

# OCDC Article: New Rule 5.28 - Reinstatements: An Overview of the New Requirements

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## Ethics: New Rule 5.28 – Reinstatements: An Overview of the New Requirements

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The Chief Disciplinary Counsel is appointed by the Supreme Court of Missouri to serve as counsel in disciplinary hearings and to conduct investigations as provided by Supreme Court Rule 5.[2] An investigation may result in the matter being presented to the Supreme Court of Missouri for a final order of discipline. If the Court finds that professional misconduct occurred, it will impose appropriate discipline. The discipline imposed may result in an order of suspension or disbarment of a lawyer.

A lawyer's license to practice law may also be suspended for failure to pay the annual enrollment fee,[3] for failure to complete and report continuing legal education requirements,[4] or for failure to file or pay state taxes.[5]

A lawyer's license to practice law may be suspended or the lawyer disbarred if a lawyer is unable to competently represent clients by reason of the mental or physical condition of the lawyer,[6] for involvement in criminal activities,[7] or for violations of the Rules of Professional Conduct.[8]

Individuals wishing to have their licenses to practice law reinstated must comply with the requirements of Rule 5.28. The Supreme Court of Missouri, by Order dated August 4, 2017, repealed Rule 5.28 and enacted a new Rule 5.28. This article will address how the new Rule will affect the reinstatement process. This article is not intended to be an in-depth review of the requirements of reinstatement.

Perhaps the most obvious change to Rule 5.28 is the adoption of a standardized Petition for Reinstatement, entitled Disciplinary Form A. Individuals who are disbarred or suspended, except for a suspension for less than three years for failure to pay the annual enrollment fee or failure to comply with CLE requirements,[9] start the reinstatement process by submitting a Petition for Reinstatement to Practice Law that is substantially in the form of Disciplinary Form A. The Form asks for contact information and contains 13 "Threshold Requirements" that must be answered. Failure to complete the petition or a "No" response to any of the requirements will cause the petitioner to be ineligible for reinstatement.[10] The Petition for Reinstatement advises the petitioner that the petition is continuing and the petitioner must provide new and updated responses to any question while the petition is pending.

Averments in Disciplinary Form A specifically address requirements for reinstatement provided in Rule 5.28.

Of particular interest is "Requirement 11":

I understand that I carry the burden to establish, by clear and convincing evidence, that I have good moral character and that the best interest of the public will be served by my reinstatement to practice law.

Rule 5.28(i) states that a petitioner for reinstatement "must establish, by clear and convincing evidence, that the person is of good moral character, is fit to practice law, and the best interest of the public will be served by reinstatement of the person's license to practice law." Any doubts or arguments that persons seeking reinstatement did not have the burden to establish their fitness to practice are laid to rest.

Subsection (i) also provides 11 factors to consider in determining whether the petitioner has met this burden. These factors include:

- Acceptance of responsibility for wrongdoing with sincerity and honesty;
- The extent of rehabilitation as shown by good current reputation for character and moral standing in the community;
- The nature and severity of the misconduct leading to discipline;
- The person's conduct since discipline;
- The time elapsed since discipline;
- Other instances of dishonesty, criminal behavior, professional discipline, unauthorized practice of law, academic and employment misconduct, financial responsibility or involvement in or neglect of legal and professional matters;
- The cumulative effect of all misconduct;
- The person's current competency and qualifications to practice law;
- Restitution;
- Candor in the discipline and reinstatement processes; and
- Positive social contributions since the misconduct.

