

PROPOSED MODIFICATION TO RULE 14-510
~~SEPTEMBER 1~~ OCTOBER 21, 2008, DRAFT

Rule 14-510. Prosecution and Appeals

(a) *Informal complaint of unprofessional conduct. . . .*

(b) *Proceedings before Committee and screening panels.*

(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.

(2) *Respondent's appearance.* Before any action is taken that may result in the recommendation of an admonition or public reprimand^[1] or the filing of a formal complaint, the screening panel shall, upon at least ~~[14]~~²¹ days' notice, afford the respondent an opportunity to appear before the screening panel. Respondent and any witnesses called by the respondent may testify ~~under oath,~~^{should be} ~~[2]~~ ^{All testimony is under oath} and respondent may present ~~[an]~~ ^{file} oral ~~[argument]~~ ^{arguments} with respect to the informal complaint. Respondent may also ~~submit~~ ^{with OPC} a written brief to the screening panel at least 10 days prior to the hearing, which shall not exceed ~~[ten]~~¹⁰ pages^[3] in length unless permission for enlargement is extended by the chair or the chair's delegate for good cause shown. A copy of the brief shall be forwarded by OPC counsel to the complainant.~~[~~

~~_____ (3) *Right to hear evidence.* The complainant and the respondent shall each have the right to be present during the presentation of the evidence unless excluded by the screening panel chair for good cause shown.]~~

~~[4]~~³ *Complainant's appearance.* A complainant shall have the right to appear before the screening panel personally and, together with any witnesses called by the complainant, may testify ~~under oath~~ with respect to the informal complaint or in opposition to the matters presented by the respondent. ~~[The]~~ ^{All testing is under oath.}

(4) *Right to hear evidence; cross-examination.* The complainant and the respondent shall have the right to be present during the presentation of the evidence unless excluded by the screening panel chair for good cause shown. Respondent may be represented by counsel, and complainant may be represented by counsel or some other representative.^[4] ~~[H] Either complainant [testifies at the hearing,] or respondent may [cross-examine complainant on the subject matter set forth in the informal complaint.] seek responses from the other party at the hearing by posing questions or areas of inquiry to be asked to the panel chair. Direct cross-examination will ordinarily not be permitted except when, on motion, the panel chair deems that it would materially assist the panel in its deliberations.~~

request
request
at discretion of chair if he
Burton suggested soften this language

(5) *Hearing Record.* The proceedings of any hearing before a screening panel under this subsection (b) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings. ~~[The screening panel chair]~~ Pursuant to its function as secretary to the Committee under Rule 14-503(h)(1), OPC shall be responsible for the assembly of the complete record of the proceedings, to be delivered to the chair of the Committee upon the rendering of the panel's recommendation to the Committee chair. OPC will also provide the chair of the Committee with an affidavit establishing the chain of custody of the record. The record of the proceedings before the panel shall be preserved for not less than one year following delivery of the panel's recommendation to the chair of the Committee and for such additional period as any further proceedings on the matter are pending or might be instituted under this section.

(6) *Screening panel determination.* Upon review of all the facts developed by the informal complaint, answer, investigation and hearing, the screening panel shall make one of the following determinations:

(A) The preponderance of evidence ~~presented does not raise facts [in]for which there is probable cause to believe~~ that the respondent was engaged in unprofessional conduct, in which case the informal complaint shall be dismissed. OPC counsel shall promptly give notice of such dismissal by regular mail to the complainant and the respondent. A letter of caution may also be issued with the dismissal.^[6] The letter shall be signed by OPC counsel or the screening panel chair and shall serve as a guide for the future conduct of the respondent. The complainant shall also be confidentially notified of the caution;

(B) The informal complaint shall be dismissed, conditioned upon the performance by the respondent of specified conduct which the Committee determines to be warranted by the facts and the Rules of Professional Conduct;

(C) The informal complaint shall be referred to the Diversion Committee to be processed in accordance with the provisions of Rule 14-533;

~~(D)~~ The informal complaint shall be referred to the Committee chair with an accompanying screening panel recommendation that the respondent be admonished;^[7]

~~(E)~~ The informal complaint shall be referred to the Committee chair with an accompanying screening panel recommendation that the respondent receive a public reprimand; or

~~(F)~~ A formal complaint shall be filed against the respondent pursuant to Rule 14-511.

(7) *Recommendation of admonition or public reprimand.* A screening panel

recommendation that the respondent should be disciplined under subsection (b)(6)(~~F~~D) or (b)(6)(~~D~~E) shall be in writing and shall state the substance and nature of the informal complaint and defenses and the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should be admonished or publically reprimanded. A copy of such screening panel recommendation shall be delivered to the Committee chair and a copy served upon the respondent.

(8) *Determination of appropriate sanction.* In determining an appropriate sanction and only after having found unethical conduct, the screening panel may consider any admonitions or greater discipline imposed upon the respondent within the five years immediately preceding the alleged offense.

