

# **CHAPTER 11**

## **Disciplinary Proceedings**

### **I. ATTORNEY DISCIPLINE**

#### **§ 11.1 History**

The Rules Relating to the Discipline of Attorneys, which provide substantive conduct standards and procedural rules in attorney discipline cases, can be found in the Kansas Court Rules Annotated, beginning at Rule 201. In 1988, the Kansas Supreme Court adopted the Model Rules of Professional Conduct to replace the Model Code of Professional Responsibility, providing the substantive rules in attorney discipline cases. Then, in 1999, the Supreme Court changed the name of the substantive rules to the Kansas Rules of Professional Conduct. The substantive rules can be found at Kansas Supreme Court Rule 226.

#### **§ 11.2 Jurisdiction**

Original actions before the Kansas Supreme Court include disciplinary proceedings relating to attorneys. The disciplinary process is conducted under the authority of the Supreme Court under K.S.A. 7-103.

#### **§ 11.3 Kansas Disciplinary Administrator**

The disciplinary administrator is appointed by the Supreme Court and serves at the pleasure of the Supreme Court. The disciplinary administrator is charged with investigating and prosecuting cases of attorney misconduct. See Rule 205.

## § 11.4 Kansas Board for Discipline of Attorneys

The Kansas Board for Discipline of Attorneys consists of 20 attorneys appointed by the Supreme Court. The board members serve staggered 4-year terms. Board members may serve three consecutive 4-year terms. See Rule 204(c). The chair and the vice-chair of the board serve on the review committee, together with a third attorney who is not a member of the board.

The Supreme Court authorized the board to adopt procedural rules not inconsistent with the rules of the Supreme Court. See Rule 204(g). Accordingly, the board adopted the Internal Operating Rules of the Kansas Board for Discipline of Attorneys. The Internal Operating Rules include sections regarding general rules, the review committee, the appointment of hearing panels, pre-hearing and formal hearing procedures, the panel report, and reinstatement. The rules govern proceedings before the review committee and hearing panels. The internal operating rules are published in the Kansas Court Rules Annotated following Rule 224 and can be found at the Supreme Court's website: [www.kscourts.org/rules/Rule-List.asp?r1=Rules+Relating+to+Discipline+of+Attorneys](http://www.kscourts.org/rules/Rule-List.asp?r1=Rules+Relating+to+Discipline+of+Attorneys).

## § 11.5 Complaints

All complaints must be in writing and filed with the disciplinary administrator. Approximately 50% of the complaints filed with the disciplinary administrator come from clients, another 45% or so come from lawyers and judges, including self-reported violations, and the final 5% come from citizens generally. Typically, the disciplinary administrator receives approximately 900 complaints every year. Of those complaints, approximately two-thirds are handled informally with correspondence to the complainant and the complained-of attorney. Approximately 300 complaints are docketed and investigated annually.

A public information brochure published by the disciplinary administrator, "If a Complaint Arises about Lawyer Services," is available at the disciplinary administrator's office or the appellate clerk's office for consumers of legal services and others thinking about filing a complaint. The information in the brochure can also be found at the disciplinary administrator's website: [www.kscourts.org/rules-procedures-forms/attorney-discipline/complaints.asp](http://www.kscourts.org/rules-procedures-forms/attorney-discipline/complaints.asp).

In 2004, the disciplinary administrator developed a three-page complaint form. The complaint form is designed so that the complainant will provide all of the necessary basic information, *e.g.*, contact information, case number, court of jurisdiction. In addition to completing the complaint form, all complainants are encouraged to provide a detailed narrative description of the basis of the complaint and documentation to support the facts alleged.

**PRACTICE NOTE:** You may request the complaint form by contacting the disciplinary administrator's office, the appellate clerk's office, or by downloading it from the Disciplinary Administrator's website. See also § 12.37, *infra*.

## **§ 11.6 Disciplinary Investigations – Duties of the Bar and Judiciary**

All members of the bar must assist the disciplinary administrator pursuant to Rule 207. The duty applies to judges as well as attorneys. The duty includes reporting violations as well as aiding the Supreme Court, the Kansas Board for Discipline of Attorneys, and the disciplinary administrator in investigations and prosecutions. One must be mindful that Rule 207 contains no exception for confidential information.

In addition, the Kansas Rules of Professional Conduct require all members of the bar to report violations whenever the attorney has “knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules.” KRPC 8.3(a). KRPC 8.3 does not require disclosure of information subject to an attorney's duty of confidentiality under KRPC 1.6 or information discovered through participation in a lawyer assistance program or other organization such as Alcoholics Anonymous. See Rule 206. Violations by attorneys must be reported to the disciplinary administrator. Attorneys who find themselves charged with a felony crime have an affirmative duty to inform the disciplinary administrator in writing of the charge and the disposition. Rule 203(c)(1).

When an attorney has knowledge that a judge has violated the rules governing judicial conduct, which raises a substantial question regarding the judge's fitness for office, the attorney must report the judicial misconduct.

KRPC 8.3(b). Judicial misconduct must be reported to the Commission on Judicial Qualifications by contacting the clerk of the appellate courts.

The disciplinary administrator generally sends a letter to the attorney accused of misconduct and requests a response to the initial complaint. The disciplinary administrator provides the attorney a time limit within which to respond to the initial complaint. Failure to assist the disciplinary administrator is a separate violation of the Supreme Court rules. See Rule 207; KRPC 8.1; *In re Lober*, 276 Kan. 633, 638-40, 78 P.3d 458 (2003); *In re Williamson*, 260 Kan. 568, 571, 918 P.2d 1302 (1996); and *State v. Savaiano*, 234 Kan. 268, 670 P.2d 1359 (1983).

