

**ABA/ OPC’s Response to the American Bar Association’s
“Utah Report on the Lawyer Discipline System”
2017**

ABA Report Recommendation 1: The Supreme Court’s oversight and control of the discipline system should be emphasized.

ABA Report Recommendation 1a: The Court should take steps necessary to separate the Office of Professional Conduct from the Utah State Bar.

Committee Discussion: The ABA/OPC Committee (Committee) and the American Bar Association’s “Utah Report on the Lawyer Discipline System” (ABA Report) both recognize the need to take steps to separate the Office of Professional Conduct (OPC) from the Utah State Bar (USB) to make clear to Utah lawyers and the public that OPC is independent from the USB, and to emphasize the Supreme Court’s responsibility to regulate and discipline lawyers. The Committee considered whether the OPC should move from the Utah Law and Justice Center. John Baldwin, the USB Executive Director, reported on the cost of the OPC office at the Utah Law and Justice Center. The OPC offices use approximately 4,000 square feet at the Utah Law and Justice Center and shares space with the USB, such as bathrooms, storage, printer room, and common space. The USB assigns \$4,000 a month in cost for the space used by OPC, which is one dollar a square foot. Comparable cost for space in the downtown area would be at least \$21 a square foot. The Committee did not think it was economically feasible to move the OPC offices. The Committee did agree that OPC should have a separate phone number, email address, and website from the USB. In addition, the reception desk at the Utah Law and Justice Center should answer the phone by stating “Utah Law and Justice Center”. Signs at the building should say “Utah Law and Justice Center” rather than “Utah State Bar”.

In December 2017 the USB reported to the Committee that the USB and OPC are ready to implement the following:

- The receptionist will answer the phone “Utah Law and Justice Center” instead of “Utah State Bar”
- Internal and external building signage will change to “Utah Law and Justice Center” instead of “Utah State Bar”
- A list of building tenants in the elevators will distinguish tenants from the USB.

Motion: The Committee adopted a motion that the name of the Office of Professional Conduct be changed to the “Office of Legal Professionals Conduct.”

(All motions in this summary were unanimously adopted by the Committee, unless indicated otherwise)

Motion: The Committee adopted a motion that the Supreme Court should appoint the OPC Senior Counsel.

Motion: The Committee adopted a motion that OPC staff titles should be changed as follows – Chief Disciplinary Counsel, Deputy Chief Disciplinary Counsel, and Assistant Disciplinary Counsel. After discussion about the terms discipline versus conduct, the motion passed unanimously.

ABA Report Recommendation 1b: The Supreme Court should create an Administrative Oversight Committee for the discipline system.

Committee Discussion: The ABA Report states the OPC and disciplinary system is too intertwined with the USB. The USB's board appoints OPC counsel and approves the OPC budget which is formulated by the USB's executive director. Current rules are not clear about whom the OPC Senior Counsel reports to, and how performance metrics are developed. The ABA Report suggested a 6 member oversight committee with diverse membership from across the state, including a judge and a public member. The ABA Report suggested that an oversight committee, independent of the USB could be authorized to:

- Propose rules of procedure for the lawyer discipline proceedings, with the Court's approval
- Periodically review the operations of the discipline system to identify where delays occur and take prompt action to address delays
- Develop realistic performance metrics and conduct annual performance evaluations for Senior Counsel
- Develop an annual budget process and inform the Court of the budget for the OPC
- Conduct a needs assessment, setting forth a 3 to 5 year funding plan for the disciplinary process, including technology and staffing needs
- Periodically report to the Court regarding the operations of the OPC and the general standing of disciplinary matters and procedures
- Develop training programs for OPC staff and Screening Panels
- Develop formal policies for OPC such as records retention policies
- Engage in public outreach on behalf of the OPC

Motion: The Committee adopted a motion to accept recommendation 1b as follows: An OPC Oversight Committee should be created with 5 voting members, including a judge, a member of the public (with an accounting background), the State Court Administrator or the administrator's designee, 2 attorneys (one of whom is a past chair or vice-chair of the Ethics and Discipline Committee), and the Executive Director of USB as an ex-officio non-voting member. The oversight committee would not have authority to interfere with the prosecutorial independence of the OPC, but would have access to confidential information as necessary to carry out its duties. The oversight committee, independent of the USB, would be authorized to:

- Assist OPC and the USB with implementing the recommendations of the ABA Report and the ABA/OPC Committee recommendations that are adopted by the Supreme Court
- Develop realistic performance metrics and conduct annual performance evaluations for Senior OPC Counsel

- Develop an annual budget for OPC and submit the annual budget to the Supreme Court and to the USB
- Conduct a needs assessment, setting forth a 3 to 5 year funding plan for the disciplinary process, including technology and staffing needs
- Annually, and in conjunction with Senior Counsel for OPC and the Chair of the Ethics and Discipline Committee, report to the Court regarding the operations of the OPC and the general standing of disciplinary matters and procedures
- Develop formal policies for OPC such as records retention policies

ABA Report Recommendation 1c: The court should consider revising how the disciplinary system is funded.

Committee Discussion: The Committee considered the use of direct assessments and other means to fund the OPC budget, but in the end the Committee concluded that the lack of budget flexibility from direct assessments may hurt the OPC more than help. The Committee also thought that the oversight committee should seek input from the Ethics and Discipline Committee and OPC when developing the budget.

Motion: The Committee adopted a motion that the USB should continue to fund the OPC budget without creating a direct assessment to fund the disciplinary process, but should strengthen the “safety valve” to ensure proper funding, which would include obtaining input from the Ethics and Discipline Committee.

Motion: The Committee adopted a motion that the OPC Oversight Committee should be responsible for creating a budget for the OPC, which budget shall be adopted by the USB, unless the USB petitions the Supreme Court for a different budget for the OPC and the Supreme Court approves a different budget for the OPC.

ABA Report Recommendation 2: The Consumer Assistance Program (CAP) and the Disciplinary Process Information Office (DPIO) should be merged with OPC.

Committee Discussion: Mr. Lund commented that the USB provides a needed service to both the public and to members of the USB by answering questions about the attorney discipline process. The Committee noted that calls to CAP and DPIO often de-escalate complaints or concerns without the need for action by OPC. The Committee did not want to lose this service by the USB to the public.

