

Agenda

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

Arthur B. Berger, Chair

Location:	Meeting held through Webex and in person at: Matheson Courthouse, Judicial Council Room – Room N. 301 450 S. State St. Salt Lake City, Utah 84111 https://utcourts.webex.com/utcourts/j.php?MTID=m34194b39979917cd2d10c08d5520d6be
Date:	November 15, 2023
Time:	4:00 to 5:30 p.m.

Action: Welcome and approval of June 20, 2023 Minutes	Tab 1	Art Berger, Chair
Action: Time to disposition of formal complaints	Tab 2	Art Berger
Action: Proposed modifications concerning discipline by consent	Tab 3	Christine Greenwood, Billy Walker, Art Berger
Action: Proposed modifications concerning appeals from OPC dismissals	Tab 4	Christine Greenwood, Billy Walker, Art Berger
Action: Proposed general rule revisions	Tab 5	Christine Greenwood
Discussion: Old/new business		Art Berger, Chair

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

Tab 1



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

[Draft] 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.

Tab 2

Case Number	Location Code	Filing Date	Disposition Date	Total Motions	Time to Disposition
190400898	2550	Jun 4, 2019	Apr 1, 2022	4	1032
190401350	2550	Aug 21, 2019	Sep 24, 2019	7	34
190700888	0609	Sep 9, 2019	Jan 27, 2020	1	140
190904624	1868	Jun 12, 2019	May 20, 2021	2	708
190905222	1868	Jul 1, 2019	Sep 30, 2019	1	91
190906785	1868	Aug 28, 2019	Mar 9, 2022	43	192
190907098	1868	Sep 11, 2019	Jun 23, 2020	2	286
190907101	1868	Sep 11, 2019	Feb 9, 2023	19	271
190907365	1868	Sep 19, 2019	May 19, 2020	1	187
190907423	1868	Sep 20, 2019	Oct 22, 2019	1	32
190907690	1868	Sep 30, 2019	Jan 4, 2023	1	1192
190909861	1868	Dec 19, 2019	Feb 5, 2020		48
200400489	2550	Apr 1, 2020	Sep 22, 2020	1	174
200401000	2550	Jul 17, 2020	Jul 15, 2021	3	363
200500613	2714	Dec 7, 2020	May 15, 2023	3	889
200700412	0609	May 11, 2020	Mar 16, 2022	1	674
200700597	0609	Jul 27, 2020	Sep 14, 2020		
200700971	0609	Nov 19, 2020	Oct 21, 2021	1	336
200900743	1868	Jan 28, 2020		12	
200900745	1868	Jan 28, 2020	Feb 16, 2021		385
200901608	1868	Feb 26, 2020	Mar 16, 2020		19
200902047	1868	Mar 12, 2020			
200903678	1868	Jun 4, 2020	Sep 22, 2020		110
200903781	1868	Jun 10, 2020	Oct 28, 2020		140
200903957	1868	Jun 18, 2020	Feb 8, 2021	1	235
200905757	1868	Sep 4, 2020	Jul 16, 2021		315
210300159	2558	Nov 3, 2021		18	
210401502	2550	Nov 2, 2021	Nov 3, 2021		1
210401685	2550	Dec 14, 2021		1	
210500052	2606	May 17, 2021	May 18, 2021		1
210500993	2714	Dec 1, 2021		1	
210900022	1868	Jan 4, 2021	Sep 21, 2022	2	625
210900318	1868	Jan 19, 2021	Jul 8, 2021	1	170
210900886	1868	Feb 16, 2021	Jan 20, 2022	1	338
210901128	1868	Feb 26, 2021	Mar 10, 2021		12
210901737	1868	Mar 31, 2021	Apr 15, 2021		15
210903348	2921	Jun 23, 2021	Dec 9, 2022	1	534

210903449	1868	Jul 1, 2021	May 16, 2022		319
210904426	1868	Aug 20, 2021	Dec 28, 2021		130
210904474	1868	Aug 24, 2021	Mar 8, 2022	1	196
210905636	1868	Oct 20, 2021		15	
210905884	1868	Nov 1, 2021	Feb 3, 2023	1	459
210905928	1868	Nov 2, 2021	Nov 3, 2021		1
210906354	1868	Nov 23, 2021	May 4, 2022	3	162
210906391	1868	Nov 24, 2021	Jan 27, 2022		64
210906477	1868	Dec 1, 2021	Dec 27, 2021		26
210906778	1868	Dec 15, 2021	Oct 5, 2022		294
210906787	1868	Dec 15, 2021			
220300087	2558	May 19, 2022	Sep 28, 2022		132
220400586	2550	Apr 18, 2022	Nov 30, 2022	3	226
220400976	2550	Jun 27, 2022		1	
220500354	2714	May 31, 2022	Jun 8, 2022		8
220500395	2714	Jun 23, 2022	Sep 15, 2022	1	84
220900479	1868	Jan 24, 2022	Jan 26, 2022		2
220901045	2921	Mar 10, 2022	Mar 15, 2022		5
220901271	1868	Feb 25, 2022	Feb 25, 2022		0
220902166	1868	Apr 6, 2022	Apr 7, 2022		1
220902698	1868	May 5, 2022		1	
220905520	1868	Sep 13, 2022	Apr 27, 2023		226
220906859	1868	Nov 14, 2022		1	
220907824	1868	Dec 28, 2022		7	
230300042	2558	Mar 6, 2023		1	
230300043	2558	Mar 6, 2023		1	
230400381	2550	Feb 28, 2023	Mar 6, 2023		6
230400382	2550	Feb 28, 2023	Mar 6, 2023		6
230900487	1868	Jan 20, 2023			
230900868	1868	Feb 7, 2023		2	
230900995	1868	Feb 13, 2023			
230901389	1868	Feb 28, 2023		1	
230901842	1868	Mar 20, 2023	May 9, 2023	1	50
230903361	1868	May 11, 2023			
230903764	1868	May 24, 2023			
230904220	1868	Jun 13, 2023			
230904221	1868	Jun 13, 2023			

Tab 3

1 Rule 11-565. Discipline by consent.

2 (a) Stipulated discipline by consent before the matter is submitted to a screening
3 panel. If the OPC and the Respondent agree to resolve a matter through discipline by
4 consent before a matter is submitted to a screening panel, they will jointly submit a
5 proposal for discipline by consent and a declaration that complies with paragraph (c) to
6 the Committee clerk for approval by the chair. If the Committee chair approves a
7 stipulated proposal, the chair will enter the appropriate disciplinary order as provided in
8 paragraph (d), with notice to the Complainant. If the Committee chair rejects the
9 proposal, the proposal, declaration, and any admissions made therein will be withdrawn
10 and cannot be used against the Respondent in subsequent proceedings.

11 (b) Respondent's Proposal for d**Discipline by consent before the matter is submitted**
12 **to a screening panel.** A Respondent against whom a Complaint has been filed may,
13 before the matter is submitted to a screening panel, tender a proposal for discipline by
14 consent, including a conditional admission to the Complaint or portions thereof and a
15 waiver of right to a screening panel hearing in exchange for a disciplinary sanction and
16 final disposition of the Complaint. ~~The proposal must include a waiver of right to a~~
17 ~~screening panel hearing.~~ The Respondent must also submit an unsworn declaration of
18 consent that complies with paragraph (c). Both the proposal and declaration must be
19 submitted to the Committee clerk~~OPC~~, who will forward them ~~m-proposal~~ to the OPC and
20 the Committee chair. Within fourteen days thereafter, the OPC will submit to the
21 Committee clerk and the Respondent ~~with~~ a recommendation in favor of or opposed to
22 the proposal and a statement of the basis for such recommendation. The Respondent may
23 submit a reply to the OPC's recommendation within seven days thereafter. If either the
24 OPC or the Respondent requires additional time for their submissions, they may submit
25 a request to the Committee clerk, who will forward the request to the Committee chair.
26 If the Committee chair approves the Respondent's proposal, the ~~sanction will be imposed~~
27 ~~as provided in this rule~~ chair will enter the appropriate disciplinary order as provided in
28 paragraph (f), with notice to the Complainant. ~~If the proposal is rejected by the~~

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Committee chair rejects the proposal, the proposal declaration, and any admissions made therein will be withdrawn and cannot be used against the Respondent in subsequent proceedings.

