

# **CHAPTER 11**

## **Disciplinary Proceedings**

### **I. ATTORNEY DISCIPLINE**

#### **§ 11.1 History**

The Rules Relating to Discipline of Attorneys, which provide substantive conduct standards and procedural rules in attorney discipline cases, can be found in the Rules adopted by the Kansas Supreme Court, beginning at Rule 200. In 1988, the 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 in Rule 240.

#### **§ 11.2 Jurisdiction**

Original actions before the 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, among other duties. See Rule 205.

### **§ 11.4 Kansas Board for Discipline of Attorneys**

The Kansas Board for Discipline of Attorneys (“Board”) consists of 20 attorneys appointed by the Supreme Court. The Board members serve staggered four-year terms. Board members may serve three consecutive four-year terms. See Rule 204(a)(1). 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 consistent with the rules of the Supreme Court. See Rule 204(f). Accordingly, the Board adopted the Internal Operating Rules of the Board. 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 Rules adopted by the Kansas Supreme Court, following Rule 239, and can be found on the Supreme Court’s website: [www.kscourts.org/Rules-Orders/Rules/Internal-Operating-Rules-of-the-Kansas-Board-for-D](http://www.kscourts.org/Rules-Orders/Rules/Internal-Operating-Rules-of-the-Kansas-Board-for-D).

### **§ 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 the general public. Typically, the disciplinary administrator receives approximately 900 to 1,000 complaints every year. Of those complaints, approximately three-fourths are handled informally with correspondence to the complainant and the complained-of attorney. Approximately one-fourth 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 for consumers of legal services and others considering filing a complaint. The information in the brochure can also be found on the disciplinary administrator's website:

<https://www.kscourts.org/Attorneys/Office-of-Disciplinary-Administration>.

The disciplinary administrator has made a six-page complaint form available for use by anyone wishing to file a complaint against an attorney. The form is designed so that the complainant can provide all the necessary information, *e.g.*, contact information, case number, court of jurisdiction, and basis of the complaint, in one form. 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 or by downloading it from the disciplinary administrator's website. See also § 12.43, *infra*.

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

Rule 210 requires all members of the bar to assist the disciplinary administrator. The duty includes reporting violations as well as aiding the Supreme Court, the Board, and the disciplinary administrator in investigations and prosecutions.

**PRACTICE NOTE:** Rule 210 contains no exception regarding 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 “through which aid is rendered to another lawyer who may be impaired in the practice of law.” See Rule 233. Violations by attorneys must be reported to the disciplinary administrator. Attorneys who find themselves charged with a felony or a class A or B misdemeanor or comparable offense have an affirmative duty to inform the disciplinary administrator in writing of the charge within 14 days of such charge being filed. Rule 219(c). Attorneys who are convicted of a felony crime or class A or B misdemeanor or comparable offense must inform the disciplinary administrator in writing within 14 days of the conviction. See Rule 219(d).

**PRACTICE NOTE:** “Conviction” includes “entry by a person into a diversion agreement or other comparable disposition for a felony or misdemeanor charge.” See Rule 219(a)(1).

When an attorney has knowledge that a judge has violated the rules governing judicial conduct in a manner that 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 Conduct by contacting the clerk of the appellate courts.

The disciplinary administrator sends a letter to the attorney accused of misconduct and requests a response to the initial complaint. The disciplinary administrator provides the attorney with 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 210; KRPC 8.1; *In re Sweet*, 314 Kan. 602, 610, 501 P.3d 890 (2022); *In re Lober*, 276 Kan. 633, 638-40, 78 P.3d 458 (2003); 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 investigators on staff at the disciplinary administrator’s

office. Finally, under 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 can become apparent that the lawyer is impaired because of an addiction or mental illness. To assist lawyers and protect the public, the Supreme Court, in 2002, created the Kansas Lawyers Assistance Program. See Rule 233. All records and information relating to the services provided by the Kansas Lawyers Assistance Program are confidential and not subject to discovery or subpoena. See Rule 233(i)(1). The reporting requirements of Rule 210 and KRPC 8.3 do not apply to lawyers working for or in conjunction with the Kansas Lawyers Assistance Program. See Rule 233(i)(3).

