FROM WHENCE WE CAME

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INTRODUCTION

As I approach twenty-five years with the Office of Chief Disciplinary Counsel, I have been reflecting on the many changes seen during my tenure. Our Missouri Supreme Court long has emphasized the twin purposes of the disciplinary system: to protect the public and maintain the integrity of the legal profession. A review of the past twenty-five years shows how the Court, the Advisory Committee established by the Court, and the Office of Chief Disciplinary Counsel, have together made changes to meet those twin purposes.

This article will not discuss the remarkable changes in the practice of law over the same period. There are many articles about the changing legal profession, the technological advancements, the market pressures from globalization, the increasing use of artificial intelligence for discovery, and other such issues. They are having a dramatic effect on the practice of law in general. This article, however, focuses on the disciplinary system.

McKay Commission

Reform efforts around the country began in the early 1990s with the American Bar Association's McKay Commission, established to address what the legal

community saw as a need for change in disciplinary enforcement. Major concerns were the need for attorney discipline to be regulated by the judiciary independently from state bar associations, a need for a central disciplinary authority in each state, the need to expedite the disciplinary process, a need for transparency to increase public confidence in the discipline system, the need to expand regulation to protect the public and assist lawyers, and a need for preventative measures to avoid future misconduct.

The McKay Commission served the American Bar Association from 1989 to 1992. The ABA House of Delegates adopted the Commission report as an official recommendation in February of 1992. Missouri since that time has addressed and adopted many of the recommendations, as set forth below.

Direct and Exclusive Judicial Control of Lawyer Discipline

The Missouri Supreme Court made the first changes to address items discussed by the McKay Commission in 1991 with the establishment of the Office of Chief Disciplinary Counsel. Prior to that date discipline was enforced through the Missouri Bar Advisory Committee, whose director was called General Chairman of the Bar Committees. Complaints alleging lawyer misconduct could be made to either the Missouri Bar Advisory Committee or to circuit bar committees for each circuit in the state. There was no centralized entity having knowledge of all bar complaints around the state. In addition, the Missouri Bar Advisory Committee investigated, prosecuted,

and made initial probable cause findings on complaints, thus serving as both prosecutor and judge. This left the perception there were insufficient checks and balances in the system, and also that regulation was too closely tied to Missouri Bar affairs.

The 1991 establishment of the Office of Chief Disciplinary Counsel resolved several issues. The OCDC would be supervised by the Court; the Bar would have no involvement. The OCDC would serve as the central intake office for all disciplinary matters around the state. Thus there would be one entity making the initial decisions about the opening of files and the extent of further investigation. In addition, the 1991 rule changes removed the investigative function from the Advisory Committee, which going forward would assist the Supreme Court in overseeing the disciplinary system, serving as an independent body in evaluation of the disciplinary system's effectiveness, and also would have a judicial function, making probable cause determinations on cases presented by the OCDC.

After the 1991 changes, the Office of Chief Disciplinary Counsel had a designated procedure for processing formal disciplinary actions. The OCDC could investigate a case on its own or assign the investigation to one of the various regional committees around the state, subject to oversight by the OCDC. Any complaint deemed serious enough for a formal charge (an Information) would first be presented to the Advisory Committee for a probable cause hearing. If the Advisory Committee

found probable cause, the actual trial of the disciplinary case would be assigned to a master appointed by the Missouri Supreme Court.

This first change in structure and procedure remained in place until 1996.

Changes to Expedite the Disciplinary Process

One of the concerns of the McKay Commission was the slow progress of disciplinary investigations and prosecutions. In 1996, the Missouri Supreme Court changed the procedures within Missouri Rule 5 to eliminate the probable cause hearing before the Advisory Committee. This change was intended to expedite the disciplinary process. The probable cause determination thereafter would be made by the OCDC or a Regional Disciplinary Committee in an informal and summary fashion. This eliminated the frequent situation where a Complainant was required to testify two or more times in the disciplinary process before its conclusion. Sometimes a Complainant would have to appear before the investigator (OCDC or a Regional Committee), the Advisory Committee at a probable cause hearing, and again at trial. This was burdensome to Complainants, inefficient and time consuming, and reinforced any public perception that the system was skewed in favor of lawyers.

