
Critical Rule Changes, Current Decisions and Tips from the Region XV Disciplinary Committee (2021)

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Order of Presentation

- Disciplinary System Statistics
- New Missouri Supreme Court Ethics Rules
- Recent Missouri Supreme Court Ethics Decisions
- Ethics Tips from the Region XV Disciplinary Committee

Role of the Regional Disciplinary Committee (RDC)

- Unique to Missouri, the RDC is designed to seek input from local practicing attorneys and non-attorneys.
- RDCs consist of seven voting members: five attorneys and two non-attorney members.
- The Special Representative is a non-voting member, charged with leading the investigation and if necessary, prosecuting the matter.
- A quorum to act requires the vote of at least three members, including at least one non-lawyer member.
- The role of the RDC is to determine if there is probable cause to believe that a violation of the rules of professional conduct has been committed and if so, what level of discipline should be pursued.

The Disciplinary System

- In 2019, the OCDC received 1,733 complaints.
- Investigative files were opened on 763 (44%) of the complaints received.
- Jurisdiction rejected for a variety of reasons, including, fee disputes, trial strategy or legal advice.

The Disciplinary System (NEW)

- Of the 763 complaints on which investigative files were opened in 2019:
 - 42% involved communications
 - 39% involved diligence
 - 23% involved dishonesty, fraud, deceit
 - 18% involved safekeeping property

The Disciplinary System (NEW)

- Of the 763 complaints on which investigative files were opened in 2019:
 - 27% involved criminal law
 - 19% involved domestic relations
 - 10% involved personal injury/tort
 - 6% involved estate/probate

The Disciplinary System (NEW)

- During 2019:
 - 22 lawyers were disbarred;
 - 30 lawyers received disciplinary suspensions;
 - 8 of the suspensions were stayed and the lawyers were placed on probation
 - 2 lawyers were placed on probation where no suspension was imposed
 - 26 lawyers were suspended for taxes under Rule 5.245;
 - 2 lawyers were reprimanded;
 - 64 lawyers were admonished.

New Supreme Court Rules

Rule 4 Amendments

- The Supreme Court of Missouri amended Rule 4-8.4(g), the anti-discrimination rule, by Order dated July 18, 2019, effective immediately.
 - Of note:
 - Missouri was among the first states in the country to adopt an anti-discrimination rule as applied to lawyers. It adopted its rule effective January 1, 1996.
 - The ABA adopted its version of Rule 8.4(g) on August 8, 2016.

Rule 4 Amendments

- The amended rule 4-8.4(g) reads as follows:
 - It is professional misconduct for a lawyer to:
 - (g) manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age sexual orientation, or marital status. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age sexual orientation, marital status, or other similar factors, are issues. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 4-1.16.

Rule 4 Amendments

- The Supreme Court of Missouri amended Rule 4-3.4 by Order dated November 19, 2019, effective immediately.
- Of note:
 - The title of the rule amended: Duties to Opposing Party and Counsel and Ethical Obligation to Follow Court Orders and Rules.
 - New Comment [4]: “Lawyers have an ethical duty to comply with court orders in both their professional and personal capacities. As an example, a lawyer’s failure to comply with court-ordered child support obligations may violate Rule 4-3.4(c) or other rules of professional conduct. See Rules 4-8.4(b), 4-8.4(c) and 4-8.4(d).

Rule 4 Amendments (NEW)

- The Supreme Court of Missouri amended comment [2] to Rule 4-4.4 (Respect for Rights of Third Persons) by Order June 1, 2021, effective December 1, 2021.
- This Rule applies to the situation when a lawyer inadvertently receives confidential or privileged information from opposing counsel or the opposing party.
- Comment [2]:
 - Old Rule Language: “Whether the lawyer is required to take additional steps, such as returning or deleting the document or electronically stored information, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document or electronically stored information has been waived.”
 - New Rule Language: “Whether the privileged status of a document or electronically stored information has been waived is a matter of law beyond the scope of these Rules.”

