

HOW ATTORNEY DISCIPLINE WORKS: INSIGHT INTO THE OCDC'S COMPLAINT REVIEW AND SANCTION ANALYSIS

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Complaint review process

Any given year, the Office of Chief Disciplinary Counsel receives 1,700 to 2,200 complaints. OCDC staff members carefully read every complaint and reject jurisdiction on more than half.

Several complaints are resolved each year through the OCDC's Informal Resolution Program; The Missouri Bar's Complaint Resolution Program; or the bar's Lawyer-to-Lawyer Dispute Resolution Program (see Rule 5.10). When successful, those programs help maintain lawyer/client relationships and eliminate the need for a disciplinary investigation. Additionally, many complaints are not opened for investigation but instead are referred to The Missouri Bar's Fee Dispute Resolution Program.

About 700 to 900 complaints are investigated each year. Lawyers being investigated are required by Rule 4-8.1 to comply with OCDC requests for information. In some situations, the lawyers are asked to produce records related to the representation of clients and documentation from their trust accounting records. Frequently, lawyers are required to appear for sworn statements. Investigations can take several months and involve some extensive back-and-forth correspondence.

Upon finding a violation, the OCDC can decide, under Rule 5.11, that further proceedings are not warranted and that an admonition is appropriate. The rule requires the lawyer to accept or reject the admonition. When deciding whether an admonition is adequate to protect the public, disciplinary authorities consider the nature of the violation, the level of intent, the lawyer's disciplinary history, and the harm or potential harm. Admonitions are often intended to help the lawyer redirect their practice to better protect their clients. If a lawyer decides to reject an admonition, Rule 5.11 indicates that the OCDC *shall* file a formal information.

Of the 855 complaints investigated in 2020, more than 87% were resolved with findings of insufficient probable cause to believe that the lawyer was guilty of professional misconduct that would justify discipline. The other 13% (105 cases in 2020) resulted in the following dispositions:

Lawyers accepted **76 Admonitions** issued by the OCDC.

The Supreme Court imposed the following sanctions:

- **Reprimands: 4**
- **Suspensions Stayed with Probation: 2**
- **Suspensions (not stayed): 14**
- **Disbarments (including Surrenders): 9**

Sanction analysis

The remainder of this article addresses the OCDC's sanction analysis in non-admonition cases or where the lawyer rejects an admonition. These are the cases where the OCDC files an information. Ultimately, the Supreme Court of Missouri considers the record and the recommendations of the parties, then decides what sanction, if any, to impose. Rules 5.16, 5.19, and 5.225 list the available sanctions, which include reprimand, reprimand with conditions, probation, stayed suspension with probation, suspension, and disbarment.

Sources for guidance

In recommending sanctions for lawyer misconduct, the OCDC has historically relied on five guiding sources.

The OCDC first looks to disciplinary decisions issued by the Supreme Court of Missouri to maintain consistency and fairness, and ultimately, to accomplish the Court's stated goals of protecting the public and maintaining the integrity of the profession. The Court's decisions become standards, even if not controlling precedent, when it issues opinions in lawyer discipline cases.²

Similarly, the OCDC analyzes the Court's many unreported decisions made in both stipulated and contested lawyer discipline cases. Recognizing the uniqueness of each case, patterns and trends are nevertheless apparent. As with reported decisions, the OCDC attempts to analyze each unreported decision, considering the particular facts, the level of harm, the level of intent, the nature of the violations, and any proven mitigating and aggravating factors. If, for example, the Court recently rejected one or more sanctions recommended by the OCDC (or stipulated by the OCDC and the respondent), the OCDC may adjust its recommendations

going forward. Similarly, the OCDC's recommendations in a certain type of case may be shaped by the Court's repeated acceptance of OCDC recommendations or stipulations in those cases.

For additional guidance, and with a nod to the objectivity that can develop with the volume of cases heard throughout the country, the OCDC routinely refers to the ABA's Standards for Imposing Lawyer Sanctions (1991 ed.), which recommend baseline discipline for specific types of misconduct, taking into consideration the duty violated, the lawyer's mental state (level of intent), and the extent of injury or potential injury. Once the baseline guideline is known, the ABA Standards allow consideration of aggravating and mitigating circumstances. These ABA Standards will be discussed below.

