

Rule 5 Procedural Changes

By Carl Schaeperkoetter

The attorney disciplinary system in the state of Missouri is under the control and supervision of the Missouri Supreme Court. The basic structure is set forth in Supreme Court Rules 4 and 5. Rule 4 contains the Rules of Professional Conduct, the ethical standards which attorneys of this state are obligated to follow. Rule 5 establishes the Missouri Disciplinary System and the procedures both for the investigation and prosecution of complaints against attorneys.

On October 25, 2007, the Supreme Court adopted several procedural changes to Rule 5 in the prosecution of attorneys. The effective date of the changes was January 1, 2008. The changes are directed only to the procedures for the trial of disciplinary cases. There have been no changes to the structure of the Office of Chief Disciplinary Counsel or Regional Disciplinary Committees, nor have there been any changes to the investigative procedures in Rule 5.

This article will briefly outline the main Rule 5 changes and the general trial process.

GENERAL PROCEDURE

After an investigation has determined that formal disciplinary charges against an attorney are warranted, an Information is filed with the Missouri Supreme Court Advisory Committee. Accompanying the Information is a list of potential disciplinary hearing panel members who may be appointed in the event of a trial. The Respondent must file an Answer to the Information within 30 days of service. Failure to timely

file an Answer can result in a default disbarment being filed directly with the Supreme Court.

At the time the Answer is filed, the Respondent may exercise peremptory challenges to two members of the potential disciplinary hearing panel list that accompanied service of the Information. The Chair of the Advisory Committee then appoints a three-member panel to hear the actual trial of the case. Two members of the panel will be lawyers and the other a non-lawyer. The trial is in accordance with the Rules of the Supreme Court. Discovery is permitted prior to the hearing date. After a hearing, the Panel renders a decision, which may include a recommendation for formal discipline by the Court. Only the Court can render formal discipline, such as a public reprimand, a suspension, or disbarment. Any recommendation for such formal discipline must be presented to the Court, regardless of whether the parties agree or disagree with the Disciplinary Hearing Panel decision. Final discipline is by the Court.

OCTOBER 25, 2007 CHANGES

The Court adopted procedural changes to Rules 5.14, 5.16, 5.19, 5.27 and 5.28. For purposes of discussion below, the changes will be referred to as "New Rule" and the applicable rule prior to change will be referred to as "Old Rule."

Rule 5.14

The Old Rule permitted peremptory challenges by the Respondent of two potential members at the time the answer was filed. That provision re-

mains. However, the Old Rule did not include any provision for challenge for cause. New Rule 5.14(d) now provides that either the Informant or the Respondent may challenge a hearing officer for cause after the Chair of the Advisory Committee has appointed the initial three panel members. A motion for cause is to be filed with the Chair of the Advisory Committee and must be done within 30 days after the appointment of the challenged panel member. If the Advisory Committee Chair determines there is good cause for the challenge, a new panel member shall be appointed to replace the one challenged.

Old Rule 5.14 addressed only the appointment of the three member disciplinary hearing panel by the Advisory Committee Chair. New Rule 5.14(e) permits the Advisory Committee Chair to request that the Supreme Court appoint a Special Master in lieu of a three member panel if good cause is shown. The Court may then appoint a Master pursuant to Rule 68.03 if deemed appropriate. The purpose of this change is to provide flexibility in the trial of disciplinary cases for situations in which the use of a three member panel of volunteers may not be possible or appropriate. For instance, if a lengthy trial is anticipated, it may be unfair to expect a three member panel of volunteers to take days or weeks out of their schedules to hear a lengthy case. It might be more appropriate under those circumstances to have a special master, such as a circuit judge, to hear such a matter.

Rules 5.16 and 5.19

Rules 5.16 and 5.19 must be read

in conjunction because both pertain to the decision making process following the trial of a case before a Disciplinary Hearing Panel. The two Rules have been reorganized with some substantive changes regarding the presentation of Panel recommendations to the Supreme Court.

A. Organizational Changes

Old Rules 5.16 and 5.19 had a somewhat convoluted process. First, Rule 5.19(a) was reviewed to consider what a Disciplinary Hearing Panel could decide, i.e. that an Information be dismissed, an admonition administered to the Respondent, or that other action was warranted. If the Panel chose to issue an admonition, the procedure was set forth in Old Rule 5.19(b). If an admonition was rejected, or if the Panel thought formal discipline warranted, Old Rule 5.16 was applied to determine what sort of formal recommendation was appropriate. After the recommendation, a return to Old Rule 5.19 was necessary to find the procedure for presentation of the recommendation to the Court.

New Rules 5.16 and 5.19 move some of the applicable rule provisions so now everything involving the Disciplinary Hearing Panel is in New Rule 5.16 and everything following, including any presentation to the Supreme Court, is contained in New Rule 5.19. The provisions in Old Rule 5.19(a) and (b) pertaining to actions by the Disciplinary Hearing Panel and the issuance of admonitions now have been moved to New Rule 5.16(a) and (b). Thus all matters involving actions by the Disciplinary Hearing Panel can be found in 5.16.

B. Substantive Change to Rule 5.16

Old Rule 5.19(b) permitted a Disciplinary Hearing Panel to issue admoni-

tions when deemed appropriate. That authority to issue admonitions has now been moved to New Rule 5.16(b). Under the Old Rule, only the Respondent had the right to reject an admonition. Under New Rule 5.16(b), either the Informant or the Respondent may reject an admonition. Rejection by either party requires the Disciplinary Hearing Panel to render a formal decision, which may either be to dismiss the Information or recommend a disciplinary sanction (other than an admonition) if there has been a violation of the Rules of Professional Conduct. Both the Informant and Respondent must take affirmative action if they wish to reject an admonition. Failure to file a written notice rejecting the admonition is deemed an acceptance.

