

UTAH

Report on the Lawyer Discipline System

April 2017

Sponsored by the
American Bar Association
Standing Committee on
Professional Discipline



**UTAH LAWYER DISCIPLINE SYSTEM
CONSULTATION TEAM**

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I. INTRODUCTION

A. History of the Regulation of the Legal Profession by the Judicial Branch of Government

The judiciary has long been responsible for the admission of applicants to the practice of law and the regulation of lawyers after they have been admitted to the bar. Since the thirteenth century, lawyers have been held accountable for their professional conduct by the judges before whom they practiced.¹ By the late 1800's, the courts were claiming their inherent and exclusive power to regulate the legal profession.² Today, in each state and the District of Columbia, the court of highest appellate jurisdiction has the inherent and/or constitutional authority to regulate the practice of law.³

It has long been the policy of the American Bar Association that the judicial branch of government is best suited to regulate the legal profession. Regulation by either the legislative or executive branch thus jeopardizes the independence of the legal profession and the judiciary. In the United States, an independent judiciary is crucial to maintaining citizens' rights and freedoms, and the rule of law. As noted in the Preamble to the *ABA Model Rules of Professional Conduct*:

An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.⁴

Studies by the American Bar Association have shown that judicial regulation of the legal profession is appropriate and more effective. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement, chaired by former U.S. Supreme Court Justice Tom Clark (the Clark Committee), issued its Report containing findings from a three-year comprehensive review of lawyer discipline in the United States.⁵ The Clark Committee concluded that the state of lawyer discipline was "scandalous" and that public dissatisfaction required immediate redress or the public would take matters into its "own hands."⁶ The Clark Committee strongly urged that the judiciary act promptly, including assertion/reassertion of its inherent regulatory authority, should legislatures attempt to intervene.⁷ In doing so, the Clark Committee stressed that, because of its political nature, the legislative process was "a far less desirable forum" for such reform to occur.⁸

¹ See, e.g., Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911 (Spring 1994); *In re Shannon*, 876 P.2d 548, 570 (Ariz. 1994) (noting that the state judiciary's authority to regulate the practice of law is accepted in all fifty states).

² COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, *LAWYER REGULATION FOR A NEW CENTURY 2* (1992) [hereinafter MCKAY REPORT], available at http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html.

³ See, e.g., *In re Attorney Discipline System*, 967 P.2d 49 (Cal. 1998).

⁴ MODEL RULES OF PROF'L CONDUCT pmbl. (2013), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

⁵ Special Comm. on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n, *Problems and Recommendations in Disciplinary Enforcement* xii (1970) [hereinafter CLARK REPORT], available at http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf.

⁶ *Id.* at 1-2.

⁷ *Id.* at 10-18.

⁸ *Id.* at 12.

Twenty years later, the ABA Commission on Evaluation of Disciplinary Enforcement, chaired initially by Robert B. McKay (the McKay Commission), examined the implementation of the Clark Committee Report.⁹ The McKay Commission also studied the advantages and disadvantages of legislative versus judicial regulation. In doing so, it examined several state agencies created by legislatures to regulate other professions in the public interest and compared them to lawyer disciplinary agencies.¹⁰ The McKay Commission concluded that legislative regulation of other professions did not result in more public protection, and that legislative regulation of the legal profession, specifically, would not be an improvement over judicial regulation. In fact, it would jeopardize the independence of the legal profession.¹¹ The McKay Commission also found that where other state regulatory agencies were charged with regulating multiple professions and occupations, their resources and effectiveness were diluted.¹² In February 1992, the ABA House of Delegates adopted the McKay Commission's recommendations for improving and expanding lawyer regulation under the jurisdiction of the judicial branch of government of each U.S. jurisdiction. Because of the McKay Commission and similar efforts, the United States is recognized as having the most advanced and professional system of lawyer regulation in the world.

B. The Lawyer Discipline System Consultation Program

In 1980, the ABA Standing Committee on Professional Discipline ("Discipline Committee") initiated a national program to confer with United States lawyer disciplinary agencies, upon invitation by a jurisdiction's highest court, and to make recommendations to increase the efficiency and effectiveness of their disciplinary systems. To date, as a result of this program, the Discipline Committee has completed 64 consultations. The Committee conducts approximately two consultations per year, sometimes more. A number of courts have retained the Committee's services multiple times.

The Discipline Committee sends a team of individuals experienced in the field of lawyer regulation to examine the structure, operations, and procedures of a host jurisdiction's lawyer discipline system. Team members typically include lawyers who represent other lawyers in disciplinary and professional responsibility matters, a disciplinary counsel, ethics counsel, and judges/state supreme court justices. At the conclusion of its examination, the team develops recommendations for adoption by the full Discipline Committee. Upon approval of those recommendations, the Committee issues to the highest court that retained its services a confidential report setting forth its findings and recommendations for improvement of the system. The consultation process allows participants in the state lawyer discipline system to understand the operation of their system not only in the context of ABA model disciplinary procedures, but national practice. Conversely, the consultation program provides an opportunity for the Discipline Committee to learn about additional or alternative procedural mechanisms that may be considered for incorporation into ABA models.

⁹ MCKAY REPORT, *supra* note 2. Raymond R. Trombadore chaired the McKay Commission following the death of Robert McKay.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 4-5.

¹² *Id.*

In examining a jurisdiction's lawyer regulatory system, the Committee uses criteria adapted from the *ABA Model Rules for Lawyer Disciplinary Enforcement* (MRLDE) as a guide. The MRLDE were adopted by the ABA House of Delegates in August 1989, and were amended in 1999 and 2002. The MRLDE identify best policies and procedures drawn from the collective experience of the nation's disciplinary agencies. The Committee also relies upon the Report and Recommendations of the McKay Commission, which reaffirm and expand upon the policies of the MRLDE.¹³ In addition, the Committee considers national practices, and carefully examines local factors and characteristics to ensure that its recommendations are tailored to meet specific or unique needs of the inviting jurisdiction. In this Report, those Recommendations appear at pages 35 through 106.

C. Persons Interviewed and Materials Reviewed

At the invitation of the Utah Supreme Court, the Discipline Committee's consultation team conducted the on-site portion of the consultation from June 21 through June 24, 2016. The Utah State Bar and the Office of Professional Conduct hosted the consultation team at the Utah State Bar offices. The team's interviews included members of the Ethics and Discipline Committee of the Utah Supreme Court, Utah District Court judges, staff of the Office of Professional Conduct (including the Senior Counsel), complainants, respondents, and lawyers who represent respondents and complainants in lawyer disciplinary matters. The team spoke with current and incoming Utah State Bar leadership, the Bar's Executive Director and other Bar staff. At the conclusion of its visit, the team met with members of the Utah Supreme Court.

In conducting its study, documents reviewed by the team included:

- (1) the Utah Supreme Court Rules of Lawyer Discipline and Disability;
- (2) the Utah Rules of Professional Conduct;
- (3) the Utah Supreme Court Standards for Imposing Lawyer Sanctions;
- (4) caseload and other statistics compiled by the Office of Professional Conduct regarding the operation of the Utah disciplinary system;
- (5) policies of the Office of Professional Conduct;
- (6) relevant case law;
- (7) the Utah Code of Civil Procedure;
- (8) administrative and financial annual reports of the Office of Professional Conduct and the Utah State Bar;
- (9) the Utah State Bar and the Utah Supreme Court websites;
- (10) Utah Supreme Court Rules for the Lawyers' Fund for Client Protection;
- (11) Utah Supreme Court Rules Governing Admissions;
- (12) Utah Supreme Court Rules of the Utah State Bar Dispute Resolution Committee;
- (13) Utah Supreme Court Rules of Integration and Management and Bylaws;
- (14) randomly chosen samples of correspondence and reports generated by the Office of Professional Conduct;
- (15) case files;
- (16) Screening Panel and District Court decisions;
- (17) Utah Supreme Court disciplinary opinions; and

¹³ MCKAY REPORT, *supra* note 2.

(18) job descriptions for the Office of Professional Conduct Senior Counsel and his staff.

The team is appreciative of and thanks the staff of the Office of Professional Conduct and the Utah State Bar for their graciousness in assisting the team and helping to make its stay comfortable and productive. The Discipline Committee thanks the Justices of the Utah Supreme Court and all other participants for their time, candor, and efforts in preparing for and participating in this study of the Utah lawyer disciplinary system.

II. OVERVIEW

A. Strengths of the Utah Lawyer Disciplinary System

This Report is designed to provide constructive suggestions based upon the ABA Standing Committee on Professional Discipline's collective knowledge and experience in lawyer regulation issues. This Report generally will exclude from discussion those areas of the system that are operating effectively. However, in order to provide a balanced assessment of Utah's lawyer disciplinary system, the Committee believes it is important to first recognize its strengths. The following is not an exhaustive description of those strengths. Additional programs and initiatives of note are described elsewhere in this Report.

It is clear that the Utah Supreme Court, the Office of Professional Conduct, the Ethics and Discipline Committee, and the volunteer and staff leadership of the Utah State Bar are all committed to maintaining an effective and fair lawyer disciplinary system. This is evident from the Court's invitation to the Discipline Committee to conduct an independent review of the disciplinary system and from its full engagement and commitment to improving the system. The Court's recent creation of the position of Clerk of the Ethics and Discipline Committee to perform administrative functions for the Committee is commendable. This change reinforces that the roles of the prosecutorial and the adjudicative components of the disciplinary system are distinct, and facilitates the necessary separation between the two.

Also commendable is the experience of and commitment of time by the system's volunteers to provide service to the public and the profession. In particular, volunteers are required to review large volumes of materials in preparation for Screening Panel hearings. All of the volunteers are dedicated and take their responsibilities seriously. The disciplinary system's volunteers are an invaluable asset of which the Court and the State should be proud.

The Discipline Committee also recognizes the dedication and commitment of the staff of the Office of Professional Conduct. The consultation team frequently heard that the Office of Professional Conduct Senior Counsel is well-respected by members of the Bar. Further, the Office of Professional Conduct's recent installation of JustWare, a new case management software program demonstrates the staff's willingness to enhance its efficiency through the use of technology. By utilizing JustWare the Office of Professional Conduct will be able to track all aspects of pending and closed/dismissed matters, retrieve related documents, and diary cases for deadlines, all of which will help improve the Office of Professional Conduct's ability to manage its caseload and address deficiencies.

The Court's adoption of Utah's Rules of Professional Conduct, which largely follow the ABA Model Rules of Professional Conduct, demonstrates the Court's willingness to ensure that Utah lawyers have optimal guidance regarding their professional conduct, and that necessary mechanisms are in place to protect Utah citizens. Utah's trust account overdraft notification program, a client protection mechanism that has proven successful nationally, is similarly commendable. Overdraft notification not only helps clients, but also serves as an educational tool for lawyers about proper trust account maintenance and record keeping. Jurisdictions that have adopted the overdraft notification rule have discovered that the vast majority of overdrafts are, in

fact, a result of bank error or lawyer negligence, not lawyer dishonesty. The result is that financial institutions are able to correct their systems to eliminate future problems, lawyers are educated about correct accounting procedures, and dishonest lawyers are discovered early, thereby minimizing losses to clients. Data reviewed by the consultation team confirms that the majority of overdraft notification investigations initiated by the Office of Professional Conduct in FY 2015/2016 resulted in dismissal or closure with a letter of caution.¹⁴

Other important client protection mechanisms of note are the Court's adoption of a rule requiring lawyers to certify annually compliance with the Court's IOLTA Rule and provide updated information about their client trust accounts.¹⁵ Also the rule providing for the appointment of a trustee, if necessary, to protect the interests of clients when a lawyer is placed on interim suspension, disappears, dies, is suspended or disbarred, or is transferred to disability inactive status, places Utah in line with other jurisdictions nationally.¹⁶ Another rule change of note designed to enhance public protection includes an accelerated summary suspension process for lawyers who fail to pay their annual license fees.¹⁷

Also notable are a number of other processes and procedures that already have been adopted by the Utah Supreme Court. For example, in addition to a diversion program, procedures exist to address concerns about lawyers who may be incapacitated. The inclusion of Rules for Lawyer Discipline and Disability providing for the interim suspension of lawyers convicted of crimes and for reciprocal discipline are also laudable. The notification rule, mandating lawyers to give notice to clients and others when certain discipline is imposed, and prohibiting those lawyers from accepting new retainers or employment after entry of the order of discipline or transfer to disability status, also serves public interest. Further, the Court's participation in the ABA National Lawyer Regulatory Data Bank contributes to effective and efficient reciprocal disciplinary enforcement.

The Discipline Committee commends the Court for adopting Standards for Imposing Lawyer Sanctions, based primarily on the black letter ABA *Standards for Imposing Lawyer Sanctions*. The Utah Standards provide a framework for evaluating misconduct and determining appropriate sanctions. They provide guidance to respondents and their counsel and facilitate negotiations for agreed dispositions.

¹⁴ See Utah State Bar Office of Professional Conduct Annual Report, August 2016, https://www.utahbar.org/wp-content/uploads/2016/10/OPC_ANNUAL_Report_2015-2016.pdf.

¹⁵ SUP. CT. R. PROF'L PRACTICE, Rule 14-1001(i).

¹⁶ RLDD 14-527.

¹⁷ RLDD 14-508(b).

B. Description of the Utah Lawyer Disciplinary System

The Utah Supreme Court possesses the inherent and constitutional authority to regulate the legal profession in Utah.¹⁸ All lawyers admitted to or engaged in the practice of law in Utah, or who render any legal services in Utah, including foreign legal consultants, are subject to the disciplinary jurisdiction of the Utah Supreme Court and the Office of Professional Conduct (“OPC”). Lawyers must comply with the rules and regulations prescribed by the Supreme Court and the Board of Bar Commissioners of the Utah State Bar.¹⁹ The Utah Supreme Court’s Rules of Professional Practice, including the Rules of Lawyer Discipline and Disability, the Utah Standards for Imposing Lawyer Sanctions, and the Rules Governing Admissions, govern discipline, disability, readmission, and reinstatement proceedings in the State.

Utah is a unified bar.²⁰ Consistent with the operation of some other unified bars, the Court has delegated the administrative, investigative, and prosecutorial functions of the disciplinary system to the Utah State Bar.²¹ The Utah State Bar is governed by a Board of Bar Commissioners (“the Board”) comprised of: eleven lawyers elected by the active members of the Utah State Bar who reside in one of five geographic areas; the president and president-elect of the Utah State Bar; and two public members appointed by the Court.²² The Utah State Bar acts as the Court’s agent with regard to lawyer discipline.²³ Subject to the Court’s approval, the Board is responsible for formulating the rules governing the conduct of all persons admitted to practice law in Utah as well as the disciplinary procedural rules.²⁴ In addition to overseeing the general affairs of the Bar, the Board consults annually with the Ethics and Discipline Committee Chair and the Office of Professional Conduct’s Senior Counsel regarding the activity and general standing of disciplinary matters and procedures.²⁵

In addition to carrying out the operations of the Utah State Bar, the Bar’s Executive Director serves as the Secretary to the Board, and performs all duties prescribed by the Board or delegated by the President, including serving as an ex-officio member of the Executive Committee. The Executive Committee’s responsibilities include reviewing the Bar’s affairs, making recommendations to the Board about the affairs of the Bar, and handling emergency matters when the entire Board cannot be convened.²⁶ The office of the Executive Director sends notices of public discipline, private admonitions, resignations with discipline pending, transfers to disability status, and petitions for reinstatement or readmission to all federal and state courts, the Utah State Bar Journal, and to newspapers of general circulation in each Utah Judicial District in which the respondent maintains a law office.²⁷ Additionally, the office of the Executive Director maintains the Roster of Lawyers

¹⁸ Utah Const. art. VIII § 4; Utah Sup. Ct. Rules of Professional Practice, Art. 5, Rule 14-501(b) (Rules of Lawyer Discipline and Disability) (hereinafter referred to as “RLDD”); *In re Discipline of Lundgren*, 2015 UT 58, ¶9, 355 P.3d 984.

¹⁹ SUP. CT. R. PROF'L PRACTICE, Rules 14-202(d) & 14-112.

²⁰ *In re Integration and Governance of the Utah State Bar*, 632 P.2d 845, 846 (Utah 1981).

²¹ See SUP. CT. R. PROF'L PRACTICE, Rules 14-102 & 14-202.

²² SUP. CT. R. PROF'L PRACTICE, Rules 14-103 & 14-105.

²³ SUP. CT. R. PROF'L PRACTICE, Rule 14-102(a)(1).

²⁴ SUP. CT. R. PROF'L PRACTICE, Rules 14-103(c)(2) & 14-105(b).

²⁵ RLDD 14-503(i).

²⁶ SUP. CT. R. PROF'L PRACTICE, Rule 14-205(l) & (o).

²⁷ RLDD 14-504(b)(12) & 14-516(b-c).

licensed to practice law in Utah on behalf of the Bar, sends delinquent registration notices, and removes lawyers from the Roster of Lawyers for not complying with the registration rules.²⁸ The Clerk of the Supreme Court maintains the Master Roll of lawyers admitted to practice in Utah.²⁹

1. Funding

Taxpayer monies are not used to fund the lawyer regulatory system. The Utah State Bar provides funds for the OPC's operational expenses and for the Consumer Assistance Program ("CAP") from various sources of its revenue streams, including from lawyer annual licensing fees.³⁰ The Bar also reimburses the expenses of the Ethics and Discipline Committee's Screening Panel members.³¹ Each lawyer licensed to practice law in Utah, including those licensed as foreign legal consultants, must be a member of the Utah State Bar, annually submit a registration form, and pay to the Bar a licensing fee in an amount fixed by the Board and approved by the Court.³² In FY 2016, approximately 11,869 lawyers were admitted to practice law in Utah, with approximately 9,234 of those lawyers actively engaged in the practice of law. Registration information collected by the Bar includes lawyers' email addresses, all jurisdictions in which a lawyer is admitted to practice, and the imposition of any discipline.³³ Lawyers who fail to submit the required registration form or pay their licensing fee are administratively suspended and ineligible to practice law until they submit their registration information and/or pay all outstanding license fees, as well as pay a \$200 reinstatement fee.³⁴

The Utah State Bar utilizes an electronic membership and licensing fee renewal system. There is no distinction between Bar membership dues and licensing fees. Utah has six categories of licensure status, as well as four categories of limited licensure. They are: 1) active; 2) active but practicing under three years; 3) active Emeritus; 4) inactive; 5) inactive with services; 6) inactive Emeritus; 7) in-house counsel; 8) inactive providing legal services for a legal organization; 9) military lawyers; and 10) foreign legal consultants.³⁵ In both FY 2015 and FY 2016, the Utah State Bar assessed active members practicing for three years or more, in-house counsel and foreign legal consultants a licensing fee of \$425, plus \$5 for the Lawyers' Fund for Client Protection. Active lawyers practicing for less than three years were assessed \$250, inactive lawyers who receive services pay \$150, and inactive lawyers paid an annual fee of \$105. Active and inactive Emeritus lawyers (who are members of the Bar for 50 years or 75 years old) pay no licensing fee. Military lawyers licensed in another jurisdiction and approved to practice law in Utah pay only a \$10 processing fee. In addition to the license fee, all active status lawyers, except for those on active Emeritus status, must pay a Lawyers' Fund for Client Protection assessment not to exceed \$20.

²⁸ SUP. CT. R. PROF'L PRACTICE, Rule 14-203(c) & RLDD 14-507.

²⁹ SUP. CT. R. PROF'L PRACTICE, Rule 14-104.

³⁰ RLDD 14-505(a).

³¹ *Id.*

³² SUP. CT. R. PROF'L PRACTICE, Rules 14-104, 14-107 & 14-207 & RLDD 14-508(a).

³³ RLDD 14-507.

³⁴ RLDD 14-508(b).

³⁵ SUP. CT. R. PROF'L PRACTICE, Rule 14-203; *see also*, Utah State Bar 2015-2016 Summary of Operations, https://www.utahbar.org/wp-content/uploads/2016/10/2015-2016_Annual_Report_FINAL.pdf.

In addition to submitting the annual fee with the licensing statement, each lawyer must report compliance with the Court's IOLTA Rule by submitting an IOLTA certification form to the Utah Bar Foundation.³⁶ The Utah Bar Foundation is authorized to petition the Court for the suspension of a lawyer who fails to comply with the IOLTA Rule or to complete the IOLTA Certification form.³⁷

The Bar pays all of OPC's expenses, salaries, and administrative costs. The Board approves a separate budget for the OPC, in conjunction with the budgets for all other activities and programs of the Bar. The Executive Director, with the assistance of OPC Senior Counsel, prepares OPC's annual budget for review and approval by the Board.³⁸ OPC Counsel may petition the Supreme Court for review of any modifications to the budget imposed by the Board.³⁹ By Rule, OPC's budget must "reasonably ensure the accomplishment of the goals of the disciplinary system, the professional development of the staff, and salaries that will encourage continued employment of competent professionals and support staff..."⁴⁰

For FY 2015/2016 the Utah State Bar collected \$4,137,400 in licensure fees.⁴¹ For FY 2016/2017, the Bar projected receiving a total of \$4,219,089 in licensure fees.⁴² OPC's expenses and overhead for FY 2015/2106 totaled \$1,253,170; in FY 2015/2016, expenses and overhead were projected at \$1,336,238.

The CAP has its own budget, also prepared by the Executive Director, for submission to and approval by the Board. CAP's budget for FY 2016 was \$122,449; its FY 2016-2017 projected budget was \$120,062.

2. Facilities and File Maintenance/Location

The OPC is located in a 33,000 square foot building, known as the "Utah Law & Justice Center," that is owned and operated by the Utah State Bar. The Law & Justice Center is a modern, well-equipped building that is conveniently located next to a major highway. The Bar offices are open to the general public, and free parking is provided. A receptionist located on the main floor directs incoming calls to the requested Utah State Bar offices, and does the same with walk-in traffic. The OPC offices are located on the main floor of the building. OPC offices have a separate locked entrance from the other offices of the Bar. The CAP office is also located on the main floor of the building. CAP's office cannot be accessed from the OPC offices. The Ethics and Discipline Committee Screening Panel hearings are held in conference rooms located on the upper level of the building. Additional Bar offices, meeting rooms, a kitchen, and storage facilities are located on the lower level.

³⁶ SUP. CT. R. PROF'L PRACTICE, Rule 14-1001(i).

³⁷ SUP. CT. R. PROF'L PRACTICE, Rule 14-1001(i)(3).

³⁸ RLDD 14-504(b)(13).

³⁹ *Id.*

⁴⁰ RLDD 14-505(b).

⁴¹ The Utah State Bar budget is based on a fiscal year running from July 1 through June 30.

⁴² See Utah State Bar 2015-2016 Summary of Operations, https://www.utahbar.org/wp-content/uploads/2016/10/2015-2016_Annual_Report_FINAL.pdf.

The Rules of Lawyer Discipline and Disability provide limited information regarding retention and expunction of the OPC records and files. OPC Senior Counsel is responsible for maintaining permanent records of discipline and disability matters. Informal complaints terminated by dismissal or a declination to prosecute are expunged after seven years.⁴³ Recordings of Screening Panel hearings are maintained for one year.⁴⁴ The Rules of Lawyer Discipline and Disability do not include retention policies for the records maintained by the Clerk of the Ethics and Discipline Committee (hereinafter referred to as the “Ethics Committee”).

The team was informed that OPC developed informal file retention policies to address retention of certain OPC records, including communications that do not fall within OPC’s jurisdiction or do not identify a specific lawyer. Those materials are kept for one year for later review to determine if the material relates to an open investigation.⁴⁵ If they do not relate to an open investigation, the materials are destroyed. In addition, during their visit, the consultation team learned that, on occasion, the OPC receives lawyers’ files as appointed trustees to inventory and return files to clients. Those files are kept in a general storage room, along with other OPC closed cases, accessible by other tenants of the Bar’s building.

3. Components of the Utah Lawyer Disciplinary System

a. The Consumer Assistance Program (CAP)

The Utah State Bar’s CAP was established in 1997, to offer consumers and lawyers an informal process to facilitate the resolution of minor complaints such as communication issues, billing disputes or return of client files. CAP operates as part of the Bar’s “Program and Services” Department under the supervision of the Bar’s Executive Director.

All communications to CAP are considered confidential and can be submitted to CAP by email, telephone or in writing. Generally, to initiate the CAP process, consumers complete a Request for Assistance Form (RFA) available on the Bar’s website. Currently, almost all RFAs and other written communications sent to CAP are forwarded by the CAP Director to the OPC for initial screening. OPC will return to CAP for processing those RFAs that OPC determines raise minor issues that can better be resolved by CAP. On occasion, consumers will contact the CAP office directly and the CAP lawyer will open a file and proceed to resolve the matter. OPC Counsel does not screen or review those communications.

CAP is staffed with one part-time lawyer whose title is Consumer Assistance Program Attorney. CAP functions independently of the OPC. Upon receipt of a complaint, the CAP Attorney attempts to informally resolve minor disputes between lawyers and consumers via telephone conferences or by letter. When appropriate, she also refers consumers to other Utah State Bar programs for assistance, including the Bar’s Fee Dispute Resolution program, Modest Means, Tuesday Night Bar, the Lawyers’ Fund for Client Protection or Lawyers Helping Lawyers. There are no written rules or policies that delineate the CAP Attorney’s responsibilities, or that govern the CAP process. CAP does not have a record retention rule or policy. The CAP Attorney maintains the office’s files

⁴³ RLDD 14-504(b)(10) & (11).

⁴⁴ RLDD 14-510(b)(6) & OPC *Policies and Procedures*, Policy K(11).

⁴⁵ OPC *Policies and Procedures*, Policy K(3).

and records. CAP does not share the database used by OPC for matters it is handling. The consultation team learned that the CAP Attorney developed her own recordkeeping system, and that she also keeps some CAP files in her home.

The CAP Attorney lawyer maintains and publishes statistical information in the Utah State Bar's annual "Summary of Operations" that is published on the Bar's website.⁴⁶ During FY 2015, the CAP Director opened 963 files and handled 1411 teleconferences.⁴⁷ Statistics maintained by CAP do not include a tally of the matters resolved successfully or those closed due to the lack of a lawyer's cooperation.

b. The Discipline Process Information Office (DPIO)

The Board of Bar Commissioners created the Discipline Process Information Office (DPIO) in 2015 to assist respondents, complainants, and the public.⁴⁸ The CAP Attorney staffs the DPIO. Although the DPIO is not part of the OPC, it is delineated as such on the Bar's website staff directory. The DPIO provides information to respondents and complainants about the disciplinary complaint process. In addition, during the pendency of a disciplinary investigation or prosecution by the OPC, the DPIO may refer respondents to the relevant disciplinary procedural rules in response to an inquiry, and also may inform respondents about the progress of their cases that are pending with the OPC. The Utah State Bar's Annual Report states that between January and September 2016, DPIO assisted sixty lawyers with questions about the disciplinary process.⁴⁹ In 2015, sixty-nine lawyers contacted DPIO with such questions.⁵⁰ There are no rules or policies governing the operations or procedures of the DPIO. In addition, no written record retention policies govern that office.

c. The Office of Professional Conduct (OPC)

The OPC is responsible for screening, investigating, and prosecuting complaints alleging violations of the Utah Rules of Professional Conduct. OPC also handles transfers to disability inactive status, interim suspensions, reinstatement, and readmission matters.⁵¹ OPC acts on behalf of the Utah State Bar in all disciplinary, disability, reinstatement and readmission matters.⁵² The Bar's Board appoints the OPC Senior Counsel to carry out the management, investigation and prosecutorial functions of the office.⁵³ OPC's current Senior Counsel has served for nineteen years. Along with the Senior Counsel, the lawyer staff of OPC includes a Deputy Senior Counsel and four Assistant Counsel, all of whom have been employed with OPC for periods ranging from

⁴⁶ See Utah State Bar 2015-2016 Summary of Operations, https://www.utahbar.org/wp-content/uploads/2016/10/2015-2016_Annual_Report_FINAL.pdf.

⁴⁷ *Id.*

⁴⁸ See Utah State Bar 2014-2015 Summary of Operations, https://www.utahbar.org/wp-content/uploads/2015/10/2014-15_USB_AnnualReport.pdf.

⁴⁹ Utah Bar Journal, vol. 29, No. 6, https://www.utahbar.org/wp-content/uploads/2016/11/2016_edition_06_nov_dec.pdf.

⁵⁰ Utah Bar Journal, vol. 28, No. 6, https://www.utahbar.org/wp-content/uploads/2015/07/2015_edition_06_nov_dec.pdf.

⁵¹ RLDD 14-504(b).

⁵² RLDD 14-502(i) & 14-504.

⁵³ RLDD 14-502(m) & 14-504(a).

five to sixteen years. OPC Counsel cannot engage in the private practice of law.⁵⁴ Former OPC Counsel are prohibited from personally representing lawyer-respondents in any proceeding which former OPC Counsel investigated or prosecuted during their employment with OPC.⁵⁵ Other OPC support staff includes four paralegals and one intake secretary. OPC employs no professional investigators or auditors.

Each OPC Assistant Counsel and the Deputy Counsel has experience investigating and litigating disciplinary cases. Some of these Counsel focus their duties on investigations or appeals, while others litigate cases either before the Screening Panels or the District Court. OPC Senior Counsel participates in screening complaints at intake and prosecutes cases in the District Court and the Supreme Court. Of the three of the Assistant Counsel who prosecute cases before Screening Panels, only one also prosecutes disciplinary cases in the District Court. Two Assistant Counsel are assigned to handle reinstatement and readmission proceedings in the District Court.

In FY 2014, OPC Counsel carried an average caseload of 203 files, and in FY 2015, their average caseload was 217.⁵⁶ The team was advised that in FY 2015, OPC initiated 614 investigations, from the 817 communications it received and reviewed that year. Of those 614 matters investigated, OPC dismissed 475 after investigation. Also in FY 2015 OPC initiated six reciprocal discipline proceedings, processed four petitions for reinstatement or readmission, and filed five petitions for the appointment of a trustee.

Pursuant to Rule 14-504 of the Rules of Lawyer Discipline and Disability, the OPC Senior Counsel:⁵⁷

- (1) employs and supervises the Deputy Senior Counsel, the Assistant Counsel and the OPC's support staff;
- (2) initiates investigations concerning possible ethics rule violations based on review of public records, media, court decisions, and the Internet;⁵⁸
- (3) maintains in print and electronic format permanent records of discipline, disability, readmission and reinstatement matters;
- (4) formulates diversionary programs;
- (5) monitors probations;
- (6) supervises pro bono lawyers who supervise respondents placed on probation;
- (7) formulates the budget for the OPC in coordination with the Bar's Executive Director;⁵⁹
- (8) forwards copies of judgments of convictions to all disciplinary agencies in which a lawyer is admitted to practice when a lawyer is convicted of a crime in Utah;

⁵⁴ RLDD 14-504(a).

⁵⁵ RLDD 14-504(c).

⁵⁶ See 2014 ABA Survey on Lawyer Discipline Systems (2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2014_sold_final_results.authcheckdam.pdf; 2015 ABA Survey on Lawyer Discipline Systems (2017), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2015_sold_results.authcheckdam.pdf.

