

OCDC SPOTLIGHT

Probation and Diversion — New Programs at OCDC

By Maridee Edwards, Chief Disciplinary Counsel

The new year will bring a major change to the Missouri lawyer discipline system. Effective January 1, 2003, the options for addressing a lawyer's violations of the Rules of Professional Conduct will include probation conditions or, in some cases, a diversionary program outside the formal discipline process. (See excerpts from new Supreme Court rules on page 22).

Supreme Court Rule 5 has heretofore set out the possible disciplinary sanctions for attorney misconduct as: admonition, reprimand, suspension or disbarment (Rule 5.16). It has, in effect, been an "all or nothing" approach to sanctioning an attorney. A lawyer would be sanctioned by suspension or disbarment and it was then up to the lawyer to show worthiness to return to practice by applying for reinstatement. The alternative was the lesser sanction of reprimand or, in more minor cases, admonitions issued by the OCDC or a Regional Disciplinary Committee.

While certainly a lawyer would face embarrassment by a public reprimand from the Supreme Court, the public often views this (or the lesser admonition) as the proverbial "slap on the wrist." The reprimand often is issued as an order identifying violations of particular rule numbers of the Rules of Professional Conduct but with little indication of the actual circumstances of the misconduct.

Similarly, the admonitions issued by the OCDC or Regional Disciplinary Committees have a "stinging" effect but are of little consequence to the injured client. It is hoped that the sanction would have the effect of educating the lawyer, heightening their vigilance to adherence to the rules, and would prompt them to take measures to avoid similar problems in the future. However, it has been common in past years for attorneys to receive multiple admonitions over a course of years, often for similar conduct. Therefore, the philosophy that an admonition will educate and deter the lawyer may not have empirical support.

REHABILITATION AND REMEDIAL ACTION

The missing element to making these forms of sanction meaningful may be the ability to assist the lawyer in fashioning remedial steps to rehabilitate or re-educate themselves, and to re-evaluate their practice to prevent problems from recurring. Injured clients can be made whole through conditions of restitution, and prospective clients can be protected from future negligence, by forcing the attorney to come to grips with what caused the underlying problem.

It is contemplated that a *diversion agreement* could be offered to an attorney with a minor violation, such as inattention to client matters with no actual harm to clients, in lieu of prosecuting the complaint or issuing an



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admonition for the conduct. The matter would be "diverted" from the discipline track with a written agreement that the attorney would comply with certain conditions to rectify the problems. If the attorney successfully completes the diversion agreement, the matter is closed with no discipline. Similarly, the *probation* component of the program will impose conditions to remedy the lawyer's past bad habits, but could be attached to a suspension period which could be "stayed" in whole in or in part. Completion of the conditions within the time frame provided will then allow the lawyer to apply directly to the Court for reinstatement of the license. Attachment of conditions to a reprimand or to a reinstatement are also options. If the lawyer doesn't satisfy the conditions, action could be taken to

SUBSTANCE ABUSE AND MENTAL HEALTH ISSUES

Probation and diversion programs are utilized in many other jurisdictions to varying degrees. Of particular note is the Colorado program of the Office of Attorney Regulation Counsel, which includes a staff psychologist to evaluate attorneys who have symptoms of mental health disorders or substance abuse issues. Colorado's stated options for conditions include:

- Periodic reports to discipline office;
- Monitoring the attorney's practice or accounting procedures;
- Establishing a relationship with an attorney-mentor;
- Successful completion of the multi-state professional responsibility examination;
- Refund or restitution;

Medical or mental health evaluation or treatment, among others.

While OCDC will not employ a staff mental health professional, there will be the opportunity, in appropriate circumstances, for a lawyer to be referred to a mental health professional. Substance abuse, depression, and other mental health issues often underlie professional misconduct. Adequate safeguards to rehabilitate and treat a lawyer when set forth as probation or diversion conditions hopefully will assist in addressing this problem in the profession. The Missouri Bar's MOLAP program will also be a component of the programs in appropriate cases.

This is a positive step in Missouri's attorney discipline system for lawyers and for the affected clients who seek

assistance through the discipline system. At a recent training session of discipline system volunteers, the Missouri Supreme Court Advisory Committee Chairman, John Dods, recognized that there are unjust complaints that come into the system, filed by disgruntled clients, and said those matters should be promptly recognized and resolved. However, of the remaining well-founded complaints, Dods expressed this message of the mission of the discipline system:

"We must punish those lawyers who intentionally do wrong, the liars and thieves among us. We must teach those lawyers who just make dumb mistakes. And we must rehabilitate, to the extent we are able, those who with help can learn from their mistakes and become productive members of the profession once again."

New Ethics Counsel's Office Now Open in Jefferson City

Sara Rittman, Missouri's first-ever "legal ethics counsel," has opened an office in downtown Jefferson City.

In her new job, Ms. Rittman, who previously served as deputy chief disciplinary counsel for the Office of Chief Disciplinary Counsel, will be available to offer ethics advice to attorneys and fill staffing needs for the volunteer members of the Supreme Court Advisory Committee.

The position was created by order of the Supreme Court last year, and will separate the advisory and prosecutorial functions of the Office of Chief Disciplinary Counsel. In addition to providing telephone and written opinions to attorneys who have ethics

questions, she will draft informal opinions on behalf of the Advisory Committee and identify for the committee those issues deserving of formal opinions.

Informal opinions will be provided to those individuals requesting them; however, a decision as to whether an informal opinion should be published will be determined by the Advisory Committee. Formal opinions will continue to be produced by the Advisory Committee.

The legal ethics counsel's office will be located at 217 E. McCarty Street in Jefferson City. The telephone number for the office is 573-638-2263.



Sara Rittman