OCDC Spotlight

The "Not-So-New" Disciplinary System

By Maridee Edwards, Chief Disciplinary Counsel

More than three years ago an American Bar Association team visited Missouri to evaluate Missouri's attorney discipline system. After the team came in August of 2000, they offered 21 recommendations. (See the list of the 21 recommendations at the end of this article.) Several centered on the theme of more accessibility to the process for the public – a website, promotional materials, a sign in order to find the office. A large number addressed revisions or refinements in procedural rules (two are addressed below).

Other recommendations were more complex. Analysis has been ongoing regarding how they could be (and if they should be) implemented in Missouri. Some of these would require additional funding in the form of enrollment fees increases. Therefore, a thorough review and consideration has been underway.

The "New" Disciplinary System

I am often asked about the "new disciplinary system," a comment that always surprises me. There is no "new disciplinary system." There have been some changes in procedural rules, there has been increased emphasis on handling matters in our informal resolution program, and a new position was created, Legal Ethics Counsel, to shift the ethics advice function away from the Office of Chief Disciplinary Counsel, but there have been no changes in the basic structure and process of attorney discipline investigations and prosecutions. Since my arrival in August 2001, OCDC has been busy implementing the suggestions of the ABA, working hard to decrease the significant backlog of older investigations that had accumulated prior to that time, and trying to effect changes that will promote efficiency, timeliness and consistency of response. But we have not changed the basic system.

Request for a Hearing Rule

Recently, two procedural rule changes were proposed and bar members were allowed to comment on them in *ESQ*. These also arose from the ABA recommendations. Certain procedural rules were not addressed when the system was changed to the present model in the 1990s.

One of the amendments (Supreme Court Rule 5.14) was designed to eliminate the additional burden upon respondent attorneys to make a written request for a hearing. The ABA's analysis of the rule read:

> Supreme Court Rule 5.14 provides, in part, that on or before the date an answer to an information is due, the respondent may (emphasis added) request a hearing on the information… If a hearing is not timely requested, the information is filed before the Court with a notice of that fact. The matter then proceeds in the same manner as default cases where a respondent fails to file an answer pursuant to Supreme Court Rule 5.14. The failure of respondents to timely request a hearing has resulted in the entry of default orders. Such is the case where respondents contest the allegations of the information and set forth affirmative defenses in their timely filed answers. (*Missouri Report on the Lawyer Regulation System*, February 2001, by ABA Standing Comm. on Professional Discipline.)

The "information" is the formal charging document in an attorney discipline case, which occurs after an investigation has been conducted and the attorney has been given an opportunity to respond and participate in the investigation. The information initiates a formal disciplinary proceeding, similar to any other court proceeding. The ABA pointed out, and rightfully so, that when a respondent attorney files an "answer" to the information – i.e., a formal pleading responding to the charges – he or she is indicating an intent to contest the charges and request a hearing before the trier of fact. In effect, the rule change will not *require* them to *request* a hearing – they will be afforded one simply by filing their answer.

Investigation Statements Rule

The other rule amendment (Supreme Court Rule 5.09) dealt with the requirement that all interviews in the investigation process be recorded and transcribed. This rule was in effect in the earlier days of the system when probable cause hearings, similar to the preliminary hearings to find probable cause, were conducted before the Advisory Committee to the Supreme Court. Since this was akin to a formal hearing where evidence and testimony was presented, this requirement of formally transcribed statements made sense.

The probable cause *hearing* requirement[1] was eliminated by rule change of the Court in 1997. However, the rule was not altered sufficiently at that time, leaving carry-over language that has caused confusion for the regional committees. There is no need to record and transcribe every statement in the course of an investigation, given the fact that the vast majority of investigations result in a finding of no probable cause, yet the rule seems to require this. The practice of calling in every person who may have some information and placing them under oath to testify results in exceptional costs incurred for court reporters and transcripts and causes significant delay. Many of these matters are handled through a phone call or a request to the witness/complainant to provide a written response.