The Court is often interested in analysis from courts in other jurisdictions when they have addressed similar facts and issues, especially in cases with seldom-seen facts and legal issues. The OCDC tries to provide that analysis.

Finally, the OCDC also considers the findings of fact, conclusions of law, and sanction recommendation issued by the Disciplinary Hearing Panel that heard the case in accord with Rules 5.15 and 5.16. After the panel makes its recommendation, the OCDC and respondent may accept or reject it. In fact, the Court itself may accept or reject the panel's sanction recommendation, even if both the OCDC and the respondent reached agreement. Importantly, under Rule 5, the Court's review of the record is *de novo*, so the panel's findings, conclusions, and sanction recommendation are advisory.

Using these sources, each new case is analyzed for an appropriate disposition. The OCDC's recommended sanction is made with an assumption that consistent sanctions in common cases have, over time, become *de facto* standards, even without reported decisions. Of course, each case is unique; certain facts require deviation from standards. The OCDC aims to recommend sanctions in accord with those apparent standards and to explain or justify any deviations from the apparent standards.

In addition to complaints from clients and others, the attorney discipline system also processes cases resulting from lawyers found guilty of certain crimes and lawyers disciplined by other jurisdictions. Although those cases are processed directly in the Supreme Court, the sanction analysis is very similar to cases resulting from client complaints.

ABA standards for imposing lawyer sanctions

Like the OCDC, the Supreme Court of Missouri routinely refers to the ABA Standards for Imposing Lawyer Sanctions (1991 ed.) that were developed by the ABA's Center for Professional Responsibility.³ The guidelines consider the following primary questions:

- (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?);
- (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?);

(3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?); and

(4) Are there any aggravating or mitigating circumstances?⁴

The ABA Standards "assume that the most important ethical duties are those obligations which a lawyer owes to clients." Application of the ABA Standards requires the user to analyze the first three questions and then, only after a baseline sanction is apparent, to consider aggravating and mitigating circumstances.⁵ The drafters intentionally rejected an approach, however, that focused only on a lawyer's intent. Instead, they recognized that sanctioning courts must consider not only the lawyer's intent and damage to the client, but also the damage to "the public, the legal system and the profession."⁶

When there are multiple acts of misconduct, the sanction imposed should be consistent with the sanction for the most serious instance of misconduct among the violations.⁷

An example from the ABA Standards might be helpful here. This set of guidelines⁸ applies to misuse of client property:

- Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
- Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
- Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
- Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

As noted, the ABA Standards also allow for consideration and balancing of both aggravating and mitigating circumstances; they can justify deviations from the baseline. Here are lists of those factors, as well as a list of factors that are neither aggravating nor mitigating.⁹

Factors which may be considered in aggravation

Aggravating factors include:

- (a) prior disciplinary offenses;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;

- (j) indifference to making restitution;
- (k) illegal conduct, including that involving the use of controlled substances.

Factors which may be considered in mitigation

- Mitigating factors include:
- (a) absence of a prior disciplinary record;
 - (b) absence of a dishonest or selfish motive;
 - (c) personal or emotional problems;
 - (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
 - (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
 - (f) inexperience in the practice of law;
 - (g) character or reputation;
 - (h) physical disability;
 - (i) mental disability or chemical dependency including alcoholism or drug abuse when: (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; (2) the chemical dependency or mental disability caused the misconduct; (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;
 - (j) delay in disciplinary proceedings;
 - (k) imposition of other penalties or sanctions;
 - (l) remorse;
 - (m) remoteness of prior offenses.

Factors which are neither aggravating nor mitigating

- The following factors should not be considered as either aggravating or mitigating:
- (a) forced or compelled restitution;
 - (b) agreeing to the client's demand for certain improper behavior or result;
 - (c) withdrawal of complaint against the lawyer;
 - (d) resignation prior to completion of disciplinary proceedings;
 - (e) complainant's recommendation as to sanction;
 - (f) failure of injured client to complain.

