

Utah State Courts Rules - Published for Comment

Comments: Rules Governing the Utah State Bar

The Bar's petition to enacted Rule 14-504(d) to rectify the situation in which Utah attorneys have been, for the past five years, unable to rely on the opinions issued by the Ethics Advisory Opinion Committee is laudable. An attorney who takes an action (or forgoes action) on the basis of the considered opinions of that Committee should not be vulnerable to prosecution by the Office of Professional Conduct if it happens to disagree with a Committee opinion.

The Bar's proposed language purports to resolve the problem and provide a safe harbor to lawyers who rely on the Committee's opinions. The petition appears to intend that a lawyer may rely upon a Committee opinion if the lawyer's behavior is addressed by an opinion that has not been withdrawn, superseded, overruled or amended.

However, the Bar's petition and, more particularly, the proposed rule contain potentially problematic language requiring that an opinion that a lawyer seeks as a safe harbor "must expressly recognize and approve the lawyer's conduct" (emphasis in Petition). This could reasonably be interpreted by an aggressive prosecutor or Ethics and Discipline Panel as requiring a strict "all fours" congruence for the lawyer's situation vis-à-vis that in an otherwise applicable ethics opinion. It might even be interpreted as requiring that the lawyer request and obtain an opinion specific to that attorney from the Committee in order to provide protection. Indeed, the wording in the proposed rule is most troublesome, as the lawyer is only protected for an "act that was expressly approved" by an ethics opinion. A plain-English interpretation of "express approval" would be that the lawyer would be required to seek direct approval for the conduct in question. But, this would eviscerate the rule and put Utah lawyers in little better position than they are now. It is often impractical to seek "express approval" for an action that may not wait for the several months that might be required for the Committee to process a request. A lawyer whose conduct is reasonably within the ambit of a opinion should not have to seek ratification of his/her specific situation.

If this interpretation is not the intent of the Bar's petition (and, it is my understanding that it is not), the language of the proposed rule should be modified to make it clear that the lawyer's conduct will be subject to a reasonable application of one or more applicable, extant Utah ethics opinion. The use of the phrase "expressly approved" implies a far higher standard than would ordinarily be expected in a person's compliance with an applicable law—whether a statute, rule or a judicial opinion.

To provide a reasonable safe harbor for ethical conduct, the proposed rule should provide that a lawyer who acts or fails to act in compliance with a currently effective and directly applicable ethics opinion shall not be subject to disciplinary action; the "expressly approved" requirement is seriously ambiguous and may provide very little protection to a lawyer who does not seek explicit approval or can't match every factual predicate in the opinion.

The binding nature of an ethics opinion should not raise a higher barrier to its use by a lawyer than any other applicable law. OPC, for example, would be free to argue that the facts and circumstances of a particular situation did not fit the invoked opinion (this is consistent with the Bar petition's note that applications would be "fact dependent"), but neither OPC nor an Ethics and Discipline panel would be entitled to ignore an applicable opinion and replace the Committee's judgment by OPC's or the panel's.

An approach subsection (d) of Rule 14-504 that is more nearly aligned with the usual application of statutes, regulations and applicable case law would read (showing changes relative to the proposed rule):

(d) Effect of ethics advisory opinions.

The Office of Professional Conduct shall not prosecute a Utah lawyer for violating the Utah Rules of Professional Conduct for conduct that is in compliance with an ethics advisory opinion that has not been withdrawn at the time of the conduct in question. No court is bound by an ethics opinion's interpretation of the Utah Rules of Professional Conduct.

Although "in compliance with" is itself subject to some interpretation, it provides the normal ability for either side of a prosecution issue to argue the extent to which the instant facts and circumstances are governed by the opinion in question. It would not be different from any normal legal proceeding in that regard, and it would reduce the likelihood of an overly zealous prosecutor to claim that a respondent lawyer's inability to match every jot and tittle of an opinion renders the opinion of no application.