In addition to the Kansas Lawyers Assistance Program, some local bar associations also have their own lawyers' assistance committees. Lawyers working for these committees have similar responsibilities and immunities as lawyers working for or in conjunction with the Kansas Lawyers Assistance Program. See Rule 233(k). 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**

Throughout the formal disciplinary proceedings, an attorney accused of misconduct is referred to as the respondent. After an investigation, the investigative report and associated materials are forwarded by the disciplinary administrator to the review committee. See § 11.4, *supra*. The disciplinary administrator must provide a copy of the investigative report and evidence in the disciplinary administrator's possession to the respondent upon request. See Rule 237(d).

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 Board conduct a formal hearing. See Rule 211(a).

If the review committee determines that probable cause does not exist, the review committee will dismiss the case. See Rule 211(a)(1). The review committee may also dismiss a docketed complaint for lack of clear and convincing evidence of a violation and may direct the issuance of a letter of caution to the respondent. The review committee dismisses approximately 65% of all docketed complaints.

All complaints filed with the disciplinary administrator's office remain confidential during the investigation. See Rule 237(a). There are a few specific exceptions to this rule, such as disclosure of the disciplinary file to the Kansas Lawyers Assistance Program and certain government agencies for specified purposes. See Rule 237(e)(5).

**PRACTICE NOTE:** Confidentiality applies to all persons connected with the disciplinary process except the complainant and the respondent. See Rule 237(c); *Jarvis v. Drake*, 250 Kan. 645, 830 P.2d (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 237(e).

**PRACTICE NOTE:** Once the review committee has found probable cause to believe that a violation has occurred, the disciplinary administrator may disclose certain information to third parties. See Rule 237.

The disciplinary administrator or the respondent may request that the review committee reconsider a probable cause

determination. If the review committee chooses to reconsider and, 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:** Attorneys responding to a complaint should retain counsel familiar with disciplinary proceedings. Disciplinary proceedings involve special procedural rules with which many attorneys are unfamiliar. Objective and experienced counsel can assist respondents in considering and presenting their position throughout the disciplinary proceedings.

### **§ 11.8 Temporary Suspension**

On motion of the disciplinary administrator, the Supreme Court for good cause shown may temporarily suspend a respondent's license to practice law. See Rule 213. Good cause exists if the respondent fails to file an answer to the formal complaint or when "the respondent poses a substantial threat of harm to clients, the public, or the administration of justice." Rule 213(b). Typically, the disciplinary administrator reserves that remedy for extreme cases.

The Supreme Court will also temporarily suspend an attorney's license when the attorney has been convicted of a felony or a crime mandating registration as an offender. See Rule 219(g).

### **§ 11.9 Attorney Diversion Program**

In 2001, the Supreme Court created the attorney diversion program. Rule 212 governs the attorney diversion program. The program is an alternative to traditional disciplinary procedures. It is designed for attorneys who have not previously been disciplined and whose participation in the program can be expected to remedy the attorney's behavior. Attorneys will be disqualified from diversion if the conduct complained of involved "self-dealing, dishonesty, or a breach of fiduciary duty." See Rule 212(b).

In determining whether an attorney should be allowed to participate in the attorney diversion program, the review committee determines “whether participation in the program will prevent future misconduct and protect the public by improving the respondent’s professional competency and by providing educational, remedial, and rehabilitative programs for the respondent.” Rule 212(d)(2).

The diversion agreement should include provisions uniquely designed to correct the misconduct. The agreement may include provisions 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 review committee will determine whether to terminate the respondent’s participation in the diversion program. If the respondent’s participation in the program is terminated, traditional disciplinary proceedings will resume. See Rule 212(i). The diversion agreement is admissible evidence during a formal hearing under these circumstances and is conclusive evidence of the facts therein and the agreed violations.

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. See Rule 212(h).

### **§ 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 within 21 days may serve the disciplinary administrator with notice of the respondent’s demand for a formal hearing. See Rule 211(d). If the attorney accepts the informal admonition, the disciplinary administrator’s office and

the respondent will come to an agreement regarding whether the informal admonition will occur at an in-person meeting, by Zoom, by telephone, or by letter. Likely, the informal admonition will include a discussion of the misconduct, any remedial action already taken by the attorney, and any remedial action that needs to be taken.