Rule 4 Amendments (NEW)

- The Supreme Court of Missouri added comment [3] to Rule 4-4.4 (Respect for Rights of Third Persons) by Order dated June 1, 2021, effective December 1, 2021.
- Comment [3]: “See also Rule 56.01(b)(9)(A)(ii)”
- Rule 56 is the general discovery rule. The changes to that Rule go into effect September 2, 2021 and are **significant**.
- Basically, the new text of 56.01(b)(9)(A)(ii) incorporates in much greater detail a lawyer's obligations when he/she/they receive privileged information. As discussed above, this information, in part, was formerly set out in the old Comment [2] to Rule 4-4.4.
 - “An attorney who receives information that contains privileged communications involving an adverse or third party and who has reasonable cause to believe that the information was incorrectly received **shall** not read the information or, if he or she has begun to do so, **shall** stop reading it. The receiving attorney **shall** promptly notify the sending attorney of such receipt; promptly return the information to the sending attorney; sequester, delete, or destroy the information and any copies thereof; and take reasonable measures to assure that the information is inaccessible. A sending attorney who has been notified about information containing privileged communications has the obligation to preserve the information.” (Emphasis added)

Recent Supreme Court Cases and Decisions

- Cases presented in order of discipline
 - Reprimand
 - Stayed suspension with probation
 - Suspension
 - Disbarment
 - Criminal Contempt

Recent Supreme Court Cases and Decisions

- ***In re Dobson***, No. SC97683 (Mo. banc, June 4, 2019)
 - Rule violated:
 - 4-4.2 (communicating with person known to be represented by counsel in the matter.)
 - Sanction: Reprimand.
 - Takeaway: Supreme Court does not do admonitions.

Recent Supreme Court Cases and Decisions

- ***In re Magee***, No. SC97592 (Mo. banc, June 4, 2019)
 - Rules violated:
 - 4-1.1 (competence);
 - 4-1.3 (diligence); and
 - 4-1.4 (communication).
 - Sanction: Indefinite suspension with no leave to apply for reinstatement for 6 months, stayed, with two-years probation.
 - Takeaway: Negligent conduct re: practice management versus knowing or intentional conduct involving dishonesty or misappropriation of client funds results in lesser sanction.

Recent Supreme Court Cases and Decisions

- ***In re Gardner*, 565 S.W.3d 670 (Mo. banc 2019)**
 - Rules violated:
 - 4-3.4(c) (knowingly disobeying an obligation under the rules of a tribunal);
 - 4-1.15 (failing to safekeep client property);
 - 4-3.3 (knowingly making a false statement of fact to a tribunal); and
 - 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).
 - Sanction: Indefinite suspension with no leave to apply for reinstatement for 6 months, stayed, with one-year probation.

Recent Supreme Court Cases and Decisions

- ***In re Schuessler*, 578 S.W.3d 762 (Mo. banc 2019)**
 - Rules violated (*Schuessler*):
 - 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation);
 - 4-8.4(d) (engaging in conduct prejudicial to the administration of justice); and
 - 4-8.4(g) (manifesting, by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age or sexual orientation)..
 - Sanction (*Schuessler*): Indefinite suspension with no leave to apply for reinstatement for 2 years.

Recent Supreme Court Cases and Decisions

- ***In re Dierdorf*, 578 S.W.3d 762 (Mo. banc 2019)**
 - Rules violated (*Dierdorf*):
 - 4-1.13 (failure to disclose information regarding the attorney's knowledge of unlawful conduct to a higher authority within the organization);
 - 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and
 - 4-8.4(d) (engaging in conduct prejudicial to the administration of justice).
 - Sanction (*Dierdorf*): Indefinite suspension with no leave to apply for reinstatement for 3 years.

Recent Supreme Court Cases and Decisions(NEW)

- ***In re Kayira*, 614 S.W.3d 530 (Mo. banc 2021)**
 - Rules violated:
 - 4-1.1 (competence);
 - 4-3.3 (false statement to a tribunal);
 - 4-3.4(c) (knowing disobedience of an obligation under the rules of a tribunal)
 - 4-5.1(supervision of associate attorneys);
 - 4-8.1 (false statement in connection with a disciplinary matter);
 - 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit and misrepresentation); and
 - Multiple 4-1.15 violations (misappropriation, commingling, failure to notify clients of settlement, failure to keep accounting records).