(9) *Continuance of disciplinary proceedings.* A disciplinary proceeding may be held in abeyance by the Committee prior to the filing of a formal complaint when the allegations or the informal complaint contain matters of substantial similarity to the material allegations of pending criminal or civil litigation in which the respondent is involved.

(c) *Exceptions to admonitions and public reprimands.* Within ~~15~~30 days after service of the recommendation of an admonition or public reprimand on respondent, respondent may file with the Committee chair exceptions to the recommendation and may request a hearing. The exceptions shall include a memorandum, not to exceed 20 pages, stating the grounds for review, the relief requested and the bases in law or in fact for the exceptions.

(d) *Procedure on exceptions.*

(1) *Hearing not requested.* If no hearing is requested, the Committee chair will review the record compiled ~~by~~before the screening panel.

(2) *Hearing requested.* If a request for a hearing is made, the Committee chair or a screening panel chair designated by the Committee chair shall serve as the Exceptions Officer and hear the matter in an expeditious manner, with OPC counsel and the respondent having the opportunity to be present and give an oral presentation. The complainant need not appear personally. However, ~~Upon~~upon motion to the Exceptions Officer and for good cause shown, respondent may seek to augment the record before the screening panel or the original brief on exceptions, including:

(i) a request to call complainant as an adverse witness for purposes of cross-examination if complainant was not subject to cross-examination before the screening panel, and

d(2)(i)
as note

if respondent requested to adverse examine direct but did not relax if don't request

if request a transcript OPC with provide chair
custody assistant

(ii) a request for time to obtain a transcript of the screening panel proceedings to support respondent's exceptions, the cost of such transcript to be borne by respondent.^[8]

(3) *Burden of proof.* A respondent who files exceptions under this section (d) shall have the burden of showing that the recommendation of the screening panel is unsupported by substantial evidence~~[,]~~ or is arbitrary, capricious, legally insufficient or otherwise clearly erroneous.

(4) *OPC response.* The Exceptions Officer may request a written response from OPC to exceptions filed by respondent.

(5) *Record on exceptions.* The proceedings of any hearing on exceptions under this subsection (d) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings.

(e) *Final Committee disposition.* Either upon the completion of the exceptions procedure under subsection (d) or ~~[when]~~ if no~~[timely]~~ exceptions have been filed by respondent under subsection (c), the Committee chair shall issue a final, written determination that either sustains, dismisses or modifies the disciplinary recommendation of the screening panel.^[9] ~~[Any]~~ A modification of the screening panel's recommendation of discipline may ~~[be no]~~ not:

- (1) Be more severe than the original recommendation of the screening panel; nor
- (2) Require OPC to file a formal complaint under Rule 14-511.^[10]

(f) *Appeal of a final Committee determination of admonition or public reprimand.*

(1) Within 30 days after ~~[the Committee chair issues]~~ service by OPC of a final, written determination of an admonition or a public reprimand in a matter for which exceptions have been filed by respondent under subsection (c), respondent may file a request for review with the Supreme Court seeking reversal or modification of the final determination by the Committee.

~~(3)~~ (2) A request for review under this subsection (f) will be subject to the procedures set forth in Title III of the ^{Utah} ~~Supreme Court's~~ Rules of Appellate Procedure.

~~(3) The cost of any transcription of the record below that any party or intervenor wishes to submit shall be borne by the submitting party.~~

(4) The Supreme Court shall conduct a review of the matter on the record ~~[and shall either sustain, reverse or modify the final determination of the Committee].~~^[11]

(5) The final decision of the Committee shall be presumed valid; respondent shall have the burden of demonstrating ~~that the Committee action was:~~

shall be borne by the party requesting the record

(i) Based on a determination of fact that is not supported by substantial evidence when viewed in light of the whole record before the Court;

(ii) An abuse of discretion; [or]

(iii) Arbitrary or capricious[-¹²]; or

(iv) Contrary to the Rules of Professional Practice of the Supreme Court.¹¹

Rules of Professional Practice

Article 5 and Article 6

(g) General procedures.

(1) Service. To the extent applicable, service or filing of documents under this Rule is to be made in accordance with Utah Rules of Civil Procedure 5(b)(1), 5(d) and 6(a).

(2) Documents submitted under this Rule shall conform to the requirements of Rules 27(a) and 27(b) of the Utah Rules of Appellate Procedure, except it is not required to bind documents along the left margin.

Chapter 14 to Rule

Rules of Discipline Disability

[The Committee recommends that such rules changes as are adopted by the Supreme Court are to be applicable to all proceedings that are subject to Rule 14-510 as of the effective date of the changes.]

of Professional Practice of the Supreme Court

Standards for Imposing Censure Sanctions

¹¹These are standards from the Utah Administrative Procedures Act, §§ [63-46b-16]63G-4-403(g), [-16]-16(h)(i), -16(h)(iv) and 16(h)([iv]iii) (2008), respectively.