If the attorney serves the disciplinary administrator with notice of demand for a formal hearing within 21 days, the Board Chair appoints a hearing panel and the case proceeds to a hearing under Rule 222. See Rule 211(d).

### **§ 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 demands a formal hearing instead of informal admonishment, a hearing panel is appointed. The chair of the Board appoints the hearing panel. Hearing panels consist of two members of the Board, one of whom serves as presiding officer of the hearing, and one member from attorneys at large. See Internal Operating Rules C.1. and C.2. 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:** 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.

The disciplinary administrator's office files a formal complaint in cases set for a formal hearing. The "facts in connection with the charge" must be "clearly set out in the complaint" so that the "respondent is put on notice as to what ethical violations may arise therefrom." *State v. Caenen*, 235 Kan. 451, 459, 681 P.2d 639 (1984); quoting *State v. Turner*, 217 Kan. 574, 579-80, 538 P.2d 966 (1975). The disciplinary administrator is required to serve a copy of the formal complaint and notice of the hearing on the respondent and hearing panel members no later than 45 days before the formal hearing. See Rule 215(a)(2). The formal

complaint and notice of hearing may be personally served on the respondent, sent by certified mail to the respondent's last registration address, or served on the respondent's counsel via personal service, first-class mail, or email. See Rule 215(a)(3). The respondent is required to file a written answer to the formal complaint within 21 days of service of the formal complaint. See Rule 215(b)(2).

The respondent and the respondent's counsel should carefully review the Rules Relating to the Discipline of Attorneys, the Internal Operating Rules of the Board, and the Kansas Rules of Professional Conduct to fully understand their rights and obligations.

**PRACTICE NOTE:** Rule 216(c) requires all pre-hearing motions, including requests to continue a hearing, be filed no later than 14 days before the formal hearing.

Except for the rules of evidence, the code of civil procedure does not apply to disciplinary proceedings. See Rule 222(d). At the hearing, witnesses are sworn and all proceedings are transcribed. See Rule 222(e)(2) and (e)(3).

The disciplinary administrator may introduce evidence that the respondent engaged in criminal activity. A certified copy of a judgment of criminal conviction is conclusive evidence of the commission of the crime, and a respondent may not present evidence that the respondent is not guilty of the crime. See Rule 219(f). Additionally, participation in a diversion program for a criminal offense is deemed, for disciplinary purposes, a conviction. See Rule 219(a)(1)(B).

A certified copy of a civil judgment that is based upon clear and convincing evidence is "conclusive evidence of the commission of the conduct that formed the basis of the judgment or ruling." Rule 220(c). A certified copy of a civil judgment, based upon less than clear and convincing evidence, is prima facie evidence of the underlying conduct. The respondent may put on evidence to disprove the findings. See Rule 220(b).

Following the submission of evidence, the hearing panel will file a report setting forth its findings of fact, conclusions of law, and recommendation for discipline. See Rule 226(a)(1). “Each finding of fact must be established by clear and convincing evidence.” See Rule 226(a)(1)(A). The hearing panel’s report also includes any relevant mitigating and aggravating circumstances. 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 of the other jurisdiction. The only issue before the hearing panel and the Supreme Court, in that situation, is the sanction to be imposed. See Rule 220(c). If the other jurisdiction’s decision is based on a standard less than clear and convincing evidence, a certified copy of the decision is *prima facie* evidence of the underlying conduct. The respondent may put on evidence to disprove the findings. See Rule 220(b).

The hearing panel may recommend disbarment, suspension for an indefinite period, suspension for a definite period, published or nonpublished censure, informal admonition, or any other form of discipline or conditions, including probation. See Rule 225(a) and § 11.12, *infra*.

If the hearing panel finds a violation of the rules and recommends that the respondent be informally admonished, the disciplinary administrator’s office or the respondent may file a written objection with the panel no later than 21 days after service of the final hearing report. See Rule 226(c). If the hearing panel recommends no discipline or if the hearing panel dismisses the complaint, the disciplinary administrator may file a written objection with the panel no later than 21 days after service of the final hearing report. See Rule 226(d). If a written objection is timely filed pursuant to Rule 226(c) or (d), the matter is docketed with the Supreme Court and proceeds according to Rule 228.