Motion: The Committee made a motion to recommend that the Consumer Assistance Program, which is currently run by the USB stay with the USB, and that the Disciplinary Process Information Office also stay with the USB. The offices should operate independently of each other, but CAP may refer people to the OPC.

ABA Report Recommendation 3: The Court should amend the rules to restructure the role and responsibilities of the Ethics and Discipline Committee.

ABA Report Recommendation 3a: The Screening Panel's Structure and role in the disciplinary process should be revised.

Committee Discussion: The Committee expressed the opinion that the Ethics and Discipline Committee Screening Panels provide complainants an important opportunity to tell their story, and provide important due process to an attorney accused of violating a rule of professional conduct. The Committee supported the role of the Screening Panels in the attorney discipline process and did not support the ABA Report's suggestions to diminish the function of the Screening Panels.

The Committee found that the current size of the eight member screening panel is too large and can create scheduling difficulties which may delay a disciplinary proceeding. In addition, the number of screening panel members who sit for a hearing sometimes varies. The Committee created a working group composed of Terrie McIntosh, Jeff Hunt, Judge Scott and Mike Skolnick to develop a proposal to establish a consistent size of Screening Panels.

Motion: The Committee unanimously adopted a motion that Rule 14-503(d) be amended to require 5 panel members for each hearing with one of the 5 being a public member, and except for the chair and vice chair of the panel, all other members will be randomly assigned.

Motion: The Committee adopted a motion that terms for members of the Ethics and Discipline Committee be for 3 years with a maximum of 2 consecutive terms, unless a member is appointed chair or vice chair.

ABA Report Recommendation 3b: The duties of the Chair of the Ethics and Discipline Committee should be revised.

Committee Discussion: The Ethics and Discipline Committee Chair's role in reviewing Screening Panel recommendations and findings when the Screening Panel does not recommend filing a complaint in District Court helps to monitor decisions among different screening panels, to check for consistency, and to discover areas in which additional training for volunteers may be needed. The Chair's review adds value to the disciplinary process and does not cause undue delay in the process.

Motion: The Committee adopted the following motion:

Screening Panel Does Not Recommend Filing a Complaint in District Court

The Committee recommends that for complaints for which the Screening Panel does not recommend filing a complaint in District Court, the Ethics and Discipline Committee Chair should continue to review the Screening Panel's findings and recommendations, should not make

changes to the findings and recommendations other than as needed for clarity, and should prepare the order to execute the Screening Panel's findings and recommendations.

Screening Panel Recommends Filing a Complaint in District Court

The Committee recommends that when the Screening Panel recommends the filing of a formal complaint with the District Court, the Ethics and Discipline Committee Chair should be given notice of the Screening Panel recommendation, but should not approve the recommendation or sign the complaint filed with the Court.

ABA Report Recommendation 4: The Court should consider whether to retain the use of District Courts for adjudicating disciplinary, disability, and reinstatement proceedings.

Committee Discussion: The District Courts have the responsibility to adjudicate formal disciplinary proceedings, reinstatement petitions, petitions for interim suspensions, and transfers to disability status. The Rules of Civil Procedure and Rules of Evidence apply in discipline cases. The ABA Report suggested that the Court consider either specialized courts for discipline cases, or a model used in other states in which a panel of lawyer and non-lawyers adjudicate the discipline matter and the Court enters a final order based on the panel adjudication. The OPC offered the opinion that specialized courts would be helpful. The Committee believes that the nature of the formal complaints warrant the use of District Courts as the trier of fact. The Committee member representing respondents in discipline cases expressed strong feelings in support of the District Court as the trier of fact. The Committee noted that complaints filed in the District Court are subject to Rule 26 of the Rules of Civil Procedure and could participate in a program for active case management.

Motion: The Committee adopted a motion to recommend that the trier of fact for formal complaints continue to be the District Court. The Committee also recommends that formal complaints for attorney discipline be eligible to participate in a program for active case management.

ABA Report Recommendation 5: The OPC should have enhanced technology tools.

Committee Discussion: Both the ABA Report and OPC acknowledged the need for additional IT support, both for updated software and IT staff. OPC should conduct a careful analysis of technology needs, and management and budget decisions should be made to support those needs.

Motion: The Committee adopted a motion to recommend that OPC Senior Counsel evaluate the OPC technology needs and take steps to update current equipment and software, and acquire needed IT staff.

ABA Report Recommendation 6: OPC would benefit from an investigator and forensic accountant.

Committee Discussion: OPC needs dedicated resources to investigate complicated cases that often need the services of a forensic accountant or other expert. Currently OPC has to request additional funds from the USB when investigators or other forensic experts are needed on a case by case basis. The OPC budget should include resources to hire a staff investigator, and to pay the expense of outside forensic experts when needed.

Motion: The Committee adopted a motion to recommend that OPC be provided with funding to hire an investigator as part of the OPC staff, and to hire forensic experts as needed. The motion passed with one dissenting vote.

ABA Report Recommendation 7: The Court should use an open and transparent appointment process to fill committee vacancies.

Committee Discussion: The ABA Report stated that the Utah Supreme Court appoints 36 volunteers (28 lawyers and 8 public members) to serve on the Ethics and Discipline Committee. The Court is assisted by an appointment committee that vets applicants. The ABA Report could not find rules or procedures setting forth qualifications, or the vetting or selection process for the appointment of volunteers. The ABA Report commented that the OPC website and the Court website do not provide much information about the volunteer opportunities, the qualifications for volunteers, or the process for appointment. The Committee noted that vacancies in the screening panels are announced on the Court's website and notices are sent to attorneys through the USB. The Committee acknowledged the benefit of increasing outreach to minority groups in the USB and in the community to increase diversity on the Screening Panels.

Motion: The Committee adopted a motion to accept ABA Report Recommendation 7 and to recommend that the Supreme Court and the Chair of the Ethics and Discipline Committee should take steps to increase diversity on the Screening Panels. The volunteer solicitation process should include communication with community groups and associations that represent minority or underrepresented populations, and to prominently display the application process and volunteer opportunities on the Court and OPC websites.

