

# Resolution of Complaints — Alternatives to Address Complaints Received by OCDC

By Mark Flanegin

Pursuant to Rule 5.06, the Supreme Court of Missouri appoints the Chief Disciplinary Counsel who shall serve at the pleasure of the Court. The Chief Disciplinary Counsel and the Counsel's assistants shall serve as counsel for the bar in all disciplinary proceedings and conduct necessary investigations as provided by Rule 5.

Rule 5.08 authorizes the Office of Chief Disciplinary Counsel to investigate any matter of professional misconduct, with or without complaint. Although all complaints received by our office are reviewed, not all complaints result in an investigation. In fact, after the complaint is reviewed by a staff counsel, no further action may be taken because the conduct described is not within our jurisdiction or the alleged conduct is determined not to be a violation of the Rules of Professional Conduct.

If a determination is made that the complaint merits further action, several options are available to the Office of Chief Disciplinary Counsel short of initiating an investigation. Those options include referring the file to the Informal Resolution Program, the Complaint Resolution Program or the Lawyer-to-Lawyer Dispute Resolution Program.

## **INFORMAL RESOLUTION PROGRAM**

Since 2001 the Office of Chief Disciplinary Counsel has attempted to resolve disputes between clients and lawyers

through this alternative program rather than initiating an investigation. The purpose of the program is to attempt to resolve less serious disputes and maintain the lawyer-client relationship. The fact that the attorney-client relationship has been severed does not preclude a referral to the program. The most common complaints handled through the program are allegations of lack of communication and failure to provide the client file after termination of the representation. Neither the lawyer nor the complainant has the option to request admission to this program.

These complaints are often handled by a staff member, who notifies the lawyer of the allegation and obtains a response to the complaint. Generally the lawyer will be contacted by phone, although on occasion the lawyer will be notified by letter. A brief description of the complaint will be provided to the lawyer; the complaint itself will not be sent. If the complaint merits further action on the lawyer's part, the lawyer is requested to take the appropriate action and notify our office in writing to confirm that action to resolve the dispute was taken. If the complaint is resolved, the Office of Chief Disciplinary Counsel notifies the complainant and lawyer that no further action is being taken on the matter.

The program can be a win-win situation for the lawyer. A lawyer who is receptive to addressing the complaint in a timely manner can resolve the complaint through this program. Lawyers who fail to take advantage of this program run

the risk of dealing with the complaint through the disciplinary process and may subject themselves to possible disciplinary action. Also, the lawyer could be subject to discipline for failing to respond to the Office of Chief Disciplinary Counsel's request for information.<sup>1</sup>

Rule 5.10 provides that the Chief Disciplinary Counsel may refer complaints that may be best resolved outside the formal disciplinary proceedings to The Missouri Bar Complaint Resolution Program or The Missouri Bar Lawyer-to-Lawyer Dispute Resolution Program.

## **COMPLAINT RESOLUTION PROGRAM**

The decision to refer cases to the Complaint Resolution Program is determined by staff counsel. Complaints alleging serious Rule violations are not considered for referral. The disciplinary history of the lawyer is considered in determining if a referral is appropriate.

The Office of Chief Disciplinary Counsel will consider complaints of a less serious nature for referral to the program. These complaints could include communication or diligence issues. Complaints in which it appears that there is a misunderstanding between the lawyer and complainant will also be considered for referral.

The goal of the program is to assist the Office of Chief Disciplinary Counsel in the resolution of grievances and "to assure the public and the legal profession that such grievances can be resolved in a just fashion and in accordance with the

participation and reasonable expectations of the parties.”<sup>2</sup>

The complaint resolution program guidelines require that the program’s files be confidential.

Once the Office of Chief Disciplinary Counsel refers the complaint to the program, our office has no further involvement in the effort to resolve the matter. However, after the program closes its file, the complaint resolution administrator will forward documents regarding the complaint and proceedings to the Office of Chief Disciplinary Counsel.<sup>3</sup>

The Complaint Resolution Program is administered by a five-person committee that oversees the activities and proceedings of the program. The Missouri Bar Board of Governors appoints the Complaint Resolution Committee. The panel of volunteers who are assigned by the program’s administrator to attempt resolution of the complaint are known as facilitators. Appointment of the facilitators is made by the Board of Governors after nomination by the Complaint Resolution Committee.

Participation by the complainant and the lawyer is voluntary. At the time of the referral, both the lawyer and the complainant are advised of the referral and the complaint is sent to the program administrator. Upon referral to the program, the Office of Chief Disciplinary Counsel encourages both parties to participate in the process.

After the complaint is referred to the Complaint Resolution Program, the program administrator sends the lawyer a copy of the complaint with a letter requesting a written response. The program administrator also requests that each party voluntarily participate in a complaint resolution conference. If the lawyer does not provide a response to the complaint, the matter will be returned to the Office of Chief Disciplinary Counsel.

Should either the lawyer or the complainant fail to return their respective consent forms, the matter will be returned to the Office of Chief Disciplinary Counsel. If the lawyer provides a response and both parties give consent to participate in a resolution conference, a facilitator will be appointed by the program chair or program administrator to hold a conference to attempt resolution of the complaint.

