



## Utah Supreme Court's Oversight Committee for the Office of Professional Conduct

### Meeting Minutes

June 20, 2023

Meeting held through WebEx and in person

Matheson Courthouse

Judicial Council Room

450 S. State St.

Salt Lake City, UT 84111

4:00–6:00 p.m.

*Arthur B. Berger, presiding*

#### **Attendees:**

Arthur Berger, Chair

Judge Laura Scott

Roger Smith

Magistrate Judge Brooke Wells

Margaret Plane

Elizabeth Wright, Ex-officio member

#### **Guests:**

Billy Walker, Office of Professional Conduct

Christine Greenwood, Ethics and Discipline Committee

Lauren Stout, Utah State Bar

Sharadee Fleming, Office of Professional Conduct

Todd Wahlquist

John Bogart

#### **Staff:**

Nick Stiles, Appellate Court Administrator

Amber Griffith, Recording Secretary

### **1. Welcome and approval of the October 17, 2022 minutes:** (Arthur Berger)

Arthur Berger welcomed everyone to the meeting and in accordance with the rule governing this Committee each committee member introduced themselves and disclosed the general nature of their legal or other practice.

Mr. Berger then asked for approval of the minutes. Judge Scott noted one typo that needed to be corrected.

*With that correction made Judge Scott moved to approve the minutes from October 17, 2022. Roger Smith seconded the motion, and the minutes were unanimously approved.*

## **2. Action—OPC Annual Report: (Billy Walker)**

Billy Walker provided an in-depth overview of the Office of Professional Conduct's Annual Report. Following that overview Mr. Berger opened the floor to questions or comments.

- Judge Scott asked Mr. Walker if the OPC tracks the length of time it takes from a screening panel decision to the filing of the complaint in the District Court. Mr. Walker informed the Committee that they can track that, but do not do so at this time, adding that they have an internal policy goal of three months.
- Mr. Berger thanked Mr. Walker for the report and acknowledged that the report provided very good information. Mr. Berger Applauded the OPC for the ongoing ethics school and added that the topics covered are guided by the types of complaints the OPC receives the most. Mr. Berger then noted the performance metrics and agreed that they seem realistic in terms of measuring time and progress.
- Judge Scott questioned the reduction in the number of cases. Mr. Walker explained that this may be due to a rule change that went into effect December 15, 2020 as a result of the ABA review.

## **3. Action—OPC Budget: (Lauren Stout)**

Lauren Stout presented the proposed budget for the OPC and provided a brief explanation of the process the Utah State Bar uses to develop their proposed budget. Ms. Stout noted that there is an overall 8% increase in the OPC's budget from the current budget year ending June 30, 2023, then proceeded to go through the numbers to explain where those increases will be occurring.

- Mr. Berger asked why there was a significant increase for computer maintenance from the year 2021 to 2022. Ms. Stout explained that previously they had been putting computer maintenance contracts in the outside consultant area of their budget, but in 2022 decided to move those numbers to computer maintenance; so, when looking at the budget between the years of 2021 and 2022 there shows an increase in computer maintenance but also a decrease in outside consultants.

Ms. Stout continued with the presentation, explaining that the next step to completing the proposed budget is to speak to Mr. Walker and see if there are any additional expenses that need to be considered. One additional need Mr. Walker would like is an individual OPC IT consultant. Ms. Stout included this need in the outside consultant's part of the budget.

Of the \$123,000 budget increase, \$86,000 will be for salary increases due to cost of living adjustments, \$30,000 for the IT consultant, the rest are smaller percentages throughout the entire budget.

- Roger Smith asked if the number of staff will remain the same. Ms. Stout confirmed that the number of staff is the same and has not changed for 4 to 5 years.
- Mr. Smith then questioned what the IT consulting was needed for. Mr. Walker explained that currently the OPC Office receives IT help through the Bar's IT department but believes that more help is needed, if not on a daily basis, than on a weekly basis. Additionally, while the OPC budgets for a case management maintenance company, occasionally there are issues that need more attention.

Ms. Stout then proceeded to the footnotes listed on the budget which will not be included in this income statement projection. These items are larger purchases that are spread out through multiple income source years. Ms. Stout provided an example of buying a copier, if that copier should last 5 years, then the cost of the purchase is spread throughout the 5 years it is projected to last through.

Another item that is not included in the income statement list is a \$50,000 cash reserve that has been earmarked for the purchase of a new database for the OPC. The current database is no longer supported by the original company that made it. Mr. Walker currently has an individual who has been helping to support the database, but that may not always be an option. Mr. Walker added that the plan is to have the current individual that is completing the maintenance on the database begin working to configure a new database for Utah and a few other states. They hope to roll out a beta test for this new database in either July or August.

*Roger Smith moved to approve the proposed budget, Judge Wells seconded the motion, and it was unanimously approved.*

#### **4. Discussion and Action—Public Input and OPC Complaint: (Arthur Berger)**

Mr. Berger summarized the letter that Todd Wahlquist submitted to the Committee regarding discipline by consent and asked for OPCs input.

- Billy Walker provided that OPC does not believe that discipline by consent should exist at the District Court level and that it is a forced settlement. Mr. Walker could not think of a case where somebody had suggested discipline by consent, and they were successful at the District Court. Mr. Walker noted that a reason for this may be how the rule is set up, there would need to be some aspect of public discipline as part of the discipline by consent, and usually the party asks for some level of private discipline. OPC's viewpoint is that discipline by consent should be changed by eliminating it from the District Court level.
- Mr. Wahlquist responded by pointing out the ABA review of the disciplinary process in Utah, the ABA recognized that discipline by consent was under-utilized in Utah and noted that the respondent almost always had to initiate the process to get cases resolved. Mr. Wahlquist added that the Supreme Court created a committee to adopt these recommendations and one of those recommendations was that discipline by consent should be used more frequently.
- Mr. Wahlquist disagrees that discipline by consent is treated more as a settlement. Mr. Wahlquist suggests that there should be an option to go to an

adjudicator instead of a prosecutor, to provide them with the facts of what rule was violated and the appropriate discipline per the rule. Then the adjudicator could review and either agree or disagree.