In addition to eliminating the probable cause hearing, the 1996 amendments also established a new mechanism for trying cases. No longer would there be a hearing before a Special Master appointed by the Supreme Court. Instead hearings would be

before a three member Disciplinary Hearing Panel, with that panel to make recommendations to the Court for discipline in serious cases. That three member Disciplinary Hearing Panel remains to this date the trial mechanism in disciplinary cases in the State of Missouri.

It is my opinion the elimination of the probable cause hearing and the establishment of the Disciplinary Hearing Panels have reduced the length of the disciplinary process, and thus were good ideas. The 1991 and 1996 changes have been the most significant in the disciplinary system over the past thirty years. Some other significant changes will be discussed below.

Disbarment as the Ultimate Sanction

When I started at the OCDC in 1994, there was an anomaly in the rules in that disbarment for some purposes was less significant than a suspension. There was nothing in the rules about the length of time a disbarred lawyer had to wait before applying for reinstatement, whereas a suspension was for a specific length of time, six months, one year, etc. Lawyers could and did file applications to surrender licenses, be disbarred, and then apply for reinstatement a short time later.

The Supreme Court addressed this anomaly by revising Rule 5.28 as of January 1, 2000, wherein any attorney disbarred had to wait five years until applying for reinstatement, and had to retake and pass the entire Missouri Bar examination,

something that never before had been a requirement. This rule change had the admirable effect of recognizing that serious misconduct should result in serious consequences, a resolution that clearly protects the public and promotes the integrity of the profession.

Transparency in the System

Another goal of the McKay report was to make disciplinary systems more transparent. Our Supreme Court has addressed transparency in several ways, both procedurally and in disciplinary sanction.

Until 2002, one of the possible disciplinary sanctions issued by the Court was called a "private reprimand," in which the Court issued an order reprimanding an attorney, but having that order be private and not generally known or available to the public. This hid Court discipline from the public. The Court in effect eliminated private reprimands by a rule change on November 13, 2002, wherein a Disciplinary Hearing Panel no longer could recommend a private reprimand to the Court. The Court has not issued a private reprimand since that date. Later rule revisions of the court rules eliminated the word "private" from the discussion of lawyer discipline. No longer is any Court discipline a secret.

Other transparency efforts took somewhat longer to accomplish. The seminal changes took place in 2012. Those changes involved both the hearing process and the

public availability of admonitions, the lowest form of sanction in the disciplinary system.

Prior to July 1, 2012, all matters involving a disciplinary case were confidential until the trial record was filed with the Supreme Court following a decision by a Disciplinary Hearing Panel recommending formal discipline. This meant the public was not aware of allegations against a lawyer even after formal charges had been filed. The 2012 rule amendment made public the disciplinary action as soon as a formal charge was filed. Investigations remained confidential, but the public was now permitted to know of, and even attend, disciplinary hearings. This change had long been advocated by transparency proponents and had been an element of the McKay Commission report.

In addition, the 2012 changes addressed the need for transparency in admonitions, the lowest form of sanction and one normally issued by the OCDC. Prior to that date, an admonition was available to the public for three years after issuance and then became private. In other words, absent a few circumstances, a member of the public could not find whether a lawyer had received that minor sanction if more than three years old. As of July 1, 2012, all admonitions going forward are available to the public upon request without a time constraint.

These transparency changes do enhance the profession in the eyes of the public. Any lack of transparency is viewed by non-lawyers as a matter of suspicion when lawyers are a self-regulated profession. In my opinion these changes have greatly benefitted our disciplinary system.

Protecting the Public and Avoiding Future Misconduct

The McKay Commission had several recommendations to protect the public and at the same time help lawyers avoid current and future disciplinary issues. Those recommendations included such things as assistance to clients losing money because of lawyer malfeasance, assistance to lawyers dealing with personal mental health or substance abuse problems, addressing lawyer misconduct that did not appear to warrant suspension or disbarment, and assuring lawyer trust accounts would properly be administered. Over the years, our Court has addressed each of these issues.

