

Agenda

Utah Supreme Court Oversight Committee for the Office of Professional Conduct

March 20, 2019
4:00 to 5:30 p.m.

Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room
Administrative Office of the Courts, Suite N31

Welcome, introductions, and approval of minutes	Tab 1	Judge Diana Hagen, Chair
Update on OPC Operations		Billy Walker
Overview of Rules Impacted by Recommendations	Tab 2	Nancy Sylvester
Prioritization of ABA/OPC Committee Recommendations	Tab 3	Judge Diana Hagen
Public Education on Oversight Committee and ABA/OPC Committee Recommendations	Tab 4	Judge Diana Hagen
Scheduling for Future Meetings		Judge Diana Hagen

Committee webpage: <https://www.utcourts.gov/utc/opc/>

Tab 1

Minutes

Utah Supreme Court Oversight Committee for the Office of Conduct for Legal Professionals

February 5, 2019

9:00 to 10:30 a.m.

Attendance:

Judge Diana Hagen, Chair
Magistrate Judge Brooke Wells
Art Berger
Margaret Plane
Nancy Sylvester, Staff

I. Welcome and Introductions

The meeting commenced at 9:00 a.m. Chairwoman Judge Diana Hagen welcomed everyone to the meeting and had the members in attendance introduce themselves.

II. Overview of the ABA/OPC Committee Recommendations

Judge Hagen reviewed the ABA/OPC Committee recommendations with the oversight committee and the members discussed the recommendations relevant to the new committee.

III. Role of the Oversight Committee and Proposed Rule

Judge Hagen and Nancy Sylvester reviewed proposed Rule 11-501 and discussed the role of the Oversight Committee. Proposed Rule 11-501 was modeled off of CJA Rule 11-401 and also contained language from the ABA/OPC Committee's list of recommendations. The committee made language edits and discussed how the committee membership section should read. The committee considered and approved Ms. Sylvester's recommendation to create a new Chapter 11, Article 5 in the Code of Judicial Administration regarding the work of the committee and OPC's charge. The committee's recommendations will go to the Supreme Court for approval.

IV. Public Member Nominations

Judge Hagen discussed the nomination of the final committee member: a public member. She noted that the Supreme Court has a recommendation in mind already for an accountant. Once Rule 11-501 was adopted, Judge Hagen would extend an invitation to the new public member.

V. Meeting Schedule

The next meeting will be on March 20, 2019 at 4 p.m. in the Judicial Council Room of the Matheson Courthouse.

VI. Adjournment

The meeting adjourned at 10:00 a.m.

Tab 2

Rules	To update
<u>Rule 14-402. Definitions.</u>	paragraph (x): update that OPC is under Sup Ct
<u>Rule 14-404. Active status lawyers: MCLE, NLCLE and admission on motion requirements.</u>	Refers to OPC ethics school. May be okay.
<u>Rule 14-712. Qualifications for admission based on UBE</u>	Refers to OPC ethics school. May be okay.
<u>Rule 14-718. Licensing of Foreign Legal Consultants.</u>	Refers to OPC ethics school. May be okay.
<u>Article 5. Lawyer Discipline and Disability</u>	
<u>Rule 14-501. Purpose, authority, scope and structure of lawyer disciplinary and disability proceedings.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-502. Definitions.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-503. Ethics and Discipline Committee.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-504. OPC counsel.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-505. Expenses.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-506. Jurisdiction.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-507. Roster of lawyers and current record information.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-508. Periodic assessment of lawyers.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-509. Grounds for discipline.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-510. Prosecution and appeals.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-511. Proceedings subsequent to finding of probable cause.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-512. Sanctions.</u>	Bring this over to Article 5; update terminology
<u>Rule 14-513. Immunity from civil suits.</u>	Bring this over to Article 5; update terminology