~~(b) Discipline by consent after filing an Action. A Respondent against whom an Action has been filed may tender a conditional admission to the allegations in the OPC's complaint or to a particular count thereof in exchange for a stated form of discipline and final disposition of the Action. The proposal must be submitted to the OPC, who will then forward the proposal to the district court with a recommendation favoring or opposing the proposal and a statement of the basis for such recommendation. The district court will either approve or reject the proposal. If the district court approves the proposal and the stated form of discipline includes public discipline, it will enter the appropriate disciplinary order as provided in paragraph (d). If the district court rejects the proposal, the proposal and conditional admission will be withdrawn and cannot be used against the Respondent in subsequent proceedings.~~

~~(c) Order of discipline by consent. The final order of discipline by consent will be predicated on:~~

- ~~(1) the Complaint and Notice if no Action has been filed;~~
- ~~(2) the Action, if filed;~~
- ~~(3) the approved proposal for discipline by consent; and~~
- ~~(4) an unsworn declaration of consent by the Respondent to be disciplined.~~

~~(c)~~ **Unsworn declaration of consent.** A Respondent ~~whose proposal for discipline by consent has been approved,~~ who tenders a proposal for discipline by consent must concurrently must submit an unsworn declaration ~~to the Committee chair or the district court as appropriate,~~ consenting to the ~~approved~~ proposed disciplinary sanction and affirming that:

- (1) the consent is freely and voluntarily entered;

(2) the Respondent is not acting under coercion or duress;

(3) the Respondent is fully aware of the implications of submitting the consent;

(4) the Respondent is aware that there is presently pending an investigation into, or proceeding involving, allegations that there exist grounds for discipline, the nature of which must be specifically set forth;

(5) for purposes of disciplinary proceedings, the Respondent acknowledges that the material facts so alleged are true; and

(6) ~~the Respondent submits consent because the Respondent knows that if the Complaint or Action were predicated on the allegations under investigation were filed, or the pending Action were prosecuted,~~ the Respondent could not successfully defend against the charges upon which the discipline is based.

(d) Order of discipline by consent. The final order of discipline by consent will be predicated on:

(1) the Complaint and Notice, if a Notice has been issued;

(2) the approved proposal for discipline by consent; and

(3) the unsworn declaration of consent by the Respondent to be disciplined.

1 **Rule 11-539. Costs.**

2 (a) **Assessment.** The prevailing party in an Action may be awarded judgment for costs
3 in accordance with Rule 54(d) of the Utah Rules of Civil Procedure.

4 ~~(b) Offer of discipline by consent. The OPC will not be deemed to have prevailed in~~
5 ~~the Action on any count of the complaint unless the sanction imposed exceeds any~~
6 ~~sanction to which the Respondent conditionally consented under Rule 11-565 before the~~
7 ~~hearing.~~

8 (b) **Disability cases.** Costs will not be awarded in disability cases except pursuant to
9 paragraph (d).

10 (c) **Trusteeship.** Court-appointed trustees, including the OPC in cases in which it is
11 appointed the trustee, may collect costs for notifying the Respondent's clients, including
12 charges for copying, postage, publication, and fees from money collected.

13

Rule 11-565. Discipline by consent.

(a) Stipulated discipline by consent before the matter is submitted to a screening panel. If the OPC and the Respondent agree to resolve a matter through discipline by consent before a matter is submitted to a screening panel, they will jointly submit a proposal for discipline by consent and a declaration that complies with paragraph (c) to the Committee clerk for approval by the chair. If the Committee chair approves a stipulated proposal, the chair will enter the appropriate disciplinary order as provided in paragraph (d), with notice to the Complainant. If the Committee chair rejects the proposal, the proposal, declaration, and any admissions made therein will be withdrawn and cannot be used against the Respondent in subsequent proceedings.

(b) Respondent's Proposal for discipline by consent before the matter is submitted to a screening panel. A Respondent against whom a Complaint has been filed may, before the matter is submitted to a screening panel, tender a proposal for discipline by consent, including a conditional admission to the Complaint or portions thereof and a waiver of right to a screening panel hearing in exchange for a disciplinary sanction and final disposition of the Complaint. The Respondent must also submit an unsworn declaration of consent that complies with paragraph (c). Both the proposal and declaration must be submitted to the Committee clerk, who will forward them to the OPC and the Committee chair. Within fourteen days thereafter, the OPC will submit to the Committee clerk and the Respondent a recommendation in favor of or opposed to the proposal and a statement of the basis for such recommendation. The Respondent may submit a reply to the OPC's recommendation within seven days thereafter. If either the OPC or the Respondent requires additional time for their submissions, they may submit a request to the Committee clerk, who will forward the request to the Committee chair. If the Committee chair approves the Respondent's proposal, the chair will enter the appropriate disciplinary order as provided in paragraph (f), with notice to the Complainant. If the Committee chair rejects the proposal, the proposal, declaration, and any admissions

made therein will be withdrawn and cannot be used against the Respondent in subsequent proceedings.

(c) **Unsworn declaration of consent.** A Respondent who tenders a proposal for discipline by consent must concurrently submit an unsworn declaration consenting to the proposed disciplinary sanction and affirming that:

(1) the consent is freely and voluntarily entered;

(2) the Respondent is not acting under coercion or duress;

(3) the Respondent is fully aware of the implications of submitting the consent;

(4) the Respondent is aware that there is presently pending an investigation into, or proceeding involving, allegations that there exist grounds for discipline, the nature of which must be specifically set forth;

(5) for purposes of disciplinary proceedings, the Respondent acknowledges that the material facts so alleged are true; and

(6) the Respondent could not successfully defend against the charges upon which the discipline is based.

(d) **Order of discipline by consent.** The final order of discipline by consent will be predicated on:

(1) the Complaint and Notice, if a Notice has been issued;

(2) the approved proposal for discipline by consent; and

(3) the unsworn declaration of consent by the Respondent to be disciplined

1 **Rule 11-539. Costs.**

2 (a) **Assessment.** The prevailing party in an Action may be awarded judgment for costs
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7 appointed the trustee, may collect costs for notifying the Respondent's clients, including
8 charges for copying, postage, publication, and fees from money collected.

9

Tab 4

E. Appeals from OPC Dismissals

When the OPC receives a complaint against a Lawyer filed by a third party, it first conducts a summary review to assess whether the complaint should be dismissed or whether additional investigation should be conducted. *See* RDDS 11-530(c). The summary review is conducted by three OPC attorneys and focuses on whether (i) the OPC has jurisdiction; (ii) the complaint states a claim or sets forth conduct that would not amount to an ethical violation, even if true; or (iii) the matter would be more appropriately addressed in a different forum. *See* OPC Annual Report Feb. 2023 (“OPC Report”) at 6. This review also assesses the likelihood of whether sufficient evidence can be obtained to establish a violation of the Rules of Professional Conduct by a preponderance. *See id.*

If the OPC determines that a complaint should not be summarily dismissed, it moves to the next phase of its screening process, which typically includes obtaining a response from the respondent and conducting a preliminary investigation. At that point, the OPC may dismiss, decline to prosecute,⁴ or present the case to a screening panel for hearing. The OPC will prepare a Notice for cases it determines to present to a screening panel. A “Notice” is essentially the charging document, and is defined as “the notice the OPC sends to the Respondent after a preliminary investigation, which identifies the possible violation(s) of the Rules of Professional Conduct . . . raised by the Complaint as the OPC has preliminarily determined.” RDDS 11-501(n).

⁴ No express parameters apply to the OPC’s ability to decline to prosecute a disciplinary complaint under the RDDS. However, the OPC reports that it generally declines to prosecute when there is a lack of nexus between the allegations and the lawyer’s practice; where a lawyer previously has been disciplined for similar misconduct and the lawyer is unlikely to receive a greater discipline than what was already imposed; or where the lawyer has taken immediate action to cure the alleged misconduct. The OPC also may decline to prosecute by referring a matter to the Professionalism and Civility Counseling Board. *See* OPC Report at 8-9.

Under Rule 11-530(g)(2) of the RDDS, complainants may appeal the OPC's dismissals, including declinations to prosecute, to the Committee chair. On appeal, the chair or a vice chair "will conduct a *de novo* review of the file, either affirm the dismissal or require the OPC to prepare a Notice (if necessary), and set the matter for hearing by a screening panel." RDDS 11-530(g)(2)(C).

In 2022, complainants filed 71 appeals from OPC dismissals. This number continues an upward trend that began in 2021, when we received a total of 66 appeals. By contrast, we received just 31 appeals in the reporting year 2019-2020, 47 in 2018-2019, and 47 in 2017-2018. In addition to the 71 appeals filed in 2022, 25 appeals filed in 2021 remained outstanding as of January 1, 2022. One reason for the increase may be a change in the rules governing complaints, which now require all information received from a complainant to be treated as a complaint, rather than requiring notarization to qualify as a complaint or sending certain matters that did not implicate the ethical rules to the Consumer Assistance Program.

During the 2022 calendar year, I and the vice chairs completed a total of 71 appeal rulings,⁵ including the 25 that remained outstanding from 2021, and 46 of the appeals filed in 2022. We affirmed the OPC's dismissals in all but four cases.

The single case that we reversed in 2021 was heard by a screening panel on May 12, 2022. Based on the information added to the file, the OPC's summary and recommendation, and the material presented at the hearing, the screening panel dismissed the case.

