

# OCDC Wants to Hear From You — Now What?

By Mark Flanegin

Supreme Court Rule 5.08 authorizes the Office of Chief Disciplinary Counsel (OCDC) to investigate any matter of professional misconduct.

The OCDC has authority to investigate alleged misconduct with or without a complaint. Although investigations are initiated without the filing of a complaint, written complaints submitted to OCDC provide the primary source of information of alleged misconduct.

## THE COMPLAINT PROCESS

All complaints must be in writing and are reviewed by staff counsel at OCDC. Not all of the complaints received result in the opening of a formal investigation. A majority of the complaints result in no further action by the OCDC because the alleged conduct is not within OCDC's jurisdiction, or the conduct is determined not to be a violation of the Rules of Professional Conduct. If that is the case, the lawyer is not notified of the complaint.

When a determination is made that a complaint merits further action, the OCDC may refer the complaint to its Informal Resolution Program, to the Complaint Resolution Program administered by The Missouri Bar, or initiate a formal investigation.

## Informal Resolution Program

The Informal Resolution Program was initiated by OCDC in 2001. The program provides the opportunity to resolve disputes informally, without the need to open a disciplinary file. The purpose of the program is to attempt to resolve less serious disputes and maintain the lawyer-client relationship. The fact that the lawyer-client relationship has concluded does not preclude a referral to the program. The decision to refer the complaint to this program is made by staff counsel. Neither the lawyer nor the complainant can request admission to the program. Complaints referred to the program include such issues as the return of a client file or lack of communication. The program is not appropriate for complaints that allege serious unethical conduct. Lawyers who are contacted in conjunction with this program are advised that OCDC is attempting to informally resolve a dispute. Failure to cooperate could result in the opening of an investigative file.

## Complaint Resolution Program

Rule 5.10 authorizes the OCDC to refer complaints that may be resolved outside formal disciplinary proceedings to the Complaint Resolution Program. That program is administered by The Missouri Bar.<sup>1</sup> Allegations of serious unethical conduct are not referred to the program. If a complaint is referred, the lawyer and complainant are advised of the referral and encouraged

to participate in the process. Although a resolution might not be reached, the fact that the OCDC decided to refer the complaint to the program should be considered as encouragement to participate. Failure to do so by the lawyer may result in OCDC opening an investigative file.

## Investigative File Opened

If an investigation is opened, the lawyer is notified and information regarding the complaint is provided. The lawyer is asked to respond. That request usually is presented by a letter from OCDC. Most lawyers respond within the prescribed time. Others take the path of most resistance. They decide not to respond at all or submit a response without explanation or relevant documentation. This approach is not beneficial to the lawyer or to OCDC. Such action will usually require the lawyer to expend more time in responding to specific inquiries from OCDC that could have been addressed in the lawyer's initial response.

During the investigation, the lawyer may be requested to provide additional response or address specific questions regarding the lawyer's representation.

Lawyers who fail to respond to a request for information run the risk of subjecting themselves to discipline even if the allegations of unethical conduct are later dismissed. Failure to respond to an investigation can result in a violation of Rule 4-8.1.<sup>2</sup> Lawyers violating that Rule have been disci-

plined even if the underlying complaint was unfounded. *In re Hardge-Harris*, 845 S.W.2d 557 (Mo. banc 1993).

The determination to dismiss the complaint, issue discipline, and refer the file to a Regional Disciplinary Committee or to file an Information is beyond the scope of this article.<sup>3</sup>

## HOW TO AVOID FALSE STARTS AND MISSTEPS

A response to the complaint should address the specific allegations of improper conduct. Experience has shown that a response that addresses the alleged conduct is beneficial in the investigation of a complaint. The submission of copies of relevant documents that support the position of the lawyer is recommended. A general denial of the complaint is not. Likewise, merely providing a copy of the client file to OCDC is not persuasive. Keep in mind, the lawyer probably has the most knowledge and understanding of what issues arose during the representation and the work performed by the lawyer. Reference to particular documents that explain the actions taken by the lawyer assist the review of the complaint.

Some lawyers have expressed concern about disclosing information obtained during the representation. A review of Rule 4-1.6 should resolve those concerns. A lawyer can reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to respond to the complaint.<sup>4</sup>

The OCDC understands that it can be time-consuming to respond to a complaint. However, that does not justify billing the client for the time the lawyer spends in addressing the complaint. Rule 4-1.5 prohibits a

lawyer from charging or collecting an unreasonable fee or an unreasonable amount for expenses for representing a client. The fee would be inappropriate for two reasons: a lawyer's response to an investigation initiated by OCDC that is billed to the client for time spent preparing the response is by its nature unreasonable, and the assessment of fees or expenses is not within the scope of the representation of the client.