ABA Report Recommendation 8a: The OPC should have its own website to increase public access and awareness.

Committee Discussion: The ABA Report suggested OPC create a standalone website, including:

- Information about all components of the disciplinary system;
- Links to rules and uniform downloadable forms;
- Removal of warning language that is inconsistent with OPC practice and that discourages complaints

Motion: The Committee adopted a motion to accept ABA Report Recommendation 8a.

ABA Report Recommendation 8b: Licensure status and disciplinary precedent should be available online in an easily searchable format.

Committee Discussion: Currently, OPC publishes summaries of cases resulting in public discipline, and summaries of private admonitions which do not include attorney names. The ABA Report suggested that optimally, the OPC website should have a searchable library of the Court's disciplinary opinions, all District Court disciplinary decisions and orders, and past Screening Panel decisions resulting in public reprimands. The Committee discussed the fact that current licensure status is available on the USB website and will always be available on the USB website. In addition, discipline information can be obtained by calling the OPC. The Committee acknowledged that the public would be better served if discipline information was publicly available on line, and that many professions currently provide public, online notice of discipline actions going back for a designated period of time. Regarding the recommendation that the OPC create and maintain a searchable database of discipline actions, the Committee acknowledged that such a database would be helpful to the Court and to the public, but there are currently no resources for the creation or maintenance of a database.

Motion: The Committee adopted a motion to accept part of ABA Report Recommendation 8b and to recommend that OPC develop a public online database that includes the names of attorneys who have received a public disciplinary action within the past 10 years, and the status of the disciplinary action. The motion included the recommendation that OPC continue the current practice of providing information by phone, or other means, for actions more than 10 years old, and that the USB continue to publish licensure status on the USB website.

ABA Report Recommendation 8c: The content of the annual OPC report should be enhanced.

Committee Discussion: OPC publishes an annual report to the Supreme Court and publishes the report on the USB's website. The ABA Report suggested that the OPC annual report should be published on the OPC and USB website. The ABA Report also suggested increasing the statistical information included in the OPC annual report, such as lawyer practice area, firm size, and years in practice. The Committee noted that the report is currently published on the OPC and USB website. The Committee discussed the potential value to adding information to the annual report for the public.

Motion: The Committee adopted a motion to accept ABA Report Recommendation 8c and to recommend that OPC collect the following information from an attorney who is the subject of a disciplinary action: years of practice, county of practice, and practice area involved in the complaint. The motion also included direction to OPC to publish the following aggregate data as part of its yearly report: years of practice for attorneys subject to disciplinary action, the number of attorneys in a particular county who were disciplined in the past year, and the number of attorneys in a particular practice area who were disciplined in the past year.

ABA Report Recommendation 9: Outreach to the public should be enhanced.

Committee Discussion: The ABA Report commended the OPC and USB outreach efforts to lawyers and judges. The ABA Report recommended OPC undertake similar efforts with the public. Mr. Lund commented that outreach efforts should be formally incorporated into the Screening Panel selection process so that outreach is not dependent on a particular person's interest in diversity.

Motion: The Committee adopted a motion to accept ABA Report Recommendation 9 and to recommend that the OPC contact civic organizations, organizations that serve underrepresented populations in the state, and specialty bar associations to inform those organizations about the lawyer disciplinary process and to invite members to apply for public volunteer positions.

ABA Report Recommendation 10: The Office of Professional Conduct should enhance outreach to specialty bar associations.

Committee Discussion: The ABA Report found no evidence of institutional bias against minority lawyers in the OPC disciplinary process. However, across the nation, there is a perception that disciplinary process is biased against minority leaders.

Motion: The Committee adopted a motion to accept ABA Report Recommendation 10.

ABA Report Recommendation 11a: The professional staff of OPC should receive increased regular training.

Committee Discussion: The ABA Report noted that disciplinary matters are becoming more complex in terms of technology, substantive law, behavioral health issues, and effective investigative techniques. The ABA Report recommends that OPC staff continue its involvement in the ABA National Conference on Professional Responsibility, continue its participation in the National Organization of Bar Counsel, participate in the NOBC Skills Training Boot Camp, and the develop internal training sessions for professional staff.

Motion: The Committee adopted a motion that OPC should develop a standardized training policy for staff, including training on substantive law, use of technology, behavioral health issues, and effective investigation techniques.

ABA Report Recommendation 11b: The disciplinary system's volunteers and adjudicators should receive enhanced training.

Committee Discussion: The ABA Report stated that the Ethics and Discipline Committee training consists of two lunches, one for new members and one for returning members. District Court Judges do not receive training for attorney discipline proceedings. The ABA Report expressed concerns regarding the consistency of sanction recommendations at the screening panel and District Court levels.

Motion: The Committee adopted a motion that the Committee accept the ABA Report recommendation and that OPC should create a budget to assist the Ethics and Discipline Committee with implementing enhanced training for Ethics and Discipline Committee volunteers.

Motion: The Committee adopted a motion that the District Courts should make it a priority to include training for judges regarding the disciplinary process during a session at Judicial Conferences and at new judge orientation.

ABA Report Recommendation 12: The Court and OPC should streamline the complaint screening and investigation process.

Committee Discussion: The ABA Report found the current system in which complaints are received, screened, and investigated is layered with multiple and duplicative procedures that contribute to confusion for complainants and respondents, and increases the time to disposition. Judge Blanch summarized the ABA Report’s time to disposition findings. The ABA Report found that in their sample it took 966 days on average from filing of the complaint with OPC until the adjudication hearing with Screening Panel, and then 524 days from the Screening Panel adjudication until completion of the District Court process, for a total average of just over 4 years. The Committee discussed whether it is appropriate to use averages for time to disposition since a couple of unusual cases may skew the average. The Committee gathered information to evaluate median time to disposition. The Committee used the following framework for the discussion of time to disposition:

1. Is there a delay in a particular stage of the process?
 - 1st stage of process: complaint filed with OPC and the OPC decision to dismiss or go to a Screening Panel
 - 2nd Stage of process: Screening panel receives complaint and adjudicates complaint (time to disposition for screening panels)
 - 3rd Stage of process: Screening panel recommends formal charges and a complaint is filed in District Court (time to disposition in Court)

2. Can we find a solution for any part of the delay?

District Court Time to Disposition (Formal Complaint Process):

Rick Schwermer, State Court Administrator, discussed the data for District Court time to disposition for attorney discipline cases for the period of 2014 through 2017. The data shows 106 discipline cases during the past 3 years. While a numerical average of the time to disposition is 430 days, 44% of the cases were disposed of within 6 months, and 55% within a year. The mean time to disposition is just over 7 months. However, the percentage of attorney discipline cases that meet the Court’s civil case standard for time to disposition is lower than other civil cases. 76% of attorney discipline cases meet the 2 year time to disposition standard in comparison to 90% of other civil cases that meet the 2 year time to disposition standard.

