

OCDC, COMPLAINTS AND YOGI

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What can lawyers learn from the wisdom of Lawrence Peter Berra, better known as Yogi Berra? Mr. Berra was one of the best known catchers to play the game of baseball. He was inducted into the National Baseball Hall of Fame in 1972, but is also well known for quotes that have been attributed to him.

Yogi Berra: You got to be very careful if you don't know where you are going because you might not get there.¹

This article will discuss the initial Office of Chief Disciplinary Counsel (OCDC) complaint process and how attorneys might prevent the filing of a complaint with OCDC.² It is intended to assist lawyers from veering off course or taking a costly detour.

Missouri Supreme Court Rule 5.08 provides that the Chief Disciplinary Counsel has the authority, with or without complaint, to investigate any matter of professional misconduct. The majority of complaints are received from clients but complaints also come from judges, other attorneys, family or friends of a client. The office has also opened investigations on information from newspaper articles or news reports.

THE COMPLAINT PROCESS

Complaints submitted to OCDC must be in writing and are reviewed by staff counsel. Not all complaints received result in the opening of a formal investigation. The majority of complaints result in no further action by OCDC because the alleged conduct is not within the jurisdiction of OCDC, 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.

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

Investigation File Opened

If an investigation is opened, the lawyer will be asked to respond to the complaint. Whatever the lawyer's initial reaction to the receipt of the complaint (anger, anxiety, disbelief and/or frustration), the lawyer should consider the response as their opportunity to address the specific allegations in a complaint by detailing the work performed on behalf of a client. This can be accomplished by submission of a written narrative

addressing the issues raised in the complaint with an explanation of the relevancy of any documents submitted with the response.

Yogi Berra: We made too many wrong mistakes.

Some lawyers decide not to respond at all or they submit copies of documents from the client file with little or no explanation of their relevance. Such action is not beneficial to the lawyer or OCDC. Such action may result in the lawyer spending more time responding to specific requests for information from OCDC. A failure to respond may result in the issuance of a subpoena for the lawyer to visit and discuss the complaint at the office of OCDC.³

During the investigation, OCDC may request the lawyer provide additional responses or address specific issues regarding the lawyer's representation.

Lawyers should keep in mind that a failure to respond to OCDC could result in discipline even if the lawyer receives no discipline for the alleged conduct in the initial complaint. Failure to respond to a request for information from OCDC can result in a violation of Rule 4-8.1.⁴

Informal Resolution Program

This program was initiated by OCDC to provide an opportunity to resolve disputes between a lawyer and a client without opening a disciplinary file.

The purpose of the program is to attempt to resolve less serious disputes and maintain the lawyer client relationship. A referral to this program may be made even if the lawyer has concluded the representation of the client. Lack of communication and the failure of the lawyer to return the client file are two of the primary complaints considered for the program. OCDC staff counsel determine what complaints are referred. The lawyer and the complainant cannot request the matter be sent to the program. Complaints that allege serious violations of the Rules of Professional Conduct are not considered for referral.

Yogi Berra: You can observe a lot just by watching.

To paraphrase Mr. Berra, you can learn a lot just by listening. If a complaint is handled through the Informal Resolution Program, the lawyer will be contacted by OCDC. The initial contact is usually by phone. The lawyer will be notified that a complaint has been received and OCDC is attempting to resolve it informally. The goal is to resolve these complaints quickly and without the need to open an investigation. Upon hearing that OCDC is calling in an effort to informally resolve the dispute, the lawyer should understand that prompt attention to the matter could save time and avoid the possible opening of an investigation,

Complaint Resolution Program

This program is administered by the Missouri Bar. Supreme Court Rule 5.10 provides that OCDC can refer complaints that may be best resolved outside of the formal disciplinary proceedings to the Complaint Resolution Program.⁵

Complaints can only be referred to the program by OCDC. Participation in the program by the lawyer and complainant is voluntary. Although a resolution of the complaint might not be reached, the fact that OCDC decided to refer a complaint to the program should be considered as encouragement to participate in the program.

Allegations of serious unethical conduct will not be referred to the program. Complaints most commonly referred by OCDC to the program relate to issues involving communication, diligence and to situations where there may be a misunderstanding between parties.

When a decision is made to refer a complaint to the program, both the lawyer and complainant (either a client or ex-client) are notified in writing by OCDC of that decision. Once the referral is made the OCDC is not involved in efforts to resolve the complaint. Failure of the lawyer to participate in the program may result in OCDC opening an investigation file on the lawyer.

THOUGHTS ON HOW COMPLAINTS MIGHT BE AVOIDED

Communication:

The majority of complaints received by OCDC involve allegations of a lack of communication or lack of diligence. Whether a client has an unreasonable expectation of how the client's case should be handled or due to concern of what is happening on the case, a lawyer who does not keep clients informed of the status of their case runs the risk of having a complaint filed with OCDC.