Posted by Gary Sackett January 29, 2012 03:59 PM

Rule 14-504 comment on ammendments.

This rule should probably give a time limit as to when the OPC is to challenge an advisory opinion. Otherwise they can do so at any time, so as to prosecute a specific attorney.

Posted by Susan Rose December 20, 2011 11:56 AM

comment rule 14-533

The OPC should not be the 'secretary' for the screening panel. An attorney before a screening panel should have a completely impartial hearing panel, and consisting of equal numbers of small firm and large firm attorneys or better persons not in economic competition with the attorney.

Posted by Susan Rose December 20, 2011 11:53 AM

Rule 14-510 comment on proposed amendments.

The rule does not define what a 'determination' is and how it is different from a 'recommendation' to the OPC. Either the panel can make a decision regarding the attorney or it is left to the prosecutor OPC to make the decision based upon a recommendation from a panel without power. In preparing defenses for attorneys before a panel, this may be more than just a 'hair splitting' fine point.

the amendments should go farther. In virtually every case before the panel it is limited to the arbitrary and inflexible time of one hour and so the panel does not often hear all the attorneys witnesses.

Further, the rule and rule 14-511 does not define what is meant by 'probable cause' to refer an attorney to public trial in state court. A process that, along with, the initial informal complaint, automatically destroys an attorney's future business due to the power of the accusations standing alone. Additionally, the 'probable cause' standard is very distinguishable from the 'clear and convincing' standard associated with serious property and license deprivations.

Rule 14-501 should be amended to read that the process is a quasi criminal one, consistent with In Re Ruffalo's U.S. Supreme Court decision.

Rule 14-517 should be amended to have a 'clear and convincing standard' for the OPC to carry in its pre trial prosecution. Not the civil preponderance standard.

An attorneys public name and reputation warrant caution in the pretrial hearing stage and the Bar and Utah Supreme Court should amend the rules to be consistent with U.S. Supreme Court Due Process standards. Rules 14-501, 503, 510, 511, 517 work together, and all have U.S. Constitutional infirmities that can be corrected.

It is not an onerous burden for the Utah Supreme Court and Bar to amend the rules to meet U.S. Supreme Court Due Process standards. Violations of those standard renders every prosecution and decision to file a public complaint in state court null and void.

Further, rule 14-510 should be amended to oblige the OPC to file a sworn information, particularly if insurance companies may be relying on the Bar to prosecute an attorney for the motions they make in litigation against the insurance companies' insureds.

Finally, rule 14-510's suggestion that a judge's non identification of misconduct for 'in court' litigation, as not persuasive, is an implied allowance for the OPC to displace the judge. Listen, there is not one single solitary U.S. Supreme court decision that suggests that one tribunal can try an attorney for 'in court' litigation allegations, that is within the inherent structure of the Court. There are many decisions stating the opposite. Only, exclusively, the judicial officer who is familiar with the totality of circumstances, can know if an attorney has or has not committed misconduct. To say differently opens the door to prosecuting attorneys for what they say and how they say it in the original tribunals.

Also, the rule probably needs to say 'state' judicial officers if it is to remain. And, the rule does not provide for a 'right' or 'entitlement' to examine and cross examine witnesses.

Finally, in reviewing approximately 330 public prosecutions of Utah attorneys, and where this counsel could identify those still on the Bar's roles--- those prosecuted attorneys were virtually all solo or small firms. Since 2007, approximately 85 or so could be found, and that is an elimination of approximately half a million dollars in small firm competition with the large firms if the attorneys are annually earning \$60,000 average. It is this person's opinion founded on this research that the Bar's prosecutions and these rules are being used to eliminate economic competition of the small and solo firms, and it is like shooting fish in a barrel given the lack of the right of examination and cross examination in this rule.