Screening Panel Time to Disposition:

Terrie McIntosh, the Chair of the Ethics and Discipline Committee, discussed the time to disposition from when OPC referred a case to the Screening Panel until the Screening Panel hearing was scheduled, for the period of October 2016 until April 2018.

Number of Cases	Days to disposition
13	31-50
17	51-60
14	61-70
18	71-80
13	81-90
5	91-100
8	101 or more

Terrie McIntosh explained that the reason for the delay in the 8 cases over 100 days was numerous continuances requested by the respondent attorneys. Ms. McIntosh believes that the process is quicker than when the ABA Report examined the process because the Ethics and Discipline Committee has a clerk to help schedule hearings and track the hearings. She also explained that some of the longer delays shown on the table resulted when OPC prepared an unusually large number of cases for hearing in the last six weeks of 2017. It took extra time to schedule those cases because there are only 8 hearing times available each month. She also pointed out that the rules require that respondents be given notice at least 30 days before a hearing is set. Terrie McIntosh informed the Committee that the period of time after a screening panel makes a decision until the parties receive the screening panel decision is not tracked, but she thinks the panels are efficient in their work.

OPC Screening Process:

Billy Walker, OPC Senior Counsel, stated that the screening process for a complaint (prior to an informal complaint being filed with a Screening Panel) varies, because the types of complaints vary. When OPC determines the need to investigate a complaint, OPC tries to gather as much information as possible before sending the complaint to the Screening Panel. This investigation process often takes time and can be prolonged by a respondent attorney failing to respond to OPC requests for information. OPC often has to send a notice of an informal complaint (the decision to send a complaint to the Screening Panel) before an attorney will provide OPC with requested documents or information. Mr. Walker discussed the time to disposition from when a case was opened by OPC to when a case was closed. The data that Billy provided showed:

- For 2016, the median time for a request for assistance was 186 days, and for an informal complaint dismissed without a screening panel was 111 days.
- For 2017, the median time for request for assistance was 168 days and for informal complaints without a screening panel was 75 days.

Motion: The Committee adopted the following two part motion:

1. The appropriate advisory committee should consider adopting rules to apply to attorney discipline cases to address perceived delays in such cases. These rules may include:
 - Requiring active case management through a Rule 16 scheduling conference at the beginning of an attorney discipline case, similar to the now completed Case Management Pilot Program for Tier III cases.
 - Promulgating specific Rule 26 requirements and deadlines for attorney discipline cases, similar to Rules 26.1 to 26.3.
2. The Supreme Court should consider revising Rule 14-518 to better address potential harm to the public and profession that may occur while attorney discipline cases are being litigated. Such revisions may include amending the standard for interim suspension to be consistent with Rule 65A (injunctions) and permitting OPC to request, and the court to impose, other types of interim orders while a discipline case is pending such as supervision or limited practice.

ABA Report Recommendation 12a: There should be one form of complaint and the Court should eliminate formalities attendant with their filing.

Committee Discussion: The OPC intake and investigation process varies depending on the form in which a complaint is received by the office. OPC currently accepts complaints in the form of Requests for Assistance (RFA), Informal Complaints, or other written communications. OPC is obligated to evaluate all information coming to its attention. The ABA Report recommended that OPC should provide the public with a simple straight forward method to complain about the conduct of Utah lawyers, including:

- The use of RFA should be eliminated and all communications to OPC should be treated the same
- Eliminate the requirement that a complaint be in writing
- Provide a universal, on-line complaint form, in multiple languages, but do not require the use of the form
- Discontinue the practice of notarizing complaint forms
- Amend Rules 14-502, 14-510 and other Disability Rules to eliminate references to “Informal Complaints” and “Notice of Informal Complaint”

Motion: The Committee adopted a motion to accept Recommendation 12c with the following changes:

- OPC should establish an intake process and create a budget for the intake process
- The USB should continue its Consumer Assistance Program
- OPC should develop an on-line complaint form available in multiple languages and should accept on-line submission of a complaint
- Notarization of a complaint should be discontinued but a declaration under penalty of perjury should be required
- References in rules to formal and informal complaints should be replaced with “complaints”.

ABA Report Recommendation 12b: The Court should amend the rules to provide for one investigation of complaints.

Committee Discussion: The ABA Report found 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 a Notice of Informal Complaint before securing the respondent’s “official response” is inefficient. The communication between OPC and the respondent is often via US Mail, when email or telephone can be effective for many purposes. Several complainants reported that they were unable to obtain information about the status of their case for long periods of time. The ABA Report suggested that the Rules of Lawyer Discipline and Disability should be amended to create screening of a complaint by OPC staff, investigation of the complaint by OPC staff, and then a probable cause determination by the screening panel. The Committee acknowledged that the terms and rules related to the complaint process are confusing; however, there is value in properly screening out improper complaints. Several committee members commented that the highest goal of the discipline process should not be efficiency, but should be justice and fairness in the process. OPC has to be very specific in a complaint about the exact rule that was violated. Billy Walker said there is no process for amending a complaint, which requires careful preparation of the complaint.

Motion: The Committee adopted a motion to instruct OPC to continue to conduct an informal screening /investigation stage of a complaint before deciding to refer a complaint to the screening panel, but to discontinue the use of confusing terminology related to a complaint such as Requests for Assistance, Informal Complaints, and Notice of Informal Complaints. OPC should also suggest changes to rules that include the confusing terminology.

