
if to org permitting OPC to
appeal?

Maughan moved to not give OPC right to
appeal
Street second

7 7 tie at

✓
more Walker more submit question to
SC+
CF

Roth second

unanimous to get to
CF