If the hearing panel recommends that the attorney be disbarred, suspended, placed on probation, or censured, the disciplinary administrator will prepare and file the case and transfer the record to the clerk of the appellate courts. See Rule 226(b). Nothing may be filed with the clerk of the appellate courts until after the case is docketed. But see § 11.8, *supra* (temporary suspension).

### **§ 11.12 Probation**

If the respondent intends to request probation, the respondent must “file and serve each hearing panel member and the disciplinary administrator with a copy of a probation plan at least 14 days before the hearing on the formal complaint.” Rule 227(a). The hearing panel is prohibited from recommending that the respondent be placed on probation unless each of the following conditions is present:

- The respondent filed and served each member of the hearing panel and disciplinary administrator with a copy of the probation plan at least 14 days prior to the hearing.
- The respondent put the plan of probation into effect by establishing compliance with the conditions of the probation plan at least 14 days prior to the hearing.
- The misconduct can be corrected by probation.
- Placing the respondent on probation is in the best interests of the legal profession and the public. See Rule 227(d).

The probation rule also sets forth a specific procedure to be followed in the event the respondent successfully completes or fails to comply with the terms and conditions of probation. See Rule 227(g) and (i).

### **§ 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, employ the Standards as guidelines for imposing lawyer discipline in individual cases. The disciplinary administrator and the respondent may refer to the Standards when recommending discipline to be imposed. 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 Standards suggest that the hearing panel, in making a recommendation regarding the imposition of discipline, and the Supreme Court, in imposing discipline, 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? See ABA Standards for Imposing Lawyer Sanctions, 3.0.

Aggravating circumstances are "any considerations or factors that may justify an increase in the degree of discipline to be imposed." See ABA Standards for Imposing Lawyer Sanctions, 9.21. 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 agency;

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- 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. ABA Standards for Imposing Lawyer Sanctions, 9.22.

Mitigating circumstances are “any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” See ABA Standards for Imposing Lawyer Sanctions, 9.31. 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 cooperation during the hearing and by the 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 dependency 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; and
- Remoteness of prior offenses.

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.

Recognizing the importance of consistency in imposing sanctions, the Supreme Court and the Board have cited the Standards with approval in their decisions and reports, respectively. See *In re Buckner*, 308 Kan. 427, 451, 421 P.3d 226 (2018); *In re Ware*, 279 Kan. 884, 892-93, 112 P.3d 155 (2005); *In re Price*, 241 Kan. 836, 837, 739 P.2d 938 (1987)

#### **§ 11.14 Summary Submission**

As an alternative to a formal hearing, the disciplinary administrator and respondent may decide to resolve the Board proceeding by summary submission. To do so, the parties must enter into a written agreement that contains:

- an admission that the respondent engaged in misconduct;
- a stipulation to the contents of the record, the findings of fact, the conclusions of law, including each violation of the Kansas Rules of Professional

Conduct, the Rules Relating to Discipline of Attorneys, or the attorney's oath of office, and any applicable aggravating and mitigating factors;

- a recommendation for discipline;
- a waiver of the hearing on the formal complaint; and
- a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken. See Rule 223(b).

The agreement for summary submission must be entered into at least 30 days prior to the formal hearing. The complainant is provided notice of the agreement and may provide the complainant's position on the agreement within 21 days. See Rule 223(c)-(d).

The agreement is then forwarded to the Chair of the Board for Discipline of Attorneys for consideration. If the Board Chair approves the agreement, the matter proceeds to the Supreme Court pursuant to Rule 228. If the Board Chair rejects the agreement, the case proceeds to a formal hearing. See Rule 223(e).

The agreement is advisory only and the Supreme Court retains the ability to reach its own conclusions and impose discipline greater or lesser than the agreed recommendation. See Rule 223(f).

