

Probation — The Process in Missouri

By Carl Schaeperkoetter

Probation is a disciplinary sanction first authorized in Missouri by Supreme Court Rule 5.225 as of January 1, 2003. It is a sanction option for lawyers who are unlikely to harm the public during a period of probation and can be adequately supervised, are able to perform legal services and practice law without causing the courts or profession to fall into disrepute, and have not committed acts warranting disbarment.¹

Probation can be an effective interim step for cases too serious to warrant the issuance of a reprimand by the Supreme Court, but not severe enough to warrant an actual suspension from practice. Probation can be utilized for lawyers having great difficulty with law practice management issues, or having substance abuse or mental health issues when there has been a demonstrated period of rehabilitation and/or treatment.

Rule 5.225(a)(3) says that a lawyer is not eligible for probation if the lawyer has committed acts warranting disbarment. The OCDC takes the position that any intentional act of misappropriation is not one for which probation should be considered, for our Supreme Court has stated any act of misappropriation is generally grounds for disbarment.² Other factors that weigh against probation include, but are not limited to, a prior disciplinary history with the Supreme Court, a dishonest or selfish motive for the misconduct, a pattern of misconduct (including multiple offenses), failure to cooperate with the OCDC during an investigation, the submission of false evidence or statements during the disciplinary process, a refusal to acknowledge the wrongful nature of the misconduct, the vulnerability of the victim, and substantial years of experience in the practice of law.³

THE PROBATION PROCESS

Probation can only be imposed by order of the Supreme Court. It is for a specified period of time and is always in conjunction with a suspension. The suspension may be stayed in whole or in part.⁴ Thus, the Rules do not provide for a suspension that accompanies a public reprimand, but the Court can have an actual suspension as part of a probation order. The Court may also impose probation as a condition of reinstatement following suspension or disbarment.⁵

The order placing a lawyer on probation specifies the conditions. A standard condition in all probation cases is that the lawyer engage in no further violations of the Rules of Professional Conduct. Other conditions are dependent upon the specific facts in each case. Common conditions include regular reporting responsibilities to the OCDC, attendance at the Ethics School offered by The Missouri Bar and the OCDC, other continuing legal education courses (particularly in ethics or law practice management), malpractice insurance, restitution, mental health evaluations and treatment, substance abuse evaluations and treatment, random drug testing, the use of management consultants, the use of mentor lawyers, and audits of trust accounts. Subsection (c) of Rule 5.225 provides that the lawyer is responsible for all costs of evaluation, treatment and supervision during the probation term.

Per Rule 5.225, the OCDC monitors lawyers on probation. If the OCDC believes that any probation conditions have been violated, the Chief Disciplinary Counsel may file a motion with the Supreme Court specifying any alleged violations and seeking an order requiring the lawyer to show cause why the stayed suspension should not be lifted and the suspension sanction imposed. The order to show cause is served upon the lawyer, who then is given 15 days to respond. At that time the Court may issue an order regarding the alleged probation violation, or the Court may refer the matter to a hearing officer to conduct a hearing and make recommendations about the probation revocation. At any hearing, the OCDC has the

burden of establishing the violation by a preponderance of the evidence. Any evidence having probative value shall be received regardless of its admissibility under the Rules of Evidence so long as the lawyer is afforded a fair opportunity to rebut that evidence.⁶ Thus, for example, items that otherwise could be construed as hearsay may be admissible at a probation hearing, subject to the ruling of a hearing officer. Successful completion of probation without violation (called “termination” in the Rules) is not automatic. Instead, a lawyer must file an application with the Court to successfully terminate the thereafter to object to the application. The Court then makes a decision on that application.⁷

THE SIX-YEAR RECORD FROM 2003-2008

One purpose of probation, at least in theory, is to improve the lawyer’s skills to decrease the likelihood of a return to the disciplinary system. The OCDC periodically looks back to see what has happened to lawyers placed on probation by the Court since the first authorization on January 1, 2003.

As of March 1, 2009, the OCDC was monitoring 18 lawyers with open probation files. The length of probation terms varied from six months to five years, with the vast majority of open cases having 1-3 year terms. A probation term is not to exceed five years unless an extension is granted.⁸

Thirty-nine probation cases have been closed since the 2003 authorization through February 28, 2009. Of those 39 probationers, 32 successfully completed the probation term (82 percent). Seven had their probations revoked, ultimately resulting in five suspensions and two disbarments.

As stated above, 32 probation terms between 2003 and February 28, 2009, were successfully completed.

It was the hope of the OCDC that successful completion would be a first step toward a lawyer having a more effective practice and avoiding the disciplinary system in the future. Results have been mixed.

Twenty-four of the 32 successful probationers have had no new complaints opened against them (75 percent). While the time frame of some of these matters is relatively short, the OCDC considers anything close to the 75 percent success rate to date to be validation for the probation program.

Of the remaining eight who had successfully completed probation, three have had now closed complaint files and one has an open file pending. Two others have received admonitions, one has an information pending, and one lawyer who successfully completed probation later was disbarred for new disciplinary misconduct. Thus, only four to date have received any new disciplinary sanction.

CONCLUSION

Each disciplinary sanction for which probation is appropriate is fact specific. To be placed on probation, a lawyer must persuade the Court that a continued ability to practice law will pose no threat to the public or the integrity of the profession. Of those lawyers warranting probation, the early data indicates that the majority of them will not return to the disciplinary system.

Endnotes

1 Supreme Court Rule 5.225(a)(1-3).

2 *In re Williams*, 711 S.W.2d 518, 522 (Mo. banc 1986); see also *In re Belz*, 258 S.W.3d 38, 46 (Mo. banc 2008).

3 American Bar Association Standards for Imposing Lawyer Sanctions (1991 ed.).

4 Supreme Court Rule 5.225(a).

5 Supreme Court Rule 5.225(i).

6 Supreme Court Rule 5.225(f).

7 Supreme Court Rule 5.225(g).

8 Supreme Court Rule 5.225(a).



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