ORAL ARGUMENT — 10/21/98
98-0724
IN RE NOLO PRESS

KENNEDY: I represent relators, Nolo Press. This is an original mandamus proceeding seeking from this court an order directing the Unauthorized Practice of Law committee to release to relator and to the public certain information regarding the Unauthorized Practice of Law Committee's (UPL) rules and regulations, the composition of its subcommittees, basic information about its meeting times, dates, schedules and agendas, and particular information about the investigation of my client, Nolo Press.

An issue before this court is whether the UPL will be regulated by the same type of open and fair proceedings that are applicable to other government agencies.

ENOCH: What proceedings are happening in the unauthorized practice of law? What do you think is going on?

KENNEDY: The current status as to my client, Nolo Press, is it has been notified that it is subject of an investigation by the UPL committee's subcommittee in Dallas. And had been until this court stayed the hearing requested to appear at a hearing before the Dallas subcommittee on August 20, 1998.

ENOCH: Does the UPL committee have any authority other than to bring a lawsuit to seek a judicial determination of whether or not Nolo Press is practicing law unauthorizedly?

KENNEDY: According to the subcommittee rules that were produced to us after we filed this lawsuit, yes, it does. It has significant authority that has practical effects on people that are subject to it.

ENOCH: What is it?

KENNEDY: The committee has the authority to subpoena witnesses to appear before subcommittees or investigators of the committee as a whole to testify under oath, to answer questions about any of their activities. The committee can make decisions to investigate for long periods of time and then decide to drop them. The committee has represented to the court that it has the authority to reach agreements with the subjects of investigations in order to drop proceedings if it will agree not to do certain actions. And the subcommittees have the authority to vote and recommend to the UPL committee as a whole, whether or not to bring the proceeding.

ENOCH: The proceeding you're talking about is?

KENNEDY: The UPL committee can vote to bring a proceeding in DC to enjoin the

activities that it contends under the UPL.

ENOCH: But absent filing a lawsuit in court, you say they have the authority to issue a subpoena?

KENNEDY: They can issue a subpoena, they hold hearings and require people to come before them and testify under oath as to their activities. And they can do investigations and they can, as they have said, they can reach settlements with parties before the filing of lawsuits to seek to regulate what their conduct is.

ENOCH: Of course any individual who has a claim against any under individual could do any of those except, I guess an individual couldn't issue a subpoena unless they satisfied some rule of procedure on a pre-suit subpoena?

KENNEDY: That's true. In this case, the UPL committee is not acting as an individual. What it's acting as is a delegatee that tells us of this court's authority to enforce the boundaries of the practice of law. That is, there is a committee that consists of private practice attorneys, and what they've been delegated is the authority essentially to define the boundaries of their own...

BAKER: Doesn't it also have public members?

KENNEDY: Yes, there is a requirement that there be a minority of three members that are non-attorneys by statute. And the current make-up of the committee is that there are 6 attorneys, and 3 non-attorneys. And from the rules that the court has enacted governing the UPL committee, that majority of attorneys can adopt the rules themselves, and as far as we know, a majority of the attorneys can make the decision whether or not to file a lawsuit, whether or not to go forward with the proceeding.

HANKINSON: Under what authority does this court have jurisdiction to issue a mandamus in this proceeding?

KENNEDY: Under the courts inherent authority to regulate the practice of law. That is a difficult question that I struggled with before I filed this. I initially felt that the appropriate place might be the DC. And then in reviewing the order that was issued by this court in Sept. 1986, the court has assumed to itself the power to regulate this very issue with the UPL committee, and entered an order in Sept. 1986, regarding what documents and under what conditions the UPL committee would release information to the public. I think it's at tab 6 of the merits brief.

PHILLIPS: How would you distinguish the relief you're asking for from the relief that was sought in *Gomez v. State Bar*?

KENNEDY: The relief that was sought in *Gomez*, was an order from the DC that would

enact affirmative obligations on the attorneys of Texas to engage in mandatory pro bono. And the court's response to that was, that type of regulation of attorneys is the exclusive jurisdiction of the SC. It is not the job of the DC to do that type of affirmative regulation.