ABA Report Recommendation 12c: Complainants should be provided a limited appeal from OPC dismissals.

Committee Discussion: The ABA Report questioned whether a complainant is provided with notice of an OPC decision to dismiss a complaint and notice of the right to appeal OPC’s decision. The Report noted that if a person files a request for assistance rather than a complaint, the person may not receive notice of the right to appeal the OPC decision. The Committee found that OPC provides notice to a complainant of both the OPC’s decision and the right to an appeal.

Motion: The Committee adopted a motion to accept the ABA Report’s recommendation 12c, which is consistent with current OPC practice which provides a complainant with notice of the OPC decision to dismiss a complaint and notice of the right to an appeal of that decision.

ABA Report Recommendation 12d: The assignment of investigative and prosecutorial duties to separate OPC counsel should be revised.

Committee Discussion: The ABA Report states that if a matter is not screened out at the intake stage of proceedings, OPC may refer a complaint to a Screening Panel. The file is then re-assigned to one of two counsel designated to prosecute cases who often need to conduct additional

investigations or re-investigate matters. Then, if the Screening Panel recommends that an action be filed in the District Court, the case is assigned to a third attorney designated to prosecute disciplinary charges in District Court. The ABA Report stated that this process contributes to delay that is both unfair to the respondent and the complainant, and is a legitimate concern of the public. Billy Walker commented that the OPC uses roundtable discussions to keep all staff current on a case and the bifurcation works well in the office. Billy Walker does not think the use of different counsel for the case results in delay.

Motion: The Committee adopted a motion to reject the ABA Report Recommendation 12d which calls for the same OPC attorney to handle a case throughout the investigative and prosecutorial process.

ABA Report Recommendation 13: The Court should amend the rules to streamline the process for requesting subpoenas, and OPC should be allowed to issue investigative subpoenas.

Committee Discussion: The ABA Report states that currently, the Rules of Lawyer Discipline and Disability permit the issuance of a subpoena only in conjunction with a Screening Panel proceeding, and requires the requesting party to petition the District Court for issuance of the subpoena. The rules do not permit the OPC, prior to referring a matter to the Screening Panel, to issue an investigative subpoena. The ABA Report finds the current rule burdensome, and states that the current rule leaves the OPC without important investigation tools, or recourse when needed to address a respondent's failure to produce needed documents. In contrast, the authority to issue a subpoena is currently given to the USB's Executive Committee, the General Counsel, and Deputy Counsel for investigating issues related to the Court's Admission Rules. Oversight of investigative subpoenas could be provided by the Chair of the Ethics and Discipline Committee and the Court could adopt necessary provisions related to motions to quash subpoenas.

Motion: The Committee adopted a motion to accept ABA Recommendation 13: OPC should have the authority to issue investigative subpoenas prior to a matter being referred to a Screening Panel and upon the approval of the Chair of the Ethics and Discipline Committee.

ABA Report Recommendation 14: The Court should streamline proceedings involving probable cause determinations and appeals from Screening Panel Decisions.

Committee Discussion: The ABA Report recommends that the role of the Screening Panel be limited to making probable cause determinations. The OPC staff should be conducting complete and thorough investigations, and if OPC does not dismiss a complaint, refer it to diversion, or issue an admonition, the matter should be referred to a screening panel for a probable cause determination.

ABA Report Recommendation 14a: The Court should eliminate probable cause hearings.

Committee Discussion: Under current rules, if the OPC decides to refer a matter to the Screening Panel, the OPC prepares a Screening Panel Memo and provides copies of the memo to the respondent. The Screening Panel then holds a hearing in which respondents, complainants, and witnesses appear. The Screening Panel then makes a probable cause determination. Screening Panels currently serve as investigators and adjudicators of probable cause. The ABA Report states that if the OPC conducts a full investigation as recommended by the report, both the complainant and the respondent lawyer will have been notified of the allegations in the complaint and provided an opportunity to respond and submit written explanations and no hearing is necessary.

ABA Report Recommendation 14b: Procedures governing exceptions to Screening Panel recommendations should be streamlined.

Committee Discussion: Either party may file exceptions to a Screening Panel decision recommending the imposition of an admonition or public reprimand. The OPC can file an exception to the Screening Panel's dismissal of a complaint or referral of the attorney to diversion. The Ethics and Discipline Committee Chair serves as the Exceptions Officer and may hold a hearing. The Chair may sustain, dismiss, or modify the Screening Panel finding. Either party may appeal the Chair's ruling on the exception to the Supreme Court. The ABA Report believes this process is inefficient, that the Chair should not hold a hearing for the exception determination, and that due process does not require an appeal of the Chair's decision to the Supreme Court. The report suggests that the Court should eliminate appellate hearings for exceptions filed with the Ethics and Discipline Committee Chair. The Chair should make a determination of the exception based on a document review and there should not be a right to an appeal to the Supreme Court for an exception ruling by the Ethics and Discipline Committee Chair.

Motion: The Committee adopted a motion that the Screening Panel process should remain the same, but when the Screening Panel recommends a public reprimand, the respondent should be permitted to choose one of three options: accept the public reprimand; file an exception with the Chair of the Ethics and Discipline Committee with no right of appeal for the ruling on the exception; or elect a Trial de Novo with the District Court.

ABA Report Recommendation 15: The Court should take steps to enhance the efficiency of formal disciplinary proceedings.

Committee Discussion: The ABA Report stated that they believe there are ways in which the Court can improve the efficiency of the formal complaint process and eliminate unnecessary delay. The Committee believes that its Motion for recommendation 4 which was to include disciplinary cases in enhanced case management programs is the best tool to address issues of delay.

ABA Report Recommendation 15a: The Ethics and Discipline Committee Chair should not review and sign formal complains.

Committee Discussion: Data reviewed by the ABA Report consultation team showed that on average, in 2016, it took 95 days from the time a complaint was filed with the Screening Panel until the Chair of the Ethics and Discipline Committee approved and signed formal charges based on that complaint. In addition, the report stated that national practice is to delegate prosecutorial discretion to disciplinary counsel to amend or dismiss counts of a formal complaint when counsel determines it is appropriate, or to conform to the proof of the case. The report suggested that the chair should not review and sign the pleadings filed with the District Court. The report also stated that the court should amend the Rules of Lawyer Discipline and Disability to give OPC the authority to amend or dismiss counts of a formal complaint when OPC counsel determines it appropriate or necessary to conform to the proof of the case. The Committee did not agree with giving disciplinary counsel the authority to amend or add counts to a formal complaint without review of a Screening Panel or the Chair of the Ethics and Discipline Committee.

