

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
June 16, 2008
5:00 pm

ATTENDEES

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

EXCUSED

Gary Chrystler
Judge Paul Maughan

1. WELCOME AND APPROVAL OF MINUTES

Mr. Burton welcomed the members of the committee. Ms. Branch advised the committee of changes to the minutes of the 5/19/08 meeting she had made in response to suggestions made by Mr. Sackett and Mr. Schultz. Mr. Wunderli moved for adoption of the minutes of the meeting held on May 19, 2008, as amended by Ms. Branch. Mr. Johnson seconded the motion, and it passed unanimously.

2. DISCUSSION - APPEAL OF DISCIPLINARY ORDERS OF THE ETHICS AND DISCIPLINE COMMITTEE

Mr. Sackett reviewed the changes he had made to proposed Rules 14-510 and 14-511 based upon comments that were made at the May 19th meeting. He stated that it was his opinion that the appeal of a final determination of admonition or public reprimand by the Ethics and Discipline Committee

should be conducted under the same trial procedures as those used for formal complaints filed by OPC at the request of the Ethics and Discipline Committee.

Mr. Burton asked the committee to focus on the threshold question of whether there should be a right of appeal from an informal disciplinary proceeding. Ms. Branch suggested to Mr. Burton that Mr. Walker be given an opportunity to explain the process currently in place for informal disciplinary proceedings before a screening panel of the Ethics and Discipline Committee. Mr. Burton asked Mr. Walker to provide this information.

Mr. Walker advised that in 1993, due to resources issues, the Supreme Court approved giving the chair of the Ethics and Discipline Committee the power to enter an order of public reprimand in connection with an informal complaint. Mr. Walker advised that the proceedings before the screening panel are recorded by both audio and video methods. He said a certified court transcriber is not present. He further advised that in most proceedings the complainant and respondent are present, and that the complainant testifies in response to questions posed by members of the screening panel. Mr. Walker said that there is no right of cross examination for the respondent and that the Supreme Court made clear in the Harding case that due process does not require the right of cross examination at the proceedings on informal complaints. He advised that the respondent is permitted to take the stand and rebut the complaint and to make a statement in his or her behalf.

Mr. Walker said that he thought it would be appropriate to “beef up” the administrative process used for informal complaint proceedings especially at the exception hearing stage and to provide some sort of limited appeal to the Supreme Court, but that he opposed granting a wide-open appeal right to the district court or the Supreme Court.

Ms. Smith stated that she thought a complainant should not be required to appear three times – at the initial screening panel hearing, at an exception hearing, and then at a judicial appeal proceeding. Mr. Walker said under the current rule it is not clear what the chair can do at an exception hearing, and that he believes the rule needs clarification.

Mr. Sackett said he thinks the respondent should have an option of taking an appeal outside of the Ethics and Discipline Committee, and that he or she should be able to pursue either an exception hearing before the chair of the Ethics and Discipline Committee or an appeal to the district court. Mr. Sackett said that if the record is good, he would be satisfied if the district court’s review was limited to the record rather than a de novo review.

Mr. Burton said that it appeared that everyone on the committee was in agreement that there ought to be a right of appeal somewhere from an informal disciplinary proceeding. He then asked the committee members whether the right of appeal should be to the Supreme Court or to the district court. Mr. Sackett suggested that the Supreme Court probably did not want to deal with appeals from informal disciplinary proceedings and would prefer they be routed to the Court of Appeals or the district court. Ms. Branch said that she questioned whether an appeal could be directed to the Court of Appeals in view of the Supreme Court's appellate jurisdiction over the lawyer discipline.

Judge May suggested that the committee ask the Supreme Court if it has a preference on whether the Supreme Court or the district court should hear initial appeals based on disciplinary orders issued by the Ethics and Discipline Committee. Ms. Van Frank moved that the procedures of the Ethics and Discipline Committee in an exception hearing be enhanced and that the rule specify the avenues for appeal and the grounds for an appeal. Mr. Walker seconded the motion. Judge Roth offered the following substitute motion:

1. there should be judicial review of an order of the Ethics and Discipline Committee through an appeal not by a petition for extraordinary relief;
2. the procedures of the Ethics and Discipline Committee should be enhanced in connection with creating a record and possibly on other matters;
3. judicial review should be on the record created by the Ethics and Discipline Committee;
4. the procedures for appeal should be detailed such as time frame, the grounds for appeal, and the filing process; and
5. the Supreme Court should be asked to provide guidance as to whether such review should take place in the Supreme Court or in the district court.

Mr. Schultz seconded the substitute motion. The substitute motion passed unanimously.

Ms. Smith agreed to prepare a draft letter to the Supreme Court describing the position of the committee and asking the Court for guidance as to the appeal route. She will forward the draft to Mr. Burton for his review, and he will finalize the letter and send it to Chief Justice Durham.

3. NEXT MEETING

After the Supreme Court responds to Mr. Burton's letter, Matty will email committee members to schedule the next committee meeting.