

IN THE SUPREME COURT OF THE STATE OF UTAH

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In re: Proposed Amendments to
Rule 14-510 of the Rules of
Lawyer Discipline and Disability

Case No. 20090129-SC

ORDER

IT IS HEREBY ORDERED that the attached proposed amendments to Rule 14-510 of the Rules of Lawyer Discipline and Disability are adopted and promulgated effective November 1, 2009.

FOR THE COURT:

August 14, 2009
Date

Christine M. Durham
Christine M. Durham
Chief Justice

Rule 14-510. Prosecution and appeals.

(a) Informal complaint of unprofessional conduct.

(a)(1) Filing. A disciplinary proceeding may be initiated against any member of the Bar by any person, OPC counsel or the Committee, by filing with the Bar, in writing, an informal complaint in ordinary, plain and concise language setting forth the acts or omissions claimed to constitute unprofessional conduct. Upon filing, an informal complaint shall be processed in accordance with this article.

(a)(2) Form of informal complaint. The informal complaint need not be in any particular form or style and may be by letter or other informal writing, although a form may be provided by the OPC to standardize the informal complaint format. It is unnecessary that the informal complaint recite disciplinary rules, ethical canons or a prayer requesting specific disciplinary action. The informal complaint shall be signed by the complainant and shall set forth the complainant's address, and may list the names and addresses of other witnesses. The informal complaint shall be notarized and contain a verification attesting to the accuracy of the information contained in the complaint. In accordance with Rule 14-504(b), complaints filed by OPC are not required to contain a verification. The substance of the informal complaint shall prevail over the form.

(a)(3) Initial investigation. Upon the filing of an informal complaint, OPC counsel shall conduct a preliminary investigation to ascertain whether the informal complaint is sufficiently clear as to its allegations. If it is not, OPC counsel shall seek additional facts from the complainant; additional facts shall also be submitted in writing and signed by the complainant.

(a)(4) Notice of informal complaint. Upon completion of the preliminary investigation, OPC counsel shall determine whether the informal complaint can be resolved in the public interest, the respondent's interest and the complainant's interest. OPC counsel and/or the screening panel may use their efforts to resolve the informal complaint. If the informal complaint cannot be so resolved or if it sets forth facts which, 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, OPC counsel shall cause to be served a NOIC by regular mail upon the respondent at the address reflected in the records of the Bar. The NOIC shall have attached a true copy of the signed informal complaint against the respondent and shall identify with particularity the possible violation(s) of the Rules of Professional Conduct raised by the informal complaint as preliminarily determined by OPC counsel.

(a)(5) Answer to informal complaint. Within 20 days after service of the NOIC on the respondent, the respondent shall file with OPC counsel a written and signed answer setting forth in full an explanation of the facts surrounding the informal complaint, together with all defenses and responses to the claims of possible misconduct. For good cause shown, OPC counsel may extend the time for the filing of an answer by the respondent not to exceed an additional 30 days. Upon the answer having been filed or if the respondent fails to respond, OPC counsel shall refer the case to a screening panel for investigation, consideration and determination. OPC counsel shall forward a copy of the answer to the complainant.

(a)(6) Dismissal of informal complaint. An informal complaint which, upon consideration of all factors, is determined by OPC counsel to be frivolous, unintelligible, barred by the statute of limitations, more adequately addressed in another forum, unsupported by fact or which does not raise probable cause of any unprofessional conduct, or which OPC declines to prosecute may be dismissed by OPC counsel without hearing by a screening panel. OPC counsel shall notify the complainant of such dismissal stating the reasons therefor. The complainant may appeal a dismissal by OPC counsel to the Committee chair within 15 days after notification of the dismissal is mailed. Upon appeal, the Committee chair shall conduct a de novo review of the file, either affirm the dismissal or require OPC counsel to prepare a NOIC, and set the matter for hearing by a screening panel. In the event of the chair's recusal, the chair shall appoint the vice chair or one of the screening panel chairs to review and determine the appeal.

(b) Proceedings before Committee and screening panels.