Motion: The Committee adopted a motion to reject the suggestion that the Rules of Lawyer Discipline and Disability should be amended to give the OPC authority to amend counts of a formal complaint when OPC determines it is appropriate or to conform to the proof of the case.

ABA Report Recommendation 15b: The Court should amend the Rules of Lawyer Discipline and Disability to require the trier of fact to hold at least one prehearing conference, with additional prehearing conferences scheduled as necessary.

Committee Discussion: The Committee recognized the value of pre-trial conferences for discipline cases and approved a motion as part of ABA Report Recommendation 4 to make Attorney Discipline cases eligible for a program for active case management.

ABA Report Recommendation 15c: The Court should amend the rules to better clarify the scope of discovery and applicability of other rules.

Committee Discussion: Utah applies the Rules of Civil Procedure and Rules of Evidence to formal discipline matters filed in District Court. The ABA Report stated that some jurisdictions limit the application of rules of procedure for discipline cases, such as allowing only limited discovery and precluding impleader. The ABA Report suggested that the Court should amend the Rules of Civil Procedure to provide more specific guidance for which rules apply to attorney discipline cases. The Committee took no action on the ABA Report Recommendation 15c and noted that this recommendation could be incorporated into the analysis of whether and how to include discipline cases in a case management program.

ABA Report Recommendation 15d: Extensions for time granted by District Courts to respondents should be limited and the default process should be streamlined.

Committee Discussion: The ABA Report stated that some delays in formal proceedings occur because respondents request and judges grant repeated extensions of time to meet deadlines. When respondent fail to answer formal charges it takes a long time to secure a default

judgement. The ABA Report suggested the Court should amend the Rules of Lawyer Discipline and Disability to include statements that anything other than an initial request for extension of time by a party will only be granted for good cause shown. The Committee decided that this recommendation could go to the oversight committee for further consideration.

ABA Report Recommendation 15e: The Court should eliminate bifurcated disciplinary hearings on formal charges.

Committee Discussion: Currently, the District Court enters findings of facts and conclusions of law regarding attorney misconduct. The parties then reconvene within 30 days for a sanctions hearing. The ABA Report suggested that the Court should hear all evidence, including evidence of mitigation and aggravation during the same hearing. The ABA Report also suggested there is a need for the Courts to include more legal analysis, citations to existing authority, and independent assessment of the issues in the Court's opinions. The Committee does not believe there is a problem with court decisions and agrees that decisions should be well reasoned with citations to existing authority, however, the short time lines for discipline cases required by Rule 14-511(f) can be an impediment to that goal. Some Committee members strongly rejected the idea of combining the sanctions hearing with the hearing on the merits of the complaint.

Motion: The Committee adopted a motion to reject the recommendation to eliminate the bifurcated hearings on formal charges and sanctions.

Motion: The Committee adopted a motion to amend Rule 14-511(f) to remove the requirement that the court hold a sanctions hearing within 30 days after it enters findings of fact and conclusions of law, and to remove the requirement that the court issue its order sanctioning the defendant within 5 days after the sanctions hearing. Instead, a disciplinary action in District Court should follow the time requirements in the Rules of Civil Procedure for other cases.

ABA Report Recommendation 16: The Court should amend Rule 14-515 governing confidentiality in disciplinary proceedings.

Committee Discussion: Rule 14-515 provides generally that disciplinary proceedings are confidential prior to the filing of formal charges or the issuance of a public reprimand. The confidentiality applies to witnesses, the complainant, OPC staff, and the volunteer Screening Panel members.

ABA Report Recommendation 16a: The Court should eliminate confidentiality restrictions on complainants and witnesses.

Committee Discussion: The ABA Report opined that similar restrictions against witnesses and complainants have been struck down in other jurisdictions as unconstitutional infringements of First Amendment rights. The ABA Report recommends that the confidentiality restrictions apply only to the OPC staff and the volunteer members of Screening Panels. In addition, the report suggests that the rule should be clarified to allow OPC to disclose information to law

enforcement, state bar admission agencies, and committees for judicial appointment. The report suggested that language should be added to the rule to require OPC to inform the disciplined USB member of the disclosure of information unless the disclosure would interfere with or prejudice an investigation.

The Committee discussed First Amendment issues related to the confidentiality rule and Mr. Hunt expressed the opinion that the current rule would not survive a constitutional challenge. Mr. Skolnick stated that some confidentiality requirements should be imposed and gave an example of a case in which a litigant tried to use confidential information from a pending USB complaint for an advantage in a civil action. The Committee created a working group to evaluate Rule 14-515 for First Amendment issues and to compare Utah's rule to other state's confidentiality rules. The working group opined that Utah's rule is subject to challenge under the First Amendment. The working group also summarized confidentiality models used in other states. The first model, adopted by only 5 states, is a completely open model with no restrictions on disclosures about a pending discipline case. The second model does not restrict disclosure, but encourages confidentiality by warning the parties that the parties have immunity for their speech about the issues of the discipline process only when the speech is part of the disciplinary process. The third model, which is the model used by a majority of jurisdictions, restricts non-party participants from disclosing information. The Working Group recommended the third approach and prepared amendments to Rule 14-515 for the Committee's consideration. Judge Hagen asked why the working group did not recommend the second model and was informed that immunity granted for the discipline process is legally nuanced and would be hard to adequately explain and implement for the parties.

Motion: The Committee adopted a motion to recommend that Rule 14-515 be amended as set forth in "Exhibit A" (attached).

ABA Report Recommendation 16b: The Court should specify that information sharing is permitted with law enforcement, bar agencies and others, with notice provided to the disciplined attorney, unless notice would interfere with or prejudice an investigation.

Committee Discussion: The Committee found that current practice is consistent with Recommendation 16b.