PHILLIPS: And we held that regulation was on our administrative side of our docket, not on the legal side.

KENNEDY: The court said that it would consider that type of issue on the administrative docket. In dicta in *Gomez*, the court said, that a DC could be empowered to review the constitutionality of a rule that this court has. And I think the issue in this case is, what Nolo Press is doing now are we challenging the constitutionality of that Sept. 1986 order in a general manner, which might be heard before the DC, or because Nolo Press is involved within a particular proceeding with the UPL committee is in a situation where it needs to get affirmative relief from the SC in an area where the SC itself has said it's exercising jurisdiction over, which is what the UPL committee will and won't disclose to the public.

So the difference between this case and *Gomez* is, if Nolo Press were to go to the DC there is no guarantee that Nolo Press could get the affirmative relief that would be necessary while it potentially could get a ruling as to whether or not this court's rule is constitutional. And there is some question to that under the declaratory judgment act, whether the declaratory judgment act gives a DC authority to determine the constitutionality of the court rule rather than a statute. The declaratory judgment act speaks in terms of statutes rather than court rules. Even if it could do that, there's no guarantee that the DC would have authority to grant affirmative relief and mandamus a UPL committee to provide the information. And that's because, according to the language contained in the same order by a court, the SC says that the UPL committee is exercising authority on behalf of the SC. And in simple terms, I don't think mandamus can run uphill from a DC to what is an arm of the SC. And the UPL committee has stressed that connection between itself and the SC and heavily on its own merits. For example, saying that what it is doing it is doing on behalf of the court. In making the decision to file here rather than the DC and looking at the order, I felt it would be very difficult to convince a district judge that it had authority to mandamus an arm of the SC.

ENOCH: As I read the order, the order gives standing to this UPL committee to bring a lawsuit to seek enjoining some person, organization, activity that the committee determines is the UPL. So the order simply says they have this standing to go to court to enforce the statute that requires people who are going to practice law to be licensed. Now why isn't the declaratory judgment act available to Nolo Press to say: Listen, they've notified us that they are going to investigate us. The only thing they can do as a result of this investigation is bring a lawsuit to try and enjoin our activities, let's bring a declaratory judgment action in the TC to declare whether or not we're violating any sort of statute in Texas. And then as a part of that through discovery seek who the members of the committee are and that sort of thing, and if the TC denies it, then you bring that up as a mandamus on whether or not that's proper discovery. Why is that not what ought to be going

on here?

KENNEDY: I think that procedure is available to Nolo Press, that it could go to the DC and say: This is what we do: we publish books; we don't practice law, and we need a determination from the court that in fact what we're doing is not practicing law; and if we are defined as practicing law it would violate the constitution.

ENOCH: And you can virtually raise every issue you want to raise at that point?

KENNEDY: I believe we could do that. I think Nolo Press would prefer not to get to that point.

ENOCH: Is mandamus an appropriate remedy to stop someone from bringing a lawsuit?

KENNEDY: It's not the relief that Nolo Press is seeking from the court. We have not asked the SC to stop the UPL committee from investigating Nolo Press, or from bringing a lawsuit. What we are asking is an order from the SC telling the UPL committee that it needs to operate in the open, that it's rules should be published, that they should be public and available to the subject of the investigation.

BAKER: Isn't this basically then somewhat analogous to a discovery dispute? You've asked for documents, the other side won't produce them, and so you're now here saying: We want them produced.

KENNEDY: To some degree, yes.

BAKER: But do you also _____ when you answered Justice Enoch's question, that the declaratory judgment act procedure is available to your client in the DC to declare your rights in this matter?

KENNEDY: To declare the rights of the ultimate merits of the case of whether Nolo Press's publication are the practice of law, or are constitutionally protected _____.

BAKER: That's available to you?

KENNEDY: That's available What we're here before the court saying is it's more analogous to an open records case, which is why I labeled it a petitioner for writ of mandamus, because typically in open record's cases, you file a petition for mandamus.

BAKER: Well whether we like or not, the law under open records, the judiciary is exempt and you recognize that because you said so in your application for mandamus. So you're here on a common law due process claim?

