

VIRGINIA:

**IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND**

**IN THE MATTER OF
PROPOSED RULES FOR THE
VIRGINIA LAWYER REFERRAL SERVICE
TO COMPRISE PARAGRAPH 23
OF PART SIX, § IV OF THE RULES OF THE
SUPREME COURT OF VIRGINIA**

PETITION OF THE VIRGINIA STATE BAR

Leonard C. Heath, Jr., President
Karen A. Gould, Executive Director
Renu M. Brennan, Deputy Executive Director
Virginia State Bar
1111 East Main Street
Suite 700
Richmond, VA 23219-0026
Phone (804) 775-0500
Fax (804) 775-0501

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PETITION

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE
SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar (VSB), by its president and executive director, and requests the Court review and add revised rules for the Virginia Lawyer Referral and Information Service (VLRS) as Part Six, § IV, ¶ 23 of the Rules of Court for Integration of the State Bar. At its October 26, 2018, meeting, the VSB Council approved the proposed VLRS rules, as amended by Council, by a vote of 54 to 2.

I. OVERVIEW OF THE ISSUES

A. VLRS

For over 40 years, the VLRS has served the public by bridging the gap between the legal profession and those in need of legal services, provided a valuable benefit to participating lawyers by providing clients to them, and rendered

to our increasingly overburdened legal system a much needed service of matching potential clients with attorneys, thereby promoting access to justice and a more efficient and effective legal system.

The VLRS is overseen by the VSB's Special Committee on Lawyer Referral.¹ The VLRS's three full-time employees assist 12,000 to 13,000 callers annually in navigating and accessing the appropriate resources, and referring individuals who require legal assistance to an attorney for the minimal fee of \$35 for a 30-minute consultation. The VLRS has eight phone lines, a dedicated e-mail address, an online portal for referrals, and in-house software. Lawyers who participate pay a \$95 annual fee, have access to potential clients and cases, and gain valuable legal and practice-building experience while serving the public. The VLRS helps the VSB fulfill its mission to provide access to legal services and improve the legal profession.

In the past several years, the VLRS has operated at a growing deficit, lost panel members, and received fewer referrals. The VLRS has two revenue sources: the \$35 consultation fee and the \$95 annual membership fee. From FY2015 to FY2018, participating attorneys have dwindled significantly from 581 to 351; paid

¹ The VSB's Special Committee on Lawyer Referral consists of lawyer volunteers who oversee the operation of the VLRS: chair Jack L. Harris of Richmond; vice chair Eugene M. Elliott, Jr of Roanoke; Joseph M. Bowen of Tazewell; Angela T. Isabell of Arlington; John A. Kassabian of Annadale; Neil S. Lowenstein of Norfolk; David A. McKelvey of Roanoke; Sara M. Morton of Harrisonburg; Duane D. Parr, Jr. of Roanoke; Todd A. Pilot of Alexandria; Jeanette D. Rogers of Glen Allen; and Christopher L Spinelli of Richmond. The VSB is indebted to the leadership of the Special Committee on Lawyer Referral during the rule study and revision process, particularly chair Jack Harris and vice chair Eugene Elliott.

referrals have dropped from 4,822 to 3,902; and the deficit in operating the VLRS has increased 48% from \$45,862 to \$67,937. While VLRS revenue and panel members decline, public inquiries through calls, e-mails and online requests have increased, demonstrating a continued need for the VLRS. As reflected in comments received from various legal aid providers throughout the Commonwealth, and as stated by Council members at the October meeting, legal aid providers refer people who they cannot help to VLRS.

B. Implementation of percentage fee structure as an equitable, successful funding model

To preserve and enhance the valuable services provided by the VLRS, and to address the declining revenue and lawyer participation, the VSB's Special Committee on Lawyer Referral requested a review by the American Bar Association's Standing Committee on Lawyer Referral and Information Service's Program of Assistance and Review ("PAR"). (Appendix at 1-18.) The PAR consultants, Charles J. Klitsch, Esq., Director of Public and Legal Services of the Philadelphia Bar Association, and George Wolff, Executive Director of the New York City Bar Legal Referral Service, formerly of the Oregon Lawyer Referral Service, visited and reviewed VLRS operations on September 18, 2017, and issued their report on October 25, 2017. The PAR report strongly recommends that VLRS

implement a percentage fee program, consistent with the majority of lawyer referral services throughout the nation.²

A percentage fee program provides an equitable source of funding by which participating attorneys pay a portion of the net fee collected to the bar association referral service. The percentage fee spreads costs proportionately and provides a reliable revenue stream to reinvest in the marketing and operation of the service. The income generated by the proposal submitted in this petition should enable the VLRS to systematically upgrade its infrastructure, increase the number of people served, and improve the overall service provided and quality of referrals for the participating attorneys, many of whom are solo and small-firm practitioners.

Per the PAR report:

... almost universally, those programs that are consistently self-sustaining, or which generate excess revenue to support other public service programs of the sponsoring bar association, generate the bulk of their revenue by collecting a percentage of the fees earned by the panel attorney from referrals.

(Appendix at 5.) Experience indicates that the VLRS should expect panel member attrition for the first two years, but members should return as the VLRS generates and invests revenue into the program.

² According to an ABA study, more than 90 state and local bar lawyer referral programs have instituted percentage fee programs, which are “now considered a ‘best practice’ to operate a successful, self-sustaining program.” (Appendix at 5.) Other unified or mandatory state bar lawyer referral services with percentage fees as a source of funding include Alabama, Florida, Michigan, Nevada, New Hampshire, Oregon, South Carolina, Texas, Wisconsin, and Wyoming.

The Fairfax Lawyer Referral Service (LRS) implemented a percentage fee structure (10% of all cases generating a fee of \$500 or more) 15 years ago. While the Fairfax LRS initially saw a decline in panel members, membership grew as the service became self-sustaining. Similarly, Oregon saw an initial decline in panel membership upon implementing a percentage fee in 2012, but membership has grown as Oregon's LRS has become profitable. Other data suggests that services which adopt a percentage fee model do not revert to annual and consultation fee models. Increases in annual fees lead to panel member attrition, raise the barrier to entry for less experienced lawyers, and do not spread costs proportionate to benefits received. In summing up the data of the 2017 ABA LRS survey with 55% participation and 121 respondents, Stephen Steinberg, the Chair of the ABA Standing Committee on Lawyer Referral and Information Service, concluded:

The jury is still out on consultation fees, but the bottom line is that there are many successful programs that use consultation fees and many successful programs that eschew such fees. However, the survey results demonstrate definitively that a program must have a percentage fee structure to be financially self-sustaining. Those lawyer referral services with percentage fee programs generate many times more revenue than those services without percentage fee programs, with those revenues going back into bar association operations, often including public service initiatives and pro bono programming.

