

## **INTRODUCTION**

This report on the Office of Professional Conduct (“OPC”) will focus on six areas: (I) staff composition; (II) attorney misconduct case process and procedure; (III) statistics for fiscal year 2001-2002; (IV) progress on cases; (V) the Consumer Assistance Program; and (VI) goals for fiscal year 2002-2003.

### **I. STAFF COMPOSITION**

The staff currently consists of nine full-time employees. These nine employees include Senior Counsel, Deputy Counsel, three Assistant Counsel, two Paralegals, one Legal Secretary/Assistant to Counsel, and one Intake Clerk.

Since the last annual report, the OPC has had to rehire for two Assistant Counsel positions. The OPC has also upgraded one Legal Secretary/Assistant to Counsel position to a Paralegal position.

### **II. ATTORNEY MISCONDUCT CASE PROCESS AND PROCEDURE**

This section outlines how the OPC addresses information that comes to its attention regarding alleged attorney misconduct. Rule 4 of the Rules of Lawyer Discipline and Disability (“RLDD”) is the overall authority for the OPC and Senior Counsel as head of the OPC. Specifically addressing the processing of cases, the pertinent provisions of Rule 4(b) of the RLDD state that Senior Counsel and the OPC have the power and duty to:

(1) Screen all information coming to the attention of the Office to determine whether it is within the jurisdiction of the Office in that it relates to misconduct by a lawyer or to the incapacity of a lawyer;

(2) Investigate all information coming to the attention of the Office which, if true, would be grounds for discipline or transfer to disability status and investigate all facts pertaining to petitions for reinstatement or readmission;

(3) For each matter brought to the attention of the Office:

(A) dismiss;

(B) decline to prosecute;

(C) refer non-frivolous and substantial informal complaints to the Committee for hearing; or

(D) petition for transfer to disability status;

(4) Prosecute before the screening panels, the district courts and the Supreme Court all disciplinary cases and proceedings for transfer to or from disability status;

Information comes to the OPC's attention in the form of notarized and non-notarized complaints. Notarized complaints are official informal complaints within the meaning of Rule 10(a)(2) and, therefore, are processed pursuant to Rule 4 and Rule 10 of the RLDD. By contrast, non-notarized complaints are not official informal complaints, and are usually submitted to the OPC in the form of a Request for Assistance. They are processed pursuant to Rule 4 of the RLDD. For purposes of this report, all non-notarized complaints will hereinafter be referred to as Requests for Assistance. The OPC reviews Requests for Assistance in coordination with the Utah State Bar's Consumer Assistance Program ("CAP").

Additionally, pursuant to Rule 4(b)(2) and Rule 10(a)(1) of the RLDD, the OPC can start an attorney misconduct investigation on its own initiative, based upon information that comes to its attention. In these cases, the OPC usually sends the attorney a notice of the OPC investigation under the notarized signature of Senior Counsel.

**A) Central Intake System**

The OPC's Central Intake System is patterned after the system used in Colorado. Intake attorneys are assigned to review all initial information received (Requests for Assistance and notarized informal complaints) to determine whether the matter can be closed by a declination to prosecute or a dismissal, or whether the matter should be processed further for referral to a Screening Panel of the Utah State Bar's Ethics and Discipline Committee. These decisions are made jointly by the intake attorneys and the other staff attorneys at weekly case status meetings.

As part of this system, the OPC reviews all Requests for Assistance made to the CAP. The OPC determines whether the Request for Assistance is appropriate to be handled through the CAP (i.e., minor attorney concerns that most likely do not rise to the level of Rule of Professional Conduct violations). The OPC also determines whether the Request for Assistance should be resubmitted as a notarized complaint (i.e., serious attorney concerns or matters involving attorneys who are already under investigation by the OPC on the basis of other notarized informal complaints alleging similar concerns). Within those parameters, when appropriate, Requests for Assistance are sent to the CAP and when appropriate, the OPC notifies the complainant to resubmit their complaint with notarization.

**B) Official Informal (Notarized) Complaints ("Informal Complaint")**

All reviews of all informal complaints and the decisions associated with these reviews are made jointly by the OPC attorneys at weekly staff meetings. The informal complaint is reviewed for jurisdiction, merit and timeliness. Looking at the "four corners" of the informal complaint, if the OPC determines it does not have jurisdiction, if the

informal complaint fails to state a claim, if the informal complaint is beyond the statute of limitations, or if the case lacks merit in that the alleged conduct even if true is not an ethical violation, the case is summarily dismissed. In summary dismissal cases, there is no need to contact the attorney for information. Both the complainant and the attorney receive a dismissal letter, and a copy of the informal complaint is sent to the attorney.