⁵⁷ RLDD 14-504(b).

⁵⁸ Utah State Bar Office of Professional Conduct Annual Report 2015-2016, https://www.utahbar.org/wp-content/uploads/2016/10/OPC_ANNUAL_Report_2015-2016.pdf.

⁵⁹ RLDD 14-504(b)(14).

- (9) compiles statistics and maintains electronically a log of all complaints received, investigative files, statistical summaries of rules violated, and transcripts of proceedings;
- (10) expunges (i.e. destroys) after seven years all records or other evidence of the existence of informal complaints terminated by dismissals or declination to prosecute, and notifies respondents of the expungement;
- (11) along with the Ethics and Discipline Committee Chair, consults annually with the Court and the Board about the disciplinary caseload and procedures;
- (12) responds to all requests for information from the media regarding specific matters;⁶⁰ and
- (13) prepares an annual report to the Court and the Board and for publication regarding the scope and nature of the Ethics Committee's work, including statistical data detailing the "number of disciplinary cases investigated, the number brought before the Committee, formal complaints filed, dispositions, cases dismissed, informal ethics opinions issued, diversionary diversions, and such other relevant information to help the Supreme Court understand OPC's operations and the efficiency and effectiveness of the disciplinary system."⁶¹

Senior Counsel also serves on the Utah Supreme Court Advisory Committees on the Rules of Professional Conduct and Professionalism, as well as on the Supreme Court Ad Hoc Committee on Rulemaking. In addition, the OPC Senior Counsel and the Deputy Senior Counsel serve on the ad hoc committee of the Ethics and Discipline Committee that advises the Court on changes to the Rules of Lawyer Discipline and Disability and the Standards for Imposing Lawyer Sanctions.

Additional responsibilities of OPC Counsel include to:

- (1) investigate information alleging lawyer misconduct, grounds for discipline or transfer to disability status;⁶²
- (2) draft Notices of Informal Complaints;⁶³
- (3) present and prosecute Informal Complaints to Screening Panels;⁶⁴
- (4) prepare briefs and memoranda and handle proceedings before Screening Panel hearings;
- (5) prepare and file Formal Complaints in the District Court;⁶⁵
- (6) prosecute Formal Complaints and proceedings for transfer to or from disability inactive status before the District Courts and the Utah Supreme Court;⁶⁶
- (7) correspond with complainants, respondents, and their counsel, including sending detailed dismissal letters to complainants explaining the reasons for closing or dismissing an investigation;
- (8) investigate and defend against petitions for readmission and reinstatement;⁶⁷

⁶⁰ The consultation team was informed that it is the policy of the OPC to refer all media inquiries of general nature regarding the OPC and the lawyer disciplinary process to the Bar's Communications Director.

⁶¹ RLDD 14-503(i).

⁶² RLDD 14-504(b)(2).

⁶³ RLDD 14-510(a)(5).

⁶⁴ RLDD 14-504(b)(4) & 14-510(b)(1).

⁶⁵ RLDD 14-511(a).

⁶⁶ RLDD 14-504(b)(4).

⁶⁷ RLDD 14-504(b)(5), 14-524 & 14-525.

- (9) attend Character and Fitness Proceedings in all readmission cases and represent the OPC in the District Court regarding all cases for reinstatement and readmission;⁶⁸
- (10) initiate interim suspension proceedings;⁶⁹
- (11) negotiate settlements and discipline by consent;⁷⁰
- (12) review and conduct inquiries regarding insufficient fund notices received from financial institutions concerning lawyers' client trust accounts;
- (13) initiate and prosecute reciprocal discipline proceedings;⁷¹ and
- (14) petition for and oversee trusteeships regarding disciplined, deceased, missing or disabled lawyers.⁷²

In addition, OPC Counsel operate an Ethics Hotline Monday through Friday, 8:00 am to 5:00 pm. OPC Counsel are assigned to answer calls to the Hotline on a rotating basis. Utah lawyers may submit ethics questions in writing or by telephone to the Hotline, and OPC Counsel will provide confidential ethics advice within 24 hours of the contact, or in less time if the inquirer indicates the situation is an emergency. No disclaimers are provided in the Rules of Lawyer Discipline and Disability for the ethics advice given by OPC on the Ethics Hotline, although information on the website cautions lawyers that the advice is informal and "is not intended to be legally binding" on the office.⁷³ OPC keeps a record of all calls to the Hotline and written ethics assistance requests for seven years. OPC Counsel also serve as consultants to the Utah State Bar's Ethics Advisory Opinion Committee which issues formal ethics advisory opinions. The OPC cannot prosecute a lawyer for conduct based on the lawyer's good faith compliance with a current written ethics advisory opinion.⁷⁴ However, no court is bound by the Ethics Advisory Opinion Committee's interpretation of the Utah Rules of Professional Conduct.⁷⁵ The OPC may ask the Ethics Advisory Opinion Committee to review, modify or withdraw an ethics advisory opinion. Any action taken by the Ethics Advisory Opinion Committee regarding a current opinion is reported to the Board, which may take any such final action it deems appropriate.⁷⁶ OPC Counsel may also "request the Supreme Court to review, affirm, reverse or otherwise modify an ethics advisory opinion."⁷⁷

OPC Counsel also engage in outreach to the Utah legal profession by writing articles for the Utah Bar Journal and presenting CLE programs on topics including professional responsibility, ethics and civility. OPC also develops and presents programs for the Bar's Ethics School.

The OPC retains lawyers' disciplinary histories electronically, and can easily retrieve them to respond to requests for information. In 2014, the Bar updated OPC's technology tools with an electronic case management system called JustWare. JustWare has a diary and tickler system that tracks progress of a case and prompts OPC staff to take action if no events are recorded in a file for a sixty (60) day period. This includes communications with complainants. JustWare allows

⁶⁸ RLDD 14-504(b)(5).

⁶⁹ RLDD 14-518 & 14-519.

⁷⁰ RLDD 14-520.

⁷¹ RLDD 14-522.

⁷² RLDD 14-527.

⁷³ See <http://www.utahbar.org/opc/office-of-professional-conduct-ethics-hotline/>.

⁷⁴ RLDD 14-504(d).

⁷⁵ *Id.*

⁷⁶ RLDD 14-504(d)(1).

⁷⁷ RLDD 14-504(d)(2).

easy access to pleadings and correspondence related to a particular case, respondents' disciplinary histories, and can assist OPC in deriving varied statistical reports. The Bar's IT Department, staffed essentially by one person, maintains the hardware and software needs for the Bar's system, including the OPC. Although the office scans documents and files for electronic storage, many interviewees informed the team that the scanning equipment breaks down frequently and is outdated. The OPC does not use trust account, investigative or litigation software.⁷⁸ OPC staff have electronic access to the state court system's records and federal court documents.

The OPC does not have its own, stand-alone website. General information about Utah's lawyer disciplinary system is available on the Utah State Bar website. Under either the "Member Services," "Public Service," or "Professional Conduct" tabs on the Bar's website, separate hyperlinks take the viewer to information about "Professional Conduct & Ethics Guidance," "the Office of Professional Conduct," "the Consumer Assistance Program," "the Ethics and Discipline Committee of the Utah Supreme Court," and the "Ethics Hotline." Under the "Professional Conduct" tab, the website describes the Utah Supreme Court's authority to regulate the practice of law and the delegation to OPC to investigate and prosecute allegations charging a violation of the Rules of Professional Conduct.⁷⁹ Individuals can also access the Utah Rules of Professional Conduct, the Rules of Discipline and Disability Rules, and other rules relating to the Court's authority to regulate the practice of law. Links to current and archived copies of the *Utah State Bar Journal* are also available on the Bar's website. The Bar's website also includes a link for "Bar Operations" where volunteer opportunities for various Bar programs are posted. Ethics and Discipline Committee decisions imposing public discipline, District Court disciplinary decisions and orders, and the Court's disciplinary opinions and public orders resulting in the imposition of discipline, are not available on the Bar's website or published as a matter of routine.

d. The Ethics and Discipline Committee of the Utah Supreme Court (Ethics Committee)

The Utah Supreme Court appoints the thirty-six individuals who volunteer to serve on the Ethics Committee. The Ethics Committee is comprised of twenty-eight lawyers and eight public members.⁸⁰ The Court designates one lawyer member to serve as chair and three lawyer members as vice-chairs.⁸¹ The vice-chairs act in the absence or resignation of the chair. Members of the Ethics Committee are appointed for a three-year term.⁸² Rule 14-503 of the Rules of Lawyer Discipline and Disability does not contain a provision for reappointment or consecutive terms.

The Ethics Committee chair's responsibilities include:⁸³

⁷⁸ Litigation support software can aid lawyers in the process of litigation and document review, including organizing, searching and reviewing discovery. *See, e.g.*, ABA Law Practice Division, Legal Technology Resource Center, Litigation Support Software Comparison Chart:

http://www.americanbar.org/content/dam/aba/migrated/tech/ltrc/charts/litsupportchart_final.pdf.

⁷⁹ *See* <http://www.utahbar.org/opc/>.

⁸⁰ RLDD 14-503(a).

⁸¹ *Id.*

⁸² RLDD 14-503(a).

⁸³ RLDD 14-503(b).

- (1) supervising the Committee and Screening Panels to ensure that matters proceed expeditiously and that there is uniformity in decisions;⁸⁴
- (2) providing information to Screening Panels concerning relevant ethics and judicial decisions;
- (3) making recommendations to the Supreme Court regarding appointments to and removals from Screening Panels;
- (4) serving as an alternate member of any Screening Panel when necessary;⁸⁵
- (5) reviewing and approving draft formal complaints prepared by the OPC, and signing the formal complaints to be filed in District Court;⁸⁶
- (6) receiving and assigning to a Screening Panel any Informal Complaint filed against an OPC Counsel, an Ethics Committee or Board member;⁸⁷
- (7) requesting that the Supreme Court appoint special counsel as necessary to present a case against OPC Counsel, an Ethics Committee or Board member;⁸⁸
- (8) reviewing, approving or rejecting Screening Panel decisions recommending the imposition of a private admonition or public reprimand;⁸⁹
- (9) approving or rejecting petitions for discipline by consent filed before formal proceedings are initiated;⁹⁰
- (10) conducting appellate review of Screening Panel decisions, upon exceptions filed by the parties;⁹¹ and
- (11) reviewing and approving requests for dismissal of cases deferred pending successful completion of diversion contracts.⁹²

The Ethics Committee Clerk is a paralegal in the Utah State Bar General Counsel's office who spends part of his time fulfilling his duties as Clerk and the other on work for the General Counsel. Although generally supervised by the General Counsel, the Clerk reports to the Chair of the Ethics Committee regarding the duties performed on behalf of the Committee. The Clerk is subject to the confidentiality provisions of the Rules of Lawyer Discipline and Disability.⁹³ The Clerk performs the administrative functions of the Ethics Committee and Screening Panels. The Clerk's duties include:⁹⁴

- (1) maintaining the Screening Panels' calendar and docket;
- (2) accepting all documents for filing with the Committee;
- (3) scheduling Screening Panel hearings;
- (4) sending notices to the appropriate individuals of the times and dates of Screening Panel hearings;
- (5) notifying respondents, complainants and counsel of Screening Panel dispositions;

⁸⁴ RLDD 14-503(b).

⁸⁵ RLDD 14-503(d).

⁸⁶ RLDD 14-511(a).

⁸⁷ RLDD 14-517(f).

⁸⁸ *Id.*

⁸⁹ RLDD 14-510(b)(10).

⁹⁰ RLDD 14-520(a).

⁹¹ RLDD 14-510(c).

⁹² RLDD 14-533(j)(1).

⁹³ RLDD 14-503(h)(1).

⁹⁴ *Id.*

- (6) assisting the Screening Panels in drafting decisions;
- (7) sending copies of files to the Ethics Committee chair and Screening Panels either electronically, by mail or messenger;
- (8) maintaining the official files of the Ethics Committee and Screening Panels; and
- (9) processing requests for video recordings of Screening Panel hearings.⁹⁵

The Clerk's desk is by the General Counsel's office, and he stores all of the Ethics Committee's paper files and documents in a locked file cabinet by his desk. Electronic files and records regarding the matters pending before the Ethics Committee are maintained on the Clerk's desktop and are kept separate from the Bar's and OPC's database.

Except for the chair and three vice-chairs, the members of the Ethics Committee are divided into four Screening Panels, each consisting of six lawyers and two public members.⁹⁶ The Utah Supreme Court names the chair and vice chair for each Screening Panel. Two lawyers and one public member constitute a quorum for each Panel and the concurrence of a majority members present is required for a Screening Panel determination.⁹⁷ Upon appointment, new members participate in an orientation luncheon and receive material. Training of continuing Screening Panel members consists of a separate annual luncheon. No other formal training is provided.

Screening Panels are responsible for reviewing, investigating and hearing Informal Complaints alleging unethical or unprofessional conduct.⁹⁸ The consultation team was advised that in practice, the Panel's investigations consist of the hearings at which respondents and/or complainants testify, and that OPC Counsel primarily are responsible for conducting the investigations. Following a hearing, Screening Panel dispositions of Informal Complaints may include: 1) dismissal; 2) the issuance of a letter of caution; 3) referral of an informal complaint to the Diversion Committee or the Professionalism Counseling Board; 4) a recommendation to the Ethics Committee Chair of a low-level sanction, such as admonition or public reprimand; or 5) a finding of probable cause and direction to OPC Counsel to file a formal complaint against the respondent in the District Court.⁹⁹

e. Utah State District Courts

The Utah Supreme Court has delegated to the Utah District Court the responsibility to adjudicate formal disciplinary proceedings, reinstatement petitions, petitions for interim suspension, and transfers to disability status.¹⁰⁰ The District Court is the state's trial court of general jurisdiction. There are 71 full-time District Court judges serving in the state's eight Judicial Districts.¹⁰¹ The Utah State Court's website includes a link for the District Courts and an "Overview of Utah District Courts" hyperlink that includes general information about the types of cases that the District Court handles and its authority. No information is provided on the District Court webpage about Utah lawyer disciplinary cases or the role of the District Court judges in adjudicating those cases. In

⁹⁵ RLDD 14-510(b)(6).

⁹⁶ RLDD 14-503(d).

⁹⁷ *Id.*

⁹⁸ RLDD 14-503(f).

⁹⁹ RLDD 14-510(b)(7); *see also*, Long v. Ethics & Discipline Comm., 2011 UT 32, ¶36, 256 P.3d 206.

¹⁰⁰ RLDD 14-511, 14-518, 14-519, 14-523 & 14-525; *see also*, *In re Sonnenreich*, 2004 UT 3, ¶ 12, 87 P.3d 712.

¹⁰¹ *See* AN OVERVIEW OF THE UTAH DISTRICT COURTS, <https://www.utcourts.gov/courts/dist/overview.htm> (last visited March 31, 2017).

addition, unlike other case types filed in the District Court, disciplinary cases are not assigned a “case type code” as listed on the Utah Courts webpage of “Comprehensive Case and Filing Types in Utah District Courts.”¹⁰² Disciplinary cases are assigned to District Court judges on a random basis by automation.

f. The Diversion Committee of the Utah State Bar

The Utah Supreme Court appoints five lawyers and one nonlawyer with professional training in substance abuse and/or stress management to serve on the Diversion Committee of the Utah State Bar.¹⁰³ The Court designates one lawyer member to serve as chair.¹⁰⁴ Members are appointed for a four-year term, with one lawyer’s term expiring each year. Members cannot serve more than two consecutive terms.¹⁰⁵ Vacancies for the Diversion Committee are announced on the Utah State Bar’s website.

In addition to monitoring and supervising the conditions of diversion, the Diversion Committee determines compliance with the terms of a diversion contract. The Diversion Committee conducts hearings regarding any alleged breach of the diversion contract. The chair of the Diversion Committee:¹⁰⁶

- (1) determines the appropriateness of diversion, if requested by the respondent, after consultation with OPC Counsel;
- (2) negotiates the terms of the diversion agreement;
- (3) executes the diversion contract;
- (4) may void a diversion contract upon a material violation of its terms; and
- (5) determines hardship requests for waiver of diversion fees and costs.

The conditions of diversion may require respondent’s participation in one or more of the following programs: 1) fee arbitration; 2) mediation; 3) law office management assistance; 4) lawyer assistance program; 5) psychological and behavioral counseling; 6) monitoring; 7) restitution; 8) continuing legal education; or 9) any other program or correction action to address the respondent’s conduct.¹⁰⁷

4. Intake and Screening Procedures

Information about the Utah lawyer disciplinary process is available on the Utah State Bar website.¹⁰⁸ A person wishing to complain about a Utah lawyer may do so by submitting: a CAP Request for Assistance Form; a non-notarized written communication; or a notarized and verified

¹⁰² See UTAH COURTS, COMPREHENSIVE CASE AND FILING TYPES IN UTAH DISTRICT COURTS, <https://www.utcourts.gov/xchange/codes.asp?type=case> (last visited March 31, 2017).

¹⁰³ See RLDD 14-533(a) (Preferably at least one lawyer member should have past experience serving on the Ethics and Discipline Committee).

¹⁰⁴ RLDD 14-533(b)(1).

¹⁰⁵ *Id.*

¹⁰⁶ RLDD 14-533.

¹⁰⁷ RLDD 14-533(a)(1)-(9).

¹⁰⁸ See UTAH STATE BAR OFFICE OF PROFESSIONAL CONDUCT, <http://www.utahbar.org/opc/> (last visited March 31, 2017).

Informal Complaint.¹⁰⁹ The Bar’s website includes a “How do File a Complaint against an Attorney” link under “Consumer Protection Programs.” That webpage provides information about submitting a CAP Request for Assistance and includes the downloadable “CAP Request for Assistance Form.” There is no Informal Complaint form provided online.¹¹⁰ Individuals who wish to file an Informal Complaint must review the procedures outlined in the Rules for Lawyer Discipline and Disability or contact OPC and request an Informal Complaint form.¹¹¹

The CAP “Request for Assistance Form” (RFA) is available in English only and allows individuals to submit pertinent information, including supporting documents, electronically or by U.S. mail to the OPC. Individuals are cautioned that if they do not attach supporting documents to the online form, their “submission will not be sent and no case will be initiated.”¹¹² The consultation team learned that this warning is inconsistent with the OPC’s practice. The OPC will routinely contact complainants or respondents requesting additional information during the preliminary investigation stage if sufficient information is not initially provided. Also, consumers are alerted in a “Notice” posted on the webpage that the lawyer in question and CAP may disclose “confidential and privileged information” and that by submitting an RFA, complainants “release all claims” against their lawyer and the Utah State Bar “relating to disclosure of the information submitted.”¹¹³

Unlike RFA’s, “Informal Complaints” alleging misconduct by or incapacity of a lawyer must be written, notarized and verified.¹¹⁴ Notarized and verified “Informal Complaints” are the only form of “official” complaint recognized in the Rules of Lawyer Discipline and Disability. Non-notarized complaints, as a matter of practice, are evaluated as RFAs.¹¹⁵ Although the Rules of Lawyer Discipline and Disability do not require a particular form for Informal Complaints, the OPC is permitted to provide a standardized form.¹¹⁶ The Rules state that “substance should prevail over form.”¹¹⁷ The consultation team learned that the OPC has developed an Informal Complaint form and provides the form upon request. The consultation team was informed that the OPC handles Informal Complaints that are not notarized and verified in one of three ways: the OPC returns the Informal Complaint to the complainant for verification and notarization; OPC refers the communication to CAP; or dismisses the matter, after an investigation. However, if the OPC determines that the circumstances warrant it, OPC Counsel may notarize a complainant’s unverified Informal Complaint and proceed with an investigation.¹¹⁸ However, the team was informed that, as a matter of practice, only Senior Counsel notarizes Informal Complaints. The OPC does not accept any form of complaints over the telephone.

¹⁰⁹ RLDD 14-510 sets out the process for informal complaints. Information about filing a Request for Assistance Form is found only on the Bar’s website. See UTAH STATE BAR, HOW DO I COMPLAIN AGAINST AN ATTORNEY, <http://www.utahbar.org/cap-request-form/> (last visited March 31, 2017).

¹¹⁰ See UTAH STATE BAR, OVERVIEW OF PUBLIC SERVICE PROGRAMS, INFORMATION AND RESOURCES, <http://www.utahbar.org/public-services/> (last visited March 31, 2017).

¹¹¹ RLDD 14-502(g).

¹¹² See UTAH STATE BAR, HOW DO I COMPLAIN AGAINST AN ATTORNEY, <http://www.utahbar.org/cap-request-form/>.

¹¹³ *Id.*

¹¹⁴ RLDD 14-502(g).

¹¹⁵ See Utah State Bar Office of Professional Conduct Annual Report (Aug. 2016), https://www.utahbar.org/wp-content/uploads/2016/10/OPC_ANNUAL_Report_2015-2016.pdf.

¹¹⁶ RLDD 14-510(a)(2).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

The OPC's central intake process is administered by three of the OPC Counsel, including the Senior Counsel, and one intake paralegal. The Rules of Lawyer Discipline and Disability do not include specific procedures for the intake and screening of complaints. However, the OPC has developed a Policies and Procedures manual that provides guidelines for processing all types of written initial communications described above during intake. Within two days of receipt of all initial written communications about a Utah lawyer, whether sent to the OPC or CAP, one of the three intake screening OPC Counsel reviews the communication to determine whether it alleges grounds for discipline, implicates the Utah Rules of Professional Conduct, falls within or outside the jurisdiction of the OPC, or raises minor issues that can be resolved by referral to CAP.¹¹⁹ If no grounds for discipline are alleged, the OPC refers the communication back to CAP. The OPC has no further involvement in the matter once a referral is made to CAP.

Statistical information reviewed by the team revealed that in 2015, of the 586 RFAs reviewed by OPC Counsel, 203 were referred to CAP. In 2016, 289 of the 625 RFAs reviewed during intake were referred to CAP for resolution. At the same time, the OPC received and reviewed 167 Informal Complaints in 2015 and 103 Informal Complaints in 2016. Other communications reviewed by the OPC during the screening process include overdraft notifications from financial institutions regarding lawyers' client trust accounts. In 2015, the OPC reported receiving 64 such notifications and, in 2016, the OPC received 52 overdraft notifications.¹²⁰

5. Investigations

All Informal Complaints and RFAs retained by the OPC are processed for preliminary investigation. The OPC Intake Secretary opens a file and the matter is assigned a case number, after which the file is assigned to one of three designated intake OPC Assistant Counsel. A preliminary investigation includes an initial review and determination of whether the allegations are sufficiently clear.¹²¹ If not, OPC Counsel may contact complainants, respondents and witnesses and review court records to obtain additional information. Although not set out in the Rules of Lawyer Discipline and Disability, the OPC Policies and Procedures Handbook provides guidelines for conducting the preliminary investigation. OPC also uses form letters for communications to complainants and respondents at this stage of the proceedings.

At the conclusion of the preliminary investigation, OPC Counsel determines whether further investigation is warranted, or if the respondent should provide an informal response. OPC Senior Counsel and his staff meet weekly to discuss the recommended action on each file. If no further information is required, OPC Counsel may dismiss, close or decline to prosecute a matter on the basis that it is "frivolous, unintelligible, may be adequately addressed in another forum, unsupported by fact, or does not raise probable cause of any unprofessional conduct."¹²² Dismissal may also be warranted if the Informal Complaint is barred by the statute of limitations, which

¹¹⁹ The consultation team was informed that consumers often contact the Consumer Assistance Office directly and those communications are not reviewed by OPC although the CAP lawyer maintains a log of such communications.

¹²⁰ Utah State Bar Office of Professional Conduct Annual Report, August 2016, https://www.utahbar.org/wp-content/uploads/2016/10/OPC_ANNUAL_Report_2015-2016.pdf; Utah State Bar Office of Professional Conduct Annual Report, August 2015, https://www.utahbar.org/wp-content/uploads/2015/10/OPC_ANNUAL_Report_2014-2015.pdf.

¹²¹ RLDD 14-510(a)(3).

¹²² RLDD 14-510(a)(7).

requires that disciplinary proceedings commence within four years from the discovery of the acts constituting an alleged violation of the Rules of Professional Conduct.¹²³ In addition to declining to prosecute a matter, OPC Counsel may elect to resolve a matter by diversion, or referral to the Professionalism Counseling Board.¹²⁴ The OPC Counsel does not require a Screening Panel's approval to dismiss a matter after a preliminary investigation.

The Rules of Lawyer Discipline and Disability state that OPC Counsel must communicate with complainants concerning the OPC's initial consideration of the matter within three months after the filing of an Informal Complaint.¹²⁵ OPC Counsel send all complainants written explanations of their dismissal decisions, but only complainants who submitted verified and notarized Informal Complaints are advised of the right to appeal the dismissal decision to the Chair of the Ethics Committee.¹²⁶ Complainants may initiate an appeal by filing a written notice with the Clerk of the Committee within 15 days after notification of the dismissal is mailed.¹²⁷ Complainants who submit RFAs or any other form of complaint, other than the officially recognized "informal complaint" that are dismissed following a preliminary investigation have no right to appeal an OPC dismissal decision or a referral to CAP.

If an Informal Complaint is not dismissed, or resolved during the preliminary investigation, OPC Counsel serves the respondent with Notice of Informal Complaint (NOIC).¹²⁸ The NOIC sets out each fact and alleged Rule of Professional Conduct violation as preliminarily determined by OPC Counsel.¹²⁹ The respondent must file a signed answer to the NOIC within twenty days after service.¹³⁰ For good cause shown, OPC Counsel may give the respondent additional time, not to exceed thirty days, to respond to the NOIC.¹³¹ A copy of the respondent's answer is forwarded to the complainant.¹³² After the respondent files the answer, or fails to do so, OPC Counsel again evaluates the NOIC and determines whether the investigation should be closed, dismissed, dismissed with a letter of caution, or referred to a Screening Panel for investigation and hearing.¹³³ Several interviewees informed the consultation team that respondents often request multiple extensions of time to respond to a NOIC, or many fail to respond until their appearance at a Screening Panel hearing.

6. Screening Panel Proceedings

After a decision is made by OPC to refer an Informal Complaint to a Screening Panel, the consultation team was informed that it is the practice of the office to reassign the file to one of the three OPC Counsel designated to prosecute cases before Screening Panels. These OPC Counsel

¹²³ RLDD 14-529.

¹²⁴ RLDD 14-510(a)(4).

¹²⁵ RLDD 14-503(h)(2).

¹²⁶ RLDD 14-510(a)(7).

¹²⁷ *Id.* The Committee Chair conducts a *de novo* review of the OPC's dismissal decision, and can either affirm the dismissal or require OPC Counsel to send a NOIC and set the matter for hearing before a Screening Panel.

¹²⁸ RLDD 14-502(h) & 14-510(a)(5).

¹²⁹ RLDD 14-510(a)(5).

¹³⁰ RLDD 14-510(a)(6).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

will again review the file to determine whether additional investigation is warranted before the file is sent to the Screening Panel. In addition, these OPC lawyers and the intake Counsel jointly prepare a Screening Panel Memo (SPM) that includes: summaries of the undisputed facts, with reference to documents in the file that are Bates Stamped and indexed; the complainant's allegations of misconduct; the respondent's response; a list of witnesses and summaries of their statements; OPC Counsel recommendations as to possible Utah Rule of Professional Conduct violations; a list of potential questions the Screening Panel may wish to explore during the hearing; a discussion of the issues; and OPC Counsel's disposition or sanctions recommendation.¹³⁴ The recommended disposition may include a request that the Screening Panel find probable cause to file a Formal Complaint. The SPM also sets out relevant factors for determining the sanction, including the duty violated, respondent's mental state, and injury or potential injury. During its onsite visit, the team was informed that each OPC file transmitted electronically to a Screening Panel a folder labeled "Disciplinary History," contained information about whether or not the respondent has prior discipline. The Panel was asked not to open that file until they found the respondent engaged in misconduct and determined a rule violation.¹³⁵ Following the consultation visit, the team was informed that the OPC changed its procedures regarding the disclosure of a respondent's disciplinary history and now includes that information in the SPM.

The Clerk of the Ethics Committee assigns all Informal Complaints randomly to Screening Panels.¹³⁶ At least thirty days before a scheduled Screening Panel hearing date, the Clerk sends a Notice of Hearing to the panel members, the respondent and complainant.¹³⁷ Within fourteen days of the hearing date, the Clerk transmits electronically to the Screening Panel, respondent, and complainant a copy of the OPC's Bates Stamped and indexed file, excluding OPC Counsels' work product, merged with the Screening Panel Memo. A hard copy of the file is made available to respondents, complainants or panel members upon request. The Clerk also transmits a Decision Sheet electronically to the Panel. Screening Panel hearings are scheduled the first two Thursdays of each month. Generally, four cases are scheduled on the panel's docket each hearing date. Screening Panel hearings are confidential and not open to the public.¹³⁸ Recordings are made of all Screening Panel hearings and transcripts are available to the respondent or the OPC at a cost borne by the requesting party.¹³⁹ Neither complainants nor witnesses can have access to the Screening Panel recordings.¹⁴⁰

The Rules of Lawyer Discipline and Disability provide that "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."¹⁴¹ The opposing party must receive notice of the petition, except for good cause shown.¹⁴² The

¹³⁴ OPC *Policy and Procedures* K(8).

¹³⁵ RLDD 14-510(b)(8).

¹³⁶ RLDD 14-503(f).

¹³⁷ RLDD 14-510(b)(2) & (b)(3).

¹³⁸ RLDD 14-515. The team reviewed training materials distributed to Screening Panels, including an opening statement template utilized by Screening Panel Chairs that informs parties and witnesses that the proceedings are confidential.

¹³⁹ RLDD 14-510(b)(6) & (d)(3).

¹⁴⁰ OPC *Policy and Procedures* K(10).

¹⁴¹ RLDD 14-503(g).

¹⁴² *Id.*

consultation team was informed that discovery is not initiated prior to Screening Panel hearings and that subpoenas are rarely sought. It is not clear from the Rules whether OPC Counsel has authority to seek a subpoena regarding an investigation that has not been referred to a Screening Panel.¹⁴³ Both the complainant and respondent have the right to be present at the Screening Panel hearing when evidence is presented. Each may be represented by counsel, may testify and call witnesses to testify, and each may seek responses from the other by posing questions to be asked by the Panel Chair.¹⁴⁴ Direct cross-examination by either OPC Counsel or the respondent is not permitted, unless requested and allowed by the Panel Chair.¹⁴⁵ Both OPC Counsel and the respondent may present evidence in aggravation and mitigation during the hearing, but such evidence is not considered until the Panel determines that the respondent engaged in misconduct.¹⁴⁶ OPC Counsel bears the burden of proving by a preponderance of evidence that the respondent engaged in misconduct and discipline is warranted or that probable cause exists for the filing of a formal complaint.¹⁴⁷

At the conclusion of the hearing, the Screening Panel can make any of the following recommendations or determinations:¹⁴⁸

- 1) find that the preponderance of evidence does not establish misconduct and dismiss the Informal Complaint;
- 2) issue a letter of caution with the dismissal;
- 3) refer the Informal Complaint to the Diversion Committee or the Professionalism Counseling Board;
- 4) find that misconduct occurred and refer the Informal Complaint to the Ethics Committee Chair with an accompanying recommendation for an admonition or a public reprimand; or
- 5) find that probable cause exists to believe there are grounds for public discipline and authorize OPC Counsel to file a Formal Complaint against the respondent.