- Mr. Wahlquist then questioned why the rules that apply to attorney discipline are treated differently than other court rules, e.g., the Rules of Professional Conduct where there are deadlines built into the rules. Mr. Wahlquist's understanding is that attorney discipline cases go to the OPC first and then they file the case on their own timeline.
- Christine Greenwood agrees that having some deadlines at the disciplinary committee level is not a bad idea. Ms. Greenwood asked Mr. Walker if cases could still be settled at the District Court level in a discipline by consent case or if the problem is that cases can only be resolved if the OPC agrees.
- Mr. Walker confirmed that was correct and explained that the case is heard de-novo at the District Court level and the OPC is entitled to put on their case. Many times, they have other evidence that can be put forth to show that there should be a different level of discipline. Mr. Walker believes the rule reads so things proceed through the OPC rather than directly to the District Court because it is more of a mandatory arbitration and not an adjudicator. However, Mr. Walker is alright if some amendments were made at the Ethics and Discipline Committee level. Ms. Greenwood voiced concerns that if a proposal was submitted to the District Court Judge, then it would end up being a mini trial before the trial.
- Judge Scott added that judges stay away from the party's settlement negotiations as they will be the fact finder both on whether misconduct occurred and to decide the appropriate sanction after hearing the evidence.
- Judge Scott questioned if a motion for summary judgment would work better? Mr. Wahlquist agreed that you could look at the existing rule as a motion for summary judgment in the context of attorney discipline. However, if you eliminate this rule and just go with summary judgments then we do have to consider if they are conditional admissions. Mr. Wahlquist believes that would cause another set of problems, because clients may not be willing to set these admissions out there if they can't be retracted in the context of a separate rule that allows for that.

*Following this discussion, the Committee decided to table further discussion until the Ethics and Discipline chair can complete their proposed amendments. Ms. Greenwood also voiced that she would like to study what other jurisdictions have done regarding discipline by consent.*

Mr. Berger moved onto John Bogart's item of the length of time cases remain pending in the District Court. Mr. Berger also inquired if this was something that the OPC tracked.

- Mr. Walker confirmed that the OPC does not track this metric, and this was a topic discussed at the ABA review committee meeting. They considered the idea of having a pilot program for OPC cases to be on a type of rocket docket. They also considered having a specialized judge for attorney discipline cases to help

speed up the process. Mr. Walker explained that there are a matter of items that they do not have control of, for example: how long it takes a respondent to respond to the OPC, contacting witnesses, and any continuances that are filed. At the District Court level, it is even more out of the OPC's control as they are bound by the case dockets and the judge's calendars. Mr. Walker emphasized that the OPC rarely asks for continuances and does try to move things along as quickly as possible.

- Mr. Bogart explained that the reason for the letter was not to criticize the OPC, the idea came from a former firm Mr. Bogart worked for that internally tracked timelines for cases, particularly when cases seemed to be going on too long. The aim was to try and get a handle on why that happened and if there was something that could be learned from that. Mr. Bogart agreed that some things are out of the OPC's control, but if there was a way to track the cases, and a case went on for longer than 3 years, the OPC could investigate and see if there was something they could change in the future to shorten the timeline.
- Judge Scott stated that it would be helpful to know the time it takes between the screening panel's decision and the filing of the complaint, adding that this could help identify if there is any delay in getting the cases filed. Judge Scott also believed the court could provide some information about times to disposition to see if there is anything internally that could be done. Margaret Plane added that if all it would take is to run a report then it could be attached to the OPC's annual report as an internal reference.

*Nick Stiles offered to look into this report and will present it to the Committee at the next meeting.*

Mr. Berger then briefly explained Mr. Bogart's next point, which raised a question regarding complaints for malfeasance against a lawyer at the OPC and whether the Chief Disciplinary Council should be involved.

- Mr. Walker pointed out that malfeasance complaints are when staff have violated the law not ethics complaints. Ethics complaints are not considered by the Chief Disciplinary Council and Mr. Walker believes there is a big difference between malfeasance and ethics complaints. Mr. Bogart thanked Mr. Walker for that explanation and confirmed that cleared up the question that was raised.

The last item received was a complaint from Chris Wangsgard who provided to the Committee a complaint he filed against Utah Attorney General, Sean Reyes. Mr. Wangsgard questioned the timeliness and responsiveness of OPC related to his complaint.

- Judge Scott asked if there is something in the rules that specifically addresses what we do to avoid a proliferation of complaining parties when there is already an ongoing case or investigation, and if it would be helpful to add something in the rule that addresses when this type of situation occurs. Mr. Walker wasn't sure what language could be added that would pertain to every case.

*Judge Wells clarified if Mr. Walker was suggesting that it would be difficult to come up with appropriate language and if the rule was alright as it is. Mr. Walker agreed.*

**5. Discussion—Old/new business:** (Arthur Berger)

Mr. Walker informed the Committee that the Supreme Court suggested that Ms. Greenwood and Mr. Walker speak to the Committee about dismissals, Ms. Greenwood verified that this was relayed to Mr. Berger, and just wasn't ready to be discussed at the current meeting.

*The meeting was adjourned.*