Rule 14-514. Service.	Bring this over to Article 5; update terminology
Rule 14-515. Access to disciplinary information.	Bring this over to Article 5; update terminology
Rule 14-516. Dissemination of disciplinary information.	Bring this over to Article 5; update terminology
Rule 14-517. Additional rules of procedure.	Bring this over to Article 5; update terminology
Rule 14-518. Interim suspension for threat of harm.	Bring this over to Article 5; update terminology
Rule 14-519. Lawyers convicted of a crime.	Bring this over to Article 5; update terminology
Rule 14-520. Discipline by consent.	Bring this over to Article 5; update terminology
Rule 14-521. Resignation with discipline pending.	Bring this over to Article 5; update terminology
Rule 14-522. Reciprocal discipline.	Bring this over to Article 5; update terminology
Rule 14-523. Proceedings in which lawyer is declared to be incompetent or alleged to be incapacitated.	Bring this over to Article 5; update terminology
Rule 14-524. Reinstatement following a suspension of six months or less.	Bring this over to Article 5; update terminology
Rule 14-525. Reinstatement following a suspension of more than six months; readmission.	Bring this over to Article 5; update terminology
Rule 14-526. Notice of disability or suspension; return of clients' property; refund of unearned fees.	Bring this over to Article 5; update terminology
Rule 14-527. Appointment of trustee to protect clients' interest when lawyer disappears, dies, is suspended or disbarred, or is transferred to disability status.	Bring this over to Article 5; update terminology
Rule 14-528. Appeal by complainant.	Bring this over to Article 5; update terminology
Rule 14-529. Statute of limitations.	Bring this over to Article 5; update terminology
Rule 14-530. Costs.	Bring this over to Article 5; update terminology
Rule 14-531. Noncompliance with child support order, child visitation order, subpoena or order relating to paternity or child support proceeding.	Bring this over to Article 5; update terminology

Rule 14-532. Failure to answer charges.	Bring this over to Article 5; update terminology
Rule 14-533. Diversion.	Bring this over to Article 5; update terminology
Article 6. Standards for Imposing Lawyer Sanctions	
Rule 14-601. Definitions.	Bring this over to Article 5; update terminology
Rule 14-602. Purpose and nature of sanctions.	Bring this over to Article 5; update terminology
Rule 14-603. Sanctions.	Bring this over to Article 5; update terminology
Rule 14-604. Factors to be considered in imposing sanctions.	Bring this over to Article 5; update terminology
Rule 14-605. Imposition of sanctions.	Bring this over to Article 5; update terminology
Rule 14-606. Prior discipline orders.	Bring this over to Article 5; update terminology
Rule 14-607. Aggravation and mitigation.	Bring this over to Article 5; update terminology
Article 5. Licensed Paralegal Practitioner Discipline and Disability	
Rule 15-501. Purpose, authority, scope and structure of licensed paralegal practitioner disciplinary and disability proceedings.	Bring this over to Article 5; update terminology
Rule 15-502. Definitions.	Bring this over to Article 5; update terminology
Rule 15-503. Ethics and discipline committee.	Bring this over to Article 5; update terminology
Rule 15-504. OPC counsel.	Bring this over to Article 5; update terminology
Rule 15-505. Reserved.	Bring this over to Article 5; update terminology
Rule 15-506. Jurisdiction.	Bring this over to Article 5; update terminology
Rule 15-507. Reserved.	Bring this over to Article 5; update terminology
Rule 15-508. Periodic assessment of licensed paralegal practitioners.	Bring this over to Article 5; update terminology

Rule 15-509. Grounds for discipline.	Bring this over to Article 5; update terminology
Rule 15-510. Prosecution and appeals.	Bring this over to Article 5; update terminology
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Rule 15-516. Dissemination of disciplinary information.	Bring this over to Article 5; update terminology
Rule 15-517. Additional rules of procedure.	Bring this over to Article 5; update terminology
Rule 15-518. Interim suspension for threat of harm.	Bring this over to Article 5; update terminology
Rule 15-519. Licensed paralegal practitioners convicted of a crime.	Bring this over to Article 5; update terminology
Rule 15-520. Discipline by consent.	Bring this over to Article 5; update terminology
Rule 15-521. Reserved.	Bring this over to Article 5; update terminology
Rule 15-522. Reciprocal discipline.	Bring this over to Article 5; update terminology
Rule 15-523. Proceedings in which licensed paralegal practitioner is declared to be incompetent or alleged to be incapacitated.	Bring this over to Article 5; update terminology
Rule 15-524. Reinstatement following a suspension of six months or less.	Bring this over to Article 5; update terminology
Rule 15-525. Reinstatement following a suspension of more than six months; relicensure.	Bring this over to Article 5; update terminology
Rule 15-526. Notice of disability or suspension; return of clients' property; refund of unearned fees.	Bring this over to Article 5; update terminology