Looking at the “four corners” of the informal complaint, if the OPC determines that the allegations of misconduct appear to have merit, a factual investigation is conducted. The OPC conducts an investigation by advising the attorney and obtaining a response to the informal complaint, and, in most cases, a response from the complainant to the attorney’s response. Further, where necessary and appropriate to ascertain the facts necessary to assess the charges, the OPC contacts witnesses. The OPC always examines all documents submitted by all participants. At any point during the investigation, the OPC is willing to conduct settlement discussions with the attorney. Upon completion of the investigation as outlined above, the OPC determines whether the informal complaint sets forth facts which by their very nature should be brought before a Screening Panel or if good cause otherwise exists to bring the matter before a Screening Panel. These are “non-frivolous and substantial within the meaning of informal complaints” within the meaning of Rule 4(b)(3).

If upon completion of this investigation the OPC determines that the case is not substantial (i.e., the factual allegations made by the complainant that can be proven do not constitute a violation of the Rules of Professional Conduct or the evidence is insufficient to establish by a preponderance that the attorney violated the Rules of Professional Conduct), the OPC dismisses the informal complaint.

Additionally, consistent with the language in Rule 10(a)(4) of the RLDD, which states that “professional counsel [OPC] shall determine whether the informal complaint can be resolved in the public interest, the respondent’s interest and the complainant’s interest,” and the OPC’s authority pursuant to Rule 4(b)(3)(B) of the RLDD to decline to prosecute a particular case, the OPC may decline to prosecute an informal complaint.

The OPC does not arbitrarily decide to decline to prosecute a case. Occasionally, due to the nature of a case (i.e., the remedy sought by a complainant; ongoing proceedings and the possible disruption of those proceedings that a Bar disciplinary case could have; the OPC resources needed to process a case compared to the OPC resources needed if the matters are first addressed elsewhere), it is in everyone’s best interests to resolve the disciplinary matter by declining to prosecute the case. Generally, the OPC standards for declining to prosecute cases are as follows:

- The OPC may decline to prosecute cases where it is probably more appropriately addressed in another forum.
- The OPC may decline to prosecute cases where there is a question as to the nexus between the allegations and the attorney practice.
- The OPC may decline to prosecute cases where the attorney has already been disciplined for similar misconduct committed during the same period. In these cases, it is unlikely the misconduct will result in discipline greater than what has already been imposed.
- The OPC may decline to prosecute cases where the attorney has taken immediate action to remedy the alleged misconduct.

It should be noted that if the OPC declines to prosecute a case and a court subsequently makes findings that could be the basis for a finding of misconduct under the Rules of Professional Conduct, the OPC will re-open the case and address the findings.

Further, pursuant to the language in Rule 10 of the RLDD regarding the OPC authority to resolve cases “in the interests of the public, the respondent, and the complainant,” if the attorney consents to a Diversion Agreement, the OPC may also decline to prosecute cases involving minor Rules of Professional Conduct violations. The specific types of cases that are appropriate for diversion are outlined in the OPC Alternative to Discipline Policy. The OPC Alternative to Discipline Policy is also patterned after a similar program in Colorado. Generally, pursuant to the OPC Alternative to Discipline Policy, the Diversion Program is available for minor rule violations where an attorney does not have a history of disciplinary complaints or problems. Further, the Diversion Program must be appropriate to address the rule violation(s).

**1) Informal Appeals**

Pursuant to Rule 10(a)(6) of the RLDD, a complainant can appeal the OPC’s summary dismissal of any informal complaint within fifteen days to the Ethics and Discipline Committee Chair. The Utah Supreme Court has not determined whether complainants have the right to appeal an OPC dismissal after investigation or its declination to prosecute an informal complaint. Until such a determination is made by Rule clarification or otherwise, when the OPC dismisses an informal complaint after investigation or declines to prosecute an informal complaint, the OPC gives notice to the

complainant of the language in Rule 10(a)(6) of the RLDD and, notwithstanding the Rule's lack of specificity, allows the complainant the opportunity to appeal the OPC decision.

## **2) Notice of Informal Complaint ("NOIC")**

If after investigation, the OPC determines that the allegations of the informal complaint are non-frivolous and substantial, or if the Chair or Vice-Chair of the Ethics and Discipline Committee remands a case after an appeal, the OPC refers the informal complaint to a Screening Panel of the Ethics and Discipline Committee.