(Appendix at 22.)

C. Synopsis of rule revisions to support public service and member benefit

The VLRS Rules previously addressed certain basic eligibility requirements, rules of operation, and rules regarding withdrawal and suspension from the VLRS. Consistent with the recommendations of the report and additional research and detailed study of other bars' rules and services, the proposed revisions accomplish the following objectives:

1. Eliminate the consultation fee in contingent fee matters. Rule amendment § V.A. Fees. Consultation Fee.
2. Establish subject matter practice requirements and panels. Rule amendment § IV. Special Subject Matter Panel Qualifications.
3. Create follow-up procedures with respect to referred callers and panel members. Rule amendment § VI. Reporting and Remittance Requirements – Conditions of Panel Membership.
4. Develop comprehensive rules and procedures for handling client complaints. Rule amendment § VIII. Complaints against Panel Members.
5. Develop program rules and procedures that strive for compliance with the ABA Model Rules for operation of a lawyer referral and information system. *Passim*.

The proposed revisions strengthen existing features, consistent with guidance in Legal Ethics Opinion 1750, Lawyer Advertising and Solicitation:

In order to qualify as a lawyer referral service for purposes of these rules, the service must: be operated in the public interest for the purpose of providing information to assist the clients; be open to all licensed lawyers in the geographical area served who meet the requirements of the service; require members to maintain malpractice insurance or provide proof of financial responsibility; maintain procedures for the admission, suspension, or

removal of a lawyer from any panel; and may not make any fee-generating referral to any lawyer who has an ownership interest in the service, or to that lawyer's law firm.

(Appendix at 144, 149.) The revisions to the VLRS Rules also strengthen procedures for the admission, suspension, or removal of a lawyer.

II. PROPOSED RULE CHANGES

The proposed revisions are substantial. Section III provides detailed commentary on the changes to aid the Court in its review. Underlining identifies new language; strikeouts identify deletions from the current VLRS Rules.

23. Virginia Lawyer Referral and Information Service.

In order to advance the availability and quality of legal services provided to Virginians, Council may establish a Virginia State Bar Lawyer Referral and Information Service (VLRS) to provide Virginians in need of legal assistance with (1) information about the legal system and other resources, including referrals to government agencies, legal aid, or other appropriate programs and services, and (2) lawyer referrals to those individuals who can afford an attorney. The VLRS shall be open to all licensed lawyers in Virginia who meet the requirements specified in the Rules of the VLRS.

~~VLRS Rules~~ The Rules of the Virginia State Bar Lawyer Referral & Information Service (VLRS)

~~The rules of service of the VLRS are intended to offer consumer protection to the public in its obtainment of legal services.~~

I. PURPOSE

The Virginia State Bar Lawyer Referral & Information Service (VLRS) operates as a public service to Virginians by providing individuals in need of legal help with information about the legal system and other resources as appropriate, and by referring individuals who can afford a lawyer to an insured lawyer who meets the individual's specified legal needs and who has agreed to abide by these VLRS Rules.

II. ADMINISTRATION AND GOVERNANCE OF THE VLRS/POWERS AND DUTIES OF THE VIRGINIA STATE BAR SPECIAL COMMITTEE ON LAWYER REFERRAL

A. VLRS Operations. The VLRS is operated from the offices of the Virginia State Bar (VSB). VSB staff under the general supervision of the VSB Deputy Executive Director (“VLRS staff”) is responsible for VLRS operations in accordance with these Rules.

B. VLRS Committee. The VSB Special Committee on Lawyer Referral (VLRS Committee) has general supervisory authority over the administration of these Rules, subject to oversight by Council and the Supreme Court of Virginia. The VLRS Committee will meet at regular intervals during the year to review these Rules, VLRS performance and operations, marketing efforts, and areas of VLRS development. The VLRS Committee may recommend changes to the VLRS Rules including qualifications for membership, fees, and areas of practice. The VLRS staff will report regularly to the VLRS Committee on operations, policies, marketing efforts, eligibility and appeals, and matters covered by these Rules. VLRS staff has discretion to waive and suspend these Rules for good cause, subject to the VLRS Committee’s review at its next regularly scheduled meeting. A majority of the VLRS Committee constitutes a quorum.

C. VLRS Qualifications Subcommittee. The Chair of the VLRS Committee shall appoint a Qualifications Subcommittee consisting of at least three (3) VLRS Committee members. A majority of the Subcommittee constitutes a quorum.

~~1. Any active member in good standing with the Virginia State Bar (VSB) may qualify as a VLRS panel member.~~

III. ELIGIBILITY

A. Eligibility Requirements. Applicants who seek to be members of the VLRS (panel members) must satisfy and maintain the following requirements to participate in the VLRS. An applicant shall be denied admission, and a panel member shall be suspended from the VLRS, for failure to maintain the following eligibility requirements:³

- 1. Active, In Good Standing.** An applicant must be (and if selected as a panel member must remain) an Active member of the VSB, as defined at the Rules of Court, Part Six, Section IV, Paragraph 3. “In good standing” means that the lawyer’s license is not currently Suspended or Revoked, as defined at the Rules of Court, Part Six, Section IV, Paragraph 13-1.

- 2. Malpractice Insurance.** ~~4. Panel members agree to the following: c. Panel members must carry professional liability insurance as of the date of the application and for as long as the applicant is a VLRS member and be in good standing with the VSB Member Compliance Department. The applicant must maintain in force and effect professional liability insurance in an amount not less than \$100,000 per occurrence and \$300,000 aggregate as of the date of the application and for as long as the lawyer is a panel member. The applicant must provide the VLRS a current copy of the insurance policy certificate, the declarations page of the policy, or other evidence satisfactory to the VLRS that such coverage is in force and effect. The panel member shall annually provide the VLRS with proof of insurance coverage. Prior to the expiration date of the insurance policy, the panel member shall notify the VLRS of the renewal of professional liability coverage, accompanied by a copy of the declarations page of the renewal policy or other evidence satisfactory to the VLRS that such coverage has been renewed. Each panel member shall promptly notify the VLRS if his/her professional liability insurance coverage is terminated or decreased. Expiration of a panel member’s professional liability insurance will automatically suspend that panel member from the VLRS, until the renewal information is submitted and approved.~~

³ Capitalized terms in Rule III. Eligibility A-G below are defined in the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-1.