Without a sworn information, without a flexible time for a hearing, without full panels being called, with the OPC as both the secretary and prosecutor choosing the panels, without the right of examination and cross examination of witnesses, now with lack of definition of terms, and now, with the OPC being allowed to displace the judgments of the sitting judges to allow for prosecution of attorneys for what they say and motions they make that the OPC at the behest of one party or the other, can use to destroy an attorney just by the charges standing alone.

Posted by Susan Rose December 20, 2011 11:45 AM

Rule 14-503 amendments. They do not go far enough.

Rule 14-503 makes the OPC prosecutor the secretary, virtually a de facto nonvoting member, of the screening panel. the screening panel should be absolutely separate from the OPC.

Next, the rule as amended provides for removal of a panel member, but strikes the reason why, and proffers no other explanation. can a panel member be removed for how they vote on an attorney's discipline? Panel members should have notice in the rule as to grounds for removal.

Further, in reviewing numerous Bar members going through the panel process, the OPC is NEVER, or virtually NEVER, calling all eight persons for a panel. The OPC only calls three members and determines who they are. The OPC is violating this rule on virtually all cases before screening panels. The OPC picks the 'judges' and limits their numbers and then gives them the information on the attorney while prosecuting the attorney? How fair is that?

This rule needs further changes. Thank you.

Posted by Susan Rose December 20, 2011 11:13 AM

Rule 14-503. Ethics and Discipline Committee.

(a) Composition. The Committee shall be appointed by the Supreme Court. The Committee shall consist of eight public members and ~~26~~27 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 and two lawyer members as Committee vice chairs~~one lawyer member as Committee vice chair. Committee members shall not serve more than two consecutive terms.~~

(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 the overall work of the Committee.

(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 ~~the~~ vice chair to assist in any of the Committee chair's duties.

(d) Screening panels, quorums. The Committee members, except for the Committee chair and Committee vice chairs, shall be divided into four screening panel sections of six members of the Bar and two public members. The Supreme Court shall name a screening panel chair from each screening panel, who shall preside over the screening panel. In the absence of the screening panel chair, a screening panel vice chair designated by the screening panel shall preside. Two members of the Bar plus one public member shall constitute a quorum of a screening panel. The concurrence of a majority of those members present and voting at any proceeding shall be required for a screening panel determination. If an even number of screening panel members participate in a proceeding, the chair or vice chair shall not vote unless necessary to break a tie. The chair or vice chair shall, however, fully participate in the proceeding.

Each screening panel shall meet as is necessary to effectively and promptly carry out its duties. The entire Committee may be convened at such other times by the chair as necessary to effectively and promptly carry out its duties.

(e) ~~Resignations~~ 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. ~~If a Committee member does not attend three consecutive scheduled screening panel hearings, that Committee member shall automatically be deemed to have resigned his or her Committee appointment.~~ 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.

(f) Responsibilities. Informal complaints shall be randomly assigned to screening panels. The screening panels shall review, investigate, and hear all informal complaints charging unethical and/or unprofessional conduct against members of the Bar. After such review, investigation, hearing and analysis, the screening panels shall determine the action to be taken on any informal complaint which, based upon the facts of the particular case, is most consistent with the public interest and the Rules of Professional Conduct.

(g) Subpoena. Any party or a screening panel, for good cause shown, may petition under seal the district court for issuance of a subpoena, subpoena duces tecum or any order allowing discovery prior to the filing of a formal complaint. Except for good cause shown, all petitions under this rule shall require a five-day written notice to the opposing party prior to the issuance of an appropriate order of subpoena.

(g)(1) Enforcement of subpoena. A district court in the district in which the attendance or production is required may, upon proper application, enforce the attendance and testimony of any witnesses and the production of any documents subpoenaed.

(g)(2) Quashing subpoena. Any attack on the validity of a subpoena so issued shall be heard and determined by the Committee chair or by the court wherein enforcement

62 of the subpoena is being sought. Any resulting order is not appealable prior to the entry
63 of a final order in the proceeding.

