

1 **Rule 14-510. Prosecution and appeals.**

2 (a) Informal complaint of unprofessional conduct.

3 (a)(1) Filing. A disciplinary proceeding may be initiated against any member of the
4 Bar by any person, OPC counsel or the Committee, by filing with the Bar, in writing, an
5 informal complaint in ordinary, plain and concise language setting forth the acts or
6 omissions claimed to constitute unprofessional conduct. Upon filing, an informal
7 complaint shall be processed in accordance with this article.

8 (a)(2) Form of informal complaint. The informal complaint need not be in any
9 particular form or style and may be by letter or other informal writing, although a form
10 may be provided by the OPC to standardize the informal complaint format. It is
11 unnecessary that the informal complaint recite disciplinary rules, ethical canons or a
12 prayer requesting specific disciplinary action. The informal complaint shall be signed by
13 the complainant and shall set forth the complainant's address, and may list the names
14 and addresses of other witnesses. The informal complaint shall be notarized and
15 contain a verification attesting to the accuracy of the information contained in the
16 complaint. In accordance with Rule 14-504(b), complaints filed by OPC are not required
17 to contain a verification. The substance of the informal complaint shall prevail over the
18 form.

19 (a)(3) Initial investigation. Upon the filing of an informal complaint, OPC counsel
20 shall conduct a preliminary investigation to ascertain whether the informal complaint is
21 sufficiently clear as to its allegations. If it is not, OPC counsel shall seek additional facts
22 from the complainant; additional facts shall also be submitted in writing and signed by
23 the complainant.

24 (a)(4) Notice of informal complaint. Upon completion of the preliminary investigation,
25 OPC counsel shall determine whether the informal complaint can be resolved in the
26 public interest, the respondent's interest and the complainant's interest. OPC counsel
27 and/or the screening panel may use their efforts to resolve the informal complaint. If the
28 informal complaint cannot be so resolved or if it sets forth facts which, by their very
29 nature, should be brought before the screening panel, or if good cause otherwise exists
30 to bring the matter before the screening panel, OPC counsel shall cause to be served a
31 NOIC by regular mail upon the respondent at the address reflected in the records of the

32 Bar. The NOIC shall have attached a true copy of the signed informal complaint against
33 the respondent and shall identify with particularity the possible violation(s) of the Rules
34 of Professional Conduct raised by the informal complaint as preliminarily determined by
35 OPC counsel.

36 (a)(5) Answer to informal complaint. Within 20 days after service of the NOIC on the
37 respondent, the respondent shall file with OPC counsel a written and signed answer
38 setting forth in full an explanation of the facts surrounding the informal complaint,
39 together with all defenses and responses to the claims of possible misconduct. For
40 good cause shown, OPC counsel may extend the time for the filing of an answer by the
41 respondent not to exceed an additional 30 days. Upon the answer having been filed or if
42 the respondent fails to respond, OPC counsel shall refer the case to a screening panel
43 for investigation, consideration and determination. OPC counsel shall forward a copy of
44 the answer to the complainant.

45 (a)(6) Dismissal of informal complaint. An informal complaint which, upon
46 consideration of all factors, is determined by OPC counsel to be frivolous, unintelligible,
47 barred by the statute of limitations, more adequately addressed in another forum,
48 unsupported by fact or which does not raise probable cause of any unprofessional
49 conduct, or which OPC declines to prosecute may be dismissed by OPC counsel
50 without hearing by a screening panel. OPC counsel shall notify the complainant of such
51 dismissal stating the reasons therefor. The complainant may appeal a dismissal by OPC
52 counsel to the Committee chair within 15 days after notification of the dismissal is
53 mailed. Upon appeal, the Committee chair shall conduct a de novo review of the file,
54 either affirm the dismissal or require OPC counsel to prepare a NOIC, and set the
55 matter for hearing by a screening panel. In the event of the chair's recusal, the chair
56 shall appoint the vice chair or one of the screening panel chairs to review and determine
57 the appeal.

58 (b) Proceedings before Committee and screening panels.