3. Adherence to VLRS Rules. Indemnification. ~~4. Panel members agree to the following: d. To follow all of the rules of the service and in no event hold the State Bar or any of its officers, members, or employees liable in connection with the operation of, or use of, the information contained in the application. Panel members must follow all VLRS Rules and indemnify, defend, and hold harmless the VSB, its officers, members, agents, and employees from and against any and all loss, expense, and liability including the cost of defense and reasonable attorneys' fees which may arise from or be related to the panel member's gross negligence or intentional conduct relating to his/her participation in the VLRS.~~

B. Restrictions based on Pending Discipline and Disciplinary History.

1. The applicant must not have any disciplinary proceedings pending.
2. The applicant must not have:
 - a. ever been convicted in any jurisdiction of a Crime;
 - b. ever committed any criminal act that reflects adversely on the applicant's honesty, trustworthiness, or fitness as a lawyer;
 - c. a Disciplinary Record in any jurisdiction consisting of a Disbarment, Revocation, Suspension imposed at any time or Public Reprimand imposed within the ten years immediately preceding the application to join the VLRS; or
 - d. a Disciplinary Record in any jurisdiction, imposed within the five years immediately preceding the application to join the VLRS, consisting of Private Discipline or an Admonition, except for a *De Minimis* Dismissal or a Dismissal for Exceptional Circumstances, or an Admonition imposed within the five years immediately preceding the application to join the VLRS.

The VLRS Committee shall have the sole discretion to determine whether a *De Minimis* Dismissal or a Dismissal for Exceptional

Circumstances shall disqualify a lawyer from participation in the VLRS.

C. Duty to Notify VLRS of Disciplinary Actions and Change in Status.

~~5. Once accepted for panel membership, it is the responsibility of the attorney (panel member) to notify VLRS of the following: . . . Any disciplinary action with the VSB~~ A panel member shall give notice to VLRS within thirty (30) days if (i) he/she has been disciplined by any jurisdiction or court or convicted of a Crime; (ii) he/she is currently under investigation concerning any allegation of professional misconduct or wrongdoing; or (iii) he/she is a defendant in any lawsuit filed by a client or former client. The VLRS may suspend the panel member consistent with Rule X. Suspension and Termination of Membership.

D. VLRS Qualifications Subcommittee Discretion to Deny Membership.

Notwithstanding the provisions of Rule III.A. and B., any applicant may be denied admission to panel membership if the VLRS Qualifications Subcommittee, in its sole discretion, determines that good cause exists to deny admission, including that the applicant's admission to panel membership would not be in the best interests of the VLRS, VSB, or public. If the VLRS Qualifications Subcommittee denies an applicant VLRS panel admission pursuant to this provision, the VLRS Qualifications Subcommittee shall notify the applicant in writing of the reason(s) for the denial within thirty (30) days of the decision to deny membership.

E. Appeal. Should the VLRS Qualifications Subcommittee deny panel membership to an applicant pursuant to Rule III.B. based on a *De Minimis* Dismissal or Dismissal for Exceptional Circumstances or pursuant to Rule III.D., the applicant may, within ten (10) days of receipt of the decision denying panel membership, submit a written notice of appeal to the VLRS Committee. The appeal shall be heard within thirty (30) days of receipt of the applicant's request for hearing. The VLRS Committee may take whatever action it deems appropriate in light of the facts, the written evidence provided by the applicant, and any other circumstances of the particular appeal the VLRS Committee deems relevant. The vote of the majority of the VLRS Committee members present and voting shall be required to overrule the findings of the VLRS Qualifications Subcommittee. Members of the Qualifications

Subcommittee may not vote but may otherwise participate in the appeal. The decision of the VLRS Committee shall be final.

F. Confidentiality. The VSB staff and VLRS Committee members shall keep confidential any information gained or obtained by the Qualifications Subcommittee or the VLRS Committee in the discharge of their duties pursuant to Sections III. Eligibility or X. Suspension and Termination of Membership, except as required by law or court order.

G. Notification Attorney. An applicant should list an attorney on his/her application who will notify the VLRS when he/she becomes aware that the panel member is incapacitated, dies, or is otherwise unable to fulfill the panel membership responsibilities.

IV. SPECIAL SUBJECT MATTER PANEL QUALIFICATIONS

The VLRS Committee shall establish and maintain subject matter panels in the practice areas it deems appropriate and as necessary to effectively and efficiently serve the public's needs. Registration for special subject matter panels requires a separate form and affirmation and may require proof of experience in particular practice areas, including having been attorney-of-record and having done a substantial amount of work on cases.

V. FEES

A. Consultation Fee. The VLRS Committee shall set a consultation fee for the first thirty (30) minutes, as necessary to effectively and efficiently serve the public's needs and the operation costs. All other attorneys' fees beyond the initial consultation must be negotiated between the panel member and client in accordance with the Virginia Rules of Professional Conduct. The consultation fee is not subject to the percentage fee provision. Unless otherwise prohibited by law, the consultation fee shall be waived for all contingent fee matters.

B. Annual Membership Fee. The VLRS Committee shall set the annual fee to join or renew as a VLRS panel member as appropriate and necessary to effectively and efficiently serve the public's needs and the operation costs. The annual fee shall be submitted with the application for initial

membership or membership renewal. The annual fee may be discounted or prorated at the VLRS staff's discretion.

C. Percentage Fee. The panel member agrees to remit to the VLRS fifteen percent (15%) of all net fees collected by the panel member on any VLRS referral which generates net attorneys' fees of \$500 or more, except that the panel member shall keep the consultation fee, if any. Net fees are defined as the total fees remaining after deduction of out-of-pocket costs.

If the VLRS refers a potential client or clients to a panel member and additional individuals who are associated with the same event or incident (e.g., multiple accident victims, plaintiffs or defendants) also retain the same panel member to represent them with regard to the same event or incident, the remittance due the VLRS by the panel member will be based on a percentage of **all** fees earned and collected as a result of the multiple-client representation.

If a VLRS matter closes and sometime later the client contacts the panel member on an unrelated matter, no remittance is due the VLRS on the new, unrelated matter.