After the investigation is conducted, and in those limited cases where probable cause is found and an information[2] is filed, a hearing is conducted by a three-person panel (one lay person and two lawyers). At this stage, the witnesses are under oath, the respondent is present and able to cross-examine, and testimony is transcribed for the record. Prior to the formal hearing, the parties are entitled to conduct formal discovery as provided in Rule 5.15(c), including depositions.

Probation and Diversion Legal Ethics Counsel

The other major rule changes effected in 2003 also were raised by ABA Recommendations. It was suggested that the legal ethics function be removed from the Chief Disciplinary Counsel and placed under a separate entity. That was done by Rule 5.07(b), establishing the position of Legal Ethics Counsel under the supervision of the Advisory Committee to the Supreme Court.[3]

It was also suggested that alternatives to discipline be expanded and that probation be an option for discipline. Rules 5.105 and 5.225 were adopted on January 1 of this year. The diversion rule allows OCDC to offer a diversionary agreement to attorneys who could benefit from remedial measures to eliminate problems in their practice in cases of minor misconduct. If the attorney completes the agreed conditions, the case is closed and is not considered discipline. The probation rule also provides for remedial conditions to be attached to a formal discipline matter. The distinction is that probation may be used in more serious cases but where it is believed the attorney can practice without harm to the public. The probation conditions are usually attached to a period of stayed suspension. However, upon successful completion of the probation, the matter does remain on the attorney's record as an instance of formal discipline.

The State of the System

We have made much progress in the timeliness of responding to complaints and resolving those matters that should not result in discipline against an attorney's license in a more timely manner. However, there is much room for improvement in this and other areas. Statistics provided by the ABA Center for Professional Responsibility from 2001 show that Missouri ranks 13th in the nation in attorney population. Yet, our disciplinary budget was far below that of *comparable* states and far below other states with *smaller* attorney populations.[4] Our own informal telephone survey of Midwestern states in September, 2003 revealed that Kansas, with 13,000 attorneys, employs five staff attorneys in their discipline office; Nebraska, with 6,000 attorneys, employs three attorneys in their office; Tennessee, with 19,500 attorneys, employs eight staff attorneys; Indiana, with 17,000 attorneys, employs nine staff attorneys; and Illinois, with 75,000 attorneys, employs 35 staff attorneys in addition to others who perform non-disciplinary functions. In comparison, Missouri has six attorneys, including the Chief Disciplinary Counsel, yet has an attorney population in excess of 25,000.

It is apparent that we need additional staff to handle the number of complaints we receive each year and the additional areas which need our attention.[5] This is a priority that must be addressed now.

For the Future

Much of our work in the last two years has been implementing the ABA recommendations and improving efficiency in our case processing. As we complete that process, we are now re-focusing our attention to the deeper issues of: Are we serving our constituents (the Supreme Court, the public, and the lawyers of this state) in the manner we should? Are we sufficiently addressing all the areas that need our attention? Unauthorized practice of law by non-lawyers and advertising are areas of concern voiced by lawyers. Trust account mismanagement is an area the ABA suggested needs more oversight.[6] Clients complain to us that they have no effective remedy against the attorney who overcharges or gives inadequate billing information.

Finally, should there be a re-structuring or further evolution of the present disciplinary system? Several of the ABA recommendations broached issues related to our system's dependence on volunteers. Some of those suggestions were: opening branch offices in Kansas City and St. Louis to increase efficiency and standardize procedures; adequate training for the volunteers who investigate complaints and those who act as disciplinary hearing officers; setting guidelines for conducting investigations; establishing consistency in processes, including enforcing the previous rule to eliminate probable cause hearings.

The questions of evolution of the attorney discipline system with regard to its structure, branch offices, the use and functions of volunteers are being carefully considered to best serve the legal system and the clients affected by it, here in Missouri. The "new discipline system?" — it's still evolving.

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[1] A probable cause determination is still necessary but the formal hearing to do so was eliminated.