Screening Panel determinations and recommendations of discipline are recorded on a form styled, “Screening Panel Informal Decision Sheet,” which is accessible to Panel members in electronic format and is password protected. The Decision Sheet includes a box to check for the type of disposition, and requires the Panel to insert various information, including the Rule violated, or for which probable cause exists to believe it has been violated, a description of the conduct that constitutes any Rule violation, the respondent’s mental state, and aggravating and mitigating factors. Prior to the appointment of the Ethics Committee Clerk, if the Panel determined that the Utah Rules of Professional Conduct were violated warranting an admonition or public reprimand, the OPC Counsel assigned to prosecute the case drafted the Panel’s written findings and conclusions of law as well as an order of discipline.¹⁴⁹ The team was informed that the Clerk of the Committee is now responsible for assisting Screening Panels in drafting their decisions.

¹⁴³ Procedures for securing a subpoena are addressed only in Rule 14-503(g) in terms of Screening Panel proceedings. In that regard, “any party” may petition the district court for a subpoena.

¹⁴⁴ RLDD 14-510(b)(2)-(4).

¹⁴⁵ RLDD 14-510(b)(4).

¹⁴⁶ RLDD 14-510(b)(8).

¹⁴⁷ RLDD 14-517(c). *See* Reneer v. Utah State Bar, 2014 UT 18, ¶9, 325 P.3d 104.

¹⁴⁸ RLDD 14-510(b)(7)(A)-(F).

¹⁴⁹ *See* RLDD 14-510(b)(10) & OPC Policy and Procedures K(1).

All Screening Panel decisions recommending private admonition or public reprimand are forwarded to the Ethics Committee Chair for a final determination and approval.¹⁵⁰ Either party may file with the Clerk of the Ethics Committee exceptions to a Screening Panel decision recommending discipline and request a hearing.¹⁵¹ Only OPC Counsel can appeal a Screening Panel dismissal of an Informal Complaint or referral to the Diversion Committee or the Professionalism Counseling Board.¹⁵² The Screening Panel's probable cause determinations are not appealable by either party.¹⁵³ If exceptions are filed, each party is given thirty days to respond to the other party's exceptions.¹⁵⁴

The Ethics Committee Chair or designee serves as the Exceptions Officer for the hearing on the exceptions to the Panel decision.¹⁵⁵ OPC Counsel and respondent may give an oral presentation and testimony may be taken.¹⁵⁶ The party who filed exceptions has the burden of showing that the Screening Panel's decision is "unsupported by substantial evidence or is arbitrary, capricious, legally insufficient or otherwise clearly erroneous."¹⁵⁷ The complainant may, but is not required to, appear at the exceptions hearing. Following the hearing, or upon review of the record if no hearing is requested, the Committee Chair issues a final, written determination that either sustains, dismisses, or modifies the Screening Panel's decision.¹⁵⁸ Either party may file a request for review in the Supreme Court seeking reversal or modification of the final determination by the Committee Chair.¹⁵⁹

Disciplinary proceedings are confidential until a Formal Complaint is filed in the District Court, or until a public reprimand is issued by the Ethics Committee Chair.¹⁶⁰ The Rules for Lawyer Discipline and Disability state that all "participants in a proceeding under these rules shall conduct themselves so as to maintain confidentiality."¹⁶¹ Under certain circumstances, OPC Counsel is authorized to disclose nonpublic information to the Professionalism Counseling Board upon a referral, and, upon a request for information, "to the Board, any Bar Committee a committee or consultant appointed by the Supreme Court or the Board to review the OPC operations, or the Executive Director, and is required in furtherance of their duties."¹⁶² Nonpublic information may also be disclosed by the OPC as necessary to protect the public, the administration of justice, or the legal profession," including to entities authorized to investigate and prosecute violations of civil or criminal statutes, administrative rules and professional rules.¹⁶³ Petitions for reinstatement or readmission and petitions for interim suspension are public proceedings.¹⁶⁴

¹⁵⁰ RLDD 14-510(b)(10) & (e).

¹⁵¹ RLDD 14-510(c).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ RLDD 14-510(d)(2).

¹⁵⁶ RLDD 14-510(d)(2) & (g)(1).

¹⁵⁷ RLDD 14-510(d)(4).

¹⁵⁸ RLDD 14-510(e).

¹⁵⁹ RLDD 14-510(f).

¹⁶⁰ RLDD 14-515(a).

¹⁶¹ RLDD 14-515(i).

¹⁶² RLDD 14-515(a)(2) & (4) & 14-515(e).

¹⁶³ RLDD 14-515 & OPC *Policies and Procedures* K(2).

¹⁶⁴ RLDD 14-515(b).

7. Formal Proceedings

The OPC initiates disciplinary proceedings against respondents on behalf of the Utah State Bar by filing a Formal Complaint in the District Court in the county in which the offense occurred, or where the respondent resides or practices law.¹⁶⁵ If the respondent is not a resident, the Chief Justice of the Supreme Court designates the county in which the OPC should file the Formal Complaint.¹⁶⁶ Prior to its filing, the Ethics Committee Chair reviews, approves and signs the Formal Complaint.¹⁶⁷ Formal proceedings are reassigned to OPC Counsel designated to handle cases in the District Court. OPC Counsel has the burden of proving charges of misconduct in the Formal Complaint or a petition to transfer to disability inactive status by a preponderance of the evidence.¹⁶⁸

The Rules of Lawyer Discipline and Disability do not include specific procedural rules governing disciplinary proceedings in the District Court other than a statement that “the Utah Rules of Civil Procedure and the Utah Rules of Evidence apply in formal disciplinary actions and disability actions.”¹⁶⁹ Written and oral discovery proceeds according to the Rules of Civil Procedure. Several interviewees raised concerns about inconsistencies between the District Court judges regarding case management of the disciplinary cases. The team was told that not all judges follow the same procedures or are familiar with the lawyer disciplinary process. Pretrial conferences are held at the discretion of the judge.¹⁷⁰ Interviewees commented that some judges schedule prehearing conferences and set strict deadlines, while others do not.

Generally, under the Utah Rules of Civil Procedure, a defendant must file an answer within 21 days after service of the summons and complaint.¹⁷¹ The Rules of Lawyer Discipline and Disability state that the respondent will be deemed to have admitted the factual allegations if the respondent fails to answer the charges within 20 days, although the Rules do not explicitly state that this provision relates to formal proceedings in the District Court.¹⁷² Several interviewees informed the team that it is not uncommon for District Court judges to give respondents repeated extensions of time to file an answer. In 2016, it took on average 108 days from the date of the filing of the Formal Complaint for respondents to file an answer in the District Court. The Rules of Lawyer Discipline and Disability do not set out the procedures or provide a timeline for OPC Counsel to seek a default order in the District Court, although Rule 14-532 includes a deemed admitted provision for failure to appear before the Ethics Committee.¹⁷³ The Utah Rules of Civil Procedure, which govern formal disciplinary proceedings, include procedures for securing a default judgment, absent any timeline.¹⁷⁴ OPC Counsel must apply to the judge and the judge may hold a hearing to establish the truth of the allegations in the Formal Complaint.¹⁷⁵

¹⁶⁵ RLDD 14-502(f) & 14-511(a) & (b).

¹⁶⁶ RLDD 14-511(b).

¹⁶⁷ RLDD 14-511(a).

¹⁶⁸ RLDD 14-517(b) & (c).

¹⁶⁹ RLDD 14-517(a).

¹⁷⁰ Utah R. Civ. P. 16.

¹⁷¹ Utah R. Civ. P. 12(a).

¹⁷² RLDD 14-532(a).

¹⁷³ RLDD 14-532(b).

¹⁷⁴ Utah R. Civ. P. 55.

¹⁷⁵ Utah R. Civ. P. 55(b)(2).

Disciplinary hearings are bifurcated. At the first hearing, the parties present evidence regarding the allegations in the Formal Complaint. As soon as practicable, with a target date of thirty days after entry of the District Court’s findings and conclusions of law, a second hearing is held for the parties to present evidence in aggravation and mitigation. The order of sanctions is entered within five days following the hearing. In 2016, it took 966 days on average from the date the Formal Complaint was filed before the adjudication hearing was held, and then 524 days from the date that the hearing was conducted until the final sanctions decision was filed by the District Court. District Court disciplinary decisions are not published generally. The decisions can be accessed on XChange – a fee-based subscription service that is a repository of public court records available in an electronic format.

A full range of dispositions available to the District Courts are outlined in the Utah Standards for Imposing Lawyer Sanctions. Dispositions may include dismissal of any or all charges; disbarment; suspension for a specific period of time less than or greater than six months; suspension for any period, stayed in whole or in part by probation; public reprimand; and private admonition.¹⁷⁶ Information provided to the team revealed that probation is rarely used. In both 2015 and 2016, probation with a stayed suspension was imposed in only one case each year.¹⁷⁷ Other sanctions that may be imposed include restitution, assessment of costs, a requirement that the respondent take the Bar or professional responsibility exam, or attend CLE courses.¹⁷⁸ Judges also may refer a matter to the Diversion Committee. Either party may appeal a judgment of the District Court by filing a petition for review in the Supreme Court.¹⁷⁹ Unlike the automatic stays allowed under the Rules for Lawyer Discipline and Disability, if a respondent appeals a final Ethics Committee determination in the Court, District Court orders of discipline are not stayed pending appeal to the Court unless a motion for stay is filed by the respondent pursuant to the Utah Rules of Civil Procedure.¹⁸⁰ The Utah Rules of Appellate Procedure governing civil appeals apply to petitions for review in all respects, including briefing schedules.¹⁸¹ Oral arguments are held, unless the Court “determines that it would not aid the decisional process.”¹⁸² Statistical information reviewed by the team revealed that in FY 2016, the average time from the filing of the notice of appeal until the final order of discipline issued by the Court was two years.

Generally, at any time during the disciplinary process, either before or after the filing of a Formal Complaint, OPC Counsel and the respondent may negotiate to resolve a matter via discipline by consent.¹⁸³ A respondent may offer a conditional admission to the allegations of misconduct, in whole or in part, in exchange for a stated form of discipline. The respondent’s proposal is first submitted to OPC Counsel who forwards the proposal either to the Ethics Committee Chair or the

¹⁷⁶ Utah Standards for Imposing Lawyer Sanctions, Rule 14-603.

¹⁷⁷ See Utah State Bar Office of Professional Conduct Annual Report, August 2016, https://www.utahbar.org/wp-content/uploads/2016/10/OPC_ANNUAL_Report_2015-2016.pdf; Utah State Bar Office of Professional Conduct Annual Report, August 2015, https://www.utahbar.org/wp-content/uploads/2015/10/OPC_ANNUAL_Report_2014-2015.pdf.

¹⁷⁸ Utah Standards for Imposing Lawyer Sanctions, Rule 14-603(i).

¹⁷⁹ RLDD 14-511(g).

¹⁸⁰ Compare RLDD 14-510(f) with Utah Rules of Appellate Procedure, Rule 8 & Utah R. Civ. P. 62.

¹⁸¹ RLDD 14-517(a). See also, *In re the Matter of the Discipline of Jamis Johnson*, 2001 UT 110, ¶16, 48 P. 3d 881.

¹⁸² Utah Rules of Appellate Procedure, Rule 29.

¹⁸³ RLDD 14-520.

District Court, depending on the stage of the proceedings, with a recommendation in favor of or opposing the proposal. If the consent is negotiated prior to the filing of a Formal Complaint, the consent petition includes the respondent's waiver of a right to a Screening Panel hearing.¹⁸⁴ The Chair of the Ethics Committee or the District Court can either approve or reject the proposal.¹⁸⁵ If motion for discipline by consent and respondent's affidavit are rejected, in either circumstance, the conditional admissions are withdrawn and cannot be used against the respondent in subsequent proceedings.¹⁸⁶ The case then proceeds as if no settlement occurred. The consultation team learned that, as a matter of practice, OPC Counsel will not engage in settlement discussions for a consent disposition with the respondent between the time of a Screening Panel's probable cause determination and the filing of respondent's answer to the formal complaint.

Another form of a consent disposition available to a respondent is resignation with discipline pending.¹⁸⁷ A respondent may resign from the Bar prior to the adjudication of a pending Informal or Formal Complaint, if approved by the Utah Supreme Court. The respondent's sworn petition must include an admission of the facts upon which the allegations of misconduct are based and agreement to provide notice to clients and return clients' property.¹⁸⁸ OPC Counsel may consent to the petition or file objections. If objections are filed, the matter is set for hearing in the District Court.¹⁸⁹ Following the hearing, the District Court submits its findings of fact and conclusions of law to the Supreme Court for review and entry of an order.¹⁹⁰ The Court's order granting the resignation may include terms and conditions, including conditions precedent to readmission.¹⁹¹

Lawyers who are disbarred, suspended for more than six months, placed on interim suspension, or resign with discipline pending, must give notice to all clients, co-counsel and opposing counsel or adverse party that the lawyer is disqualified from acting further in a matter after the effective date of the order of discipline.¹⁹² The District Court may impose similar notification requirements upon respondents suspended for six months or less.¹⁹³

Lawyers suspended for six months or less may be reinstated by the District Court upon the filing of an affidavit stating compliance with all requirements of the order of discipline and reimbursement to the Lawyers' Fund for Client Protection, if applicable. If the OPC files objections to the reinstatement, the District Court will hold a hearing.¹⁹⁴ Disbarred lawyers, those who resigned with discipline pending, or lawyers suspended for more than six months, may seek reinstatement or readmission by filing a petition in the District Court.¹⁹⁵ In these proceedings, the petitioner has the burden of demonstrating by a preponderance of evidence that he or she has met the criteria for reinstatement or readmission.¹⁹⁶ In addition to complying with the terms of Rule

¹⁸⁴ RLDD 14-520(a).

¹⁸⁵ RLDD 14-520(a) & (b).

¹⁸⁶ *Id.*

¹⁸⁷ RLDD 14-521.

¹⁸⁸ RLDD 14-521(b).

¹⁸⁹ RLDD 14-521(c).

¹⁹⁰ *Id.*

¹⁹¹ RLDD 14-521(d).

¹⁹² RLDD 14-526(b) & 14-518(c).

¹⁹³ RLDD 14-526(d).

¹⁹⁴ RLDD 14-524.

¹⁹⁵ RLDD 14-525.

¹⁹⁶ RLDD 14-525(g).

14-525 of the Rules of Lawyer Discipline and Disability, disbarred lawyers, and those who resigned with discipline pending, must comply with the Court’s Rules Governing Admissions and submit a new application for admission to the Utah State Bar, undergo a character and fitness investigation, and participate in a character and fitness hearing.¹⁹⁷ Petitions for readmission following a disbarment or resignation with discipline pending may not be filed until five years after the effective date of the order of discipline.¹⁹⁸ Suspended lawyers “may not petition for reinstatement until three months before the period of suspension has expired.”¹⁹⁹

The OPC is responsible for sending notices to the disciplinary enforcement agency in every jurisdiction in which a respondent is admitted of public discipline, resignation with discipline pending, reinstatement and readmission, transfer to or from disability inactive status, and include certified copies of judgments of conviction. In addition, the OPC must provide notice of public discipline to the ABA National Lawyer Regulatory Data Bank.²⁰⁰ The Bar’s Executive Director sends such notices of public discipline to all state and federal courts in Utah and causes such notices to be published in the Utah Bar Journal and newspaper of general circulation in each Judicial District within Utah in which the respondent maintained a law office.²⁰¹

8. Interim Suspension Proceedings

Interim suspension proceedings are public and are initiated in the District Court under one of two circumstances.²⁰² First, a lawyer who “poses a substantial threat of irreparable harm to the public and has committed a violation of the Rules of Professional Conduct or is under a disability” may be suspended on an interim basis pending final disposition of a disciplinary proceeding.²⁰³ The respondent receives notice in accordance with the Utah Rules of Civil Procedure and following a hearing requiring proof by clear and convincing evidence, the District Court may then enter an order of interim suspension.²⁰⁴ The order may include the appointment of a trustee to protect the interests of the respondent’s clients.²⁰⁵ OPC Counsel may initiate formal disciplinary proceedings involving a lawyer under interim suspension directly in the District Court without presenting the matter first to a Screening Panel.²⁰⁶

Second, upon being advised that a lawyer has been convicted of a crime that “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer,” OPC Counsel determines if interim suspension is warranted.²⁰⁷ Regardless of the pendency of an appeal, OPC Counsel may file a petition for interim suspension in the District Court concurrently with the formal complaint and a certified copy of the judgment of conviction. The respondent is allowed to assert any jurisdictional deficiencies to the petition in response, however, the judgment of conviction is

¹⁹⁷ SUP. CT. R. PROF’L PRACTICE, Rule 14-717.

¹⁹⁸ RLDD 14-525(a).

¹⁹⁹ *Id.*

²⁰⁰ RLDD 14-516(a).

²⁰¹ RLDD 14-516(b) & (c).

²⁰² RLDD 14-518 & 14-519.

²⁰³ RLDD 14-518(a) & (b).

²⁰⁴ RLDD 14-517(b) & 14-518(b).

²⁰⁵ RLDD 14-518(b).

²⁰⁶ RLDD 14-518(b)(2).

²⁰⁷ RLDD 14-519(b).

conclusive evidence of the crime.²⁰⁸ The “respondent is not entitled to an evidentiary hearing on the petition for interim suspension but may request an informal hearing.”²⁰⁹ If the petition for interim suspension is not granted, the Formal Complaint is dismissed, and OPC Counsel must proceed with the matter as any other Informal Complaint.²¹⁰

9. Diversion Program

Either OPC Counsel, the Screening Panel, or the respondent may recommend diversion of an Informal Complaint alleging less serious misconduct by making a referral to the Utah Supreme Court Diversion Committee (“Diversion Committee”).²¹¹ Less serious misconduct is defined as any conduct that would not result in a suspension or disbarment.²¹² Diversion does not occur unless the respondent opts for it and the Diversion Committee deems it appropriate. Interviewees informed the consultation team that diversion occurs infrequently. In both 2016 and 2015, a total three matters each year were dismissed with diversion. Diversion is proposed only in those cases where the presumptive sanction is no more severe than a public reprimand or private admonition, and participation is likely to improve the respondent’s future professional conduct. The Diversion Committee may consider additional factors, including the existence of aggravating or mitigating factors, and whether diversion has already been tried.²¹³ Diversion cannot be utilized if the misconduct involves: misappropriation of client funds or property; results in substantial prejudice to the client or a third party; constitutes a substantial threat of irreparable harm to the public; a felony or misdemeanor that reflects adversely on the lawyer’s honesty or fitness to practice law; dishonesty; a pattern of similar misconduct; or the misconduct is of the same nature as misconduct for which the respondent was sanctioned in the last three years.²¹⁴ The consultation team was informed that neither OPC Counsel nor the CAP lawyer refer Request for Assistance matters to the Diversion Committee for resolution.

Diversion may occur either before or after the filing of a Formal Complaint. Screening Panels that recommend diversion have no further involvement in the matter once the matter is referred to the Diversion Committee, unless the Committee rejects the diversion recommendation. The Panel’s recommendation to refer the matter is incorporated into the diversion agreement.²¹⁵ Diversion agreements that occur after a formal complaint is filed in the District Court include the judge’s ruling and order approving the diversion.²¹⁶ Complainants receive notice of the decision to refer a respondent to diversion and may submit written comments.²¹⁷ Complainants cannot appeal decisions to divert a matter.²¹⁸

²⁰⁸ RLDD 14-519(e).

²⁰⁹ RLDD 14-519(b).

²¹⁰ *Id.*

²¹¹ RLDD 14-533(a) & (f)(1).

²¹² RLDD 14-533(c).

²¹³ RLDD 14-533(d).

²¹⁴ RLDD 14-533(c)(1)-(7).

²¹⁵ RLDD 14-533(f)(1).

²¹⁶ *Id.*

²¹⁷ RLDD 14-533(e).

²¹⁸ *Id.*

Either the respondent or OPC may draft the diversion agreement. After respondent enters the diversion program, the underlying disciplinary matter is deferred until completion of the terms of diversion.²¹⁹ If diversion is successfully completed, the Ethics Committee Chair will dismiss the informal complaint. A material breach of the diversion contract is cause for termination. Disputes regarding the alleged material breach are reviewed by the Diversion Committee and may be adjudicated by the Committee in a hearing.²²⁰ Unless waived, lawyers participating in the diversion program must pay an initial fee of \$250 and \$50 per month thereafter payable to the Bar's general fund.²²¹

²¹⁹ RLDD 14-533(h).

²²⁰ RLDD 14-533(j)(3).

²²¹ RLDD 14-533(k).

III. STRUCTURE

Recommendation 1: The Supreme Court’s Oversight and Control of the Disciplinary System Should Be Emphasized

As noted above, the Utah Supreme Court possesses the inherent and constitutional authority to regulate the legal profession in Utah, and it is committed to seeing that its lawyer disciplinary system operates fairly and effectively. Like a number of other courts in unified bar states, the Utah Supreme Court has delegated significant responsibility and oversight of the state’s lawyer disciplinary system to the Utah State Bar. Although the Rules of the Utah Supreme Court provide for the creation of the lawyer disciplinary system and state that the OPC operates pursuant to the Court’s authority, the Discipline Committee believes, and interviews bore out, that the OPC functions, in reality and perception, as a component of the Utah State Bar.

The Rules Governing the Utah State Bar provide that the Court “authorizes and designates the Bar to administer rules and regulations which govern the practice of law in Utah.”²²² The responsibilities of the Bar include providing for the regulation and discipline of those practicing law.²²³ Subject to the Court’s approval, the Bar’s Board formulates procedures for discipline and disability matters.²²⁴ The definition of “OPC” in the Rules of Lawyer Discipline and Disability states that it “means the *Bar’s* Office of Professional Conduct” (emphasis added).²²⁵ The OPC is designated as acting on behalf of the Utah State Bar in all disciplinary, disability, reinstatement and readmission matters. The Board appoints the OPC Senior Counsel.²²⁶ The Executive Director participates in creating the budget for the OPC, and is responsible for publishing all notices of discipline, private admonitions, resignations with discipline pending, transfers to and from disability status, and reinstatement and readmission petitions.²²⁷ Currently, the Rules of Lawyer Discipline and Disability provide that the OPC Senior Counsel and the Chair of the Ethics Committee report to and consult with the Board, in addition to the Supreme Court, regarding disciplinary matters and procedures.²²⁸

When asked which entity is associated with processing lawyer complaints in the State, many interviewees pointed to the Utah State Bar. Some interviewees, all lawyers, noted that authority for lawyer regulation was the Court’s. Absent any specific questions from the consultation team, some interviewees raised questions and concerns about a lack of separation between the OPC and the Bar. Some interviewees commented about the fact that the State Bar controls the disciplinary process, and noted that, in all likelihood, this negatively affects the public’s perception of the system as independent and fair.

A hallmark of an optimally effective and fair lawyer disciplinary system is independence, which includes independence of the system from the actual or perceived influence of bar association

²²² SUP. CT. R. PROF’L PRACTICE, Rule 14-102(a)(1).

²²³ SUP. CT. R. PROF’L PRACTICE, Rules 14-102(b)(4), 14-202(d), & 14-105(a).

²²⁴ SUP. CT. R. PROF’L PRACTICE, Rule 14-103.

²²⁵ RLDD 14-502(i).

²²⁶ *Supra* note 53.

²²⁷ *Supra* notes 27 & 38.

²²⁸ RLDD 14-503(i).

politics, and appropriate separation of the prosecutorial and adjudicative functions of the system.²²⁹

Based on the consultation team's study of the materials noted above and interviews with individuals involved at different levels of the system, the Discipline Committee agrees with the team that the current structure of the system, coupled with the lack of certain procedural rules and policies, enhances the risks of potential and actual conflicts of interest, and feeds a perception that the system is not optimally fair, accessible and protective of the public. When elected Bar officials control all or parts of the disciplinary process, an appearance of impropriety and conflict of interest is created, regardless of the actual fairness or impartiality of the system.²³⁰

The Discipline Committee believes that it is in the best interest of the public and the profession for the Utah Supreme Court's authority and control of the state's lawyer disciplinary system to be emphasized and strengthened. An independent lawyer disciplinary system, operated under the direct oversight of the Court, promotes the integrity of the judicially regulated legal profession. It enhances the public's perception of the system as being fair, accessible and free from appearance that the internal politics of bar associations may somehow influence disciplinary proceedings.²³¹ Based on its experience, the consultation team's interviews, and national practice, the Discipline Committee recommends that the Court restructure the disciplinary system so as to let Utah lawyers and the public more clearly understand that the Court is responsible for regulating and disciplining lawyers.

The first way in which to do this would be for the Court to amend the Rules of Lawyer Discipline and Disability, and seek companion amendments to the Court's Rules Governing the Utah State Bar, to eliminate provisions indicating, specifically or implicitly, that it is the Bar's responsibility to provide for the regulation and discipline of lawyers or that Senior Counsel and the OPC act on behalf of the Utah State Bar.²³² For example, Rule 14-510(a)(1) of the Rules of Lawyer Discipline and Disability should be amended to state that disciplinary proceedings may be initiated by filing a complaint with the OPC, instead of with the Bar.

a. The Court Should Take Steps to Separate the OPC From the Utah State Bar

Next, the Discipline Committee recommends that the Court take steps to separate the OPC from the Bar to further its independence, physically and administratively. The Committee is aware of the gravity and sensitivity of this Recommendation, and is cognizant of the logistical, political and financial challenges that it poses. While some disciplinary agencies remain under the purview of the state bar association in unified bar states, the majority of the country's lawyer disciplinary agencies, in unified and voluntary bar jurisdictions, are physically separate from the state bar association and governed more directly by the highest court.²³³

²²⁹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 & Cmt; McKay Report, *supra* note 2, at 23 et seq.

²³⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 Cmt

²³¹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 & Cmt.

²³² *See, e.g.*, SUP. CT. R. PROF'L PRACTICE, Rules 14-102, 14-103, 14-202(d) & RLDD 14-503.

²³³ Excluding U.S. territories, there are 33 unified/mandatory bar jurisdictions. In 21 of those jurisdictions, the state bar association oversees lawyer discipline, and in 12 of those jurisdictions the court has appointed an independent agency to handle the lawyer disciplinary functions. There are 19 voluntary bar states where lawyer discipline is handled by an independent agency created by the state supreme court.

The Discipline Committee's recommendation in this regard is not intended as a criticism of the leadership and members of the Utah State Bar, system volunteers or staff, and their commitment to the public interest, as well as to the profession. The Bar's longstanding support of the system and its commitment to accountability of the legal profession in Utah is laudable. The Court, the professionals and volunteers of the disciplinary agency and the Utah State Bar are all dedicated to having an effective and efficient lawyer discipline system. However, as noted above, one of the hallmarks of such a system is independence.

The Discipline Committee also recommends that the Court should consider taking steps to physically distance the discipline system from the Utah State Bar. Ideally, the disciplinary agency should not be housed within the offices of the Utah State Bar. Currently, Utah's lawyer disciplinary agency is physically located in the State Bar's headquarters and bears the Bar's name (as does the OPC letterhead). The disciplinary system is funded by the Bar's collection of lawyers' fees and its budget competes with the requests of other Bar programs. General information about the Utah lawyer disciplinary process and procedures for filing a complaint against a lawyer is available on the Utah State Bar's website, which identifies the Bar as the principal entity responsible for maintaining the ethical standards of the legal profession.

The Committee is aware of the seriousness of the suggestion that the Court act to physically separate its disciplinary agency from the Utah Bar. However, implementing this Recommendation will assure the public that the disciplinary agency is an independent agency functioning directly under the Supreme Court. This alleviates the risk of any public misperception that the agency is overly protective of lawyers and gives proper credit to the Court for the efforts of its agency.

The Discipline Committee has made similar recommendations in other unified bar states, including Louisiana and Nebraska, where the state supreme courts studied the recommendations and implemented them. In Louisiana, the separation from the state bar association was complete and the bar remains unified. Initially, the Nebraska Supreme Court enhanced separation of the disciplinary function from the state bar association and, for example, the disciplinary counsel's office moved to a location outside the state bar association. Over a decade later, in *In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 841 N.W.2d 167 (Neb. 2013), the Nebraska State Supreme Court completed the separation of the disciplinary and other regulatory components from the state bar association when it, in effect, deunified the bar. The Discipline Committee's Recommendations in this Report are not intended to suggest and should in no way be read to support deunification of the Utah State Bar. That is not the purpose of this or any other Recommendations in this Report. The Discipline Committee takes no position on the mandatory or voluntary status of any jurisdiction's Bar.

For economic and other reasons, the Discipline Committee understands that it may not be feasible to achieve complete physical separation. In the alternative, the Discipline Committee recommends that even if the Court does not physically separate the disciplinary agency from the Utah State Bar, the Court should make clearer its independence. For example, the Court could rename the disciplinary agency the "Utah Supreme Court Office of Professional Conduct" or "The Lawyer Disciplinary Office of the Utah Supreme Court" to be more easily identified with the Court and its authority. Letterhead should reflect any new moniker.

The Discipline Committee recommends that the Rules of Lawyer Discipline and Disability be amended to state that the Court appoints the OPC Senior Counsel, who should serve at its pleasure.²³⁴ OPC Senior Counsel should no longer be hired and subject to removal by the Bar's Board. Court appointment of the system's chief disciplinary counsel highlights the Court's regulatory authority and responsibility for the system. Should the Court determine that the Bar's Board should continue to hire OPC Senior Counsel, the Discipline Committee believes such hiring should be subject to the Court's approval. Similarly, a recommendation to remove OPC Senior Counsel may come from the Bar's Board, but that decision should ultimately be made by the Court.²³⁵

In this regard, the Discipline Committee also suggests that the Court may wish to rename the OPC Counsel positions to more closely associate them with the disciplinary process. For example, the Court may wish to refer to that position as the "Chief Disciplinary Counsel" (a title used in many other states) or "Chief Regulatory Counsel." Other lawyers in the OPC could be titled "Deputy Disciplinary Counsel" and "Assistant Disciplinary Counsel."

OPC Senior Counsel, as the chief disciplinary counsel, should formulate with the new Administrative Oversight Committee described below, not with the Executive Director of the Bar, the budget for the disciplinary office, and should be able to approve expenditures necessary to fulfill the duties of the office. The Discipline Committee was pleased to see that the Rules for Lawyer Discipline and Disability currently allow the Senior Counsel to petition the Court to review any Bar Board modifications to the budget.²³⁶ OPC Senior Counsel should not be required to report on the activities of the Office to the Bar's Board or to the Executive Director. That position should report to the Administrative Oversight Committee.