Ethics and grievance committees located across the state investigate allegations of attorney misconduct. The disciplinary administrator may request that an investigator from the ethics and grievance committee investigate a complaint, or the disciplinary administrator may assign the investigation to one of the three investigators on staff at the disciplinary administrator's office. Finally, pursuant to Rule 210, an attorney who is not a member of an ethics committee may be requested by the disciplinary administrator to investigate a complaint or to testify at a disciplinary hearing as a fact or expert witness. Once the investigation is completed, the investigator files an investigative report with the disciplinary administrator's office.

During investigations, it often becomes apparent that the lawyer is impaired because of an addiction or mental illness. In order to assist lawyers and protect the public, the Supreme Court, in 2002, created the Kansas Lawyers Assistance Program. See Rule 206. All records and information maintained by the director of the Kansas Lawyers Assistance Program are confidential and not subject to discovery or subpoena. The reporting requirements of Rule 207 and KRPC 8.3 do not apply to lawyers working for or in conjunction with the Kansas Lawyers Assistance Program. See Rule 206(k).

In addition to the Kansas Lawyers Assistance Program, some local bar associations also have their own lawyers assistance committees. Some local bar associations likewise have fee dispute resolution committees. The ethics and grievance committees, the lawyer assistance committees, and the fee dispute resolution committees play an important role in assisting lawyers and clients and are an integral part of the disciplinary process.

## § 11.7 Disciplinary Procedure

After the investigation is completed, the investigative report and associated materials are forwarded by the disciplinary administrator to the review committee. The review committee is charged with reviewing all disciplinary cases that have been docketed for investigation to determine if probable cause exists to believe an attorney has violated a rule of professional conduct or other Supreme Court rule.

If the review committee determines, after reviewing the materials provided, that probable cause exists to believe that an attorney has violated the rules, the review committee may place an attorney in the Attorney Diversion Program, direct that the attorney be informally admonished by the disciplinary administrator, or direct that a hearing panel from the Kansas Board for Discipline of Attorneys conduct a formal hearing. Rule 210(c). Throughout the formal disciplinary proceedings, the attorney accused of misconduct is referred to as the respondent. If the review committee determines that probable cause does not exist, the review committee will dismiss the case. Rule 210(c). The review committee also may dismiss the complaint if it determines that, while probable cause exists, clear and convincing evidence, which is the burden of proof in disciplinary proceedings, does not exist. The review committee dismisses approximately 65% of all docketed complaints.

All complaints filed with the disciplinary administrator's office remain confidential during the investigation.

**PRACTICE NOTE:** Confidentiality applies to all persons connected with the disciplinary process except the complainant and the respondent, who are never covered by the rule of confidentiality. See *Jarvis v. Drake*, 250 Kan. 645, 830 P.2d 23 (1992).

If the review committee dismisses the complaint, the complaint will always be confidential. If the review committee finds probable cause to believe that the attorney has violated one or more rules, the matter becomes one of public record. See Rule 222.

**PRACTICE NOTE:** Once the review committee has found probable cause to believe that a violation has occurred, the disciplinary administrator maintains a policy of open file review by all attorneys accused of misconduct, their attorneys, and any member of the public.

The disciplinary administrator or the respondent may request that the review committee reconsider a probable cause determination. The review committee may reconsider or deny reconsideration. If the review committee, on reconsideration again concludes that probable cause exists to believe that the respondent violated a rule, the case proceeds as it would otherwise. If the review committee reconsiders and finds no probable cause, the case is dismissed.

**PRACTICE NOTE:** Once there has been a probable cause determination, it is a good idea to be represented by counsel in disciplinary proceedings. Many respondents are unfamiliar with the special procedural rules that apply and may also be less than objective in considering and presenting their positions.

## **§ 11.8 Temporary Suspension**

The Supreme Court, the Kansas Board for Discipline of Attorneys, or the disciplinary administrator may file a motion requesting that the attorney's license be temporarily suspended pending the outcome of the disciplinary proceedings. See Rule 203(b). Typically, the disciplinary administrator reserves that remedy for cases where clients are in immediate risk of an attorney's continued misconduct.

An attorney who has been convicted of a felony is temporarily suspended automatically, pending the outcome of the disciplinary proceedings. See Rule 203(c)(4).

## **§ 11.9 Attorney Diversion Program**

In 2001, the Supreme Court created the Attorney Diversion Program by adopting Rule 203(d). The diversion program is an alternative to traditional disciplinary procedures. It is designed for attorneys who have not previously been disciplined. Attorneys will be disqualified from

diversion if the conduct complained of involved “self-dealing, dishonesty, or a breach of fiduciary duty.” Rule 203(d)(1)(ii).

In determining whether an attorney should be allowed to participate in the diversion program, the review committee determines “whether the diversion process can reasonably be expected to cure, treat, educate, or alter the [attorney’s] behavior so as to minimize the risk of similar future misconduct.” Rule 203(d)(1)(ii).

The diversion agreement should include provisions uniquely designed to correct the misconduct. The agreement may include provisions, among others, that require the attorney to pay restitution, participate in treatment, cooperate with a practice supervisor, or complete additional continuing legal education.

If an attorney fails to complete the terms and conditions of diversion, the attorney’s participation in the diversion program is terminated and traditional disciplinary procedures resume. Rule 203(d)(2)(vii).

Successful completion of the diversion agreement will be reported to the review committee, and the pending disciplinary case will be dismissed. The fact that an attorney successfully participated in the diversion program will remain confidential and not available to the public. However, if the attorney engages in misconduct following the successful completion of the diversion program, the attorney’s participation in the diversion program can be considered prior discipline in future disciplinary proceedings. Rule 203(d)(2)(vi).