59 (b)(1) Review and investigation. A screening panel shall review all informal
60 complaints referred to it by OPC counsel, including all the facts developed by the
61 informal complaint, answer, investigation and hearing, and the recommendations of
62 OPC counsel.

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63 (b)(2) Respondent's appearance. Before any action is taken that may result in the
64 recommendation of an admonition or public reprimand or the filing of a formal complaint,
65 the screening panel shall, upon at least ³⁰~~21~~ days' notice, afford the respondent an
66 opportunity to appear before the screening panel. Respondent and any witnesses called
67 by the respondent may testify, and respondent may present oral argument with respect
68 to the informal complaint. Respondent may also submit a written brief to the screening
69 panel at least 10 days prior to the hearing, which shall not exceed 10 pages in length
70 unless permission for enlargement is extended by the chair or the chair's delegate for
71 good cause shown. A copy of the brief shall be forwarded by OPC counsel to the
72 complainant.

73 (b)(3) Complainant's appearance. A complainant shall have the right to appear
74 before the screening panel personally and, together with any witnesses called by the
75 complainant, may testify.

76 (b)(4) Right to hear evidence; cross-examination. The complainant and the
77 respondent shall have the right to be present during the presentation of the evidence
78 unless excluded by the screening panel chair for good cause shown. Respondent may
79 be represented by counsel, and complainant may be represented by counsel or some
80 other representative. Either complainant or respondent may seek responses from the
81 other party at the hearing by posing questions or areas of inquiry to be asked by the
82 panel chair. Direct cross-examination will ordinarily not be permitted except, on request,
83 the panel chair deems that it would materially assist the panel in its deliberations.

84 (b)(5) Hearing Record. The proceedings of any hearing before a screening panel
85 under this subsection (b) shall be recorded at a level of audio quality that permits an
86 accurate transcription of the proceedings. Pursuant to its function as secretary to the
87 Committee under Rule 14-503(h)(1), OPC shall be responsible for the assembly of the
88 complete record of the proceedings, to be delivered to the chair of the Committee upon
89 the rendering of the panel's recommendation to the Committee chair. The record of the
90 proceedings before the panel shall be preserved for not less than one year following
91 delivery of the panel's recommendation to the chair of the Committee and for such
92 additional period as any further proceedings on the matter are pending or might be
93 instituted under this section.

when upon

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

97 (b)(6)(A) The preponderance of evidence presented does not establish that the
98 respondent was engaged in unprofessional conduct, in which case, the informal
99 complaint shall be dismissed. OPC counsel shall promptly give notice of such dismissal
100 by regular mail to the complainant and the respondent. A letter of caution may also be
101 issued with the dismissal. The letter shall be signed by OPC counsel or the screening
102 panel chair and shall serve as a guide for the future conduct of the respondent. The
103 complainant shall also be confidentially notified of the caution;

104 (b)(6)(B) The informal complaint shall be referred to the Diversion Committee to be
105 processed in accordance with the provisions of Rule 14-533;

106 (b)(6)(C) The informal complaint shall be referred to the Committee chair with an
107 accompanying screening panel recommendation that the respondent be admonished;

108 (b)(6)(D) The informal complaint shall be referred to the Committee chair with an
109 accompanying screening panel recommendation that the respondent receive a public
110 reprimand; or

111 (b)(6)(E) A formal complaint shall be filed against the respondent pursuant to Rule
112 14-511.

113 (b)(7) Recommendation of admonition or public reprimand. A screening panel
114 recommendation that the respondent should be disciplined under subsection (b)(6)(C)
115 or (b)(6)(D) shall be in writing and shall state the substance and nature of the informal
116 complaint and defenses and the basis upon which the screening panel has concluded,
117 by a preponderance of the evidence, that the respondent should be admonished or
118 publicly reprimanded. A copy of such screening panel recommendation shall be
119 delivered to the Committee chair and a copy served upon the respondent,