Recent Supreme Court Cases and Decisions (New)

- ***In re Kayira*, 614 S.W.3d 530 (Mo. banc 2021)**
 - Kayira argued in mitigation for the first time on appeal that bipolar disorder contributed to his misconduct and that he should be suspended not disbarred. The Court rejected this argument, noting that Kayira had not properly raised this argument in accordance with Rule 5.285 (Consideration of Mental Disorder in Determining Discipline).
 - Sanction: Disbarment.

Recent Supreme Court Cases and Decisions

- ***In re Allen Bell***, No. SC97784 (Mo. banc, April 1, 2019)
 - Bell suspended on interim basis per Rule 5.24 (substantial threat of irreparable harm to the public and the integrity of the profession)
 - OCDC filed Motion for Criminal Contempt and Sanctions on June 12, 2019 based on assertion that Bell continued to hold himself out as a lawyer, continued to accept client funds and engaged in deceptive practices in violation of suspension order.
 - Rule 5.29 gives CDC authority to institute and prosecute against any party engaged in the unauthorized practice of law.
 - Judgment of Criminal Contempt issued June 23, 2020

Tips from the Region XV Disciplinary Committee

Office of Chief Disciplinary Counsel (OCDC) Area of Emphasis – Financial Matters

- Increasingly, in addition to a regional disciplinary committee investigation, OCDC has audited both operating and trust accounts when financial matters are raised or inferred in the bar complaint.
- Common complaints resulting in audits:
 - Delayed payment of client settlement funds or delayed refund of unearned fees/retainer (See Rule 4-1.15(d)).
 - Delayed payment of earned fee to the lawyer (i.e., letting the money sit in trust) (See Rule 4-1.15 comment [6] (“funds belonging to the lawyer must be disbursed to the lawyer reasonably promptly after the fee is earned . . . one month shall be presumed to be reasonably prompt.”))
 - Denial/delayed response to request for client accounting documents (invoices, settlement documents, etc.) (See Rules 4-1.4, 4-1.15(d), and 4-1.16(d)).
 - Failure to use a trust account (See Rule 4-1.15(a) and (h)).
 - Previous trust account overdrafts.
 - Fee agreement/contract/engagement letter using terms such as “non-refundable fee” or “earned upon receipt” (See Rules 4-1.5, 4-1.15(c) and Formal Opinion 128 (as amended October 24,2018)).

Office of Chief Disciplinary Counsel (OCDC) Area of Emphasis – Financial Matters

- Financial Recordkeeping – Rule 4-1.15(f) – details what minimum trust account records must be kept.
- Failure to keep all or part of the records under this rule may result in a finding of knowing or intentional conduct and result in serious discipline. *See In re Farris*, 472 S.W.3d 549, 560-61 (Mo. banc 2015):
 - “Rule 4-1.15[f] requires each attorney to keep detailed records showing, among many other things, the source of every deposit to—and the purpose of every disbursement from—that attorney’s trust account. These records must also show, for each separate client or trust beneficiary, the source of all funds deposited, the identity of the client or third person for whom the attorney is holding those funds, and the date, payee, and purpose of each disbursement of those funds”
 - “One of the twin purposes of Rule 4-1.15[f] is to ensure that an attorney always knows what money is being moved into or out of the trust account and why. The other purpose of Rule 4-1.15[f] is to ensure that, if a problem arises with an attorney’s trust account, the OCDC and this Court are not forced to depend on the attorney’s self-serving memory and claims that he “did not know.”
 - “The Court abandons the purpose of Rule 4-1.15[f] if it allows a lawyer’s failure to maintain the required records to work to the attorney’s benefit. To avoid this result, the failure to comply with Rule 4-1.15[f] must give rise to an inference of knowledge, particularly when the attorney tries to defend a charge of misappropriating trust account funds on grounds that the required documents plainly would support or refute had the attorney kept them.”