64 (g)(3) Witnesses and fees. Subpoena fees, witness fees, and mileage shall be
65 reimbursed in the amounts provided under Rule 45 of the Utah Rules of Civil Procedure.

66 (h)(1) Committee and OPC as screening panel secretary. OPC counsel shall be the
67 secretary to the Committee and is charged with the responsibility of the administrative
68 affairs of the Committee, the handling of the screening panel calendars, giving notice to
69 screening panel members and members of the Bar whose attendance is requested,
70 notifying those who have filed informal complaints of the times and dates their matters
71 will be heard, and otherwise performing or providing the secretarial and administrative
72 functions of the Committee and screening panels. Except as otherwise provided in this
73 article, whenever OPC counsel may be present before a screening panel during a
74 hearing, the respondent may also be present.

75 (h)(2) OPC counsel shall within three months after the filing of an informal complaint
76 of unprofessional or unethical conduct of a respondent, advise the party making the
77 informal complaint concerning the initial consideration of the informal complaint, and
78 shall promptly advise such party in writing of the subsequent disposition of the informal
79 complaint and the reasons therefor.

80 (i) Annual report. Senior counsel shall prepare and submit an annual report to the
81 Supreme Court and the Board encompassing the scope and nature of the Committee
82 work. The report shall be submitted on or about August 1 of each year for the preceding
83 fiscal year and shall set forth the number of disciplinary cases investigated, the number
84 brought before the Committee, formal complaints filed, dispositions, cases dismissed,
85 informal ethics opinions issued, diversionary dispositions and such other information as
86 may be helpful to the Supreme Court in comprehending the operations of the OPC as
87 well as the efficiency and effectiveness of the disciplinary system. Such report may
88 contain Committee recommendations for rule amendments or changes in Committee
89 procedure. The chair and senior counsel shall annually consult with the Board and the
90 Supreme Court regarding the level of activity and general standing of disciplinary
91 matters and procedures.

Rule 14-510. Prosecution and appeals.

(a) Informal complaint of unprofessional conduct.

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

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

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

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

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

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

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

(b) Proceedings before Committee and screening panels.

(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

63 | respondent's alleged misconduct, the screening panel should not determine that this
64 | failure to address or report is evidence either that misconduct has occurred or has not
65 | occurred.

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

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

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

88 | (b)(5) Hearing Record. The proceedings of any hearing before a screening panel
89 | under this subsection (b) shall be recorded at a level of audio quality that permits an
90 | accurate transcription of the proceedings. Pursuant to its function as secretary to the
91 | Committee under Rule 14-503(h)(1), OPC shall be responsible for the assembly of the
92 | complete record of the proceedings, to be delivered to the chair of the Committee upon
93 | the rendering of the panel's determination or recommendation to the Committee chair.

94 The record of the proceedings before the panel shall be preserved for not less than one
95 year following delivery of the panel's determination or recommendation to the chair of
96 the Committee and for such additional period as any further proceedings on the matter
97 are pending or might be instituted under this section.

98 (b)(6) Screening panel determination or recommendation. Upon review of all the
99 facts developed by the informal complaint, answer, investigation and hearing, the
100 screening panel shall make one of the following determinations or recommendations:

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

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

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

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

120 (b)(6)(E) A formal complaint shall be filed against the respondent pursuant to Rule
121 14-511.

122 (b)(7) Recommendation of admonition or public reprimand. A screening panel
123 recommendation that the respondent should be disciplined under subsection (b)(6)(C)
124 or (b)(6)(D) shall be in writing and shall state the substance and nature of the informal

125 complaint and defenses and the basis upon which the screening panel has concluded,
126 by a preponderance of the evidence, that the respondent should be admonished or
127 publicly reprimanded. A copy of such screening panel recommendation shall be
128 delivered to the Committee chair and a copy served upon the respondent.

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

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

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

144 (d) Procedure on exceptions.