Two of the four cases we reversed in 2022 were recently presented to a screening panel. The cases were related and filed by the same complainant against two different respondents. The screening panel dismissed the complaints but issued cautions to both respondents.

1. Potential Reforms to Processes Related to Appeals from OPC Dismissals

There are several reasons why changes to the appeal process may be warranted. First is the large and seemingly increasing number of appeals, which require substantial time and resources. A table summarizing the number of appeals decided per year and the reversal rates for the reporting years from 2000 through 2022 is attached as Exhibit

⁵ The fact that the number of appeals filed in 2022 and the number of appeals ruled on in 2022 is coincidental.

B.⁶ Although many of the appeals are simple and can be resolved relatively quickly, many of the appeals have voluminous files and require extensive analysis, such that preparing a decision can end up taking many days. A related issue is turnaround time and backlog. Given the large number of appeals, many are not completed until six months or more after they are filed, leaving some of the parties frustrated with the delay.

Second, a significant majority of the appeals result in affirmance. As indicated on Exhibit B, the largest reversal rate occurred in 2002-2003, when nine out of 45 appeals (20%) were reversed and remanded to the screening panels. That number appears to be a bit of an outlier, however, because the reversals in most years have been far lower, ranging from 0%-14%. See Exhibit B. Because such a small number of appeals result in reversal, the question arises whether the appeal process provides sufficient benefits to justify the time and effort involved.

Third, even in the small number of cases that are reversed and remanded to a screening panel, the OPC sometimes disagrees with the outcome of the appeal. In such cases, when the case is presented to a screening panel, the OPC informs the panel that, despite the chair's or vice chair's reversal, it believes no violation has occurred or no discipline is warranted. The OPC typically states its position in the Notice, in the summary and recommendations memoranda provided to the panel, and/or during the hearing. Setting aside the issue of whether the appeal ruling or the OPC is correct on the merits, this means that the ultimate result is most often the same as if no appeal had been taken, i.e., the case is dismissed.⁷ This is not to say that the OPC always disagrees with reversals or that screening panels always follow the OPC's position, but what is clear is that a significant majority of the cases reversed on appeal are dismissed on remand. Under these circumstances, it is reasonable to question whether the appeal process provides a meaningful level of review.

The following is a list of potential reforms aimed at reducing the number of appeals and attempting to ensure that the appeal process adds value to the disciplinary system as a whole. The suggestions below might be implemented individually or in combination with each other and, if any are to be implemented, rule changes will be required. Thus, while I provide these suggestions for your consideration and input, I anticipate that additional work and consideration by the OPC and the OPC Oversight Committee will be required.

⁶ Please note that the data in Exhibit B is not necessarily fully accurate due to slight differences in recording methods utilized by the OPC and past Committee chairs. It is intended only to provide a broad snapshot of trends in the appeal outcomes over time.

⁷ This data is summarized in the final column of Exhibit B.

- Eliminate the ability to appeal cases dismissed at the intake stage, on the OPC's Summary Review or, alternatively, adjust the standard of review from *de novo* to a more deferential standard, such as abuse of discretion. In its 2017 Report on the Utah Lawyer Discipline System (the "ABA Report"), the ABA stated that allowing appeals from the OPC's dismissal is valuable because "disciplinary counsel are not immune from making errors of judgment, and a limited appeal provides a useful check and balance for the system. It also helps alleviate perceptions that the profession is too protective of its own." ABA Report at 69. Based on this conclusion, the ABA recommended that all complaints, whether properly submitted at the time or not, should be subject to appeal. While this conclusion remains apt, I question whether Summary Review dismissals should be subject to review, both because the OPC likely should have some discretion in this regard and because most dismissals are affirmed in any case.
- Clarify the distinction between dismissal of a complaint versus a declination to prosecute, and clarify the scope of the OPC's discretion to decline to prosecute. Currently, the applicable rules states that the OPC may dismiss a complaint when it is:
 - frivolous, unintelligible, unsupported by fact, or fails to raise probable cause of any unprofessional misconduct;
 - barred by the statute of limitations;
 - more adequately addressed in another forum; or
 - one in which the OPC declines to prosecute.

RDDS 11-530(g)(1). This rule clearly indicates that the OPC may dismiss a complaint when it declines to prosecute, but it offers no guidance as to when the OPC may decline to prosecute. Although the OPC has internal policies about when it typically declines to prosecute, specificity could be added by rule. Clarification of these parameters would help participants in the system understand what types of complaints the OPC is unlikely to pursue and why. Relatedly, if the OPC's discretion to decline to prosecute is intended to be broad or unlimited, as it appears from the rule, then it might be possible to eliminate appeals from the OPC's declinations to prosecute. Even if such appeals are retained, the standard of review should be adjusted to reflect to scope of the OPC's discretion as to declining to prosecute.

- Adjust the standard of review on all appeals from *de novo* to a more deferential standard, such as arbitrary and capricious or abuse of discretion. The *de novo* standard implies that the OPC lacks broad prosecutorial discretion with regard to both dismissals on the merits and declinations to prosecute.

- Adjust OPC intake procedures to include more plainly stated dismissal letters and increased contact, possibly by telephone, with complainants and respondents. This suggestion is based on a June 29, 2022 CLE presentation by the General Counsel of the Solicitors Regulation Authority (“SRA”), which oversees solicitor regulation in England and Wales.⁸ In the presentation, the General Counsel described new intake procedures adopted after identifying problems in their system including large case volumes, slow resolution of matters, inflexible criteria applied to dismissals, and poor customer experience. The new system includes simplified, risk-based assessment criteria, along with early contact and resolution efforts to provide guidance and explanations to complainants and respondents. The presenter described significant reductions in the number of complaints that were pursued beyond the intake phase as a result of the new procedures. While the changes enacted in England and Wales are not all practical for implementation in Utah, which has a much smaller population of regulated lawyers, many of the changes seem workable and potentially beneficial.
- Allow the chair or vice chair to request the OPC to conduct additional investigation on remand, particularly when a case has been dismissed on Summary Review. In some instances, the vice chairs or I have reversed cases where, if certain questions had been answered by the material in the file, perhaps by obtaining additional information from the complainant or by seeking a response from the respondent, then a ready determination could be made as to whether an ethical violation had actually occurred. However, our review is generally confined to the evidence in the file and other, publicly available materials (such as case dockets and filings). If those materials are insufficient to answer whether a violation occurred, additional investigation may be warranted. Under the current rules, the chair and vice chairs on reversal may only “require the OPC to prepare a Notice⁹ (if necessary) and set the matter for hearing by a screening panel.” RDDS 11-530(g)(2)(C). Although the OPC in many or most instances conducts additional investigation following remand regardless of the contents of the reversal ruling, it would be helpful if the chair or vice chair were able to call for additional investigation.

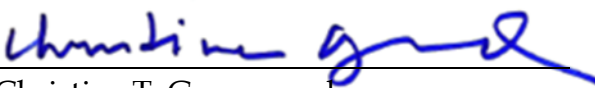
⁸ The presentation, entitled “Innovations in Regulation: The SRA’s Investigation, Assessment, and Early Resolution Process,” is available to members of the National Organization of Bar Counsel at <https://www.nobc.org/webinars/past-webinars/>.

⁹ A “Notice” is defined in the RDDS as “the notice the OPC sends to the Respondent after a preliminary investigation, which identifies the possible violation(s) of the Rules of Professional Conduct . . . raised by the Complaint as the OPC has preliminarily determined.” RDDS 11-501(n).

- Relatedly, if the OPC were to obtain information on remand that definitively established the absence of a rule violation, then perhaps OPC should have another opportunity to dismiss a case following additional investigation after a reversal. At that point, the matter could be appealed again, or the dismissal could be deemed final.
- Another possibility that Billy Walker raised with me is hiring an a staff attorney to assist with appeals, in the event numbers remain high and continue to grow. Although having four vice chairs has helped matters, the vice chairs all have full-time practices and aren't able to complete as many appeals as are needed.
- Impose additional requirements on complainants to complete an appeal. Although making it more difficult to navigate for the people it is intended to serve may not be ideal, requirements such as a brief memorandum articulating the bases for the appeal may prove beneficial. As it stands, all that is required to perfect an appeal is for a complainant to notify the Committee clerk of their intent to appeal.

As stated above, I present these suggestions to the Court to seek guidance and determine whether any particular suggestion or combination thereof seems reasonable, in which case we could pursue appropriate rule changes with the OPC and the OPC Oversight Committee for the Court's consideration.

I appreciate the hard work of all those involved in the lawyer discipline system, including the OPC and the members of the Committee. Thank you for the opportunity to serve.