### **§ 11.10 Informal Admonition**

If the review committee directs that the attorney be informally admonished by the disciplinary administrator, the attorney may accept the informal admonition or appeal the review committee’s decision. Rule 210(d). If the attorney accepts the informal admonition, an appointment is scheduled between an attorney in the disciplinary administrator’s office and the attorney. During the meeting, the attorneys discuss the misconduct, discuss any remedial action already taken by the attorney, and discuss any remedial action that needs to be taken.

If the attorney appeals from the review committee’s decision that he or she be informally admonished, a hearing panel is appointed and the matter proceeds as described below. Rule 210(d) and 211.

## § 11.11 Formal Hearing and Procedural Rules of the Kansas Board for Discipline of Attorneys

If the review committee directs that a hearing panel conduct a formal hearing or if an attorney appeals from the review committee's decision that the attorney be informally admonished, a hearing panel is appointed. The chair of the Kansas Board for Discipline of Attorneys appoints the hearing panel. Hearing panels consist of two members of the Kansas Board for Discipline of Attorneys and one member from attorneys at large. See Rule 211(a). However, members of the review committee who initially reviewed the case may not serve on the hearing panel. See Internal Operating Rule C.1.

**PRACTICE NOTE:** Generally, the chair tries to appoint attorneys to the hearing panel who practice in the same area of law, but not in the same location in Kansas, as the respondent.

After the hearing panel is appointed, the hearing is scheduled. Thereafter, an attorney from the disciplinary administrator's office files a formal complaint. The formal complaint must be sufficiently clear and specific as to inform the attorney of the alleged misconduct. See Rule 211(b). The disciplinary administrator is required to serve a copy of the formal complaint and notice of the hearing on the attorney, the attorney's counsel, and the complainant, giving at least 15 days' advance notice. The formal complaint and notice of hearing must be personally served on the respondent or sent by certified mail to the respondent's last registration address or last known office address. See Rule 215. The respondent is required to file a written answer to the formal complaint within 20 days of the filing of the formal complaint. See Rule 211(b).

**PRACTICE NOTE:** Disciplinary hearings are governed by the Rules of Evidence as set forth in the Code of Civil Procedure, K.S.A. 60-401 *et seq.* See Rules 211(d) and 224(b).

It is imperative that a respondent and his or her counsel review the Rules Relating to the Discipline of Attorneys, the Internal Operating Rules of the Kansas Board for Discipline of Attorneys, and the Kansas Rules of Professional Conduct to fully understand their rights and obligations.

**PRACTICE NOTE:** Internal Operating Rule D.1 requires all pre-hearing procedural matters, including requests to continue a hearing, be raised by written motion at least 10 days before the hearing.

All disciplinary proceedings before hearing panels and the Supreme Court are open to the public. At the hearing, witnesses are sworn and all proceedings are transcribed. See Rule 211(e).

The disciplinary administrator may introduce evidence that the respondent engaged in criminal activity or other actionable conduct. All criminal convictions and civil judgments that are based upon clear and convincing evidence are conclusive evidence of the commission of the crime or civil wrong. Additionally, participation in a diversion program for a criminal offense is deemed, for disciplinary purposes, a conviction. Other civil judgments, based upon a preponderance of the evidence, are prima facie evidence of misconduct, requiring the respondent to disprove the findings. See Rule 202.

Following the submission of evidence, the hearing panel files a report setting forth its findings, conclusions, and recommendations. “To warrant a finding of misconduct the charges must be established by clear and convincing evidence.” See Rule 211(f). The hearing panel’s report also includes any mitigating and aggravating circumstances relied upon. See § 11.13, *infra* (ABA Standards).

**PRACTICE NOTE:** Discipline imposed in another jurisdiction on an attorney with dual licenses is not binding in Kansas. However, provided the other jurisdiction’s decision is based on clear and convincing evidence, the Supreme Court will accept the findings of fact and the conclusions of law. The only issue before the hearing panel and the Supreme Court, in that situation, is the sanction to be imposed. See Rule 202. If the other jurisdiction’s decision is based on a preponderance of the evidence or on probable cause, the facts must be established in the Kansas proceeding. See *In re Tarantino*, 286 Kan. 254, 182 P.3d 1241 (2008).

The hearing panel may recommend disbarment, suspension for an indefinite period of time, suspension for a definite period of time, censure to be published in the *Kansas Reports*, censure not to be published in the

*Kansas Reports*, informal admonition by the Kansas Board for Discipline of Attorneys or by the disciplinary administrator, or any other form of discipline or conditions, including probation. See Rule 203(a) and § 11.12, *infra*.

If the hearing panel finds a violation of the rules and recommends that the respondent be informally admonished by the disciplinary administrator, the respondent may not appeal the decision. However, if the hearing panel recommends informal admonition or no discipline or if the hearing panel dismisses the complaint, the disciplinary administrator may appeal to the Supreme Court. See Rule 211(f).

If the hearing panel recommends that the attorney be disbarred, suspended, or censured, the case is filed with the clerk of the appellate courts and is docketed for oral argument before the Supreme Court. Until the attorney receives a copy of a docketing notice from the clerk of the appellate courts, nothing relating to the disciplinary proceeding should be filed with the clerk. But see § 11.8, *supra* (Temporary Suspension).

## **§ 11.12 Probation**

In 2004, the Supreme Court adopted a rule that sets forth certain requirements regarding a respondent's request for probation. See Rule 211(g). If the respondent intends to request probation, respondent must provide "the hearing panel and the disciplinary administrator with a workable, substantial, and detailed plan of probation at least 10 days prior to the hearing on the Formal Complaint." Rule 211(g)(1). The hearing panel is prohibited from recommending that the respondent be placed on probation unless each of the following conditions is present:

- The respondent puts the plan of probation into effect prior to the hearing on the formal complaint;
- The misconduct can be corrected by probation; and
- Placing the respondent on probation is in the best interests of the legal profession and the citizens of the State of Kansas. See Rule 211(g)(3).