### **§ 11.15 Disabled Attorneys**

An attorney is "disabled" under Rule 234 if the attorney is "unable to continue the practice of law due to a mental or physical limitation." Rule 234(a). If an attorney wishes to voluntarily register as a disabled attorney, and there are no pending disciplinary complaints against the attorney, the attorney may do so by submitting evidence that the attorney is disabled to the disciplinary administrator. See Rule 234(d). If there is a complaint pending against an attorney who wishes to transfer to disabled status, the respondent must stop practicing law, serve evidence of the disability on the disciplinary administrator, and either file a motion with the Supreme Court or request that the

disciplinary administrator file a motion to transfer the attorney to disabled status. See Rule 234(e). An attorney whose license is transferred to disabled status may not engage in the practice of law until the attorney's license is reinstated by the Supreme Court. See Rule 234(g).

The disciplinary administrator may file a motion with the Supreme Court requesting an order requiring that an attorney be examined by a qualified medical expert. The attorney may file a response to this motion within 14 days. If the Supreme Court grants the motion, the attorney must submit to examination. Refusal or failure to submit to examination will result in the Supreme Court issuing an order temporarily suspending the attorney's license to practice law. See Rule 234(b).

While investigation of a docketed disciplinary complaint is pending, the disciplinary administrator may file a motion with the Supreme Court to transfer a respondent to disabled status. The Supreme Court may appoint counsel to represent the respondent and the disciplinary administrator must file with the Supreme Court and serve the respondent with a report obtained pursuant to Rule 234(b). The disciplinary administrator must prove the respondent is disabled by clear and convincing evidence before the Supreme Court will transfer the attorney to disabled status. See Rule 234(e)(2).

After an attorney has been transferred to disabled inactive status, if it appears that the attorney has disappeared or died, if affairs of an attorney's clients are being neglected, or if a disbarred or suspended attorney has not complied with Rule 231, the chief judge of the judicial district in which the attorney practiced may appoint an attorney to inventory the attorney's client files, access the attorney's trust account, and take such action as may be necessary to protect the interests of the attorney and the attorney's clients. See Rule 235(a).

**PRACTICE NOTE:** Participants in disciplinary proceedings who file a complaint or report, provide testimony, or act within the scope of their duties under the Rules Relating to Discipline of Attorneys are entitled to absolute immunity. See Rule 238 and *Jarvis v. Drake*, 250 Kan. 645, 830 P.2d 23 (1992).

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

At the time a case is docketed with the Supreme Court, the clerk of the appellate courts notifies the respondent by certified mail. Within 21 days, the respondent must file exceptions to the report or a statement that the respondent will not file an exception. See Rule 228(e). If the respondent files no exception or a statement that the respondent will not file an exception, all findings of fact and conclusions of law are deemed admitted. See Rule 228(g)(1). The same requirements apply to the disciplinary administrator. See Rule 228(e) and (g). The disciplinary administrator and the respondent may contest the discipline recommended by the hearing panel without filing an exception. See Rule 228(f)(1).

If an exception is filed, the clerk of the appellate courts provides a copy of the hearing transcript to the respondent. The party who filed an exception has 30 days from service of the transcript to file a brief. The responding party has 30 days from the service of the opening brief to file a response brief, and the party who filed the opening brief then has 14 days to file a reply brief. See Rule 228(h).

In addition to the Rules Relating to Discipline of Attorneys, all Supreme Court rules relating to civil appellate practice apply to original disciplinary proceedings. Failure of a party to file a brief in a timely manner is considered admission of the findings of fact and conclusions of law in the final hearing report. See Rule 228(h)(2)(E). When the filing of briefs is complete, the matter is set for oral argument. See Rule 228(i).

**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 offered for admission into evidence, and the hearing panel's final hearing report or the parties' summary submission agreement. See Rule 228(b) and (c). 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.

### **§ 11.17 Scope of Review and Standard of Review**

Appellate briefs must contain 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).

### **§ 11.18 Oral Argument**

The parties are each 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. 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.

Regardless of whether the disciplinary administrator or the respondent files exceptions to the final hearing report, the disciplinary administrator argues first because the disciplinary

administrator has the burden of proof. Additionally, the disciplinary administrator may reserve rebuttal time.

While oral argument before the Supreme Court by competent counsel for the respondent is most effective, the respondent should personally address the Court to establish that the respondent has taken responsibility for the misconduct.

**PRACTICE NOTE:** The hearing panel is the fact finder and the facts found by the hearing panel have rarely been set aside by the Supreme Court. Thus, the respondent is well-advised to focus on the appropriate discipline to be imposed rather than to hope for a factual substitution by the Supreme Court.