Christine T. Greenwood

Chair

cc: Katherine E. Venti
Mark F. James
Bryan J. Pattison
Corbin Gordon
Billy L. Walker

EXHIBIT B - Historic Appeal Numbers

Reporting Year	Appeals Decided	Affirmances	Reversals	Percentage of Reversals	Screening Panel Outcome after Reversal
2000-2001	26	22	4	15%	2 dismissed; no data on other 2
2001-2002	72	63	9	13%	3 of 9 cases heard by time of report; 2 dismissed; 1 admonition
2002-2003	45	36	9	29%	6 cases heard by time of report; 5 dismissed; 1 admonition
2003-2004	73	68	5	7%	2 cases heard by time of report; both dismissed
2004-2005	50	48	2	4%	1 dismissed; 1 Action in district court
2005-2006	55	50	5	9%	2 cases heard by time of report; 1 dismissed; 1 admonition
2006-2007	58	56	2	3%	1 dismissal; 1 admonition
2007-2008	45	41	4	9%	4 dismissed
2008-2009	45	**numbers not available			
2009-2010	59	56	3	5%	2 dismissed; 1 dismissed with caution
2010-2011	30	28	2	7%	2 dismissed
2011-2012	49	47	1	2%	1 dismissed
2012-2013	40	37	3	8%	1 case heard by time of report; 1 admonition
2013-2014	40	39	1	3%	1 dismissed
2014-2015	21	19	3	14%	**not available
2015-2016	50	47	3	6%	1 dismissed; 1 dismissed with caution; 1 admonition
2016-2017	46	45	1	2%	1 dismissed
2017-2018	37	36	1	3%	**information not available
2018-2019	34	32	2	6%	1 dismissed; 1 dismissed with caution
2019-2020	14	14	0	0%	n/a
2020 last 6 months	15	15	0	0%	n/a
2021	41	40	1	2%	1 dismissed
2022	71	67	4	6%	2 cases heard by time of report; both dismissed with caution

Big Picture Questions

- Does the appeal process provide a meaningful level of review, particularly given the small number of reversals?
- How much discretion should OPC have in deciding whether to dismiss or pursue a case?
- How much discretion should OPC have in deciding not to prosecute a case?
- What should OPC's duties be when a dismissal is reversed?

Possible Reforms

- Eliminate appeals altogether
- Eliminate appeals for cases dismissed on "Summary Review"
- Eliminate appeals for cases in which OPC declines to prosecute (as opposed to dismissing on the merits)
 - Doing so would require clarification of the nature and scope of OPC's discretion to decline to prosecute
 - Doing so would require OPC to specify when it is declining to prosecute; the current practice is to state that it is both dismissing and declining to prosecute
- Modify *de novo* standard of review on appeals to more deferential standard, e.g., abuse of discretion, arbitrary and capricious, or substantial evidence; possibly different standards for appeals from dismissals vs. appeals from declinations to prosecute

Deference Continuum	No Deference	Minimal Deference	Some Deference	More Deference	More Deference	Complete Deference
Standard of Review	De novo	Clearly erroneous	Reasonableness/ Substantial Evidence	Arbitrary and capricious	Abuse of discretion	No review
When it Applies	Question of law	Question of fact	Jury decision Formal agency decision	Informal agency decision	Discretionary decision	Some agency actions Decision to not prosecute

[Table from "Identifying and Understanding Standards of Review," The Writing Center at Georgetown University Law Center, 2019.]

- Specify what burden applies for a complainant on appeal, e.g., burden is on complainant to show that case should be presented to screening panel, burden is on complainant to show case requires additional investigation, burden is on complainant to show that OPC abused its discretion, etc.
- Adjust OPC intake procedures
 - Language on website or in letters to manage expectations of complainants (e.g., vast majority of complaints do not result in discipline and many are dismissed without investigation)
 - More plainly stated dismissal letters
 - Increased phone contact with complainants prior to dismissal
- Allow chair to call for additional investigation after reversal and prior to presentation to screening panel, especially when a case was dismissed on “summary review”
 - Additional opportunity for OPC to dismiss following investigation; possible second appeal
- Hire staff attorney
- Impose additional requirements for appeal, such as a brief statement of bases for reversal

Tab 5

1 **Rule 11-502. Definitions.**

2 As used in this article:

3 (a) “**Action**” means a lawsuit filed by the OPC in district court alleging Lawyer
4 misconduct or seeking to transfer a Lawyer to disability status.

5 (b) “**Bar**” means the Utah State Bar.

6 (c) “**Bar Commission**” or “**Commission**” means the Board of Bar Commissioners of the
7 Utah State Bar.

8 (d) “**Chief Disciplinary Counsel**” means the lawyer the Supreme Court appoints to
9 manage the OPC.

10 (e) “**Committee**” means the Ethics and Discipline Committee of the Supreme Court.

11 (f) “**Complainant**” means either (1) the person who files a Complaint, or (2) the OPC
12 after opening an investigation.

13 (g) “**Complaint**” means any written allegation of Lawyer misconduct or incapacity
14 containing an unsworn declaration [in compliance with Utah Code § 78B-18a-106](#) as to
15 the accuracy of the information provided.

Commented [CG1]: Suggested reference to statute for complainants who may not understand this requirement.

16 (h) “**injury**” means harm to a client, the public, the legal system, or the profession that
17 results from a lawyer’s misconduct. The level of injury can range from “serious” injury
18 to “little or no” injury; a reference to “injury” alone indicates any level of injury greater
19 than “little or no” injury.

20 (i) “**intent**” means the conscious objective or purpose to accomplish a particular result.

21 (j) “**knowledge**” means the conscious awareness of the nature or attendant
22 circumstances of the conduct but without the conscious objective or purpose to
23 accomplish a particular result.

24 (k) “**Lawyer**” includes those licensed to practice law in any jurisdiction of the United
25 States, foreign legal consultants, and licensed paralegal practitioners, insofar as the

licensed paralegal practitioner is authorized to practice under Utah Special Practice Rule14-802, unless provided otherwise.

(l) “**licensed**” includes lawyers admitted to the Bar, unless provided otherwise.

(m) “**negligence**” means a Lawyer’s failure to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable Lawyer would exercise in the situation.

(n) “**Notice**” means the notice the OPC sends to the Respondent after a preliminary investigation, which identifies the possible violation(s) of the Rules of Professional Conduct ~~or Licensed Paralegal Practitioner Rules of Professional Conduct~~, raised by the Complaint as the OPC has preliminarily determined.

Commented [CG2]: I wonder if we can make this term more specific, given that the term “notice” is used so frequently for many different types of notice. How about “Notice of Violations,” “Notice of Alleged Violations,” “Notice of Charges,” or something along those lines.

(o) “**OPC**” means the Office of Professional Conduct.

(p) “**OPC Counsel**” means Chief Disciplinary Counsel, deputy chief disciplinary counsel, and any assistant disciplinary counsel.

(q) “**Oversight Committee**” means the committee established in Rule 11-503 to oversee the OPC.

(r) “**potential injury**” means the harm to a client, the public, the legal system, or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.

(s) “**Respondent**” means a Lawyer subject to the disciplinary jurisdiction of the Supreme Court against whom a Complaint has been filed or an Action has been initiated.

(t) “**Rules of Professional Conduct**” means the rules in Chapter 13 of the Supreme Court Rules of Professional Practice ~~and “Licensed Paralegal Practitioner Rules of Professional Conduct”~~ means the rules in Chapter 15, article 12 of the Supreme Court Rules of Professional Practice.

Commented [CG3]: The LPP rules no longer exist.

52 (u) “**Supreme Court**” means the Utah Supreme Court.

1 **Rule 11-510. Ethics and Discipline Committee composition.**

2 (a) **Composition.** The Supreme Court appoints the Committee members. The
3 Committee consists of a minimum of four to a maximum of eight public members and a
4 minimum of 21 to a maximum of 25 Lawyers who have demonstrated a high standard
5 of professional conduct. With the exception of the Committee chair, who serves as an
6 employee, All appointments are for a term of three years with no Committee member
7 serving more than two consecutive terms unless appointed as a Committee chair or vice
8 chair of the Committee, in which case the member may serve up to two additional
9 three-year terms. The Supreme Court designates one Lawyer member as Committee
10 chair and three to four Lawyer members as Committee vice chairs.

Commented [CG1]: Amendment proposed to reflect current status.

11 (b) **Committee chair.** The Committee chair supervises the Committee, the Committee
12 clerk, and the screening panels. The chair is responsible for:

13 (1) maintaining an adequate check on the screening panels' work to ensure that
14 matters move forward expeditiously;

15 (2) determining that screening panels have a uniform basis for the judgments
16 rendered;

17 (3) providing the screening panels with information concerning ethics and judicial
18 decisions necessary to their activities; and

19 (4) making recommendations to the Supreme Court concerning appointments to and
20 removals from the screening panels and reports concerning screening panel
21 activities and the overall work of the Committee.

