

Lawyer – Are You Listening?

By Carl Schaeperkoetter

The Supreme Court of Missouri has stated on numerous occasions that the purpose of the lawyer discipline system is to protect the public and maintain the integrity of the profession. The traditional view was that a sanction should be imposed for any violation of the Rules of Professional Conduct. For minor matters, an admonition could be issued by the Office of Chief Disciplinary Counsel (“OCDC”). For more serious violations, discipline would be imposed by the Supreme Court, with the options being reprimand, suspension or disbarment.

In recent years there has been a recognition that the dual mandate to protect the public and maintain the integrity of the profession can, in some instances, be realized while providing assistance to lawyers that permits the continued practice of law and the opportunity to improve lawyer skills. This article will discuss various tools available to lawyers if the lawyers are willing to listen.

Among the tools available to lawyers having contact with the discipline system are The Missouri Bar Complaint Resolution Program, The Missouri Bar Fee Dispute Program, and three programs monitored by the OCDC – namely, conditional admission for new lawyers, diversion agreements for minor violations, and probation for more serious violations. The general nature of each program will be discussed below.

Missouri Bar Complaint Resolution Program

The Complaint Resolution Program was established in 1995, effective January 1, 1996, by what is now Supreme Court Rule 5.10. It permits disciplinary counsel to refer complaints to The Missouri Bar if the alleged rule violation is not considered serious and disciplinary counsel thinks a lawyer-client dispute might well be resolved by face-to-face discussion with a trained facilitator. Many of these minor problems involve diligence or communication issues in which there appears to have been a misunderstanding between the lawyer and the client.

In 2010, the OCDC referred 45 cases to the Complaint Resolution Program. Twenty-five facilitations were conducted with the assistance of a volunteer facilitator. Twenty-two of those resulted in a mutually agreed resolution of the problem. Only three face-to-face facilitations failed to reach agreement. In addition, in an additional seven referrals the parties were able to resolve the matter without even having to appear for facilitation. The remaining cases were ones in which either the complainant/client and/or the lawyer chose not to participate in the Complaint Resolution Program. Those cases were returned to the OCDC for determination as to whether further investigation activities were warranted.

As illustrated above, a high percentage of the lawyers who chose to participate in facilitation through the Complaint Resolution Program were able to reach an agreement with the client. The result is a more satisfied

client, a closed case that will not be reviewed by disciplinary counsel, and hopefully some education to the lawyer so that the problem will not re-occur. It would seem a lawyer, given the choice to participate in complaint resolution, should utilize this “tool” to improve skills and maintain good client relations.

Fee Dispute Resolution Program

A second program offered by The Missouri Bar is the Fee Dispute Resolution Program. This is a program where a client can directly contact The Missouri Bar. It does not require a referral from the OCDC, although the OCDC can and does make referrals to the program. The Missouri Bar received more than 500 fee inquires in 2010. Many of those inquiries were not deemed appropriate for the program, i.e., they involved matters other than disputes over fees. The Missouri Bar opened 77 fee dispute cases in 2010. In addition, referrals were made to two other entities in Missouri that have fee dispute resolution programs. There were 43 referrals made to the Kansas City Metropolitan Bar Association and 84 referrals to the Bar Association of Metropolitan St. Louis.

The Missouri Bar program itself conducted 31 mediations in 2010, with 19 of those coming to a resolution (61 percent). The others did not result in a mutually agreeable resolution. In addition to mediation, The Missouri Bar Fee Dispute Program conducted eight binding arbitration matters, with arbitration by agreement of the parties. Two awards were made to respondent

lawyers for additional fees, one award was made to a client for return of fees, and there were two partial awards in which both the lawyer and the client were determined to have some obligation to the other. At the end of the year, there were three binding arbitration cases that remained pending.

The percentage of successful fee dispute resolutions does not quite equal the percentage of successful complaint resolutions. Perhaps the difference is the nature of the problem. Fee disputes are situations in which the positions of the parties may have hardened over time. Nonetheless, the majority of mediated fee dispute cases were resolved. It would seem that this “tool” to eliminate a client dispute would be well worth the time, particularly if a client would be more inclined to pay a portion of a fee if the program were utilized and a client satisfied with the result.

Conditional Admission

The Conditional Admission Program was started in 1999 by the Board of Law Examiners. That entity, having the authority under Supreme Court Rule 8 to determine admissibility to The Missouri Bar, decided that in some instances an applicant could have sufficient character and fitness issues to warrant further monitoring after licensure. Those conditional admittees are required to sign a monitoring agreement that permits the OCDC to monitor the lawyer’s activities for a period of time after admission.

Most conditional admissions tend to be for either consumer credit problems or past substance abuse issues. The period of monitoring typically can range between two and five years. Depending on the type of problem, common terms can include credit reporting and counseling, mental health counseling,

mentoring, mandatory AA attendance, random drug tests, random client audits, etc.

Numbers would indicate the Conditional Admission Program has been quite successful. From 1999 through the end of 2010, 77 lawyers had completed the conditional admission term, with 74 of the 77 successfully complying all admission requirements (96 percent). Of the 74 successfully completing the program, 61 have had no complaints thereafter (82 percent). Of the 13 others receiving complaints, only two have received admonitions and one has a currently pending information.