As to the level of discipline to be imposed, the Supreme Court is not bound by the recommendation of the hearing panel. See Rule 226(a)(1)(D); *In re Hodge*, 307 Kan. 170, 230, 407 P.3d 613 (2017); and *In re Gershater*, 270 Kan. 620, 625, 17 P.3d 929 (2001).

The sanctions recommended by the hearing panel and the disciplinary administrator are only recommendations. The parties are free to argue the appropriate discipline even when no exceptions have been taken. In arguing for a lesser sanction, the respondent should discuss any compelling mitigating circumstances.

When arguing for a particular sanction, the respondent should be aware that the Court has held that “[c]omparison of past sanctions imposed in disciplinary cases is of little guidance. Each case is evaluated individually considering its particular facts and circumstances and in light of protecting the public.” See *In re Jones*, 252 Kan. 236, 843 P.2d 709 (1992).

### **§ 11.19 Supreme Court Opinions**

Discipline ordered by the Supreme Court is effective immediately upon the filing of the order with the clerk of the appellate courts unless otherwise ordered by the Supreme Court. See Rule 228(j). The respondent may file a motion for rehearing

or modification under Rule 7.06 within 21 days. The filing of a motion for rehearing or modification does not stay the effect of the order unless the Supreme Court rules otherwise. See Rule 228(k).

The final judgment of the Supreme Court cannot be challenged 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 regarding a Kansas attorney disciplinary case.

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

Typically, the Supreme Court's opinion imposing discipline on an attorney is published in the *Kansas Reports*. However, Rule 225(a)(5) 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 chief judge of the district where the attorney resides and the clerks of all other state and federal courts in which the respondent is known to be licensed. See Rule 231(c). Any discipline imposed by the Supreme Court is also reported to the National Discipline Data Bank for dissemination to other jurisdictions.

Upon suspension or disbarment, within 14 days of the order, the attorney must notify each client in writing of the attorney's inability to continue representation or to undertake further representation. Additionally, the attorney must inform all clients of their need to retain other counsel. Within 14 days the attorney must also provide written notification to opposing counsel and to all courts and administrative bodies before whom the attorney is counsel of record in pending proceedings of the inability to proceed in the matter(s). Appropriate notices of withdrawal as counsel of record must also be filed within 14 days. See Rule 231(a).

Costs of the disciplinary proceedings, as certified by the disciplinary administrator, may be assessed by the Supreme Court against a respondent. See Rule 229.

### **§ 11.20 Additional Procedural Rules**

Rule 239 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 (b) provides that any deviation from the rules is not a defense to the disciplinary proceedings unless it causes prejudice to the respondent.

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

Under Rule 230(b), an attorney facing charges of ethical misconduct may voluntarily surrender the attorney's license to practice law. When a respondent in a pending disciplinary matter voluntarily surrenders, the Supreme Court issues an order of disbarment and the attorney's name is stricken from the roll of licensed Kansas attorneys. See Rule 230(b)(1) and *In re Rock*, 279 Kan. 257, 262-63, 105 P.3d 1290 (2005). Any pending disciplinary proceeding terminates, but the disciplinary administrator may direct the completion of a pending investigation to preserve evidence. See Rule 230(b)(1)(C). Thereafter, the clerk of the appellate courts notifies the chief judge of the district court where the attorney resides and other jurisdictions where the attorney is licensed as in other cases of suspension or disbarment. See Rule 231(c).

An example of a surrender letter appears at § 12.44, *infra*. Along with the surrender letter, the attorney must send to the clerk of the appellate courts the attorney's original bar certificate and the most recent annual registration card. See Rule 230(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 230(c).

## § 11.22 Reinstatement

Five years after the date of disbarment, three years after the date of an indefinite suspension, or after a definite period of suspension has passed, 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, along with a \$1,250 filing fee, and serve the disciplinary administrator with a copy of the petition. See Rule 232(b)(2).

The petition must contain evidence that the attorney is eligible to petition for reinstatement, has complied with Rule 231 and Supreme Court orders, has paid costs assessed under Rule 229, and should be reinstated to the practice of law. See Rule 232(b)(1). 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 has elapsed since the discipline was imposed, considering the gravity of the misconduct. If insufficient time has elapsed, the Court will dismiss the petition. See Rule 232(e)(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 Board. See Rule 232(e)(1)(B) and (e)(2).