Also, the Discipline Committee suggests that the Senior Counsel, and not the Bar's Executive Director, should be responsible for ensuring publications and notices of discipline, resignations with discipline pending, transfers to disability status, reinstatements and readmissions.²³⁷ Currently, the Executive Director does so.²³⁸ This duty is in line with OPC's current responsibility to notify other jurisdictions when discipline is imposed upon a Utah lawyer.²³⁹

Another way to increase separation without moving the OPC offices, is to provide the OPC with its own, separate telephone number, one that is not answered by a Bar employee or answered in any way that indicates the office's association with the Bar. In addition, providing the OPC with a distinct email address noting its association with the Court, as opposed to the Bar, would be helpful. The Committee also recommends creation of a stand-alone website (see Recommendation 8) for the disciplinary agency, again noting specifically its relationship to the Court. If the agency's website needs to remain "hosted" by the Utah State Bar, the Court's imprimatur and authority as well as language noting the agency's separation from the Bar's representational functions should be clearly stated.

²³⁴ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(A).

²³⁵ See ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4 & Cmt.

²³⁶ RLDD 14-504(b)(13).

²³⁷ See RLDD 14-516(b).

²³⁸ See pages 11-12.

²³⁹ See RLDD 14-504(b)(7).

b. The Court Should Create an Administrative Oversight Committee for the Disciplinary System

Currently, it appears that administrative oversight authority over the OPC resides partly with the Bar's Board, partly with the Chair of the Ethics Committee, partly with the Executive Director, and also with the Court. The Bar's Board is responsible for providing for the regulation and discipline of members of the Utah Bar, including formulating procedures for discipline and disability.²⁴⁰ The Board appoints OPC Senior Counsel, and approves the OPC's budget, which is formulated by the Bar's Executive Director with the assistance of the Senior Counsel.²⁴¹ The Chair of the Ethics Committee and OPC Senior Counsel report to and consult with the Bar's Board and the Court on disciplinary matters.²⁴² The Chair of the Ethics Committee approves and signs all formal complaints drafted by the OPC prior to filing.²⁴³

To further clarify that oversight of the OPC falls under the purview of the Court and to enhance uniformity, the Discipline Committee recommends that the Court create a statewide "Administrative Oversight Committee" (hereinafter "Oversight Committee"), independent of the Utah State Bar, to assist the Court in carrying out its discipline and disability functions.²⁴⁴ This Court appointed new Oversight Committee would administer and supervise the operations of the OPC.

The Discipline Committee recommends that the Court appoint six members to the Oversight Committee, consisting of two-third lawyers and one-third nonlawyers for fixed, staggered three-year terms, and a subsequent three-year term, but no more than two consecutive three-year terms.²⁴⁵ The Court should provide for staggering of terms so that there are experienced members on the Oversight Committee at all times. This helps to ensure continuity. The Court can appoint the chair and vice-chair.

Individuals selected to serve on the Oversight Committee should be a diverse representation of all segments of the public and the profession, including minority members, women and solo or small firm practitioners. The Court may wish to utilize the geographical judicial districts from which to select volunteers. As with all volunteers in the disciplinary system, the Oversight Committee members should be adequately trained.

The Court should amend the Rules of Lawyer Discipline and Disability to include the new Oversight Committee as a component of Utah's lawyer disciplinary system and outline the Committee's authority and responsibilities. The Committee suggests that the Oversight Committee should be authorized to:

- 1) propose rules of procedure for lawyer discipline and disability proceedings, with the Court's approval;
- 2) review periodically the operations of the discipline system;

²⁴⁰ *Supra* note 24.

²⁴¹ *Supra* notes 38 & 53.

²⁴² RLDD 14-503(i).

²⁴³ *Supra* note 167.

²⁴⁴ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 Cmt.

²⁴⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2(B).

- 3) periodically report to the Court regarding the operations of the OPC and the general standing of disciplinary matters and procedures;
- 4) develop training programs; and
- 5) engage in public outreach, including informing the public about the existence and operation of the system and the disposition of each matter in which public discipline has been imposed.

The current disciplinary procedural rules are not clear on to whom OPC Senior Counsel reports or who conducts his performance evaluations. When this question was posed by the team to interviewees, some responded that OPC Senior Counsel reports to and receives performance evaluations by the Executive Director of the Utah State Bar, while others expressed uncertainty. The Discipline Committee suggests that the new Oversight Committee does so. The Oversight Committee should work with the Senior Counsel to develop realistic performance metrics and conduct an annual performance review for that position. The Court should not allow itself to become involved in the internal personnel management of the office. For this reason, a recommendation to the Court to remove Senior Counsel may come from the newly created Oversight Committee.

The Discipline Committee believes that creating an Administrative Oversight Committee can serve an effective administrative role to help address delays and optimize the system's efficiency and timeliness. The Oversight Committee can work with the Senior Counsel to identify where in the system the delays occur and take prompt action to address such concerns. The Oversight Committee should regularly review with OPC Senior Counsel case management reports that include information about the type of misconduct alleged, whether the facts and evidence are complex in nature, the work already completed, the nature and extent of the investigation that needs to be performed and an estimate of how long that will take. Case management reports should omit the names of respondent-lawyers. OPC Senior Counsel should remain responsible for the day-to-day operations of the office, including managing staff and setting investigative and prosecutorial priorities. The exercise of appropriate prosecutorial discretion with respect to the manner in which cases are investigated, prosecuted and appealed must remain with OPC Counsel, without the possibility of interference. The Oversight Committee should not engage in micromanagement.

With the assistance of OPC Senior Counsel, the new Oversight Committee should develop an annual, documented budget process and submit a proposed budget for the OPC to the Court for approval. The budget should include recommendations for necessary additional OPC staff based on a true needs assessment. This includes ensuring that adequate technology and other resources are made available on a regular basis. Rule 14-504(b)(13) of the Rules of Lawyer Discipline and Disability should be amended to reflect that the Bar's Board and Executive Director no longer prepare or approve OPC's budget.

The Committee recommends that the chair of the newly created Oversight Committee and OPC Senior Counsel should study and prepare a true-needs assessment setting forth a proposed three-to-five-year funding plan for the disciplinary system. This includes ensuring that salaries for the legal and professional staff are competitive enough to attract and retain experienced individuals. The disciplinary agency's budget should take into consideration existing and future needs in terms of space, caseload, staffing and technology. In this way, subsequent increases, if necessary, will not be required for a period of years. If necessary, a financial planner or budget analyst should

assist in assessing the current and future needs of the system. The Oversight Committee also should consider contacting other states with adjudicative staff to help assess future needs.²⁴⁶

The Discipline Committee's recommendation should not be construed as prohibiting the Bar from continuing to manage non-disciplinary matters and valuable programs such as the fee arbitration program and Lawyers Helping Lawyers. Given the funding requirements of many of these programs, the Bar is performing a vital public service in fulfilling these functions. The Bar's operation of these programs does not create a conflict of interest or the appearance of impropriety. Although some of these programs may interact with the disciplinary process, it is entirely appropriate for the organized bar to cooperate with the court in the administration of such programs.²⁴⁷

The Discipline Committee also recommends that the Court further enhance its involvement with the disciplinary system by assigning a justice, or justices, to serve on a rotating basis as liaison to the newly created Oversight Committee.

c. The Court Should Consider Revising How the Disciplinary System Is Funded

In conjunction with these Recommendations urging enhanced separation of the disciplinary operations from the Utah State Bar, the Court may wish to study whether and how to modify the manner in which the disciplinary function is funded. Under the current system, the Bar's Board directs the disbursement of monies collected annually from Utah lawyers for the purpose of carrying out the powers and duties delegated to it by the Court.²⁴⁸ The budget for the disciplinary functions and the budgets for other Utah State Bar programs and initiatives "compete" for money out of the same pool of funds.

The Discipline Committee believes that it is optimal for the Court to fund the disciplinary agency via a direct annual assessment on lawyers for the discipline system. The Court, as part of its exclusive authority to regulate the practice of law, may impose such an assessment. This fee would be separate and distinct from what the Utah State Bar could charge as dues to its members. The Utah State Bar annual registration statement could be modified to delineate between the two amounts, and for expediency and logistical convenience, the Court could continue to have the Utah State Bar collect this separate fee along with the annual dues. The Bar could then deposit all these licensing fees into a segregated and dedicated account for the disciplinary system. Doing so would eliminate any perceived or actual conflicts during the Utah State Bar's budgeting process when it must necessarily weigh competing interests and programs. The Court may also wish to amend the Rules to provide that diversion fees be paid to the OPC and deposited into the dedicated discipline system account instead of into the Bar's general fund. As noted in Recommendations 5 and 6 below, the Discipline Committee suggests that some additional resources for the disciplinary system are currently needed.

²⁴⁶ Chart X of the 2015 ABA Survey on Lawyer Discipline Systems includes staffing information of various jurisdictions disciplinary adjudicative offices. *See* 2015 ABA Survey on Lawyer Discipline Systems (2017), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2015_sold_results.authcheckdam.pdf.

²⁴⁷ *See* ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 & Cmt.

²⁴⁸ SUP. CT. R. PROF'L PRACTICE Rule 14-103(c) & 14-107.

Recommendation 2: The Consumer Assistance Program (CAP) and the Disciplinary Process Information Office (DIPO) Should Be Merged With the OPC

The Discipline Committee commends the Utah State Bar for establishing a Consumer Assistance Program (CAP) to offer an informal process to facilitate resolution of minor complaints such as communication issues, billing disputes or return of client files. This type of program offers consumers an opportunity to resolve minor disputes with their lawyer. CAP was structured to operate independently from the OPC. There are no rules or procedures established to guide the CAP process. The consultation team learned that the CAP lawyer who staffs the office developed her own system for processing complaints submitted to CAP and file maintenance. As described elsewhere in this Report, the various ways in which Utah citizens can complain about a lawyer, and the different procedures that are associated with each, makes the complaint filing process in Utah more complicated than it should be, and this does not inure to the benefit of the public or lawyers. The discipline system should be easy to use and its procedures consistent.

As described in the Section of this Report setting forth the components of the Utah system, to initiate the CAP process a consumer completes a Request for Assistance Form (RFA). Generally, RFAs are provided to the OPC for initial screening and then returned by OPC to CAP for resolution, if the matter is not retained by OPC. On occasion, consumers will contact the CAP office directly and the CAP lawyer will open a file and proceed to resolve the matter without OPC screening it. According to the Bar's FY2015/2016 Summary of Operations Report, the CAP lawyer opened 963 files.²⁴⁹ On the other hand, according to statistical data provided to the team, OPC reported reviewing 625 Requests for Assistance the same year. Interviewees informed the consultation team that since there are no procedures or guidelines established to assist the CAP lawyer in evaluating a RFA and the two entities have separate databases, the CAP lawyer may be unaware that a RFA involves a lawyer who OPC is concurrently investigating.

a. The CAP Should Be Moved to the OPC

The Discipline Committee believes that the CAP can continue to offer an important and necessary service, but that it should do so as part of a central intake division in the OPC. Transforming the current CAP in this way will decrease decentralization with regard to the handling of complaints and increase public accessibility and consistency. It also will streamline the process, avoiding delays and unnecessary duplication of effort. The Discipline Committee recommends that the current database utilized by CAP be merged with OPC's system, and removed from the Utah State Bar's system.

The Discipline Committee suggests that the OPC consider whether the revised intake function could currently be efficiently performed by one experienced lawyer and at least one well-trained member of the support staff, instead of the three OPC counsel currently assigned to intake. As with other OPC staff, Senior Counsel should supervise the central intake division. Senior Counsel should develop procedures for the handling of matters at this level of the process and propose to

²⁴⁹ See Utah State Bar 2015-2016 Summary of Operations, https://www.utahbar.org/wp-content/uploads/2016/10/2015-2016_Annual_Report_FINAL.pdf.

the Court for its review and adoption, any related amendments to the Rules of Lawyer Discipline and Disability (see also Recommendation 12).

Intake staff should possess the expertise necessary to determine expeditiously where valid complaints should be directed, whether to another agency or referred for docketing and investigation. Intake staff should have excellent “people” skills and should be adequately trained in alternative dispute resolution techniques, in addition to providing complainants with information about the availabilities of other remedies. Intake staff should not provide legal advice to complainants or respondents, and should make clear that they are unable to do so. The ability of the new central intake unit to informally resolve complaints between a client and lawyer in a manner similar to that currently undertaken by the CAP lawyer need not cease. This recommended process also makes available necessary time for the OPC to proceed with the investigation and prosecution of more serious complaints. If a matter is summarily dismissed by OPC intake staff, the complainant and lawyer should be advised of the disposition and the reasons for it. Currently, there is no appeal from a summary dismissal. The Discipline Committee recommends that this remain the case.

The Discipline Committee commends to the Court the intake systems of Massachusetts and Colorado as useful models to consider. Although these are larger jurisdictions, their functions could be scaled down to accommodate the needs of a state the size of Utah. In 1999, the Office of the Bar Counsel in Massachusetts established a central intake system known as the Attorney and Consumer Assistance Program (ACAP).²⁵⁰ With the adoption of ACAP, the Massachusetts disciplinary office now generally resolves minor disciplinary complaints outside of the disciplinary process in a swift, effective, and more personalized manner—one focused on educating the public and profession on the contours of the client-lawyer relationship and attendant responsibilities of the parties to such a relationship. ACAP screens all written and telephone inquiries from concerned citizens to determine whether the problem involves minor misconduct appropriate for resolution without formal investigation, calls the party to discuss the problem in detail, and often calls the lawyer in order to reach a mutually satisfactory solution to the matter.²⁵¹ ACAP attempts to educate concerned citizens on the nature of the professional relationship, clarify any misunderstandings, and recommend ways to interact effectively with one’s lawyer.²⁵² ACAP also attempts to educate lawyers by recommending ways to avoid future complaints and resolve disputes as they arise.²⁵³ This practice of direct communication with the relevant parties allows for resolution of concerns in a matter of days and without lengthy written responses for minor complaints.²⁵⁴ According to the Office of the Bar Counsel, in 2016, ACAP succeeded in informally resolving more than 86% of the over 3,799 matters the office handled without referral to bar counsel for investigation.²⁵⁵ Nearly 99% of ACAP contacts reached final disposition

²⁵⁰ ANNE KAUFMAN, OFFICE OF THE BAR COUNSEL, FIVE YEARS OF ACAP (2004), <http://www.mass.gov/obcbbo/acap5.htm>.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Mass. Office of the Bar Counsel, Bar Counsel’s Annual Report to the Supreme Judicial Court—Fiscal Year 2016, 3 (2016), <http://www.mass.gov/obcbbo/fy2016.pdf>.

(whether resolution or referral for investigation) within 45 days and over 98% of contacts were processed within 30 days of receipt.²⁵⁶

Similarly, the Office of Attorney Regulation Counsel in Colorado established a comparable central intake system in 1999, which operates as the Central Intake Division (CID).²⁵⁷ CID acts as the office's triage and is the frontline for all complaints, deciding how a case is handled and whether it moves forward.²⁵⁸ Thus, in a similar vein to the Massachusetts reform of its intake system, Colorado instituted practices that better educate the public and profession on their rights and responsibilities and that allow for swift and often informal resolution of complaints outside the disciplinary process.²⁵⁹ In 1998, prior to the implementation of a central intake system, the average time matters spent at intake was thirteen weeks. In 2015, Colorado reports that complaints are resolved in 7.4 weeks, with CID having handled 19,461 telephone calls, reviewed 3,505 requests for investigation, entered into 35 diversion agreements and dismissed 142 cases with educational language.²⁶⁰ In both of these systems, complaints that warrant further investigation by disciplinary counsel are promptly referred for investigation.

b. The DPIO Should Reside Within the OPC

The Discipline Committee believes that the current functions of the Discipline Process Information Office (DPIO) should also be undertaken by the OPC. The DPIO was originally created by the Bar to assist lawyers who are the subject of complaints and complainants.²⁶¹ Currently the lawyer who staffs CAP also staffs the DPIO. Although the DPIO is an office that was created by the Utah State Bar, to be separate from the OPC, it is listed in the Bar's directory under the OPC office, along with OPC staff.

Respondents and complainants are encouraged to contact the DPIO lawyer regarding general questions about Utah's lawyer disciplinary process or their specific disciplinary case. The DPIO lawyer provides information on a confidential basis about the OPC disciplinary complaint process, refers respondents to the discipline procedural rules at various stages of the OPC investigation and discipline process, and informs lawyers and complainants about the progress of their cases pending with OPC. Although the DPIO maintains records regarding communications to its office, there are no rules or policies governing the DPIO. Between January 2016 and May 2016, DPIO assisted

²⁵⁶ *Id.* at 4.

²⁵⁷ COLORADO SUPREME COURT, OFFICE OF ATTORNEY REGULATION COUNSEL, ANNUAL REPORT JANUARY 1, 2010 THROUGH DECEMBER 31, 2010, 2 (2011), <http://www2.cde.state.co.us/artemis/scserials/sc151internet/sc1512010internet.pdf>.

²⁵⁸ COLORADO SUPREME COURT, OFFICE OF ATTORNEY REGULATION COUNSEL, 2015 ANNUAL REPORT, 32, <https://www.coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2015%20Annual%20Report.pdf>. CID is composed of six experienced lawyers, two investigators and three legal assistants.

²⁵⁹ *Id.* at 76.

²⁶⁰ *Id.* at 32 & 75.

²⁶¹ See Utah State Bar 2015-2016 Summary of Operations, https://www.utahbar.org/wp-content/uploads/2016/10/2015-2016_Annual_Report_FINAL.pdf.

sixty lawyers with questions about the disciplinary process.²⁶² In 2015, sixty-four lawyers contacted DPIO with similar questions.²⁶³

The Utah Bar's effort to provide a resource to the public about the lawyer discipline system is commendable. As discussed in Recommendation 8, information about the disciplinary system should be readily accessible to lawyers and the public. However, the Discipline Committee has concerns about the DPIO lawyer (who is also the CAP lawyer) counseling lawyers about the disciplinary process or their disciplinary case, while also assisting complainants in filing complaints against lawyers. In addition to creating perceived conflicts of interest, the OPC is, and should be, the place where those who have questions about the process should seek answers. This is particularly true for lawyers who may have a complaint pending. As a result, the Discipline Committee also recommends that the functions of the DPIO be moved to the OPC.

A separate office dedicated to answering questions about discipline procedures or pending cases creates the potential for confusion and unnecessarily insulates OPC Counsel from contact with respondents or complainants. Disciplinary agencies around the country regularly provide guidance to lawyers, including those being investigated or prosecuted, about how the disciplinary process works and where the necessary rules and procedures can be found. Disciplinary counsel nationwide also regularly tell lawyers that they should consult with counsel about pending complaints. In fact, many disciplinary offices maintain and make available a list of respondents' counsel who can provide legal advice or representation in disciplinary proceedings. In any communications, OPC Counsel should, of course, make clear that they are unable to provide legal advice.

²⁶² Utah Bar Journal, vol. 29, No. 6, https://www.utahbar.org/wp-content/uploads/2016/11/2016_edition_06_nov_dec.pdf.

²⁶³ Utah Bar Journal, vol. 28, No. 6, https://www.utahbar.org/wp-content/uploads/2015/07/2015_edition_06_nov_dec.pdf.

Recommendation 3: The Court Should Amend the Rules to Restructure the Role and Responsibilities of the Ethics and Discipline Committee

The Ethics and Discipline Committee consists of thirty-six members (28 lawyers and 8 public members) appointed by the Utah Supreme Court.²⁶⁴ Excluding the Chair and three Vice-Chairs, the Committee is divided into four Screening Panels consisting of eight members each. As noted in the section of this Report describing the system, the Ethics Committee Screening Panels' duties include: investigating informal complaints, dismissing or referring informal complaints to diversion or the Professionalism Counseling Board, making findings of probable cause, conducting hearings and serving as trier of fact, making findings of misconduct and rule violations, and recommending disciplinary sanctions.²⁶⁵

One the primary functions of the Screening Panels is to "investigate" the allegations of misconduct.²⁶⁶ As a result, pursuant to the procedures outlined in the current Rules of Lawyer Discipline and Disability, at the time a matter is assigned to a Screening Panel for review, the investigation is technically deemed incomplete, although the OPC has completed its part in the investigation. The Screening Panel completes its "investigation" by holding a hearing where it questions the respondent, complainant and other witnesses. Prior to a hearing, OPC Counsel sends to the Screening Panel, the respondent and the complainant a complete copy of OPC's file, excluding work product, and a Screening Panel memorandum (SPM)²⁶⁷ summarizing the undisputed facts and the allegations of misconduct. The SPM also includes questions drafted by OPC Counsel for the Panel to consider, as well as OPC's recommended disposition.

OPC Counsel and respondent are entitled to be present at the hearing, as well as any witnesses either party may bring to the hearing. All are allowed to testify, either in person, by telephone or video conference. Neither OPC Counsel nor respondent or respondent's counsel are permitted to conduct the direct examination of the witnesses.²⁶⁸ The Rules of Evidence are not followed at these hearings and the procedures utilized by the Committees during these hearings vary. Several interviewees expressed concerns that the Screening Panels prolong the resolution of matters pending before the Committee, oftentimes because of requests for continuances by the respondent.

At the same time that a Screening Panel is "conducting its investigation," it is, during these hearings, making probable cause determinations and adjudicating whether the Rules of Professional Conduct were violated by the respondent. At the conclusion of its hearing, if the Screening Panel finds misconduct and recommends an admonition or public reprimand, that determination is submitted to the Ethics Committee Chair for approval. If the Screening Panel finds probable cause, it directs the OPC to draft and file a formal complaint. The Screening Panel also can recommend dismissal or diversion. This means the Screening Panels are acting as investigators, determiners of probable cause, and also, as adjudicators in the disciplinary system.

²⁶⁴ *Supra* note 80.

²⁶⁵ *See* pages 25-29.

²⁶⁶ RLDD 14-503(f).

²⁶⁷ Although the acronym for the Screening Panel memo is "SPM" the consultation team heard many interviewees refer to the memo as "SPAM." This characterization unfortunately vitiates the document's value in the screening process. The OPC may wish to change the name of the document or consider another acronym.

²⁶⁸ RLDD 14-510(b)(4).

A hallmark of a discipline system that is independent and fair is one that separates the investigatory/prosecutor functions from the adjudicative functions.²⁶⁹

The consultation team heard frequently from interviewees, and reviewed other information demonstrating that the current Screening Panel structure and process results in delay and a lack of consistency among Screening Panels.²⁷⁰ Statistical data reviewed by the team revealed the hearing process at the screening level and any subsequent review by the Ethics Committee Chair significantly extends the time period during which matters pend in the disciplinary process. For example, in FY2015, the average time from receipt of an Informal Complaint to a recommendation of an admonition by the Screening Panel was 519 days, and in FY2016 it was 388 days. An average of 97 days in FY2016 were added to matters before the Committee Chair ruled on the Screening Panel recommendation.

a. The Screening Panel's Structure and Role in the Disciplinary Process Should Be Revised

To enhance efficiency and fairness in the process, the Discipline Committee recommends that the Court revise the structure and duties of the Ethics Committee and its Screening Panels. The Discipline Committee believes that the optimal use of the Ethics Committee Screening Panels is for them to determine whether probable cause exists to file a formal complaint against a lawyer. The Discipline Committee recommends that the Court amend the Rules for Lawyer Discipline and Disability to so limit the Screening Panels' role in the process.²⁷¹ Limiting their duties to making probable cause determinations allows these volunteers to continue to serve a crucial function by providing an important check and balance in the disciplinary process. The Discipline Committee's consultation team also heard from many interviewees that Utah's local practice of using Screening Panels should be retained. This recommendation by the Discipline Committee is sensitive to these Utah-centric concerns while ensuring that Screening Panels operate with optimal efficiency, fairness and effectiveness. The procedures by which Screening Panels should make probable cause determinations are set forth in Recommendation 14 below, and the Discipline Committee believes that process should be adopted by the Court regardless of whether it agrees with this Recommendation to limit the duties of the Screening Panels to making probable cause determinations.

To further increase efficiency, the Discipline Committee recommends that Screening Panels should be comprised of three members (two lawyers and a public member). Relying on an eight-member Screening Panel to review investigations further promotes delays and creates inefficiencies. Reducing the size of the Screening Panels will also reduce the paperwork that would need to be processed, as well as limit travel and other reimbursable expenses. The Clerk of the Ethics Committee should continue assigning matters to Screening Panels on a random and rotating basis so that workload is evenly distributed and matters are not assigned to panels based on any

²⁶⁹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2(A).

²⁷⁰ Also contributing to delay and the lack of consistency between panels is a lack of adequate training of system volunteers, their ability to access a searchable database of disciplinary decisions, and clearly prescribed and followed uniform guidelines for Screening Panel proceedings. These issues will be addressed in Recommendation 11 below.

²⁷¹ In many states, and consistent with ABA policy, the probable cause determination based on discipline counsel's recommendation is made by a hearing committee chair. *See* ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 3 & 11 Cmt.

relationship between the location of the respondent's office or residence and the location of the panel members.²⁷²

Given the reduction of the Screening Panel responsibilities, the Court may wish to consider decreasing the size of the Ethics Committee to nine or twelve members (two-thirds lawyers and one-third nonlawyers), one of whom is designated the chair. Only experienced members should serve as chair. Reducing the size of the Ethics Committee would further reduce the number of appointments that the Court is required to make, while maintaining the current balance between lawyer and public participation. It will also be much easier for the Clerk of the Ethics Committee to coordinate the schedules of this smaller group. Members of the Ethics Committee should be appointed via an open and transparent appointment process.

The Discipline Committee also recommends that the Court amend the Rules of Lawyer Discipline and Disability to set term limits for the Ethics Committee. The use of three-year staggered terms permits the system and the public to benefit from experienced members, while the periodic rotation of members ensures that outmoded practices and procedures are not perpetuated and the system is responsive to change.²⁷³ Members should not be permitted to serve more than two consecutive three-year terms.²⁷⁴

b. The Duties of the Chair of the Ethics Committee Should Be Revised

In amending the Rules of Lawyer Discipline and Disability to limit the role of the Screening Panels, the Court should make concomitant amendments to adjust the duties of the Ethics Committee Chair. For example, the Court should amend the Rules of Lawyer Discipline and Disability to reflect that the Ethics Committee Chair will no longer be reviewing the Screening Panel's misconduct findings and recommendation for imposition of admonition or reprimand.²⁷⁵ In addition, for reasons discussed below, the Ethics Committee Chair should not review and sign the formal complaints before they are filed in the District Court. This is an unnecessary step that results in further delays. OPC can and should sign those formal charges, as is consistent with national practice. Nor should the Ethics Committee Chair receive or make reports to the Court regarding the activity and general standing of disciplinary matters. As discussed in Recommendation 1 above, reports to the Court should be made by the newly created Oversight Committee. The Ethics Committee Chair should continue supervising the Ethics Committee and Screening Panels, as well as working with the Panels, to enhance efficiency and ensure that matters are proceeding expeditiously.²⁷⁶ The Ethics Committee Chair should also participate in formulating with the OPC and Oversight Committee the training program for the Ethics Committee.

²⁷² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 6.

²⁷³ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 & 3.

²⁷⁴ *Id.*

²⁷⁵ Recommendation 25 discusses why the OPC should be responsible for determining whether admonition is appropriate and for preparing that private sanction, with the respondent's consent, for approval by the Discipline Committee chair.

²⁷⁶ RLDD 14-503(b).

Recommendation 4: The Court Should Consider Whether to Retain the Use of District Courts for Adjudicating Disciplinary, Disability and Reinstatement Proceedings

In Utah, District Court judges adjudicate formal disciplinary proceedings, reinstatement petitions, petitions for interim suspension and transfers to disability status.²⁷⁷ The Utah District Courts are the state trial court of general jurisdiction. The District Court also issues and enforces subpoenas requested by the parties in disciplinary matters.²⁷⁸ Utah has 71 full-time District Court judges serving in the state's eight judicial districts.²⁷⁹ In addition to lawyer discipline and readmission matters, the District Court has original jurisdiction in all civil cases, criminal felonies, certain misdemeanors, domestic relations matters, and probate. Also, the District Court serves as an appellate court to review informal adjudicative proceedings from administrative agencies. Each District Court controls its own calendar. Lawyer disciplinary cases are filed in the District Court in the county in which the misconduct occurred or where the respondent resides or practices law.²⁸⁰ To locate a disciplinary case, an individual would need to know in which county the case was filed in order to check that court's docket.

There is no question that District Court judges are dedicated and hard working. They have full dockets aside from their disciplinary cases, and must accommodate numerous competing schedules for parties, witnesses and counsel. During the course of the team's interviews, a number of people expressed concerns about delays and timeliness of District Court disciplinary proceedings. In 2016, it took 966 days on average from the date the Formal Complaint was filed before the adjudication hearing was held, and then 524 days from the date that the hearing was conducted until the final sanctions decision was filed by the District Court. The team also heard from interviewees that some judges are more familiar with the disciplinary process and procedures than others, resulting in inconsistencies in disciplinary decisions. The team was told that the District Court judges do not receive training regarding disciplinary matters.

The Discipline Committee suggests the Court undertake a study regarding the feasibility of retaining District Court judges as adjudicators in disciplinary matters. Almost all other jurisdictions use lawyer and nonlawyer volunteers to adjudicate disciplinary matters by creating hearing committees or boards, which submit findings and recommendations to the Court for the entry of a final order. The use of lawyer and nonlawyer volunteers to serve as the trier of fact in disciplinary cases is also consistent with ABA policy and has proven effective.²⁸¹ Unlike Utah's disciplinary process, specific procedural rules are adopted to govern these disciplinary trials, including limited discovery and depositions.²⁸² The Rules of Civil Procedure and the Rules of Evidence generally apply to these proceedings, unless otherwise specified in the procedural rules.²⁸³ The parties have the ability to cross-examine witnesses and present evidence in

²⁷⁷ RLDD 14-525; *see also In re Sonnenreich*, 2004 UT 3, ¶ 12, 87 P.3d 712.

²⁷⁸ RLDD 14-503(g).

²⁷⁹ *See* UTAH COURTS, AN OVERVIEW OF THE UTAH DISTRICT COURTS, <https://www.utcourts.gov/courts/dist/overview.htm> (last visited March 31, 2017).

²⁸⁰ RLDD 14-511(b).

²⁸¹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 & R. 3.

²⁸² *See* Recommendation 15.

²⁸³ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 18(B).

aggravation and mitigation.²⁸⁴ Regardless of the forum in which disciplinary and readmission matters are filed, all formal proceedings should be open to the public, and such is the case in Utah.

There are several jurisdictions that have chosen alternate means by which to handle formal disciplinary proceedings. For example, Colorado has instituted a system that employs a Presiding Disciplinary Judge. The Presiding Disciplinary Judge works in concert with two volunteers to handle disciplinary trials and hearings.²⁸⁵ The Presiding Disciplinary Judge rules on all motions, objections, and other matters presented after a formal complaint is filed and in the course of a hearing. The opinions of the Presiding Disciplinary Judge and hearing board are final orders in that case and may be appealed to the Supreme Court of Colorado. Arizona also utilizes a Presiding Disciplinary Judge. Arizona adopted this mechanism for hearing disciplinary matters in 2011.²⁸⁶ The Arizona system is modeled on that in Colorado and operates similarly. The Discipline Committee understands that both Arizona and Colorado have found the use of a Presiding Disciplinary Judge effective in meeting their specific needs. If the Court is interested in further exploring the use of a Presiding Disciplinary Judge, the Discipline Committee recommends contacting the Chief Disciplinary Counsel in Colorado and Arizona, as well as the Presiding Disciplinary Judges in those states.