KENNEDY: Yes. But we're not conceding that the Act does not apply. We have recognized it.

BAKER: You just said you didn't bring it under that. So if you didn't bring it under that, how can you argue it?

KENNEDY: In this proceeding we're not arguing that. The open records act does apply.

BAKER: Then if it's a due process situation, how do you answer the two cases that the committee cited that there's no finality to what they are doing now, so you don't have due process protection?

KENNEDY: There is no absolute finality to what the UPL committee is doing. We concede that. But, we do believe that there are principles of due process: equal protection and open government that this court should apply to its own arms just as the legislature has decided to apply that to the executive and the legislative branch. And that there should not be investigative and prosecutorial arms of any branch of government in Texas that takes the position that it's rules shall not be published and that's it members are secret.

BAKER: Haven't you gotten the rules? Is that correct or not? That's what they say in their response.

KENNEDY: Some of the rules have been provided after the lawsuit was filed. We now have been told that there are additional materials that have not been provided. There are exhibits to the subcommittee rules that are being withheld. Idenitified within the subcommittee rules themselves, 7 exhibits, those are being withheld. We've also identified that there are other materials, other procedural guidelines - handbooks - that is given to the committee and the subcommittee members when they join, and that they are also governed by that handbook. Those rules have not been produced and my understanding is they are being withheld.

ENOCH: You don't have to go to any hearing with the UPL do you? This all began with an invitation by just simply: If you don't come, then we might be inclined to think that there is something going on here. Is there something here you're saying that you're being compelled to attend against your will or anything like that in this case?

KENNEDY: No, but it is a proceeding that can substantially effect in a practical matter, the rights of my client.

ENOCH: If you have a client that comes to you and says: I want to file a lawsuit against X, Y, Z. I think they've done me wrong. And you write a demand letter and you say: either cease and desist what you're doing or pay us a bunch of money. And the other side says; No, I don't want to. Do you ever call them to see if we can't resolve this before we file a lawsuit?

KENNEDY: Sure, that's a possibility.

ENOCH: But you don't have to. But what really happens is, you've threatened them with a lawsuit, you've said we need to negotiate this out, and they can attend or not attend. But the ultimate result will simply be, you either file your lawsuit or you don't file your lawsuit. Is there a due process notion to the pre-suit process? Does the defendant have some sort of due process right to sit down and talk with you before you bring the lawsuit?

KENNEDY: There's two parallel things going on here. One is, that Nolo Press has been individually drawn in to this proceeding with the UPL committee. Getting in that process, Nolo Press came to the realization that the process is very closed and secret

ENOCH: Well your process with your client is closed and secret. All you want to do is talk to the defendant and see where the defendant's story is. But your process with your own client is secret as well until you finally file your lawsuit.

KENNEDY: But this is a government agency that is bound by rules. And it is a government agency that can exercise government authority and can file lawsuits if it chooses. And it isn't until we filed this lawsuit that we found out that the subcommittee was actually bound by rules. This court itself in this 1980 order, ordered that the UPL committee enact rules, it shall adopt rules. And it listed 6 different areas where the court was concerned that the committee should adopt rules, including things, such as: recusal of members in the case where it's possible that there is either a real or a perceived conflict of interest. The court was concerned about the UPL committee being governed by the rule of law.

It appears that the UPL committee has not in fact adopted rules governing itself.

ENOCH: But you're talking about it might have some internal rules about conflict before a board of directors determines whether to bring a lawsuit. Would that be a basis for a defendant coming in and say: I need to have all the information to make a determination somehow about whether or not I can be sued, or something?

KENNEDY: Perhaps. One might find it's not the government. And government agencies are bound to follow their own rules, and they are bound by the SC order to not have members participate in the process if there is an apparent or real conflict of interest. So without access to the rules, without access to information if the individuals are involved in the process, then those _____ subject - the rules aren't self enforceable. There is no way to investigate to see whether or not the people involved in the investigation voting on the recommendation, voting on the decision to file a lawsuit have in fact avoided the appearance of the reality of a conflict of interest.