<u>Rule 15-527. Appointment of trustee to protect clients' interest when a licensed paralegal practitioner disappears, dies, is suspended or delicensed, or is transferred to disability status.</u>	Bring this over to Article 5; update terminology
<u>Rule 15-528. Appeal by complainant.</u>	Bring this over to Article 5; update terminology
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<u>Rule 15-603. Sanctions.</u>	Bring this over to Article 5; update terminology
<u>Rule 15-604. Factors to be considered in imposing sanctions.</u>	Bring this over to Article 5; update terminology
<u>Rule 15-605. Imposition of sanctions.</u>	Bring this over to Article 5; update terminology
<u>Rule 15-606. Prior discipline orders.</u>	Bring this over to Article 5; update terminology
<u>Rule 15-607. Aggravation and mitigation.</u>	Bring this over to Article 5; update terminology
Article 8. Special Practice Rules	
<u>Rule 14-801. Definitions.</u>	paragraph (j): update that OPC is under Sup Ct

Tab 3

ABA/OPC COMMITTEE

SUMMARY OF RECOMMENDATIONS

Office of Legal Professional Conduct

Governance, Public Trust and Confidence

The Office of Professional Conduct's name should be changed to the Office of Legal Professional Conduct (OLPC). The new name better describes the function of the office and is broad enough to include the new Licensed Paralegal Practitioner.

It is important for the public to understand that the OLPC is not a part of the Utah State Bar (USB), and that the OLPC is part of the Supreme Court's regulation of the practice of law. The OLPC and the USB should take steps to help the public understand that OLPC operates independently from the USB.

OLPC should create a website that is separate from the USB website, and the website should:

- Include information about all components of the disciplinary process
- Provide links to rules and uniform downloadable forms, including a complaint form in multiple languages
- Remove warning language to a complainant that is currently included on the website, that is inconsistent with OLPC practice, and might discourage complaints
- Include the names of attorneys who have received a public disciplinary action within the past 10 years, and the status of the disciplinary actions

In order to increase public confidence in the disciplinary process, OLPC should contact civic organizations, organizations that serve underrepresented populations in the state, and specialty bar associations, and offer to provide talks and information about the lawyer discipline process.

The governance of OLPC should be more transparent to the public and attorneys. An OLPC 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 the Bar, as an ex-officio non-voting member. The oversight committee, independent of the USB, should be authorized to:

- Assist OLPC and the USB with implementing the recommendations adopted by the Supreme Court
- Develop realistic performance metrics and conduct annual performance evaluations for OLPC Senior Counsel

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

The oversight committee should not have authority to interfere with the prosecutorial independence of the OLPC, but should have access to confidential information as necessary to carry-out its duties.

OLPC Staff

The Supreme Court should appoint the OLPC Senior Counsel.

OLPC staff titles should be changed as follows – Chief Disciplinary Counsel, Deputy Chief Disciplinary Counsel, and Assistant Disciplinary Counsel.

OLPC should be provided with funding to hire an investigator as part of the OLPC staff and to hire forensic experts as needed.

OLPC should create a policy and budget that requires more standardized training for staff, including training on substantive law, use of technology, behavioral health, and effective investigation techniques.

OLPC Budget

The USB should continue to fund the OLPC budget without creating a separate, direct assessment to fund the disciplinary process.

The USB should adopt the budget created by the Oversight Committee unless the USB petitions the Supreme Court for a different budget for the OLPC, and the Supreme Court approves a different budget for the OLPC, in which case, the USB should adopt the budget approved by the Supreme Court.

OLPC Senior Counsel should evaluate the OLPC technology needs and take steps to update current equipment and software, and acquire needed IT staff.

OLPC should create a budget to assist the Ethics and Discipline Committee with implementing enhanced training for Ethics and Discipline Committee Screening Panel volunteers.