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

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- Deleted: A copy of such screening panel recommendation shall be served upon the respondent prior to delivery of the recommendation to the Committee chair. The Committee chair shall enter an order admonishing the respondent if no exception has been filed within ten days of notice of the recommendation being provided to the respondent; or ¶ (b)(5)(E)
- Deleted: that the informal complaint be referred to the Committee chair with an accompanying screening panel recommendation that the respondent receive a public reprimand. Such screening panel recommendation 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 rec... [1]
- Deleted: prior to the delivery of the recommendation to the Committee chair. The Committee chair sha... [2]
- Deleted: (b)(5)(F) that a formal complaint be filed against the respondent.¶
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124 (b)(9) Continuance of disciplinary proceedings. A disciplinary proceeding may be
125 held in abeyance by the Committee prior to the filing of a formal complaint when the
126 allegations or the informal complaint contain matters of substantial similarity to the
127 material allegations of pending criminal or civil litigation in which the respondent is
128 involved.

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

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135 (d) Procedure on exceptions.

136 (d)(1) Hearing not requested. If no hearing is requested, the Committee chair will
137 review the record compiled before the screening panel.

138 (d)(2) Hearing requested. If a request for a hearing is made, the Committee chair, or
139 a screening panel chair designated by the Committee chair, shall serve as the
140 Exceptions Officer and hear the matter in an expeditious manner, with OPC counsel
141 and the respondent having the opportunity to be present and give an oral presentation.

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142 The complainant need not appear personally. However, upon motion to the Exceptions
143 Officer and for good cause shown, respondent may seek to augment the record before
144 the screening panel or the original brief on exceptions, including:

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145 (d)(2)(A) A request to call complainant as an adverse witness for purposes of cross-
146 examination, if complainant was not subject to direct cross-examination before the
147 screening panel, and

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148 (d)(2)(B) A request for time to obtain a transcript of the screening panel proceedings
149 to support respondent's exceptions, the cost of such transcript to be borne by
150 respondent. If a transcript is requested, OPC will provide the Committee chair with the
151 transcript as transcribed by a court reporting service, together with an affidavit
152 establishing the chain of custody of the record.

153 (d)(3) Burden of proof. A respondent who files exceptions under this section (d) shall
154 have the burden of showing that the recommendation of the screening panel is

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155 unsupported by substantial evidence, or is arbitrary, capricious, legally insufficient or
156 otherwise clearly erroneous.(d)(4) OPC response. The Exceptions Officer may request
157 a written response from OPC to exceptions filed by respondent.

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

161 (e) Final Committee disposition. Either upon the completion of the exceptions
162 procedure under subsection (d) or if no exceptions have been filed by respondent under
163 subsection (c), the Committee chair shall issue a final, written determination that either
164 sustains, dismisses, or modifies the disciplinary recommendation of the screening
165 panel. A modification of the screening panel's recommendation of discipline may
166 not (e)(1) Be more severe than the original recommendation of the screening panel; nor

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167 (e)(2) Require OPC to file a formal complaint under Rule 14-511.

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

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

174 (f)(2) A request for review under this subsection (f) will be subject to the procedures
175 set forth in Title III of the Utah Rules of Appellate Procedure.

176 (f)(3) A party requesting a transcription of the record below shall bear the costs.
177 OPC will provide the Court with the transcript as transcribed by a court reporting
178 service, together with an affidavit establishing the chain of custody of the record.

179 (f)(4) The Supreme Court shall conduct a review of the matter on the record.

180 (f)(5) Respondent shall have the burden of demonstrating that the Committee action
181 was:

182 (f)(5)(A) Based on a determination of fact that is not supported by substantial
183 evidence when viewed in light of the whole record before the Court;

184 (f)(5)(B) An abuse of discretion;

185 (f)(5)(C) Arbitrary or capricious; or

186 (f)(5)(D) Contrary to Articles 5 and 6 of Chapter 14 of the Rules of Professional
187 Practice of the Supreme Court.

188 (g) General procedures.

189 (g)(1) Testimony. All testimony given before a screening panel or the Exceptions
190 Officer shall be under oath.