The probation rule also sets forth a specific procedure to be followed in the event the respondent fails to comply with the terms and conditions of probation. See Rule 211(g)(9) - (12).

## § 11.13 ABA Standards for Imposing Lawyer Sanctions

In 1986, the American Bar Association House of Delegates approved a set of Standards compiled and proposed by the ABA Joint Committee on Professional Sanctions. Disciplinary systems in many jurisdictions, including Kansas, have employed the Standards as guidelines for imposing lawyer discipline in individual cases. The disciplinary administrator and the respondent may refer to the Standards when recommending an appropriate level of discipline at hearings. Internal Operating Rule E.3 provides that the hearing panel may apply the Standards in its determination and may reference and discuss the Standards in the final hearing report.

The model developed through the Standards requires the hearing panel, in making a recommendation regarding the imposition of discipline, or the Supreme Court, in imposing discipline, to answer the following four questions:

1. What ethical duty did the lawyer violate?
2. What was the lawyer's mental state? In other words, did the lawyer act intentionally, knowingly, or negligently?
3. What was the extent of the actual or potential injury caused by the lawyer's misconduct?
4. Are there any aggravating or mitigating circumstances?

Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Factors that may be considered in aggravation by the hearing panel include:

- Prior disciplinary offenses;
- Dishonest or selfish motive;
- A pattern of misconduct;
- Multiple offenses;
- Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary process;
- Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- Refusal to acknowledge wrongful nature of conduct:

- Vulnerability of victim;
- Substantial experience in the practice of law;
- Indifference to making restitution; and
- Illegal conduct, including that involving the use of controlled substances.

Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Mitigating factors do not excuse a violation and are to be considered only when determining the nature and extent of discipline to be administered. Factors that may be considered in mitigation by the hearing panel include:

- Absence of a prior disciplinary record;
- Absence of a dishonest or selfish motive;
- Personal or emotional problems if such misfortunes have contributed to violation of the Kansas Rules of Professional Conduct;
- Timely good faith effort to make restitution or to rectify consequences of misconduct;
- The present and past attitude of the attorney as shown by his or her cooperation during the hearing and his or her full and free acknowledgment of the transgressions;
- Inexperience in the practice of law;
- Previous good character and reputation in the community including any letters from clients, friends, and lawyers in support of the character and general reputation of the attorney;
- Physical disability;
- Mental disability or chemical dependency including alcoholism or drug abuse when: a) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; b) the chemical dependence or mental disability caused the misconduct; c) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and d) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;

- Delay in disciplinary proceedings;
- Imposition of other penalties or sanctions;
- Remorse;
- Remoteness of prior offenses; and
- Any statement by the complainant expressing satisfaction with restitution and requesting no discipline.

The Standards are organized based upon the duty violated by the attorney. Each section includes the language of the Standard as well as commentary that often includes case citations.

**PRACTICE NOTE:** Copies of the 67-page booklet *Standards for Imposing Lawyer Sanctions* are no longer available. However, an Adobe version of the Standards, without the commentary, can be found on the ABA's website at: [www.abanet.org/cpr/regulation/standards\\_sanctions.pdf](http://www.abanet.org/cpr/regulation/standards_sanctions.pdf).

Recognizing the importance of consistency in imposing sanctions, the Supreme Court and the Kansas Board for Discipline of Attorneys have cited the Standards with approval in their decisions and reports, respectively. See *In re Ware*, 279 Kan. 884, 892-93, 112 P.3d 155 (2005); *In re Anderson*, 247 Kan. 208, 212, 795 P.2d 64 (1990); *In re Price*, 241 Kan. 836, 837, 739 P.2d 938 (1987). But see *In re Jones*, 252 Kan. 236, 843 P.2d 709 (1992), in which the Supreme Court expressly states that “[c]omparison of past sanctions imposed in disciplinary cases is of little guidance. Each case is evaluated individually in light of its particular facts and circumstances and in light of protecting the public.” *Jones*, 252 Kan. 236 at Syl. ¶ 1.

## § 11.14 Disabled Attorneys

When the Kansas Board for Discipline of Attorneys or the disciplinary administrator petitions the Supreme Court to determine whether an attorney is incapacitated from continuing to practice law because of a mental illness or because of an addiction to drugs or intoxicants, the Court may order that the attorney be examined by a qualified medical expert. If the Supreme Court concludes that the attorney is incapacitated, then the Supreme Court shall transfer the attorney to disabled inactive status. See Rule 220.

If, during a disciplinary proceeding, it is determined that the respondent is suffering from a disability because of a mental illness or because of an addiction to drugs or intoxicants, then the Supreme Court shall transfer the respondent to disabled inactive status, and the disciplinary proceedings are placed on hold until such time as the respondent is no longer disabled. See Rule 220(c). Respondents who have been transferred to disabled inactive status may not engage in the practice of law. See Rule 220(a).

After an attorney has been transferred to disabled inactive status or if it appears that for some other reason the affairs of an attorney's clients are being neglected, the chief judge of the judicial district in which the attorney practiced shall appoint an attorney to inventory the attorney's client files. With the approval of the judge, the appointed attorney may take such action as may be necessary to protect the interests of the attorney and the attorney's clients. See Rule 221(a).

**PRACTICE NOTE:** Disciplinary proceedings have been deemed judicial proceedings. As a result, all participants in disciplinary proceedings are granted judicial immunity and public official immunity. See Rule 223 and *Jarvis v. Drake*, 250 Kan. 645, 830 P.2d 23 (1992).