Online Reviews (NEW)



Online Reviews (NEW)

- The issue: Lawyers requiring, insisting or strongly implying that their client leave them positive reviews on Google or other rating/review services.
- Is the review truly voluntary? What are the circumstances under which the review was made?
- Rules possibly implicated
 - Rules 4-1.7 and 4-1.8 (Conflict Rules)
 - Rule 4-1.15(d) (Payment of Settlement Proceeds)
 - Rule 4-8.4(d) (Conduct Prejudicial to the Administration of Justice)

Timeshare Exit Practice



Timeshare Exit Practice – A Veritable Minefield of Ethics Issues

- The players:
 - Timeshare/Vacation Rental Company (“Timeshare Company”) – the company that owns or leases the vacation property and enters into a timeshare rental, lease or ownership contract with Customers.
 - Timeshare Customer (“Customer”) – a person or family who enters into a contract with the Timeshare Company to rent, lease or own a vacation rental property and who usually is obligated to pay annual fees or other expenses (“Obligations”).
 - Timeshare Exit Companies (“Exit Company”) – companies that offer to assist Customers in getting out of their timeshare Obligations or sell their timeshare interest.
 - Timeshare Exist Attorney (“Attorney”) – an attorney, group of attorneys or a law firms usually retained by the Exit Company to assist Customer with getting out of their Obligations.

Timeshare Exit Practice – A Veritable Minefield of Ethics Issues

- Potential issues: Customers attend a seminar put on by the Exit Company who “promises” or “guarantees” that they can get clients out of oppressive timeshare Obligations. Customers pay Exit Company for this service. Customers are then in turn referred to an Attorney selected by Exit Company to accomplish this task. Unbeknownst to Customers, Attorney has an agreement or contract with Exit Company to split the fees paid by Customers and/or Attorney pays to or receives a referral fee from the Exit Company. Attorney may charge an additional fee in addition to fees charged by Exit Company.

- Problems:
 - Attorney cannot promise or guarantee a certain legal result. See e.g., Rules 4-7.1 and 4-8.4(c)
 - Attorneys cannot split or share fees with non-attorneys. See Rule 4-5.4.
 - Attorneys cannot accept referral fees. See Rules 4-1.5(e) and 4-7.2(c).
 - Attorneys cannot charge unreasonable fees. See Rule 4-1.5(a).
 - Who is Attorney’s client – the Exit Company or Customer or both? With whom does attorney’s duty of loyalty lie? Or duty of confidentiality? Potential conflicts abound. See Rules 4-1.6, 4-1.7 and 4-1.8.

Timeshare Exit Practice – A Veritable Minefield of Ethics Issues

- Potential issues: Unknown to Customers, Timeshare Company, as a matter of practice or policy, refuses to engage in negotiations with Exit Company or Attorney associated with Exit Company. Both Attorney and Exit Company know of Timeshare Companies' policy but fail to advise Customers of this fact. Attorney continues to “work” on cases instead of withdrawing. Customers request “updates” on cases and receive little to no information or boilerplate responses.

- Problems:
 - Communication –Rule 4-1.4
 - Diligence – Rule 4-1.3
 - Fees – Rule 4-1.5
 - Misconduct - Rule 4-8.4(c) and (d)

Timeshare Exit Practice – A Veritable Minefield of Ethics Issues

- Final Potential Issue:

TIMESHARE COMPANY v. [INSERT YOUR NAME OR LAW FIRM NAME HERE]

- Timeshare Companies have sued Timeshare Exit Attorneys under several legal and equitable theories including, but not limited to: false and misleading advertising, tortious interference with contract, civil conspiracy, fraud and deceptive trade practices.
- The Timeshare Companies have prayed for injunctive relief, attorneys' fees, and damages in the millions of dollars.

Any Questions or Comments?

Resources for Researching Ethics Issues:

- **Legal Ethics Counsel– www.Mo-Legal-Ethics.org**
 - Informal Opinions given over the phone or in writing – 573-638-2263
 - Articles
 - Approved Financial Institutions for Trust Accounts
- **Missouri Supreme Court - www.courts.mo.gov**
 - Rule 4 – Missouri Rules of Professional Conduct
 - Rule 5 – Disciplinary Procedural Rules
 - Disciplinary Decisions
- **Office of Chief Disciplinary Counsel – www.mochiefcounsel.org**
 - Articles
 - Overview of Disciplinary Process