

Anatomy of a Complaint With New Rules

Wyandotte County Bar Association

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Here are some highlights of the new/amended rules which became effective January 1, 2021:

Order. We have attempted to place the rules in an order which directly correlates to how an attorney disciplinary complaint proceeds. As a result, many rules were moved and, as a result, renumbered.

Separate Rules. Many of the current rules include provisions that related to varied subject matters. The new rules each subject is separated into a separate rule, i.e., temporary suspension, diversion, probation, etc.

Definitions. Rule 201 includes an expanded definitions section. The definition section was designed to further clarify the changes.

Jurisdiction. Rule 202 makes it clear that all individuals engaged in the practice of law in Kansas are subject to the Rules Relating to Discipline of Attorneys. For example, Rule 202 states that, in addition to attorneys admitted to practice law in Kansas, the rules apply to out-of-state attorneys providing legal services under KRPC 5.5, attorneys admitted to practice law *pro hac vice*, attorneys authorized to provide *pro bono* or low-cost legal services under Rule 712B, etc.

Attorney Registration. Because Rule 206 (attorney registration) was recently amended, only minimal changes were made to this rule.

Existing Practices. Many of the new/amended rules, including Rules 208 (initial complaint or report of misconduct), 209 (investigation of docketed complaint), and 211 (review committee disposition), include provisions that codify existing practices.

Diversion. The Supreme Court created the Attorney Diversion Program, by rule, in 2001. Rule 212 retains the structure of the program, eliminates the creation language, and clarifies the process.

Emergency Temporary Suspensions. Rule 213 provides clarity on the procedure for seeking the temporary suspension of an attorney on an emergency basis.

Service. Rule 215 allows the disciplinary administrator and the respondent to file and serve certain documents by email. The pleadings – the formal complaint and the answer – may not be served exclusively by email.

Subpoenas. Rule 217 clarifies how and when the parties may issue or obtain subpoenas. The former rule included a provision, which to our knowledge was never used, where a party could seek to obtain a subpoena in a disciplinary case from a district court. The new/amended rule provides a procedure for respondents to obtain subpoenas from hearing panels. Also, subsection (d) is a provision which would allow the disciplinary administrator's office to assist disciplinary authorities in other jurisdictions with obtaining a subpoena. Currently, more than 30 jurisdictions have a reciprocal subpoena rule.

Depositions. Rule 218 expands the use of depositions in attorney disciplinary cases. It provides that a deposition may be taken by agreement of the parties. There are some cases, cases which involve Kansas attorneys located in other states, where this provision may prove to be particularly helpful and cost-saving.

Summary Submission. Rule 223 (summary submission) would allow the parties to agree to the record to present to the Court and forego a hearing before a hearing panel of the board. The rule does require review and approval by the chair of the board. This rule would be a great tool to speed up the process in cases where all participants agree to the contents of the record, the findings of fact, the conclusions of law, and the recommendation for discipline.

Expert Witness. The former disciplinary rules do not address the use of expert witnesses. From time to time, the parties seek to present testimony from expert witnesses. Rule 224 includes procedures to follow when a party seeks to present expert testimony. We hope that this rule will provide a consistent approach for the use of expert witnesses in disciplinary cases.

Disabled Status. The rule regarding transfer to disabled status has undergone significant changes. The changes are designed to clarify the procedures necessary to transfer to disabled status (1) automatically following a court order, (2) when an attorney disciplinary complaint is pending, and (3) when an attorney disciplinary complaint is not pending.

Deadlines. A number of the rules provide deadlines for the disciplinary administrator and the respondent during disciplinary proceedings where none existed before. We are hopeful that clear deadlines will promote an efficient prehearing process.

- Rule 211 (review committee disposition) provides 21 days for a respondent to reject an informal admonition and request a formal hearing. Former Rule 210 did not include a deadline for rejecting an informal admonition.
- Rule 213 (temporary suspension) provides 14 days for a respondent to respond to a motion for a temporary suspension. Former Rule 203(b) did not contain a provision for a response by a respondent.
- Rule 215 (pleadings) requires the disciplinary administrator's office to file a formal complaint at least 45 days prior to a hearing. Previously, former Rule 211(b) required that a respondent file an answer within 20 days of the filing of the formal complaint without any provision for the timing of the filing of the formal complaint. This provision codifies existing practice.
- Rule 216 (prehearing procedure) incorporates and clarifies a provision of the Internal Operating Rules of the Kansas Board for Discipline of Attorneys, requiring prehearing motions to be filed at least 14 days prior to a hearing. *See* Int. Op. R. D.1. Rule 216 also provides that responses to motions must be filed at least seven days prior to a hearing. Previously, there is no time requirement for responses to prehearing motions.
- Rule 217 (subpoena) sets forth deadlines for requesting and serving subpoenas. Additionally, Rule 217 provides for the timing of motions to quash. Former Rule 216 did not contain similar requirements.
- Rule 221 (discipline imposed in another jurisdiction) requires respondents to notify the disciplinary administrator's office within 14 days of the imposition of discipline in another jurisdiction. Previously, attorneys had a duty to report, but there was no time requirement associated with the duty. *See* KRPC 8.3(a).
- Rule 224 (witnesses and exhibits) creates deadlines for providing witness lists, exhibits lists, and exhibits, prior to the hearing. Rule 224 also creates deadlines for disclosing expert witnesses. Previously, the parties were required to mark and present exhibits to the hearing panel members in advance of the hearing, but the respondents rarely did. *See* Int. Op. R. D.11.
- Rule 227 (probation) includes a requirement that a respondent seeking probation must file an affidavit with the Court describing compliance 14 days prior to oral argument. Previously, former Rule 211(g)(5) required a respondent to file an affidavit, but it did not provide a deadline for doing so. Rule 227 also shortens the time limit for the disciplinary administrator's office to respond to a motion for discharge from probation from 20 days to seven days. *See* Rule 227(g)(2) and Former Rule 211(g)(7).

- Rule 229 (costs) establishes a deadline for respondents to pay the costs of the action, when imposed. Under the proposed rule, respondents are required to pay the costs within 30 days. Former Rule 224(c) did not include a time limit.
- Rule 231 (notice to clients, opposing counsel, and courts following suspension or disbarment) requires respondents to certify that proper notice has been provided within 30 days of an order of suspension or disbarment. The former rule, Rule 218(b), required a respondent to make that showing prior to filing a request for reinstatement. We are hopeful that this change will result in more respondents complying with the requirement. Rule 231 also establishes a time frame for the clerk of the appellate courts to notify certain courts of suspension and disbarment orders. *See* Rule 231(c).
- Rule 232 (reinstatement following suspension or disbarment) includes a provision for the disciplinary administrator's office to respond to a petition for reinstatement within seven days. This codifies existing practice.
- Rule 234 (transfer to disabled status) includes timing provisions when a transfer to disabled status matter arises. Previously, there were no timing provisions in the rule.
- Rule 235 (appointment of counsel to protect client interests) creates a time frame for a district court judge to provide the disciplinary administrator's office with a copy of an order appointing an attorney. While the former practice was for district court judges to provide the disciplinary administrator's office with a copy of the order, former Rule 221 did not contain such a provision.