191 (g)(2) Service. To the extent applicable, service or filing of documents under this
192 Rule is to be made in accordance with Utah Rules of Civil Procedure 5(b)(1), 5(d) and
193 6(a).

194 (g)(3) Form of Documents. Documents submitted under this Rule shall conform to
195 the requirements of Rules 27(a) and 27(b) of the Utah Rules of Appellate Procedure,
196 except it is not required to bind documents along the left margin.

197

Comment regarding proposed rule changes to USB 14-0510

The proposed changes should also permit complainants to take exception to a screening panel recommendation. Currently, the rules give screening panels too much authority. They can simply dismiss or give an admonition or reprimand to an attorney and there is no way the Supreme Court or anyone else can review the decision unless the attorney requests a review. The Court in essence completely gives up its authority to police attorney misconduct at the screening panel stage. The panel has more authority than district courts (which are subject to an appellate process) yet has the least amount of time with the case, no real adversary system and is much less informed of the facts and the law and is not trained to make legal and factual determinations as a trial court would be. There is simply no protection provided to the public from a rogue or simply reckless, ill-informed screening panel or one that just mistakenly makes a completely and clearly wrong decision. They could dismiss the most egregious case without any justification or a completely arbitrary and capricious basis and there is no mechanism by which the matter could be reviewed or brought to the attention of the Supreme Court or anybody else for review. This should be corrected to give the Court the oversight it is supposed to exercise and also to make the process fair. This is clearly a one-sided, self-serving process that appears designed to protect attorneys and not the public from a bad decision by a screening panel. Although the rule clearly recognizes that screening panels can make mistakes and attempts to provide some relief, apparently only an attorney can question the wisdom of a screening panel and not the public citizen who complained or the Office of Professional Conduct or anybody else. If we are going to continue to police ourselves, we should do so in a fair manner. This clearly is not a fair process for complainants or the public the process is designed to protect.

David Pena

3/3/2009 10:33 AM

Utah State Courts Rules - Published for Comment

Comments: Rules Governing the Utah State Bar

Rule 14-510 has many problems and the changes proposed are admirable.

14-510(a)(2) should minimally require all NOIC meet In Re Worthen standards, an assumption that should be spelled out. The OPC when filing a complaint should file a notarized statement that the facts asserted are true and accurate, and if a complainant is able to file their own notarized statement, the OPC should not file a NOIC in their behalf to avoid this requirement.

(a)(3) a Rule 11 investigation should take place prior to filing of the NOIC, not after. There is nothing 'informal' for the attorney receiving a NOIC and the OPC should know exactly what In Re Worthen requires prior to issuing a NOIC.

(a)(4) should require minimally contacting the attorney subject to an investigation to obtain their side of the story as part of potential resolution.

(b)(2) should be 30 days. If an attorney is to be hung, then unless they are an immediate danger, should be allowed 30 days given busy schedules of the attorney and of potential witnesses.

Witnesses 'must be allowed' to testify.

The screening panel hearing must be of a duration long enough to accomodate hearing all the witnesses willing to appear live or telephonically.

A written brief may also be allowed to be submitted as quickly as possible, recommended within ten days, but may be shorter for good cause shown. [not every accused attorney can obtain counsel quickly, or prepare a written brief within ten days of a hearing when there is only 21 days proposed from the notice of the hearing until the hearing.]

(b)(3) The complainant, and if the OPC is the complainant, must appear at the hearing, and must testify under oath. If an electronic execution is to take place, then the accused as well as the accuser should have to appear and testify under oath.

(b)(4) direct examination and cross ex should be absolutely allowed. If one is to accuse then examination and cross ex to challenge the accuser and accused should be allowed, unless the screening panel is to be like a criminal grand jury.

(b)(5) it is a direct conflict for the prosecutor OPC to be the Ethics and Discipline committee's secretary. Such a position fosters a conscious or unconscious reliance upon the prosecutor placing them in an unfair position with the screening panel. This position invites the screening panel to adopt the OPC's recommendations as a working partner with it, that destroys impartiality of the screening panel. They need their own secretary and should have no contact with the OPC aside from receipt of its briefs as for the accused.