22 (c) **Vice chairs.** The Committee vice chairs will act if the chair is absent or resigns. In
23 such event, a ~~vice chair will become the chair~~ the Supreme Court will appoint a
24 replacement chair. The chair may call upon any vice chair to assist in any of the
25 Committee chair's duties.

26 (d) **Removal.** The Committee chair may recommend removal of a Committee member
27 by notifying the Supreme Court of the recommendation of removal and reasons for the

28 recommendation. The removal is effective when the Supreme Court accepts the
29 recommendation.

Rule 11-511. Screening panel composition; responsibilities.

(a) **Screening panel composition.** The Committee members, except for the Committee chair and vice chairs, are divided into four screening panels. Each screening panel shall be comprised of a minimum of five members, including ~~four~~five Lawyers and ~~two~~one public members. ~~Screening panels may have more than five members, including up to two public members and up to five lawyer members, but no~~No more than four lawyer members and one public member will participate in any screening panel hearing.

Whenever a screening panel is assigned a Complaint involving a licensed paralegal practitioner, the Committee chair may, as practical, assign up to two Committee members who are licensed paralegal practitioners to the screening panel.

(b) **Screening panel number.** All screening panel hearings must have five panel members present, including a panel chair or vice chair and a public member.

(c) **Screening panel chair and vice chair.** The Supreme Court will name a chair and vice chair for each screening panel. The chair or, in the chair's absence, vice chair presides over screening panel hearings. The panel chair may call upon the vice chair to assist in any of the panel chair's duties. Chairs or vice chairs from other panels may conduct hearings if the regular chair and vice chair are unable to attend. If the chair is removed or resigns, the vice chair will become the chair, and the Court will appoint a Committee member to serve as vice chair.

(d) **Voting.** A majority vote of those members present and voting at any screening panel hearing is required for a determination.

(e) **Meetings.** Each screening panel meets as necessary to effectively and promptly carry out its duties. The Committee chair may convene the entire Committee at such other times as necessary to effectively and promptly carry out the Committee's duties.

(f) **Alternates.** Members of any screening panel may serve as alternate members on different screening panels. The Committee chair and ~~the Committee~~ vice chairs may serve as alternate members on all screening panels.

28 (g) **Responsibilities.**

29 (1) Complaints are randomly assigned to a screening panel. The screening panels
30 review and hear all Complaints charging that a Lawyer engaged in unethical or
31 unprofessional conduct, and may consider any other relevant information. Screening
32 panels determine the action to be taken on any Complaint that, in applying these
33 rules to the facts of the case, is most consistent with the public interest and the Rules
34 of Professional Conduct~~-or Licensed Paralegal Practitioner Rules of Professional~~
35 ~~Conduct.~~

36 (2) Unless otherwise provided in this article, whenever the OPC may be present
37 before a screening panel during a hearing, the Respondent may also be present.

1 **Rule 11-522. Ethics advisory opinions.**

2 (a) **Effect of ethics advisory opinions.** The OPC may not prosecute a Utah Lawyer for
3 conduct that complies with an ethics advisory opinion that has not been withdrawn at
4 the time of the conduct in question. No court is bound by an ethics opinion's
5 interpretation of the Rules of Professional Conduct ~~or Licensed Paralegal Practitioner~~
6 ~~Rules of Professional Conduct.~~

7 (b) **Reviewing, modifying, or withdrawing ethics advisory opinions.**

8 (1) The OPC may at any time request the Bar's Ethics Advisory Opinion Committee
9 to review, modify, or withdraw an ethics advisory opinion and any OPC
10 investigation or prosecution is suspended pending the final outcome of the request.
11 The Ethics Advisory Opinion Committee may issue a modified opinion, withdraw
12 the opinion, or decline to take any action but will report its action or
13 recommendation to the Bar Commission and the Commission will take such final
14 action as it deems appropriate.

15 (2) The OPC may also request the Supreme Court to review, affirm, reverse, or
16 otherwise modify an ethics advisory opinion.

Rule 11-530. Unprofessional conduct Complaints.

(a) **Filing.** The OPC or any person may initiate a disciplinary proceeding against any Lawyer by filing a written Complaint in concise language setting forth the acts or omissions claimed to constitute unprofessional conduct.

(1) If an individual initiates the Complaint, filing is complete when the Complaint is delivered to the OPC office in hard copy or electronic form, or through the OPC's website at opcutah.org.

(2) If the OPC initiates the Complaint, filing is complete when the OPC delivers the Complaint to the Lawyer in hard copy or electronic form.

(3) If a Complainant who files a Complaint later elects to withdraw the Complaint, the OPC may, in its discretion, proceed with the matter without filing a separate complaint.

Commented [CG1]: Screening panels have raised this issue on more than one occasion.

(b) **Complaint form.** The Complaint need not be in any particular form or class and may be by letter or other informal writing, although the OPC may provide a form to standardize the format. The Complaint need not recite disciplinary rules, ethical canons, or a prayer requesting specific disciplinary action. The Complainant must sign the Complaint and include the Complainant's address and may list the names and addresses of other witnesses. The Complaint must contain an unsworn declaration as to the accuracy of the information in the Complaint. Complaints filed by the OPC are not required to contain such a declaration. A Complaint's substance prevails over the form.

(c) **Initial investigation.** Upon receiving a Complaint, the OPC will conduct a preliminary investigation to ascertain whether the Complaint's allegations are sufficiently clear. If the allegations are not sufficiently clear, the OPC will seek additional facts from the Complainant, who must, upon the OPC's request, submit documents or writings containing any additional facts. Within three months after filing a Complaint, the OPC must advise the Complainant concerning the initial investigation of the Complaint.

(d) **Referral to Professionalism and Civility Counseling Board.** ~~The OPC may – i~~n connection with any conduct that comes to its attention, the OPC may – refer any matter to the Professionalism and Civility Counseling Board established under Rule 14-303. Such referral may be in addition to or in lieu of any further proceedings related to the subject matter of the referral. Such referral should be in writing and – at the discretion of the OPC – may include any or all information included in the Complaint or additional facts submitted by the Complainant.

(e) **Notice to Respondent.** Upon completing the preliminary investigation, the OPC will determine whether the Complaint can be resolved in the public interest, the Respondent’s interest, and the Complainant’s interest. If the Complaint cannot be resolved or if it alleges facts that, by their very nature, should be brought before the screening panel, or if good cause otherwise exists to bring the matter before the screening panel, the OPC must:

(1) ~~serve the Respondent with~~prepare a Notice identifying with particularity the possible violation(s) of the Rules of Professional Conduct ~~or Licensed Paralegal Practitioner Rules of Professional Conduct~~ raised by the Complaint as the OPC has preliminarily determined;

(2) attach a copy of the signed Complaint; and

(3) ~~mail-serve~~the documents by mail or electronic mail on the Respondent at the Respondent’s address as reflected in the Bar’s records, with a copy to the Complainant.

(f) **Answer to Complaint.** Within 21 days after the Respondent is served with the Complaint and Notice, the Respondent must file with the OPC a signed, written answer explaining the facts surrounding the Complaint, together with all defenses and responses to the claims of possible misconduct. For good cause, the OPC may extend the time for filing an answer not to exceed an additional 28 days. When the answer is filed or if the Respondent fails to respond, the OPC will refer the case to a screening

panel to make a determination or recommendation. The OPC must forward a copy of the answer to the Complainant.

(g) **Dismissing the Complaint.**

(1) **Reasons for dismissal.** The OPC may dismiss a Complaint without referral to a screening panel hearing if the OPC determines the Complaint is:

- (A) frivolous, unintelligible, unsupported by fact, or fails to raise probable cause of any unprofessional misconduct;
- (B) barred by the statute of limitations;
- (C) more adequately addressed in another forum; or
- (D) one in which the OPC declines to prosecute.

(2) **Notification and appeal.**

(A) When the OPC dismisses a Complaint, it must:

- (i) notify the Complainant and the Respondent that the OPC has dismissed the Complaint;
- (ii) state the reasons for dismissal; and
- (iii) include a notice of the Complainant's right to appeal an OPC decision to the Committee chair.

(B) The Complainant may appeal the dismissal by filing an appeal with the Committee clerk and serving a copy of the appeal on the OPC within 21 days after the dismissal notification is ~~mailed~~ served by mail or electronic mail.

(C) On appeal, the Committee chair or a vice chair will conduct a de novo review of the file, ~~either~~ The chair may either affirm the dismissal, affirm the dismissal with caution, or require the OPC to prepare a Notice ~~(if necessary a Notice has not already been prepared)~~, and set the matter for hearing by a screening panel. In addition to or in lieu of affirming or reversing the dismissal, the chair may

Commented [CG2]: These comments relate partly to the discussion on appeal reforms and generally seek a bit more discretion as to appeal rulings.