(b)(1) Review and investigation. A screening panel shall review all informal complaints referred to it by OPC counsel, including all the facts developed by the informal complaint, answer, investigation and hearing, and the recommendations of OPC counsel.

(b)(2) Respondent's appearance. Before any action is taken ~~that may result in the recommendation of an admonition or public reprimand~~ or the filing of a formal complaint, the screening panel shall, upon at least ~~30 days'~~ notice, afford the respondent an opportunity to appear before the screening panel. ~~Respondent and any witnesses called by the respondent may testify, and respondent may present oral argument with respect to the informal complaint. Respondent may also submit a written brief to the screening panel at least 10 days prior to the hearing, which shall not exceed 10 pages in length unless permission for enlargement is extended by the chair or the chair's delegate for good cause shown. A copy of the brief shall be forwarded by OPC counsel to the complainant.~~

(b)(3) Complainant's appearance. A complainant shall have the right to appear before the screening panel personally and ~~together with any witnesses called by the complainant, may testify.~~

(b)(4) Right to hear evidence; ~~cross-examination~~. The complainant and the respondent shall ~~have the right to be present during the presentation of the evidence unless excluded by the screening panel chair for good cause~~

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shown. Respondent may be represented by counsel, and complainant may be represented by counsel or some other representative. Either complainant or respondent may seek responses from the other party at the hearing by posing questions or areas of inquiry to be asked by the panel chair. Direct cross-examination will ordinarily not be permitted except, upon request, when the panel chair deems that it would materially assist the panel in its deliberations.

(b)(5) Hearing Record. The proceedings of any hearing before a screening panel under this subsection (b) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings. Pursuant to its function as secretary to the Committee under Rule 14-503(h)(1), OPC shall be responsible for the assembly of the complete record of the proceedings, to be delivered to the chair of the Committee upon the rendering of the panel's recommendation to the Committee chair. The record of the proceedings before the panel shall be preserved for not less than one year following delivery of the panel's recommendation to the chair of the Committee and for such additional period as any further proceedings on the matter are pending or might be instituted under this section.

(b)(6) Screening panel determination. Upon review of all the facts developed by the informal complaint, answer, investigation and hearing, the screening panel shall make one of the following determinations:

(b)(6)(A) The preponderance of evidence presented does not establish that the respondent was engaged in unprofessional conduct, in which case, the informal complaint shall be dismissed. OPC counsel shall promptly give notice of such dismissal by regular mail to the complainant and the respondent. A letter of caution may also be issued with the dismissal. The letter shall be signed by OPC counsel or the screening panel chair and shall serve as a guide for the future conduct of the respondent. The complainant shall also be confidentially notified of the caution.

(b)(6)(B) The informal complaint shall be referred to the Diversion Committee to be processed in accordance with the provisions of Rule 14-533;

(b)(6)(C) The informal complaint shall be referred to the Committee chair with an accompanying screening panel recommendation that the respondent be admonished;

(b)(6)(D) The informal complaint shall be referred to the Committee chair with an accompanying screening panel recommendation that the respondent receive a public reprimand; or

(b)(6)(E) A formal complaint shall be filed against the respondent pursuant to Rule 14-511.

(b)(7) Recommendation of admonition or public reprimand. A screening panel recommendation that the respondent should be disciplined under subsection (b)(6)(C) or (b)(6)(D) shall be in writing and shall state the substance and nature of the informal complaint and defenses and the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should be admonished or publicly reprimanded. A copy of such screening panel recommendation shall be delivered to the Committee chair and a copy served upon the respondent.

(b)(8) Determination of appropriate sanction. In determining an appropriate sanction and only after having found unethical conduct, the screening panel may consider any admonitions or greater discipline imposed upon the respondent within the five years immediately preceding the alleged offense.

(b)(9) Continuance of disciplinary proceedings. A disciplinary proceeding may be held in abeyance by the Committee prior to the filing of a formal complaint when the allegations or the informal complaint contain matters of substantial similarity to the material allegations of pending criminal or civil litigation in which the respondent is involved.

