

## **Airing Your Laundry in Private**

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### **- A discussion of problems and risks encountered in disputes between attorneys, and the advantages of a new tool to lessen the impact: The Lawyer-to Lawyer Dispute Resolution Program.**

We have all heard the stories of contentious, embarrassing, and outright ugly law firm divorces. Of course, the high profile law firm dissolutions have garnered national and sometimes international press, such as those of Millberg Weiss (New York), Coudert Brothers (New York), Brobeck, Phleger and Harrison (San Francisco), Altheimer & Gray (Chicago), and many others. Some of the important distinctions (among many) between these types of dissolutions and those more common to your everyday law firm are size, teams of lawyers representing the parties, and well-planned press releases.

Unfortunately, many law firm splits are not resolved nearly as professionally, resulting in public back-biting, embarrassing stories, and the tarnished reputations of many attorneys involved in the dissolved firm. The impact of a contentious, public, law firm break-up can be long-lasting, not only on the former partners and their respective friendships, but also on their reputations in their communities and among their peers in the Bar.

The common causes of law firm dissolutions, include, but are not limited to, disputes over compensation, control, and short or long-term plans for the direction of the firm. They can also arise from simple personality conflicts, poor management practices, or poor execution of business plans. Many times the arguments between lawyers during a dissolution center around disputes over earned or unearned fees, contingent fees, restrictive covenants in partnership agreements, or alleged breaches of contract or fiduciary duty. If not resolved amicably, these disputes can result in nasty litigation where many of the firm's and attorneys' "secrets" are publicly aired, contributing to the public's negative perception of attorneys generally, and of the firm and attorneys involved specifically.

The detrimental impacts of law firm divorces are not only upon the firms or attorneys in the "heat of the battle", but also are often felt by their respective clients. The attorneys' competing desires to continue to represent their clients, or worse their sometimes vindictive actions towards their partners or soon to be former partners, cause problems for their clients in numerous ways. There are often disputes over the method and manner of communication of the firm break-up, or exit of attorneys, to their clients. The transfer of client files and property, either to an exiting attorney or to the client, can be delayed to the client's detriment. In the inevitable scramble by attorneys to keep or attract clients, attorneys sometimes make exaggerated or misleading statements of their, or their former partners', experience and abilities, resulting in possible ethics violations.

Finally, such disputes can also cause neglect or abandonment of client files, severely impacting the clients and the matters which they have entrusted to their attorneys. This, of course, may result in ethics violations with varying impacts on the

ability of a lawyer or lawyers to continue to practice their profession. These neglectful acts may also result in damages to their clients and potentially costly malpractice claims.

Fortunately for attorneys in Missouri, there is now a new tool that may aid attorneys in resolving their disputes before they find themselves facing ethics complaints or legal malpractice claims. The Missouri Supreme Court has recently approved a revision to Rule 5.10 which establishes the Lawyer-to-Lawyer Dispute Resolution Program, hereafter referred to as the “Program”. A complete copy of the revised Rule, as adopted, follows this paper.

In short, the Program is designed to provide a confidential mechanism to resolve complaints or disputes arising among lawyers concerning financial, property, or professional matters unrelated to any lawyer-client relationship among those lawyers. This mechanism may be utilized upon submission of the complaint or dispute by any lawyer involved therein, or upon referral by the Office of Chief Disciplinary Counsel where the complaint or dispute may be resolved through alternative resolution rather than formal disciplinary procedures.

One of the key advantages of this Program is its confidentiality, protecting all inquiries, proceedings, and communications therein from discovery or production in any other forum or for any other purpose. In fact, even information as to the identity of the parties and the fact of a dispute are confidential.

The stated goal of the Program is “to provide an efficient, private, cost-effective and voluntary mechanism for resolving economic and professional disputes between and among lawyers. This program is intended to protect the interests of clients and benefit

the judicial system, the public, and the profession by preventing additional burdens on an already over-burdened court system.” *See* Rule 5.10.