Can a lawyer continue to represent a client if that client has filed a complaint? Can a lawyer communicate with a client if the client files a complaint against the lawyer? The answer to both questions is yes. The Rules of Professional Conduct do not require withdrawal from representation simply because a complaint has been filed. It is not unusual for lawyers to continue their representation during the investigation process. Rule 4-1.16 should be reviewed to determine if withdrawal from representation is appropriate.

Can an attorney participate in a settlement that includes a term that a party will withdraw, or decline to cooperate regarding a complaint filed pursuant to Rule 5? This question was resolved by the Missouri Supreme Court Advisory Committee<sup>5</sup> with Formal Opinion 122, issued on March 8, 2006.<sup>6</sup> The Committee wrote:

It is the opinion of the Advisory Committee that an attorney who enters into, or attempts to enter into, a settlement that includes a term that a party to the agreement will withdraw, refrain from filing, or decline to cooperate, regarding a complaint under Supreme Court Rule 5 violates Rule 4-8.4(d) by engaging

in conduct prejudicial to the administration of justice.”

The Committee reasoned that a settlement that eliminated the potential for a disciplinary proceeding related to allegations of a lawyer's misconduct is contrary to public policy reasons for establishing an attorney discipline system.

Complaints alleging the failure of a lawyer to return the file to the client are received by OCDC. Lawyers should consider Rule 4-1.16(d). That Rule requires that, upon the termination of representation, a lawyer shall take reasonable steps to protect a client's interest, including surrendering papers and property to which the client is entitled. This issue often is presented to the OCDC when a client discharges a lawyer, or the lawyer withdraws, and the client requests the file because the client's legal matter is not resolved.

The entire file belongs to the client.<sup>7</sup> This includes attorney “work product.” The only exception is for items in the file for which the lawyer has out-of-pocket expense. Examples of such items would include medical records and depositions paid for by the lawyer. The lawyer may retain those items, not the complete file, but only until reimbursement is made. If the lawyer wants to keep a copy of the file, the lawyer must incur the costs to copy the file.<sup>8</sup>

## COMMUNICATION NOW MIGHT PREVENT A COMPLAINT LATER

OCDC records reflect that inadequate communication and lack of diligence are the cause of a large majority of the complaints made against

Missouri lawyers.

Common complaints presented to OCDC:

“The lawyer would not return my calls.”

“The administrative assistant would not let me speak with my lawyer.”

“I would wait for days or weeks to get a return call.”

“I never knew what was going on in my case.”

Lawyers who fail to consider the concern and anxiety clients have in regard to their cases run the risk that the client will file a complaint against them. Rule 4-1.4 requires that a lawyer keep a client reasonably informed about the status of the case, promptly comply with requests for information, and explain a matter to the extent necessary to allow the client to make informed decisions.

Lawyers should consider at the initial consultation with clients what the lawyer can and cannot do for them. Throughout the representation issues regarding procedure, discovery, time restrictions, scheduled court dates, and settlement offers should be discussed with clients. Some of the communication can be handled by support staff.

However, relying primarily on support staff to deal with clients could result in the filing of a complaint and possible disciplinary action. It is not uncommon for OCDC to receive a complaint alleging a lack of diligence and communication but then have the lawyer provide documentation that the case was diligently pursued. The lawyer may have filed the necessary pleadings, initiated discovery, and discussed the case with opposing counsel, but failed to notify the client of the status of the case. Proper communication probably would have avoided the filing of a complaint with OCDC.

## CONCLUSION

OCDC correspondence requiring a lawyer to respond to a complaint should not be ignored. It will not go away. It should be considered an opportunity to address the complaint and provide information that might warrant dismissal of the complaint.

## ENDNOTES

1 Supreme Court Rule 5.10. Also see The Missouri Bar Complaint Resolution Program Guidelines.

2 Supreme Court Rule 4-8.1(c).

3 Rule 5.11. If after completion of an investigation there is a finding of probable cause to believe the lawyer is guilty of professional misconduct, an admonition may be administered or an Information prepared. Pursuant to Rule 5.08, OCDC may request Regional Disciplinary Committees to investigate matters regarding professional misconduct.

4 Supreme Court Rule 4-1.6(b)(3).

5 Rule 5.01. The Missouri Supreme Court Advisory Committee is appointed by the Missouri Supreme Court. The Committee is composed of lawyers and nonlawyers.

6 Rule 5.30. The Advisory Committee may give formal opinions as to the interpretations of Rules 4, 5, and 6.

7 Missouri Supreme Court Advisory Committee Formal Opinion 115, as amended.

8 *Id.*



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