Commented [CG3]: I am not sure what "if necessary" is supposed to mean, so I am looking for clarification here.

80 [refer a matter to the Professionalism and Civility Counseling Board.](#) If the chair
81 recuses, the chair will appoint ~~the~~[a Committee](#) vice chair or ~~one of the~~[a](#)
82 screening panel chairs to review and determine the appeal.

Rule 11-531. Proceedings before Committee and screening panels.

(a) **Review.** Screening panels will review all Complaints the OPC refers to them, including all facts developed in the Complaint, the answer, the contents of the file, and the hearing, and including the OPC's recommendations.

(b) **OPC's summary and ~~Notice of additional alleged violations~~.** Before any screening panel hearing, the OPC may file with the clerk and serve on the Respondent a summary of its investigation. If the OPC has determined, after serving Respondent with the Notice, that the Respondent may have violated any additional Rules of Professional Conduct ~~or Licensed Paralegal Practitioner Rules of Professional Conduct~~, then the summary must identify with particularity all such additional alleged violations. The summary will serve as Notice of any additional violations the OPC did not previously charge. If the OPC provides a summary to the screening panel, the OPC must also provide the summary to the Respondent and Complainant. If the OPC alleges additional rule violations in the summary, the summary must be served on the Respondent at least 14 days before the hearing. In cases where a judicial officer has not addressed or reported a Respondent's alleged misconduct, the screening panel may not consider this inaction to be evidence either that misconduct has occurred or has not occurred.

(c) **Respondent's appearance.** The screening panel must, with at least 28 days' notice, afford the Respondent an opportunity to appear before the screening panel before taking any action that may result in recommending an admonition or public reprimand, or the OPC's filing of an Action. Respondent and any witnesses the Respondent calls may testify, and Respondent may present oral argument with respect to the Complaint.

(d) **Respondent's brief.** Respondent may submit a written brief to the screening panel and serve a copy on the OPC at least 7 days before the hearing, which may not exceed 10 pages unless the panel chair or vice chair allows an extension for good cause. The OPC will forward a copy of the brief to the Complainant.

Commented [CG1]: Is the complainant entitled to a copy of this document? It appears the summary is provided to the complainant as a matter of course, but I think it would be helpful to make it explicit.

(e) **Complainant's appearance.** A Complainant has the right to appear before the screening panel personally and may testify, together with any witnesses the Complainant calls.

(f) **Right to hear evidence; cross-examination.** The Complainant and Respondent have the right to be present during presentation of evidence unless excluded by the screening panel chair for good cause. Respondent may be represented by counsel, and Complainant may be represented by counsel or another representative. Either Complainant or Respondent may request that the panel chair seek responses or pose questions to the other party at the hearing. Direct cross-examination will ordinarily not be permitted unless, upon request, the panel chair deems that it would materially assist the panel in its deliberations.

(g) **Rule violations not charged by the OPC.** During the screening panel hearing, but not after, the panel may find that rule violations have occurred not previously charged by the OPC. If so, the screening panel will give Respondent a reasonable opportunity to respond during the hearing. The Respondent may address the additional charges at the hearing and may file with the Committee clerk and serve on the OPC within two business days of the hearing a written response to the new charges along with supplemental materials related to the new charges. Before making a determination or recommendation, the panel members present at the original hearing must review and consider the response and any supplemental materials ~~must be reviewed and considered by~~ submitted by the Respondent ~~the panel members present at the original hearing.~~

(h) **Hearing record.** The proceedings of any screening panel hearing under this rule will be recorded at an audio quality level that permits an accurate transcription of the proceedings. The clerk will assemble and deliver to the Committee chair a complete record of the proceedings upon the panel's determination or recommendation to the Committee chair. The record of the proceedings before the panel must be preserved for at least one year after delivery of the panel's determination or recommendation to the

Committee chair and for such additional time as any further proceedings on the matter are pending or might be instituted under this rule.

(i) **Screening panel determination or recommendation.** After reviewing all the facts developed by the Complaint, answer, investigation, and hearing, the screening panel will make one of the following determinations or recommendations:

(1) The preponderance of evidence does not establish that the Respondent engaged in misconduct, in which case the screening panel will dismiss the Complaint. A letter of caution may also be issued with the dismissal. The letter must be signed by the screening panel chair or vice chair and will serve as a guide for the future conduct of the Respondent. The Complainant will be confidentially notified of the caution;

(2) The Complaint must be referred to the Professionalism and Civility Counseling Board established under Rule [14-303](#). ~~Such referral may be in addition to or in lieu of dismissal or any other sanction or further proceeding related to the subject matter of the referral. Such referral should be in writing and may include any or all information included in the file;~~

(3) The Complaint must be referred to the Committee chair with an accompanying screening panel recommendation that the Respondent be admonished;

(4) The Complaint must be referred to the Committee chair with an accompanying screening panel recommendation that the Respondent receive a public reprimand;

(5) The OPC must file an Action against the Respondent if the panel finds probable cause to believe there are grounds for public discipline that merit an Action; or

(6) The OPC must file an Action if the panel finds misconduct and the misconduct is similar to the misconduct alleged in an Action against the Respondent that has been recommended by a screening panel or is pending in district court at the time of the hearing.

(j) **Aggravation and mitigation.** The Respondent and the OPC may present evidence and argument as to mitigating and aggravating circumstances during the screening panel hearing, but this evidence will not be considered unless the panel has determined the Respondent engaged in misconduct.

(k) **Multiple cases involving the same Respondent.** More than one case involving the same Respondent may be scheduled before the same panel, but in determining whether a rule has been violated in one case, only the factual allegations in that case may be considered.

(l) **Recommendation of admonition or public reprimand.** A screening panel recommendation that the Respondent be disciplined under paragraph (i)(3) or (i)(4) must be in writing and state the ~~substance and nature of the Complaint and defenses~~ findings of fact and conclusions of law upon which the screening panel has concluded, by a preponderance of the evidence, that the Respondent should be admonished or publicly reprimanded. The screening panel must deliver copies of the recommendation to the Committee chair, Respondent, and the OPC.

Rule 11-532. Exceptions to screening panel determinations and recommendations.

(a) **Time to file.** Within 28 days of the date of service of the screening panel's determination or recommendation:

(1) the OPC may file an exception to the determination or recommendation and may request a hearing, and Respondent will have 28 days to respond, and

(2) the Respondent may file an exception to the determination or recommendation and may request a hearing, and the OPC will have 28 days to respond.

(b) **Reply.** The Committee chair may allow a reply to any response.

(c) **Actions.** No exception may be filed to a screening panel determination that ~~an~~ the OPC must file an Action ~~will be filed~~ against a Respondent.

(d) **Requirements.** All exceptions must include a memorandum, not exceeding 20 pages, stating the grounds for review, the relief requested, and the bases in law or in fact for the exceptions. All exceptions, responses, and replies must be filed with the Committee clerk.

(e) **Procedure on exceptions.**

(1) **Hearing not requested.** If no hearing is requested, the Committee chair or a vice chair will review the record compiled before the screening panel.

(2) **Hearing requested.** If a request for a hearing is made, the Committee chair or a ~~screening panel chair designated by the Committee~~ vice chair will serve as the Exceptions Officer and hear the matter in an expeditious manner, with OPC Counsel and the Respondent having the opportunity to be present and give an oral presentation. The Complainant ~~need not appear~~ personally.

(3) **Transcript Request.** Upon request, the Committee chair must extend the deadlines for filing exceptions or responses no more than 60 days to allow a party time to obtain a transcript of the screening panel proceedings, so long as the audio or video recording is requested within 28 days. The requesting party will bear the

Commented [CG1]: May the complainant appear? Typically, they don't get notice of exceptions or exception hearings. Should we be providing notice to complainants?

costs of such transcript and must file the transcript with the Committee clerk at the time of or before filing an exception or response, together with an unsworn declaration establishing the transcript's chain of custody.

(4) **Burden of proof.** The party who files an exception has the burden of showing that the determination or recommendation of the screening panel is unsupported by substantial evidence or is arbitrary, capricious, legally insufficient, or otherwise clearly erroneous.

(5) **Record on exceptions.** The proceedings of any hearing on an exception must be recorded at a level of audio quality that permits an accurate transcription of the proceedings.

1 **Rule 11-534. Final Committee disposition.**

2 (a) **Final, written determination.** Either upon completing the exception procedure
3 under Rule 11-532 or, if no exception has been filed, [upon the expiration of the time to](#)
4 [file an exception](#), the Committee chair will review the screening panel's findings and
5 recommendations and will prepare the order to execute those findings and
6 recommendations. **The Committee chair may not make changes to screening panel**
7 **findings and recommendations, other than changes needed for clarity.** If no exception is
8 filed, the Committee chair need not issue a final, written determination for a dismissal
9 or a dismissal with a letter of caution.

