

As the rules are currently constituted, Screening Panel decisions of dismissals and diversions under 14-510 (b)(6)(A) & (b)(6)(B) are not appealable to the Committee Chair so with respect to the Committee Chair, determinations of dismissals and diversions are final decisions on a case. Screening Panel recommendations of admonitions and/or public reprimands are, pursuant to 14-510(c) appealable by Respondents, but not appealable by OPC. And, in accordance with 14-510 (e)(1) & (e)(2) whether the Chair agrees or not, he cannot modify the Screening Panel recommendation to be more severe or authorize a formal complaint to be filed. Thus, under the present rules, there is no mechanism whereby OPC can appeal any determination by a Screening Panel, and there is no mechanism whereby the Chair can increase any sanction (although the Chair may decrease a sanction).

The limitation of the review process described above is inconsistent with the Committee Chair's responsibility of ensuring uniformity of Screening Panel decisions and the Utah Supreme Court's overall constitutional responsibility for attorney discipline. In this respect, one of the responsibilities with which the Chair is charged under 14-503 (b) is to determine that Screening Panels have a uniform basis for the judgments rendered. Given that there are 8 different Panel compositions (24 attorney and 8 public panel members sitting in quorums of 2 attorneys and one public member), it is impossible to have perfect uniformity in decisions. However, within reasonable practicality, the Chair has made a concerted effort to have consistent decisions. As part of this effort, the Chair has developed a structured decision sheet to be followed for an analytical approach to decisions and he communicates with the Panels on their general approach to decisions. What is missing is the possibility through appeal of a specific review of all Panel decisions to help ensure consistency. This missing link is OPC's role in the process. The OPC is the linchpin in the process of having the potential for all the cases heard by Screening Panels to be subject to review by the Chair of the Committee or the Utah Supreme Court. In this respect, when cases are dismissed; diverted or under sanctioned despite clear evidence of misconduct under the Rules of Professional Conduct and the Standards For Imposing Lawyer Sanctions, if OPC has no right of appeal, neither the Chair nor the Supreme Court can ever hear these cases to correct the error and provide more consistent results. This interferes with the Supreme Court's overall responsibility for lawyer discipline.

From a general standpoint, the Screening Panels have done a fair job of making determinations that are consistent and correct pursuant to the Standards for Imposing Lawyer Sanctions. However, over the years (2003 to present) there have been a number of case examples where the evidence has been clear regarding serious misconduct where the Panels either mildly sanctioned or declined to sanction an attorney in contravention of the Rules. They are as follows:

- (1) Father and son law partners who had previously done legal work for client. Subsequent and incidental to previous legal work, lawyers requested \$350,000 from client to invest in gold making venture promoted by lawyers without documenting the loan or bringing their conflict to the client's attention. Client lost all money. Panel dismissed case with a caution against father and recommended admonition against son.
- (2) Attorney misappropriated client monies by charging excessive fee not approved by client; Panel recommended admonition. Same attorney criminally charged with possession of controlled substance (meth); failure to stop and DUI. Panel recommended public reprimand.
- (3) Attorney committed domestic violence resulting in serious injury; Panel recommended admonition.
- (4) Attorney has sex with client; Panel dismissed.
- (5) Attorney smuggles drugs into jail on visit; Panel recommended admonition.
- (6) Attorney criminally charged with hiding from feds \$300,000 plus of client money in trust account; Panel dismissed on condition.
- (7) Attorney criminally charged with possession of a controlled substance (cocaine); Panel dismissed.

- (8) Attorney criminally charged with obtaining prescriptions by fraud or false pretenses, attorney stole a doctor's prescription pad and wrote prescription in ex-spouse's name for personal use; Panel recommended public reprimand.
- (9) Attorney misappropriated client monies where clear evidence that trust account funds dropped below funds owed to clients due to personal expenditures of attorney; Panel first diverted but rejected by Diversion Committee, 2nd Panel recommended admonition.

The foregoing nine examples are a tiny fraction of the Screening Panel decisions over the same time period, but we believe they illustrate that Screening Panels can make mistakes, and we believe those mistakes should have at least the potential for being corrected.

Many of these examples involve the interplay between the Rules and Standards and criminal conduct. The Utah Supreme Court has not given clear directions in this area, and allowing the Chair the authority to increase sanctions and OPC the right of appeal would give the Court the opportunity to develop case law that would guide OPC, Panels and district courts.

The OPC would not lightly or frivolously appeal a Screening Panel decision; however the cases described above are examples where some level of Panel review is needed to obtain better consistency and correctness concerning attorney discipline. And the only way to obtain this is for the Chair to have the authority to increase a sanction and for OPC to have the right to appeal. It should also be noted that as a matter of symmetry allowing OPC the right to appeal from Ethics and Discipline Committee decisions is consistent with OPC's right to appeal district court decisions.

The Supreme Court's comments to us suggested that the Court's desire for uniformity and providing an avenue to address a Panel's serious under-sanctioning motivated its request that we submit this rule change to the Committee.