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

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

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

(d)(2)(B) 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. If a transcript is requested, OPC will provide the Committee chair with the transcript as transcribed by a court reporting service, together with an affidavit establishing the chain of custody of the record.

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

(d)(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 if no 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. A modification of the screening panel's recommendation of discipline may not: (e)(1) Be more severe than the original recommendation of the screening panel; nor

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

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

(f)(1) Within 30 days after 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. Dissemination of disciplinary information pursuant to Rules 14-504(b)(13) or 14-516 shall be automatically stayed during the period within which a request for review may be filed under this subsection. If a timely request for review is filed, the stay shall

185 remain in place pending resolution by the Supreme Court unless the Court otherwise
186 orders.

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

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

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

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

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

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

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

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

201 (g) General procedures.

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

204 (g)(2) Service. To the extent applicable, service or filing of documents under this
205 Rule is to be made in accordance with Utah Rules of Civil Procedure 5(b)(1), 5(d) and
206 6(a).

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

210

Rule 14-533. Diversion.

(a) Referral to diversion. In a matter involving less serious misconduct as outlined in subsection (c), upon receipt of an informal complaint and before filing a formal complaint, the respondent may have the option of electing to have the matter referred to diversion, the appropriateness of which will be determined by the chair of the Diversion Committee after consultation with OPC. The option for diversion also may be initiated by OPC or the Ethics and Discipline Committee screening panel. Diversion may require the participation of the respondent in one or more of the following:

- (a)(1) fee arbitration;
- (a)(2) mediation;
- (a)(3) law office management assistance;
- (a)(4) lawyer assistance programs;
- (a)(5) psychological and behavioral counseling;
- (a)(6) monitoring;
- (a)(7) restitution;
- (a)(8) continuing legal education programs including, but not limited to, ethics school; or
- (a)(9) any other program or corrective course of action to address the respondent's conduct.

(b) Diversion Committee.

(b)(1) Composition. Members of the Diversion Committee shall be appointed by the Supreme Court. The committee shall consist of five members, four of whom shall be members of the Bar who have demonstrated a high standard of professional conduct, preferably with at least one Bar member having past experience on the Supreme Court Ethics and Discipline Committee, and one public member with professional training in the area of substance abuse and/or stress management. Upon initial appointment, committee members, other than the chair, shall draw by lot for terms of office of two and three years. All appointments thereafter shall be for three-year terms. Committee members shall not serve more than two consecutive terms. The Supreme Court shall designate one of the Bar members as committee chair for a term of three years.

(b)(2) Authority and responsibility. The Diversion Committee may negotiate and execute diversion contracts, assign monitoring to a lawyers assistance program, determine compliance with the terms of diversion contracts, and determine fulfillment or any material breach of diversion contracts, subject to review under subsection (j)(3) of this rule, and adopt such policies and procedures as may be appropriate to accomplish its duties under this rule. The Diversion Committee shall have authority to establish subcommittees of volunteer attorneys and other professionals for the specific purpose of monitoring the compliance of any attorney under diversion and reporting compliance to OPC and the Diversion Committee on a regular basis.

(c) Less serious misconduct. Conduct which would result in a suspension or disbarment is not considered to be less serious misconduct. Conduct is not ordinarily considered less serious misconduct if any of the following considerations apply:

(c)(1) the misconduct involves the misappropriation of client funds;

(c)(2) the misconduct results in or is likely to result in substantial prejudice to a client or other person, absent adequate provisions for restitution;

(c)(3) the respondent has been sanctioned in the last three years;

(c)(4) the misconduct is of the same nature as misconduct for which the respondent has been sanctioned in the last three years;

(c)(5) the misconduct involves dishonesty, deceit, fraud, or misrepresentation;

(c)(6) the misconduct constitutes a substantial threat of irreparable harm to the public; a felony; or a misdemeanor which reflects adversely on the respondent's honesty, trustworthiness or fitness as a lawyer; or

(c)(7) the misconduct is part of a pattern of similar misconduct.