## **§ 11.15 Proceedings Before the Supreme Court**

At the time a case is docketed with the Supreme Court, the clerk of the appellate courts mails a copy of the final hearing report to the respondent. Within 20 days, the respondent must file exceptions to the report or all findings of fact are deemed admitted. If exceptions are filed, the clerk of the appellate courts provides a copy of the hearing transcript to the respondent. The respondent has 30 days from service of the transcript to file a brief. The disciplinary administrator has 30 days from the service of the respondent's brief to file a brief, and the respondent then has 14 days in which to file a reply brief. See Rule 212(e)(3).

All Supreme Court rules relating to civil appellate practice apply to original disciplinary proceedings. Failure of the respondent to file a brief in a timely manner is considered to be a waiver of the exceptions taken. When the filing of briefs is complete, the matter is set for oral arguments as in civil appeals.

When no exceptions are filed, the respondent is notified when to appear before the Supreme Court for oral argument. The respondent may appear with counsel and may be heard regarding the discipline to be imposed even if no exceptions are filed.

**PRACTICE NOTE:** Regardless of whether the respondent filed exceptions, the respondent must appear in person before the Supreme Court on the date set for oral argument.

The record available to the Supreme Court includes the formal complaint, the attorney's answer, other pleadings filed, the hearing transcript, the exhibits admitted into evidence, and the hearing panel's final hearing report. See Rule 212(b). Because the Supreme Court operates from a closed evidentiary record, it is essential that all material facts be included in the record at the hearing level.

## § 11.16 Scope of Review and Standard of Review

Appellate briefs must begin the discussion of each issue with a citation to the appropriate standard of appellate review. See Rules 6.02(a)(5) and 6.03(a)(4). In disciplinary matters where exceptions and briefs are filed, the Supreme Court's scope of review is a complete de novo review of the challenged factual findings and the legal conclusions. The Supreme Court has a "duty in disciplinary proceeding[s] to examine the evidence and determine for [themselves] the judgment to be entered." *State v. Klassen*, 207 Kan. 414, 415, 485 P.2d 1295 (1971).

The Supreme Court has stated, though, that while the report "is advisory only, it will be given the same dignity as a special verdict by a jury, or the findings of a trial court, and will be adopted where amply sustained by the evidence, or where it is not against the clear weight of the evidence, or where the evidence consisted of sharply conflicting testimony." *State v. Zeigler*, 217 Kan. 748, 755, 538 P.2d 643 (1975), quoted in *In re Carson*, 252 Kan. 399, 406, 845 P.2d 47 (1993).

## § 11.17 Oral Argument

Disciplinary matters are generally heard as the final cases on the Supreme Court's oral argument docket. The parties are given 15 minutes to argue the case. Either side may request additional time beyond the 15-

minute time limit at the time the brief is filed. See § 12.36, *infra*. If the request is granted, both sides will receive the additional time.

The Supreme Court is a hot court and is familiar with the findings of fact, conclusions of law, and recommendations regarding discipline. The Supreme Court will direct counsel to limit their comments to the dispositive legal issues and the appropriate sanction.

Regardless of whether the disciplinary administrator files an appeal or the respondent files exceptions from the final hearing report, the disciplinary administrator always argues first and has the ultimate burden of proof. Additionally, the disciplinary administrator may reserve rebuttal time.

While oral argument before the Supreme Court is most effective when presented by competent counsel for the respondent, the Supreme Court does favor a statement by the respondent as to recognition of the nature of the violation and the appropriate level of discipline. The shortest and most succinct arguments are generally the most effective and well received by the Supreme Court. Most positions can be effectively stated in five to ten minutes.

**PRACTICE NOTE:** It is important to keep in mind that there are only three issues involved in disciplinary proceedings: the facts, the rule violations, and the sanctions. The hearing panel is the fact finder, and the findings have virtually never been set aside by the Supreme Court. Rarely, the Supreme Court has concluded that a particular violation found by the hearing panel has not been established as a matter of law. Thus, the respondent is well-advised to emphasize appropriate discipline to be imposed rather than to hope for a factual substitution by the Supreme Court.

The best opportunity the disciplinary administrator has to argue and emphasize the facts fully is when the respondent has opened the door by filing exceptions and a brief. Otherwise, the Supreme Court considers the cold recitation of the facts contained in the hearing panel's final hearing report and does not conduct a closer factual review.

As to the level of discipline to be imposed, the Supreme Court is not bound by the recommendation of the hearing panel. See Rule 212(f); *In re*

*Gershater*, 270 Kan. 620, 625, 17 P.3d 929 (2001); and *In re Jones*, 252 Kan. 236, 239, 843 P.2d 709 (1992). The sanction suggested by the hearing panel or requested by the disciplinary administrator is only a recommendation, and the issue remains open at the Supreme Court level. The most effective arguments requesting lighter sanctions include arguments which focus on the presence of compelling mitigating factors.

## § 11.18 Supreme Court Opinions

Discipline of suspension or disbarment is effective immediately upon the filing of the order with the clerk of the appellate courts unless otherwise ordered by the Supreme Court. The respondent may file a motion for rehearing or modification within 20 days. The filing of a motion for rehearing or modification does not stay the effect of the order until the Supreme Court rules otherwise. See Rule 212(g). No motion for rehearing or modification has ever been granted by the Supreme Court, as far as can be determined from the disciplinary records. On rare occasions, the Supreme Court has granted remand to the hearing panel for additional evidence and reconsideration of the final hearing report.

The final judgment of the Supreme Court cannot be attacked in a United States District Court. The only available appeal is a direct petition for *writ of certiorari* to the United States Supreme Court. No petition for a *writ of certiorari* to the United States Supreme Court has ever been granted with regard to disciplinary decisions of the Kansas Supreme Court.