BAKER: I understood you to say that you agreed with Justice Enoch's hypothetical that

you have available with the declaratory judgment act proceeding in a DC to declare your rights?

KENNEDY: Only to the extent to declare the ultimate right about whether...

BAKER: I understand that. But you also agree that within the framework of that type of litigation, you had discovery rights, too?

KENNEDY: Yes.

BAKER: And then, therefore, you can go to a DC and ask by a motion to compel the same thing you're asking this court to give you?

KENNEDY: Only if Nolo Press is forced to go and to challenge the merits of whether or not what it does is the UPL. Nolo Press would like to see this go away long before that stage.

BAKER: Well we probably will all agree with that. Do you also agree then if you were denied your motion to compel, you would have a right of mandamus at that time in the DC's?

KENNEDY: That's an open question.

BAKER: Well why wouldn't you?

KENNEDY: Well it's not clear whether a DC could mandamus the UPL committee to do something, which the committee feels is in violation of this court's 1986 order. We still would be in a position asking a DC to mandamus uphill. Even if we were involved in a proceeding that involved the UPL committee, we still have this 1986 order, which the UPL committee reads as prohibiting it from releasing any of this information to the public. Now we don't agree with this interpretation in this order, and we might convince a district judge that our interpretation of the order is correct. But what we cannot get is affirmative relief from the DC, I believe, that would tell an arm of this court what to do. Because I think that UPL committee would be in the position to say: no, we're the SC and we don't have to okay orders from an _____ court.

BAKER: Doesn't the same rationale though say that you don't appear, you don't get any information, recommendation is made to sue for an injunction against Nolo Press, that lawsuit is filed, you respond, do you still have the same discovery rights there to ask for everything you're asking for now?

KENNEDY: We might, and we may run into this same problem.

BAKER: In other words, on either side of this issue, there is a legal remedy available?

KENNEDY: I don't agree. Either way it is raised, if it's raised during a lawsuit on the

merits, we still face the difficulty of getting a DC to order an arm of this court to produce information when its position is it is controlled by an order that this court has entered itself.

PHILLIPS: The State Board of Law Examiners and the State Bar of Texas, two entities, have considerable regulatory power over people's lives, and they are sued more than occasionally in DC over issues of remedies. Why is this order the SC passed carrying out a legislative mandate on UPL different than other SC _____?

KENNEDY: In this case it's different, and the committee is telling us it's different is because what the committee is doing it is doing on behalf of the court. And what the state bar is doing it is doing on behalf of a legislative mandate, and the SC has recognized that in this particular area of the UPL committees release or nonrelease of the information that Nolo Press seeks.

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RESPONDENT

LAWYER: This proceeding contemplates the utilization of an extraordinary remedy, a writ of mandamus, against Mr. Rodney Gilstrap, the chair of this court's UPL committee. And it would be wrong for this court to exercise its original mandamus jurisdiction in this manner when there has been no showing for violation of any duty imposed by law.

HECHT: Does the court have the jurisdiction?

LAWYER: Under mandamus, I don't think it's appropriate.

HECHT: They should go to the DC?

LAWYER: I believe that there's an adequate remedy at law. In addition to the fact that they haven't met their burden as to a violation of a duty imposed by law, or even raised a complaint about an abuse of discretion, there is an adequate remedy at law. There are factual disputes still out there.

HECHT: So respondent's position is that this can be fully litigated and an appropriate order is issued by the DC?

LAWYER: And ultimately, this court may exercise its regular appellate jurisdiction over some of the rulings that are made. And in fact, might exercise mandamus jurisdiction with respect to a DC's ruling on some of these issues. But in a sense, it's really actually premature and they haven't met what they need to meet to get this extraordinary remedy from the court at this time.

PHILLIPS: Briefly summarize what are the factual disputes, and what are the adequate remedies at law that are available?

LAWYER: If I can go through the information that they have asked for. They have asked for the rules and procedures. Our position is, they have all of the committee's rules and procedures. They have been provided with those.

OWEN: What about the exhibits that are referenced in the rules?