The Ethics and Discipline Committee ("the Committee") is appointed by the Utah Supreme Court. The Committee consists of eight public members, and twenty-six members of the Bar who have demonstrated a high standard of professional conduct. The Committee is divided into four Screening Panels, each consisting of six Bar members and two public members.

Before a case is referred to a Screening Panel, the OPC serves the attorney with an NOIC, officially notifying the attorney of the OPC's intent to bring the case before a Screening Panel.

## **3) Screening Panel**

Unless a case is settled, after the attorney has had an opportunity to respond to the NOIC, the case is heard by the Screening Panel. The Screening Panel may make the following determinations:

- Dismissal for lack of merit
- Dismissal with a letter of caution
- Dismissal upon condition of a specific performance by the attorney (i.e. CLE, restitution, Ethics School, etc.)

- Recommendation that the attorney be admonished (if the Screening Panel recommends an admonition, the attorney has ten days to file an exception to the recommendation with the Chair of the Ethics and Discipline Committee Chair.)
- A finding of probable cause that a formal Complaint be filed with the District Court.

If the Screening Panel determines that the informal complaint should be filed as a formal Complaint, Rule 11 of the RLDD requires the OPC to prepare the formal Complaint for the signature of the Chair of the Committee. Often the attorney has more than one informal complaint pending against him/her. If there is more than one informal complaint involved, an informal complaint may be temporarily held in a formal-not-filed category until the other informal complaints pass through the Screening Panel process and can be combined into a single formal Complaint.

**C) Formal Complaints**

A formal Complaint can be filed in the county where the alleged misconduct occurred, or in the county where the attorney resides or practices law or last practiced law. Once a formal Complaint is filed with the District Court, if no settlement can be reached, the case is prepared for a bench trial. The bench trial is bifurcated. The first portion of the trial involves the adjudication of misconduct. If the judge does not dismiss the case and finds misconduct, the second stage of the trial is a sanctions hearing. At the end of the sanctions hearing, the judge can order sanctions and remedies that may include, but is not limited to, the following dispositions:

- |                        |              |
|------------------------|--------------|
| ➤ Admonition           | ➤ Probation  |
| ➤ CLE or Ethics School | ➤ Suspension |
| ➤ Public Reprimand     | ➤ Disbarment |
| ➤ Restitution          |              |



**D) Formal Appeals**

All appeals from District Court orders are directed to the Utah Supreme Court. Only the attorney or the OPC can appeal from the District Court order.

**E) Monitored Cases**

Monitored cases include probation cases, disability cases and trusteeship cases. Probation cases require someone to docket reminder dates, and follow-up to ensure that the attorney meets the probation requirements. Disability cases generally require someone to investigate the extent of the disability, to process the case through District Court, and to monitor the continuing status of the attorney. Trusteeship cases generally require that someone inventory the attorney's files, notify the attorney's clients of the trusteeship, and assist with distribution of client files to the clients. Additionally, trusteeship cases require someone to inventory unclaimed files, prepare a notice for publication of potential destruction of the files, prepare a request to the District Court to approve destruction of unclaimed files, and ultimately to destroy the files.

When the OPC has to undertake a trusteeship, it takes a tremendous amount of resources and time. It is preferable to the OPC than an attorney or firm outside of the OPC be appointed to manage trusteeships. However, since in most trusteeship cases there is little or no money for the recoupment of costs and fees, there are very few attorneys or firms that are willing and able to oversee a trusteeship.

**F) Interim Suspension**

Pursuant to Rules 18, 19, and 23 of the RLDD, if an attorney poses a substantial threat of irreparable harm to the public and has either committed a violation of the Rules of Professional Conduct or has been convicted of a crime which reflects adversely on the attorney's honesty, trustworthiness, or fitness as an attorney, or is under a disability as defined in the RLDD, the OPC may file a petition for interim suspension and/or a request for trusteeship. This is an immediate filing in the District Court, and need not go through the NOIC and Screening Panel process outlined above.

**G) Final Dispositions**

Until a case reaches a "final" disposition, the OPC considers it an active case. Final dispositions are cases where the result has been determined to be dismissal, dismissal with caution, dismissal on condition, admonition, public reprimand, disbarment, time-specified suspension, probation, resignation pending discipline, and cases in which no appeal is pending.

**III. STATISTICS – Fiscal Year 2001-2002 (July 1, 2001 to June 30, 2002)**

For purposes of compiling statistics, the OPC counts as one case each Request for Assistance received, informal complaint received, or attorney misconduct investigation started on the OPC's initiative. Formal Complaints filed with the District Court or Supreme Court often encompass a number of underlying informal complaints. The underlying informal complaints are not closed and considered final dispositions until an order is entered and no formal appeal is pending.