(d) Factors for consideration. The Diversion Committee considers the following factors in negotiating and executing the diversion contract:

(d)(1) whether the presumptive sanction that would be imposed, in the opinion of OPC or the Diversion Committee is likely to be no more severe than a public reprimand or private admonition;

(d)(2) whether participation in diversion is likely to improve the respondent's future professional conduct and accomplish the goals of lawyer discipline;

(d)(3) whether aggravating or mitigating factors exist; and

62 (d)(4) whether diversion was already tried.

63 (e) Notice to complainant. The OPC will notify the complainant, if any, of the
64 proposed decision to refer the respondent to diversion, and the complainant may submit
65 written comments. The complainant will be notified when the complaint is diverted and
66 when the complaint is dismissed. All notices will be sent to the complainant's address of
67 record on file with the OPC. Such decision to divert or dismiss is not appealable.

68 (f) Diversion contract.

69 (f)(1) If the respondent agrees or elects to participate in diversion as provided by this
70 rule, the terms of the diversion shall be set forth in a written contract. If the contract is
71 entered prior to a hearing of a screening panel of the Ethics and Discipline Committee
72 pursuant to Rule 14-510(b), the contract shall be between the respondent and OPC. If
73 diversion is agreed to and entered after a screening panel of the Ethics and Discipline
74 Committee has convened pursuant to Rule 14-510(b), the contract shall be made as
75 part of the decision of that screening panel. As secretary to the screening panel, OPC
76 will memorialize the contract and decision. If diversion is agreed to and entered after a
77 complaint has been filed pursuant to Rule 14-512, the diversion contract shall be made
78 as part of the ruling and order of the Court. Except as otherwise part of an order of a
79 court, the Diversion Committee shall monitor and supervise the conditions of diversion
80 and the terms of the diversion contract. The contract shall specify the program(s) to
81 which the attorney shall be diverted, the general purpose of the diversion, the manner in
82 which compliance is to be monitored, and any requirement for payment of restitution or
83 cost. The respondent attorney shall bear the burden of drafting and submitting the
84 proposed diversion contract. Respondent may utilize counsel to assist in the negotiation
85 phase of diversion. Respondent may also utilize Bar benefits programs provided by the
86 Bar, such as a lawyer assistance program to assist in developing terms and conditions
87 for the diversion contract appropriate to that respondent's particular situation. Use of a
88 lawyers assistance program to assess appropriate conditions for diversion shall not
89 conflict that entity from providing services under the contract. The terms of each
90 contract shall be specifically tailored to the respondent's individual circumstances. The
91 contract is confidential and its terms shall not be disclosed to other than the parties to
92 the contract.

(f)(2) All diversion contracts must contain at least all the following:

(f)(2)(A) the signatures of respondent, his counsel if any, and the chair of the Diversion Committee;

(f)(2)(B) the terms and conditions of the plan for respondent and, the identity, if appropriate, of any service provider, mentor, monitor and/or supervisor and that individual's specific responsibilities. If a professional or service is utilized, and it is necessary to disclose confidential information, respondent must sign a limited conditional waiver of confidentiality permitting the professional or service to make the necessary disclosures in order for the respondent to fulfill his duties under the contract;

(f)(2)(C) the necessary terms providing for oversight of fulfillment of the contract terms, including provisions for those involved to report any alleged breach of the contract to OPC;

(f)(2)(D) the necessary terms providing that respondent will pay all costs incurred in connection with the contract and those costs further specified pursuant to subsection (k) and any costs associated with the complaints to be deferred; and

(f)(2)(E) a specific acknowledgement that a material violation of a contract term renders the respondent's participation in diversion voidable by the chair of the Diversion Committee or his designee;

(f)(3) The contract may be amended on subsequent agreement of respondent and OPC.

(f)(4) The chair of the Ethics and Discipline Committee and OPC shall be given copies of every diversion contract entered and signed by the respondent and the Diversion Committee chair.