LAWYER: The exhibits are not there and there is some dispute over both the forms that are utilized by the UPL committee in their investigations, and the handbook as well. And it's our position that they aren't rules or regulations, that they are clearly records and documents covered by the confidentiality order.

OWEN: Why are the exhibits covered by the confidentiality order?

LAWYER: I think you can argue that they are records and documents of the committee. I think you can also argue that these are forms that they utilize within their investigations and litigation. For example, in the handbook, this is a handbook that was developed specifically to aid the members to conduct effective investigations in litigation. It contains advice and opinions and sort of strategies, I guess. There are litigation forms in there. The committee can't see how anybody much less a potential adversary would be entitled to those kinds of documents. And the document is not before the court. It is not before the court to be reviewed, and without that, it doesn't seem that the court would be in a position to order the production of those. So either they have all the rules and regulations and the issue is moot, or there still exist a dispute with respect to the nature of the documents that are not before the court.

The next issue is the minutes and the agendas. The minutes and the agendas clearly are covered by a confidentiality rule. It's important to understand that UPL meetings consist almost entirely of discussions of on-going investigations, pending and anticipated litigation, the minutes...

PHILLIPS: I thought you were outlining the factual issues, the reason mandamus couldn't be granted because they were disputed facts?

LAWYER: Of the disputed facts, again these agendas and minutes are not before the court. They are claims of confidentiality within the minutes that the committee does claim. And it seems to me that if these documents are not before the court, that they can't be ordered to be produced without knowing the extent of the confidential information that is within it. Those are the two items of information that's been requested, that they are it seems to me disputes with respect to what's actually within them.

OWEN: Why couldn't they be submitted for in-camera inspection by this court?

LAWYER: I could not find any case in which an original mandamus proceeding was filed

where the documents that were produced to the court without having first been produced, for example, before a DC in camera, and then the records sent up to the SC. Even the *A&T* case, I think that's cited in their brief, I think that's distinguishable 1) because it was brought pursuant to the Texas Open Records Act, and 2) because I believe this court exercised jurisdiction because it believed that it was the only court that had the ability to mandamus an executive officer of the state. So I think that case can be distinguishable. And even in that case, it didn't look to me as if the documents had actually been submitted to the court for in camera. So I could find no mechanism available for that.

PHILLIPS: So if indeed the DC didn't have jurisdiction over this dispute, this case would be like _____?

LAWYER: It seems to me that what they are really complaining about is the confidentiality rule. They say it covers records and documents of the committee; don't really think that this is right. And they can challenge that. That's an actual rule of the court. They can challenge that in DC. I think it is analogous to both the *Schenault* and *Gomez* cases of the court. In those cases, the court said: Our inherent power to regulate the practice of law are administrative powers. They are not jurisdictional powers. And just because we maintain the ultimate authority to regulate the practice of law doesn't mean that we're going to assume exclusive jurisdiction over any action affecting that authority. And just because it's a rule of a court doesn't change that. Lawyers challenge the rules of professional conduct, which are also rules of this court, the rules of disciplinary procedure, which are also rules of this court all the time in DC. In fact, just last term this court ultimately exercised appellate jurisdiction to a challenge of one of the disciplinary rules. So that appears to be an avenue that is certainly available to that court. They can make all of these same arguments. A DC is certainly capable of considering any arguments with respect to that, including constitutional ones, and ultimately, this court may very well exercise appellate jurisdiction over any ruling that a DC can make.

I think it's also important to understand that proceedings before subcommittees do not carry finality. I think some of the questions have gone to the respect of that. The names of the subcommittee members have been an issue that has been raised in the brief, and it's important again for the court to recognize that the committees are made up entirely of volunteer lawyers and non-lawyers. The system is completely dependent upon their service. And unlike the grievance committees don't have any paid staff of investigators or litigators, they have no administrative staff that acts as a kind of buffer between them and the public at large. They conduct all of their own investigations and litigation, and these subcommittee members have no power to enjoin anyone's activities in the state. They don't adjudicate matters. They don't enter judgements. The extent of their authority collectively is simply to recommend that a lawsuit be filed to the state committee.

ENOCH: Mr. Kennedy says they can issue subpoenas and put people under oath and compel them to appear?