**A) Case Activity**

Active cases as of 7/1/01 .....643

1) Cases opened

Informal Complaints .....443  
 Requests for Assistance .....651  
 Disability .....1  
 Readmission/Reinstatement/Contempt .....9  
 Trusteeships .....3  
**Total** ..... 1107

**Total cases processed during period: ..... 1750**

2) Informal Complaints Closed

By Declination to Prosecute .....20  
 By Dismissal After Investigation .....229  
 By Dismissal After Screening Panel .....34  
 By Summary Dismissal .....70  
**Total** .....353

3) Requests for Assistance Closed

By Sending to CAP .....206  
 By Return for Notarization .....286  
 By Declination to Prosecute .....88  
**Total** .....580

4) Cases Closed With Orders of:

# of attys

Admonition ..... 64 (48)  
 Resignation With Discipline Pending ..... 7 (2)  
 Reinstatement/Readmission/Contempt ..... 6 (6)  
 Suspension ..... 24 (5)  
 Public Reprimand ..... 5 (3)  
 Disbarment ..... 44 (8)  
 Miscellaneous Orders ..... 1 (1)  
**Total** ..... 151 (73)

Orders of Readmission/Reinstatement/Contempt ..... 7  
 Order Closing Disability ..... 1  
 Closure of Cases Underlying Trusteeship ..... 2

**Total case closures during period:..... 1095**

**Active cases as of 7/1/02 ..... 655**  
 (Open cases minus closures for fiscal year 2001-2002)

5) During the Fiscal Year 2001-2002, the OPC had open case activity as follows:

Diversions .....	15
Informal Abeyances .....	6
Informal Appeals .....	72
(9 remands by Committee Chair and to date 3 have been heard by Screening Panel. The results of the remands have been an admonition and 2 dismissals)	
Interim Suspension .....	1
Disability.....	1
Trusteeship .....	3
(Representing 9 underlying informal complaints)	
Formal cases filed .....	22
(Representing 69 underlying informal complaints)	
Formal Appeals.....	2
(No remands)	

6) Screening Panel outcomes were as follows: # of attys

Cases voted formal .....	41	
Cases voted admonition.....	35	
Cases dismissed.....	34	
<b>Total Screening Panel Case Outcomes.....</b>	<b>110</b>	<b>(58)</b>

7) Stipulations

Admonitions .....	29
Suspensions.....	3
Public Reprimand.....	2

8) Notice of Insufficient Funds

As part of the OPC case activity, Rule 1.15(a) of the Rules of Professional Conduct requires that attorneys maintain their trust accounts in financial institutions that

agree to report to the OPC “in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds (NSF), irrespective of whether or not the instrument is honored.” Pursuant to this rule the OPC opened 55 NSF cases in fiscal year 2001-2002, and dismissed 32 of them. The usual reasons for dismissals of NSF cases are accounting errors, bank errors, depositing errors, or drawing on the account before a deposit clears.

9) Summary

Of the 1750 cases the OPC processed in fiscal year 2001-2002, 933 or 53.3% were resolved by dismissals, declinations to prosecute, referral to CAP or return for notarization. Of these 1750 cases, 151 or 8.6% of the cases resulted in Orders of Discipline. Approximately 21% of the Orders of Discipline were by stipulation. Finally, 6.2% of the OPC’s processed cases for the year were heard by Screening Panels.

10) Beginning Fiscal Year 2002-2003

The 655 active cases the OPC begins Fiscal Year 2002-2003 with are against 459 attorneys. The breakdown of the various stages of the 655 cases is as follows:

Requests for Assistance .....	95
Informal Complaints .....	362
Informal Abeyances .....	40
Diversions .....	31
Informal Appeals .....	9
Screening Panel Voted Formal (not yet filed).....	44
Cases as part of 24 formal filed complaints with the District Court .....	47
Disability .....	1

Probation.....	1
Readmission/Reinstatement/Contempt.....	7
Cases as part of 9 Trusteeships.....	12
Interim Suspensions.....	2
Formal Appeals.....	4

**B) Miscellaneous**

1) Rule 4(b)(13) of the RLDD requires that the OPC provide informal guidance to promote ethical conduct by Bar members. In compliance with this rule, the OPC has an Ethics Hotline where the OPC attorneys give Bar members informal guidance by telephone. During fiscal year 2001-2002, the OPC rendered 597 informal ethics opinions by telephone.