ABA Report Recommendation 17: The Court should clarify the record retention rules for the Office of Professional Conduct.

Committee Discussion: OPC established informal record retention policies for communications and files not identified in the Rules of Lawyer Discipline and Disability. The report recommends the Court amend the rules to formalize the record retention and expungement requirements for the OPC. The report recommends that records of formal proceedings be kept indefinitely. The report also commented that OPC currently stores records and client files in an unsecure area accessible by other USB employees and building services. OPC said that all files are secured in locked drawers. Billy Walker said the current record retention policy is:

- Records of an attorney who is disciplined are kept forever;
- Records of dismissed complaints are kept for 7 years;
- Records of Screening Panels are kept for 1 year if there is a finding of no probable cause.

Motion: The Committee adopted a motion to create a Rule of Lawyer Discipline and Disability to formalize the OPC record retention policy, and to find a more secure location within the Law and Justice Center to store the OPC records.

ABA Report Recommendation 18: The Court should streamline procedures for the interim suspension for threat of harm.

Committee Discussion: Rule 14-518 allows interim suspension for a substantial threat of irreparable harm to the public, and if an attorney has either committed a violation of the Rules of Professional Conduct or is under a disability. OPC has the burden of proof by clear and convincing evidence. The ABA Report suggested that Rule 14-518 should be amended to allow for interim suspension 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.

Motion: The Committee adopted a motion to accept ABA Report Recommendation 18 and to amend Rule 14-518 to:

- Permit an interim suspension based on a threat of serious harm to the public;
- Use a preponderance of the evidence standard; and
- Use the same procedure to obtain the interim suspension as a TRO under Rule 65A.

ABA Report Recommendation 19: The Court should amend Rule 14-519 governing interim suspension for conviction of a crime.

Committee Discussion: The ABA Report stated that Utah Rule 14-519 permits interim suspension based on a conviction of guilt, as opposed to a finding or admission of guilt, which creates too much delay. In addition, the current rule provides that an interim suspension does not start until both the motion for interim suspension and formal charges are filed. The ABA Report stated that a suspension should occur upon a finding or admission of guilt and later, after appeal times have ended, the formal disciplinary charges should be filed. The current rule does not permit an evidentiary hearing prior to the interim suspension but allows an informal hearing, without explaining how or why an informal hearing is held.

Motion: The Committee made a motion to accept ABA Report Recommendation 19 to amend Rule 14-519 to permit interim suspension after a finding or admission of guilt, including a plea in abeyance.

Motion: The Committee adopted a motion that Rule 14-519 be amended to clarify that the hearing permitted before the interim suspension is only for the purpose of determining whether

a finding or admission of guilt was for a serious crime or misdemeanor that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law.

ABA Report Recommendation 20: The Court should amend the rules to allow OPC to initiate reciprocal disability inactive status proceedings when another jurisdiction has made a determination of disability.

Motion: The Committee adopted a motion to accept ABA Report Recommendation 20.

ABA Report Recommendation 21: The Court should amend the rules to eliminate the statute of limitations.

Committee Discussion: Rule 14-529 imposes a statute of limitations of 4 years from the discovery of the acts. The ABA Report opines that the purpose of lawyer discipline is to protect the public. The ABA report stated that the conduct of a lawyer, no matter when it occurs, is always relevant to questions of fitness to practice law. The Committee discussed this issue in detail, and in light of the pending Utah Supreme Court case that includes issues related to the statute of limitations. The Committee discussed the approach in some states which creates a statute of limitations for most cases, but imposes no statute of limitations if the case alleges fraud, conversion, or conviction of a serious crime, or for an offense the discovery of which has been prevented by concealment by the attorney.

Motion: The Committee adopted a motion to reject the recommendation to do away with a statute of limitations and to revisit the issue of any other amendments to the statute of limitations rule after the Supreme Court rules on a pending case.

ABA Report Recommendation 22: The Court should adopt a disqualification and abstention rule applicable to Screening Panel members and Ethics and Discipline Committee members.

Committee Discussion: The ABA Report stated:

- Panel and committee members should refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain
- A panel member or committee member should be barred from representing a lawyer in a discipline case for one year after service on a panel or the committee
- OPC or a respondent should be allowed to seek a recusal of a member

Motion: The Committee adopted a motion to accept ABA Report Recommendation 22.

ABA Report Recommendation 23: The Court should amend Rule 14-513 to state specifically that all communications or contacts with the disciplinary system, including testimony, are subject to absolute immunity, and that no civil suit can be instituted against a complainant or witness based on the communication or contact.

Committee Discussion: The ABA Report suggested that Rule 14-513 is not clear about the type of immunity given to participants in the discipline process. Is it qualified immunity or absolute immunity? The ABA Report opined that the case law in Utah is not clear. Without assurances of immunity, complainants and witnesses may be unwilling to file grievances. The Committee believes that Utah case law on the issue of immunity is clear, but that the issue is nuanced. In addition, the Committee stated that providing absolute immunity would require a change to the Rules of Evidence rather than an amendment to Rule 14-513.

Motion: The Committee adopted a motion to reject ABA Report Recommendation 23.

ABA Report Recommendation 24: The Court should streamline the diversion process and OPC should enhance the use of diversion.

Committee Discussion: The ABA Report stated that Rule 14-533 includes many of the provisions that make for an effective diversion program but the process needs to be more efficient and more cases involving lesser misconduct should be referred to diversion. The current practice is to send diversion candidates to the Diversion Committee which administers the diversion program. The Diversion Committee and ABA Report did not see a benefit to the added layer of referring an attorney to a committee rather than directly to a diversion program.

ABA Report Recommendation 24a: The Diversion Committee should be eliminated and OPC should be responsible for overseeing and operating the diversion programs.

Committee Discussion: The ABA Report recommends that OPC should:

- Eliminate the Diversion Committee;
- Use the standards in Rule 14-533(d) to determine when a case of lesser misconduct should go to diversion;
- Amend Rule 14-533 to make it clear that diversion is not available once formal charges have been filed with the district court; and
- Negotiate the diversion contract with the attorney, tailored to the specific case, including:
 - Designate a monitor for compliance and have the monitor report to OPC; and
 - Determine when non-compliance results in termination of the diversion agreement.