Specific Missouri rules for probation and mental health issues

In Missouri, two key sanction factors are established by court rule, essentially overriding otherwise applicable ABA guidelines.

First, Supreme Court of Missouri Rule 5.225 lists criteria for the use of probation, which may be imposed as its own sanction or imposed along with a stayed suspension. Rule 5.225 sets the minimum standards for the use of probation in Missouri discipline cases. Briefly, a lawyer is *eligible* for probation if (a) the lawyer is unlikely to harm the public and can be supervised, (b) continued practice by the lawyer would not harm the profession's reputation, and (c) the misconduct does not warrant disbarment. The OCDC fully supports the use of probation in many cases and routinely suggests

terms and conditions for probation that are intended to both protect the public and help correct any deficiency in a lawyer's practice. The OCDC often opposes probation, however, when the misconduct is more serious and when no obvious probation conditions could remedy the problem that led to the lawyer's violation. In those circumstances, the OCDC has concerns that the public cannot be protected. A lawyer's refusals to respond to disciplinary investigations or to accept responsibility provide concerns about whether that lawyer's practice can be effectively supervised.


The second sanction analysis governed by Court rule relates to the possibility of mitigation arising from respondents' claims of mental health conditions. Rule 5.285 defines the mental conditions that can mitigate; as importantly, it sets criteria for mitigation. First, a mental health condition, including substance abuse and dependency, cannot mitigate unless the respondent raises it when filing an answer to the information. And, the condition only mitigates if it has been diagnosed by a licensed, non-treating (independent) mental health professional. Lawyers claiming mitigation have the burden to establish, through the independent evaluation, that the conditions caused or had a substantial and direct relationship to the misconduct and that the lawyer has a current ability to manage the mental disorder for a meaningful and sustained period of successful functioning, and that recurrence is unlikely. Even if those factors are met, mitigation is not automatic.

Other factors include:

- (1) The seriousness of the misconduct;
- (2) The extent to which the misconduct is attributable to the mental disorder;
- (3) The extent to which the mental disorder will interfere with the ability to practice law;
- (4) The results of a functional analysis of the person's abilities in light of the mental disorder;
- (5) Other health conditions the person has that interact with, or result in, mental health disorders or impairments;
- (6) The person's prognosis including, but not limited to, the likelihood of relapse as determined by an independent evaluation;
- (7) The person's history of dealing with the mental disorder;
- (8) The person's ability to self monitor the person's status in relation to the mental disorder;
- (9) The level of monitoring that will be needed;
- (10) The length of time monitoring will be needed;
- (11) The cost of monitoring; and
- (12) The likelihood the person will be able to continue to practice in a manner in which the public is protected once any period of monitoring is complete.¹⁰

Supreme Court of Missouri analysis

While the OCDC and respondent lawyers often argue their respective positions, the Court analyzes and decides each case on its merits. In some instances, the Court concurs with the OCDC; at other times, respondents are more persuasive. Occasionally, the Court imposes sanctions harsher than

the ODCD requests. Over time, and with a critical mass of cases, Missouri sanction standards emerge. But, each set of facts offers new opportunities for the ODCD, respondents, and the Court to find unique circumstances justifying any sanction provided for in Rule 5. Not surprisingly, apparent standards may evolve as differing concerns are recognized. 

Endnotes

- 1 Sam Phillips is deputy disciplinary counsel at the Office of Chief Disciplinary Counsel in Jefferson City.
- 2 *In re Kazanas*, 96 S.W.3d 803 (Mo. banc 2003).
- 3 *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994).
- 4 ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS: THEORETICAL FRAMEWORK, p. 5 (1991 ed.).
- 5 ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Preface: Methodology, p. 3 (1991 ed.).
- 6 *Id.*
- 7 *In re Ehler*, 319 S.W.3d 443 (Mo. banc 2010); ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, (Theoretical Framework), p. 6 (1991 ed.).
- 8 ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, 4.11-4.14, (1991 ed.).
- 9 ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, 9.2, 9.3, 9.4, (1991 ed.).
- 10 Missouri Supreme Court Rule 5.285.

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