Some reasons for the low recidivism rate with the discipline system may be that new lawyers conditionally admitted are very appreciative of the privilege they have been given to practice law and that early efforts to plug them into the support system in the legal community help avoid future problems. Certainly, if one has had a past substance abuse problem, the contacts within the recovering lawyer community can provide encouragement, support and models for a recovering substance abuser. Likewise, a mentor for a person with credit problems or organizational problems can serve as a sounding board and a guide to assist a young lawyer starting out in the legal world. For whatever reason, a conditional admittee should look on the requirements of a monitoring agreement as “tools” to improve practice skills and personal life.

Diversion

Diversion is a program established by Missouri Supreme Court Rule 5.105 and first made available in 2003. The concept of diversion is to take a matter that is minor in nature, but possibly a rule violation, and divert the

lawyer out of the disciplinary system. The hope is that, through education and contractual agreement, the lawyer will better be able to serve the public and the profession in the future. Diversion is considered a step-up in the disciplinary chain from The Missouri Bar Complaint Resolution Program. An investigation file would already have been opened against the lawyer. The determination is made, after the investigation, that the public can be protected while the lawyer is given an opportunity to avoid discipline by entering into a diversion agreement.

The agreement is a contractual arrangement between the OCDC and the lawyer in which certain conditions are to be met over a period of time. If met, the underlining disciplinary case is closed. Diversion conditions can be very flexible, depending on the problem to be addressed. They could include mandatory continuing legal education, the procurement of malpractice insurance, mentoring, mental health or substance abuse counseling, the use of a law practice management consultant, random drug tests, AA attendance, random trust account audits, etc. The conditions imposed really depend on the case.

The OCDC considers the diversion program to date only to have been moderately successful. There have been 58 successful diversion contracts out of the 75 diversions completed since 2003 (77 percent). While this number is not terrible, 34 of the 58 successful participants have later received new complaints (59 percent) and 18 of the 58 (31 percent) have later gone on to receive an admonition (8), some form of suspension (6), disbarment (1), or have a matter pending before a disciplinary hearing panel or the Supreme Court at this time (3). Clearly, many of the diversion partici-

pants have not taken advantage of the opportunity that diversion offered to them to change the ways they practice.

Even more disconcerting, of the 17 lawyers whose diversions were terminated as unsuccessful between 2003 and the present, all 17 ultimately have received some sort of discipline or have Informations pending against them – disbarments (8), suspensions with or without probation (3), reprimand (1), admonition (3), or pending Informations (2). All the serious discipline would have been for complaints that came to the OCDC at a later time, since diversion is only available for minor matters. What this data suggests is that a person who is not able to correct deficiencies through a diversion agreement at an early stage is a prime candidate to lose a license at a later time.

It has been suggested that some lawyers don't take the diversion process and the opportunity it provides seriously enough. The lawyers entering a diversion agreement typically are not new admittees who still recognize what a privilege it is to practice law. Nor is the typical diversion candidate a person whose problems have become so severe that it is either change now or lose your license. Instead, a typical diversion participant is one who has been in practice for a while but is heading downhill and doesn't always recognize it. Such individuals should recognize that diversion is a "tool" to correct practice problems before a license is put in danger.

Probation

Probation was established in Missouri by Supreme Court Rule 5.225

in 2003. Unlike diversion, which was established by Rule 5.105 at the same time, probation can only be offered as part of a suspension order by the Supreme Court of Missouri. Thus, probation is for major violations; diversion is for minor ones. A person placed on probation has committed a serious rule violation that has harmed a client in some significant way.

The Supreme Court has determined that probation is appropriate in cases where the public can receive some assurance of protection from the lawyer committing more violations in the future, the lawyer can be monitored in a realistic way, and there has been no violation warranting disbarment – e.g., the stealing of client money. Many of the probation terms can be similar to those in diversion – i.e., continuing education programs, malpractice insurance, mentoring, substance or mental health counseling, random trust account audits, etc. The term typically is between one and three years, with the conditions ordered by the Court.

Probation history to date indicates a low recidivism rate, somewhat surprisingly given the seriousness of the charges that have resulted in the probation order. This may well be because the lawyer is staring at the loss of license and finally has to address the underlying problems. Since 2003, there have been 54 completed probation cases. Of those, 45 successfully completed all the probation terms (83 percent). Of those 45 successes, only two have received future admonitions and two have been disbarred. Thus, only four of 45 (9 percent) have been recidivists to the discipline system.

As one would expect when a probation case has been unsuccessful, of the

nine failed cases, the scorecard currently reads four disbarments and five suspensions. The suspensions would have been as a result of the probation revocation. The disbarments would have been for yet more offenses after suspension, because by definition probation cannot be ordered in a disbarment case. The bottom line is that one whose probation is revoked is going to lose a license to practice law.

Most lawyers would not look at probation as an opportunity. However, considering the alternative, it is indeed an opportunity for a lawyer to improve practice skills and to address whatever problems have put the lawyer before the Supreme Court. Thus, probation can be a "tool" to improve lawyer practice and to avoid the discipline system in the future.

Conclusion

During the past 15 years there have been programs developed at each stage of the discipline process to give lawyers the opportunity to change. From the very minor (complaint resolution) to the very serious (probation), a lawyer dealing with disciplinary charges should utilize the "tools" available to dig out of trouble. A conscientious effort will improve a lawyer's practice, professional life, personal life, and sense of worth. Lawyer, are you listening?



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