Missouri was ahead of the curve in addressing substance abuse. We have had an Intervention Committee since 1985 to intervene in situations involving substance abuse. Our protection of the public because of lawyer malfeasance goes back even further. The Missouri Bar has administered a Client Security Fund since 1965, paying restitution to people not receiving legal services after having paid lawyers, the lawyers being suspended, disbarred or dying after payment. A Complaint Resolution Program

wherein complaints could be mediated short of the discipline process was established in 1996. All these programs are offered by the Missouri Bar.

An additional and significant change to the disciplinary rules occurred as of January 1, 2003, when our Court established programs for diversion and probation. Diversion is a contractual agreement between the lawyer and the OCDC that avoids a disciplinary sanction in cases of minor misconduct. It has an educational component with two goals: one to avoid discipline, and the other to protect the public by educating the lawyer to avoid future problems. Diversion is confidential. It simply is another tool in the list of available remedies to the OCDC.

Probation permits a lawyer to continue practicing even though the lawyer has committed serious misconduct. Probation cannot be used in conduct that warrants disbarment, such as misappropriation. However, probation can be used in cases in which a lawyer needs education to improve law practice management, make restitution to a client, and/or seek treatment for a mental health or substance abuse issue. Like diversion, probation is simply another tool to protect the public and yet allow a lawyer to continue to practice without adversely affecting the integrity of the profession.

In my opinion, both diversion and probation have been highly successful in reducing repeat violations of the rules of professional conduct.

By rule change of January 1, 2010, Missouri now has mandatory overdraft reporting for trust accounts. Any lawyer having a trust account in the State of Missouri is required to have that account in a bank agreeing to report overdrafts to the OCDC. This rule change helps protect client money and increases the likelihood that trust accounts are being properly managed.

Addressing Mental Health and Substance Abuse in Discipline

A perennial problem in all disciplinary systems is the interplay between lawyer misconduct, mental health, and substance abuse. The McKay Commission recognized the significant detrimental effect to the public and to the integrity of the profession from these interrelated issues. Our Court has addressed the problem by the implementation of Rule 5.285 in 2010. The Court recognized that misconduct cannot be condoned, but applicable mental health and substance abuse issues could be mitigating factors in the level of sanction. Rule 5.285 addresses the problem by giving specific steps for a Respondent to plead and provide information about a mental health or substance abuse problem to mitigate a sanction. This clarity assists the OCDC in sanction analysis, protects the public by addressing a root cause of misconduct, and promotes the integrity of the profession by encouraging treatment when possible.

Clarifying Lawyer Obligations

The Supreme Court has addressed several common issues arising in lawyers handling files and trust accounts. The Court in 2005 clarified that a client file must be kept for ten years, absent an agreement between the lawyer and client. The Court in 2016 lowered the retention period to six years. At the same time the Court increased the time a lawyer must retain trust account records to the same six years. These changes give lawyers a bright timeline for file and record retention.

The Court also in 2013 greatly increased the detailed provisions on the handling of client trust accounts in Rules 4-1.145 and 4-1.15. No lawyer should have an excuse not to follow proper trust account practices because of the detail in these rules.

The Court as of January 1, 2019 also gave lawyers some flexibility in the deposit of advance fee payments. Flat fee advance payments of $2,000 or less no longer need to be deposited into the lawyer's trust account. The lawyer may immediately receive those funds, subject to reimbursement if for some reason the representation does not work out and the service is not provided.

These changes regarding the safe keeping of property and files have been beneficial. They provide clarity to lawyer obligations.

CONCLUSION

There have been a great many changes to the rules in the twenty-five years I have been at the OCDC. I believe the changes I have discussed here significantly

addressed the concerns of the McKay Commission, while protecting the public and maintaining the integrity of the legal profession in Missouri.