California is the only state that has a separate court, staffed by independent judges to handle formal disciplinary matters. The State Bar Court²⁸⁷ has been in existence for decades. California also has the largest lawyer population in the United States. The Discipline Committee would not recommend that Utah develop, adopt and implement an entirely separate court like California's to hear disciplinary cases. In the Committee's view, the disciplinary caseload in Utah and the resources necessary to do so do not justify it.

The Discipline Committee also recommends that the Court direct enhanced training for whomever it determines should serve as the trier of fact in disciplinary proceedings, including a comprehensive discussion of the disciplinary process and procedures. In Recommendation 15 below, the Discipline Committee sets forth other recommendations for streamlining the adjudication of formal complaints that should apply regardless of who the Court decides should adjudicate these matters.

²⁸⁴ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(D).

²⁸⁵ See, e.g., *Office of the Presiding Disciplinary Judge*, COLORADO SUPREME COURT, http://www.coloradosupremecourt.us/PDJ/PDJ_Decisions.asp (last visited Jan. 6, 2014).

²⁸⁶ See, e.g., *Presiding Disciplinary Judge*, ARIZONA JUDICIAL BRANCH, <http://www.azcourts.gov/pdj/Home.aspx> (last visited Feb. 14, 2017).

²⁸⁷ See, e.g., *General Information*, STATE BAR OF CALIFORNIA, <http://www.statebarcourt.ca.gov/> (last visited Feb. 14, 2107).

IV. RESOURCES

Recommendation 5: The OPC Should Have Enhanced Technology Tools

In 2014, the OPC installed JustWare, an electronic case management system that enables OPC to track all aspects of pending and closed/dismissed matters, retrieve related documents, diary cases for deadlines and otherwise manage matters pending at the litigation stage of proceedings. JustWare's diary and tickler system tracks the progress of a case and prompts the OPC to take action if no events are recorded in a file for a sixty (60) day period. This includes communications with complainants. In addition, JustWare allows the OPC to retain lawyers' disciplinary histories electronically, and easily retrieve them to respond to requests for information. JustWare allows easy access to pleadings and correspondence related to a particular case, and can assist the OPC in deriving varied statistical reports. The OPC does not utilize other investigative or accounting software. The OPC staff does have access to the state court system's records and to electronic federal court documents.

All lawyers in the office have computers with access to Lexis and the Internet. The OPC uses Hightail, an electronic document-sharing system, to transmit files and documents to the Ethics Committee. The team was advised by several interviewees that Hightail does not function optimally. The team was advised that often, the OPC delivers paper copies of files or documents to the Ethics Committee members to review instead of electronically. Currently, the Bar's IT Department, consisting essentially of one person, maintains the hardware and software needs for Bar's and the OPC's system, and manages the Bar's network infrastructure, including that for the OPC. The IT Department also functions as technology support for the Bar and the OPC.

The OPC's purchase and use of JustWare is commendable. It has helped the Office operate more effectively while enhancing accountability. Use of this software will allow the agency to promptly identify and address caseload management and resource allocation problems. It will also increase the ease with which the annual report recommended in this Report can be produced to show the public and profession that the system is doing its job and is accountable.

Further and consistent use of technology by the OPC will optimize resource allocation and save it time and money that would otherwise be spent having individuals do certain tasks manually, such as printing and copying files. For example, the consultation team was advised that the OPC has scanners, which facilitate the electronic archiving of files, but the scanners do not operate optimally. The Discipline Committee recommends that the OPC Senior Counsel and the newly created Oversight Committee undertake an evaluation of the OPC's technology needs, and that steps also be taken to update current equipment that is not functioning optimally. For example, the OPC should be provided the necessary resources to fix the problems with Hightail, or install another document-sharing program that effectively permits the volunteers to access the documents and case files needed to promptly fulfill their duties. In the Committee's view, it would be useful for the system's volunteers to have access to a password-protected, web-accessible site associated with the OPC, or a secure listserv so that they can conduct business electronically with the requisite confidentiality.

The Discipline Committee also recommends that the OPC be given enhanced IT support, as needed, to maintain and update its computer system. In addition, the consultation team understands that the OPC staff does not receive regular training in the use of technology.

Technology training of OPC staff should occur regularly, and staff should be encouraged to attend offsite technology training relevant to their work, including about technological advances impacting the practice of law and the different types of technology being used by lawyers in their practices. The lack of training and unavailability of resources to address these types of cases can lead to unnecessary delays and inconsistencies in investigations.

The OPC should have trust accounting software to aid in the investigation and prosecution of disciplinary cases involving the mishandling of funds. Such technology will enable the OPC to more efficiently evaluate financial records, handle complex financial cases, and assist in auditing lawyer trust accounts. The Court and the OPC Senior Counsel may wish to consult with law enforcement agencies in identifying the appropriate investigative software. Ensuring that the OPC has the appropriate investigative and financial software is crucial, given the pervasiveness of technology in law practice and everyday life. The OPC should also explore whether additional litigation software can help improve efficiency.²⁸⁸

The consultation team was advised by a good number of interviewees that the OPC does not consistently use email to communicate with respondents or respondents' counsel. The Discipline Committee suggests that more consistent use of email makes sense. In addition to the cost savings in terms of postage, paper and time, email systems can track the receipt and reading of messages. Such records can be helpful in establishing a respondent's cooperation or lack of cooperation in the disciplinary process.

The Discipline Committee believes that the OPC can also better leverage its use of technology, thereby increasing efficiency, by updating its electronic procedures manual, instituting policies that facilitate the consistent use of technology in the office and develop comprehensive caseload processing guidelines for the investigation and prosecution of matters. Such guidelines should include directory time guidelines for the completion of investigations, proceedings based on formal charges, and other dispositions. The manual should be updated regularly. The team noted that some of the material submitted for their review included references to Rules that were no longer in effect. A detailed and regularly updated procedures manual will be especially helpful to new OPC staff.

Another way to enhance how the OPC uses technology relates to the current templates for correspondence, memoranda, and pleadings to reduce the amount of staff time it takes to prepare these documents. The OPC's use of templates is commendable, and helps streamline case processing. However, templates should be regularly updated and new ones created for new subjects.

²⁸⁸ *Supra* note 78.

Recommendation 6: The OPC Would Benefit From An Investigator and Forensic Accountant

The OPC does not employ an investigator to assist Counsel with the investigation and prosecution of allegations of misconduct. The OPC Counsel are responsible for conducting the investigations, along with any additional investigation that currently occurs via the Screening Panels. Counsel's investigatory duties include obtaining documents, compiling and analyzing bank and court records, and interviewing witnesses. OPC paralegals assist with some of these tasks, but they are not trained to perform the various evaluative tasks customarily performed by professional investigators.

The Discipline Committee strongly recommends that the OPC be provided with the resources to employ, or contract with, an investigator. The vast majority of U.S. disciplinary agencies employ professional investigators to assist with the gathering of evidence and efficient evaluation of cases.²⁸⁹ Trained professional investigators interview witnesses, undertake review and analysis of documents, and help counsel develop investigative strategy and theories of the case. All of which increases the efficiency and effectiveness of investigations and trial preparation.

The scope of the investigations would still be determined by the OPC Counsel, and the investigator would work under his or her supervision. Additionally, having an investigator conduct witness interviews can eliminate the risk of the OPC Counsel being called as a witness in formal proceedings regarding any non-sworn or recorded interviews of the respondent or others that Counsel conducted during the investigation, absent the presence of a "prover." Many jurisdictions hire former police officers and/or FBI agents to act as investigators for the disciplinary system. This means that the investigators are skilled in interview techniques and are able to act with some autonomy. The skills and knowledge or resources of investigators with law enforcement experience would be particularly helpful to the OPC.

The consultation team was advised by several interviewees that the significant time that it takes OPC Counsel to thoroughly analyze volumes of bank and financial records in cases involving mishandling of funds strains resources. This is especially true if the respondent does not produce the bank records until the last minute, and the consultation team was told by interviewees that this happens with some frequency. As a result, the Discipline Committee also recommends that the OPC Senior Counsel and the newly created Administrative Oversight Committee discuss hiring a forensic accountant, or engaging the services of a private accounting firm on a contract basis. This individual should be familiar with the operation of law firm accounts. Complex financial investigations and audits often take significant time, and in the Discipline Committee's experience, financial cases are becoming more complex. A forensic accountant, with proper software, would be able to efficiently and thoroughly organize, review, and analyze financial information and bank records and thereby allow the OPC Counsel and any investigator hired to focus on completing other aspects of the investigation and trial preparation.

²⁸⁹ See 2015 ABA Survey on Lawyer Discipline Systems (2017), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2015_sold_results.authcheckdam.pdf (of the forty-seven disciplinary jurisdictions that responded to the ABA 2015 Survey on Lawyer Discipline Systems, thirty-three employ investigators).

V. PUBLIC ACCESS AND OUTREACH

Recommendation 7: The Court Should Utilize an Open and Transparent Appointment Process to Fill Committee Vacancies

The Discipline Committee commends the Court for establishing a lawyer regulatory system that recognizes that a combination of both nonlawyer and lawyer volunteers results in a more balanced evaluation of complaints and increases the credibility of the disciplinary system in the eyes of the public.²⁹⁰ As noted earlier in the Report, the volunteers in Utah’s lawyer discipline system are generous with their time and experience. In conducting interviews, the consultation team learned that the discipline system’s volunteers at every level are highly regarded for their professionalism and their dedication to fulfilling their responsibilities.

Currently, the Utah Supreme Court appoints the thirty-six volunteers (twenty-eight lawyer and eight public members) who serve on the Ethics Committee.²⁹¹ They serve one three-year term.²⁹² The Rules of Lawyer Discipline and Disability do not provide for the reappointment of Ethics Committee members.²⁹³ If the Court agrees with Recommendation 1 above, it should also appoint the members of the new Administrative Oversight Committee.

The team is not aware of rules or procedures setting forth the qualifications, vetting or selection process for the appointment of members for either Committee, other than a general requirement that all members “have demonstrated a high standard of professional conduct.”²⁹⁴ Those who wish to serve on the Ethics Committee can find general information about the Committee on the Utah State Bar’s website, but there is no information about the required minimum qualifications to serve or the appointment process.²⁹⁵ Information on the Court’s website about the Ethics Committee is limited to a list of the current members under the hyperlink for the Court’s Boards and Committees.²⁹⁶

The consultation team was informed that the Court is assisted by an Appointments Committee to screen volunteer applications for appointment to the Ethics and Discipline Committee. It is not clear if the same process is used for appointments to the Diversion Committee. In addition, the team was informed that, in the past, it has been difficult to secure applications from public members. As a result, the Appointments Committee Chair relies on recommendations from existing members of the Ethics and Diversion Committees. The Discipline Committee commends the Court for utilizing an independent Appointments Committee to assist it in vetting applicants.

²⁹⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 Cmt. & R. 3.

²⁹¹ The Court currently appoints six volunteers (five lawyer members and one nonlawyer) to the Diversion Committee to serve a four-year term, and those members may be reappointed to serve a second consecutive term. Recommendation 24 suggests that the Court eliminate the Diversion Committee.

²⁹² RLDD 14-503(a).

²⁹³ Recommendation 3 above sets forth additional recommendations regarding the terms for which these volunteers are appointed.

²⁹⁴ See RLDD 14-503(a) & 14-533(b)(1).

²⁹⁵ See UTAH STATE BAR, UTAH SUPREME COURT: ETHICS & DISCIPLINE COMMITTEE, <http://www.utahbar.org/opc/bar-committee-ethics-discipline/> (last visited March 31, 2017).

²⁹⁶ See UTAH COURTS, GOVERNING BOARDS AND COMMITTEES, <https://www.utcourts.gov/Committees/index.asp?comm=30> (last visited March 31, 2017).

The use of an Appointments Committee reinforces both for the public and for the profession, the Court's commitment to maintaining the independence and quality of the system, as well as the Court's leadership role.

The Discipline Committee suggests that in order to broaden the pool of applicants and hopefully increase the number of members of the public who seek to serve the system, that the Court take steps to increase awareness of the application and appointment process by better publicizing it. In addition, the Court could develop and publicize criteria for evaluating applicants so that lawyers and public members interested in serving the system are able to better understand what their duties will be and the time commitment expected of them. The Discipline Committee suggests that all candidates should have to complete an application and undergo a background check.²⁹⁷ Efforts to achieve balanced representation of all segments of the public and profession, including minorities, women, government lawyers, large firm lawyers, small firm lawyers, and sole practitioners should continue.

The Discipline Committee recommends that the Court advertise availability of volunteer positions at all levels of the lawyer discipline system, not only on its website and that of the Utah State Bar, but on the new stand-alone website for the OPC discussed in Recommendation 8.²⁹⁸ The Committee suggests that a separate link on the OPC's website homepage be created to direct any person searching for volunteer information to a newly created webpage devoted to volunteer opportunities in the disciplinary system for lawyers and nonlawyer members. The new webpage should describe the duties and training requirements for volunteers, the process for applying, the number of positions available during the particular application period, deadlines, and provide a link to the application.

Announcements of vacancies can also be publicized in print and online media throughout the state. The Discipline Committee believes that enhancing the outreach associated with the appointment process will help to address the concern about attracting public members to serve. It may also help to solicit input from the system's public members as to how to enhance recruitment opportunities.

²⁹⁷ For example, in Louisiana, those wanting to serve on a Hearing Committee (the trier of fact akin to the District Court judge) must complete an application that asks for disclosure of all lawsuits, bankruptcies, state or federal tax liens and moving violations for the last five years, in addition to authorizing a criminal background investigation.

²⁹⁸ See, e.g., THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, COMMITTEES, BOARDS & ADVISORY GROUPS, <http://www.pacourts.us/courts/supreme-court/committees/> (last visited March 31, 2017).

Recommendation 8: The Disciplinary System Can Be More Accessible and Visible to the Public

The purpose of lawyer discipline is to protect the public and the administration of justice. To accomplish these goals, the lawyer disciplinary agency must be easy to find and accessible to the public, physically and electronically. The consultation team learned from interviewees that the public lacks sufficient information about the OPC and Utah’s lawyer disciplinary system. Several interviewees informed the consultation team that they were unaware of the existence of the OPC, had little information about its functions, and knew little or nothing about the disciplinary process. The team learned that, in most instances, members of the public learn about the disciplinary agency only after being referred to the OPC by the Utah State Bar or by their own lawyers. The Discipline Committee believes that more can and should be done to engage the public, and that there are several ways this can be accomplished.

Currently, persons wishing to obtain online information about the OPC must go to the Bar’s website. The Bar’s website includes a “How to File a Complaint Against an Attorney” link under “Consumer Protection Programs,” which includes information about submitting a Request for Assistance and provides a downloadable “CAP RFA.” No form is provided online for those who wish to file an Informal Complaint against a Utah lawyer.²⁹⁹ Individuals who wish to file an Informal Complaint, the only “officially recognized” form of complaint under the Rules of Lawyer Discipline and Disability, must review the procedures outlined in the Rules for Lawyer Discipline and Disability or contact the OPC and request an Informal Complaint Form.³⁰⁰ No information is provided on the website about filing an Informal Complaint, or the requirement that such Complaint be verified and notarized.³⁰¹

Although hyperlinks provide access to the Court’s Rules, including the Rules of Professional Conduct and the Rules of Lawyer Discipline and Disability, there is no a hyperlink to the Utah Supreme Court’s home webpage. In addition, while information provided on the Bar’s website discusses the delegation of the Court’s authority to the OPC to investigate and prosecute disciplinary cases, other webpages suggest the authority lies with the Bar. For example, the OPC “Attorney Discipline FAQ” webpage makes repeated references to “Bar disciplinary proceedings,” “filing a complaint with the Bar,” and the “Bar filing a formal complaint in the district court.”³⁰²

a. The OPC Should Have Its Own Website

The Discipline Committee strongly recommends that the OPC have a stand-alone consumer-friendly web presence. Optimally, the website should be “hosted” by the OPC to serve as a primary portal for the public and lawyers to learn about the disciplinary system in Utah. It should provide detailed information about the functions of each component of the system, as well as their

²⁹⁹ See UTAH STATE BAR, OVERVIEW OF PUBLIC SERVICE PROGRAMS, INFORMATION AND RESOURCES, <http://www.utahbar.org/public-services/> (last visited April 3, 2017).

³⁰⁰ RLDD 14-502(g).

³⁰¹ In a recent article rating the various websites of lawyer disciplinary agencies throughout the country for transparency and accessibility, Utah’s website was rated in the lowest category: “Little Accessible Disciplinary Information Available.” See Jacquelyn M. Desch, *Attorney Discipline Online*, 29 GEO. J. LEGAL ETHICS 921 (2016).

³⁰² See UTAH STATE BAR, OFFICE OF PROFESSIONAL CONDUCT FREQUENTLY ASKED QUESTIONS, <http://www.utahbar.org/opc/office-of-professional-conduct-frequently-asked-questions/> (last visited April 3, 2017).

limitations in a consumer friendly manner. The new website should include all contact information for the OPC, including an email address. The Discipline Committee also recommends that information on the website about all of the other components of the disciplinary system should be enhanced, including publishing a roster of the names of all of the volunteers who serve. Currently, the Utah State Bar website has general information about the role of the Ethics Committee, but does not include a directory of the members who serve. The new OPC website should also include information about the newly created Administrative Oversight Committee. At the time this Report was finalized, the Bar's website included no information about the Diversion Committee.³⁰³

The new web presence for the OPC should include links to the Utah Rules of Professional Conduct, the Court's Rules of Lawyer Discipline and Disability, as well as to the opinions of the Ethics Advisory Opinion Committee. Other links that can be added include those for the rules and forms of the Lawyers' Fund for Client Protection. Every effort should be made to ensure that the public is, and remains aware, of the Lawyers' Fund and the new website should include information about the procedures to be followed by an aggrieved party who may have suffered a financial loss as a result of a lawyer's dishonest conduct in order to seek reimbursement of the loss. Individuals should be informed that filing a complaint with the OPC is a prerequisite to submitting a claim with the Lawyers' Fund for Client Protection. Links to other Utah legal resources and publications on relevant topics relating to professional responsibility and ethics will help the profession and the public. The Discipline Committee also recommends that the OPC's stand-alone website be updated regularly and amendments to any disciplinary procedural rules be posted promptly.

The OPC's new website should include the uniform and downloadable complaint form discussed in Recommendation 12 with regard to streamlining the complaint filing process. This template complaint form will not only help complainants better organize their thoughts and assist in the collection of relevant information, it will also allow for a more efficient and consistent screening process. The OPC and the new Oversight Committee should discuss whether to allow complaints to be submitted electronically. Currently, some jurisdictions permit that to happen, but the majority do not yet allow complainants to file grievances electronically.

The OPC new website, and the Bar's site, should not include language that could be perceived as discouraging individuals from filing a complaint. Currently, the Bar's website cautions individuals that if they do not attach supporting documents, their "submission will not be sent and no case will be initiated."³⁰⁴ The consultation team learned that this warning is inconsistent with the OPC's practice, since the OPC will contact complainants and request additional information during the preliminary investigation. Further, a "Notice" posted on the webpage alerts individuals who wish to file a complaint that the lawyer in question and CAP may disclose "confidential and privileged information," and that by submitting an RFA, complainants "release all claims" against their lawyer and the Utah State Bar "relating to disclosure of the information submitted."³⁰⁵ The Discipline Committee finds these warnings troubling, as they discourage complainants from submitting a grievance against a lawyer, and the posted information may be inconsistent with the Utah Rules of Professional Conduct. Under Rule 1.6(b)(5) of the Utah Rules of Professional

³⁰³ As noted in Recommendation 24, the Discipline Committee recommends elimination of the Diversion Committee.

³⁰⁴ See UTAH STATE BAR, HOW DO I COMPLAIN AGAINST AN ATTORNEY, <http://www.utahbar.org/cap-request-form/> (last visited April 3, 2017).

³⁰⁵ *Id.*

Conduct, lawyers do not have an unfettered right to disclose confidential information in response to a disciplinary complaint. Rule 1.16(b)(5) allows disclosure of confidential information only to the extent “reasonably necessary” to respond to allegations relating to a client representation.³⁰⁶ Further, the Discipline Committee suggests that the OPC review whether the “release” referenced is appropriate, and queries the wisdom of appearing to ask a complainant to provide an uncounseled release of confidential information.

b. Licensure Status and Disciplinary Precedent Should Be Available Online In An Easily Searchable Format

The Discipline Committee recommends that information about a Utah lawyer’s licensure status should be available and searchable from the OPC’s website. This includes information about pending public disciplinary and reinstatement/readmission cases, and the date and location of hearings on formal proceedings. The consultation team was advised that currently, in order to locate information about a District Court disciplinary proceeding, the public must conduct a search on X-Change, a fee-based website. They must know in which judicial district the case was filed. The public should have free access to this information.

The public and lawyers should also have access to all disciplinary decisions resulting in the imposition of public discipline and all reinstatement/readmission decisions. Optimally, the OPC’s website would have a searchable library of the Court’s disciplinary opinions, all District Court disciplinary decisions and orders, and past³⁰⁷ Screening Panel decisions resulting in public discipline, as well as all decisions relating to reinstatement/readmission cases. Currently, the OPC publishes only summaries of cases resulting in public discipline. Summaries of private admonitions are also published without the lawyer’s name. Making available to the public and profession a searchable library of public disciplinary decisions and orders enhances transparency, shows that the Court’s disciplinary system is accountable, helps improve uniformity in the imposition of sanctions, and provides lawyers facing disciplinary charges with the precedent necessary to adequately prepare their defense or respond to complaints.

c. The Content of the OPC Annual Report Should Be Enhanced

The Rules of Lawyer Discipline and Disability require the OPC Senior Counsel to prepare and submit an annual report to the Court and to the Bar’s Board, setting out the scope and nature of the Ethics and Discipline Committee’s work. This report includes “information about the number of disciplinary cases investigated, the number brought before the Ethics Committee, formal complaints filed, dispositions, informal ethics opinions issued, diversionary dispositions, and such other information that may be helpful to the Court in comprehending the operations of the OPC,

³⁰⁶ Compare Rule 1.6(b)(5) of the Utah Rules of Professional Conduct with ABA Model Rule 1.6(b)(5) of the Model Rules of Professional Conduct. Utah’s Rule 1.6 is consistent with ABA Model Rule of Professional Conduct Rule 1.6 or its equivalent, which permits limited disclosure of otherwise confidential information only “to the extent reasonably . . . necessary to establish a claim or defense . . . in a controversy between the lawyer and the client . . .” See also e.g., *In re Disciplinary Action Against Dyer*, 817 NW 2d 351 (N.D. 2012) (disclosure by lawyer of confidential information relating to the representation of a client in a disciplinary proceeding is permitted only to extent *reasonably necessary* to respond to the allegations) (emphasis added).

³⁰⁷ As noted in Recommendation 14, the Discipline Committee recommends limiting the role of the Screening Panels to making probable cause findings.

as well as the efficiency and effectiveness of the disciplinary system.”³⁰⁸ Although not required by the Rules, the OPC publishes its annual report on the Bar’s website.³⁰⁹ Making the annual report available to the public is commendable, demonstrates accountability, allows the public and the bar to evaluate the performance of the discipline system, and promotes increased public confidence in the discipline system. The annual report also offers an opportunity for the Court to detail the accomplishments of its agents, identify improvements in the system, and explain any new initiatives.

The publication of an annual report is consistent with the practice of many state disciplinary agencies nationwide.³¹⁰ Since publication, as opposed to preparation, of the OPC annual report is not addressed in the Rules of Lawyer Discipline and Disability, the Discipline Committee recommends that the Court amend those Rules to direct its publication on the new OPC website, and also on the Court’s website. Consistent with Recommendation 1, the Committee recommends that the OPC annual report omit reference to it being the Bar’s report. The Committee also suggests that the report can be expanded to include new statistical information, such as the number of complaints submitted against lawyers, broken down by lawyer practice area, the number of years in practice, and the nature of the practice, including whether in solo/small firm, government, in-house or large firms settings. JustWare should help the OPC derive this new statistical information for the annual report. Such information is helpful not only to lawyers but also to the OPC in planning CLE and other educational programs. The report should continue to include information about all revisions to OPC procedures and related Rules, and to enhance the description of its outreach efforts to the bar and the public, speaking events, CLE presentations, and committee work. Consistent with Recommendation 1, the OPC annual report should continue to be provided to Bar’s Board for informational purposes only.

In addition, the Discipline Committee suggests that the OPC should, working with the new Administrative Oversight Committee, develop, publish, and widely disseminate in places frequented by the public (i.e., courthouses, libraries and consumer organizations) pamphlets describing the system and that provide the web address for the new OPC site. As noted in Recommendation 9, this should be coupled with enhanced public outreach.

³⁰⁸ RLDD 14-503(j).

³⁰⁹ See UTAH STATE BAR OFFICE OF PROFESSIONAL CONDUCT ANNUAL REPORT 2015-2016 (Aug. 2016), https://www.utahbar.org/wp-content/uploads/2016/10/OPC_ANNUAL_Report_2015-2016.pdf.

³¹⁰ See, e.g., OFFICE OF ATTORNEY REGULATION COUNSEL 2015 ANNUAL REPORT (2015), <http://www.coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2015%20Annual%20Report.pdf>; <http://iardc.org/AnnualReport2015.pdf>; ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD & ANNUAL REPORT OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY (2015), <http://lprb.mncourts.gov/AboutUs/Documents/2015%20Annual%20Report.pdf>; WASHINGTON STATE BAR ASSOCIATION DISCIPLINE SYSTEM ANNUAL REPORT (2015), [http://www.wsba.org/~media/Files/Licensing_Lawyer%20Conduct/Discipline/2015%20Discipline%20System%20Annual%20Report\(00212318\).ashx](http://www.wsba.org/~media/Files/Licensing_Lawyer%20Conduct/Discipline/2015%20Discipline%20System%20Annual%20Report(00212318).ashx).

Recommendation 9: Outreach to the Public Should Be Enhanced

During its visit, the consultation team learned that the OPC Counsel actively engage in outreach efforts to the Utah bar by regularly speaking to lawyers and judges, and by writing articles that address professional responsibility and ethics issues, in addition to responding to lawyers who call the OPC's Ethics Hotline. These outreach efforts are much appreciated by Utah lawyers and judges, and are considered invaluable. The Discipline Committee commends the Court for encouraging these outreach efforts, and the OPC for engaging in them.

The Discipline Committee recommends that the OPC undertake similar efforts to better inform the public about the disciplinary system. As noted above, the consultation team heard that members of the public are generally not aware of the existence of the OPC and lack an understanding of how the disciplinary process works. This is not, in the Discipline Committee's experience, an uncommon refrain from the public. The Discipline Committee agrees with the sentiment expressed by interviewees that more can and should be done to engage the public about the accessibility of the system and its protection of the public.

By way of example, OPC Counsel and the system's volunteer members can increase outreach to the public, civic organizations and consumer groups by seeking invitations to speak at meetings of these entities. Participation by the nonlawyer system participants in this increased outreach is crucial.

Recommendation 10: The Office of Professional Conduct Should Enhance Outreach to Specialty Bar Associations

As noted above, the outreach and education efforts of the OPC to the profession is significant. However, some interviewees advised the consultation team that there persists a perception that the disciplinary process is biased against minority lawyers. That such a perception exists is not unique to Utah, and it is an issue that has been studied by other jurisdictions over the years. Such studies did not find evidence of institutional bias, purposeful or otherwise, by disciplinary agencies against minority lawyers.³¹¹ Similarly, in Utah, the consultation team found no evidence to support these contentions. However, the existence of the perception alone is cause enough for the Discipline Committee to recommend that the OPC and the volunteer members increase outreach efforts to specialty bar associations throughout the state. OPC staff and volunteers at all levels of the system should be proactive in seeking invitations to address specialty bar associations about the system, and also, to provide educational programs for their membership. It is the Discipline Committee's belief that such increased outreach coupled with the enhanced nomination and selection process for the system's volunteers (Recommendation 7) will help diminish incorrect perceptions about the system.

³¹¹ See, Mark Hansen, *Picking on the Little Guy*, ABA J., Mar. 2003 (studies revealed a lack of empirical evidence supporting or rebutting claims of bias in the disciplinary system but rather indicated a higher percentage of disciplinary complaints against sole practitioners and small firm lawyers than against lawyers in large firms nationwide). See also, REPORT OF STATE BAR OF CAL., INVESTIGATION AND PROSECUTION OF DISCIPLINARY COMPLAINTS AGAINST ATTORNEYS IN SOLO PRACTICE, SMALL SIZE LAW FIRMS AND LARGE SIZE LAW FIRMS (2001), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwigl-iNh9DMAhVSET4KHSu_BbcQFggcMAA&url=http%3A%2F%2Fwww.calbar.ca.gov%2FLinkClick.aspx%3Ffileticket%3DOydXJk36ys4%253D%26tabid%3D224%26mid%3D1534&usg=AFQjCNE0P3tDhcujNz6eyhoclr0mBsMF8Q; ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINE COMMISSION, 2003 ANNUAL REPORT STUDY OF DEMOGRAPHIC DATA FOR LAWYERS DISCIPLINED OVER FIVE YEAR PERIOD (2003), <https://www.iardc.org/AnnualReport2003.pdf>; TASK FORCE ON MINORITIES IN NEW MEXICO - AN UPDATE 1990-1999 REPORT, SECTION VI. DISCIPLINARY SANCTIONS AGAINST MINORITY ATTORNEYS, http://www.nmbar.org/Nmstatebar/Publications_Resources/Status_of_Minority_Attorneys_in_NM.aspx.

VI. TRAINING

Recommendation 11: The Professional Staff and Volunteers Should Receive Increased and Regular Training

As noted earlier in this Report, Utah has a professionalized lawyer disciplinary office. A majority of those interviewed by the consultation team felt that the OPC staff generally performed their duties well. Others, while complimenting the OPC staff, were rightly critical of instances of delay not traceable to the role that volunteers have in the current system. Based on the consultation team's study, a number of factors contribute to instances in Utah where cases are not processed as efficiently as they should be. In a number of respects the current structure of the system and multiple layers of process contributes to delay; in other ways delay occurs due to lack of necessary technology resources, internal OPC practices at the staff and volunteer levels, and in the Discipline Committee's view, a need for enhanced and regular training for all system participants.