Additionally, the OPC attorneys make Continuing Legal Education (“CLE”) ethics presentations. During fiscal year 2001-2002, the OPC’s CLE presentations totaled 24.5 hours.

2) The OPC has collected and categorized other data regarding its cases. Specifically, the data collected provide statistics on the rule violations generally alleged by complainants. For example, for informal complaints received in fiscal year 2001-2002 in approximate numbers: 25.8% of the cases alleged violations of Rule 8.4 (Misconduct) of the Rules of Professional Conduct, 21.4% of the cases alleged violations of Rule 1.1 (Competence) of the Rules of Professional Conduct, and 10.3% of the cases alleged violations of Rule 1.3 (Diligence) of the Rules of Professional Conduct. Looking at the source of the complaint in approximate numbers, 14.0% were made by opposing counsel, 14.0% were made by former clients, 12.8% were made by

current clients, 11.7% were made by the OPC, 9.1% were made by a lawyer - not opposing counsel, and 3.4% were made by judges.

#### **IV. PROGRESS ON CASES**

The OPC, like every other state bar disciplinary authority, has and will continue to have unfinished work. Furthermore, the OPC, like every other state bar disciplinary authority, has and will continue to have a percentage of its unfinished work accumulate at the informal stage. The reason for this is the nature of the work. In this regard, the OPC processes disciplinary cases against attorneys who are often determined to use every means at their disposal to protect their "privilege" to practice law. This sometimes makes investigating and processing cases analogous to a criminal proceeding. In these cases, it tends to lengthen the processing at both the informal and post-informal stages.

The OPC case progress goal is to have a system in place that keeps cases moving so the percentage of unfinished work at the informal stage is as small as possible. This goal must be accomplished while simultaneously, and as expeditiously as possible, moving the larger percentage of cases that are at the post-informal stage (i.e., cases before Screening Panels or the District Court; cases on appeal; cases holding for resolution of a companion formal case; or cases held in abeyance pending related litigation). The OPC brought over 60% of the cases it processed in the last fiscal year to a final disposition; this included bringing informal and post-informal stage cases to final dispositions. Based upon this fact, the OPC feels it is accomplishing this goal. Further, evidence of this is the fact that at the same time, the OPC is also filing a significant number of new formal cases. In this respect, in addition to handling three new trusteehips, one new disability case, and nine new cases of

readmission/reinstatement/contempt, the OPC filed 22 new formal cases with the District Court (the 22 formal cases represent 69 underlying informal complaints).

The OPC does not simply concentrate its efforts on older cases: it attempts to provide expedited and efficient work on all cases, new and old. This work method is intended to keep cases progressing.

The addition of the Central Intake System has greatly aided case processing goals. It has enabled the OPC to address all information coming to its attention (both notarized and non-notarized) to quickly and efficiently determine the appropriate track for the information. Under this system, dismissals, closures, and preliminary investigations can be made within 5-10 working days. This leaves more resources to address cases raising more serious ethical allegations, resulting in quicker case processing for all cases. It should also be noted that the OPC's Alternatives to Discipline Policy has allowed the OPC to more quickly resolve cases. Furthermore, this policy has alleviated the need to spend extra OPC resources on cases involving minor ethical violations.

#### **V. CONSUMER ASSISTANCE PROGRAM**

The CAP is not part of the OPC, but the OPC works in coordination with it, and reviews all information sent to the Utah State Bar as a non-notarized Request for Assistance. This review ensures that the allegations of serious misconduct are not processed as Requests for Assistance. Of the 651 Requests for Assistance the OPC reviewed in fiscal year 2001-2002, 231 were sent to CAP, and 25 ultimately came back to the OPC as informal complaints. Thus, 206 cases were resolved by CAP in fiscal year 2001-2002.



The OPC uses the resources normally needed for reviewing and resolving the cases that are handled by the CAP to process cases where there are serious ethical violations.

**VI. GOALS FOR FISCAL YEAR 2002-2003**

The OPC will continue to work toward the goals outlined in its previous reports. Specifically, the OPC has a responsibility to resolve disciplinary complaints in a uniform, expeditious and systematic way to protect the public, clients, and the legal profession from the professional misconduct of attorneys. The overriding goal is to continue to develop the OPC case processing system to ensure that the majority of resources are utilized to more quickly prosecute those cases where it is appropriate to file formal complaints with the District Court.

**CONCLUSION**

The OPC staff is excellent and continues its hard work. The OPC will continue its efforts towards efficiency in the expedition of cases. The OPC looks forward to another productive year.

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