(b)(6) In keeping with Worthen, this rule should spell out that the EDC's screening panel has a duty to provide the accused with analysis, records of the screening panel's independent investigation, and basis of their 'determination' that goes beyond merely saying the "preponderance of evidence shows"...

(b)(6)(A) In Re Ruffalo, is a U.S. Supreme Court decision that holds attorney discipline cases are quasi-criminal. As such, an attorney should not be held to be declaring guilt if the Bar cannot make its case without the attorney's admissions. If there is proof of wrongdoing, misconduct, the standard should be clear and convincing evidence, and the right to be silent. If the rule 11 investigation is done initially, then there should be no problem with this standard.

(b)(6)(D) & (E) the rules provide no standards references for when or how the screening panel is to determine when the confidentiality of an attorney is to be utterly destroyed by a formal complaint and public law suit. Such ambiguity is intolerable under Ruffalo, Worthen that require clear notice before proceedings begin against an attorney of the why, how, and context within which the screening panel, EDC chair, and OPC arrived at the 'determination' of a filing a

public formal complaint.

(b)(7) should include the determination of filing a formal complaint. The OPC's filing of a public suit is in and of its self a public 'reprimand' that places the entire world on notice of the Bar's opinion of the attorney, without the attorney having any thing stating "the substance and nature of the informal complaint and defenses and the basis upon which the screening panel has concluded, " and should read by 'clear and convincing evidence' "that the respondent should be admonished, or publicly reprimanded" or subject of a formal complaint. "

(b)(9) abeyance 'shall' be had under the conditions therein.

(c) should read "Exceptions to admonitions, public reprimand, or filing of a formal complaint" with all being given rights of in house appeal and a new hearing.

(d)(3) there burden of the EDC screening panel and OPC as prosecutor should remain, and not shift to the respondent to demonstrate there was absolutely no legal basis for the screening panel hearing.

(d)(4) the word 'may' should read 'shall' and the exceptions should not be to the OPC but to the EDC screening panel making its determination.

Finally, a new rule should be enacted so that attorneys can appeal directly to the Utah Supreme Court, without going through a lower court without the authority to (a) set policy, (b) ascertain if a rule is vague, ambiguous or conflicting with another rule, (c) control the Utah Supreme Court ethics and discipline committee actions separate from the Bar's OPC, (d) determine if adequate due process in the proceedings below meet Utah standards as only the Supreme Court can set.

As Justice Durham sets forth in her part concurrence and dissent, In Re Discipline of Johnson, 2001 UT 110 ¶¶21,23 "¶21 This court is charged by the Utah Constitution with [1] the obligation to regulate the practice of law. [2] We arbitrate questions of proportionality, [3] rules of law, and [4] guidelines for the imposition of sanctions that have general application for the practice of law in Utah. Our decisions [5] interpret the Rules of Professional Conduct and [6] develop the principles of application that will guide lawyers, the Bar, and the trial courts..... ¶23 Trial courts have a more limited perspective on the disciplinary system than does this court. A trial judge is often called on to "predict" the answer to a question of first impression involving the rules and the scope of appropriate sanctions. It is not at all unexpected that a trial judge's best assessment of the trend of developing law turns out to be "wrong" in the sense that this court will reject it and opt for a different interpretation or policy. Where the judgment is equivalent to a professional death penalty, I believe that this court's review should precede execution.") Emphasis added.)

As long as attorneys must fund their own prosecution with their dues, then the criminal protection standards accompanying the state prosecution of any attorney should apply based upon the higher U.S. Constitutional protections found in In Re Ruffalo, and its progeny.

Thank you for allowing this comment and petition to the governing body making the rules under Utah's Constitution's Art. VIII sec. 4 mandates.

Yours sincerely,

Susan Rose

Posted by Susan Rose (7985) February 24, 2009 02:23 PM

Utah State Courts Rules - Published for Comment

Comments: Rules Governing the Utah State Bar

Not part of charge

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— moved to take no action

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*considered —
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