D. Duty to Refer Back to VLRS; Duty to Remit Percentage Fee to VLRS. If a panel member cannot handle a matter, he/she shall refer the caller back to the VLRS. Panel members shall not transfer or assign matters to avoid paying the percentage fee to VLRS. A panel member shall promptly pay fees due VLRS to VLRS and may be removed if he/she fails to pay VLRS the percentage fee when it is due. Any panel member who violates this provision is still responsible to pay VLRS a percentage of all fees earned in the matter.

E. No Increase in Fees to Compensate for VLRS Payments. Panel members are prohibited from increasing legal fees to VLRS referred clients to compensate for the required payments to the VLRS.

F. VLRS Income. The income generated by the VLRS shall be applied to support the programmatic public services of the VLRS.

5. Once accepted for panel membership, it is the responsibility of the attorney (panel member) to notify VLRS of the following:

- Address changes
- Departure from your current firm or office
- Panel selection changes
- Any disciplinary action with the VSB

VI. REPORTING AND REMITTANCE REQUIREMENTS – CONDITIONS OF PANEL MEMBERSHIP

A. Routine Reporting Requirements. Within thirty (30) days, in addition to the items referenced at III.C., a panel member must timely notify VLRS of the following:

1. Address, telephone, and e-mail changes,
2. Changes in membership status,
3. Departure from current firm or office,
4. Panel selection changes,
5. Any disciplinary action with the VSB or any bar to which the panel member is admitted, and/or the
6. Inability to accept referrals for a period of time fifteen (15) days or more due to vacation, leave of absence, heavy caseload, or any other reason.

B. Reporting on VLRS Referred Cases. Within thirty (30) days of the VLRS referral, the panel member must report to the VLRS whether or not the panel member will represent the client. Panel members must respond promptly, and preferably via e-mail, to VLRS requests for information regarding the status of the case and the status of fees billed and/or collected, including the amount of fees due and owing the VLRS. Nothing herein will require any panel member to violate Virginia Rule of Professional Conduct 1.6.

C. Remittance of Percentage Fee Due VLRS. A panel member shall pay the VLRS a remittance within thirty (30) days of the availability of the funds for distribution.

D. Failure to Timely Report or Remit/Suspension from VLRS. The panel member must timely comply with all reporting and payment requirements. The failure to comply with these requirements, including the failure to timely remit the initial and monthly reports, follow up forms, or percentage fees, and the failure to timely or accurately respond to VLRS inquiries regarding the status of cases and payments may result in panel member suspension, with ten (10) business days written notice, until all reports are received and remittances are paid in full. While suspended, the panel member will be deemed inactive and ineligible to receive referrals.

E. Panel Member Duty to Notify Client of VLRS/Consent to Release Information to VLRS. The VLRS may contact clients to determine fees paid to panel members. A panel member must notify a client at the outset of representation that a portion of the fees are payable to VLRS and that information about attorneys' fees and expenses paid or received by the panel member may be released and reported to the VLRS. The panel member must notify the client that the VLRS is entitled to (a) know the outcome of any legal representation, (b) know the fees received by the panel member and any other attorney with whom the panel member associates in the course of representation of the client, and (c) audit the file to check for fees paid. Upon the settlement of any such action, the panel member is obligated to include the VLRS with those who have a right to know about a settlement, to the extent necessary to allow the VLRS to have knowledge of the terms of the settlement, including all attorneys' fees paid in the case, whether paid directly, by another party or by settlement proceeds, so that the VLRS may determine the portion of the panel member's fees to which the VLRS is entitled. If the matter is a contingent fee matter which requires a written statement showing the remittance to the client pursuant to Virginia Rule of Professional Conduct 1.5(c), the panel member will provide the statement to the VLRS.

F. VLRS Audit. The VLRS may require a panel member to verify that correct remittances have been paid. The panel member must keep records of fees and expenses of all VLRS referred clients for five (5) years from the conclusion of the representation for each client. These records shall include, but not be limited to, referral notices, fee agreements, if any, billing and payment records, settlement agreements,

releases, and distribution sheets. Upon request from the VLRS, and to the extent permitted by the Virginia Rules of Professional Conduct, within ten (10) business days of the date of the request, the panel member shall make available for review or audit all records relating to the VLRS matters handled by the panel member. If the audit reveals a shortfall to the VLRS, the panel member shall pay all fees due and owing the VLRS within thirty (30) days. Nothing herein will require any panel member to violate Virginia Rule of Professional Conduct 1.6.

G. Mediation/Arbitration to Resolve Percentage Fee Dispute. Any dispute regarding percentage fees owed VLRS shall be resolved first by mediation, pursuant to the Virginia mediation statutes, Va. Code Sections 8.01-581.21-581.26, if the parties agree, and any issues not resolved by mediation shall be resolved by binding arbitration or the Uniform Arbitration Act, Va. Code Sections 8.01-581.01-581.16. The parties shall attempt to agree upon an arbitrator within fifteen (15) calendar days, and if they fail to do so, the moving party shall file a petition with the Circuit Court of the City of Richmond to appoint an arbitrator. All mediations and arbitrations under this provision shall be held in Richmond, Virginia.

H. Continuing Duty to Remit Percentage Fee. A panel member's obligation to pay remittances owed to the VLRS continues regardless of whether the panel member is in breach of or fails to comply with these Rules or is no longer eligible to participate in the VLRS, is removed from, or leaves the VLRS.

VII. OPERATION OF THE PANEL

A. Referrals. Referrals will be made on a rotating basis, within fields of law and geographical areas. Matters requiring fluency in a foreign language will, to the extent possible, be referred to an attorney having fluency in that language. The panel member agrees to provide the referral a thirty-minute (30-minute) consultation within three (3) business days of the referral date, or as soon as practicable after a request is made. After processing a referral, VLRS staff will send a referral notice to the panel member, which must be returned to the VLRS within ten (10) days of the consultation. VLRS staff will also send follow-up surveys to

VLRS callers. VLRS staff will send pertinent information from the surveys to panel members and, if necessary, to the VLRS Committee, VSB, or Supreme Court of Virginia, as may be appropriate.

B. **2. Grouping of Panel Members.** Panel members will be grouped by judicial circuit and arranged by geographically convenient areas within such groups.

C. **3. Areas of Competency.** Panel members may choose up to ~~35~~ ten (10) areas of the law to list as areas of competency, in accordance with Virginia Rule of Professional Conduct 1.1. Panel members are cautioned against selecting areas of practice in which they are not actively engaged. Panel members will accept an initial interview for any referred caller in the areas of competency. Panel members are not required to accept employment beyond the initial consultation.