Upon final resolution of each disciplinary complaint, the disciplinary administrator notifies the complainant, the respondent, the ethics and grievance committee assigned to investigate the complaint, and the investigator assigned to investigate the complaint of the outcome.

Typically, the Supreme Court's opinion imposing discipline on an attorney is published in the *Kansas Reports*. However, Rule 203(a)(3) provides that censure may or may not be published in the *Kansas Reports*.

In cases where discipline of suspension or disbarment is ordered by the Supreme Court, the clerk of the appellate courts notifies the clerks of all other state and federal courts in which the respondent is known to be licensed. See Rule 224(e). Any discipline imposed by the Supreme Court is also reported to the National Discipline Data Bank for dissemination to other jurisdictions. Any pending disciplinary proceedings terminate upon disbarment of the respondent. See Rule 217(b)(1)(C).

Upon suspension or disbarment, the attorney must notify each client in writing of the attorney's inability to continue to represent or undertake further representation within 14 days of the order or opinion. Additionally, the attorney must inform his clients of their need to retain other counsel. The attorney must provide written notification to all courts and administrative bodies before whom there are pending proceedings, as well as opposing counsel, of his or her inability to proceed in the matter within 14 days of the order or opinion. Appropriate motions to withdraw as counsel of record must also be filed within 14 days of the order or opinion. See Rule 218(a).

Costs of the disciplinary proceedings, as certified by the disciplinary administrator, are assessed against the respondent when the respondent is found to have violated one or more rules. Costs include hearing panel fees and expenses, witness fees and expenses, some investigative expenses, transcript and deposition costs, and the docketing fee. If a disciplinary proceeding is dismissed at any stage of the proceeding, the respondent is not responsible for the costs of the action. See Rule 224(c).

### **§ 11.19 Additional Procedural Rules**

Rule 224 contains additional procedural rules that are worth noting. First, subsection (a) provides that time limitations included in the rules are directory and not jurisdictional. Second, subsection (d) provides that any deviation from the rules is not a defense to the disciplinary proceedings absent actual prejudice to the respondent. In such cases, respondents must show actual prejudice by clear and convincing evidence.

### **§ 11.20 Voluntary Surrender of License to Practice Law**

Pursuant to Rule 217(b), an attorney facing charges of ethical misconduct may voluntarily surrender his or her license to practice law. When an attorney voluntarily surrenders and the attorney is facing charges of ethical misconduct, the Supreme Court issues an order of disbarment and the attorney's name is stricken from the roll of licensed Kansas attorneys. See Rule 217(b) and *In re Rock*, 279 Kan. 257, 262-63, 105 P.3d 1290 (2005). Thereafter, the clerk of the appellate courts notifies other jurisdictions as in other cases of suspension or disbarment. See Rule 224(e).

An example of a surrender letter appears at § 12.38, *infra*. Along with the surrender letter, the attorney must send to the clerk of the appellate courts his or her original bar certificate and the most recent annual registration card. See Rule 217(a).

An attorney who is not under investigation and who does not anticipate an investigation may also surrender if the attorney is in good standing. When an attorney surrenders the attorney's license when the attorney is not under investigation and when an investigation is not anticipated, the attorney's name is stricken from the roll of attorneys. See Rule 217(c).

## § 11.21 Reinstatement

Five years after the date of disbarment and three years after the date of an indefinite suspension, an attorney may file a verified petition to apply for an order of reinstatement. The petition must bear the original case caption and number. The attorney is required to file with the clerk of the appellate courts the original and eight copies of the petition, along with a \$1,250 filing fee. See Rule 219(a).

The petition must contain evidence that the attorney has been rehabilitated. While the attorney is referred to as the respondent during disciplinary proceedings, in reinstatement proceedings, the attorney is considered the petitioner.

After a petition for reinstatement is filed, the Supreme Court determines whether a sufficient period of time has elapsed since the discipline was imposed, considering the gravity of the misconduct. If insufficient time has elapsed or the gravity of the misconduct is overwhelming, the petition is dismissed. See Rule 219(d)(1)(A) and *In re Russo*, 244 Kan. 3, 765 P.2d 166 (1988).

If the Supreme Court finds sufficient time has elapsed, then the clerk of the appellate courts forwards the petition to the disciplinary administrator for investigation and hearing before a hearing panel of the Kansas Board for Discipline of Attorneys. Rule 219(d)(1)(B).

The petitioner must establish all aspects of the reinstatement petition by clear and convincing evidence. The petitioner must be able to establish that the petitioner has paid the costs of the prior disciplinary proceedings and that all notifications required by Rule 218 were made in a timely

manner. Finally, the petitioner must establish that he or she has satisfied claims made by clients in any other disciplinary cases. Rule 219(d)(4)(K).

**PRACTICE NOTE:** Hearing panels that hear reinstatement petitions typically consist of review committee members. Following the hearing on the reinstatement petition, the hearing panel files a final hearing report.

If the report recommends denial of the petition, the petitioner may file exceptions within 21 days. At that point, or if the report recommends approval of the petition, the matter stands submitted to the Supreme Court. No briefs or oral arguments are permitted unless requested by the Supreme Court. In reaching its decision, the Supreme Court considers the petition, all exhibits admitted into evidence, the transcript of the hearing, the report, and any exceptions filed. The Supreme Court may order reinstatement with or without conditions or may deny the petition. See Rule 219(f).

**PRACTICE NOTE:** As a statistical footnote, as far as can be determined from disciplinary records, since 1950, only one attorney disbarred in Kansas has been reinstated to the practice of law.