OLPC Records

OLPC should continue the current practice of providing information about disciplinary actions by phone, or other means, for actions more than 10 years old. OLPC should publish on its website, the names of attorneys who have been publicly disciplined in the last 10 years. The USB should continue to publish attorney licensure status on the USB website.

OLPC should 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. OLPC should 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.

A Rule of Lawyer Discipline and Disability should be adopted to formalize the current record retention practices for OLPC and OLPC should find a more secure location in the Law and Justice Center to store discipline records.

Complaint Intake Process – Office of Legal Professional Conduct

The complaint process should be more accessible to the public. OLPC should modify its intake process as follows:

- OLPC 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”

OLPC should continue to conduct an informal screening /investigation stage of a complaint before deciding to refer a complaint to the screening panel, but OPC should discontinue using confusing terminology related to a complaint, such as “Requests for Assistance”, “informal complaints”, and “Notice of Informal Complaints” (NOIC). Rules that include the confusing terminology should be amended.

OLPC should have the authority to compel an attorney to provide information to OLPC during an initial investigation of a complaint. The Rules of Lawyer Discipline and Disability should give OLPC 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.

Final

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 OLPC or a Screening Panel, or knowing failure to respond to a lawful demand from OPC counsel, a separate ground for discipline

If OLPC dismisses a complaint, OLPC should continue its current practice of providing notice to the complainant of the decision to dismiss the complaint and notice of a complainant's right to appeal an OLPC decision to the Chair of the Ethics and Discipline Committee.

Discipline by consent should be encouraged at all stages of the proceeding.

The Court should amend the rules to allow OLPC to initiate reciprocal disability inactive status proceedings when another jurisdiction has made a determination of disability.

Ethics and Discipline Committee Screening Panels

Role of Screening Panels

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 supports the role of the Screening Panels in the attorney discipline process and does not support the ABA Report's suggestions to diminish the function of the Screening Panels.

Membership and Training

The number of screening panel members who sit for a hearing varies between Screening Panels. The Screening Panel hearings should be standardized. The Screening Panel members required for a hearing should be reduced from 8 members to 5 members, with one of the 5 being a public member. All Screening Panel hearings should require 5 panel members unless all parties agree to fewer than 5 panel members.

The Supreme Court and the Chair of the Ethics and Discipline Committee have done a good job of increasing diversity of members related to gender, race, ethnicity, geography, and firm size. They should continue their efforts to increase diversity of the members on Screening Panels. The volunteer solicitation process should include communication with community groups and bar associations that represent minority or underrepresented populations. The applications, the application process, and volunteer opportunities should be prominently displayed on the Court website, the USB website, and the OLPC website.

Final

Terms for members of the Ethics and Discipline Committee should be limited to 3 years with a maximum of 2 consecutive terms, unless a member is appointed chair or vice chair of a screening panel, in which case, the member may serve more than 2 terms.

The Chair of the Ethics and Discipline Committee and OLPC Senior Counsel should implement enhanced training for Screening Panel volunteers.

Process

Rule 14-515 should be amended to apply the confidentiality restrictions for disciplinary proceedings only to non-party participants unless the Screening Panel Chair issues an order of confidentiality for the parties based on a showing of good cause. If the Screening Panel Chair issues an order of confidentiality for the parties, the rule should establish enforcement mechanisms for the order of confidentiality through a petition filed with the District Court, under seal.

The Court should adopt a disqualification and abstention rule applicable to Screening Panel members who serve on a particular case. Screening Panel members and OLPC staff should be barred from representing a lawyer in a discipline case for one year after service on a panel or committee.

The Ethics and Discipline Committee Chair should continue to review the Screening Panel's findings and recommendations for complaints that are resolved without a recommendation to file an action in the District Court. The Ethics and Discipline Committee Chair should not make changes to Screening Panel findings and recommendations, other than changes needed for clarity, and should prepare the order to execute the Screening Panel's findings and recommendations.

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 the right to appeal the ruling on the exception; or elect a trial de novo with the District Court.

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

Diversion Programs

The Court should streamline the diversion process and OLPC should enhance the use of diversion.

The Diversion Committee should be eliminated and OLPC should be responsible for overseeing and operating the diversion programs, including, negotiating the diversion contract with the attorney tailored to the specific case, and designating a monitor for compliance who will be responsible to report to OLPC.