~~4.— Panel members agree to the following:~~

~~a.— Pre paid callers will be referred to panel members who then must provide the callers with 30 _minutes of legal consultation. An appointment should be granted within three business days of the referral date, or as soon as practicable after a request is made. Immediately following the up to 30 minute initial consultation or within ten days of the referral notice date, e mail the completed referral notice back to VLRS indicating the outcome of the consult. Any charges for further service will be as agreed upon between the lawyer and the referral.~~

~~b.— Panel members will accept an initial interview for any referred caller in the areas of practice preference indicated on the application.~~

D. **Conflict of Interest.** Should any referral give rise to a conflict of interest, the lawyer panel member should direct the referred caller to contact VLRS to receive a new referral. A panel member rejecting two consecutive initial referrals for reasons other than ~~those set forth here~~ a conflict of interest will be moved to the bottom of referral rotation list. ~~Panel members are not required to accept employment beyond the initial consultation.~~

- E. Notification of and Authorization Required to Transfer VLRS Matters.** Panel members shall not transfer responsibility or control of any VLRS referred matter without notifying the VLRS, unless required by law or court order.
- F. Fee Dispute Resolution.** Panel members shall submit any fee dispute between the panel member and a client referred by the VLRS, if the client so elects, to mediation or arbitration by the VSB Fee Dispute Resolution Program (FDRP).

VIII. COMPLAINTS AGAINST PANEL MEMBERS

VLRS staff shall monitor complaints concerning the service provided by panel members. Complaints, which rise to the level of potential ethical misconduct, will be referred to the VSB Professional Regulation Department. Complaints regarding fee disputes, which do not rise to the level of ethical misconduct, will be referred to the VSB Fee Dispute Resolution Program. Issues, which do not rise to the level of ethical misconduct, may be handled informally but noted in the panel member record for a pattern, which may require investigation by VLRS staff. VLRS staff must report serious and/or repeated complaints against panel members to the VLRS Committee, which may result in removal from VLRS. All panel members agree to cooperate with the VLRS staff and VLRS Committee in the event of any client complaints. In the event that a client files a complaint against a panel member, subject to Virginia Rule of Professional Conduct 1.6, the panel member agrees to file a written response, including appropriate documentation, with the VLRS within ten (10) business days of receipt of the complaint. Failure to respond to the VLRS within ten (10) business days of receipt of the client complaint will result in immediate suspension from VLRS. If the VLRS receives repeated written complaints against a panel member or for good cause, the VLRS may require the panel member to address the complaints before the Qualifications Subcommittee. A panel member shall not commence or threaten to commence any libel, slander, interference with contractual relations or similar action against the VSB, its officers, directors, members, agents, or employees, or the VLRS Committee or its members based upon a complaint or inquiry made to VLRS.

How do I withdraw from VLRS?

IX. WITHDRAWAL FROM MEMBERSHIP

A panel member may withdraw his/her name from VLRS participation ~~five days after~~ by submitting written notice to the VLRS. Withdrawal does not relieve the panel member of his/her obligations to (1) dispose of, in accordance with the Virginia Rules of Professional Conduct and standard practices, any pending case(s) or obligation(s) incurred during VLRS panel membership; (2) complete reports on all referrals; (3) pay any fees due the VLRS; and/or (4) satisfy any other obligations to the VLRS in a timely manner and pursuant to these Rules. Membership fees are neither refundable nor transferable. ~~At the time of written withdrawal, please also advise the VLRS in writing as to the consultation outcome of all outstanding pre-paid referral notices.~~

~~**Note: Administrative Hold** If a panel member charged with misconduct has been referred to a District Committee, the Disciplinary Board, or any circuit court, or agrees to or is placed under disciplinary terms, the service will not make referrals to that panel member until a) completion of the disciplinary proceedings without limitations having been placed on the panel member's license to practice law or terms having been imposed, or b) following removal of such limitations and/or successful compliance with the terms imposed. Membership fees are non-refundable regardless of whether the panel member is under administrative hold or suspension.~~

Suspension from VLRS

X. SUSPENSION AND TERMINATION OF MEMBERSHIP

- ~~1. Failure to comply with the rules will result in a written notice of proposed suspension from the VLRS from the chair of the Virginia State Bar Lawyer Referral Committee, or his or her designee. Service is deemed effective when sent to the member's e-mail address of record with the VSB, or mailed to the member's address of record by certified mail, return receipt requested.~~

- ~~2. Upon notice of proposed suspension or service of suspension, the panel member may submit a written response within thirty days stating the reasons for noncompliance. The mailing of a notice of suspension to the panel member at his or her last address of record with the Virginia State Bar constitutes adequate service for the purposes of these rules.~~
- ~~3. Failure to respond in writing within thirty days of the date of the mailing of the notice of suspension to the panel member will result in a final action of suspension that will run until such time as the panel member furnishes evidence of compliance with the rules and regulations of the service.~~
- ~~4. Upon receipt of a response to the notice of proposed suspension by the panel member, the VSB VLRS Committee or its designee will review and recommend to the committee the following actions:
 - ~~a. Final action of suspension;~~
 - ~~b. Withdrawal of the notice of proposed suspension; or~~
 - ~~c. Conditional participation on the panel.~~Any such action will be by majority vote of the committee at any regularly scheduled meeting or by telephone poll or other communication deemed appropriate.~~
- ~~5. Any such action may be appealed within thirty days of the service of the notice of the committee's action by written notice of appeal to the chair of the VSB VLRS Committee giving reasons for appeal of the committee's action. Upon receipt of the notice of appeal, the chair of the VSB VLRS Committee or his or her designees will convene a three member panel of current Bar Council members to review the committee's action and the written notice of appeal within thirty days of its receipt.~~
- ~~6. If the review panel finds the committee's action to be supported by substantial evidence, it will notify the panel member of its decision in writing. If the review panel finds the committee's action to be unsupported by substantial evidence, or otherwise finds evidence of compliance with rules and regulations cited for alleged noncompliance or violation, the review panel will notify the panel member, withdraw the committee's decision, and reinstate the panel member.~~

~~7. The filing of any notice for appeal by the panel member does not stay the VSB VLRS Committee's action.~~

~~8. Complaints from members of the public or attorneys regarding conduct allegedly constituting noncompliance with disciplinary provisions of the Code of Professional Responsibility will be referred for such other action as is necessary according to the disciplinary procedures defined by the Code of Virginia and the Rules of Professional Conduct.~~

A. Summary Suspension and Termination/Removal for Disciplinary Action. A panel member shall be summarily suspended from the VLRS if a complaint alleging Misconduct by the panel member has been referred for investigation to a District Committee,⁴ the Disciplinary Board, or any circuit court. If the complaint against the panel member is dismissed, and no discipline is imposed, the panel member will be reinstated in VLRS. Consistent with Rule III, a panel member shall be terminated or removed from membership from the VLRS if his/her license to practice law is Revoked, Suspended, or if he/she receives a Public Reprimand, Admonition, or Private Discipline, except for a *De Minimis* Dismissal or a Dismissal for Exceptional Circumstances. The VLRS Qualifications Subcommittee, subject to appeal to the VLRS Committee set forth below, shall have the sole discretion to determine whether a *De Minimis* Dismissal or a Dismissal for Exceptional Circumstances shall disqualify a lawyer from participation in the VLRS.