## **§ 11.22 Lawyers' Fund for Client Protection**

In 1993, the Kansas Supreme Court established the Lawyers' Fund for Client Protection to compensate clients who suffer economic loss as a result of dishonest actions by active members of the Kansas bar. The fund covers most cases in which lawyers have taken for their own use or otherwise misappropriated clients' money or other property entrusted to them. The Fund does not cover losses resulting from lawyers' negligence, fee disputes, or cases of legal malpractice. Claimants for reimbursement from the Fund are also required to report the misconduct of the attorney to a county or district attorney or to the disciplinary administrator as a condition precedent to filing a claim. See Rule 227 and Lawyers' Fund for Client Protection Rule 12.E. Further information on the Lawyers' Fund for Client Protection may be obtained by contacting the clerk of the appellate courts.

## II. JUDICIAL DISCIPLINE

### § 11.23 History

The Kansas Commission on Judicial Qualifications was established by the Supreme Court of the State of Kansas on January 1, 1974. The Commission, created under the authority granted by Article III, Section 15 of the Kansas Constitution and in the exercise of the inherent powers of the Supreme Court, is charged with assisting the Supreme Court in the exercise of the court's responsibility in judicial disciplinary matters.

The Commission consists of fourteen members, including six active or retired judges, four lawyers, and four non-lawyers. All members are appointed by the Supreme Court and may serve no more than three consecutive four-year terms. See Rule 602(b). The fourteen members are divided into two seven-person panels, consisting of three judges, two lawyers, and two non-lawyers. Each panel meets every other month, alternating with the other panel. See Rule 602(e). The full Commission meets in January and upon call.

### § 11.24 Jurisdiction/Governing Rules

The Commission's jurisdiction extends to approximately 500 judicial positions including justices of the Supreme Court, judges of the Court of Appeals, judges of the district courts, district magistrate judges, and municipal judges. This number does not include judges *pro tempore* and others who, from time to time, may be subject to the Code of Judicial Conduct.

The Supreme Court Rules governing operation of the Commission and standards of conduct are found in the Kansas Court Rules Annotated, Rules 602 through 627.

### § 11.25 Staff

The Clerk of the Supreme Court serves as secretary to the Commission under Rule 603. The secretary acts as custodian of the official files and records of the Commission and directs the daily operation of the office. A deputy clerk manages the operation of the office.

The Commission also retains an examiner, a member of the Kansas Bar who investigates complaints, presents evidence to the Commission, and participates in proceedings before the Supreme Court.

## **§ 11.26 Initiating a Complaint**

The Commission is charged with conducting an investigation when it receives a complaint indicating that a judge has failed to comply with the Code of Judicial Conduct or has a disability that seriously interferes with the performance of judicial duties. See Rule 609.

Any person may file a complaint with the Commission. Initial inquiries may be made by telephone, by letter, by email, or by visiting the Appellate Clerk's Office personally. All who inquire are given a copy of the Supreme Court Rules Relating to Judicial Conduct, a brochure about the Commission, and a complaint form. For complaint form, see § 12.39, *infra*. The complainant is asked to set out the facts and to state specifically how the complainant believes the judge has violated the Code of Judicial Conduct. Very often, the opportunity to voice the grievance is sufficient, and the Commission never receives a formal complaint. In any given year, one-fourth to one-third of the initial inquiries will result in a complaint being filed.

The remainder of the complaints filed come from individuals already familiar with the Commission's work or who have learned about the Commission from another source. Use of the standard complaint form is encouraged but not mandatory. If the complaint received is of a general nature, the Commission's secretary will request further specifics.

In addition to citizen complaints, the Commission may investigate matters of judicial misconduct on its own motion. Referrals are also made to the Commission through the Office of Judicial Administration and the Office of the Disciplinary Administrator.

Referrals are made through the Office of Judicial Administration on personnel matters involving sexual harassment. The Kansas Court Personnel Rules provide that, if upon investigation the Judicial Administrator finds probable cause to believe an incident of sexual harassment has occurred involving a judge, the Judicial Administrator will refer the matter to the Commission on Judicial Qualifications. See Kansas Court Personnel Rules 9.4(e).

The Disciplinary Administrator refers complaints to the Commission if investigation into attorney misconduct implicates a judge. There is a reciprocal sharing of information between the two offices.

## **§ 11.27 Commission Review and Investigation**

When written complaints are received, all are mailed to a panel of the Commission for review at its next meeting. In the interim, if it appears that a response from the judge would be helpful to the Commission, the secretary may request the judge to submit a voluntary response. With that additional information, the panel may be able to consider a complaint and reach a decision at the same meeting.

All complaints are placed on the agenda, and the panel determines whether they will be docketed or remain undocketed. A docketed complaint is given a number and a case file is established.

Undocketed complaints are those that facially do not state a violation of the Code; no further investigation is required.

Appealable matters constitute the majority of the undocketed complaints and arise from a public misconception of the Commission's function. The Commission does not function as an appellate court. Examples of appealable matters that are outside the Commission's jurisdiction include: matters involving the exercise of judicial discretion, particularly in domestic cases; disagreements with the judge's application of the law; and evidentiary or procedural matters, particularly in criminal cases.

Many complaints address the judge's demeanor, attitude, degree of attention, or alleged bias or prejudice. These are matters in which the secretary is likely to request a voluntary response from the judge and, based on that response, the panel in some instances determines there has clearly been no violation of the Code.

These undocketed complaints are dismissed with an appropriate letter to the complainant and to the judge, if the judge has been asked to respond to the complaint. Judges are not routinely notified of undocketed complaints.

Docketed complaints are those in which a panel feels that further investigation is warranted.

A panel has a number of investigative options once it docketed a complaint. Docketed complaints may be assigned to a subcommittee for review and report at the next meeting. These complaints may be referred to the Commission Examiner for investigation and report. Finally, the panel may ask for further information or records from the judge.

