

What's Trending in Legal Discipline? Transparency

By Sam Phillips

On July 1, 2012, the Missouri attorney discipline system will follow the lead of 40 other states and other Missouri licensed professions when Supreme Court Rule 5.31 increases transparency in the attorney discipline process. Chief Justice Richard B. Teitelman explained: “...[W]e realize it is important for the public to know if an attorney is facing disciplinary action, even before the case might get to this Court.”

Under Current Rule 5.31 (effective until July 1, 2012), most Missouri attorney discipline cases are closed throughout the complaint, investigation, probable cause determination, charging, discovery and hearing processes. Currently, discipline cases become public only when filed at the Supreme Court of Missouri. These cases will soon be public at an earlier stage, in line with most other states' attorney discipline systems and the administrative systems for other licensed professionals in Missouri. The process will remain confidential through the complaint, investigation, probable cause determination, and charging stages, but will become public upon an Answer to the charges being filed. Hearings will no longer be closed to the public. By comparison, complaints and proceedings of the other Missouri professional licensing boards are open under one or more of the following circumstances: (i) when the licensee has consented in writing to the disclosure, (ii) when the board elects in its discretion to release the materials to the licensee or to another law enforcement agency, and (iii) when a formal complaint is filed against the licensee with the Missouri Administrative Hearing Commission.

“I’m Sorry, But We Cannot Answer Your Question”

For many years, officials in the discipline system have been required to explain to complainants, lawyers, judges, the media and the public that Rule 5.31 prohibits the disclosure of the very existence of discipline matters, even after

the OCDC has investigated, found probable cause that a violation has occurred, and filed charges. Concerns about that led the ABA Center for Professional Responsibility to recommend increased transparency in Missouri. Relying heavily on the Model Rules of Disciplinary Enforcement, the ABA wrote:

The public’s confidence in the lawyer discipline system is vital. It relates directly to the goal of public protection, promotes the integrity of the profession and helps ensure that regulation of the legal profession remains with the judiciary. Conducting public disciplinary hearings, after a determination of probable cause has been made and the respondent is served with formal charges, enhances the public’s trust in the disciplinary process.

The Office of Chief Disciplinary Counsel (OCDC) concurred with the ABA’s recommendation. The CDC believes that the public trusts a profession that openly addresses allegations of misconduct by its members, recognizing that all professions include people who struggle to meet the high standards expected of them. Put another way, when the process is closed, the public may wonder whether cronyism prevails. “The Missouri Supreme Court, like most state high courts, has consistently held that the twin purposes of attorney discipline are to protect the public and to maintain the integrity of the profession. The adoption of this new rule is great news because it significantly enhances the integrity of the legal profession,” says Alan Pratzel, Missouri’s chief disciplinary counsel.

In early 2011, the Court asked the Supreme Court Advisory Committee to consider and draft a rule to address the issue. The Advisory Committee formed a group of its own members and lawyers involved in the system to draft the rule. That Public Access Committee consisted of: Doreen D. Dodson (chair and Advisory Committee vice-chair), Susan Ford Robertson (Advisory Committee member), Kendall R. Garten (disciplinary hearing officer), Tom Casey (Missouri Bar representative

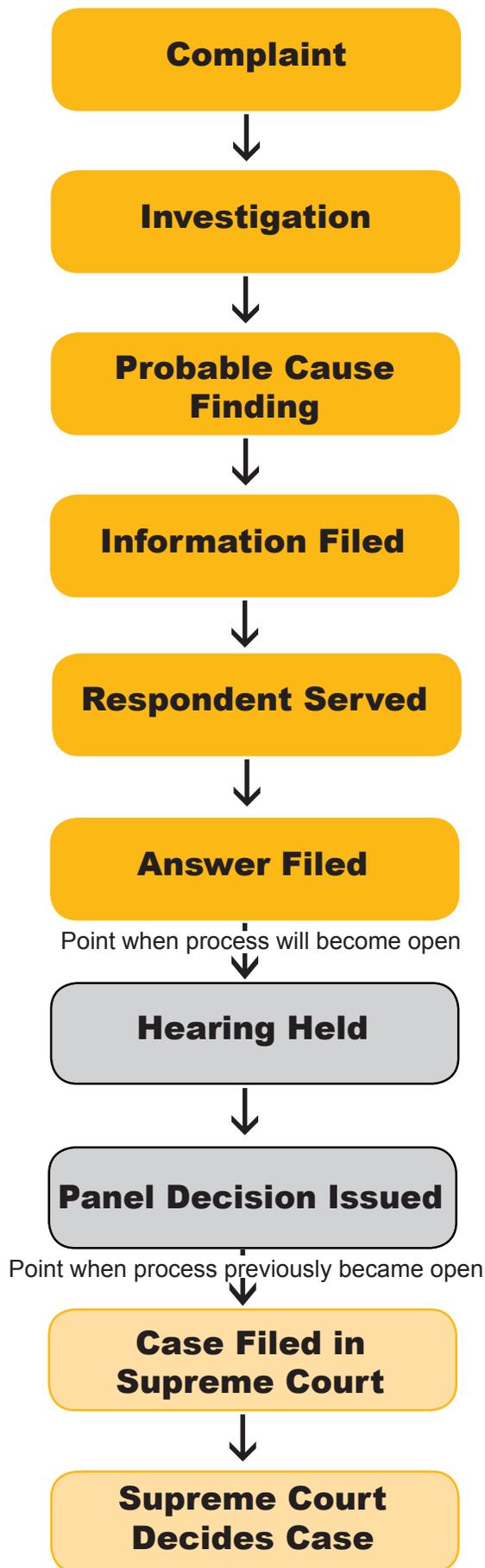
and disciplinary hearing officer), John Robert “J.B.” Lasater (Missouri Bar representative), Maurice Graham (respondents’ counsel), Alan Pratzel (Chief Disciplinary Counsel), Sam Phillips (Deputy Chief Disciplinary Counsel), and Sara Rittman (Legal Ethics Counsel).