B. Summary Suspension for Failure to Maintain Insurance. A panel member shall be summarily suspended from VLRS if the panel member fails to timely submit evidence of malpractice insurance.

C. Suspension for Good Cause. The VLRS staff has the power to immediately suspend or remove a panel member for good cause, which includes, but is not limited to:

1. Falsification of any material statement made to qualify for the VLRS or in any report to the VLRS;
2. Failure to deliver timely reports or remittances of fees to the VLRS;
3. Failure to permit the VLRS to inspect records pursuant to these Rules;

⁴ The capitalized terms used in § X.A. are defined in the Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-1.

4. Failure to maintain eligibility and qualifications under these Rules;
5. Failure to handle VLRS cases with competence and diligence;
6. Failure to respond to the VLRS inquiries about client complaints as set forth at Rule VIII;
7. Repeated rudeness/inappropriate conduct to VLRS clients and/or staff; and
8. Violation of these Rules.

D. Notice to Panel Member. Within five (5) days of the suspension, the VLRS staff shall notify the panel member in writing of the suspension and the reason(s) for the suspension.

E. Terms of Suspension. A panel member who is suspended from the VLRS shall not receive referrals. Suspension from VLRS does not relieve the panel member of his/her obligations to (1) dispose of, in accordance with the Virginia Rules of Professional Conduct and standard practices, any pending case(s) or obligation(s) incurred during VLRS panel membership; (2) complete reports on all referrals; (3) pay any fees due the VLRS; and (4) satisfy any other obligations to the VLRS in a timely manner and pursuant to these Rules.

F. Reinstatement. VLRS staff may reinstate any panel member suspended for nonpayment of fees or failure to submit reports or for failure to submit proof of insurance, after payment of all fees and submission of all reports and proof of insurance.

G. Notice of Appeal from Suspension. Within thirty (30) days of suspension, the panel member has the right to submit a written request to the VLRS for an informal hearing before the Qualifications Subcommittee.

H. Automatic Termination or Removal. If the panel member fails to appeal the suspension, the panel member shall be removed from the VLRS.

I. Qualifications Subcommittee Review.

1. Upon the timely filing of a notice of appeal, the matter shall be referred to the Qualifications Subcommittee for a decision as to whether a panel member shall be removed from VLRS.
2. A panel member who has filed a timely notice of appeal shall be given the opportunity to make a written or oral response to the Qualifications Subcommittee.
3. The Qualifications Subcommittee shall render a written decision in any such matter within thirty (30) days of the panel member's filing of written request for a hearing, unless the panel member consents to an extension of time.

J. Appeal to VLRS Committee. A panel member may appeal the decision of the Qualifications Subcommittee by filing a written notice of appeal to the VLRS Committee within thirty (30) days of receipt of a written decision from the Qualifications Subcommittee.

K. VLRS Committee Review.

1. All appeals from the Qualifications Subcommittee shall be reviewed and decided by the VLRS Committee.
2. The vote of the majority of the VLRS Committee members present and voting shall be required to overrule the Qualifications Subcommittee's decision.
3. Members of the Qualifications Subcommittee may not vote but may otherwise participate in the appeal process.
4. The appeal shall be granted or denied within thirty (30) days of receipt of the notice of appeal unless the panel member consents to an extension of time.
5. The decision of the VLRS Committee shall be final.

XI. QUALITY CONTROL

The VLRS shall monitor public and member satisfaction with the VLRS through formal and informal methods including surveys and calls to panel members and clients. The VLRS sends follow-up surveys to all clients to inquire whether the client consulted with the panel member, the amount of fees paid, and whether they were satisfied with the VLRS process. Any

pertinent information will be forwarded to panel members, and as necessary, shared with the VLRS Committee. The VLRS may monitor referrals by checking court dockets, legal notices, etc. The VLRS staff will actively seek to improve both the quality of referrals and the quality of the VLRS through consultation with panel members, peer agencies, ABA resources, and other community support and information resources.

XII. MARKETING AND PUBLIC RELATIONS

The VLRS will be marketed and publicized by such means and to such extent as determined by VLRS staff in consultation with the VLRS Committee. In its regular reports to the Committee, the VLRS staff shall report on its marketing efforts, and the VLRS Committee shall review the same annually and make recommendations as necessary.

XIII. AMENDMENTS

The VLRS Committee, may, by majority vote, recommend amendments to these Rules at any time.

II. DETAILED COMMENTARY ON REVISIONS

I. PURPOSE

Adds a “Purpose” section and expands first statement of former VLRS Rules from “offering consumer protection to the public in the obtainment of legal services” to clarify that the VLRS is operated as a public service, the goals of which are (1) to provide the public with information regarding and resources about the legal system and (2) refer legal consumers who can afford legal services to attorneys appropriate for the consumers’ specific legal needs.

II. ADMINISTRATION AND GOVERNANCE OF THE VLRS/POWERS AND DUTIES OF THE SPECIAL COMMITTEE ON LAWYER REFERRAL

Defines the roles of the VLRS staff, for daily operations (subsection A); VLRS Committee, for general oversight, rules, policies (subsection B); and creates a VLRS Qualifications Subcommittee to add a layer of review for strengthened eligibility and suspension processes and determinations (subsection C).

III. ELIGIBILITY

A. Eligibility Requirements.

1. **Active, In Good Standing.** Incorporates former Rule 1 (any active member in good standing may qualify as a VLRS panel member) as part of Rule III.A.1. Defines “in good standing” and cross-references the Rules of Court, Part Six, Section IV, Paragraph 3 definition of Active Member.
2. **Malpractice Insurance.** Incorporates former Rule 4, bullet 3 that panel member must carry and maintain professional liability insurance.
3. **Adherence to VLRS Rules.** Indemnification. Incorporates Rule 4, bullet 4 (duty to follow VLRS Rules and agreement not to hold VSB or its officers, employees, or members liable for operation of the VLRS or use of information in the VLRS application), as revised to add indemnity and hold harmless language.