The major substantive change in New Rule 5.16 is the authorization for the Informant to reject an admonition. The policy reason is to give the Informant and Respondent the same rights to reject a Disciplinary Hearing Panel's recommended disposition.

C. Substantive Change to Rule 5.19

New Rule 5.19(a) requires both the Informant and the Respondent to notify the Chair of the Advisory Committee within 30 days after a Disciplinary Hearing Panel decision whether that party accepts or rejects the decision. Failure to timely file a notice rejecting the decision is deemed acceptance. This is a change from Old Rule 5.19(d), which essentially said unless both parties filed a written concurrence with the Court agreeing with the Panel decision that the record was to be filed and the case briefed and argued. Under the Old Rule, the presumption was that a party did not agree with a Disciplinary Hearing Panel decision unless explicitly so stating. Under the New Rule, the presumption is that the parties do agree

with the Panel's recommendation. To overcome the presumption, a party must specifically reject the recommendation in writing. Under both the old and new Rules, final decisions for discipline are made by the Court. The Disciplinary Hearing Panel decision, even if accepted, is only a recommendation.

New Rule 5.19 puts the burden on each party to take some affirmative action if it wishes to reject the Disciplinary Hearing Panel decision. In that sense, it is consistent with ordinary civil and criminal practices, which require an affirmative act to appeal a decision from a trial court. This change seems fair when remembering that both the Informant and Respondent participated at trial before the Disciplinary Hearing Panel. Each would be expecting a decision from that Panel and each should be on notice that some action is necessary if that party does not agree with the decision. The New Rule is fundamentally fairer than the old one, which required that cases be briefed and argued before the Court simply if one party refused or failed to communicate about the Disciplinary Hearing Panel decision.

D. 5.19 Costs

Old Rule 5.19(h) had a provision stating that costs shall be taxed as the Court, in its discretion, shall order. New Rule 5.19(h) establishes set cost assessments when discipline is imposed by the Court. The set costs are \$750 following a reprimand, \$1,000 for a suspension, and \$2,000 for a disbarment. Those costs are to be paid to the Clerk of the Supreme Court in the same manner as costs are paid in any other type of case.

E. Rule 5.27

New Rule 5.27 clarifies when a disbarment or suspension shall become effective. The effective date is 15 days

after the entry of the Court order unless the Court sets a different effective date. This 15-day “grace period” permits a suspended or disbarred attorney to wrap up a case that may be set for trial or have a dispositive motion scheduled within the 15 days. However, the Rule says a suspended or disbarred attorney shall not accept any new retainer or act as a lawyer in any new case during those 15 days, and shall withdraw from representation in all pending matters during that time. Thus, the 15-day provision is to serve as an opportunity to rectify all immediately resolvable matters and get out of all other cases before the effective date of suspension.

F. Rule 5.28

New Rule 5.28(g) establishes a flat reinstatement fee of \$500. This replaces Old Rule 5.28(g), which required a deposit for costs of investigation of a

reinstatement application. The \$500 reinstatement fee does not apply to suspensions of less than three years for the following: failure to pay annual fees, failure to report required MCLE attendance, and failure to pay state income taxes. The New Rule establishing the \$500 reinstatement fee, along with the new cost provisions for disciplined attorneys pursuant to New Rule 5.19(h), shifts a greater share of the cost burden to suspended or disbarred attorneys.

CONCLUSION

The Supreme Court’s new Rule 5 changes, effective January 1, 2008, modify the trial procedures in disciplinary cases to permit either party to reject an admonition, require each party to affirmatively reject a Disciplinary Hearing Panel recommendation or else have that recommendation deemed accepted, provide new set cost provisions

for disciplinary and reinstatement matters, and clarify that a suspended or disbarred attorney has 15 days to wrap up a practice before the effective date of suspension.

ENDNOTES

1. Rule 5.11.
2. Rule 5.13.
3. *Id.*
4. Rule 5.14
5. *Id.*
6. Rule 5.14.
7. Rules 5.16 and 5.19.
8. Rule 5.19.



Carl Schaeperkoetter is staff counsel for the Office of Chief Disciplinary Counsel in Jefferson City.

Benefits of Bar Membership

mobar@mobar.org

Substantive Law:

- CLE Programs
- CLE Publications
- Journal of The Missouri Bar
- Courts Bulletin
- Legislative Digest
- ESQ.

Practice Management & Development

- Client Keeper
- Durable Power of Attorney
- Fee Dispute Resolution
- Law Practice Management Assistance

- Law Practice Management Lending Library
- Lawyer Referral Service
- LawyerSearch
- Lawyer Trust Fund Handbook
- Legal Links
- Legislative Activities
- MCLE
- Missouri Case Law Summaries
- MoBar Net
- Professional Liability Insurance from The Bar Plan
- Public Information Brochures
- Risk Management
- Sample Fee Agreements

Career/Personal Development

- Bar Meetings/Conferences
- Committee Membership
- Law-Related Education
- Lawyer Placement Service
- Leadership Academy
- Mentoring Program
- Missouri Bar Foundation
- Missouri Lawyers’ Assistance Program (MOLAP)
- Pro Bono Services
- Young Lawyers’ Section
- Vacation and Travel