LAWYER: The subcommittee themselves cannot issue subpoenas. If you actually look

at the rules, it's only the state committee who is authorized to issue subpoenas. The subcommittee has to actually get authority permission from the state committee to do that. And in practice they rarely do so. I think in the documents that you have there, you can see that most the meetings that they have are informal. They are tape-recorded.

OWEN: But they do have the authority to do that, you concede that?

LAWYER: The subcommittee, yes.

OWEN: Why should their identities be kept from the public?

LAWYER: I think there are several reasons. One, as I was saying, that they have no ability themselves to actually enjoin anybody's activities. I think the effect of releasing the names of individuals who have no ultimate power of authority to enjoin anybody's activities could subject them to undue harassment.

ENOCH: Are grand juror names and addresses released to the public?

LAWYER: I don't know if they are or not. I was always under the impression that they were not released.

ENOCH: Does this subcommittee or even the state committee have the power of a grand jury?

LAWYER: No. The end result of a grand jury would actually be to issue information or indictment that becomes the basis of the criminal charge or lawsuit in DC.

ENOCH: The recommendation of this committee or the state committee could simply result only in the bringing of a civil lawsuit that would have all the discovery rules, the rules of civil procedure, rule 76a, all applicable to that. Is there any reason why a different view of the publicness of the members of the committee be than the members of a grand jury? Need to know who these people are. They are making these major decisions.

LAWYER: I think that they are protections that are built-in to the way that the process works that can take care of that. They bring up questions about potentials for abuse. Well the matter may never reach DC, so it may never actually become relevant. And second, even if you say, say there is some particular member with some sort of acts to grind, they still have to convince a subcommittee to recommend a lawsuit. They still have to get authorization from the state committee to actually authorize a lawsuit. It seems there are procedural mechanisms that are built-in to the system to address those complaints. In fact, the lawsuit that Nolo Press actually raises in their brief, the case pending in Harris county where they had some questions or suspicions about the particular lawyer who was acting on behalf of the UPL committee, the respondents did just that. They were represented by high

competent counsel, and they raised all of these complaints to the district judge regarding the motives of the particular lawyer and due process concerns and complaints, and the DC is certainly capable of and duly considered all of those arguments.

It seems to me given the fact that when you come to the meeting, the identity of the members are identified to you. When you get there, the subcommittees require the individuals who are present to sign-in and so you know who was there when you come there. The real issue is that the names simply just aren't released to the public at large. And the reason the committee has done that before, and as I've said, is to sort to protect them from any sort of undue harassment, being sued individually. Like the Republic of Texas having liens placed on their property.

PHILLIPS: Doesn't the Public Information Act require a district attorney's office to release the names of its assistants, its lawyers, and its investigators?

LAWYER: I believe that it is covered by the Texas Public Information Act. But anyway if you want to have reasons as to why they have not done it, those are the reasons why they have not done it before.

OWEN: Why was the committee so reluctant to provides its rules of procedure to Nolo Press?

LAWYER: We thought that they had they rules and procedures. And once we learned that they did not have them they were provided to them immediately.

OWEN: It wasn't until after this lawsuit was filed?

LAWYER: That's correct, and I don't have an answer for that . I only know that I thought that they had them, and when we learned that they didn't have them, we provided it to them and they have all of the rules and procedures now.

HECHT: How are these issues different than *Gomez*?

LAWYER: The difference in *Gomez,* if I recall in that case, was that the court said: what those plaintiffs were seeking were a new regulation - some new requirement that wasn't already in existence. If I recall in *Gomez*, the court said: You know if we actually had rules out there, if we had actually promulgated rules out there, then the DC would have been in a position to consider any attacks on any rules that were out there. They have obviously jurisdiction to consider any complaints against rules that have been promulgated. And that's why I think that this is analogous, is that you have promulgated rules that can be attacked in DC in the same way that you could attack any other statute or rule of the court.

I think in *Gomez,* that what they were asking for was a new requirement that

lawyers actually be required to perform a certain number of hours of pro bono work.