Nationwide, disciplinary investigations and prosecutions involve increasingly complex and sophisticated issues, and that translates into increased pressure on current system resources in terms of skill and efficiency. In addition, many disciplinary agencies are seeing a rise in complaints involving lawyers who are struggling with substance abuse, mental health, and age-related impairment issues. The staff and volunteers in all disciplinary agencies, Utah's as well, need to be educated and otherwise equipped to address these cases, as well as cases that implicate technological advances impacting the practice of law. The lack of required ongoing training on these and other issues leads to unnecessary delays and inconsistencies in investigations, prosecutions, and adjudications. Individuals with varied expertise in these fields should be invited to speak at the training sessions.

a. Enhanced Training for OPC Staff

Although the lawyers in the OPC collectively have many years of dedicated service and experience, the information provided to the team indicates that enhanced training would benefit all lawyers in the office. In addition to the issues noted above, enhanced training should include conflicts checking, use of the new searchable library of disciplinary precedent discussed in Recommendation 8, negotiation skills, and technology training, including offsite courses relevant to their work that also address technological advances being used by lawyers and law firms. All of the OPC counsel should be required to attend continuing legal education programs focusing on areas of law commonly the subject of disciplinary complaints, including, but not limited to, criminal law, domestic relations law, and personal injury. In-house programs should be developed that focus not only on substantive law, but also on effective investigative techniques, effective writing and use of technology. For internal training sessions, experts in the areas of substance abuse and addiction, mental health, and age related impairments should be invited to address the staff, as well as system volunteers.

OPC Counsel should continue to attend the ABA National Conference on Professional Responsibility. The ABA National Conference on Professional Responsibility is the preeminent educational and networking opportunity in the field of ethics and professional responsibility. Attendees have the opportunity to formally and informally collect information and discuss current issues and problems in the area of professional responsibility and disciplinary enforcement with

leading experts, scholars and practitioners from across the country. Conference programs address recent trends and developments in legal ethics, professional discipline for lawyers and judges, professionalism and practice issues, and are intended to be informative on a level appropriate to a group with considerable knowledge of and familiarity with the subject area. The National Conference is held annually in conjunction with the National Forum on Client Protection, which offers programs on fee arbitration and an array of other client protection mechanisms.

OPC Counsel should also continue active participation with the National Organization of Bar Counsel (NOBC). The NOBC is an affiliated organization of the ABA. NOBC meetings are held in conjunction with the ABA Midyear and Annual Meetings. Resources provided by the NOBC include online educational programming tailored for disciplinary counsel, briefs, pleadings and educational presentations at the meetings to help jurisdictions with the implementation of more efficient and effective regulatory enforcement mechanisms. In addition, OPC counsel should be alternately enrolling in the NOBC's Skills Training Boot Camp, taught by a faculty of experienced disciplinary counsel.³¹²

b. Enhanced Training for System Volunteers and Adjudicators

Mandatory and annual training for the disciplinary system's volunteers and adjudicators (whether those continue to be District Court judges or not) should also continue.³¹³ A separate orientation session should be mandatory for all new appointees. The consultation team was informed that currently, annual training for the Ethics Committee consists of two luncheons, one for new appointees and one for continuing members. The District Court judges do not receive training.

Regular training is vital to the effective and efficient operation of the disciplinary system. Training helps to ensure consistency in, and the expeditious resolution of, disciplinary matters. Training also provides a forum for volunteers, staff, and respondents' counsel to discuss problems and exchange information about how to enhance the effectiveness and efficiency of this level of the process. As with OPC staff, these training sessions should include medical experts and personnel from the Utah Lawyer Helping Lawyers program to educate volunteers about substance abuse, gambling, mental health and issues relating to aging lawyers. All of these issues are being raised with increasing frequency in lawyer disciplinary cases.

Another component of regular training includes education about the disciplinary process, its purpose, and the role the professional staff and volunteers serve in the system. Enhanced training should be given to the volunteers whose roles in the disciplinary system may change as a result of the Court's implementation of new procedural rules or any of the Recommendations in this Report. For example, if the Screening Panels' role will be limited to making probable cause determinations, the training should emphasize how at that stage of the proceedings the volunteers are not charged with determining the merits of a case. In the Discipline Committee's experience, volunteers, in particular lawyers, who perform the probable cause finding function often confuse the probable cause finding function with that of adjudicating the merits of a case.

³¹² See, e.g., NOBC SKILLS TRAINING, <https://www.nobc.org/index.php/news-events/upcoming-events/event/19/Skills-Training> (last visited April 3, 2017).

³¹³ In some jurisdictions, like Alabama and Wisconsin, the Court has included training requirements in the disciplinary procedure. See, e.g., AL R. DISC. P. 4(a)(1), 4.2(a)(2) and 7(d) and WI SCR 21.11.

As noted above, concerns exist regarding the consistency in sanctions recommendations at the Screening Panel and District Court levels. As a result, the Discipline Committee recommends that training sessions hone in on strengthening consistency in the manner in which the adjudicators apply the Sanctions Standards. This may require enhanced in-person training with OPC staff and respondents' counsel present, as well as the development of on-line courses so that the adjudicators and other volunteers do not have to travel. The Annotated *ABA Standards for Imposing Lawyer Sanctions* can assist the volunteers in enhancing the consistency with which they recommend sanctions.³¹⁴

All training materials should be made available to the volunteers and District Court judges electronically, and should be updated regularly.³¹⁵ Training materials should include all rules, policies and procedures of the disciplinary system, an organizational chart clearly identifying the volunteer members' roles within the system, samples of exemplary reports, sample scheduling and prehearing conference orders, applicable time guidelines for processing cases, relevant court cases and the Utah Standards for Imposing Lawyer Sanctions. In addition, as noted at page 54, an electronic and searchable library of all of the Court's disciplinary opinions and District Court and Screening Panel's public discipline decisions should be created. Adjudicators should receive training regarding the new searchable library of disciplinary precedent, so that they can use it effectively.

³¹⁴ See ANNOTATED ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (2015) available for purchase at the ABA Store. Additional information for e-book and bulk purchases available at: <http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=184851996>.

³¹⁵ The consultation team found that current training materials provided to the Ethics Committee did not include updated information or the most recent amendments to the Rules of Lawyer Discipline and Disability.

VII. PROCEDURES

Recommendation 12: The Court and OPC Should Streamline the Complaint Screening and Investigation Process

In addition to incorporating the CAP and DPIO into the OPC (see Recommendation 2), the Discipline Committee believes that the Court and OPC should take additional steps to streamline the manner in which complaints are received, screened, and investigated. The current system is layered with multiple and duplicative procedures relating to this stage of the disciplinary process that, in the Discipline Committee's view, contribute to confusion for complainants and respondents, and also increase the amount of time it takes to process matters.

a. There Should Be One Form of Complaint and the Court Should Eliminate Formalities Attendant With Their Filing

Currently, the OPC accepts complaints about the conduct of Utah lawyers in the form of Requests for Assistance (RFA), Informal Complaints, or other written communications. However, the Rules of Lawyer Discipline and Disability only refer to "Informal Complaints" that are notarized and verified by the complainant, or other information coming to the attention of the OPC.³¹⁶ The OPC intake and investigation process varies depending on the form in which a complaint is received by that office.

The system should provide the public with a simple and straightforward method to complain about the conduct of Utah lawyers. By merging the CAP with the OPC, the use of RFAs can and should be eliminated, and the intake process should proceed more efficiently. All communications to OPC about lawyer conduct should be treated the same. As noted above, the Rules of Lawyer Discipline and Disability already provide that the OPC is obligated to evaluate all information coming to its attention. This should include anonymous complaints.³¹⁷ As a result, the Discipline Committee urges the Court to amend Rules 14-502, 14-510, and other Lawyer Discipline and Disability Rules to eliminate references to "Informal Complaints" and "Notice of Informal Complaints."

The Court should also eliminate the requirement that complaints must be in writing. There are a number of reasons that complainants cannot submit complaints in writing. These reasons range from language barriers to physical disabilities that prohibit individuals from writing or typing. The OPC intake staff can assist these complainants in reducing their complaints to writing when necessary.

OPC should make available online one universal complaint form to assist those wishing to file complaints.³¹⁸ Consistent with existing Rules, this does not mean that complainants should be

³¹⁶ RLDD 14-502(g) & 14-510(a).

³¹⁷ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4 & R. 11.

³¹⁸ Examples of complaint forms from other jurisdictions can be accessed at: OFFICE OF BAR COUNSEL, BOARD ON PROFESSIONAL RESPONSIBILITY DISTRICT OF COLUMBIA COURT OF APPEALS, <http://www.dcbbar.org/attorney-discipline/for-the-public/upload/English-Complaint-Form.pdf> (last visited Jan. 31, 2017); ATTORNEY AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, REQUEST FOR INVESTIGATION,

“investigation.” The practice of first conducting a preliminary investigation, which may include an exchange of correspondence between OPC and the respondent, and then reformulating the allegations of the complaint into the NOIC before securing respondent’s “official” response is inefficient.

The consultation team was informed by interviewees that respondents often do not respond to initial screening requests for information from OPC, and instead wait until they receive the NOIC. Some respondents do not respond to the allegations until they appear at the Screening Panel hearing. Amending the Rules as recommended herein should help eliminate that, as should providing the OPC with the authority to issue investigative subpoenas, discussed in Recommendation 13. Additionally, OPC should be careful to limit the number of extensions of time that they give respondents to respond to complaints and requests for information, except in extraordinary circumstances. The Court may wish to consider adding language to the Rules of Lawyer Discipline and Disability limiting the number of requests for extensions of time to respond to a complaint that a respondent may seek. In addition, many interviewees advised the consultation team that the back and forth that currently occurs with exchanges of correspondence at various levels of the investigation process is not efficient. Direct telephone or email contact to obtain necessary information, in lieu of exchanging correspondence via U.S. mail, can be effective for many purposes in the disciplinary process.

The Discipline Committee also suggests that OPC enhance communication with respondents and complainants throughout the investigative process. Several interviewees commented that they were unable to obtain information from OPC about the status of their complaint for long periods of time. The OPC should promptly send to complainants the respondent’s response to the initial complaint. Complainants and respondents should receive regular updates as their matters progress through the disciplinary system. OPC should not discourage complainants from contacting the office for information about their case. Including warnings in letters sent by OPC to complainants that “calling or writing the OPC for status updates will not speed up processing your Bar complaint,” or suggesting they should not expect a prompt resolution to their complaint by informing complainants that the Rules of Lawyer Discipline and Disability “do not give specific deadlines for completing the Bar complaint process,” should cease.³²²

Upon the completion of the investigation, the OPC should dismiss appropriate cases without having to obtain approval from a Screening Panel or the Ethics Committee Chair, refer matters to diversion, impose an admonition with the respondent’s consent and the approval of the Ethics Committee Chair, or refer the matter to a Screening Panel for a probable cause determination.³²³ The Discipline Committee recommends that the Court amend the Rules for Lawyer Discipline and Disability accordingly.

c. Complainants Should Be Provided a Limited Appeal From OPC Dismissals

Notice to complainants that a matter has been dismissed should include a concise statement of the facts resulting from the investigation, the reasons the matter has been dismissed, and that the complainant may appeal the dismissal to the Ethics Committee Chair. A well-crafted letter that

³²² See OPC templates of letters to complainants on record with the ABA Standing Committee on Professional Discipline.

³²³ See Recommendations 14, 24 & 25.

explains the reasons for the dismissal in the Discipline Committee's experience results in fewer appeals of such dismissals. It also helps decrease skepticism about the agency.

Consistent with the recommendation that the dismissal letter include language advising complainants that they may appeal the dismissal to the Ethics Committee Chair, the Discipline Committee recommends that the Court amend the Rules of Lawyer Discipline and Disability to provide for that appeal for all who file complaints against lawyers. Disciplinary counsel are not immune from making errors of judgment, and a limited appeal provides a useful check and balance for the system. It also helps alleviate perceptions that the profession is too protective of its own.

Currently, only individuals who submit a notarized and verified Informal Complaint are recognized as "complainants" under the Rules of Lawyer Discipline and Disability.³²⁴ The consultation team was informed that individuals who submit unverified complaints or RFAs are not regarded as complainants, and therefore, the appeal process does not apply to them. As noted above, the Discipline Committee urges the Court to amend the Rules of Lawyer Discipline and Disability to eliminate the various forms of complaints and associated procedures and provide for one form of grievance that can be filed with the OPC.

d. The Assignment of Investigative and Prosecutorial Duties to Separate OPC Counsel Should Be Revised

As noted above, if a matter is not screened out at the intake stage of the proceedings, it should be promptly docketed as a complaint and investigated. The Discipline Committee was advised that currently, after a decision by OPC to refer an Informal Complaint to a Screening Panel, the file is reassigned to one of the two OPC Counsel designated to prosecute cases. These Counsel review the file to determine whether additional investigation is warranted before sending it to the Screening Panel. Information provided to the consultation team demonstrates that there are instances where the OPC prosecuting Counsel need to conduct additional investigation or to reinvestigate a matter before referring it to a Screening Panel. This contributes to delay that is both unfair to the respondent and the grievant, and of legitimate concern to the public. In addition, these OPC lawyers, with the other OPC Counsel who conducted the investigation, jointly prepare the SPM and attachments for the Screening Panel. Then, if a Screening Panel determines that the case should proceed with the filing of a formal complaint, the file is reassigned again to another OPC Counsel designated to prosecute disciplinary charges in the District Court.³²⁵ This takes time.

Almost all jurisdictions employ an integrated system in which the same well-trained, qualified lawyer is responsible for investigating and prosecuting each complaint. Bifurcating the investigative and prosecutorial functions may have made sense in Utah at one time, but the Discipline Committee does not believe that it remains an efficient way to process disciplinary investigations and prosecutions. This is particularly true given the increasingly complex nature of disciplinary investigations.

³²⁴ RLDD Rules 14-502(d) & (g) & 14-510(a)(2).

³²⁵ See OPC Organizational Chart on record with the ABA Standing Committee on Professional Discipline.

The Discipline Committee recommends that the Utah Supreme Court, the new Oversight Committee, and the OPC discuss the adoption of such an integrated, or what is commonly known as vertical, system for handling disciplinary matters. This will eliminate the duplication of effort that is currently causing delay and enhance the quality of the investigation. Doing so will also reduce the likelihood of inconsistent theories of a case being advanced by separate counsel, a situation that inevitably requires substantial additional research and preparation.

Recommendation 13: The Court Should Amend the Rules to Streamline the Process for Requesting Subpoenas, and OPC Should Be Allowed to Issue Investigative Subpoenas

Currently, the Rules of Lawyer Discipline and Disability provide that subpoenas may only be requested and issued in conjunction with Screening Panel proceedings.³²⁶ Any party, or a Screening Panel, may for good cause shown petition under seal the District Court for issuance of a subpoena or subpoena *duces tecum*.³²⁷ Requesting these subpoenas requires the filing of a new cause of action in the same judicial district in which the formal complaint would be filed.³²⁸ The Rule further provides that, except for good cause shown, the opposing party must be given notice of the petition for subpoena. The consultation team was informed by a number of interviewees involved in different levels of the system that the OPC rarely seeks subpoenas when it can, because the process is time consuming and burdensome. The Discipline Committee agrees.

The Rules also do not permit the OPC, prior to referring a matter to a Screening Panel, to issue a subpoena. OPC must instead rely primarily on the voluntary production of information from respondents, complainants, and outside entities and individuals. The current procedures for securing subpoenas not only results in unnecessary delays, but denies the OPC an indispensable investigatory tool and impacts its ability to be effective and command public confidence.³²⁹ The inability to issue investigative subpoenas also leaves the OPC without prompt recourse, when necessary, to address a respondent's failure to produce requested information. Some information from third parties or entities necessary to conduct a complete investigation (including exculpatory information) will not be available to OPC at this stage absent a subpoena. Therefore, to enhance the efficiency and effectiveness of OPC's investigations, the Discipline Committee recommends that Court amend the Rules of Lawyer Discipline and Disability to provide the OPC with authority to issue investigative subpoenas prior to a matter being referred to a Screening Panel. This authority is important for the OPC to have generally, but will be more crucial if the Court implements the Discipline Committee's recommended changes to the responsibilities of the Screening Panels.

The OPC should be permitted to determine whether the issuance of an investigatory subpoena is necessary to further an inquiry into alleged lawyer misconduct, and to issue such subpoena to compel the production of documents or attendance of witnesses to give sworn statements upon the prompt approval of the Chair of the Ethics and Discipline Committee.³³⁰ The Discipline Committee notes that similar discretionary authority has been given to the Bar's Executive Director, the General Counsel and the Deputy General to issue subpoenas compelling the attendance of witnesses or production of documents pursuant to the Court's Admission Rules.³³¹

The involvement of the District Court and the process currently set forth in the Rules is burdensome and contributes to delay. Allowing the OPC to issue investigatory subpoenas, with approval of the Ethics and Discipline Committee Chair, is especially important in cases where

³²⁶ *Supra* note 143.

³²⁷ RLDD 14-503(g).

³²⁸ *Supra* note 141.

³²⁹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 14 Cmt.

³³⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 14(B).

³³¹ *See* SUP. CT. R. PROF'L PRACTICE, Rule 14-702.

lawyers are accused of misappropriation of client funds.³³² In such instances, delay is particularly detrimental to the affected client or other individuals, and potentially to the wider public. Such delay provides respondents and others with the opportunity to destroy, conceal, or create evidence, and may result in the investigators' increased difficulty or outright inability to obtain financial records that banks and other institutions are required to keep only for prescribed periods of time. The Court can adopt necessary provisions relating to motions to quash subpoenas to ensure that respondents are provided appropriate opportunities to challenge the issuance of investigative subpoenas by the OPC.³³³

³³² With regard to handling of client trust funds, the Discipline Committee suggests that the OPC increase its education of the profession with regard to its obligations under the Utah Rules of Professional Conduct relating to the handling of those funds and required record retention.

³³³ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 14(E) & Cmt.

Recommendation 14: The Court Should Streamline Proceedings Involving Probable Cause Determinations and Appeals from Screening Panel Decisions

As noted in Recommendation 3, the Discipline Committee recommends that the role of the Screening Panels be limited to making probable cause determinations. The professionals staffing the OPC should be responsible for conducting complete and thorough investigations, and if they do not dismiss a complaint, refer it to diversion, or issue and admonition, the matter should be referred to the Screening Panel for a probable cause determination. The Discipline Committee believes that the Screening Panel process can be made more efficient without sacrificing due process if the Court amends Rule 14-510 of the Rules of Lawyer Discipline and Disability in several ways.

a. The Court Should Eliminate Probable Cause Hearings

Under the current Rules, the Screening Panels make their probable cause determinations at the conclusion of a hearing at which respondents, complainants and any additional witnesses either may wish to call are allowed to appear.³³⁴ The Discipline Committee urges the Court to amend the Rules to eliminate hearings by the Screening Panels, which will also eliminate the need to have the complainant, respondent and other witnesses summoned to testify. The Committee believes this should occur regardless of whether the Court agrees to limit the role of these volunteers to making probable cause determinations.

The completion of a full and thorough investigation by the OPC will have afforded both the complainant and respondent lawyer sufficient opportunity to provide information. The Court may wish to provide respondents with one more opportunity to submit a written explanation as to why formal charges are not warranted prior to the date the Screening Panel is scheduled to consider the matter. If the Court does so, the respondent should not be afforded extensions of time in which to make such a submission.

The OPC should continue to provide the Screening Panel with a report similar to the SPM currently submitted to the Screening Panel. Currently, Respondents receive copies of the SPM. From a reading of the Rules and interviews, it appears this occurs because the Screening Panels currently operate not just as finders of probable cause and “investigators,” but as “adjudicators” of misconduct whose decisions can result in lower level discipline. Under these circumstances, due process justifies providing the SPM to a respondent. That would no longer be the case if the Court amends the Rules to limit the role of the Screening Panels to determining whether probable cause exists. By the conclusion of a complete investigation, the respondent will have been notified of the allegations in the complaint and provided an opportunity to respond. Complainants also should not receive copies of the SPM.

The SPM report provided by the OPC to the Screening Panels, along with OPC’s request for a finding of probable cause to file formal charges, should include a recitation of the facts and evidence supporting the allegations of misconduct, all exculpatory evidence, and the alleged rule violations. The OPC should attach, where necessary, exhibits supporting the recommendation that probable cause be found. These volunteers need not be provided with the entire file. The SPM report provided to the Screening Panels should not include any information about prior

³³⁴ RLDD 14-510(b).

discipline.³³⁵ The Court may wish to require the OPC to provide to the Screening Panel a draft of formal charges. In other jurisdictions, such as Illinois, the entity responsible for determining probable cause to file formal charges is provided with a draft charging document. Screening Panel members may request additional information if they feel that it is needed to help them fulfill their duties.

The Screening Panels should continue to meet regularly, whether in person, by telephone or electronically, to efficiently and expeditiously perform their duties. The “Screening Panel Decision Sheet” templates currently used should be modified accordingly based on the Court’s decision regarding whether and how to revise the role of the Panels. If the Court limits the role of the Panels to determining probable cause, the Panels should not have to issue reports, but simply indicate their decision. Currently, a Screening Panel’s decision disapproving the OPC’s request that probable cause be found is not appealable; the Discipline Committee does not recommend any changes in that regard.³³⁶

b. Procedures Governing Exceptions to Screening Panel Recommendations Should Be Streamlined

The Rules for Lawyer Discipline and Disability currently outline proceedings for appealing certain other decisions made by Screening Panels. For example, either party may file with the Clerk of the Ethics Committee exceptions to a Screening Panel decision recommending the imposition of an admonition or public reprimand.³³⁷ The OPC can file exceptions to a Screening Panel dismissal of an Informal Complaint, or referral to the Diversion Committee or the Professionalism Counseling Board.³³⁸ Either party may request a hearing on the exceptions.

The Ethics Committee Chair serves as the Exceptions Officer for the hearing.³³⁹ The respondent and OPC Counsel may make oral presentations; the complainant is not required to appear at the hearing.³⁴⁰ Following the hearing, or upon review of the record if no hearing is requested, the Committee Chair issues a final, written determination that either “sustains, dismisses, or modifies” the Screening Panel’s decision.³⁴¹ Either party may file a request for review in the Supreme Court seeking reversal or modification of the final determination by the Committee Chair.³⁴² In the Discipline Committee’s view, this process for taking appeals from Screening Panel decisions is overly laden with process that results in an inefficient use of system resources, and adds delay to the proceedings.

As noted above, the Discipline Committee urges the Court to revise the role and duties of the Screening Panels to limit them to making probable cause determinations without hearings. If the Court agrees with and implements the Discipline Committee’s suggestions to restructure the role of the Screening Panels, then concomitant changes will need to be made to the Rules setting forth

³³⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11 Cmt.

³³⁶ RLDD 14-510(c).

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ RLDD 14-510(d)(2).

³⁴⁰ *Id.*

³⁴¹ RLDD 14-510(e).

³⁴² RLDD 14-510(f).

the appeals process from the decisions that those Panels can now make. For example, since the OPC will be taking on responsibility for dismissing matters, referring matters to diversion, and issuing admonitions, provisions in the Rules relating to OPC appeals from these current Screening Panel decisions would need to be eliminated. As a respondent's consent to an admonition would be required under the procedures recommended by the Discipline Committee, there is further reason to not make available an appeal of that decision. Recommendation 12 suggests that the Court allow complainants to have a limited, documentary appeal of OPC dismissal decisions to the Ethics Committee Chair.

Even if the Court disagrees with the Discipline Committee's recommended restructuring of the Screening Panels and the duties of the OPC, the current exceptions process for these "pre-formal charges" matters should be streamlined. In the Discipline Committee's view, and consistent with national practice, due process does not necessitate that there be "appellate hearings" or any further right of appeal to the Utah Supreme Court on these matters. The Discipline Committee strongly urges the Court to eliminate those hearings and the appeal to the Court. A documentary review by the Ethics Committee Chair should suffice. The Rules currently provide that each party may provide the Ethics Committee Chair with a memo not to exceed 20 pages setting forth the basis of the appeal.³⁴³

³⁴³ RLDD 14-510(c).

Recommendation 15: The Court Should Take Steps to Enhance the Efficiency of Formal Disciplinary Proceedings

The consultation team heard from many interviewees that the process relating to disposition of formal complaints takes too long. Data reviewed by the team shows that matters can take significant time to proceed through the formal complaint stage of the disciplinary process. In FY2016, for example, the average time to process a case from the filing of formal charges to the imposition of discipline by the District Court was 1,490 days. In FY 2015, it took on average 831 days from the filing of formal charges to the issuance of a disciplinary order by the District Court. It was not clear to the team if there were specific reasons for this significant increase in the average case processing time, but as noted in Recommendation 4 above, the District Court judges have heavy dockets of matters in addition to their disciplinary caseloads.

Recommendation 4 above urges the Court to undertake a study to determine whether it is best to continue to use District Court judges as adjudicators in disciplinary matters. Even if the Court determines to continue to use these judges to adjudicate formal disciplinary proceedings, the Discipline Committee believes that there are ways in which the Court can improve the efficiency of that process and eliminate unnecessary delay.

a. The Ethics Committee Chair Should Not Review and Sign Formal Charges

The first way in which the Discipline Committee believes that the process by which formal proceedings can be expedited relates to the process before formal charges are filed. Currently, after a Screening Panel makes a probable cause determination that formal charges should be filed, the OPC prepares the formal complaint and provides it to the Chair of the Ethics Committee for that volunteer's review and signature.³⁴⁴ Data reviewed by the consultation team showed that, on average, in FY2016 it took an extra 95 days for the Ethics Committee Chair to approve and sign formal charges after receipt from the OPC.

The Discipline Committee believes that it is not necessary for the Ethics Committee Chair to approve and sign that pleading. The preparation and signing of formal charges should be the responsibility of the OPC. Such practice is consistent with national practice and ABA policy.³⁴⁵ The formal complaint should be filed promptly with the adjudicator. The Discipline Committee suggests that additional time can be saved if the OPC, when submitting a matter to the Ethics Committee for a probable cause determination, includes a draft of this charging document.

The Court may also wish to amend the Rules of Lawyer Discipline and Disability to give the OPC the authority to amend or dismiss counts of a formal complaint when he/she deems appropriate, or to conform to the proof of the case. Providing disciplinary counsel with this authority conforms to national practice and would be an appropriate delegation of prosecutorial discretion.

³⁴⁴ *Supra* note 167.

³⁴⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(D).

b. The Court Should Amend the Rules of Lawyer Discipline and Disability to Require Prehearing Conferences

Based on national practice and the Discipline Committee's experience, it is clear that regular prehearing conferences are an important caseload management tool. The Rules of Discipline and Disability do not address prehearing conferences, as the Utah Rules of Civil Procedure apply to trials of formal charges. Rule 16 of the Utah Rules of Civil Procedure states that pretrial conferences are held either at the discretion of the District Court judge or at the request of either party.³⁴⁶ The team learned from interviewees that, as a matter of practice, some District Court judges regularly schedule prehearing conferences and set strict deadlines, while others do not.

In 2016, initial prehearing conferences were held, on average, 813 days after the formal charges were filed, shortly before the hearing date. The consultation team was advised that the prehearing conferences occur so late in the process based on procedures set forth in the Rules of Civil Procedure and scheduling protocols followed by the Clerk's office. Regardless of the reasons, the Discipline Committee believes that it is taking too long to hold an initial prehearing conference. The Discipline Committee recommends that the Court amend the Rules of Discipline and Disability to provide that in formal disciplinary proceedings the trier of fact must hold at least one prehearing conference, with additional prehearing conferences scheduled as necessary or at the parties' request.³⁴⁷ The Committee recommends that the new Rule provide that the prehearing conference should be scheduled soon after expiration of the twenty-day deadline for the filing of the respondent's answer to formal charges. By then, contested issues in the case should be framed.

In order for the initial prehearing conference to have maximum effectiveness, the adjudicator of formal charges and the parties should address the following:

- a. a deadline for the respondent to file an answer if not yet filed;
- b. simplification of issues;
- c. appropriate elimination of charges and defenses;
- d. amendments to pleadings;
- e. identifying where the parties can stipulate to facts and the admissibility of evidence;
- f. pre-trial rulings on the admissibility of evidence;
- g. identification and limitation of occurrence, character, and expert witnesses, including explanations of the subject matter of their proposed testimony;
- h. limitations on discovery, including the setting of deadlines and limitations on the number and length of depositions;
- i. the consideration of hearing dates and its estimated length;
- j. deadlines for the exchange of exhibits between the parties and submission of exhibits to the adjudicator;

³⁴⁶ Utah R. Civ. P. 16.

³⁴⁷ Consistent with this recommendation and other similar suggestions that would differ from the Rules of Civil Procedure, the Discipline Committee urges the Court to include in all relevant Rules for Lawyer Discipline and Disability a statement that "except as otherwise provided in these Rules of Lawyer Discipline and Disability, the Utah Rules of Civil Procedure apply." A similar statement in the Rules for Lawyer Discipline and Disability should be made, when appropriate, with respect to application of the Rules of Evidence and Rules of Appellate Procedure.

- k. anticipated evidentiary and legal issues to be raised at trial; and
- l. any other matters that will aid in the prompt disposition of a case.

Subsequent to each prehearing conference, the disciplinary adjudicator should enter an order setting forth all action taken that also recites any agreements between the parties. These pre-trial orders should be enforceable. If necessary, or if all parties and the adjudicator are located in the same city, prehearing conferences should be held in person. Otherwise, they can be held telephonically. The Discipline Committee also suggests that consideration be given to recording prehearing conferences by some means if that is not already done.

c. The Court Should Amend the Rules to Better Clarify the Scope of Discovery and Applicability of Other Rules

Based on information provided to the consultation team, the Discipline Committee believes that some of the delay at the formal charges stage of the process can be attributed to the lack of more specific procedural guidelines for formal disciplinary proceedings. Other than a statement that the Utah Rules of Civil Procedure and the Rules of Evidence apply in formal disciplinary and disability actions in the District Court, the Rules of Lawyer Discipline and Disability do not include specific rules for the discovery process associated with formal proceedings that would limit the use of the those broader Civil Procedure Rules. The Discipline Committee suggests that providing more specific guidance about the scope of discovery in disciplinary proceedings would benefit respondents and their counsel, the OPC, and the adjudicators. For example, the Court should clarify in the Rules the nature and scope of any motion or pleading practice that is allowed in disciplinary proceedings versus other civil cases. The Committee found one case where the Utah Supreme Court limited the application of the Rules of Civil Procedure in a disciplinary proceeding to preclude impleader, but the Rules were not subsequently amended to reflect this restriction.³⁴⁸

The Court may also wish to consider further limiting the scope of discovery in disciplinary proceedings while continuing to encourage the liberal exchange of non-privileged information, as that facilitates the fair and orderly hearing on formal charges.³⁴⁹ Consistent with ABA policy, the Court may wish to provide that proceedings regarding discovery shall not be subject to Rules of Civil Procedure *except those* relating to depositions and subpoenas.³⁵⁰ Other jurisdictions have limited discovery in specific ways. For example, in Arizona the parties may file interrogatories and requests for admission of facts; in Illinois and New Jersey interrogatories are prohibited. In Hawaii, all requests for discovery must be made in writing to the Disciplinary Board Chair, who may order it for good cause shown. In Kansas the Disciplinary Administrator must disclose to the respondent all evidence in his possession relevant to the proceeding and no other discovery is permitted. In Massachusetts, discovery depositions are allowed after application to the Board Chair and only upon a showing of a substantial need for the deposition.