**PRACTICE NOTE:** A panel of the Commission, seeking further information from a judge, appreciates candor and will often consider in mitigation acceptance of responsibility and expression of regret.

Failure to cooperate in an investigation or use of dilatory tactics may be considered as a separate Code violation. See Rule 609.

### **§ 11.28 Disposition of Docketed Complaints**

After investigation of docketed complaints, the panel may choose a course of action short of filing formal proceedings.

A complaint may be dismissed after investigation. On docketing, there appeared to be some merit to the complaint, but after further investigation the complaint is found to be without merit.

A complaint may be dismissed after investigation with a letter of informal advice. The panel finds no violation in the instant complaint, but the judge is advised to avoid such situations in the future. Such letters have been issued when alcohol consumption appears problematic or when there is a strong suggestion of inappropriate personal comment. See Rule 610.

Letters of caution are issued when some infraction of the Code has occurred, but the infraction does not involve a significant violation or course of conduct sufficient to warrant further proceedings. Such letters may, for example, address isolated instances of delay, *ex parte* communication, or discourtesy to litigants or counsel. See Rule 610.

A cease and desist order may be issued when the panel finds a factually undisputed violation of the Code that represents a significant violation or violations representing a continuing course of conduct. Cease and desist orders may be either private or public. See Rule 611. The judge must agree to comply by accepting the order, or formal proceedings will be instituted. Examples of conduct resulting in cease and desist orders

include: activity on behalf of a political candidate, intervention with a fellow judge on behalf of family or friends, or *ex parte* communications.

Upon disposition of any docketed complaint, the judge and the complainant are notified of the Commission's action. Other interested persons may be notified within the Commission's discretion.

### **§ 11.29 Confidentiality**

The panel assigned a complaint conducts investigations, often contacting the judge involved as well as witnesses. The Commission and its staff are bound by a rule of confidentiality unless public disclosure is permitted by the Rules Relating to Judicial Conduct or by order of the Supreme Court. See Rule 607(a). One exception to the confidentiality rule exists if the panel gives written notice to the judge, prior to the judge's acceptance of a cease and desist order, that the order will be made public. Rule 611(a).

Other narrowly delineated exceptions to the rule of confidentiality exist. Rule 607(d)(3) provides a specific exception to the rule of confidentiality with regard to any information that the Commission or a panel considers relevant to current or future criminal prosecutions or ouster proceedings against a judge. Rule 607 further permits a waiver of confidentiality, in the Commission's or panel's discretion, to the Disciplinary Administrator, the Judges Assistance Committee, and to the Supreme Court Nominating Commission, the District Judicial Nominating Commissions, and the Governor with regard to nominees for judicial appointments.

The rule of confidentiality does not apply to the complainant or to the respondent. See Rule 607(c).

### **§ 11.30 Formal Proceedings**

During the investigation stage prior to the filing of the notice of formal proceedings, the judge is advised by letter that an investigation is underway. The judge then has the opportunity to present information to the examiner. Rule 609.

**PRACTICE NOTE:** A judge would be well-advised to be represented by counsel before responding to a 609 letter, which represents a step in the investigation beyond the panel's initial request for response.

If a panel institutes formal proceedings, specific charges stated in ordinary and concise language are submitted to the judge. The judge has an opportunity to answer, and a hearing date is set. Rule 611(b); Rule 613. The hearing on that notice of formal proceedings is conducted by the other panel, which has no knowledge of the investigation or prior deliberations.

**PRACTICE NOTE:** A prehearing conference may be held to further define issues or to facilitate stipulations. Scheduling issues such as dates for submission of witness and exhibit lists as well as a date of hearing may be discussed.

The hearing on a notice of formal proceedings is a public hearing on the record. The judge is entitled to be represented by counsel at all stages of the proceedings, including the investigative phase prior to the filing of the notice of formal proceedings if the judge so chooses. The rules of evidence applicable to civil cases apply at formal hearings. Procedural rulings are made by the chair and consented to by other members unless one or more calls for a vote. Any difference of opinion with the chair is controlled by a majority vote of those panel members present.

The Commission Examiner presents the case in support of the charges in the notice of formal proceedings. At least five members of the panel must be present when evidence is introduced. A vote of five members of the panel is required before a finding may be entered that any charges have been proven. The charges must be proven by clear and convincing evidence. Rule 620(a); *In re Rome*, 218 Kan. 198, Syl. ¶ 9, 542 P.2d 676 (1975).

If the panel finds the charges proven, it can admonish the judge, issue an order of cease and desist, or recommend to the Supreme Court the discipline or compulsory retirement of the judge. Discipline means public censure, suspension, or removal from office. Rule 620.

In all proceedings resulting in a recommendation to the Supreme Court for discipline or compulsory retirement, the panel is required to make written findings of fact, conclusions of law, and recommendations that shall be filed and docketed by the Clerk of the Supreme Court as a case. Rule 622. The respondent judge then has the opportunity to file written exceptions to the panel's report within 20 days after receipt of the clerk's citation directing a response. A judge who does not wish to

file exceptions may reserve the right to address the Supreme Court with respect to disposition of the case. Rule 623.

If exceptions are taken, a briefing schedule is set, and the rules of appellate procedure apply. After briefs are filed, argument is scheduled before the Supreme Court at which time respondent appears in person and, at respondent's discretion, by counsel. If exceptions are not taken, the panel's findings of fact and conclusions of law are conclusive and may not later be challenged by respondent. The matter is set for hearing before the Supreme Court, at which time the respondent appears in person and may be accompanied by counsel, but only for the limited purpose of making a statement with respect to the discipline to be imposed. In either case, the Supreme Court may adopt, amend, or reject the recommendations of the panel. Rule 623.