(g) Affidavit supporting diversion. A diversion contract must be supported by the respondent's or the respondent's lawyer's affidavit or declaration as approved by the Diversion Committee setting forth the purpose for diversion and how the specific terms of the diversion contract will address the allegations raised by the complaint. The respondent is not required to admit to the allegations in the complaint upon entering diversion. However, an admission and/or acknowledgement may be relevant and necessary as part of treatment in diversion. Such an admission shall be confidential for

123 treatment purposes, shall not be released to any third party, and shall not be treated as
124 an admission against interest nor used for future prosecution should diversion fail.

125 (h) Status of complaint. After a diversion contract is executed by the respondent, the
126 disciplinary complaint is deferred pending successful completion of the contract.

127 (i) Effect of non-participation in diversion. The respondent has the right to decline to
128 participate in diversion. If the respondent chooses not to participate in diversion, the
129 matter proceeds pursuant to the Rules of Lawyer Discipline and Disability.

130 (j) Termination of diversion.

131 (j)(1) Fulfillment of the contract. The contract terminates when the respondent has
132 fulfilled the terms of the contract and gives the Diversion Committee and OPC an
133 affidavit or declaration demonstrating fulfillment. Upon receipt of this affidavit or
134 declaration, the Diversion Committee and OPC must acknowledge receipt and request
135 that the chair of the Ethics and Discipline Committee or his designee dismiss any
136 complaint(s) deferred pending successful completion of the contract or notify the
137 respondent that fulfillment of the contract is disputed based on an OPC claim of material
138 breach. The complainant cannot appeal the dismissal. Successful completion of the
139 contract is a bar to any further disciplinary proceedings based on the same allegations
140 and successful completion of diversion shall not constitute a form of discipline.

141 (j)(2) Material breach. A material breach of the contract is cause for termination of
142 the contract. After a material breach, OPC must notify the respondent of the alleged
143 breach and intent to terminate the diversion. Thereafter, disciplinary proceedings may
144 be instituted, resumed or reinstated.

145 (j)(3) Review by the chair. The Diversion Committee may review disputes regarding
146 the alleged material breach of any term of the contract on the request of the respondent
147 or OPC. The request must be filed with the Diversion Committee chair within 15 days of
148 notice to the respondent of the determination for which review is sought. The
149 respondent is entitled to a hearing before the Diversion Committee on any alleged
150 breach to the diversion contract. Determinations under this section are not subject to
151 further review and are not reviewable in any proceeding.

152 (k) Costs. Upon entering diversion, respondent shall pay an initial fee of \$250.
153 During diversion, respondent shall pay a fee of \$50 per month. All such fees are

154 payable to the Bar's general fund. These fees may be waived upon a hardship request,
155 the validity or appropriateness of which shall be determined by the chair of the Diversion
156 Committee or his designee.
157

Rule 1.5. Fees.

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(a)(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

(a)(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(a)(3) the fee customarily charged in the locality for similar legal services;

(a)(4) the amount involved and the results obtained;

(a)(5) the time limitations imposed by the client or by the circumstances;

(a)(6) the nature and length of the professional relationship with the client;

(a)(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(a)(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(d)(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(d)(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(e)(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(e)(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (e)(3) the total fee is reasonable.

Comment**Reasonableness of Fee and Expenses**

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (a) (1) through (a)(8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent

fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee but is obligated to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fees

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Rule 1.15. Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. The account may only be maintained in a financial institution that agrees to report to the Office of Professional Conduct in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. In addition to normal monthly maintenance fees on each account, the lawyers can anticipate that financial institutions may charge additional fees for reporting overdrafts in accordance with this Rule. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

[6a] This Rule is identical to ABA Model Rule 1.15 except it incorporates two sentences that were added to the prior version of this Rule in 1997. These two sentences are the third sentence of paragraph (a) of the Rule and the corresponding fifth sentence of Comment [1].