Participation in the Program is completely voluntary. The two methods of dispute resolution available under the program are non-binding facilitation, and if that is not successful, binding arbitration. Submission to the non-binding facilitation method is a prerequisite to the offer of binding arbitration. Although the non-binding facilitation is conducted much like a mediation, the neutral serves on a volunteer basis and his or her expenses are reimbursed by The Missouri Bar.

One important caveat to this process is that the neutral remains subject to the requirement of Supreme Court Rule 4-8.3, which imposes upon him or her the duty to report any serious ethical violations to the OCDC.

Finally, another advantage to this Program over other traditional complaint resolution forums (the Courts) is that it is designed to be an expeditious process, with the goal for the neutral to complete the facilitation process within 30 days after its initiation.

Given the public perception, and sometimes outright attacks, on the legal profession, all lawyers must make efforts to preserve our reputation and restore the dignity of our profession, in common with the ethical standards we seek to uphold. This Program, which begins in 2008, provides a very useful tool for lawyers to air their disputes, and resolve them, in private, which is surely a step in the right direction!

# **SUPREME COURT OF MISSOURI**

## **en banc**

October 2, 2007  
Effective January 1, 2008  
[CORRECTED]

In re:

(1) Repeal of Comment [9], entitled "Disputes Over Fees," to subdivision 4-1.5, entitled "Fees," of Rule 4, entitled "Rules of Professional Conduct," and in lieu thereof adoption of a new subdivision (f) of subdivision 4-1.5, entitled "Fees."

(2) Adoption of a new subdivision 4-6.6, entitled "Provision of Legal Services Following Determination of Major Disaster," of Rule 4, entitled "Rules of Professional Conduct," and a Comment thereto.

(3) Repeal of subdivision 5.10, entitled "Resolution of Complaints," of Rule 5, entitled "Complaints and Proceedings Thereon," and in lieu thereof adoption of a new subdivision 5.10, entitled "Resolution of Complaints," and new Lawyer-to-Lawyer Dispute Resolution Program Guidelines thereto.

### ORDER

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3. It is ordered that effective January 1, 2008, subdivision 5.10 of Rule 5 be and the same is hereby repealed and a new subdivision 5.10 and new Lawyer-to-Lawyer Dispute Resolution Program Guidelines adopted in lieu thereof to read as follows:

#### 5.10 RESOLUTION OF COMPLAINTS

The chief disciplinary counsel may refer complaints that may be resolved best outside of the formal disciplinary proceedings to either The Missouri Bar Complaint Resolution Program or The Missouri Bar Lawyer-to-Lawyer Dispute Resolution Program, as appropriate. Upon receipt, the designated program shall attempt to resolve the matters raised by the complaint.

If the matter is not successfully resolved or if it appears further

consideration by the chief disciplinary counsel is required, the complaint must be returned to the office of the chief disciplinary counsel for appropriate disposition pursuant to this Rule 5.10.

Governance of The Missouri Bar Complaint Resolution Program and The Missouri Bar Lawyer-to-Lawyer Dispute Resolution Program shall be in accordance with the guidelines established for such program and approved by this Court.

When a complaint is referred to either program under this rule by the chief disciplinary counsel, records of all referrals, complaints, conferences and proceedings shall be filed with the chief disciplinary counsel and are subject to the confidentiality restrictions of Rule 5.31.

## THE MISSOURI BAR LAWYER-TO-LAWYER DISPUTE RESOLUTION PROGRAM GUIDELINES

### **Overview**

Complaints or disputes arising among lawyers concerning financial, property, or professional matters unrelated to any lawyer-client relationship among those lawyers may be submitted to the Lawyer-to-Lawyer Dispute Resolution Program. That complaint or dispute may be:

- 1) submitted by any lawyer involved in the complaint or dispute, or
- 2) referred pursuant to Rule 5.10 by the office of chief disciplinary counsel where it believes the complaint or dispute may be resolved through alternative resolution rather than formal disciplinary procedures.

All complaints and disputes shall be processed as these guidelines provide.

The program shall be administered by a five-person Lawyer-to-Lawyer Dispute Resolution Committee that will oversee the activities and proceedings in the program. The committee shall be

appointed by The Missouri Bar board of governors, with the chair designated by the president of The Missouri Bar. The terms of the committee appointees shall be four years. No committee member shall be requested to serve more than two successive terms.