B. **Restrictions based on Pending Discipline and Disciplinary History.** Adds restrictions disqualifying attorneys with disciplinary history consistent with the restrictions in the VSB Disciplinary System and tracks the Rules of the Supreme Court, Part Six, Section IV, Paragraph 13 limitations on service in the disciplinary system.

C. **Duty to Notify VLRS of Disciplinary Actions and Change in Status.** Adds provision requiring panel member to notify VLRS within thirty (30) days of:

1. discipline by another jurisdiction or court;
2. if under investigation for misconduct; or
3. if a defendant in a suit filed by a client or former client.

Any of the foregoing may trigger suspension consistent with Rule X.

- D. **VLRS Qualifications Subcommittee Discretion to Deny Membership.** Adds a layer of review with the new VLRS Qualifications Subcommittee, which has discretion to deny panel membership for good cause including that the panel member's admission would not be in the best interests of the VLRS, VSB, or public. The VLRS Qualifications Subcommittee must notify the applicant in writing of the reason(s) for denial within thirty (30) days of the decision to deny membership.
- E. **Appeal.** Creates appeal process for discretionary denial of membership.
- F. **Confidentiality.** Provides that the VLRS staff and Committee will keep confidential information obtained by the Qualifications Subcommittee and the VLRS Committee in their review of applicants or panel members pursuant to Section III. Eligibility and Section X. Suspension and Termination of Membership.
- G. **Notification Attorney.** Adds provision requesting VLRS applicant to identify an attorney to inform VLRS if the applicant becomes unable to fill his/her responsibilities as a VLRS member (panel member).

IV. **SPECIAL SUBJECT MATTER PANEL QUALIFICATIONS**

Revision permits establishment of subject matter panels but does not yet identify the particular panels.

V. FEES

Defines and distinguishes between fees charged by the VLRS to callers and panel members and adds requirement that VLRS will now impose a percentage fee (15%) of the net fees (total fees remaining after deduction of out-of-pocket costs) collected on VLRS referrals. The income to the VLRS will be used to operate and market the VLRS and, if funds exist, on the recommendation of staff and with the approval of the VLRS Committee and VSB Council may be applied to support the VLRS.

- A. **Consultation Fee.** Fee paid to VLRS for thirty (30) minute consult now to be waived in contingency fee cases. States that all other attorneys' fees beyond the consultation are to be negotiated by the attorney (panel member) and client.
- B. **Annual Membership Fee.** Annual fee to be set by the VLRS Committee and submitted with the membership application and renewal. Fee may be discounted or prorated at the VLRS staff's discretion.
- C. **Percentage Fee.** Panel member will remit fifteen percent (15%) of net attorneys' fees of \$500 or more, minus any consultation fee. Rationale and use of income generated addressed above.
- D. **Duty to Refer Back to VLRS; Duty to Remit Percentage Fee to VLRS.** Panel members should refer back to the VLRS any matter the panel member cannot handle. A panel member should not transfer a matter to avoid paying a percentage fee to the VLRS, and a member is still responsible to pay the VLRS the percentage fee if he/she violates this provision.
- E. **No Increase in Fees to Compensate for VLRS Payments.** Panel members must not increase attorneys' fees to the client to compensate for the payments to the VLRS.
- F. **VLRS Income.** Any income generated to the VLRS will be reinvested in the VLRS.

VI. REPORTING & REMITTANCE REQUIREMENTS – CONDITIONS OF PANEL MEMBERSHIP

This entire section is new and specifies panel members' reporting and remittance obligations.

- A. **Routine Reporting Requirements.** Within thirty (30) days, panel members must identify the VLRS of changes to contact information, firm or membership status, panel selection changes, any disciplinary actions against them, and inability to accept referrals for a period of fifteen (15) days or more.
- B. **Reporting on VLRS Referred Cases.** Within thirty (30) days of the referral, the panel member must report to the VLRS whether or not he/she will represent the client. Panel members must also respond promptly, and preferably, via e-mail, to VLRS requests for information; however, no reporting obligations will require a member to violate his/her duty under Virginia Rule of Professional Conduct (RPC) 1.6.
- C. **Remittance of Percentage Fee Due VLRS.** A panel member shall remit the VLRS a remittance within thirty (30) days of the funds' availability for distribution.
- D. **Failure to Timely Report or Remit/Suspension from VLRS.** Failure to comply with reporting and remittance requirements may result in suspension from the VLRS with ten (10) business days written notice.
- E. **Panel Member Duty to Notify Client of VLRS/Consent to Release Information to VLRS.** The panel member must notify the client that the VLRS may contact the client or audit the file to determine fees paid, and the panel member must include the VLRS with those who have a right to know about any settlement, to the extent necessary to allow the VLRS to determine the portion of percentage fees owed the VLRS. The panel member will provide the VLRS a written statement

showing the remittance if the matter is a contingent fee matter which requires such statement pursuant to Virginia RPC 1.5(c).

- F. **VLRS Audit.** Panel members must keep records of VLRS referred clients' fees and expenses for five (5) years from the conclusion of the representation(s) and permit the VLRS, to the extent permitted by the Virginia Rules of Professional Conduct, to audit the records within ten (10) business days of a request from VLRS. If the audit reveals a shortfall, the panel member shall remit the shortfall to the VLRS within thirty (30) days.
- G. **Mediation/Arbitration to Resolve Percentage Fee Dispute.** Disputes between panel members and the VLRS regarding fees owed the VLRS will be resolved by binding mediation or arbitration consistent with the Virginia mediation and arbitration statutes.
- H. **Continuing Duty to Remit Percentage Fee.** A panel member's duty to remit the percentage fees owed to the VLRS remains whether or not the member complies with the Rules and/or is suspended from the VLRS.

VII. **OPERATION OF THE PANEL**

This section is consistent with existing VLRS rules, with a reduction in areas of competency from thirty-five (35) to ten (10).

- A. **Referrals.** Referrals will be made on a rotating basis within geographical areas and fields of law. Panel members agree to provide a thirty-minute consultation within three (3) days of the referral or as soon as practicable. Panel members will return a referral notice to VLRS staff within ten (10) days of the consultation. VLRS staff will send surveys to callers and share and use the information with the VLRS Committee, VSB, and Supreme Court of Virginia, as necessary.
- B. **Grouping of Panel Members.** Panel members will be grouped by judicial circuit and arranged geographically within the circuit.