³⁴⁸ *In re Discipline of Gilbert v. Utah Down Syndrome Foundation Inc.*, 2012 UT 81, 301 P. 3d 979 (2012).

³⁴⁹ *See, e.g.*, ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 15(A).

³⁵⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 15(C).

d. Extensions of Time Granted to Respondents Should be Limited and the Default Process Streamlined

Interviewees advised the consultation team that some of the delays in formal proceedings are occasioned by respondents who request, and by judges who grant, repeated extensions of time to meet deadlines. The Discipline Committee suggests that the Court take steps to better clarify when respondents can be given extensions of time to meet deadlines in formal proceedings. As a matter of equity, amendments to the Rules of Lawyer Discipline and Disability can include statements that anything other than an initial request for extension of time by any party will only be granted for good cause shown, and that the parties are limited in the number of requests for more time that can be made. While respondents are entitled to due process, they should not be able to delay disciplinary proceedings (see also Recommendation 29 urging the Court to add additional grounds for discipline).

The team also heard from interviewees that it takes a long time to secure a judgment of default in the District Court when a respondent fails to answer the formal charges or does not participate in the proceedings. Regardless of whether the Court decides to continue to use District Court judges to adjudicate formal proceedings, the Discipline Committee recommends that it streamline the process for deeming the allegations of the formal charges admitted when a respondent fails to answer those charges.³⁵¹ If a respondent fails to answer the formal charges within the time allotted, the OPC should promptly request, and the adjudicator should expeditiously order, that the factual allegations in the complaint are deemed admitted.³⁵² Such expedited process still balances fairness to the respondent with the goal of public protection, as the respondent should have the ability to move to vacate any default order for good cause shown.

e. The Court Should Eliminate Bifurcated Disciplinary Hearings on Formal Charges

Finally, the Discipline Committee suggests eliminating bifurcated hearings on formal charges and that the Court should amend the Rules for Lawyer Discipline and Disability accordingly. The Committee believes this practice is inefficient and not a wise use of system resources. Again, the Committee urges the Court to do this regardless of whether it continues to use District Court judges as disciplinary adjudicators.

Currently, the first part of the disciplinary hearing addresses whether the allegations of misconduct have been proven. At the conclusion of the first hearing, the District Court judge enters findings of fact and conclusions of law.³⁵³ Then the parties must reconvene before the judge for the sanctions hearing, which the Rules for Lawyer Discipline and Disability require to be set no more than 30 days after the findings of misconduct are entered.³⁵⁴

The Discipline Committee suggests that the Rules of Lawyer Discipline and Disability should be amended to provide that the adjudicator hear all evidence, including evidence in mitigation and aggravation during the same hearing. The parties can make their arguments as to the appropriate

³⁵¹ See, e.g., ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(D)(3) & R. 33

³⁵² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 33.

³⁵³ RLDD 14-511(f).

³⁵⁴ *Id.*

sanction at that time in their closing arguments. If the adjudicator determines that the respondent has violated the Utah Rules of Professional Conduct, the aggravating or mitigating evidence will be considered for purposes of the adjudicator ordering imposition of a particular sanction.³⁵⁵ Evidence of prior misconduct should not be disclosed to the adjudicator until after a finding of misconduct has been made, unless it is probative of any issues in the underlying proceeding.³⁵⁶ This can be quickly accomplished by having the OPC submit to the adjudicator in a sealed envelope any evidence of prior discipline. This would be a change from current practice.

Based on information provided to the consultation team, there also appears to be a need for the opinions of the District Court judges to enhance their disciplinary decisions with more legal analysis, citations to existing authority, and an independent assessment of the issues. Doing so, regardless of who serves as the disciplinary adjudicator, will better provide the public and the bar with guidance as to the types of acts that will be considered misconduct and the likely sanctions for such misdeeds.

³⁵⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(C) & R. 11. In some jurisdictions, like Illinois, hearing panels take a recess after the first phase of the disciplinary proceedings and go into executive session to decide whether, generally, any violation of the Rules of Professional Conduct has been proven. The panel then enters a non-binding preliminary determination of the charges, enters a general finding of misconduct without identifying the specific charges that were proven, and reconvenes immediately to hear evidence in mitigation and aggravation.

³⁵⁶ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(D)(5).

Recommendation 16: The Court Should Amend Rule 14-515 Governing Confidentiality in Disciplinary Proceedings

Rule 14-515 of the Rules of Lawyer Discipline and Disability set forth the requirements for access to disciplinary information. Rule 14-515(a) provides generally that disciplinary proceedings are confidential prior to the filing of formal charges or the issuance of a public reprimand pursuant to Rule 14-510. The Rule does not limit this confidentiality to being within the agency, but rather appears to apply to all involved, including complainants and witnesses. Rule 14-515(i) states that all “participants in a proceeding under these rules shall conduct themselves so as to maintain confidentiality.” Interviewees advised the consultation team that in the event that a complainant or witness violated Rule 14-515, contempt proceedings could be pursued, but that to their knowledge that had not happened. Regardless of the fact that interviewees advised that complainants or witnesses had not been charged with contempt, the possibility of that being able to happen remains under the Rule.

a. The Court Should Eliminate Restrictions on Complainants and Witnesses

The Discipline Committee recommends that the Court amend Rule 14-515(i) to make clear that these restrictions do not apply to complainants and witnesses, but only to the system’s volunteers and staff.³⁵⁷ The Committee also recommends that upon amendment of the Rule, the OPC revise any physical or electronic records relating to this subject.

Similar restrictions on complainants and witnesses in other jurisdictions have been found to be unconstitutional infringements on First Amendment rights. For example, in *In re Warner* the Louisiana Supreme Court held that the “confidentiality requirement imposed upon participants in attorney disciplinary proceedings” under Louisiana’s disciplinary procedural rules violated the First Amendment of the United States Constitution.³⁵⁸ The Louisiana Court noted that in addition to the disciplinary system’s volunteers and staff, the term “participant” includes complainants, witnesses, respondents, and any lawyers retained by them.³⁵⁹ Noting that other courts similarly found such restrictions unconstitutional, the Court in *Warner* determined its disciplinary procedural rule implicitly threatened sanctions against all participants the Court was unable to enforce.³⁶⁰

Similarly, in *Doe v. Supreme Court of Florida*³⁶¹, the United States District Court held that Florida Bar Rule 3-7.1, which prohibited complainants/participants in the disciplinary process from disclosing information regarding disciplinary proceedings, violated First Amendment free speech protections. In striking down Rule 3-7.1 as an improper time, place and manner restriction on free speech, the District Court noted that the Rule improperly prohibited complainants from speaking or writing about the nature of a pending or past disciplinary matter.³⁶² The *Doe* court condemned as overbroad the Florida Rule’s prohibition on the disclosure by complainants of

³⁵⁷ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(B).

³⁵⁸ *In re Warner*, 21 So. 3d 218, 262 (La. 2009) (Court also defined participant as “simply one who ‘takes part’ in the disciplinary proceeding”).

³⁵⁹ *Id.* at 233.

³⁶⁰ *Id.* at 232.

³⁶¹ 734 F. Supp. 981 (S.D. Fla. 1990).

³⁶² *Id.* at 985.

allegations of misconduct found to be meritorious and worthy of a private sanction,³⁶³ and rejected all of the Florida Bar’s justifications for upholding the “gag” rule.³⁶⁴

Citing to *Doe*, the New Hampshire Supreme Court and Supreme Court of Tennessee have also respectively rejected various justifications by a disciplinary agency for maintaining a “gag” rule, including claims about the need to protect lawyers’ reputations.³⁶⁵ Of particular interest, in *Petition of Brooks*, the Supreme Court of New Hampshire decided to consider the challenge to its Rule requiring confidentiality in the disciplinary process even though that Rule had been amended and the question had become moot.³⁶⁶ The New Hampshire Rule, like Utah’s, required all participants in the disciplinary proceedings to conduct themselves in a manner that maintained the required confidentiality. The New Hampshire Supreme Court held that its prior Rule failed to pass First Amendment scrutiny.³⁶⁷ In addition to being held unconstitutional, imposing such restrictions on complainants can foster resentment and contempt for the disciplinary process, not the confidence and respect it deserves.

b. The Court Should Specify That Information Sharing Is Permitted With Law Enforcement, Bar Admissions Agencies and Others

Currently, Rule 14-515(a)(2) permits the OPC to disclose nonpublic disciplinary information to another person or organization, including the Lawyer’s Fund for Client Protection, if necessary, “in order to protect the public, the administration of justice, or the legal profession.” The Rule does not, however, specify that the OPC is authorized to share confidential information with law enforcement, bar admissions agencies or other agencies that the Court deems appropriate.³⁶⁸ The consultation team learned that in interpreting Rule 14-515(a)(2), the OPC has developed procedures for disclosing nonpublic information to other entities authorized to investigate and prosecute conduct that may be a violation of civil statutes, criminal statutes, administrative rules, or other professional rules.³⁶⁹

In the Discipline Committee’s experience it is not uncommon for allegations of misconduct to implicate possible violations of criminal laws. Similarly, it is not uncommon for state and federal law enforcement agencies to uncover information indicating that lawyers have violated the applicable rules of professional conduct. These agencies often work cooperatively with disciplinary counsel during the course of grand jury or other investigations and prosecutions. There are instances when information comes into the possession of the disciplinary agency that should be provided to law enforcement or other agencies to protect an individual, the public or the administration of justice.

The same is true with regard to providing information to state bar admissions agencies, including character and fitness committees, as well as to committees for judicial appointments. As a result, the Discipline Committee recommends that the Court amend Rule 14-515(a)(2) to specify that

³⁶³ *Id.* at 987-88.

³⁶⁴ *Id.* at 985-88.

³⁶⁵ See *Petition of Brooks*, 678 A. 2d 140 (N.H. 1996); *Doe v. Doe*, 127 S.W.3d 727 (Tenn. 2004).

³⁶⁶ See *Brooks*, 678 A. 2d at 141-142.

³⁶⁷ *Id.* at 146.

³⁶⁸ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(E).

³⁶⁹ OPC *Policies and Procedures*, Policy K(2).

disclosure of otherwise confidential information can be made by the OPC to law enforcement and these other entities under those circumstances. Doing so would ally Utah's Rule with what the Discipline Committee believes is the OPC's correct interpretation, and will provide necessary clarity.³⁷⁰ This added clarity is not only in the best interest of the public and the profession, but it will provide the OPC with the ability to point to specific language in the Rule if the interpretation is challenged.

The Committee also suggests that the Court consider adding language to Rule 14-515 providing that unless the entity requesting the information specifies that it is doing so in furtherance of an investigation into a lawyer, the information is essential to their investigation, and the disclosure of the existence of the investigation would seriously prejudice the investigation, the respondent lawyer should be notified of the disclosure.³⁷¹

³⁷⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(F).

³⁷¹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(G) & (H).

Recommendation 17: The Court Should Clarify the Record Retention Rules for the Office of Professional Conduct

The OPC Senior Counsel is responsible for maintaining “permanent records of discipline and disability matters, subject to any expungement requirements. That position is also responsible for compiling statistics to aid in the administration of the system, including but not limited to, creating a log of all informal complaints received, investigative files, statistical summaries of rules violated and dispositions, any transcripts of proceedings, and other records as the Supreme Court requires to be maintained.”³⁷² Recordings of Screening Panel hearings are retained for a minimum of one year.³⁷³ All records of informal complaints terminated by dismissal or a declination to prosecute are expunged seven years after closure.³⁷⁴ Respondents are given written notice of the expungement only if they were initially contacted by the OPC about the Informal Complaint or learned of its existence on their own.³⁷⁵ The OPC Counsel also keeps a record of all calls to the Ethics Hotline and written requests for ethics assistance for seven years.

The OPC established informal record retention policies regarding all other communications and files not identified in the Rules of Lawyer Discipline and Disability. Those records are retained for one year and later reviewed to determine if the material relates to an open investigation. If not, the materials are destroyed and no record is kept. As mentioned earlier in this Report, there are no record retention rules or policies governing the CAP or the DPIO.

The Discipline Committee recommends that the Court amend the Rules of Lawyer Discipline and Disability to formalize the record retention and expunction requirements for the OPC. The new record retention Rule should address all OPC records and data, including those of the newly created central intake division discussed above. Given Recommendations 2 and 12, which urge elimination of multiple forms of complaints, elimination of the NOIC, and the merging of CAP and DPIO with the OPC, this new record retention Rule need not include provisions relating to the retention of RFA’s, Informal Complaints, NOICs, or separate CAP or DPIO records.

In the Discipline Committee’s experience, most lawyers believe that dismissed complaints are consulted in the event a new grievance is filed, or that if a new complaint is filed, the existence of the dismissed matter somehow lends enhanced credibility to the new complaint. The Committee has also learned that these fears by lawyers are not always unfounded. In fashioning record retention rules, state supreme courts must balance these concerns with valid reasons for retaining records of dismissed investigations. Complaints are not always dismissed because they are invalid. In some cases, there was not enough evidence available at the time to corroborate the allegations, which, if true, would constitute serious misconduct. Additional proof regarding those allegations may become available at a later date. Further, an isolated instance of lesser misconduct may warrant dismissal, but the receipt of subsequent complaints may raise concerns about a pattern of conduct that warrants reconsideration of the first complaint. Subsequent complaints indicative of a pattern of misconduct or issue relating, for example, to poor law office practices usually occur within a fairly close period of time following the receipt of the earlier complaint. As a result, the

³⁷² RLDD 14-504(b)(10).

³⁷³ RLDD 14-504(b)(6).

³⁷⁴ RLDD 14-504(b)(11).

³⁷⁵ RLDD 14-510(b)(11)(A).

Committee suggests that the Court may wish to reduce the period of time that records must be retained after dismissal from seven to three years.³⁷⁶

In the Committee's experience, and from information garnered during consultations in other jurisdictions, after a three year period of time has elapsed following the investigation and dismissal of a complaint, there is little reason to keep those records and risk subjecting the lawyer who was the subject of a dismissed complaint to any adverse implications that can be drawn from the fact that the complaint was made.³⁷⁷ The Court may wish to add a provision to any new record retention rule stating that, upon good cause shown by OPC, the Court will permit the retention of specified records for an additional period of time not to exceed three years.³⁷⁸ The disciplinary counsel who conducts the investigations is in the best position to make the decision whether retention is necessary for additional time. Lawyers should be given notice of any matters that have been expunged, regardless of prior notice, so that they may accurately respond to inquiries that require disclosure of their disciplinary history.³⁷⁹ The disciplinary agency should state that there is no record of such a matter.

The Discipline Committee also recommends that, consistent with the existing Rule, the new record retention rule provide that investigative files, records and documents relating to matters that have proceeded to the formal complaint stage and the imposition of any discipline should be retained indefinitely.³⁸⁰ Reinstatement matters should similarly be retained indefinitely. These records can be useful in reinstatement proceedings and are relevant to whether a pattern of misconduct exists in the event of subsequent formal proceedings against a lawyer. In the same regard, all records resulting in a lawyer's transfer to an inactive status due to incapacity also should be retained indefinitely.

In addition, OPC should have adequate space to store all of OPC's paper files and records securely. This would include lawyers' client files being inventoried by OPC under a court-ordered trusteeship. The consultation team was informed that OPC is often appointed trustee by the District courts to retrieve, store and inventory client files for destruction or distribution if no other individuals are available to perform those tasks. OPC counsel currently stores trusteeship records and closed files in the Bar's building general storage room accessible by other Bar staff and building services. The practice of storing confidential files in a publically accessible area should cease.

³⁷⁶ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(B)(12).

³⁷⁷ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(B)(12).

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(B)(11).

Recommendation 18: The Court Should Streamline Procedures For Interim Suspension For Threat of Harm

Currently, Rule 14-518 of the Rules of Lawyer Discipline and Disability allow OPC counsel to initiate interim suspension proceedings in the District Court against a lawyer who poses “a substantial threat of irreparable harm to the public and has either committed a violation of the Rules of Professional Conduct or is under a disability.” OPC has the burden of establishing the motion for interim suspension under Rule 14-518 by clear and convincing evidence, while the standard of proof in other disciplinary proceedings is a preponderance of the evidence.³⁸¹ While the Discipline Committee commends the Court for providing for the immediate interim suspension of a lawyer who poses an immediate threat of serious harm, which is consistent with national practice, the Committee suggests that some amendments to the Rule will enhance public protection.

First, the Committee recommends that the Court amend Rule 14-518 to provide for the immediate interim suspension of a lawyer who poses a substantial threat of *serious* harm to the public, as opposed to a substantial threat of *irreparable* harm. The Discipline Committee believes that the use of the term “irreparable” creates far too high a burden before an interim suspension for conduct of the type addressed by this Rule. This current standard risks unnecessary harm to the public. Certain misconduct poses such an immediate threat of injury, or likelihood of injury to clients, the public or to the orderly administration of justice, that the immediate suspension of a lawyer’s license pending final resolution of disciplinary proceedings is warranted.³⁸² For example, a lawyer who abandons his/her practice or is engaging in an ongoing fraud may fall into this category, while the harm technically may not be irreparable.

Second, the Court should amend Rule 14-571 to eliminate the requirement that OPC’s standard of proof in these proceedings is clear and convincing evidence, and instead provide in Rule 14-518 that upon receipt of “sufficient evidence demonstrating a lawyer has committed a violation of the Rules of Professional Conduct and poses a substantial threat of serious harm to the public,” OPC counsel should transmit that evidence to the Supreme Court³⁸³ with a proposed order for that lawyer’s immediate interim suspension.³⁸⁴ For these situations, a standard of proof of clear and convincing evidence does not make sense. The OPC should contemporaneously make reasonable attempts to provide the lawyer with notice that the proposed order for immediate summary suspension has been sent to the Court.³⁸⁵ Personal service of the documents should not be required, and the matter should proceed expeditiously, even if the respondent has not been served. After reviewing the evidence, including any rebuttal proof submitted by the lawyer, the Court may enter an order immediately suspending the lawyer and provide for any other action it deems appropriate.³⁸⁶

³⁸¹ RLDD 14-517(b).

³⁸² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 20 & Cmt.

³⁸³ Currently, the Rule requires that petitions for this type of interim suspension be filed with the District Court. The Discipline Committee suggests that the Supreme Court is the more appropriate forum for these proceedings, and also notes its recommendation that the Court study whether to eliminate the use of District Court judges as disciplinary adjudicators.

³⁸⁴ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 20(A).

³⁸⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 20(B).

³⁸⁶ *Id.*

The Discipline Committee strongly urges the Court to amend Rule 14-518 to eliminate hearings on these petitions. These proceedings are for highly emergent situations and should be similar to those applicable to civil temporary restraining orders.³⁸⁷ However, if the suspension occurs without consideration of rebuttal evidence submitted on the lawyer's behalf, then on two days' notice to the OPC, a lawyer subject to this type of interim suspension should be able to move for modification or dissolution of the order. That motion should contain sufficient proof to support the basis for requesting the dissolution or modification of the temporary suspension. That motion should be heard directly by the Court as expeditiously as possible.³⁸⁸

³⁸⁷ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 20 Cmt.

³⁸⁸ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 20(D).

Recommendation 19: The Court Should Amend Rule 14-519 Governing Interim Suspension for Conviction of a Crime

Rule 14-519 of the Rules for Lawyer Discipline and Disability sets forth the procedures for the interim suspension of lawyers *convicted* (emphasis added) of a felony or misdemeanor that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.³⁸⁹ The Discipline Committee commends the Court for providing procedures for the interim suspension of lawyers who have committed a crime. Data provided to the consultation team shows that in FY2016, it took an average of 227 days from the filing of a certification of conviction to disposition of a petition for interim suspension. In FY 2015, this process took an average of 41 days.

Under the current Rule, interim suspension proceedings may be initiated only upon a lawyer's conviction. Often in criminal proceedings there is significant delay between a finding of guilt and the entry of a judgment of conviction. Such delays may be attributable to several factors, including time spent completing presentence investigations or the postponement of sentencing pending a defendant's cooperation with the government in another matter pursuant to a plea agreement. In situations involving serious crimes, the continued practice of law between the time a lawyer has been found guilty and when the conviction becomes final creates undue risk to the public and reflects poorly on the profession.

The Discipline Committee first recommends that the Court amend Rule 14-519 to provide that any lawyer "found guilty" of a "serious crime" is subject to immediate interim suspension.³⁹⁰ The finding of guilt should constitute conclusive evidence that the lawyer committed the crime warranting interim suspension.³⁹¹ The Discipline Committee suggests that doing so would benefit the public and profession, and provide greater clarity for the OPC in these types of cases as to the type of criminal misconduct that may warrant application for this form of interim suspension. As noted above, Rule 14-519 currently requires a determination by OPC counsel whether a crime reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer warranting an interim suspension.

The ABA Model Rules for Lawyer Disciplinary Enforcement define a "serious crime" as:

... any felony or any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy or solicitation of another to commit a "serious crime."³⁹²

³⁸⁹ RLDD 14-519(a).

³⁹⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 19(D)(1).

³⁹¹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 19(E).

³⁹² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 19(C).

This recommended definition also aligns with the type of conduct proscribed under Rule 8.4(b) of the Utah Rules of Professional Conduct.³⁹³ As explained in Comment [2] to Utah’s Rule 8.4:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

The application by OPC for such immediate interim suspension should include the verdict or finding of guilt and should be filed with the Utah Supreme Court.³⁹⁴ The imposition of an interim suspension prior to the entry of a judgment of conviction does not deprive a lawyer found guilty of committing a serious crime of due process. It is not a final disciplinary sanction and the OPC still has to file and prosecute formal charges. Rule 14-519 currently provides that interim suspension proceedings do not commence until both the petition for interim suspension and formal charges are filed. The Discipline Committee recommends that the Court amend the Rule to eliminate this requirement, as the emergent nature of the situation is addressed by the petition for interim suspension, but the formal charges should not be conducted until an order of conviction has been entered and appeal from that order of conviction exhausted.³⁹⁵ Under Utah’s current Rule and the ABA Model Rules, the lawyer may still challenge the interim suspension prior to its entry by asserting any jurisdictional deficiency.

Rule 14-519 also provides that while the respondent is not entitled to an evidentiary hearing during interim suspension proceedings, he or she may request an “informal hearing” on the motion for interim suspension.³⁹⁶ No information is provided in the Rule explaining the scope of the “informal hearing.” The Discipline Committee recommends the Court amend Rule 14-519 to eliminate these informal hearings. Immediate interim suspensions are necessary to protect the public by removing the danger that a lawyer who has been found guilty of committing a serious crime poses. It also helps to ensure the integrity of the profession and the administration of justice “from the specter created where an individual found guilty of a ‘serious crime’ continues to serve

³⁹³ Rule 8.4(b) of the Utah Rules of Professional Conduct states that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

³⁹⁴ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 9. As with Recommendation 18, the current Rules require that petitions for this type of interim suspension be filed with the District Court. The Discipline Committee suggests that the Supreme Court is the more appropriate forum for these proceedings, and also notes its Recommendation that the Court study whether to eliminate the use of District Court judges as disciplinary adjudicators.

³⁹⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 19 & Cmt.

³⁹⁶ RLDD 14-519(b).

as an officer of the court in good standing.”³⁹⁷ In these situations, a Rule that provides a respondent with the ability to have the interim suspension terminated, in the interest of justice, upon a showing of extraordinary circumstances, or where the respondent shows that the underlying guilty finding has been reversed or vacated, is sufficient.³⁹⁸

Under current Rule 14-519, the responsibility of reporting the conviction to the OPC is on the “court” in which the lawyer is convicted.³⁹⁹ The Discipline Committee suggests that the Court may want to consider amending Rule 14-519 to provide that lawyers found guilty of *any* felony or misdemeanor are required to report that information to the OPC. The notification should not be limited to crimes that reflect adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer. While this requirement is not currently set forth in Rule 19 of the *ABA Model Rules for Lawyer Disciplinary Enforcement*, a number of jurisdictions require such self-reporting, including, Arizona, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Illinois, Kentucky, Maine, Massachusetts, Michigan, Nebraska, Nevada, New York, Pennsylvania, Washington State, and Wisconsin.

³⁹⁷ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 19 Cmt.

³⁹⁸ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 19(F) & Cmt.

³⁹⁹ RLDD 14-519(a) obligates the court in which the lawyer is convicted to transmit a copy of the judgment of conviction to OPC within 30 days after the conviction.

Recommendation 20: The Court Should Amend the Rules to Allow OPC to Initiate Reciprocal Disability Inactive Status Proceedings

If discipline is imposed by another jurisdiction against a lawyer admitted to practice in Utah, Rule 14-522 of the Rules for Lawyer Discipline and Disability set forth procedures for reciprocal discipline. Unlike the Rules in other jurisdictions, however, the Rules of Lawyer Discipline and Disability do not provide for reciprocal transfers to disability inactive status. Reciprocal enforcement of another jurisdiction's order transferring a lawyer to disability inactive status advances the protection of the public in the same way as reciprocal discipline. If a lawyer is suspended, disbarred, or transferred to disability inactive status in one jurisdiction, but no action can be taken against her in another jurisdiction in which she is admitted until a new proceeding is begun and adjudicated in the second jurisdiction, the public is left unprotected against a lawyer that already has been found to be judicially unfit to practice.⁴⁰⁰

Other jurisdiction's rules providing for reciprocal discipline and disability inactive status are modeled on Rule 22 of the ABA Model Rules for Lawyer Disciplinary Enforcement. The Discipline Committee recommends that the Court amend Rule 14-522 of the Rules of Lawyer Discipline and Disability to include procedures for reciprocal disability inactive status proceedings. The procedures governing reciprocal disability inactive status proceedings should be the same as those for reciprocal discipline. A judicial determination of disability by a respondent in another jurisdiction should be conclusive and not subject to re-litigation in Utah, unless one of the exceptions specified in Rule 14-522 applies.⁴⁰¹ Including procedures for such reciprocal proceedings is particularly relevant today, given the increasing population of lawyers throughout the country, including Utah, who often for the first time in their careers and for age related reasons, are experiencing mental or physical disability issues that may interfere with their ability to practice law and put clients at risk.

Utah's Rule 14-522 obligates lawyers admitted to practice in the state to report to the OPC that they have been publicly disciplined in another jurisdiction.⁴⁰² This notice requirement is laudable and should apply to lawyers transferred to disability inactive status in another jurisdiction. The Discipline Committee commends the Court for including transfers to disability status in the Rule obligating lawyers to notify clients when such orders are entered.

⁴⁰⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 22.

⁴⁰¹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 22 Cmt.

⁴⁰² RLDD 14-522(a).

Recommendation 21: The Court Should Amend the Rules of Lawyer Discipline and Disability to Eliminate the Statute Of Limitations

Rule 14-529 of the Rules of Lawyer Discipline and Disability states that disciplinary proceedings must begin within “four years of the discovery of the acts allegedly constituting a violation of the Rules of Professional Conduct.” Under the current Rules, an Informal Complaint can be dismissed if barred by the statute of limitations.⁴⁰³ The Discipline Committee recommends that the Court amend Rule 14-529 and related Rules to eliminate the statute of limitations in disciplinary proceedings and its impact on complaints. The purpose of lawyer discipline is to protect the public from those who are no longer deserving of the privilege to practice law. The conduct of a lawyer, no matter when it occurs, is always relevant to the question of fitness to practice law.⁴⁰⁴ The passage of time between when the misconduct occurred and the filing of a complaint may be relevant to the appropriate level of sanction to be imposed in a matter that proceeds for formal charges, but such delay in filing a complaint should not be determinative of whether the OPC should be able to investigate.⁴⁰⁵

Additionally, eliminating the statute of limitations would not prevent the triers of fact or the Court from applying the doctrine of laches if the delay resulted in unfair prejudice to the respondent’s ability to procure witnesses and evidence. Under Rule 14-607(b)(10) of the Utah Standards for Imposing Lawyer Sanctions, a delay in disciplinary proceedings that is not caused by the respondent is a mitigating factor. Similarly, the passage of time may bear on the ability of OPC counsel to meet the standard of proof.

If the Court decides to retain the statute of limitations, the Discipline Committee suggests that the Court amend Rule 14-529 to make clear that it does not bar disciplinary proceedings for certain types of misconduct. For example, the Court should consider amending the Rule to provide that the statute of limitations does not apply to disciplinary proceedings alleging any crimes committed by a lawyer, misconduct relating to the handling of client/third party funds or property, where the complainant was under the age of majority at the time of the misconduct or otherwise unable to file a complaint due to mental or physical incapacity, where the respondent is engaged in a continuing course of misconduct, prosecutorial misconduct, or where the more timely discovery of the offense was prevented by concealment by the respondent. Eliminating these types of misconduct from the reach of the statute of limitations ensures optimal public protection.

⁴⁰³ RLDD 14-510(a)(7).

⁴⁰⁴ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 32 Cmt.

⁴⁰⁵ *Id.*

Recommendation 22: The Court Should Adopt a Disqualification and Abstention Rule Applicable to System Volunteers and Adjudicators

The Rules of Lawyer Discipline and Disability address disqualification of former OPC Counsel, prohibiting them from representing a lawyer in any disciplinary proceeding in which they were involved during their employment by the OPC.⁴⁰⁶ However, the Rules do not contain disqualification provisions governing Ethics and Discipline Committee members. The Discipline Committee recommends that the Court should amend the Rules of Lawyer Discipline and Disability to establish clear disqualification standards applicable to the system's volunteers and adjudicators.

The new Rule should state that Ethics Committee members and those serving on the newly created Administrative Oversight Committee should refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain.⁴⁰⁷ District Court judges are subject to disqualification requirements set forth in other Utah Rules. Further, the Rules should state that former members of the Ethics and Discipline Committee and the Administrative Oversight Committee should not represent a lawyer in any disciplinary proceeding for a period of one year following the completion of the member's service.⁴⁰⁸ Under Rule 1.12(c) of the Utah Rules of Professional Conduct, a lawyer in the firm of a former Ethics Committee or Administrative Oversight Committee member may also be disqualified.⁴⁰⁹

The Discipline Committee also suggests that Court may wish to consider allowing the OPC or the respondent to seek the recusal of an Ethics Committee member serving on a probable cause panel for cause. Unlike Rule 14-511(d), which allows the parties the right for one change of district court judge without setting forth reasons, the Court may wish to require the party seeking disqualification of an Ethics Committee member to set forth the reasons why such action is being requested.

⁴⁰⁶ RLDD 14-504(c).

⁴⁰⁷ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2(F) & R. 3(F).

⁴⁰⁸ *Id.*

⁴⁰⁹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 2 Cmt.

