

**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
November 28, 2011
5:00 pm

ATTENDEES

Steve Johnson, Chair
John Bogart
Tom Brunker
Simon Cantarero
Gary Chrystler
Nayer Honarvar
Judge Mark May
Trent Nelson
Gary Sackett
Stuart Schultz
Paula Smith
Kent Roche
Leslie Van Frank
Paul Veasy
Billy Walker
Earl Wunderli
Diane Abegglen, Staff

ABSENT

GUESTS

Bruce Maak
Terrie McIntosh

1. WELCOME, INTRODUCTION OF NEW MEMBERS AND APPROVAL OF
MINUTES

Steve Johnson welcomed the members of the committee and guests. Pursuant to the requirement of Rule 11-101(4) of the Supreme Court Rules of Professional Practice, Mr. Johnson asked each committee member to briefly disclose the general nature of his or her legal practice. Each member present at the meeting made such a disclosure.

Mr. Johnson asked if there were any corrections to the minutes of the December 6, 2010 meeting. Earl Wunderli moved to approve the minutes. Gary Sackett seconded the motion and it passed unanimously.

2. PROPOSED AMENDMENTS TO SUPREME COURT RULES OF PROFESSIONAL PRACTICE: RULES 14-503, 14-510 AND 14-533

Mr. Johnson invited Bruce Maak, chair of the Utah Supreme Court's Ethics & Discipline Committee, to set the stage for the committee's discussion of the proposed changes to Supreme Court Rules of Professional Practice 14-503, 14-510 and 14-533. Mr. Maak began by explaining that his August 2011 annual written report to the Supreme Court sparked the Court's interest in four areas: (1) diversions at the screening panel level, (2) judicial participation in the disciplinary process, (3) sanctions at the exception level, and (4) under-performing screening panel members. After reviewing the report, the Supreme Court invited Mr. Maak, Terrie McIntosh (vice chair of the Ethics & Discipline Committee) and Billy Walker to attend the October 25, 2011 Supreme Court administrative conference to discuss these issues. At the conclusion of the court conference, the Supreme Court asked Mr. Maak, Ms. McIntosh and Mr. Walker to draft proposed changes to Rules 14-503, 14-510 and 14-533 and present those changes to this committee for review.

With respect to issue #1 (diversions at the screening panel level), Mr. Maak noted that Rule 14-510(b)(6)(B) allows screening panels to refer informal complaints to the Diversion Committee to be processed in accordance with Rule 14-533. Rule 14-533 provides that diversions may be utilized for less serious misconduct generally involving non-repeat offenders whose misconduct does not involve dishonesty and whose misbehavior would otherwise potentially result in an admonition or public reprimand. Mr. Maak observed that diversions typically occur prior to screening panel involvement. When diversions are initiated at the screening panel level, difficulties arise under current diversion procedure because screening panels are unable to interact with the Diversion Committee and the respondent on the multiple occasions that Rule 14-533 requires. To address this problem, Mr. Maak proposed that Rule 14-510(b)(6)(B) be modified as follows:

(b)(6)(B) The informal complaint shall be referred to the Diversion Committee for diversion. In this case, the specific material terms of the Diversion Contract agreed to by the respondent are to be recorded as a part of the screening panel record, along with any comments by the complainant. The screening panel shall have no further involvement in processing the diversion. The Diversion Committee shall process the diversion in accordance with Rule 14-533.

After the committee considered the proposed rule change and discussed the authority of the Diversion Committee to administer diversion contracts, John Bogart made a motion that the revised rule be recommended to the Supreme Court. Simon Cantarero seconded the motion and the motion passed 13-2.

With respect to issue #2 (judicial participation in the disciplinary process), Mr. Maak informed the committee that respondents and screening panel members have inferred

through the years that if attorney misconduct occurs in the context of a judicial proceeding but a judge fails to initiate disciplinary proceedings or sanction the attorney himself or herself, the attorney's conduct must have been ethically appropriate. To clarify that a judge's failure to mete out discipline or refer an attorney to OPC does not suggest that an attorney's conduct was ethically appropriate, Mr. Maak proposed that Rule 14-510(b)(1) be modified as follows:

(b)(1) Review and investigation. A screening panel shall review all informal complaints referred to it by OPC counsel, including all the facts developed by the informal complaint, answer, investigation and hearing, and the recommendations of OPC counsel. *In cases where there is a judicial officer's failure to address or report a respondent's alleged misconduct, the screening panel should not determine that this failure to address or report is evidence either that misconduct has occurred or has not occurred.*

After the committee discussed the proposed rule change, Gary Sackett made a motion that the revised rule be recommended to the Supreme Court. Stuart Schultz seconded the motion and the motion passed 14-1.