The parties, with the assistance of the facilitator, work to resolve the matter. The facilitator is not to impose a settlement on the parties. The facilitator’s role is to encourage communication and suggest ways of resolving the dispute. The facilitator should also advise the lawyer before the conference begins that the facilitator must report any serious ethical violations as outlined under Rule 4-8.3.<sup>4</sup> If new information is revealed which makes it appear that the lawyer engaged in serious misconduct, the committee must return the matter to the Office of Chief Disciplinary Counsel. If either the lawyer or the complainant fail to participate, the committee will refer the complaint back to the Office of Chief Disciplinary Counsel.

Not all complaints are resolved by the parties after participating in the Complaint Resolution Program. The Office of Chief Disciplinary Counsel and the program administrator believe even unresolved complaints result in a better understanding of the legal system by the complainant. The program also provides an opportunity for lawyers to learn how their actions might have been misunderstood. It may also assist lawyers in understanding how their conduct could be modified to better serve the client and possibly avoid complaints in the future.

Lawyers who are notified that a complaint against them has been referred to the Complaint Resolution Program should consider participating in the pro-

cess. Although a resolution might not be reached, the fact that the Office of Chief Disciplinary Counsel decided to initially refer the complaint to the program should be viewed as an encouragement to participate.

## **LAWYER-TO-LAWYER DISPUTE RESOLUTION PROGRAM**

On October 2, 2007 the Missouri Supreme Court adopted a new subdivision 5.10 of Rule 5, effective January 1, 2008, authorizing a Lawyer-to-Lawyer Dispute Resolution Program and approved guidelines for the program.

The program guidelines provide that complaints or disputes among lawyers regarding financial, property, or professional matters unrelated to any lawyer-client relationship among those lawyers can be submitted to the program. The complaint or dispute may be submitted by any lawyer involved in the complaint or by referral pursuant to Rule 5.10 by the Office of Chief Disciplinary Counsel if it believes the complaint or dispute may be resolved through an alternative resolution instead of formal disciplinary procedures. Thus, unlike the Complaint Resolution Program, the matter can be presented to the program without a referral from the Office of Chief Disciplinary Counsel.

The goal of the program is to provide a private, voluntary and cost-effective method to resolve economic and professional disputes between lawyers. It is intended to protect the interests of clients and benefit the judicial system, the public and the profession.

The program proceedings are confidential. The Office of Chief Disciplinary Counsel will have access to confidential records only on complaints referred to the program by the Office of Chief Disciplinary Counsel.<sup>5</sup>

The program is administered by a five-

person committee appointed by the Missouri Bar Board of Governors, with the chair designated by the President of the Missouri Bar. The committee shall solicit and maintain a list of Missouri lawyers to serve as a panel of neutrals. Unless the parties otherwise stipulate, disputes will be assigned to a neutral from outside the parties' geographic regions.

The program will provide non-binding facilitation as the preferred method for resolution, but in the event that is unsuccessful, binding arbitration will be offered.

Participation in the program is voluntary and requires the consent of all parties. If any party fails to sign an agreement for facilitation, the file will be closed and the parties will be notified of the closure. If all parties execute agreements for facilitation, a neutral will be assigned.

Like facilitators in the Complaint Resolution Program, the neutrals are to conduct all facilitation sessions informally, suggest ways to resolve the dispute, but not impose a settlement on the parties. The neutral also has the responsibility to notify all lawyers before the initial session begins that the neutral must report, pursuant to Rule 4-8.3, any serious ethical violation.

The Office of Chief Disciplinary Counsel anticipates making referrals to the Lawyer-to-Lawyer Dispute Resolution Committee if a determination is made that the dispute can best be resolved outside of the disciplinary process and the conduct is within the stated goal of the program.

Complaints received by a lawyer alleging violation of the Rules of Professional Conduct by another lawyer would not be appropriate for referral to the program.

## CONCLUSION

The Chief Disciplinary Counsel may offer a lawyer an opportunity to participate in one of these programs. Each program presents an alternative method of addressing complaints received by the office. These programs also provide a cost effective, and hopefully less stressful, alternative for lawyers to address complaints filed against them. Lawyers who take advantage of the opportunity to participate in one of these programs may save themselves time while possibly learning how to avoid a similar complaint in the future.

Lawyers who are notified by the Office of Chief Disciplinary Counsel that a complaint against them has been referred to its Informal Resolution Program or

the two programs administered by The Missouri Bar should consider the benefits these programs could provide.

## ENDNOTES

1. Rule 4-8.1(c) A lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a demand for information from a disciplinary authority.
2. The Missouri Bar Complaint Resolution Program Guidelines, Mo Court Rules.
3. Rule 5.10. See also The Missouri Bar Complaint Resolution Program Guidelines, Panel Procedures, paragraph 18, Mo Court Rules.
4. Rule 4-8.3(a) A lawyer who knows another lawyer committed a violation of the Rules of Professional Conduct that raises a substantial question concerning that lawyer's honesty, trustworthiness or fitness as a lawyer must inform the appropriate professional authority.
5. Rule 5.10 When a complaint is referred to either the Lawyer-to-Lawyer Dispute Resolution Program or the Complaint Resolution Program, records of the referrals, complaints, conferences and proceedings must be filed with the Office of Chief Disciplinary Counsel. See also The Missouri Bar Lawyer-to-Lawyer Dispute Resolution Guidelines, Procedures, paragraph 3, Mo Court Rules.



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