Recommendation 23: The Court Should Enhance the Rules Relating to Immunity

Rule 14-513 of the Rules of Lawyer Discipline and Disability states that “participants in proceedings” are “entitled to the same protections for statements made in the course of the proceedings as participants in judicial proceedings.”⁴¹⁰ The Rule also states that “the district courts, Committee members, special counsel, supervising attorneys engaged in pro bono assistance, trustees, and OPC Counsel and staff” are immune from civil suit for their official acts, but not for acts of intentional misconduct.⁴¹¹ However, Rule 14-513 does not specify whether individuals are entitled to qualified or absolute immunity. The case law reviewed by the consultation team on this issue appears to be ambiguous. For example, in *Bailey v. Utah State Bar*, the Court stated that “[i]n pursuing the disciplinary process and complying with the applicable rules, the Bar essentially functions as an arm of the Supreme Court. As such, the Bar is ‘protected by the same cloak of absolute judicial immunity worn by that tribunal’” (citation omitted) (emphasis added).⁴¹² The Court further explained in *Bailey* that “[o]ur holding today is only that quasi-judicial immunity extends to the Bar's judicial functions” (emphasis added).⁴¹³ Later, in *Pendleton v. Utah State Bar*, when confirming that immunity is granted to individuals who participate in the disciplinary process, the Court cautioned, “that any grant of immunity carries with it the burden of restraint and good judgment,”⁴¹⁴ suggesting that qualified immunity applies.

The Discipline Committee recommends the Court amend Rule 14-513 to state specifically that all communications or contact with the disciplinary system, including testimony, is absolutely privileged, and that no civil suit can be instituted against a complainant or witness.⁴¹⁵ Providing complainants and witnesses with absolute immunity encourages those who have some doubt about a lawyer’s conduct to submit the matter to the disciplinary agency or provide information during the course of an investigation irrespective of whether disciplinary proceedings are initiated against the lawyer.⁴¹⁶ Without an assurance of immunity, complainants may be hesitant to file grievances, and some valid complaints will not be filed. Complainants should not fear repercussions for filing a complaint. Therefore, the new single complaint form that will be utilized by OPC, as discussed in Recommendation 12 above, should not include the warnings that currently appear on the Bar’s website regarding the submission of RFAs. The Court’s confidentiality rule protects lawyers from unwarranted public disclosure of unsubstantiated allegations made by members of the public or other lawyers.

⁴¹⁰ RLDD 14-513. *See also*, *Pendleton v. Utah State Bar*, 2000 UT 96, ¶7, 16 P.3d 1230 (2000).

⁴¹¹ RLDD 14-513.

⁴¹² 846 P.2d 1278, 1281 (1993).

⁴¹³ *Id.*

⁴¹⁴ 2000 UT 96, ¶13, 16 P.3d 1230.

⁴¹⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 12.

⁴¹⁶ *Id.*

VIII. DIVERSION

Recommendation 24: The Court Should Streamline the Diversion Process, and the OPC Should Enhance Use of Diversion

The Discipline Committee commends the Court for including in the Rules of Lawyer Discipline and Disability procedures for diversion.⁴¹⁷ Rule 14-533 of the Rules of Lawyer Discipline and Disability already includes many of the provisions that make for an effective diversion program as an alternative to discipline. This Recommendation is intended to provide the Court with additional suggestions for making the process more efficient and increasing the use of diversion in cases involving lesser misconduct.

All diversions are referred to the Diversion Committee which determines whether the referred matter is appropriate for diversion. The Diversion Committee consists of five Court-appointed volunteers, five lawyers and one nonlawyer who has professional training in substance abuse and/or stress management.⁴¹⁸ The Court designates one of the lawyer members to serve as the chair.⁴¹⁹ The consultation team noted that no information about the Diversion Committee is posted on either the Court's or the Bar's website. Unlike the Ethics and Discipline Committee, the Diversion Committee is not identified as a Supreme Court Committee under the menu on the Court's website for "Governing Boards and Committees."⁴²⁰ The Diversion Committee is similarly not listed in the Utah State Bar's online directory of Committees, even though announcements about vacancies on the Diversion Committee are posted on the Bar's website.

a. The Court Should Eliminate the Diversion Committee, and OPC Should Be Responsible for Diversion

Currently, respondents, the OPC, a Screening Panel or a District Court judge may propose diversion.⁴²¹ The parties to diversion contracts vary depending on where in the process a complaint was pending at the time a matter is referred to a diversion program.⁴²² The Diversion Committee is charged with the responsibility of negotiating and approving diversion contracts, assigning monitoring to a lawyers assistance program, and determining compliance with contracts.⁴²³ The Committee also conducts hearings if a dispute arises between the OPC and a respondent as to whether a diversion contract has been materially breached.⁴²⁴

Based on the Discipline Committee's experience, as well as national practice, the current procedures for diversion in Utah are inefficient and unnecessarily convoluted. Rule 14-533 of the Rules of Lawyer Discipline and Disability, in the Discipline Committee's view, involves too many

⁴¹⁷ RLDD 14-533.

⁴¹⁸ RLDD 14-533(b)(1).

⁴¹⁹ RLDD 14-533(b)(1). Preferably at least one lawyer member has past experience serving on the Ethics and Discipline Committee.

⁴²⁰ See UTAH COURTS, GOVERNING BOARDS AND COMMITTEES, <https://www.utcourts.gov/committees/> (last viewed Apr. 3, 2017).

⁴²¹ *Supra* note 211.

⁴²² RLDD 14-510(b)(7)(B) & 14-533(f).

⁴²³ *Supra* note 106.

⁴²⁴ RLDD 14-533(j)(3).

participants in the diversion process, and its multiple layers of process do not add public benefit. Diversion should be a simple and straight-forward process. As a result, the Discipline Committee believes that the Court should amend the Rules of Lawyer Discipline and Disability to eliminate the Diversion Committee and its role in the diversion process, and further streamline the process.

In that regard, the Committee recommends that the Rules be amended to provide that the OPC is responsible for overseeing and operating the diversion process in Utah, with continued notice to complainants when a matter is referred to a diversion program.⁴²⁵ The OPC's duties in this regard should include being charged with the responsibility for determining when, in cases of lesser misconduct, to refer a matter to a diversion program.⁴²⁶ To guide his or her decision in determining whether to refer a respondent to the diversion program, OPC Counsel continue to rely on the factors set forth in Rule 14-533(d). It is not, in the Discipline Committee's view, an appropriate role for volunteers who are not charged with investigating and prosecuting allegations of misconduct to refer matters to a diversion program, negotiate diversion contracts and enforce them.

Diversion contracts should be negotiated between and signed by the respondent and the OPC, and should continue to be tailored to the specific circumstances presented by the matter.⁴²⁷ The contract should specify a monitor responsible for overseeing fulfillment of the contract and reporting noncompliance to the OPC. The OPC may determine whether noncompliance should result in termination of the contract.⁴²⁸ The diversion contract should also terminate automatically upon successful completion of its terms.⁴²⁹ Respondents should continue to be afforded the opportunity to decline to participate in a diversion, and if they do so, the matter should proceed as if no referral had been made.⁴³⁰

It was not clear to the consultation team from its reading of the Rules whether diversion is available after the filing of formal charges. It appeared that this could happen. The Discipline Committee recommends that if such is the case, that the Court amend Rule 14-533 of the Rules of Lawyer Discipline and Disability to provide that diversion is only appropriate prior to the filing of formal charges.⁴³¹ Since diversion is limited to instances of lesser misconduct that also meet the requirements of Rule 14-533(c), the district courts or the Court should not be involved.

b. The Use of Diversion Should Be Enhanced

Information from interviewees and data received by the consultation team indicates that referrals to the diversion program are not made as frequently as they could or should be made. Data provided to the consultation team indicates that in FY2016, only three cases were dismissed with diversion. The same is true with regard to FY2015. The Discipline Committee believes that, consistent with national practice, the use of diversion may be appropriate in more cases, and that the referral of more appropriate cases to diversion programs would benefit Utah lawyers as well as the disciplinary system.

⁴²⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(1).

⁴²⁶ *Id.*

⁴²⁷ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(4).

⁴²⁸ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(7) & Cmt.

⁴²⁹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(7)(a).

⁴³⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(5).

⁴³¹ *See* ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(2).

The programs available for diversion referral are participation in the Lawyer Helping Lawyers program, the Professionalism Counseling Board, voluntary fee dispute resolution and ethics school. Typically, alternatives to discipline programs include law practice management, and trust accounting and ethics school. Currently, the Utah State Bar does not have a law practice management program, a trust account or ethics school.

During its visit, the consultation team discussed with interviewees the benefits of the Bar instituting a law practice management program and hiring a law practice management advisor.⁴³² Over twenty state bar associations offer programs to help lawyers improve law practice management skills.⁴³³ Creating a law practice management program would allow the Utah State Bar to increase member benefits, and it helps not only lawyers, but their clients and the public.

The Discipline Committee understands that expanding the availability of other programs to be a part of the diversion program or generally available to members of the Utah State Bar will require cooperation between the State Bar and OPC in order to be successful. The Court, OPC Senior Counsel, and the Bar each have distinct and important roles to play in successfully implementing the initiative. The Bar's active role in this process is vital to the success of the diversion process and will only enhance the public's perception of the profession and the disciplinary system. The Discipline Committee recommends that OPC and the Bar establish a committee to study the feasibility of implementing a law practice management program. The Bar will also have to ensure that these member programs are adequately resourced separate and apart from funds allocated for the disciplinary system.

⁴³² The Discipline Committee is available to provide additional resources to the Utah State Bar regarding law practice management programs at other state bars in addition to contacts with law practice management advisors who may be able to assist in the development and implementation of such programs. The ABA Law Practice Division offers resources on its website including, a *Planning Guide to Start a Bar-Sponsored Practice Management Assistance Program*, <http://www.americanbar.org/content/dam/aba/administrative/barservices/archive/library/4479.authcheckdam.pdf> (last visited Apr. 3, 2017).

⁴³³ See PRACTICE MANAGEMENT ASSISTANCE PROGRAMS AND PRACTICE MANAGEMENT ADVISORS, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/roadmap_to_access/ideas_page/practice_management.html (last visited Apr. 3, 2017).

IX. SANCTIONS

Recommendation 25: The Court Should Authorize OPC to Issue Admonitions

Recommendation 24 above addresses structural and procedural changes to the diversion process in Utah that include providing the OPC with the increased authority and discretion to determine when diversion may be an appropriate disposition for a case and to perform additional duties with regard to that process. The Discipline Committee also believes that process can operate more effectively and efficiently if the Court provides the OPC with enhanced discretionary authority to issue admonitions.

Currently, only the Ethics Committee Chair and the District Court can privately admonish respondents.⁴³⁴ The consultation team learned that when an admonition is issued by the District Court, the public record of the formal proceedings are then ordered sealed. Admonitions should continue to be private sanctions, limited to those cases where there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition of the misconduct by the lawyer.⁴³⁵ In the Discipline Committee's experience, professional disciplinary counsel, who have intimate knowledge of disciplinary law and have thoroughly evaluated the information gathered during the course of the investigation, are in the best position to determine if a respondent's conduct warrants an admonition. It is a more efficient use of system resources for these professionals to have the discretion to determine when an admonition is proper and the authority to issue this private and lowest level sanction.

The Discipline Committee recommends that the Court amend the Rules to allow only the OPC to impose a private admonition with the consent of a respondent and prompt approval by the Ethics Committee Chair.⁴³⁶ A respondent who does not want to consent should demand that, within fourteen days from the OPC's notice proposing an admonition, the matter be resolved by formal proceedings.⁴³⁷ A respondent's failure to do so within that time period should constitute consent to the admonition.⁴³⁸ Admonitions should not be available after the filing of formal charges, at which time the proceedings become public. The issuance of a private sanction after public formal proceedings does not inspire public trust and confidence in the disciplinary system, but rather causes justifiable public skepticism. These recommended changes allow for more efficient resolution of minor misconduct cases, is in the public's interest, and will allow the Screening Panels/disciplinary adjudicators, as well as the OPC, to focus their time and resources on cases involving more serious misconduct. These changes will reduce the current costs associated with copying materials for the volunteers' review. The publishing of summaries of cases resulting in the imposition of an admonition, without disclosing the respondents' names, should continue, and sources of such publication should be broadened.

⁴³⁴ RLDD 14-510(b)(7)(D) & (10) & 14-512; Utah Standards for Imposing Lawyer Sanctions, Rule 14-603(f).

⁴³⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10.

⁴³⁶ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(A)(5).

⁴³⁷ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(C).

⁴³⁸ *Id.*

Recommendation 26: The Court Should Enhance the Use of Probation and Adopt Rule Specifying Terms for its Application, Monitoring, and Revocation

Rule 14-603(g) of the Utah Standards for Imposing Lawyer Sanctions provides for public or nonpublic probation that can be imposed alone, or in conjunction with other sanctions. Probation also may be considered for conditional readmission or reinstatement to the practice of law. Rule 14-504(b)(12) of the Rules of Lawyer Discipline and Disability states that OPC Senior Counsel monitors probation and supervises “the attorneys who provide pro bono services by supervising the lawyers placed on probation.”

However, neither the Standards for Imposing Lawyer Sanctions nor the Rules of Lawyer Discipline and Disability provide guidance regarding when probation is appropriate, and they do not address appropriate terms of probation, requirements for monitoring, or procedures for revoking probation. Based on information from interviewees and a review of available data, the consultation team learned that probation is not often imposed, notwithstanding the Court’s recognition that “the imposition of probation with the right conditions may in some cases be more protective of the public than suspension.”⁴³⁹

The Discipline Committee recommends that the Court amend the Rules of Lawyer Discipline and Disability to include a detailed Rule relating to probation. The Committee believes that adoption of this Rule will ensure that the Court’s goals for successful rehabilitation of lawyers and the protection of the public are met fairly and efficiently. This Rule will provide needed guidance to the OPC, disciplinary adjudicators, lawyers, and the public.

The Discipline Committee suggests that this Rule describe in more detail when the imposition of probation is appropriate. Such situations may include: (1) the respondent can perform legal services without causing the courts or legal profession to fall into disrepute; (2) formulation of necessary conditions of probation and adequate supervision is possible; (3) the respondent has a temporary or minor disability that does not require transfer to inactive status; and (4) the respondent has not committed misconduct warranting disbarment.⁴⁴⁰

The Committee also suggests that the Rule provide that the order placing a respondent on probation state unambiguously each specific condition of probation applicable to the respondent. Placing the exact conditions of probation in the order lets the respondent know exactly what is expected of him or her, and what constitutes a lack of compliance that could lead to revocation of probation and the possible imposition of suspension or other discipline. The conditions of probation should take into consideration the nature and circumstances of the misconduct and the history, character, and condition of the respondent. The Rule should allow for flexibility and not interfere with adjudicators’ or the Court’s exercise of discretion in fashioning individualized sanctions.⁴⁴¹ Suggested terms of probation for the Court’s consideration are:

- (1) supervision of client trust accounts as the Court may direct;
- (2) limitations on practice;

⁴³⁹ See, e.g., *In re Discipline of Crawley*, 2007 UT 44, ¶23, 164 P. 3d 1232 (2007).

⁴⁴⁰ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(A)(3) & Cmt.

⁴⁴¹ See *In re Discipline of Crawley*, 2007 UT 44, ¶25, 164 P. 3d 1232 (2007).

- (3) psychological counseling and treatment;
- (4) abstinence from drugs or alcohol;
- (5) random substance testing;
- (6) restitution;
- (7) successful completion of the Multistate Professional Responsibility Examination;
- (8) successful completion of a course of study;
- (9) regular, periodic reports to the OPC; and
- (10) the payment of disciplinary costs and the costs associated with the imposition and enforcement of the probation.

The new probation Rule adopted by the Court should provide that the probationer is required to sign a release authorizing the monitor to provide information to the OPC. Additionally, Rules of Lawyer Discipline and Disability should provide immunity for probation monitors to the same extent as other system volunteers (see Recommendation 23).

An effective means of monitoring probationers is essential to the successful use of probation as a disciplinary sanction. The Discipline Committee believes that the Rule adopted by the Court should provide for the continued administration of probation under the control of the OPC. This is consistent with national practice as well as with ABA policy. While OPC counsel should work closely with the assigned probation monitor to ensure that the terms of probation are met, they should not, themselves, be the monitors. The Court may wish to direct the new Administrative Oversight Committee to work with the Senior Counsel to recruit and appoint a group of probation monitors for the system that is comprised of lawyers, accountants, mental health care professionals and other appropriate professionals. The Discipline Committee believes that selection of a regular roster of qualified probation monitors, who receive appropriate training, will better serve the system, the public, and respondents.

The Oversight Committee and Senior Counsel should develop qualifications for probation monitors, specify their duties, and develop policies and procedures for appointing, supervising, and when necessary, removing them. In addition, there should be put in place policies and procedures regarding the substance and frequency of monitors' reports to the OPC. The monitor's only role should be to supervise the respondent in accordance with the terms of the probation and to report compliance or noncompliance with the Court's order to the OPC. The monitor should not be a counselor or sponsor for the probationer.

Adequate and regular training of probation monitors is vital to the successful use of probation. The Administrative Oversight Committee and the OPC should develop training materials and curricula for probation monitors. Other jurisdictions that have training programs for probation monitors in place, such as Louisiana, can be consulted. The Discipline Committee recommends that all probation monitors should be required to attend training annually.

Probation monitors should report to the OPC immediately any instances of noncompliance with the Court's order. OPC Counsel should make necessary inquiry to determine whether the act(s) of noncompliance warrant initiating revocation proceedings with the Court for the probationer's failure to comply with the conditions of probation. If OPC Counsel determines that revocation proceedings should be initiated, then the petition to the Court seeking revocation should also

request that the Court issue a rule to show cause why the probation should not be revoked. The respondent should be required to respond to the rule, to show cause promptly, and to attach any documentation demonstrating that probation should not be revoked. Any proceedings seeking the revocation of probation should be conducted expeditiously, and the Discipline Committee recommends that the Court consider such matters based upon the pleadings and that it not hold hearings.

In addition, the Discipline Committee urges the Court to amend the Rules of Lawyer Discipline and Disability to eliminate private probation as a possible sanction. The Discipline Committee believes that probation should be a public sanction,⁴⁴² and that the Court consider that where private probation has been imposed in the past, that diversion would be a more appropriate resolution for these matters going forward. Orders imposing probation should be published in the same manner as other public sanctions.⁴⁴³ The Discipline Committee also suggests that the Court amend Rule 14-516 of the Rules of Lawyer Discipline and Disability to include the transmittal of notices of probation to appropriate entities.

⁴⁴² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(D).

⁴⁴³ *See* RLDD 14-516.

Recommendation 27: The Court Should Eliminate Resignations With Discipline Pending

With consent of the Utah Supreme Court, respondents may elect to resign from the Bar prior to the adjudication of a pending complaint. They may do so by filing a sworn petition in the Court.⁴⁴⁴ The petition for resignation must include the respondent's admission of the facts that form the basis for the allegations of misconduct, a verification that the respondent is fully aware of the implications of resignation, an agreement to provide notice to clients and return clients' property, and an acknowledgment that the resignation will be published in the Utah Bar Journal.⁴⁴⁵ OPC Counsel may either consent or object to the proposed resignation. If OPC Counsel objects, the matter is set for a hearing in the District Court.⁴⁴⁶ Within ten days after the hearing, the District Court submits findings of fact and conclusions of law to the Court for review and entry of an appropriate order. If OPC Counsel consents the resignation, the Court reviews the matter and enters an appropriate order.⁴⁴⁷ A lawyer who resigns is not eligible for reinstatement until five years after the effective date of the resignation, unless the Court orders otherwise.⁴⁴⁸

Lawyers who resign pursuant to Rule 14-521 of the Rules of Lawyer Discipline and Disability must apply for readmission in the same manner as a disbarred lawyer. As a result, it appears to the Discipline Committee that these resignations are tantamount to disbarment. The Rule, however, does not require that the misconduct that is subject to investigation be so serious as to warrant disbarment, if it were to be proven.

The Discipline Committee recommends that the Court amend the Rules of Lawyer Discipline and Disability to eliminate resignations with discipline pending, and instead treat these matters under Rule 14-520 governing Discipline by Consent. Discipline by consent that results in the lawyer withdrawing from the practice of law should be recorded and treated as disbarment, not as resignation. A lawyer who commits misconduct serious enough to warrant disbarment should not be allowed to claim later that he or she voluntarily resigned his or her license to practice law. Providing a lawyer facing disciplinary proceedings the option to "resign" leads to the inference that the Court and the profession view the misconduct as a somehow less serious a matter because the lawyer "willingly resigned" from practice. It also creates problems in the context of reciprocal disciplinary enforcement, because a majority of jurisdictions have eliminated the option of resigning with charges pending in favor of adopting rules for discipline by consent, including consensual disbarment.

⁴⁴⁴ RLDD 14-521 & SUP. CT. R. PROF'L PRACTICE, Rule 14-604(h). Lawyers may also elect to resign from the Bar without discipline pending, but those petitions are processed administratively.

⁴⁴⁵ RLDD 14-521(a) & (b)(1-7).

⁴⁴⁶ RLDD 14-521(c).

⁴⁴⁷ *Id.*

⁴⁴⁸ RLDD 14-521(e).

Recommendation 28: Discipline by Consent Should Be Encouraged at All Stages of the Proceedings

Discipline by consent, implemented expeditiously, benefits the public and the parties. The public is protected and the respondent avoids the uncertainty and cost that accompanies going to a public hearing.⁴⁴⁹ The disciplinary agency is not required to expend valuable time and resources on formal prosecutions and can devote its energies to other contested matters.⁴⁵⁰ The Utah Rules of Lawyer Discipline and Disability allow for discipline by consent at any stage of the disciplinary process, and this is commendable.⁴⁵¹

The consultation team learned that, as a matter of practice, Utah respondents, and not the OPC, most frequently initiate discussion about discipline by consent, and that they prepare the first draft of the pleadings for that stipulated disposition. The team was told by a number of interviewees involved at different stages of the disciplinary process that there appears to them to be some reticence by the OPC to consensual discipline. The team was also advised that the OPC will not engage in settlement discussions with a respondent between the time of a Screening Panel's probable cause determination and the filing of that respondent's answer to the Formal Complaint. In FY 2015, of the 46 cases that resulted in the filing of formal charges in the District Court, a total of 9 cases were resolved via an agreed disposition: 8 matters were resolved with discipline by consent and 1 case resulted in a resignation with discipline pending. In FY 2016, of the 48 formal complaints filed in the District Court, 7 of those matters were resolved by consent: 6 via stipulated discipline and 1 submission of a resignation with discipline pending.

The Discipline Committee believes that discipline by consent should be encouraged, and recommends that the OPC take steps to evaluate how this process can be used more frequently when appropriate. Conversations regarding consensual resolution of matters in appropriate cases should be initiated promptly, and that the OPC should not wait for the respondent to take the initiative to start those discussions. Delaying the commencement of that process does not benefit the public or the system. The Discipline Committee suggests that the Screening Panel memo prepared by OPC may serve as an effective tool to assist the OPC in determining when a matter may be appropriate for possible consensual resolution.

⁴⁴⁹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 21 & Cmt.

⁴⁵⁰ *Id.*

⁴⁵¹ RLDD 14-520.

Recommendation 29: The Court Should Add to the Rules New Grounds for Discipline

The Rules of Lawyer Discipline and Disability include a specific Rule setting forth grounds for discipline.⁴⁵² That Rule omits some of the grounds identified in Rule 9 of the ABA *Model Rules for Lawyer Disciplinary Enforcement*, while adding others. The Discipline Committee commends the Court for including as separate grounds for discipline a lawyer's failure to comply with the Client Notification Rule and failure to notify the OPC of the imposition of public discipline in another jurisdiction. Both of these grounds for discipline enhance protection of clients and the public.

According to the information gathered by the consultation team, some of the delays occurring in the disciplinary system are a result of respondents' failure to respond to OPC's requests for information during an investigation. The team learned that respondents often do not respond to a communication from OPC until the date the matter is set for hearing before a Screening Panel, notwithstanding the fact that lawyers are informed by the OPC that they are required to respond to a lawful demand for information from a disciplinary authority pursuant to Rule 8.1(b) of the Utah Rules of Professional Conduct.

The Discipline Committee suggests that the Court consider amending Rule 14-509 of the Rules of Lawyer Discipline and Disability to add a provision making a lawyer's willful failure to comply with a validly issued subpoena, or a knowing failure to respond to a lawful demand from OPC counsel, as separate grounds for discipline.⁴⁵³ The Discipline Committee believes that adding these new grounds for discipline will provide OPC with greater enforcement authority when requesting a response to a letter or investigative subpoena (see Recommendation 18). In addition, including these new grounds for discipline reinforces Utah lawyers' obligation under Utah Professional Conduct Rule 8.1(b).

⁴⁵² See RLDD 14-509.

⁴⁵³ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 9(A)(3).

X. ADDITIONAL CLIENT PROTECTION MECHANISMS

Recommendation 30: The Court Should Consider Amending Rule 14-1102 to Provide for Mandatory Arbitration of Fee Disputes

“Dissatisfaction with legal fees is consistently one of the highest causes of complaints registered against lawyers (along with the oft related “failure to communicate”), [therefore] avoidance of rancorous litigation is in everyone’s best interests.”⁴⁵⁴ Currently, the Utah State Bar operates a voluntary fee dispute program through its Fee Dispute Resolution Committee. The Committee commends the Court for providing an out-of-court method for lawyers and clients to resolve fee disputes. Under Utah’s fee dispute resolution program, if agreed, both the lawyer and client execute a binding Fee Dispute Agreement to resolve the matter.⁴⁵⁵ Along with a \$10.00 filing fee, the petitioner-client submits a notarized and verified “Petition to Arbitrate Fee Dispute.”⁴⁵⁶ The lawyer must file a verified answer within ten days. A hearing is held before a panel of three volunteers: one lawyer, one Utah state or federal court judge, and one nonlawyer, if the amount in controversy is more than \$3,000. If less than \$3,000 is at issue, one lawyer member is assigned to conduct the hearing.⁴⁵⁷

In order to provide further assistance to the public with respect to the resolution of fee disputes, the Discipline Committee suggests that the Court and the Utah State Bar study whether to amend Rule 14-1102 of the Court’s Rules governing the arbitration of fee disputes to make the process mandatory for lawyers.⁴⁵⁸ A fee dispute arbitration system that is commenced at the option of the client and is then mandatory for the lawyer eliminates the advantage “lawyers have over the majority of clients who are of modest means and have only the most rudimentary knowledge of the law.”⁴⁵⁹ It eliminates one of the primary impediments to the effectiveness of voluntary programs---the ability of the lawyer to dictate whether or not arbitration occurs by refusing to participate. Similarly, a mandatory fee arbitration program can be an effective tool in negotiating diversion and allow respondents to avoid discipline in cases involving lesser misconduct. When a legitimate fee dispute arises and the lawyer enters arbitration in good faith, the client’s opinion of both the lawyer and the profession can be improved. The experience of those states that provide mandatory fee arbitration demonstrates that these programs can work without being unduly burdensome on the profession.⁴⁶⁰ For example, mandatory fee arbitration programs have been in effect in California and New Jersey for twenty-five years.

⁴⁵⁴ PREFACE, ABA COMPENDIUM OF CLIENT PROTECTION RULES (2011),

http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/preface.html.

⁴⁵⁵ SUP. CT. R. PROF’L PRACTICE, Rule 14-1102.

⁴⁵⁶ SUP. CT. R. PROF’L PRACTICE, Rule 14-1104.

⁴⁵⁷ See UTAH STATE BAR, THE UTAH STATE BAR FEE DISPUTE RESOLUTION PROGRAM,

<http://www.utahbar.org/public-services/fee-dispute-resolution-service/> (last visited April 3, 2017).

⁴⁵⁸ ABA MODEL RULES FOR FEE ARBITRATION R. 1(3).

⁴⁵⁹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 1 Cmt.

⁴⁶⁰ Eleven jurisdictions have programs that require lawyers to participate in fee arbitration if requested by the client (“mandatory” fee arbitration) and an additional six jurisdictions require respondents to participate in fee arbitration to avoid discipline. See 2008 ABA Fee Arbitration Survey,

http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/fee_arb.pdf.

Recommendation 31: The Court Should Explore Adoption of a Payee Notification Rule

The Discipline Committee suggests that the Court explore implementation in Utah of an insurance payee notification rule. Insurance carriers usually deliver settlement proceeds in payment of liability claims to the lawyer of record in the form of a check made payable jointly to the claimant and the claimant's lawyer. The insurance company normally does not notify the claimant of the issuance of this check. Unfortunately, in the Discipline Committee's experience, this lack of notification creates an opportunity for misconduct relating to the handling of settlement funds. Such misconduct includes unauthorized settlement of the client's claim, forgery of the claimant's signature on a stipulation of settlement, forgery of the claimant's endorsement on the settlement draft, or misappropriation of the claimant's share of the proceeds.⁴⁶¹ The ABA adopted its Model Rule for Payee Notification to provide jurisdictions with a mechanism to help eliminate the theft of insurance proceeds.⁴⁶² The Model Rule requires an insurer to notify a claimant in writing when the claimant's insurance proceeds are sent to a third party, including the party's lawyer.⁴⁶³ To date, fifteen states have adopted a payee notification rule.⁴⁶⁴

There are two methods for adopting a payee notification rule. The first is for the jurisdiction's legislature to enact payee notification legislation. This is the process used in New York.⁴⁶⁵ The second method involves the jurisdiction's department of insurance issuing a regulation or bulletin or directive requiring insurance companies to comply with the requirements the regulation.⁴⁶⁶ Jurisdictions that have adopted such a mechanism have reported a reduction in the loss of client funds from forged endorsements on settlement drafts. Prophylactic measures such as this, taken to prevent financial losses to clients, should also reduce the number of claims made to the Utah Lawyer's Fund for Client Protection.

⁴⁶¹ PREFACE, ABA MODEL RULE FOR PAYEE NOTIFICATION (1991).

⁴⁶² ABA MODEL RULE FOR PAYEE NOTIFICATION (1991).

⁴⁶³ *Id.*

⁴⁶⁴ A state-by-state chart on payee notification rules and insurance directives can be viewed at: ABA Standing Committee on Client Protection, *Jurisdictions with Payee (Insurance) Notification* (July 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/implementation_payee_notification_authcheckdam.pdf.

⁴⁶⁵ See 11 NYCRR 216.9, available at <http://www.dfs.ny.gov/insurance/acrobat/reg64.pdf>.

⁴⁶⁶ See Nebraska Bulletin CB 101, Nebraska Department of Insurance, *Written Notice of Payment* (Apr. 20, 2001), <https://doi.nebraska.gov/sites/doi.nebraska.gov/files/doc/cb101.pdf>.

XI. CONCLUSION

The Standing Committee on Professional Discipline hopes that the recommendations contained in this Report will assist the Utah Supreme Court in its study of the Utah lawyer disciplinary system, its implementation of desired changes, and the development of training and educational programs for staff and volunteers at all levels of the system. As noted in the Report, continued mandatory training and education is crucial to ensuring that the system operates effectively and efficiently.

The members of the Discipline Committee and the consultation team thank the Court for the opportunity to provide these consultation services. The Committee and team are grateful to the leaders of the Utah State Bar and Senior Counsel of the OPC for their hospitality, and for ensuring that the consultation team had access to all the information it needed to perform its study. As part of the discipline system consultation program, the Committee is available to provide further assistance to the Court and to the OPC if so requested.