HECHT: But they claim that there were constitutional basis for that. They didn't just argue that as policy. They said there were legal reasons why that should be done.

LAWYER: I am trying to remember what they were. I believe that it was more of a policy argument than anything else at that time.

And I do think it is, again, analogous to the *Shenault* case where the lawyers made the same kind of argument where: Look, you regulate the practice of law, you ultimately decide what is or what isn't going to be done, and that's why we've come to you directly. And I think the court in there said: Look, those powers are administrative. They are not necessarily jurisdictional. And that's why we are here saying that mandamus relief is not appropriate. Before you even get to the adequate remedy at law, I think you have to show that this has been in violation of some duty imposed by law. Nolo Press has failed to cite to a single statute that would have required Mr. Gilstrap to disclose this information. In fact, the only rule out there is the confidentiality rule. They haven't argued that he abused his discretion. And so, before you even get to the adequate remedy, I think they have those problems as well. Nor does mandamus appear to be appropriate for this court to exercise its rule-making authority. They say: well could you modify or change the rule and make it more clear to us. Again, it seems like that's directly at odds with what mandamus proceedings are supposed to be about, and this court has said before that it will not exercise its rule-making authority by way of judicial opinion. It would probably set a bad precedent. Anybody who would ever have a complaint against the committee would come straight to this court to try to get it resolved. As it is just the granting of the petition has halted some investigations in the UPL process. There have been other individuals who have said they were going to bring mandamus actions. And we would just urge the court that in considering this case, that Nolo Press is not going to be without adequate remedy. They are not going to be in the position to not at least ask for relief in another forum, and that not to grant a writ of mandamus against one of this court's committees.

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REBUTTAL

KENNEDY: There is a fundamental difference between the rule that this court has enacted - orders that this court has enacted regarding its own committee, UPL, and rules that this court may promulgate governing procedures in lower courts. And the fundamental difference is that the lower courts are not, I do not believe, are in a position to grant relief against an arm of this court based on its determination of whether or not those rules meet a constitutional challenge.

The UPL committee has said that we should have gone to DC and filed an open records lawsuit, because DC's have original jurisdiction over open records lawsuits. While at the same time they are saying, they are not subject to the open records act. And so it seems inconsistent to take the position we should be going to the DC for relief while at the same time saying that relief is not

available.

The members of the UPL subcommittee are not grand jurors. And there are two reasons why they are significantly different. One is, a grand jury is not asked to and authorized to participate in investigations and prosecutions to determine the scope of their own professional interests of their own profession. The UPL committee is unique in Texas, and that is, given the legal authority to investigate and then to enforce through lawsuits, the boundaries of its own professions is not self-regulation. This is not attorneys regulating their own profession. This is private attorneys who do the lion's share of defining the boundaries of who can be an attorney, and what an attorney does. It's fundamentally different from what a grand jury does.

Another reason they are fundamentally different from grand juries, is because grand juries exist as a check on governmental power. In fact, the grand jury is there in order to make sure and be a check on a prosecutor before a lawsuit is filed. What the subcommittee members do is they are the investigative and prosecutorial arm of this court. They are not there as a check. And so there is a greater need for the public accountability for these people, because they are not acting on behalf of the public. They are asked to be an investigative and prosecutorial arm.

SPECTOR: The subcommittee members are they all lawyers or do they have non-lawyers as well?

KENNEDY: I don't know. One of the reasons I am here is I don't know who is on the subcommittees. The only subcommittee members who have been identified to Nolo Press are all attorneys.

GONZALEZ: If you were to show up at one of the hearings, you would find out.

KENNEDY: Well we would know who showed at the hearing, but there is no requirement that all of the subcommittee members attend the hearing. The rules that they produce said that a quarter of the subcommittee constitutes a quorum, so that an ⅛ of a subcommittee plus one could make the vote, to vote to decide. I don't know, and we don't know, and there is no requirement as there is in the statute that there be any percentage of non-lawyers on the subcommittees. Non-lawyers are by rule can be on the subcommittees, but we don't know the composition. And the public of Texas does not know whether the subcommittee is dominated entirely by lawyers in private practice or whether there is some balance.