Reinstatement applications will continue to be submitted to the Chief Disciplinary Counsel for a Report and Recommendation.[11] Under the old Rule 5.28, applications for reinstatement were referred to the Chief Disciplinary Counsel for a Report and Recommendation. The new Rule 5.28 provides that petitions for reinstatement will be referred to the Chief Disciplinary Counsel for a "character and fitness investigation" of the petitioner and a Report and a Recommendation.[12]

Some reinstatement petitions are eligible for expedited processing. Pursuant to Rule 5.28(k), if a petitioner was suspended indefinitely with leave to reapply in a period of six months or less and is not on probation or was suspended for failure to pay tax for three years or less, then the petitioner's license may be reinstated as a matter of course 30 days after the Petition for Reinstatement is referred to the Chief Disciplinary Counsel for a report and recommendation. However, if within that 30-day period the Chief Disciplinary Counsel files a motion to respond to the Petition for Reinstatement, the license will not be issued, the matter will proceed, and a comprehensive character and fitness investigation of the lawyer will be conducted.

New Rule 5.28 permits the Chief Disciplinary Counsel to contract with the Board of Law Examiners for the Board to conduct a character and fitness investigation. The Rule authorizes the Board to provide its investigative documentation and information to the Chief Disciplinary Counsel for its review in connection with the report and recommendation.[13]

The Rule does not change the procedure that the report shall be served on the petitioner. The petitioner may, but is not required to, send to the Chief Disciplinary Counsel a written response to the report. The report, recommendation and any response must be filed with the Court. A decision by the Court regarding reinstatement of the petitioner's license will be made on the basis of the petition, report, recommendation and response.

The new Rule provides that if the Court denies a reinstatement petition, it may state a period of time before a subsequent petition will be considered. The Court may also provide guidance to the petitioner regarding concerns or conditions that the petitioner should address before the submission of another Petition for Reinstatement.[14]

Petitioners for reinstatement of their licenses pursuant to Rule 5.28 must complete CLE hours as a requirement for reinstatement. The new Rule 5.28 makes it clear that the number of CLE hours that must be completed is based on the time the petitioner's license "has been suspended" at the time the petitioner files a Petition for Reinstatement. A petitioner who has been suspended less than three years as of the filing date of the petition must specifically aver that, within one year prior to the date of filing the petition, the petitioner has completed at least 15 hours of CLE credit, including at least three hours of ethics credit. For a petitioner whose license has been suspended three years or more as of the filing date of the petition, 30 hours of CLE credit, including at least six hours of ethics credit, must be concluded within two years prior to the date of filing the Petition for Reinstatement.[15]

This requirement to complete CLE credit hours does not apply to petitioners seeking reinstatement if their license to practice law was suspended for more than three years only for the failure to comply with CLE requirements or for failure to pay the annual enrollment fee.

#### Conclusion

Persons who had their licenses to practice law suspended or have been disbarred should review Rule 5.28 and Disciplinary Form A to understand the reinstatement process. The new Rule 5.28 makes it clear that the burden is on petitioners for reinstatement to comply with the threshold requirements before a Petition for Reinstatement will be considered, and that once an investigation is commenced petitioners have a continuing burden to establish their fitness for reinstatement.

#### Endnotes

1 Mark Flanegin is staff counsel for the Office of Chief Disciplinary Counsel in Jefferson City.

2 Rule 5.06. All citations are to the Missouri Supreme Court Rules.

3 Rule 6.01.

4 Rule 15.06.

5 Rule 5.245.

6 Rule 5.23.

7 Rule 5.21.

8 Rule 5.19.

9 Rule 6.01. Lawyers who are suspended for failure to timely pay the annual enrollment fee for less than three years will be retroactively reinstated upon paying the enrollment fee for each calendar year of the suspension plus the accumulated penalty.

Rule 15.06. Any lawyer suspended for failing to comply with Rule 15 shall be retroactively reinstated upon certification by The Missouri Bar to the clerk of the Supreme Court of Missouri that the lawyer is in full compliance with Rule 15 within three years of the date of the lawyer's suspension and the payment of a \$100 late fee.

10 Disciplinary Form A, Rule 5.28. The petition would be subject to dismissal on a motion filed by the Chief Disciplinary Counsel. Disciplinary Form A is available at the Missouri Courts website, [www.courts.mo.gov](http://www.courts.mo.gov), under Appellate Court Forms.

11 Rule 5.28(j).

12 Id.

13 Id.

14 Id.

15 Rule 5.28(c).