The committee shall solicit and maintain a list of Missouri attorneys who will serve as a panel of neutrals. In compiling the list of neutrals, the committee shall consider the following criteria: (1) years of practice; (2) years of practice in Missouri; (3) specific training or experience; (4) specific training provided by The Missouri Bar on the relevant Missouri Rules of Professional Conduct; (5) minority representation, and (6) other relevant factors. The neutrals of the program shall be appointed to four-year terms and may be reappointed to successive terms, provided they agree to serve.

Unless the parties stipulate otherwise, disputes will be assigned to a neutral from outside the parties' geographic regions. For this purpose, the neutral may neither reside nor maintain an office in the county in which any of the parties practice or reside unless the parties, in their agreement for facilitation, agree that the neutral from that geographic region be appointed.

All program proceedings are confidential. All inquiries, all proceedings and all communications with the committee, the administrator, the parties, and the neutral are not subject to discovery or production in any other forum or for any other purpose. See section 435.014.2, RSMo. Even information as to the identity of the parties and the fact of a dispute is confidential. No neutral or candidate for appointment as a neutral shall disclose to any person any confidential information acquired as a result of or in connection with a complaint or dispute processed under these guidelines, except with the consent of the parties, or as required by Rule 4-8.3, or as otherwise required by law.

The dispute resolution administrator shall be responsible for maintaining all files received, assigning neutrals, giving notices, making arrangements for all conferences, record keeping, compiling reports to The Missouri Bar and chief disciplinary counsel, and handling administrative tasks. The administrator shall be designated by the executive director of The Missouri Bar. The administrator may delegate program administrative tasks as

appropriate and as approved by the executive director of The Missouri Bar.

By participating in the program and submitting to these rules, the parties agree that The Missouri Bar, its agents and employees, and any assigned neutral shall not be liable to any person for any act or omission in connection with any proceeding conducted under these guidelines. The parties further agree that The Missouri Bar, its agents and employees, and the assigned neutral shall have the same immunity from civil suit or claim in connection with any conduct or actions under the proceedings described herein that a judicial officer or body would have in a court proceeding.

The goal of this program is to provide an efficient, private, cost-effective and voluntary mechanism for resolving economic and professional disputes between and among lawyers. This program is intended to protect the interests of clients and benefit the judicial system, the public, and the profession by preventing additional burdens on an already over-burdened court system.

### **Procedures**

The Missouri Bar offers the parties non-binding facilitation as the preferred mechanism for dispute resolution. In the event that non-binding facilitation is not successful in resolving any complaint or dispute, binding arbitration will be offered. Submission of the dispute to non-binding facilitation shall be a prerequisite to the offer of binding arbitration.

1. The first step in the process is the submission of the complaint or dispute to the program by any party to the dispute by the filing of a notice of dispute and request for facilitation with the administrator or referral of the complaint or dispute to the program by the chief disciplinary counsel.
2. Upon receiving the complaint or dispute, the administrator shall open a dispute resolution program file. The administrator shall assign a chronological docket number to the matter using as a prefix the year the complaint was received; prepare a manual index for each matter; and maintain a computerized record of each matter, which shall contain the same information as the manual index.

3. For each matter, the administrator shall open a confidential file, which shall contain the original of all documents submitted to the program. This file will remain at all times in the custody of the program. The file and manual index will each prominently be marked "confidential," and the computerized docket will be password protected. The administrator will take all reasonable steps to maintain confidentiality. Absent an order from the Supreme Court of Missouri, the only persons who shall have access to the confidential files of the program are the committee, administrator, program secretary, personnel authorized by the Supreme Court of Missouri, the parties, and their respective counsel, if any. The office of chief disciplinary counsel also shall have access to the confidential files, except for internal memoranda, if the complaint or dispute was referred by that office.

4. All written communications from the program to the parties shall bear the legend, "ALL PROCEEDINGS OF THE DISPUTE RESOLUTION PROGRAM ARE CONFIDENTIAL, AND ANY UNAUTHORIZED DISCLOSURE RELATING THERETO IS PROHIBITED." In addition, all envelopes should be marked, "PERSONAL AND CONFIDENTIAL."