The petitioner must establish that the factors in Rule 232(e)(4) weigh in favor of reinstatement and that the petitioner is fit to practice law by clear and convincing evidence. See Rule 232(e)(3).

**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. See Rule 232(g)(4)(A). At that point, or if the report recommends approval of the petition, the matter stands submitted to the Supreme Court. See Rule 232(g)(3) and (4)(C). No briefs or oral arguments are permitted unless requested by the Supreme Court. See Rule 232(g)(4)(D). 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 232(h).

### **§ 11.23 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 because 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 the disciplinary administrator as a condition precedent to filing a claim. See Rule 241. Information about the fund and the claim form is available on the disciplinary administrator's webpage.

## **II. JUDICIAL DISCIPLINE**

### **§ 11.24 History**

Under authority granted by Article 3, §§ 1 and 15 of the Kansas Constitution, the Commission on Judicial Conduct (formerly known as the Commission on Judicial Qualifications) was created on January 1, 1974. The Commission is subject to the Supreme Court's direction and approval and assists the Court in the exercise of its 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. See Rule 602(c). Each panel meets every other month, alternating with the other panel. The full Commission meets in June and upon call of the chair. See Rule 602(d).

### **§ 11.25 Jurisdiction/Governing Rules**

The Commission's jurisdiction extends to approximately 500 judicial positions including Supreme Court justices, Court of Appeals judges, district court judges, 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 the operation of the Commission and standards of conduct are found in the Kansas Court Rules Annotated, Rules 602 through 622, which were updated on May 1, 2019.

### **§ 11.26 Staff**

The Clerk of the Appellate Courts serves as secretary to the Commission under Rule 605. The secretary is the custodian of the official files and records of the Commission and directs the operation of the office. The administrator for Judicial Conduct manages the daily operation of the office.

The Commission also retains an examiner, a member of the Kansas Bar who acts in a dual capacity by assisting an Inquiry Panel, when requested, in investigating a complaint and by prosecuting a formal complaint before a Hearing Panel, including any judicial discipline proceedings before the Supreme Court. See Rule 606.

### **§ 11.27 Initiating a Complaint**

Any person may file a complaint with the Commission concerning the actions of a judge. Initial inquiries may be made and complaint packets obtained by telephone, letter, email, by visiting the Appellate Clerk's Office personally, or by visiting the Kansas Judicial Branch website. Under Rule 607, a complaint must be submitted on a form provided by the Commission, signed by the complainant, and contain a complaint against only one judge. The complaint should identify the conduct or action believed to be improper and provide specific details and facts. Very often, the opportunity to voice the grievance is sufficient and the Commission never receives a formal complaint.

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 Conduct. See Kansas Court Personnel Rules 9.1(b).

The Disciplinary Administrator refers complaints to the Commission if investigation into attorney misconduct implicates a judge.

### **§ 11.28 Complaint Receipt; Initial Review**

Under Rule 607, the secretary of the Commission will assign each complaint a number used to identify the complaint at all steps in the Commission process. The secretary will send a written acknowledgment of receipt to the complainant and make an initial review of the complaint. A complaint that is illegible or does not conform to the requirements of Rule 607(a) will

be returned. If the complaint fails to state a violation of the Code of Judicial Conduct or does not state a matter within the Commission's jurisdiction, the complainant will be notified. The secretary's decision will be reviewed by the next sitting Inquiry Panel. Rule 607(d). Any complaint not resolved by the initial review process will be assigned to an Inquiry Panel.

**PRACTICE NOTE:** Appealable matters constitute the majority of the complaints received by the Commission 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.

### **§ 11.29 Procedures of an Inquiry Panel**

A complaint assigned to an Inquiry Panel by the secretary will be considered at its next monthly meeting to determine whether the complaint states sufficient credible facts that cause a reasonable person to believe a violation of the Code of Judicial Conduct has occurred. Under Rule 613, an Inquiry Panel may obtain additional documents, direct the secretary to request a response from the judge, refer the matter to the Examiner, or stay a complaint.