ABA Report Recommendation 24b: The use of diversion should be enhanced.

Committee Discussion: Current available diversion programs are (1) Lawyers Helping Lawyers, (2) Professionalism Counseling Board; (3) Voluntary Fee Dispute Resolution and (4) Ethics School. The USB does not have a law practice management or trust account management diversion program. The ABA Report stated that there should be more referrals to existing programs and the USB should establish practice management and trust account management courses for diversion programs.

Motion: The Committee adopted a motion to accept the ABA Report’s recommendations 24, 24a, and 24b.

ABA Report Recommendation 25: The Court should authorize OPC to issue an admonition with the consent of the respondent and approval by the Ethics and Discipline Committee Chair.

Committee Discussion: The ABA report suggested that it would be more efficient to allow OPC to issue an admonition and allow a respondent who does not want to consent to the admonition to demand that, within 14 days from the OPC notice imposing an admonition, the matter be resolved by formal proceedings. A respondent’s failure to request a formal proceeding, within 14 days of notice of the admonition, would constitute consent. The ABA Report also suggested that the District Courts not issue admonitions, because once a complaint is in Court, the sanction should be public. The Committee rejected taking admonitions from the District Court. OPC reported that current practice allows OPC and a respondent to consent to an admonition, but in the absence of consent, does not allow an admonition from OPC. Billy Walker expressed the opinion that allowing what amounts to a default judgement for an admonition at the pre-screening panel stage results in OPC functioning as an adjudicator rather than a prosecutor. The Committee did not adopt this recommendation.

ABA Report Recommendation 26: The Court should enhance the use of probation and should adopt rules specifying terms of probation, monitoring of probation, and revocation of probation.

Committee Discussion: The ABA Report stated that current standards for imposing lawyer sanctions and rules of lawyer discipline do not provide guidance regarding when probation is appropriate, and they do not address terms for probation, requirements for monitoring probation, or procedures for revoking probation. District Courts do not often impose probation despite recognition that the imposition of probation with the right conditions may in some cases be more protective of the public than suspension from the practice of law. The Committee agreed with the report’s analysis and also discussed whether probation terms should function as the sanction, or whether probation should be a tool accompanied with a sanction, much like a plea in abeyance tied to conditions of probation in a criminal proceeding.

Motion: The Committee adopted a motion to recommend that Rule 14-603 and 14-504 be amended to provide details relating to probation, including:

- change the nature of probation so that it can be used as a set of conditions accompanied with a sanction, rather than using it as the sanction itself;
- provide guidance regarding when probation is appropriate; and
- provide a non-exclusive list of standard terms and conditions for probation, such as
 - Behavioral health treatment
 - Restitution
 - Completion of the MPRE
 - Completion of a course of study
 - Regular, periodic reports to OPC

- Payment of disciplinary costs.

ABA Report Recommendation 27: The Court should eliminate resignation with discipline pending and should replace that option with Discipline by Consent (Rule 14-520). A lawyer who agrees to Discipline by Consent could consent to disbarment and withdraw from the practice of law, and the Utah Bar should record and treat the action as disbarment.

Committee Discussion: The ABA Report stated that Utah’s practice of allowing resignation with disciplinary action pending (Rule 14-521) 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. The Committee discussed that under current Utah rules, the attorney who resigns with discipline pending must apply for readmission in the same manner as a disbarred attorney. It appears that resignation with discipline pending is tantamount to disbarment. The Committee discussed that resignation pending disciplinary action is often more palatable to a lawyer than disbarment, and encourages settlement. OPC reported that terms and reasons for discipline vary between states and understanding reciprocal disciplinary action usually requires independent analysis by state bar associations, regardless of how the action is labeled. The Committee did not adopt this recommendation.

ABA Report Recommendation 28: Discipline by consent should be encouraged at all stages of the proceeding.

Motion: The Committee adopted a motion to accept ABA Report Recommendation 28.

ABA Report Recommendation 29: The Court should amend Rule 14-509 of the Rules of Lawyer Discipline and Disability to make a lawyer’s willful failure to comply with a subpoena validly issued by OPC or a Screening Panel, or knowing failure to respond to a lawful demand from OPC counsel, a separate ground for discipline.

Committee Discussion: Rule 8.1(b) requires an attorney to respond to OPC’s request for information during an investigation. However, respondents often do not respond until the date a matter is set for a hearing before a Screening Panel. Adding new grounds for discipline will give OPC greater enforcement tools.

Motion: The Committee adopted a motion to accept ABA Report Recommendation 29.

ABA Report Recommendation 30: The Court should consider amending Rule 14-1101 to provide that arbitration of fee disputes is optional for a client, but mandatory for lawyers.

Committee Discussion: The ABA Report stated that arbitration eliminates the advantage a lawyer has over the majority of clients who are of modest means. If a client requests fee arbitration, a lawyer should be required to arbitrate the fee dispute. Mandatory fee arbitration programs have been in effect in 2 states for over 25 years. The Committee discussed the USB’s voluntary fee

dispute program offered through its Fee Dispute Resolution Committee. Steve Johnson, who has served as an arbitrator for the USB's voluntary program, made a motion to accept the ABA Report recommendation 30. The Committee discussed only requiring arbitration if the amount in controversy was \$10,000 or less, and the client requested arbitration. The motion did not pass. Steve Johnson said for some reason the number of voluntary arbitrations has declined in the past few years. The Committee thought efforts should be made to increase awareness of the program.

MOTION: The Committee adopted a motion to increase public outreach for the voluntary fee dispute resolution program run by the USB.

ABA Report Recommendation 31: The Court should explore the adoption of a payee notification system that would notify a claimant when a check has been issued by an insurer.

Committee Discussion: The ABA Report stated that notifying a claimant when a check is issued either in the name of the claimant or jointly in the name of the claimant and the claimant's attorney will reduce the misconduct related to the handling of settlement funds. A notification rule usually requires legislation or action by the Insurance Department. The Committee did not adopt this recommendation for 2 reasons: the recommendation requires action by entities not under court jurisdiction; and notice alone would not keep an attorney from putting the money into a trust account and spending the money.