5. Promptly after receipt of the submission or referral, the administrator shall contact all parties or their counsel by facsimile or mail and advise them regarding all appropriate administrative agreements and the neutral selection process. All parties will be asked to sign an agreement for facilitation, developed by the committee, agreeing voluntarily to participate in the program.

6. If any party fails to sign the agreement for facilitation, the administrator shall mail a second written inquiry as to the willingness to execute the agreement. If any party initially failing to sign an agreement does not do so within ten days after the administrator mails the second written inquiry, the file shall be closed and all parties notified of such closure.

7. Upon execution of all agreements for facilitation, the administrator will assign a neutral from the panel.

8. Before determining the neutral's availability to serve, the

administrator shall advise the neutral of the identities of the parties in order to determine the possibility of conflicts of interest. The neutral should attempt to determine whether members of the neutral's firm or organization have any relationship with any party. In doing so, the neutral should keep in mind that the process is confidential and that any inquiries concerning conflicts should be made discreetly. If the neutral does not believe that he or she can serve as an impartial neutral, the administrator should be advised to assign the matter to another neutral.

Within ten days of the receipt of notification of the name of the assigned neutral, any party may exercise a peremptory challenge to the person serving as the neutral, at which time the neutral must be excused. A new neutral must be assigned to the case. Only one peremptory challenge shall be allowed to each party for each process initiated under this program. Upon application within such ten-day period by any party who has previously exercised its peremptory challenge and an opportunity for all other parties and the assigned neutral to respond, the committee may disqualify an assigned neutral for good cause. Upon such disqualification, a new neutral will be assigned.

9. The assigned neutral shall make the initial contact with each of the parties to ascertain the nature of the dispute and the parties' respective positions. The neutral shall request such information from all parties as may be reasonably necessary to promote a thorough understanding of the issues and to produce meaningful suggestions for resolving the dispute.

10. All sessions shall be scheduled at the earliest date practicable. Sessions shall take place at a site mutually agreed upon by the parties and the neutral. If the parties are unable to agree upon a site, the neutral shall designate a neutral site. The neutral's offices, courthouses, and the offices of the state and county bar associations shall be considered neutral sites for this purpose. Any neutral may request the administrator's assistance in scheduling sessions and notifying parties of the time and place of such sessions.

11. Time shall be provided at each facilitation session for the frank exchange of all parties' views. At the request of any party or the neutral, the neutral may caucus individually with one party at

a time. All statements made during the caucus shall be kept confidential between the neutral and the caucusing party, except insofar as the caucusing party permits the neutral to disclose such statements to the other parties. There shall be no limitation on the duration or the number of facilitation sessions. After the first session, additional sessions may be scheduled by mutual agreement of the parties and the neutral. If a party fails to appear at a facilitation session, the remaining parties may agree to proceed with the session if they feel that progress can be made in the absence of a party.

12. Parties shall be entitled to legal representation if they choose. Parties shall be responsible for arranging and paying for their own legal representation. Subject to other of these guidelines, additional persons may be allowed to attend the facilitation sessions; however, the neutral shall have the discretion to exclude from any session any person who she or he considers counterproductive to the process and may limit the number of legal representatives who may speak for each side.

13. The neutral shall not be considered legal counsel for any party and shall not provide legal advice to any party. The neutral may, however, identify legal issues as they arise during the course of the session. The neutral shall attempt to alert the parties to the requirements of the Rules of Professional Conduct and other applicable ethical codes and shall not knowingly participate in the formation of a resolution of a complaint or dispute in violation of any such codes.

14. The services of the neutral shall be on a volunteer basis and the neutral's expenses shall be reimbursed by The Missouri Bar.

15. The administrator will consult with the neutral about requests to postpone a scheduled session or requests for adjournment. The neutral shall consider and decide all requests for adjournments, but adjournments should be granted sparingly.

16. The neutral will conduct all facilitation sessions informally. At the initial session, the neutral should make clear to the parties that the neutral is not serving as a judge. The neutral's role is to promote communication and suggest ways of resolving the dispute; the neutral is not to impose a settlement on the parties.

