

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
April 21, 2008
5:00 pm

ATTENDEES

Robert Burton, Chair
Matty Branch
Gary Chrystler
Judge Royal Hansen
Nayer Honarvar
Steve Johnson
Judge Paul Maughan
Kent Roche
Judge Stephen Roth

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

GUESTS

Nate Alder
John Baldwin

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee and introduced Paul Veasy and Leslie Van Frank as new members. Mr. Wunderli moved for adoption of the minutes of the meeting held on June 25, 2007. Mr. Johnson seconded the motion, and it passed unanimously.

2. POSSIBLE RE-EXAMINATION OF ETHICAL RULES GOVERNING
LAWYER ADVERTISING

Mr. Burton introduced the topic and gave examples of local attorney ads that he felt were either misleading, false, or demeaned the judicial system. He stated that he had invited Nate Alder, president-elect of the Utah State Bar, and John Baldwin, executive director of the Utah State Bar, to attend the committee meeting because of their interest in the topic and based on their attendance at a

lawyer advertising breakout session at a recent ABA conference.

Mr. Alder said that the conference session included information about the new advertising rules in effect in Florida and Texas, and that he, John Baldwin, and Lowry Snow felt that Utah might want to consider changes to its rules as well. He suggested that the Florida rule seemed like a reasoned approach, and that he understood that Florida had been litigating lawyer advertising cases with some success. Mr. Alder also stated that in the last several years, he had been contacted by Utah lawyers who were concerned about lawyer advertising they had seen or heard.

Mr. Baldwin said that in the past the Bar generally pursued a “hands-off” policy towards lawyer advertising unless a complaint was filed with OPC. He said that since “reasonable” people can differ on whether an ad is misleading, the Bar had not taken a pro-active position.

Mr. Walker stated if a complaint as to a lawyer advertisement is filed, OPC investigates it and pursues it as aggressively as any other complaint. But he said OPC does not monitor ads or search the yellow pages for violations, and that OPC does not have the resources to pursue that approach.

Mr. Chrystler said that he felt the current rules governing lawyer advertising already prohibit the type of advertising committee members were complaining of, and that it seemed like the focus should be on enforcement rather than amending the rules. Judge Roth said he agreed with Mr. Chrystler and couldn't see why the committee should pursue more rulemaking when the Bar has not pursued enforcement of the existing rules. Mr. Schultz suggested that more specific rules might be an aid to enforcement and could provide additional direction to lawyers who advertise. Mr. Roche questioned whether the Supreme Court had asked the committee to re-examine the lawyer advertising rules. Mr. Burton said the Supreme Court had not made such a request, and that the idea was his and Mr. Schultz's.

Mr. Schultz made the motion that the committee undertake additional evaluation of the advertising issue in order to decide whether it wants to pursue further rulemaking. Mr. Wunderli seconded the motion. The motion passed, ten in favor, five opposed.

Mr. Burton asked Mr. Schultz, Mr. Veasy, and Ms. Van Frank to serve on a subcommittee to further evaluate the lawyer advertising issue and to report to the full committee at the next meeting.

3. DISCUSSION OF SUPREME COURT ASSIGNMENT AS TO RULE 14-510 OF THE RULES OF LAWYER DISCIPLINE AND DISABILITY

Mr. Burton advised that the Supreme Court had asked the committee to examine the Rules of Lawyer Discipline and Disability and to make a recommendation as to whether the rules should be amended to provide for a right of appeal from disciplinary orders made by the Ethics and Discipline Committee based upon informal complaints of unprofessional conduct.

The issue arose in connection with the case Bowen v. Utah State Bar. In its opinion deciding the case, the Supreme Court pointed out that while disciplinary orders of district courts entered as part of a formal complaint process are appealable to the Supreme Court, there is no provision in the rules for obtaining judicial review of disciplinary orders issued by the Ethics and Discipline Committee.

Judge Roth questioned whether the Bowen case itself did, in fact, establish that the process for judicial review of a disciplinary order of the Ethics and Discipline Committee is the filing of a petition for extraordinary relief in the Supreme Court. Mr. Walker said that such an approach could be problematic for the Supreme Court because there is not a "record" per se from the proceedings of a screening panel for the Court to review. Mr. Walker said that if the rules are amended to provide for judicial review of decisions from informal complaints, he believes that ninety percent of disciplined lawyers would pursue such judicial review.

The committee engaged in general discussion as to whether judicial appeal should be a de novo proceeding in the district court and whether a right to appeal from the trial de novo should be permitted. Mr. Burton halted discussion and asked Mr. Sackett, Mr. Roche, Mr. Johnson, and Judge Roth to form a subcommittee to study the issue and present recommendations to the full committee.

4. AMENDMENT TO ABA MODEL RULE 3.8

Discussion deferred until next committee meeting.

5. OTHER BUSINESS

Judge Royal Hansen announced that he was retiring from the committee after many years of membership. He thanked Mr. Burton for his leadership, and

thanked the committee members for their association.

6. NEXT MEETING

The next meeting will be Monday, May 19, 2008, at 5:00 pm at the Law and Justice Center.