10 (b) **Public reprimand.** If the screening panel recommends a public reprimand, the
11 Respondent may, within 28 days, file an exception in accordance with Rule 11-532, or
12 elect a trial de novo with the district court by notifying the Committee chair, who will
13 authorize the [OPC to file an](#) Action in accordance with Rule 11-536.

Commented [CG1]: Should the chair modify the findings and conclusions after an exception is granted that changes the recommended outcome? That is the current practice.

1 **Rule 11-550. Diversion referrals, authority, and responsibilities.**

2 (a) **Referral to diversion.** In a matter involving less serious misconduct under Rule 11-
3 551, upon receiving a Complaint and before the matter is submitted to a screening
4 panel, the Respondent may ~~have the option of electing~~ request to have the matter
5 referred to diversion, the appropriateness of which the OPC will determine.

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6 (b) **Authority and responsibility.** The OPC may negotiate and execute diversion
7 contracts, assign monitoring to a Lawyer or assistance program, determine if the
8 Lawyer complied with ~~the diversion contract, determine if the Lawyer fulfilled~~ or
9 materially breached the diversion contract, and adopt such policies and procedures as
10 may be appropriate to accomplish its duties. The OPC has authority to establish
11 committees of volunteer attorneys and other professionals for the specific purpose of
12 monitoring the compliance of any attorney under diversion and reporting compliance
13 to the OPC.

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14 (c) **Notice to Complainant.** The OPC will notify the Complainant, if any, of the
15 proposed decision to refer the Respondent to diversion, and the Complainant may
16 submit written comments. The Complainant will be notified when the Complaint is
17 diverted and when the Complaint is dismissed. All notices will be sent to the
18 Complainant's address according to the OPC's records. Such decision to divert or
19 dismiss is not appealable.

20 (d) **Effect of not participating in diversion.** The Respondent has the right to decline to
21 participate in diversion. If the Respondent chooses not to participate in diversion, the
22 matter proceeds under these rules.

Rule 11-552. Diversion contract.**(a) Contract requirements.**

(1) If the Respondent agrees or elects to participate in diversion, the terms of the diversion must be set forth in a written contract. The contract will be between the Respondent and the OPC.

(2) The OPC must monitor and supervise the conditions of diversion and the terms of the diversion contract.

(3) The contract must specify the program(s) to which the attorney will be diverted, the general purpose of the diversion, the manner in which compliance is to be monitored, and any requirement for payment of restitution or cost.

(4) The Respondent will bear the burden of drafting and submitting the proposed diversion contract. Respondent may use counsel to assist in the negotiation phase of diversion. Respondent may also request that the OPC draft the proposed diversion contract.

(5) Respondent may also use benefits programs provided by the Bar, such as a lawyer or licensed paralegal practitioner assistance program to assist in developing terms and conditions for the diversion contract appropriate to that Respondent's particular situation. Use of a lawyer or licensed paralegal practitioner assistance program to assess appropriate conditions for diversion will not conflict that entity from providing services under the contract.

(6) The terms of each contract must be specifically tailored to the Respondent's individual circumstances. The contract is confidential and its terms may not be disclosed to anyone other than the parties to the contract.

(b) Contract terms. All diversion contracts must contain at least:

(1) the signatures of respondent, Respondent's counsel (if any), and the OPC;

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(2) the terms and conditions of the plan for Respondent and, the identity, if appropriate, of any service provider, mentor, monitor and/or supervisor and that individual's specific responsibilities. If Respondent uses a professional or service, and it is necessary to disclose confidential information, Respondent must sign a limited conditional waiver of confidentiality permitting the professional or service to make the necessary disclosures for the Respondent to fulfill the Respondent's duties under the contract;

(3) the necessary terms providing for oversight of fulfilling the contract terms, including provisions for those involved to report any alleged breach of the contract to the OPC;

(4) the necessary terms providing that Respondent will pay all costs incurred in connection with the contract and those costs further specified under Rule 11-555 and any costs associated with the Complaints to be deferred; and

(5) a specific acknowledgement that a material violation of a contract term renders the Respondent's participation in diversion voidable by the OPC.

(c) **Amendments.** The contract may be amended if the Respondent and the OPC agree.

(d) **Status of complaint.** After a diversion contract is executed by the Respondent, the Complaint is deferred pending successful completion of the contract.

1 **Rule 11-554. Terminating diversion.**

2 (a) **Fulfilling the contract.** The contract terminates when the Respondent fulfills the
3 contract terms and gives the OPC an unsworn declaration demonstrating fulfillment.
4 Upon receiving the unsworn declaration, the OPC must acknowledge receipt and
5 dismiss any Complaint(s) deferred pending successful completion of the contract or
6 notify the Respondent that fulfillment of the contract is terminated based on an OPC
7 claim of material breach. Determinations under this rule are not subject to further
8 review and are not reviewable in any proceeding. Successfully completing the contract
9 is a bar to any further disciplinary proceedings based on the same allegations and
10 successfully completing diversion ~~may~~does not constitute a form of discipline.

11 (b) **Material breach.** Materially breaching the contract is cause for terminating the
12 contract. After a material breach, the OPC must notify the Respondent of the alleged
13 breach and intent to terminate the diversion. Thereafter, disciplinary proceedings may
14 be instituted, resumed, or reinstated.

1 **Rule 11-560. Grounds for discipline.**

2 It constitutes a ground for discipline for a Lawyer to:

3 (a) violate these rules, the Rules of Professional Conduct,~~or the Licensed Paralegal~~

4 ~~Practitioner Rules of Professional Conduct;~~

5 (b) violate a valid court or Committee order imposing discipline;

6 (c) be publicly disciplined in another jurisdiction;

7 (d) fail to comply with the requirements of Rule 11-570; or

8 (e) fail to notify the OPC of public discipline in another jurisdiction in accordance with

9 Rule 11-567(a).

Rule 11-561. Accessing disciplinary information.

(a) **Confidentiality.** Before the OPC initiates an Action or publishes notice of a public reprimand, OPC Counsel, OPC staff, the Committee, Committee volunteers, Committee staff, Committee employees, special counsel appointed pursuant to Rule 11-542, and special counsel employees or assistants, must keep the proceeding confidential, but the OPC may disclose the pendency, subject matter, and status of an investigation if the proceeding is based on allegations disseminated through the mass media, or include either the conviction of a crime or reciprocal public discipline. The proceeding is not confidential to the extent:

(1) the Respondent has given an express written waiver of confidentiality;

(2) there is a need to notify another person or organization—including the Bar’s Lawyer’s Fund for Client Protection ~~or Licensed Paralegal Practitioners’ Fund for Client Protection~~ to protect the public, the administration of justice, or the legal profession;

(3) the information is required in a subsequent Lawyer sanctions hearing; or

(4) a referral is made to the Professionalism and Civility Counseling Board, in which event OPC Counsel, Committee members, screening panel members, and Professionalism and Civility Counseling Board members may share all information between and among them with the expectation that such information will in all other respects be subject to applicable confidentiality rules or exceptions.

(b) **Public proceedings.** Upon filing an Action or a petition for reinstatement or relicensure, the proceedings are public, except as provided in paragraph (d) below.

(c) **Proceedings alleging disability.** Proceedings for transfer to or from disability status are confidential. All orders transferring a Respondent to or from disability status are public.

(d) **Protective order.** To protect the interest of a Complainant, witness, third party, or Respondent, the district court may, on any person’s request and for good cause, issue a

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protective order prohibiting the disclosure of specific information and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application.

(e) **Request for nonpublic information.** Nonpublic information is confidential, other than as authorized for disclosure under paragraph (a), unless the request for information is approved by the OPC and the requestor complies with paragraphs (f) and (g).

(f) **Notice to the Respondent.** Except as provided in paragraph (g), if the [OPC](#) ~~Committee~~ decides to provide nonpublic information requested pursuant to paragraph (e), and if the Respondent has not signed an express written waiver permitting the party requesting the information to obtain the nonpublic information, the Respondent must be notified in writing at the Respondent's mailing address as shown by Bar records of the information that has been requested and by whom, together with a copy of the information proposed to be released. The notice must advise the Respondent that the information will be released 21 days after the notice's mailing unless the Respondent objects to the disclosure. If the Respondent timely objects to the disclosure, the information must remain confidential unless the requesting party obtains a court order authorizing its release.

(g) **Release without notice.** If a requesting party as outlined in paragraph (e) has not obtained an express written waiver from the Respondent to obtain nonpublic information, and requests that the information be released without giving notice to the Respondent, the requesting party must certify that:

- (1) the request will further an ongoing investigation into the Respondent's misconduct;
- (2) the information is essential to that investigation; and

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(3) disclosing the existence of the investigation to the Respondent would seriously prejudice that investigation.