After investigation, if an Inquiry Panel finds no violation it may dismiss the complaint or dismiss the complaint and issue a letter of informal advice to the judge. Rule 614(b)(1). If an Inquiry Panel finds a violation of the Judicial Code, it may issue a letter of caution to the judge; issue a cease-and-desist order as set forth in Rule 614(c); or refer the matter for formal proceedings. Rule 614(b)(2).

The complainant will be notified of the Inquiry Panel's action upon disposition of a complaint. If there is a finding of a violation,

the judge or other interested persons will be notified. If there is a finding of no violation, the judge or other interested persons may be notified within the Inquiry Panel's discretion. Rule 607(h).

### **§ 11.30 Confidentiality**

The Inquiry Panel assigned a complaint will conduct an investigation, 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 611(a). An exception to the confidentiality rule exists if the panel issues a public cease and desist order. Rule 614(c).

Other narrowly delineated exceptions to the rule of confidentiality exist. Rule 611(c)(3) provides a specific exception to the rule of confidentiality regarding any information that the Commission or a panel considers relevant to current or future criminal prosecutions or ouster proceedings against a judge. Rule 611(d) further permits a waiver of confidentiality in the Commission's or panel's discretion to the Disciplinary Administrator and the Judges Assistance Committee. Rule 611(e) permits a waiver of confidentiality, upon written request, to disclose complaint dispositions that find a violation of the Judicial Code to the Supreme Court Nominating Commission, District Court Nominating Commissions, and the Governor regarding nominees for judicial appointments.

The rule of confidentiality does not prohibit the complainant or the judge from disclosing the existence of a complaint or from disclosing any documents or correspondence filed by, served on, or provided to that person. See Rule 611(b)(3).

### **§ 11.31 Formal Proceedings**

If an Inquiry Panel concludes that formal proceedings should be instituted, the examiner is directed to prepare a formal complaint. After the formal complaint is approved by the Inquiry Panel and served on all parties, all matters relating to the formal proceedings are referred to the Hearing Panel. Rule 615. The Hearing Panel proceeding is not a continuation of the Inquiry

Panel's process, but instead is a new separate proceeding based on the formal complaint. The judge has an opportunity to answer. A prehearing conference is set to conduct preliminary matters and to establish the time, place, and duration of the formal hearing. Rule 616(e). At the formal hearing, the judge has the right to defend against the charges and to be represented by a lawyer. See Rule 617.

The hearing on a notice of formal proceedings is a public hearing on the record. See Rule 611(c). 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. Rule 618(e). 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 examiner for the Commission presents the case in support of the charges in the formal complaint. At least five members of the panel must be present when evidence is introduced. Rule 618. A vote of four 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 619(b); Rule 619A(a); *In re Rome*, 218 Kan. 198, Syl. ¶ 9, 542 P.2d 676 (1975).

If the Hearing Panel finds the charges have been proven, it must make one of the following dispositions: admonishment, issue a cease-and-desist order; recommend to the Supreme Court a discipline of public censure, suspension, or removal; or recommend to the Supreme Court compulsory retirement. Rule 619(b).

If the Hearing Panel finds the charges have not been proven or its disposition is admonishment or issuance of a cease-and-desist order, the proceedings will terminate and the examiner, the respondent or the respondent's attorney, and any complainant will be notified. Rule 619(c).

In all proceedings resulting in a recommendation to the Supreme Court for discipline or compulsory retirement, a Hearing Panel must submit written findings of fact, conclusions of law, and the basis for the recommendation. Rule 619(f). The written findings will be filed and docketed by the Clerk of the Supreme Court as a case. Rule 620. The respondent can file written exceptions to the panel's report within 20 days after receipt of the clerk's citation directing a response. A respondent who does not wish to file exceptions may reserve the right to address the Supreme Court with respect to the disposition of the case. Rule 620.

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.

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 the respondent must appear in person and may be accompanied by counsel.

In its resolution of the disciplinary matter, the Supreme Court may refer the matter back to a Hearing Panel for any further proceedings as directed by the Court; reject the Hearing Panel's recommendations; dismiss the proceedings; order discipline; order compulsory retirement; or make any other disposition as justice requires. Rule 620.