With respect to issue #3 (sanctions at the exception level), Mr. Maak reminded the committee that when a respondent appeals from a screening panel's recommendation under Rule 14-510(c), the hearing officer (the chair or vice chair of the Ethics & Discipline Committee) cannot modify the screening panel's recommendation to be more severe than the original recommendation. Mr. Maak suggested that this presumes that screening panels only make mistakes in over-sanctioning attorneys, but never in under-sanctioning them. Mr. Maak also reminded the committee that current procedure is skewed in one direction; OPC cannot appeal screening panel recommendations or sanctions at the exception level.

When Mr. Maak, Ms. McIntosh and Mr. Walker discussed this rule with the Supreme Court on October 25, 2011, the Court suggested that the rules committee revisit the asymmetry in the current rule. Accordingly, Mr. Maak proposed revisions to Rule 14-510(c), (d), (e) and (f) which would allow both OPC and respondents to appeal screening panel determinations and recommendations.

Because the committee studied this rule at great length in 2008, committee members asked Diane Abegglen to locate and circulate the minutes from the 2008 meetings. The committee then determined that further research and discussion were necessary before they could act on Mr. Maak's proposed revisions. Paul Veasy made a motion that the proposed revisions to Rule 14-510 be approved. John Bogart made a substitute motion that Rule 14-510(c) through (f) be tabled for future consideration. Tom Bruner seconded the substitute motion and the motion passed 13-2.

With respect to issue #4 (under-performing screening panel members), Mr. Maak explained that the Rules of Lawyer Discipline and Disability do not address in any

detail what is to be done when screening panel members do not perform properly. Rule 14-503(b) authorizes the chair of the Ethics & Discipline Committee to “supervise” the committee and screening panels, but the rule does not specify how the chair should handle under-performing or poorly performing screening panel members. To address this gap, Mr. Maak proposed that Rule 14-503(b) and (e) be revised as follows:

(b) Committee chair. The Committee chair shall supervise the Committee and screening panels. The chair is responsible to maintain an adequate check on the work of the screening panels to ensure that matters move forward expeditiously, to determine that screening panels have a uniform basis for the judgments rendered, and to provide the screening panels with information concerning ethics and judicial decisions necessary to their activities. The chair shall make recommendations to the Supreme Court concerning appointments to *and removals from* the screening panels and reports concerning the activities of the screening panels and overall work of the Committee.

(e) *Removal, alternates.* The Committee chair may recommend removal of a Committee member by notifying the Supreme Court of the recommendation of removal and reasons for the recommendation. The removal shall take effect upon the Supreme Court’s acceptance of the recommendation. Members of any screening panel may serve as alternate members on different screening panels. The Committee chair and the Committee vice chairs may serve as alternate members on all screening panels.

After the committee discussed the proposed rule changes, John Bogart made a motion that the revised rule be recommended to the Supreme Court. Kent Roche seconded the motion and the motion passed 14-1.

Finally, Mr. Maak noted that the workload of the Ethics & Discipline Committee’s chair and vice chair is enormous. At the urging of the Supreme Court, Mr. Maak proposed the following changes to Rule 14-503(a) and (c) to add a second vice chair:

(a) Composition. The Committee shall be appointed by the Supreme Court. The Committee shall consist of eight public members and 7 members of the Bar who have demonstrated a high standard of professional conduct. All appointments shall be for a term of three years. The Supreme Court shall designate one lawyer member as Committee chair; one lawyer member as Committee vice chair; and one lawyer member as a second Committee vice chair. Committee members shall not serve more than two consecutive terms.

(c) Vice chairs. The Committee vice chairs shall act in the event of the chair’s absence or resignation. In the event of the chair’s absence or resignation, a vice chair will become the chair. The chair may call upon either vice chair to assist in any of the Committee chair’s duties.

After the committee considered the proposed rule changes, Leslie Van Frank made a motion that the revised rule be recommended to the Supreme Court. John Bogart seconded the motion and the motion passed unanimously.

Mr. Johnson will prepare a letter to the Supreme Court recommending that the rules changes approved above be sent out for public comment.

3. UPDATE: LAWYER ADVERTISING COMMITTEE

Gary Sackett reported that the Utah State Bar Commission's lawyer advertising committee is in the early stages of its work. Further information will be shared with this committee as the work of the Bar Commission committee progresses.

4. OTHER BUSINESS

None.

The next meeting will be held on Monday, January 30, 2012 at 5 p.m. in the Board Room of the Law & Justice Center.