That committee studied the rules of the jurisdictions with systems more open than Missouri’s. They also studied the relative transparency of the administrative discipline processes applicable to other licensed professionals in Missouri. They studied Missouri’s unique attorney disciplinary structure – to ensure that any revision would fit within that structure. Serious debate about many issues took place. Some expressed concerns heard from other lawyers who wondered whether airing the profession’s dirty laundry might harm, instead of enhance, the profession’s integrity. Some were concerned about complainants’ privacy. Special consideration was given to concerns of disclosure of financial and other personal identifying information. Finally, the committee and the Advisory Committee agreed on a draft. That draft rule was presented to The Missouri Bar’s Board of Governors, which, after more debate, agreed to support the draft with slight changes. Those changes were made, and the draft was submitted to the Court. The Court reorganized provisions within the draft and adopted new Rule 5.31 on March 29, 2012, effective July 1, 2012.

“That is Why We Are Opening the Disciplinary Process at a Much Earlier Stage”

The Supreme Court acknowledged the public’s need for up-to-date information in adopting new Rule 5.31:

“Citizens have a right to expect a high level of professional service from their lawyers, and when lawyers fail to meet the ethical standards set out in this Court’s rules, they are subject to disciplinary action,” Missouri Chief Justice Richard B. Teitelman said. “Disciplinary proceedings in this Court always have been open, and for six years we have published online this Court’s disciplinary orders and opinions. But we realize it is important for the public to know if an attorney is facing disciplinary action, even before the case might get to this Court. That is why we are opening the disciplinary process up at a much earlier stage, at the point when the chief disciplinary counsel has found cause to believe an attorney has violated the rules of ethics and, therefore, begins the process of seeking discipline against that attorney’s license to practice law in Missouri.”



ETHICS

What Else is Trending?

Several questions about the new rule have already arisen: Some have asked whether old admonitions will become public. Admonitions accepted before July 1, 2012 will be available to the public for only three years. Admonitions accepted after June 30, 2012 will be permanent public records under the new rule. Media representatives asked whether disciplinary hearing dates will be publicly posted. Others wonder whether discipline case dispositions will be posted other than at the Supreme Court's website. The OCDC and others will be considering options for compliance with the rule's permissive dissemination of the public records.



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KEY CHANGES

- Admonitions will be public; previously, admonitions were available to the public for three years, and only available to discipline authorities after that three-year period for evidence of prior misconduct in new disciplinary complaints.
- Discipline cases will remain confidential until an Answer is filed to a formal disciplinary charge. The charge, of course, follows a determination of probable cause. Previously, cases were confidential throughout the hearing process and did not become public until discipline case records reached the Supreme Court.
- Social Security numbers and financial account numbers will be partially redacted.
- Protective orders are explicitly permitted, for good cause shown, in certain settings.
- Respondents may seek to close records upon dismissal of charges.
- Disciplinary authorities may disclose otherwise confidential information to the extent necessary to rebut false or misleading public statements made about the proceedings.
- Dissemination of public discipline is explicitly permitted.
- Dissemination of discipline orders is to be made to the *Journal of The Missouri Bar*, newspapers in the respondent lawyer's circuit, presiding judge of each judicial circuit, and each chief judge of the court of appeals.