The neutral shall make every effort to hear all the relevant facts, review all the documents, be familiar with any controlling relevant legal principles, and seek to bring about an acceptable resolution for the parties. The neutral should advise all lawyers before the initial session begins that the neutral must report any serious ethical violations, pursuant to Supreme Court Rule 4-8.3. If the neutral takes notes during the conference, they should be either destroyed immediately thereafter or returned in a marked sealed envelope to the administrator's office to be stored in a secure location for five years. The neutral should make sure that any proposal offered for resolution of the matter is clearly understood by the parties, perceived to be fair, and freely entered into by the parties.

17. The neutral shall suspend any facilitation session upon any of the following occurrences: the parties reach an agreement; one of the parties refuses to continue with the process; the neutral assesses that nothing meaningful is to be gained in continuing the process; or upon the request of all parties.

18. The neutral shall attempt to complete the facilitation process within 30 days after its initiation. If the parties reach an agreement, the neutral may assist the parties in reducing their agreement to a written settlement agreement, which shall be binding upon the parties. If the parties fail to reach an agreement, the neutral may recommend binding arbitration.

19. If the parties agree to binding arbitration, it shall be conducted in a manner as agreed by the parties and consistent with these guidelines. If the administrator believes that any process for binding arbitration to which the parties have agreed is in conflict with any of these guidelines, the administrator shall refer the matter to the committee before any neutral is assigned as an arbitrator. The committee's determination as to whether to proceed with such proposed arbitration under this program shall be final. Any neutral previously assigned to facilitate the resolution of the complaint or dispute shall be ineligible for assignment as the neutral for the binding arbitration of the complaint or dispute under this program.

20. Within ten days after the conclusion of the last scheduled session, or if the matter is closed prior to the initial session, the

neutral will prepare a brief report reflecting the disposition of the matter, along with a copy of any settlement agreement, which will promptly be sent to the administrator.

21. The administrator should keep in mind that performance of any settlement agreement should take place within a reasonably short time after the facilitation so that the program may close the file. The administrator should advise the parties that they may contact the administrator if they have any difficulty enforcing the agreement.

22. At the conclusion of the matter, the administrator will prepare a brief memorandum reflecting the resolution reached, if any, along with a copy of the settlement agreement or comments from the neutral if a resolution was not reached, which will be forwarded to the committee chair for a final review. The committee chair will review and sign the closing memorandum and return it to the administrator within ten days. The administrator will close the file and forward the closing memorandum, settlement agreement, if any, and the report from the neutral to the parties. If the initial referral of the matter was by the chief disciplinary counsel, the administrator shall also forward a copy of the entire contents of the file to the chief disciplinary counsel.

4. It is ordered that notice of this order be published in the Journal of The Missouri Bar.

5. It is ordered that this order be published in the South Western Reporter.

Day – to – Day

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LAURA DENVIR STITH

Chief Justice

## **Steven C. Couch**

Steve joined The Bar Plan on April 2, 2007 as Vice President of Claims. He hails from Dallas, Texas, where he was licensed to practice law in 1990. Prior to joining The Bar Plan, Steve spent over seven years in-house at a national legal malpractice insurance carrier managing and resolving thousands of legal malpractice claims and lawsuits against lawyers. Steve's experience also includes handling many other types of professional liability claims, including those against accountants, insurance and real estate professionals.

Steve's professional background also includes over nine years of commercial litigation and insurance defense trial experience in such areas of practice as professional liability, errors and omissions, and premises and product liability. Steve has also had a keen interest in providing risk management and consulting services to lawyers and law firms, assisting and guiding lawyers and law firms through various ethical nuances, conflict resolution, and many other issues affecting the practice of law.

Steve is a graduate of Baylor University and Baylor Law School. He is a member of the American Bar Association, Missouri Bar, State Bar of Texas, Dallas and Collin County Bar Associations. Steve is blessed with a beautiful wife, Katherine, and three young children, Evan, Austin, and Courtney. When he can find the time, Steve is also an avid golfer and sports enthusiast.