(h) **Disclosure without notice.** The OPC may disclose nonpublic information without notice to the Respondent if:

(1) disclosure furthers an ongoing OPC investigation into the Respondent's misconduct; and

(2) disclosure is essential to that investigation.

(i) **Participants' duty.** OPC Counsel, OPC staff, the Committee, Committee volunteers, Committee staff, Committee employees, special counsel appointed pursuant to Rule 11-542, and special counsel employees or assistants in a proceeding under these rules must maintain confidentiality. Unless otherwise authorized, persons receiving private records under paragraph (e) will not provide access to the records to anyone else.

Rule 11-563. Interim discipline for threat of harm.

(a) **Petition for interim discipline.** Upon receiving sufficient evidence that a Lawyer subject to the Supreme Court's disciplinary jurisdiction poses a threat of serious harm to the public and has either committed a violation of the Rules of Professional Conduct ~~or~~ ~~Licensed Paralegal Practitioner Rules of Professional Conduct~~ or is under a disability as herein defined, the OPC must file a petition for interim discipline in the district court, requesting a hearing and giving notice in accordance with Utah Rule of Civil Procedure 65A.

(1) The petition for interim discipline must be filed with the district court and served on the Respondent in accordance with Rule 4 of the Utah Rules of Civil Procedure.

(2) The district court will set a hearing within 14 days of filing the return of service showing that Respondent has been served.

(b) **Immediate interim discipline.** After conducting a hearing on the petition, the district court may enter an order immediately suspending the respondent, limiting the Respondent's practice area, or requiring supervision of the Respondent pending final disposition of a disciplinary proceeding, or may order such other action as deemed appropriate.

(1) If an order is entered:

(A) the district court may appoint a trustee under Rule 11-538, to protect the interests of the Respondent's clients; and

(B) the OPC may file an Action without presenting the matter to a screening panel.

(2) If an order for interim discipline is not obtained, the OPC must dismiss the interim Action and will process the matter as it does any other information coming to the OPC's attention.

- 26 (c) **Notice to clients.** A Respondent subject to interim discipline pursuant to paragraph
27 (b) must comply with the notice requirements in Rule 11-570 as ordered by the district
28 court.
- 29 (d) **Motion to dissolve or modify interim discipline.** On 48 hours' notice to the OPC, a
30 Respondent suspended pursuant to paragraph (b) may appear and move to dissolve or
31 modify the order of discipline, and such motion will be heard and determined as
32 expeditiously as justice requires.

Rule 11-580. Purpose and nature of sanctions.

(a) **Purpose of sanctions.** The purpose of imposing Lawyer sanctions is to ensure and maintain the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as Lawyers, and to protect the public and the administration of justice from Lawyers who have demonstrated by their conduct that they are unable or likely to be unable to discharge properly their professional responsibilities.

(b) **Public nature of sanctions.** The ultimate disposition of Lawyer discipline will be public in cases of delicensure, suspension, and reprimand; and nonpublic in cases of admonition.

(c) **Purpose of the sanctions rules.** These rules are designed for use in imposing a sanction or sanctions following a determination that a member of the legal profession has violated a provision of the Rules of Professional Conduct ~~or Licensed Paralegal Practitioner Rules of Professional Conduct~~. Descriptions in these rules of substantive disciplinary offenses are not intended to create grounds for determining culpability independent of the Rules of Professional Conduct ~~or Licensed Paralegal Practitioner Rules of Professional Conduct~~. The rules constitute a system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of Lawyer misconduct. The rules are designed to promote:

- (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case;
- (2) consideration of the appropriate weight of such factors in light of the stated goals of Lawyer discipline; and
- (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

Rule 11-581. Sanctions.

(a) **Scope.** A disciplinary sanction is imposed on a Lawyer upon the Committee's or the court's finding that the Lawyer has engaged in professional misconduct.

(b) **Delicensure.** Delicensure terminates the individual's status as a Lawyer. A Lawyer who has been delicensed may be relicensed.

(c) **Suspension.** Suspension removes a Lawyer from the practice of law for a specified minimum time, generally six months or more. In no event should the time before application for reinstatement be more than three years.

(d) **Interim suspension or interim discipline.** Interim suspension temporarily suspends a Lawyer from the practice of law. Interim suspension or interim discipline may be imposed as set forth in Rules [11-563](#) and [11-564](#).

(e) **Reprimand.** Reprimand is public discipline that declares the Lawyer's conduct improper, but does not limit the Lawyer's right to practice law.

(f) **Admonition.** Admonition is nonpublic discipline that declares the conduct of the Lawyer improper, but does not limit the Lawyer's right to practice law.

(g) **Probation.** Probation allows a Lawyer to practice law under specified conditions. The Lawyer's probationary status is public, but the terms of probation may be public or nonpublic. Probation may be imposed alone or in conjunction with other sanctions, and imposed as a condition of reinstatement or relicensure.

(1) **Requirements.** To be eligible for probation, a Respondent must demonstrate that:

(A) the Respondent can perform legal services and the continued practice of law will not cause the courts or the profession to fall into disrepute;

(B) the Respondent is unlikely to harm the public during probation;

(C) the necessary conditions of probation can be adequately supervised; and

(D) the Respondent has not committed acts warranting delicensure.

(2) **Conditions.** Probation may include the following conditions:

(A) no further violations of the Rules of Professional Conduct ~~or Licensed
Paralegal Practitioner Rules of Professional Conduct;~~

(B) restitution;

(C) assessment of costs;

(D) limitation on practice;

(E) requirement that the Lawyer pass the Multistate Professional Responsibility Exam;

(F) requirement that the Lawyer take continuing legal education courses;

(G) mental health counseling and treatment;

(H) abstinence from drugs and alcohol;

(I) medical evaluation and treatment;

(J) periodic reports to the court and the OPC; and

(K) monitoring of all or part of Respondent's work by a supervising attorney.

(3) **Costs.** The Respondent is responsible for all costs of evaluation, treatment, and supervision. Failing to pay these costs before probation terminates is a violation of probation.

(4) **Terminating probation.** A Respondent may terminate probation by filing with the district court and serving on the OPC an unsworn declaration stating that the Respondent has fully complied with the requirements of the probation order. The OPC may file an objection and thereafter the court will conduct a hearing.

(5) **Violations.** If during the period of probation, the OPC receives information that any probation term has been violated, the OPC may file a motion specifying the alleged violation and seeking to have the probation terminated. Upon filing such

50 motion, the Respondent must have the opportunity to respond and a hearing will be
51 held, at which time the court will determine whether to revoke probation.

52 (h) **Diversion.** Diversion is an alternative to a sanction if completed. Diversion allows a
53 Lawyer to practice law under specified conditions. Diversion may be public or non-
54 public.

55 (1) Rule [11-550](#) governs diversion matters before the matter is submitted to a
56 screening panel.

57 (2) For an Action, the following criteria will determine the appropriateness of a
58 diversion:

59 (A) The misconduct does not involve the misappropriation of funds or property;
60 fraud, dishonesty, deceit or misrepresentation; or the commission of a
61 misdemeanor adversely reflecting on the Lawyer's fitness to practice law or any
62 felony;

63 (B) The misconduct appears to be the result of inadequate law office
64 management, chemical dependency, a physical or mental health condition,
65 negligence or lack of training, education or other similar circumstance; and

66 (C) There appears to be a reasonable likelihood that the successful completion of
67 a remedial program will prevent the recurrence of conduct by the attorney
68 similar to that under consideration for diversion.

69 (3) In addition to the above-required criteria of (A), (B) and (C), other considerations
70 may include whether the misconduct is a one-time act or based on a physical or
71 mental condition beyond the Respondent's control and whether there is sufficient
72 evidence connecting the condition to the misconduct.

73 (4) Diversion determinations must include compliance conditions to address the
74 misconduct and the time for completion.

(5) If the Lawyer completes the diversion conditions, the Action will be dismissed with prejudice.

(6) If the Lawyer does not complete the diversion conditions within the required time, the Lawyer will be subject to a suspension of six months and a day.

(i) **Resignation with discipline pending.** Resignation with discipline pending is a form of public discipline that allows a Respondent to resign from the practice of law while either a Complaint or Action is pending against the Respondent. Resignation with discipline pending may be imposed as set forth in Rule [11-566](#).

(j) **Other sanctions and remedies.** Other sanctions and remedies that a court may impose include:

(1) restitution;

(2) assessment of costs;

(3) limitation upon practice;

(4) appointment of a receiver;

(5) a requirement that the Lawyer take the Bar Examination or professional responsibility examination; and

(6) a requirement that the Lawyer attend continuing education courses.

(k) **Reciprocal discipline.** Reciprocal discipline is imposing a disciplinary sanction on a Lawyer who has been disciplined in another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction.