

**MINUTES OF THE  
JUDICIAL RULES REVIEW COMMITTEE**

Wednesday, June 27, 2001 – 2:00 p.m. – Room 414 State Capitol

**Members Present:**

Sen. Terry R. Spencer, Senate Chair  
Rep. Greg J. Curtis, House Chair  
Sen. L. Steven Poulton  
Rep. Scott Daniels  
Rep. Stephen H. Urquhart

**Staff Present:**

Mr. Jerry D. Howe,  
Research Analyst  
Ms. Susan Creager Allred,  
Associate General Counsel  
Ms. Cassandra Bauman, and  
Ms. Glenda S. Whitney,  
Legislative Secretaries

**Members Absent:**

Sen. Pete Suazo

**Note:** A list of others present and a copy of materials distributed in the meeting are on file in the Office of Legislative Research and General Counsel.

**1. Call to Order**

Chair Curtis called the meeting to order at 2:23 p.m.

Mr. David Nuffer, Utah State Bar, distributed handouts "Regulation of the Practice of Law in Utah," "Initiatives for Delivery of Legal Services," and "Utah Bar Journal, June/July 2001." He reviewed the handouts and presented an overview on the regulation of the practice of law in Utah. He said the Supreme Court, by rule, governs the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law. He noted that the Utah State Bar regulatory functions deal with admissions and licensing.

Mr. Nuffer reviewed the initiatives for delivery of legal services and noted that the Utah State Bar was among the first bar association to establish a Legal Assistants Division and is monitoring all developments in licensing legal assistants. With regards to multidisciplinary practice, he said, the Bar commission unanimously recommended Utah regulate and permit multidisciplinary practice, affiliation of diverse professionals, allowing lawyers and others to share profits and management, and proposed rules for adoption. He indicated that a petition was filed in February 2001, and the Utah Supreme Court referred to this matter in its rules committee requiring a report by October 1, 2001. Mr. Nuffer concluded by referring to the June/July Utah Bar Journal and answered questions of the committee.

**2. Discussion of Proposed Modification**

- *Code of Judicial Administration*

Chair Curtis explained that the proposed rules were drafted in response to legislation that was past in the 2000 General Session.

Mr. Jerry D. Howe, Research Analyst, and Ms. Susan Creager Allred, Associate General Counsel, distributed a handout "Proposed Amendments to the Code of Judicial Administration," and addressed proposed rules and recent development from the advisory committee.

Mr. Richard Schwermer, Administrative Office of the Courts, responded to comments and concerns of the committee on the proposed rules.

Mr. Howe explained that these rules define the Judicial Council's role in certifying judges for retention election.

The committee reviewed the rules and made the following recommendations to the proposed rules.

- **Rule 2-106.05. Administration of the performance evaluation program for judicial self improvement** - Chair Curtis referred to page 8, lines 15-20 and questioned the drafting of the geographic regions, "Region 5: The Supreme Court and the Court of Appeals."
- **Rule 3-111. Performance evaluation for certification of judges and commissioners.** Chair Curtis referred to page 13, lines 21 and 22, and page 15, lines 10 and 11. He said this language is deleted in the proposed rules. The general retention question on page 13, which asks the respondent if the judge or commissioner should be retained, is deleted. The committee felt that, as the lawyers' opinion of a judge is important to the voters, this question should be retained, and the results provided to the public. The general evaluation question of the jurors, on page 15, provides useful information and the results should also be made available to the public.

In the 1985 debate of the Judicial Article, the Legislature was told that the State Bar should devise a system to rate judges and that the system should be made public. This is the only question on the survey that directly asks whether the subject judge ought to be retained. It serves to inform the public what attorneys think should happen with respect to retention. It is a valid question, and the committee recommended that it continue to be asked and the results reported.

Mr. Schwermer responded to the concerns of the committee and said the direction from the Legislature was that the public needed some more information on which to base a retention election decision or vote. Also, that the Judicial Council certification process of certifying somebody as qualified to be retained needs to be a more serious process than it is now perceived. He said the council tried to respond to both of these issues. It was reported to

the Judiciary Interim Committee in October 2000, the 12 steps that the Judicial Council is taking to address this issue. He noted that the Judiciary Interim Committee was fine with the language.

- **Rule 3-111.02. Judicial performance evaluation criteria** - Chair Curtis referred to page 19, line 32, and said the discretionary language of "may" is used regarding the application of the listed criteria. It would seem appropriate to change the "may" to "shall," as the committee is not aware of any circumstance in which the Council would need to exclude any criteria from application.

Mr. Schwermer said in Rule 3-111.02, it is viewed as the general list of issues, an introductory general statement of the broad areas on which they will evaluate judges. Then in Rules 3-111.03 through 3-111.07, the language "shall" is used which indicates the enactments of the general language in Rule 3-111.02.

- **Rule 3-111.03. Standards of judicial performance** - Sen. Poulton addressed concern with page 22, lines 9-36, regarding the ability of judges to exclude attorneys from responding to the attorney survey. The committee discussed the justification for attorney exclusions in general terms. They suggested that exclusions of any nature, including exclusions permitted on page 22, lines 12-20, seem to undermine the purpose of conducting the survey.

The committee understands that judges in some small rural districts are concerned that the bias of a few attorneys can disproportionately affect the survey score. The committee is sympathetic to the judge with small attorney population, yet the rule is drafted as broadly as possible, affecting all judges in all districts. If the Judicial Council shares the concern that surveys in small rural districts are distinguishable from the larger urban districts, then a more narrowly crafted rule would be sufficient. By excluding certain attorneys, one effectively silences these voices. Because it is reported that so few judges actually exclude attorneys, the committee finds it difficult to understand the need for the rule at all.

Should the Council decide to keep the rule, the committee respectfully requests that it narrowly draft the rule to apply only to judges with respondent pools smaller than thirty attorneys. It would seem that only these smaller pools are potentially affected by the inability to exclude any respondents. Also, they suggested that the rule require disclosure to the attorney who is to be excluded from the survey. The committee would also suggest that if a judge believes that animus between himself and an attorney is so strong as to cause the judge to believe the attorney would exercise intentional bias against the judge, then it seems appropriate that the judge should be recused from cases in which that attorney appears.

- **Rule 3-111.03. Standards for judicial performance** - Rep. Urquhart referred to page 21, lines 31-37. This rule concerns the evaluation by attorneys. Currently, a ranking of "adequate" carries the same weight as a ranking of "excellent." As a result, this type of scoring prevents the public from distinguishing between judges. Moreover, the committee felt that with three of the five options carrying the value of "satisfactory," there is a likely bias in favor of a satisfactory rating, even though the attorney may perceive a ranking of "adequate" to be less than "satisfactory."

It appeared to the committee that the current five-point scale used to solicit responses, combined with the current scoring mechanism, and including the opportunity for attorney exclusions, denies the public a complete view of how the attorneys perceive the judges.

- **Rule 3-111.03. Standards for judicial performance** - Chair Curtis addressed concern with survey respondents on page 22, lines 37- 43. Survey respondents are to be selected with a preference for those attorneys who appear most frequently and most recently before the judge. This selection process favors the last year or two of a judge's term at the expense of first part of the term. If the judge is to be accountable on his record, as was indicated in Justice Oaks' discussion with the Legislature in 1985, then a judge should be accountable for the entire record, not just the last portion of the term. Moreover, as attorneys who appear before judges most often and most recently are favored as respondents, some attorneys feel that their anonymity may not be adequately protected.

The committee suggested that the respondents be selected to reflect a review of the entire term, not just of the last year or two of the term.

- **Rule 3-111.03. Standards for judicial performance** - On page 24, lines 16-20, The guidelines for determining "substantial compliance" were discussed, and concerns were raised that there are no standards for either the number of formal or informal reprimands that would cause a judge to not be in substantial compliance with the Rules of Judicial Conduct.

The committee expressed concern that the rule contains no specific guidelines as to how the information will be used. The committee would recommend some clarification so that a judge with either a certain number of formal or informal reprimands, or both, within an established period of time could not receive certification.

- **Rule 111.04. Evaluation and certification of judges and commissioners** - Chair Curtis addressed concern with page 25, lines 40-45. He said the Judicial Council may not be the appropriate body to draft a statement under Section 20A-7-702 regarding judicial

misconduct. In addition, the committee thought that a sanctioned judge should not have an opportunity to recommend amendments to the statement regarding his own misconduct.

**3. Discussion of Rules which comment period ended May 2001**

The committee did not review the rules out for the comment period which ended May 21, 2001.

Mr. Schwermer mentioned that the provision regarding Scientific Evidence was the only rule that received significant comment.

**4. Other Business and Adjourn**

Chair Curtis directed staff to draft a letter with the Judicial Rules Review Committee's comments and concerns to the Judicial Council for comment.

Chair Curtis adjourned the meeting at 4:28 p.m.

