



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

Approved Meeting Minutes

November 15, 2023

Meeting held through Webex and in person

Matheson Courthouse

Judicial Council Room

450 S. State St.

Salt Lake City, UT 84111

4:00–5:30 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

Metra Barton, Office of Professional Conduct

Sharadee Fleming, Office of Professional Conduct

Todd Wahlquist

Staff:

Nick Stiles, Appellate Court Administrator

Amber Griffith, Recording Secretary

1. Welcome and approval of the June 20, 2023 minutes: (Arthur Berger)

Arthur Berger welcomed everyone to the meeting and asked for approval of the minutes.

Judge Wells moved to approve the minutes from June 20, 2023. Judge Scott seconded that motion, and the minutes were unanimously approved.

2. Action—Time to Disposition of Formal Complaints: (Arthur Berger)

Arthur Berger presented the data spreadsheet to the Committee and provided a brief analysis of the data. Mr. Berger noted that of the cases reported on the spreadsheet 38% of them were disposed of within 6 months, 18% took more than a year to disposition, and the rest of the cases are in the middle. Mr. Berger expressed the belief that most cases are disposed of in a relatively reasonable timeframe, then opened the floor for additional feedback from Committee members.

- Judge Wells asked Billy Walker if there was a general explanation for the cases that have been pending for more than a year. Mr. Walker explained that without researching the cases he would not be able to provide an explanation. Mr. Walker did note that the OPC rarely files motions, and many of the delays are due to motions being filed by the other party.

3. Action—Proposed Modifications Concerning Discipline by Consent:

(Christine Greenwood, Billy Walker, Arthur Berger)

Christine Greenwood presented the proposed amendments to UCJA Rule 11-565 and 11-539 concerning discipline by consent. Ms. Greenwood explained that removing discipline by consent from the trial court level was a suggestion made by Mr. Walker, and after looking into the matter further Ms. Greenwood agreed that the procedure was unnecessary at that level. Ms. Greenwood noted that it appears that Rule 11-539 (discipline by consent) was intended to be more like Rule 68, which is not used very often at the State Court level in Utah. Ms. Greenwood also noted that after an action has been filed the respondent and OPC can negotiate at any time to resolve the case.

Mr. Walker provided additional information to the proposed amendment, explaining that OPC used to complete stipulations all the time, independent of discipline by consent. They began using discipline by consent for these stipulations, but it was only because of convenience not because of necessity. Mr. Walker also noted that no party has ever prevailed when filing a discipline by consent at the trial court level. Mr. Walker believes these do not prevail because typically there are disputed facts, and the district court judge does not want to intervene in the proceeding when those facts are being disputed. Mr. Walker also advised the Committee that they completed research on 51 jurisdictions and only Georgia had a mechanism similar to Utah's discipline by consent. Other jurisdictions have discipline by consent, but they interpret consent as consent on both sides, so the result is more of a stipulation.

- Following these explanations Ms. Greenwood noted an edit that needed to be made on line 28, the reference to paragraph (f) should be (d). Mr. Berger also noted a small edit to line 15.
- Mr. Berger asked if guest, Todd Wahlquist, had any thoughts on the proposed amendments. Mr. Wahlquist thanked the Committee for their review of this procedure and while not completely agreeing with everything that has been said, believes that this draft addresses his primary concern with time limits.
- Judge Scott questioned if once the case goes formal is there something that informs the respondent that they can still use Rule 68. Ms. Greenwood responded that there isn't currently anything in the proposal notifying the respondent of this

information. Mr. Walker added that they have had cases that have settled on the eve of the trial or even in the middle of the trial, when this occurs, they use Rule 68 and bring the case before the judge to notify them that they have reached a settlement. Mr. Walker also noted that their cases proceed under the Rules of Civil Procedure like any other civil case and is concerned that adding additional processes or procedures may make the cases seem more unique than a regular civil case.

Following these discussions Judge Wells moved to approve the proposed amendments to Rules 11-539 and 11-565. Roger Smith seconded that motion and it unanimously passed.

4. Discussion and Action—Proposed Modifications Concerning Appeals from OPC Dismissals: (Christine Greenwood, Billy Walker, Arthur Berger)

Ms. Greenwood introduced the proposal and emphasized that the number of appeals from dismissals continue to increase each year, these appeals are filed by a complainant in response to OPC dismissing a case. In addition, there is a large backlog of these cases and they receive numerous calls for updates. Ms. Greenwood expressed the belief that the increase is due to a change in the ABA Review completed in 2017. Prior to this review OPC did not view received material as a complaint unless it was notarized and if these were subsequently dismissed there was no right to an appeal. After the ABA Review everything that is received is deemed a complaint, which provides the complainant with the right to an appeal if the complaint is dismissed.

- Billy Walker disagreed advising the Committee that prior to the ABA Review they did not dismiss complaints because they were not notarized, they were referred to CAP and many came back to the OPC notarized or on an official complaint form. Mr. Walker then provided the number of complaints received and the number of appeals resulting from dismissals, noting that since 2017 the number of complaints has increased, but the percentage of appeals from these complaints has not.
- Mr. Walker disagreed with eliminating a complainant's right to an appeal. Of the proposals presented Mr. Walker believes the solution that makes the most sense is to modify the standard of review to an arbitrary and capricious standard.
- Margaret Plane agreed that we should not eliminate the right to appeal, and agreed changing the standard of review may be the best approach.
- Ms. Greenwood confirmed that changing the standard of review was the approach that Mr. Walker and Ms. Greenwood agreed on, but asked if we could also require the complainant to carry the burden of proof and be responsible to show that the dismissal was arbitrary and capricious. Mr. Walker agreed that the weight needs to be higher on the complainant in the appeal.

Following this discussion Art Berger asked if Ms. Greenwood would draft a proposal for consideration at the next meeting. Judge Scott suggested having the complaining party specify what their basis is for the appeal and stated that there may be helpful language in Rule 108 of the Rules of Civil Procedure.

5. Action—Proposed General Rule Revisions: (Christine Greenwood)

The Committee reviewed each proposal submitted by Ms. Greenwood allowing for comments or edits to be made. The Committee made small edits to the proposals for Rules 11-502, 11-510, 11-511, 11-530

- Mr. Walker disagreed with a proposed amendment to UCJA Rule 11-530, paragraph (g)(2)(C), which would allow the Committee chair or vice chair to refer a matter to the Professionalism and Civility Counseling Board in lieu of affirming or reversing the dismissal. Mr. Walker explained that when the OPC refers a matter to the Board they do so because they believe there is not evidence that the Rules of Professional Conduct was violated, but there may be evidence that the standards of professional and civility were violated. Ms. Greenwood thanked Mr. Walker for that explanation and that proposed amendment was removed.

Due to time constraints the Committee tabled the proposed amendments to UCJA Rules 11-531, 11-532, 11-534, 11-550, 11-552, 11-554, 11-560, 11-561, 11-563, 11-580, and 11-581 until the next meeting.

6. Discussion—Old/new Business: (Arthur Berger)

Mr. Berger asked the Committee for their thoughts on what the Committee should do when public input is received, should we notify the individual that their input will be discussed at the next committee meeting? If the individual does not attend, should we reach back out to the individual to inform them what was discussed?

- Judge Wells stated that providing the individual with notice should be sufficient. Judge Scott agreed and noted that our minutes should reflect what was discussed and this is posted to the Court's website.
- Nick Stiles noted that UCJA Rule 11-503 states that unless the appropriate action taken on a complaint is part of a formal proceeding, any action taken is confidential.

The meeting was then adjourned.