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MLA 9th ed.

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EVERYTHING YOU EVER WANTED TO KNOW ABOUT RULE 5 IN MISSOURI'S LAWYER DISCIPLINARY SYSTEM

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RULE 5 DETAILS THE PROCEDURE FOR HANDLING COMPLAINTS AGAINST LAWYERS ARISING OUT OF ALLEGED VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT (RULE 4).

Over the course of many, many months, and with the effort of a handful of dedicated individuals,² Rule 5 underwent significant amendments which took effect Jan. 1, 2023. Through reorganization, retitling, and renumbering, the amendments make Rule 5 more accessible and easier to navigate. Additionally, there were a few substantive changes. This article summarizes the revised rule's primary provisions and includes those substantive changes.

At the core of Missouri's lawyer disciplinary system is the Advisory Committee.³ The Advisory Committee, consisting of lawyers and non-lawyers, is appointed by the Supreme Court of Missouri to carry out specific responsibilities related to the provisions of Rule 4, Rule 5, and Rule 6 (Fees to Practice Law). The legal ethics counsel serves as staff and counsel to the Advisory Committee and acts as its clerk by accepting litigation documents that are filed with the Advisory Committee.⁴

Missouri's chief disciplinary counsel is also appointed by the Supreme Court of Missouri.⁵ The chief disciplinary counsel is expressly authorized – with or without complaint – to investigate professional misconduct; that is to say, alleged violations of Rule 4.⁶ They may employ or engage lawyers and support staff to assist in these investigations, the purpose of which is determining probable cause.⁷ Investigations may be aided by the issuance of subpoenas to compel witnesses to testify under oath and the production of documents.⁸ There are Regional Disciplinary Committees in St. Louis, Kansas City, and Springfield that also undertake investigations at the direction of the chief disciplinary counsel.⁹

Once the investigation is completed, if the chief disciplinary counsel (or the Regional Disciplinary Committee) determines that there is insufficient probable cause to believe that the lawyer has engaged in professional misconduct, the complaint is dismissed.¹⁰ Timely written notification is provided to the complainant and to the lawyer who was the

subject of the complaint. The complainant may seek review of the probable cause determination by submitting a written request to the Advisory Committee within 30 days, but if the Advisory Committee finds no substantial need for additional investigation, no further review is available.

One of two things will happen when the chief disciplinary counsel or the Regional Disciplinary Committee finds probable cause to believe there was professional misconduct. If the professional conduct is of such a nature that further proceedings are not warranted, then the lawyer may receive a written admonition, which is a public record.¹¹ The lawyer has 15 days to accept or reject the admonition, and if the admonition is accepted, the matter is concluded. If, however, the admonition is rejected, or if an admonition is not appropriate, then written information shall be filed with the Advisory Committee. The information shall state the grounds upon which the proceedings are based and must be served upon the lawyer in manner that provides for due process.¹²

The lawyer is required to file an answer to the information within 30 days of service or risk default.¹³ Motions to dismiss and other types of dispositive motions are not permitted. If no answer is filed, a notice of default is filed with the Supreme Court of Missouri. The notice of default must include a recommendation regarding appropriate discipline with supporting suggestions. The lawyer can respond within 30 days, but the response is limited to suggestions supporting a particular discipline because failure to answer the information is deemed to be an admission of the facts and charges contained therein.

The Advisory Committee maintains a list of disciplinary hearing officers, and the members of the Advisory Committee also serve in that role.¹⁴ Once the lawyer files an answer, the Advisory Committee will appoint a Disciplinary Hearing Panel from that list.¹⁵ The Disciplinary Hearing Panel consists of two lawyers and one lay person, with one of the lawyers designated to act as presiding officer. The lawyer who is the subject of the information may exercise peremptory challenges to the disciplinary hearing officers on the list, and any party may challenge a hearing officer for cause.¹⁶ The Disciplinary Hearing Panel will establish a date for a hearing on the allegations in the information and will provide notice to the parties. Hearings may be conducted virtually.¹⁷

The Disciplinary Hearing Panel's task is generally to create an evidentiary record, to issue findings, and to recommend

discipline. The rules of evidence for trial in circuit court are applicable, and no expert testimony regarding interpretation of Rule 4 or Rule 5 is allowed.¹⁸ The burden of proof is on the informant (the chief disciplinary counsel or the Regional Disciplinary Committee), who must establish a violation of Rule 4 by a preponderance of the evidence.¹⁹ At the conclusion of the hearing, the Disciplinary Hearing Panel may administer an admonition or issue a written decision recommending dismissal of the admonition or that the lawyer be disciplined.²⁰ Rule 5.16 contains the types of discipline which the Disciplinary Hearing Panel may recommend and includes factors for the panel's consideration in reaching its decision.