Rule 4-1.4 requires a lawyer to keep the client reasonably informed of the status of the matter, promptly comply with reasonable requests for information and explain a matter to the extent reasonably necessary to allow the client to make informed decisions.

During the initial consultation with a client consideration should be given to discussing what the client can expect. This discussion should include what the lawyer can do for the client and address any misunderstandings the client may have. As the case progresses issues regarding pleadings, discovery, scheduled court dates and settlement offers should be discussed with clients.

Clients may file complaints with OCDC alleging lack of diligence even when the lawyer has filed all necessary pleadings, prepared discovery and attended court dates, but has failed to keep the client informed. Lawyers should not avoid direct communication

with their clients by relying on support staff to relay messages between the lawyer and client. This may result in the client thinking the lawyer is avoiding them. The prompt return of phone calls and written communication should be considered throughout the representation.

Diligence

Yogi Berra: Nobody goes there anymore because it's too crowded.

Several factors may explain why a complaint alleging a lack of diligence is filed. Misunderstanding of the legal system by the client, failure of the lawyer to keep the client informed, or lawyer procrastination, to name a few. But also consider the lawyer who fails to recognize a heavy caseload while taking on new clients.

Rule 4-1.3 requires a lawyer to act with reasonable diligence and promptness in representing clients. Too many clients and too little time is a lack of diligence complaint waiting to happen. Although fewer clients might result in fewer fees, a lawyer runs the risk of failing to diligently represent a client and the consequences that will follow, including the possible filing of a complaint with OCDC and the affect the dissatisfaction of a client will have on the lawyer's reputation.

Train Your Support Staff

Yogi Berra: I'm not going to buy my kids an encyclopedia. Let them walk to school like I did.

Rule 4-5.3 requires a lawyer who has direct supervisory authority over a non-lawyer to make reasonable efforts to ensure the conduct of a non-lawyer in the firm is compatible with the professional obligations of the lawyer.

Following the wisdom of Mr. Berra might be risky when it comes to your support staff. Lawyers who fail to inform staff members of the ethical requirements of their employment and supervise staff members run the risk of a client complaint and possible discipline.

A FEW QUESTIONS, A FEW ANSWERS

If a lawyer receives a complaint can the lawyer continue to represent the client?

Yes, the Rules of Professional Conduct do not prohibit a lawyer from continuing to represent the client simply because a complaint was filed. Rule 4-1.16 should be reviewed to determine if withdraw would be appropriate. It is not unusual for lawyers to continue representation of the client during the complaint process.

Can a lawyer agree to a settlement that provides that a party will not file a complaint, withdraw a complaint or not cooperate regarding a complaint filed with

OCDC? The Supreme Court Advisory Committee⁶ addressed this issue in Formal Opinion 122.⁷ The Opinion states:

“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 Opinion does provide that the lawyer and complainant involved in a complaint may communicate with each other and attempt to resolve the problems between them.

May a lawyer retain the client file? Complaints received by OCDC regarding this issue often involve the discharge of a lawyer by a client or withdraw of a lawyer, and the client requested the file because the client’s legal matter has not been resolved. Rule 4-1.16(d) provides that upon termination of representation, a lawyer should take reasonable action to protect the client’s interests, including the surrender of papers and property to which the client is entitled.

The complete file belongs to the client.⁸ This includes “work product”. Items in the file that the lawyer has out of pocket expense may be retained by the lawyer (not the complete file), but only until reimbursement is made. Examples of those items would include depositions and medical records paid for by the lawyer. If the lawyer wants to keep a copy of the file, the lawyer is responsible for the costs of copying the file.⁹

CONCLUSION

Correspondence from OCDC requesting a response to a complaint should not be ignored. Lawyers should consider it as an opportunity to address the issues raised in the complaint and provide information that may result in the dismissal of the complaint.

A lawyer who is asked to address a dispute through the Informal Resolution Program or the Complaint Resolution Program should seriously consider doing so, as it may prevent the opening of an investigative file.

During the representation of a client time spent on the review of each client’s file, the timely performance of the services required for each client and communication with each client may prevent the filing of a complaint with OCDC.

¹ All quotes in this article attributed to Yogi Berra are taken from www.baseballalmanac.com.

² The determination to close an investigation without discipline, the referral of an investigation to a Regional Disciplinary Committee, the issuance of discipline or the filing of an Information with a Disciplinary Hearing Panel is beyond the scope of this article.

See Supreme Court 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.

³ Supreme Court Rule 5.09(b)

⁴ Supreme Court Rule 4-8.1(c)

⁵ Supreme Court Rule 5.10. See also the Missouri Bar Complaint Resolution Program Guidelines.

⁶ Supreme Court Rule 5.01. The Missouri Supreme Court Advisory Committee is appointed by the Missouri Supreme Court. The Committee is comprised of lawyers and non-lawyers.

⁷ Supreme Court Rule 5.30. The Advisory Committee may give Formal Opinions as to the interpretations of Rule 4, 5, and 6.

⁸ Missouri Advisory Committee Formal Opinion 115, as amended.

⁹ id