The OLPC should establish diversion programs that educate lawyers on practice management and trust account management.

The USB should increase the public awareness of the USB's voluntary fee dispute program to increase its use among attorneys and clients.

Probation and Interim Suspensions

The Supreme Court Advisory Committee on Rules of Professional Conduct should consider amending rules to better address potential harm to the public and profession that may occur while an attorney discipline case is being litigated.

Utah Rule of Professional Practice 14-603 Sanctions, and 14-504 OPC Counsel, should 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
- 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 OLPC
 - Payment of disciplinary costs

Utah Rule of Professional Practice 14-518 Interim Suspension for Threat of Harm, should be amended to:

- Permit an interim suspension based on serious harm to the public
- Use a preponderance of the evidence standard
- Use the same procedure to obtain the interim suspension as the procedure for a temporary restraining order under URCP 65A
- Permit OLPC to request and the Court to impose other types of interim orders to protect the public, such as supervision or limited practice while a case is pending

Utah Rule of Professional Practice 14-519 Lawyers Convicted of A Crime, should be amended to:

- Permit interim suspension after a finding or admission of guilt (as opposed to a conviction of guilt), including a plea in abeyance

- 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

Complaints Filed in District Court

The ABA Report recommended that the Court undertake a study regarding the feasibility of retaining District Courts as the adjudicators in discipline cases. The report suggested that the Court consider using lawyer and non-lawyer adjudicators for disciplinary matters which would submit findings and recommendations to the Court for entry of a final order. The committee believed that the trier of fact should continue to be the District Court.

The Utah Rules of Civil Procedure Advisory Committee should adopt rules to apply to attorney discipline cases filed in District Court to require active case management for attorney discipline cases, including:

- Requiring a Rule 16 scheduling conference at the beginning of attorney discipline cases, 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

The District Courts should make it a priority to train judges about the attorney disciplinary process. The training could be included at judicial conferences, at new judge orientation, and in bench books.

Utah Rule of Professional Practice 14-511(f) should be amended 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 filed in District Court should follow the time requirements that are applied to all cases in District Court under the Rules of Civil Procedure, except as modified by an active case management program.

Tab 4

Posted: March 5, 2019

Utah Courts**Rule Establishing Oversight Committee for the Office of Professional Conduct – Comment Period Closes April 19, 2019**

CJA11-0501. Oversight Committee for the Office of Professional Conduct. New. Establishes a Supreme Court oversight committee for the Office of Professional Conduct (OPC). Includes membership, committee member terms, meeting schedule, and committee purposes and responsibilities.

EDIT PAGE

This entry was posted in **CJA11-0501**.

Code of Judicial Administration – Comment Period Closes March 15, 2019 »

UTAH COURTS

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3 thoughts on “Rule Establishing Oversight Committee for the Office of Professional Conduct – Comment Period Closes April 19, 2019”

Laura Gray
March 5, 2019 at 9:45 pm Edit

I am not sure I understand why we need this....

Reply

Amy Pomeroy

March 5, 2019 at 10:40 pm Edit

Purportedly, the Utah State Bar exists to protect the public and improve the quality of the practice of law. Really, like all regulatory agencies, the Bar exists to grow the power and reach of the Bar. This is but the latest example of the expansion of the Bar's reach. It is constantly adding more requirements to practice law and adding more bureaucratic oversight without providing any additional material benefits to the legal community or the public. It would be nice to see a proposal once in a while peeling back senseless regulations instead of increasing them.

Reply

J. Bogart

March 7, 2019 at 9:22 am Edit

The Rule is a result of the ABA audit of the Utah disciplinary system. That report can be found here:

https://www.utcourts.gov/resources/reports/docs/ABA-OPC_Report.pdf

The minutes of the first meeting of the Supervisory Committee can be found here:

<https://www.utcourts.gov/utc/oclp/wp-content/uploads/sites/41/2019/02/OCLP-Agenda-20190205.pdf>

Apparently there was a committee, with monthly meetings since 2017, which considered the ABA report. Its recommendations include those embodied in the proposed Rule. I have not located any minutes or documents from that committee.

Reply