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Summer Convention registration inside.

Utah Supreme Court Forms OPC Oversight Committee

by Judge Diana Hagen and Keith A. Call

Nothing will raise a lawyer's blood pressure like getting a letter from the Office of Professional Conduct stating that you are under investigation for violation of the ethical rules. If you have ever seen such a letter, it probably included something like this: "We recognize that having our office involved in matters such as this can be inconvenient and unsettling." They are obviously Masters of Understatement.

What Is the OPC?

The Office of Professional Conduct (OPC) is comprised of a "senior counsel" appointed by the Board of Commissioners of the Utah State Bar, and other lawyers and non-lawyer staff appointed by the senior counsel. See Utah Sup. Ct. R. Prof'l Practice 14-504. The purpose of the OPC is three-fold: (1) investigate allegations of attorneys violating the Rules of Professional Conduct; (2) prosecute those allegations in accordance with applicable rules; and (3) provide informal guidance to members of the Bar concerning professional conduct. See www.utahbar.org/opc/ (last visited Mar. 30, 2019). The Bar pays the salaries of OPC counsel and their staff. Utah Sup. Ct. R. Prof'l Practice 14-505.

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What Changed?

A few years ago, at the suggestion of the Utah State Bar, the Utah Supreme Court asked the American Bar Association (ABA) to conduct an evaluation of Utah's attorney discipline system and make recommendations for improvement. In 2017, the ABA submitted its findings in a written report available on the Utah Courts website. See American Bar Association, *Utah Report on the Lawyer Discipline System* (Apr. 2017), available at

https://www.utcourts.gov/resources/reports/docs/ABA-OPC_Report.pdf. While noting the many strengths of Utah's existing system, the ABA recommended specific reforms designed to increase public trust and confidence in the system as well as the speed and efficiency of the process.

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After receiving the report, the Utah Supreme Court formed an ad hoc committee to review the ABA's suggestions and make recommendations as to what changes should be implemented. The committee's recommendations (also available on the Utah Courts website) fall into two general categories. First, the committee recommended a series of procedural changes designed to improve the efficiency and effectiveness of the disciplinary system. Those changes include streamlining the complaint

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process to make it more accessible to the public, providing additional tools and resources to OPC staff to speed investigations, and simplifying the process used by screening panels to increase efficiency while providing important due process protections to attorneys accused of professional misconduct.

Second, the committee recommended a series of steps to separate the OPC from the Bar. It is important for the public to understand that the OPC is part of the Utah Supreme Court's regulation of the practice of law and operates independently of the Bar. Some of the recommendations seek to correct the misperception that the OPC is part of the Bar (for instance, by separating the OPC's website from the Bar's website and changing the signs in the Utah Law and Justice Center to distinguish between the OPC and the Bar), but others are more substantive and will require rule changes (such as appointment of the OPC's Chief Disciplinary Counsel – formerly “senior counsel” – by the Utah Supreme Court, rather than the Bar Commissioners). One of those substantive changes is the creation of the new Oversight Committee.

What Is the New Oversight Committee?

On March 4, 2019, the Utah Supreme Court adopted a rule, Rule 11-501, creating a new Oversight Committee for the OPC. Utah Sup. Ct. R. Prof'l Practice 11-501. The committee is comprised of five voting members appointed by the court. The members must include at least one judge, one member of the public, one past chair or past vice chair of the Ethics and Discipline Committee, and one member with an accounting background. The executive director of the Bar is an ex-officio, non-voting member of the committee.

The purpose of the committee is to “assist the OPC in implementing the reforms to the attorney discipline process adopted by the Utah Supreme Court and to provide oversight for the OPC.” *Id.* R. 11-501(2)(A).

Oversight Committee Responsibilities

The new Rule charges the committee with the following responsibilities:

1. Implement performance metrics and annual evaluations of OPC's senior counsel;

2. Develop an annual budget for the OPC;
3. Prepare a three- to five-year funding plan;
4. Report to the court annually; and
5. Develop formal policies for the OPC.

Id. R. 11-501(2)(B). Placing these responsibilities under the purview of the Oversight Committee underscores the OPC's independence from the Bar.

So, What Can We Expect?

The Utah Supreme Court has adopted the recommendation to create the Oversight Committee but has yet to officially approve the other recommendations. Over the next year, the Oversight Committee will present the court with concrete proposals for implementing the recommended reforms, which the court will review individually. Because many of the recommendations require changes to court rules, you can expect to see notices of proposed rule amendments in your inbox over the coming months. In short, the court is looking for ways to improve both process and perception. Members of the public may tend to believe the OPC is comprised of lawyers protecting lawyers.

Members of the Bar charged with violations of the rules may perceive they are the subject of a Star Chamber proceeding. *See, e.g., In re Nicholson*, 791 S.E.2d 776, 778 (Ga. 2016) (highlighting a respondent's claim in state bar disciplinary action that "[t]his is a Star Chamber proceeding... [a]nd you're here to do a hatchet job on me"); *see also* Bryan Garner, *Lawyer Walks Out of Hearing, Misses 10-Year Disbarment Recommendation* (June 5, 2008), http://www.abajournal.com/news/article/lawyer_walks_out_of_hearing_misses_10_year_disbarment_recommendation (last visited Mar. 3, 2019). The new Oversight Committee may be able to help with this perception on both sides by creating more transparency and recommendations for improvement.

The bottom line is to expect additional changes to the lawyer disciplinary process as the new Oversight Committee ramps up. Whatever the changes may be, I am sure you will keep hoping they stay irrelevant to you and your practice.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the authors.