(c) Exceptions to admonitions and public reprimands. Within 30 days after service of the recommendation of an admonition or public reprimand on respondent, respondent may file with the Committee chair exceptions to the recommendation and may request a hearing. The exceptions shall include a memorandum, not to exceed 20 pages, stating the grounds for review, the relief requested and the bases in law or in fact for the exceptions.

(d) Procedure on exceptions.

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

(d)(2) Hearing requested. If a request for a hearing is made, the Committee chair or a screening panel chair designated by the Committee chair shall 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. However, upon motion to the Exceptions Officer and for good cause shown, respondent may seek to augment the record before the screening panel or the original brief on exceptions, including:

(d)(2)(A) A request to call complainant as an adverse witness for purposes of cross-examination, if complainant was not subject to direct cross-examination before the screening panel, and

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(d)(2)(B) A request for time to obtain a transcript of the screening panel proceedings to support respondent's exceptions, the cost of such transcript to be borne by respondent. If a transcript is requested, OPC will provide the Committee chair with the transcript as transcribed by a court reporting service, together with an affidavit establishing the chain of custody of the record.

(d)(3) Burden of proof. A respondent who files exceptions under this section (d) shall have the burden of showing that the recommendation of the screening panel is unsupported by substantial evidence or is arbitrary, capricious, legally insufficient or otherwise clearly erroneous. (d)(4) OPC response. The Exceptions Officer may request a written response from OPC to exceptions filed by respondent.

(d)(5) Record on exceptions. The proceedings of any hearing on exceptions under this subsection (d) shall be recorded at a level of audio quality that permits an accurate transcription of the proceedings.

(e) Final Committee disposition. Either upon the completion of the exceptions procedure under subsection (d) or if no exceptions have been filed by respondent under subsection (c), the Committee chair shall issue a final, written determination that either sustains, dismisses, or modifies the disciplinary recommendation of the screening panel. A modification of the screening panel's recommendation of discipline may not, (e)(1) Be more severe than the original recommendation of the screening panel; nor

(e)(2) Require OPC to file a formal complaint under Rule 14-511.

(f) Appeal of a final Committee determination of admonition or public reprimand.

(f)(1) Within 30 days after service by OPC of a final, written determination of an admonition or a public reprimand in a matter for which exceptions have been filed by respondent under subsection (c), respondent may file a request for review with the Supreme Court seeking reversal or modification of the final determination by the Committee.

(f)(2) A request for review under this subsection (f) will be subject to the procedures set forth in Title III of the Utah Rules of Appellate Procedure.

(f)(3) A party requesting a transcription of the record below shall bear the costs. OPC will provide the Court with the transcript as transcribed by a court reporting service, together with an affidavit establishing the chain of custody of the record.

(f)(4) The Supreme Court shall conduct a review of the matter on the record.

(f)(5) Respondent shall have the burden of demonstrating that the Committee action was:

(f)(5)(A) Based on a determination of fact that is not supported by substantial evidence when viewed in light of the whole record before the Court;

(f)(5)(B) An abuse of discretion;

(f)(5)(C) Arbitrary or capricious; or

(f)(5)(D) Contrary to Articles 5 and 6 of Chapter 14 of the Rules of Professional Practice of the Supreme Court.

(g) General procedures.

(g)(1) Testimony. All testimony given before a screening panel or the Exceptions Officer shall be under oath.

(g)(2) Service. To the extent applicable, service or filing of documents under this Rule is to be made in accordance with Utah Rules of Civil Procedure 5(b)(1), 5(d) and 6(a).

(g)(3) Form of Documents. Documents submitted under this Rule shall conform to the requirements of Rules 27(a) and 27(b) of the Utah Rules of Appellate Procedure, except it is not required to bind documents along the left margin.

Advisory Note: See *Nemelka v. The Ethics and Discipline Committee of the Utah Supreme Court*, 2009 UT 33, as to subpoena procedure for cross-examination if permitted by the panel chair or Exceptions Officer.

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