

OCDC SPOTLIGHT

Diversion — How it Works — Does It Work?

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Diversion is a new alternative¹ to the discipline system authorized by Supreme Court Rule 5.105, effective as of January 1, 2003. Its purpose is to divert cases that might be considered minor rule violations out of the disciplinary system, recognizing that many times a program of education, training, peer assistance, etc., may have greater future benefit to the bar and the public than issuing a letter of admonition or some other form of low level discipline.

Rule 5.105(c) lists the criteria for a diversion from the disciplinary system. Among other things, the allegations must be of a minor nature, there must be little likelihood that the lawyer will harm the public, adequate supervision must be available, and participation in the diversion is likely to benefit the lawyer. Absent unusual circumstances, the diversion program is not appropriate when the alleged misconduct is likely to result in the imposition of discipline by the Supreme Court (conduct likely to result in a public reprimand, suspension or disbarment) or involves misappropriation of funds, criminal activity, dishonesty, or if the lawyer has prior discipline.

In practical terms, the Chief Disciplinary Counsel or a Regional Disciplinary Committee, in the course of investigating a complaint, may perceive that the allegations against the lawyer, even if true, are of a minor nature. The lawyer may show a lack of knowledge in such matters as office practice management, people skills, organization, knowledge of a particular area of law, or there may be evidence the lawyer is in

the beginning stages of substance abuse. Any or all of these matters could, under the right circumstances, be addressed by education, training, and the assistance of other lawyers serving as mentors.² The diversion goal is for a lawyer to avoid future dealings with disciplinary counsel and develop a more productive law practice.

If a decision is made by disciplinary counsel or a regional disciplinary committee to offer diversion to a lawyer, the investigating entity will do so by offering the lawyer the opportunity to enter into a diversion agreement, a contract wherein the attorney agrees to take certain actions over a specified period of time. Examples of some common conditions in a diversion agreement can include specific types of continuing legal education courses, malpractice insurance requirements, restitution to clients in some circumstances for fees paid, mental health evaluations or treatments, substance abuse evaluations or treatments, the employment of a management consultant, and the use of a mentor attorney to meet with the lawyer on a regular basis. Most diversion agreements are for 6-18 months, depending on the circumstances.

Rule 5.105(g) states that the underlying disciplinary file will be closed upon successful completion of the diversion agreement. Rule 5.105(h) states, upon breach of the diversion agreement by failing to meet its terms, that the Chief Disciplinary Counsel may modify the diversion agreement or terminate the diversion agreement and recommence a Rule 5 disciplinary investigation.

One purpose of a diversion, at least in theory, is to improve the lawyer's skills so

that recidivism to the disciplinary process will be minimized. A brief look back shows the majority of diversion agreements have been completed successfully. From 2003-2005, the Chief Disciplinary Counsel and the Regional Disciplinary Committees entered into 41 diversion agreements: 15 in 2003, 12 in 2004 and 14 in 2005. Five of the fourteen 2005 diversion agreements remain in effect. Thus, 36 diversions from that three-year period are completed.

Of the 36, only seven were terminated because the lawyer failed to meet the diversion conditions. Each of those went back into the disciplinary system, with one complaint being dismissed, four lawyers being disciplined, and two cases pending as of June 2006.

Twenty-nine of the diversion agreements executed between 2003 and 2005 were successfully completed, the lawyers fulfilling all requirements in their respective contracts. It was the hope of the disciplinary office that successful completion would be a first step toward a lawyer having a more effective practice and avoiding the disciplinary system in the future. Results have been mixed. Of the 11 successful diversions executed in 2003, five of those eleven lawyers have received new complaints since their diversion agreements were completed. Four of the five new complaints remain open as of this writing, with one complaint having been closed. Thus, no new discipline has yet been imposed on any of the lawyers participating in the 2003 diversions, although OCDC had hoped there would be a smaller number of new complaints.

Of the 10 successful diversions initiated in 2004, only one lawyer has received a new complaint. That complaint remains pending at this time. None of the eight lawyers successfully completing 2005 diversions has received a new complaint. Whether recent diversion agreements are more effectively addressing problems, or whether the lack of new complaints is a factor of time, is yet to be determined.

It is good policy to offer alternatives to discipline that will benefit both the lawyer and the public. Disciplinary counsel is using diversion agreements in the right circumstances to advance that policy. We hope future efforts in this area will result in fewer complaints and fewer lawyers disciplined in years ahead.

Footnotes

¹ Diversion is one of several programs utilized by the OCDC as an alternative to discipline. Other examples include referral to Missouri Bar programs such as The Missouri Bar Complaint Resolution Program, Fee Dispute Program and MOLAP.

² The use of mentor lawyers is not limited to the disciplinary system. The Missouri Bar has a mentoring program available to all Missouri lawyers.

Mentoring Committee Honors 10 Mentors

The Missouri Bar's Mentoring Committee, chaired by Lynn Ricci of St. Louis County, recently issued special recognition for 10 lawyers from around the state.

Since the mentoring program was created in 1996, each of the 10 lawyers has mentored at least four protégés, contributing to the development of new lawyers in their areas.

Recognized were: Timothy Ronald Beard of Centralia; Patrick F. Bottaro of Kansas City; Jack L. Campbell of Kansas City; Mary-Corinne Corley of Kansas City; Michael P. Gunn of St. Louis; Priscilla F. Gunn of St. Louis; Robert Edward Jones of St. Louis; Gary Seltzer of Clayton; and James C. Wirken of Kansas City.

Prospective mentors or protégés can learn more about the program under the "Practice Resources" tab on The Missouri Bar's website at www.mobar.org.