Once the Disciplinary Hearing Panel issues its findings and recommendation, the parties have 30 days to accept or reject it.²¹ If the panel recommends dismissal, and the informant accepts that recommendation, the matter is concluded. If the panel recommends discipline, and both parties accept the recommendation, the matter is referred to the Supreme Court of Missouri, which may issue a final order of discipline. If either party rejects the panel's decision, the matter is referred to the Court.

Disciplinary matters filed with the Court are original actions and *de novo* proceedings.²² If the parties have both accepted the Disciplinary Hearing Panel's decision, the Court may issue a final order of discipline consistent with that recommendation, but it could also reject it.²³ In those cases, the Court might suggest an alternative disposition to the parties or order that the case be briefed and argued. When either party has rejected the panel's decision, they must file briefs and have oral arguments. The Court then determines the appropriate discipline from the options listed in Rule 5.17.²⁴

Not all complaints lead to litigation. When appropriate, complaints may be referred to The Missouri Bar Complaint Resolution Program or The Missouri Bar Lawyer-to-Lawyer Dispute Resolution Program (see Rule 7.16).²⁵ The chief disciplinary counsel may, under certain conditions, offer the lawyer an opportunity to participate in a diversion program.²⁶ Additionally, Rule 5.285 contains the provisions under which a mental disorder, including substance abuse or dependency, may be considered as a mitigating factor in determining appropriate discipline.

Finally, the recent Rule 5 amendments also include provisions addressing lawyer discipline of a reciprocal nature or as the result of a criminal matter. Lawyers who are disciplined in another jurisdiction are required to notify the chief disciplinary counsel within 10 days of that discipline.²⁷ Lawyers who have pleaded guilty or nolo contendere to a crime, or have been found guilty of a crime, are required to report that information to the chief disciplinary counsel within 10 days.²⁸ This reporting is required whether sentence is imposed or not.

For more information regarding the provisions of Rule 5 and its processes, please consult the amended rule. 

Endnotes

- 1 Laura E. Elsbury is Missouri's chief disciplinary counsel.
- 2 Special thanks are due to the following: Hon. Laura Denvir Stith, Alan Pratzel (former chief disciplinary counsel), Sam Phillips (deputy chief disciplinary counsel), and Melinda Bentley (legal ethics counsel) for all their time and hard work.
- 3 Rule 5.01. The rule also prohibits Advisory Committee members from representing lawyers subject to discipline and from serving as expert witnesses in lawyer discipline matters.
- 4 Rule 5.07; Rule 5.1255.
- 5 Rule 5.06.
- 6 Rule 5.08. This rule also contains provisions allowing for reassignment of investigations when there is a conflict of interest.
- 7 Rule 5.07; Rule 5.09.
- 8 Rule 5.09; 5.095.
- 9 Rule 5.02. The rule also prohibits members of the Regional Disciplinary Committees from representing lawyers subject to discipline and from serving as expert witnesses in lawyer discipline matters.
- 10 Rule 5.11.
- 11 Rule 5.12.
- 12 Rule 5.125. The rule also discusses retention of and access to records.
- 13 Rule 5.13.
- 14 Rule 5.04. The rule also prohibits disciplinary hearing officers from representing lawyers in discipline matters and from serving as expert witnesses.
- 15 Rule 5.14.
- 16 Rule 5.13; 5.14.
- 17 Rule 5.04; Rule 5.15.
- 18 Rule 5.15.
- 19 Rule 5.15.
- 20 Rule 5.16.
- 21 Rule 5.16.
- 22 Rule 5.19.
- 23 Rule 5.19.
- 24 The details pertaining to a probation can be found in Rule 5.175.
- 25 Rule 5.10.
- 26 Rule 5.105.
- 27 Rule 5.20.
- 28 Rule 5.21.



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