ENOCH: If we move this over to the administrative docket and we just simply said, that when a person receives a letter of inquiry, that person is entitled to receive the members of the subcommittee and their addresses, and a copy of the rules and procedures that will be used for this information hearing, does that satisfy everything you are interested in?

KENNEDY: That would address two out of the four issues.

ENOCH: What are the other two?

KENNEDY: One is that Nolo Press believes that basic information about meeting times, schedules and agendas should be released.

ENOCH: Of course you would have to know where the meeting is.

KENNEDY: Well in general, not just the one for a particular investigation. For instance, this case has raised a good issue as to why that information should be available to the public. And I can see that there may be some information in minutes and agendas that could be redacted, but that's commonly done in open records case.

OWEN: If the meetings aren't open to the public what good does it do you to know where and when they occur?

KENNEDY: To simply note that the meetings are taking place. They take place on a regular basis and that the people of Texas will know how its government is acting. For instance, in this case there is still an open question, and I don't believe it's a fact issue, but it's an open question about when and whether these subcommittee rules were actually adopted. The only copy that's been produced is an undated, unsigned version of the rules. And the UPL committee is unable to say anything other than that these rules were adopted some time before July 23, 1981.

ENOCH: So you want the rule to be, that if they are going to have a meeting, that they post the notice of the meeting, but they note that it's not open to the public? That would satisfy No. 3?

KENNEDY: Something to that extent that says: These are the dates that we meet on a regular basis, and when they meet to discuss things that are not confidential, such as promulgating rules...

ENOCH: Unlike the open meetings act that limits them it would be okay if the rule said: if the meeting gets canceled there is no - they can meet even if a notice doesn't go out can't they? Or would you say that unless they send out the notice they can't meet?

KENNEDY: We're not asking relief that would have this court essentially enact a version of the open meetings act for this case. Our specific request is, we would like documents that reflect the meetings that have taken place and the dates and schedules to the extent the documents exist.

OWEN: In the past or prospectively?

KENNEDY: I believe the request was for 1997 and 1998. And then if there are documents reflecting the future meetings when they are scheduled that's what we've requested. We're not asking

the court to create a structure by which actions of the committee are or aren't validated depending on how they meet.

ENOCH: Of course the rule would have to operate prospectively. But the rule would be that upon request that they should distribute whatever is on their calendar for when their meetings are scheduled and where they will be meeting?

KENNEDY: That the information is public rather than secret.

ENOCH: Then No. 4, what's the last thing?

KENNEDY: The fourth is a particular question of Nolo Press, and Nolo Press has asked for documents relating to itself, and is focusing on two individual matters. One, is information regarding the identity and the complainant against it; and information regarding the scope of the investigation. Nolo Press publishes over 100 plus titles, and has not been given notice as to whether one, some or all of its titles are at issue.

ENOCH: As to the complaint, are you seeking anything more than just the nature of the complaint, or are you seeking the name of the complainant?

KENNEDY: The nature of the complaint and the source of the complainant, whether it was a private citizen, a member of the subcommittee, or a member of the bar. In this particular instance, we don't see any confidentiality concerns. There may be in certain cases. In this instance, we don't see them because of the nature of Nolo Press's business. It does not develop individual relationships. It doesn't have confidential relationships with clients or individuals. It simply distributes and publishes books.

We think it's important for Nolo Press and the public to know as to whether or not the alleged complaint against it has been generated by a member of the bar concerned about competition, or about some dissatisfied customer who is not satisfied with the quality of Nolo's publication.

BAKER: Did you have private competitors in your same market?

KENNEDY: Yes.

BAKER: What if it was a competitor who was just unhappy with the competition?

KENNEDY: That we would like to know as well. I think it would be unlikely because a competitor would be shooting himself in the foot to raise the issue in what they are doing in the law.

BAKER: So you see no reason why a complaint was made?

KENNEDY: In this particular instance, no.

OWEN: But you're asking us to make rules for everyone. And you do recognize in some circumstances it may not be appropriate to release...

KENNEDY: It may be. There may be where there is some type of personal relationship between the complainant and the subject of the complaint.