

# **OCDC Article: Ethics: Reprimand, Probation, Suspension or Disbarment? (How the OCDC Arrives at a Sanction Recommendation)**

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When the Office of Chief Disciplinary Counsel (OCDC) or a Regional Disciplinary Committee believes that a Missouri lawyer has violated a Rule of Professional Conduct, the OCDC has several options. In a few cases, the lawyer is given an opportunity for diversion. In the large majority of cases, the OCDC issues admonitions, which lawyers may accept or reject. This article addresses the OCDC's sanction analysis in non-admonition cases or where the lawyer rejected an admonition. These are the cases where the OCDC files an Information. Ultimately, the Supreme Court considers the record and both parties' recommendations, 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 attorney misconduct, the OCDC has historically relied on five guiding sources. The OCDC first looks to disciplinary decisions issued by the Supreme Court of Missouri, hoping 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 attorney discipline cases.[2]

The OCDC also analyzes the Court's many unreported decisions made in both stipulated and contested 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, Respondents, and the Supreme Court routinely refer to the ABA's Standards for Imposing Lawyer Sanctions (1991 ed.). Those guidelines 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.[3] Once the baseline guideline is known, the ABA Standards allow

consideration of aggravating and mitigating circumstances. These ABA Standards will be discussed further below.

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

The OCDC also considers the findings of fact, conclusions of law and recommendation of 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 some cases, the OCDC accepts the panel recommendation, even if the recommendation was less severe than the OCDC requested. The Court itself may accept or reject the panel sanction recommendation, even if both the OCDC and the Respondent had agreed. Per Rule 5, the Court's review of the record is de novo, so the panel's findings, conclusions and sanction recommendation are all advisory.

Using all 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. It is one of OCDC's goals to recommend sanctions in accord with those apparent standards and to explain any deviations from the apparent standards.

#### ABA Standards for Imposing Lawyer Sanctions

The Supreme Court of Missouri routinely refers to sanction guidelines developed by the ABA's Center for Professional Responsibility.[4] The guidelines, known as the ABA Standards for Imposing Lawyer Sanctions (1991 ed.), 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?[5] ABA Standards: Theoretical Framework (p. 5).

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 first analyze the first three questions and then, only after a baseline sanction is apparent, to consider aggravating and mitigating circumstances.[6] 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 attorney's intent and damage to his client, but also the damage to "the public, the legal system and the profession." [7]

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.[8]

#### Missouri Court Rules for Probation and Mental Health Issues

In Missouri, two key sanction factors are established by rule, essentially overriding otherwise applicable ABA guidelines. First, Supreme Court 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 doesn't 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 alcohol and substance use, cannot mitigate unless the respondent raises it when filing an Answer. And, the condition only mitigates if it has been diagnosed by a licensed, non-treating (independent) mental health professional. Respondents seeking mitigation have the burden to establish, through that 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.[9]

#### Sample Application of Missouri Decisions and ABA Guidelines

Let's assume these facts: Attorney Doe wrote a check on his trust account, causing an overdraft. Per Rule 4-1.15, Doe is deemed to have agreed that his bank must notify the OCDC. When the OCDC asked Doe to explain the overdraft, his response was not sufficient, so the OCDC investigated further. The OCDC quickly discovered that Doe kept poor records of his clients' funds and that he had intentionally spent client funds for office overhead.

In a case like Doe's, additional facts would be developed; for this exercise, we can discuss the process for finding an appropriate sanction with those bare facts. As discussed, the OCDC's first step would be to find relevant and reported disciplinary decisions by the Supreme Court of Missouri. More recent cases are preferable, but older cases on all four might also provide guidance. As can be imagined, the Supreme Court often imposes significant sanctions when lawyers use client funds as their own.[10]

The next step would be to find applicable ABA standards. The application to Doe's case must start with ABA Standard 4.11: Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.[11] That standard must be the starting point, because mitigating and aggravating circumstances are only considered after a baseline standard is determined. And, that standard must be the baseline if the evidence supports a finding that Doe made conscious choices and took specific action to convert and misappropriate the funds of his clients to his own use. Doe's acts and omissions caused actual injury to his clients and to third parties within the meaning of ABA Standard 4.11.

Suspension, which is discussed as a baseline sanction in ABA Standard 4.12, is not applicable in this case because Doe did not merely commingle his own money with client and third party funds; instead, he intentionally took and spent his clients' money out of his trust account and used it to pay his personal expenses.

Under the ABA Standards, once a baseline is established, aggravating and mitigating circumstances will be considered and weighed. As examples, if Respondent Doe's conduct was

clearly dishonest, that would aggravate. If he had substantial experience, that would also aggravate. A lack of prior discipline would mitigate, but indifference to paying restitution would aggravate. Multiple offenses, vulnerable victims, obstruction of the discipline process, and refusal to accept responsibility are all aggravating factors. On the other hand, inexperience, full cooperation and disclosure, and prompt restitution all mitigate.

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.[12]

#### Supreme Court Analysis

While the OCDC and Doe 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 OCDC requests. As noted, over time, and with a critical mass of cases, Missouri sanction standards develop. But each lawyer and each set of facts offer new opportunities for the OCDC, respondents and the Court to find unique circumstances justifying any sanction provided for in Rule 5. And, apparent standards may change as differing concerns develop.

#### Endnotes

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2 *In re Kazanas*, 96 S.W.3d 803, 808 (Mo. banc 2003).

3 *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994).

4 *Id.*

5 ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

6 ABA Standards for Imposing Lawyer Sanctions, Preface: Methodology, p. 3 (1991 ed.).

7 *Id.*

8 *In re Ehler*, 319 S.W.3d 443, 451 (Mo. banc 2010); ABA Standards for Imposing Lawyer Sanctions (Theoretical Framework), p. 6 (1991 ed.).

9 Missouri Supreme Court Rule 5.285.

10 *In re Farris*, 472 S.W.3d 549 (Mo. banc 2015).

11 ABA Standards for Imposing Lawyer Sanctions, 4.11 (1991 ed.).

12 *In re Ehler*, 319 S.W.3d 443, 451 (Mo. banc 2010); ABA Standards for Imposing Lawyer Sanctions (Theoretical Framework), p. 6 (1991 ed.).