[2] At the time of filing an information, Rule 5.11 requires that respondent attorney be served with copies of all evidence obtained in the investigation.

[3] Legal Ethics Counsel is Sara Rittman. She can be reached at 573-638-2263, sara.rittman@mo-legal-ethics.org.

[4] The same ABA survey showed budgets for Louisiana (pop. 18,673 attorneys) at $3,122,840; for Washington (pop. 19,217 attorneys) at $3,099,324; for Ohio (pop. 33,211 attorneys) at $5,453,723; for Minnesota (pop. 22,420 attorneys) at $2,122,423. Missouri's discipline budget in 2001 was $1,616,300, and our attorney population was stated as 25,844.

[5] In 2002, we received approximately 2,000 complaints. In the preceding four years, the complaints received were approximately 1,500 each year. OCDC is handling more complaints at our office through the Informal Resolution Program. Last year 139 files were resolved by OCDC staff through this program, compared to about half as many in 2001. Increased resources are anticipated in several areas, including our expanding probation/diversion programs, trust account monitoring, and unauthorized practice of law.

[6] See ABA Recommendation 18. The Advisory Committee and OCDC supported the notion of a rule to allow reporting of trust account overdrafts in their Joint Recommendations to the Court in 2002. OCDC expects to propose a rule to the Court before the end of 2003.

ABA RECOMMENDATIONS
February, 2001

Recommendation 1:	The Advisory Committee Should Function as a True Oversight Committee for the System
Recommendation 2:	The Court Should Consider Increasing the Efficiency of the System by Revising the Regional Disciplinary Committees and Opening Fully Staffed Offices for the OCDC in St. Louis and Kansas City
Recommendation 3:	All Volunteers in the Lawyer Disciplinary System Should be Adequately Trained
Recommendation 4:	Public Access to the Missouri Lawyer Disciplinary System
Recommendation 5:	Public Promotion of the Missouri Lawyer Disciplinary System
Recommendation 6:	The Court Should Appoint Additional Public Members to the Advisory Committee and to the Regional Disciplinary Committees
Recommendation 7:	Upon the Filing and Service of an Information, Lawyer Disciplinary Proceedings in Missouri Should be Public
Recommendation 8:	Supreme Court Rule 5.13 Should be Amended to Provide Notice to Respondents of the Complete Range of Sanctions the Court May Impose in the Event of a Default
Recommendation 9:	Respondents Should Not Have to Request Hearings on Informations
Recommendation 10:	The Court Should Eliminate Private Reprimands
Recommendation 11:	The Regional Disciplinary Committees Should Not Hold Probable Cause Hearings
Recommendation 12:	Records or Evidence of Complaints Terminated by Dismissal Should be Expunged
Recommendation 13:	The Supreme Court Should Amend Its Reinstatement Rule to Provide for Automatic Reinstatement After a Suspension of Less Than Six Months
Recommendation 14:	The Court Should Clarify the Appropriate Use of Prior Discipline
Recommendation 15:	The Court Should Amend Supreme Court Rule 5 to Direct the Routine Use of Pre-Hearing Conferences
Recommendation 16:	The Supreme Court Should Amend Supreme Court Rule 5.19(g) to Provide that Respondents Who Are Disciplined Must Reimburse the Agency for the Costs of the Proceedings
Recommendation 17:	The OCDC Should Not Issue Written and Oral Ethics Opinions
Recommendation 18:	Lawyers Should be Required to Maintain Client Trust Accounts Only at Financial Institutions that Provide Trust Account Overdraft Notification
Recommendation 19:	The Supreme Court Should Continue to Use and the Hearing Panels Should Use and Cite to the ABA Standards for Imposing Lawyer Sanctions
Recommendation 20:	The Court Should Enact a Probation Rule as Part of Supreme Court Rule 5
Recommendation 21:	Matters Involving Lesser Misconduct Should be Referred to an Alternative to Discipline