- C. **Areas of Competency.** Panel members may select ten (10) (vs. thirty-five (35) previously) areas of competency, consistent with RPC 1.1. Panel members agree to accept an initial interview in their areas of competency. Panel members are not required to accept employment beyond the initial consultation.
- D. **Conflict of Interest.** Panel members should refer back to the VLRS any potential conflict of interest. If a panel member rejects two (2) consecutive referrals for reasons other than a conflict of interest, he/she will be moved to the bottom of the referral rotation list.
- E. **Notification of and Authorization Required to Transfer VLRS Matters.** Panel members shall not transfer VLRS referred cases without notifying the VLRS, unless required by law or court order.
- F. **Fee Dispute Resolution.** If the client agrees, panel members shall submit fee disputes with clients over VLRS referred matters to the VSB Fee Dispute Resolution Program (FDRP).

VIII. COMPLAINTS AGAINST PANEL MEMBERS

This new section clarifies the handling of various complaints.

VLRS staff will monitor complaints concerning panel members' service and address as appropriate with the VLRS Committee. Panel members agree to respond to VLRS inquiries within ten (10) business days and to cooperate in the investigation of complaints. Repeated complaints may be referred to the VLRS Qualifications Subcommittee. Panel members agree not to threaten or commence libel, slander, interference with contractual relations or similar action against the VSB, its staff, and the VLRS committee. Complaints which rise to the level of ethical misconduct will be referred to the VSB Professional Regulation Department, and fee disputes will be referred to the FDRP.

IX. WITHDRAWAL FROM MEMBERSHIP

This new section clarifies that withdrawal from the VLRS shall be in writing, and withdrawal does not relieve the panel member of obligations incurred to VLRS referred clients or to the VLRS (handling pending cases in

accordance with the Virginia RPC and standard practices, and paying fees and completing reports).

X. SUSPENSION AND TERMINATION OF MEMBERSHIP FROM VLRS

This section has been revised and detailed to clarify the bases and consequences of summary suspension and suspension for good cause; the consequences of suspension; and the rights of panel members to request a review and to appeal, as set forth in detail.

- A. **Summary Suspension and Termination/Removal of Disciplinary Action.** A panel member shall be summarily suspended from the VLRS if a Misconduct complaint is referred for investigation to a disciplinary District Committee, as defined at the Rules of Court, Part Six, Section IV, Paragraph 13-1. If Misconduct is not found, and the complaint is dismissed, the panel member shall be reinstated in VLRS. If Misconduct is found, and the panel member receives any sanction other than a *De Minimis* Dismissal or Dismissal for Exceptional Circumstances, the panel member shall be removed from VLRS. The VLRS qualifications subcommittee, subject to appeal by the VLRS Committee, shall have the sole discretion to determine whether a *De Minimis* Dismissal or Dismissal for Exceptional Circumstances disqualifies the panel member from VLRS participation.
- B. **Summary Suspension for Failure to Maintain Insurance.** A panel member shall be summarily suspended for failure to timely submit evidence of malpractice insurance.
- C. **Suspension for Good Cause.** The VLRS staff may immediately suspend or remove a panel member for good cause including falsification of VLRS application materials or VLRS reports, failure to timely deliver reports or remit fees to the VLRS, failure to respond to VLRS inquiries about client complaints, failure to permit the VLRS to inspect records, failure to maintain eligibility or qualifications, failure to handle VLRS cases with competence and diligence, rudeness or

inappropriate conduct to VLRS clients or staff; and violation of the VLRS Rules.

- D. **Notice to Panel Member.** Within five (5) days of the suspension, the VLRS staff shall notify the panel member in writing of the suspension and the reason(s) for the suspension.
- E. **Terms of Suspension.** A suspended panel member is not relieved of pending obligations to the VLRS, including fee remittance and submission of reports. A suspended panel member will not receive referrals.
- F. **Reinstatement.** VLRS staff may reinstate members after they pay fees, submit reports, or submit proof of insurance.
- G. **Notice of Appeal from Suspension.** Within thirty (30) days of suspension, a panel member has a right to submit a written request for an informal hearing before the Qualifications Subcommittee.
- H. **Automatic Termination or Removal.** If the panel member does not appeal the suspension, he/she will be removed from the VLRS.
- I. **Qualifications Subcommittee Review.** The Qualifications Subcommittee will render a written decision within thirty (30) days of the request for hearing, unless the panel member consents to an extension of time. The panel attorney may make a written or oral response to the Qualifications Subcommittee.
- J. **Appeal to VLRS Committee.** Within thirty (30) days of the decision, a panel member may appeal the Qualifications Subcommittee's decision by filing a written notice of appeal.
- K. **VLRS Committee Review.** The vote of a majority of the VLRS Committee members present and voting is required to overrule the Subcommittee's decision, and the Committee's decision is final. Members of the Subcommittee may not vote with the Committee, but

may otherwise participate. The appeal shall be granted or denied within thirty (30) days receipt of the notice of appeal, unless the panel member consents to an extension of time.

XI. QUALITY CONTROL – This provision requires monitoring of public and member satisfaction, by staff and the Committee, consistent with VLRS practice.

XII. MARKETING AND PUBLIC RELATIONS
The VLRS Committee and staff will consult to market and publicize the VLRS. The VLRS staff will report on VLRS marketing efforts to the VLRS Committee, which will annually review and make recommendations as necessary.

XIII. AMENDMENTS
The VLRS Committee may, by majority vote, recommend amendments to these VLRS Rules.

IV. ANALYSIS OF COMMENTS RECEIVED

On June 26, 2018, the VSB posted the proposed revised rules and solicited comments through July 27, 2018. (Appendix at 49-77.) On July 5, 2018, *Virginia Lawyers Weekly* published “Bar moves to revamp lawyer referral” by Peter Vieth. (Appendix at 78-79.) The VSB received 41 comments within the comment period, analyzed below. (Appendix at 80-135.) The VSB Special Committee on Lawyer Referral met August 9, 2018, and voted to release the revised rules to Council for consideration, as reflected in a post updated August 24, 2018, on the VSB website. (Appendix at 136.) On August 20, 2018, *Virginia Lawyers Weekly* published “On life support” by Peter Vieth. (Appendix at 137-139.) Attorney August Bequai

submitted an additional comment in support of the changes on October 19, 2018. (Appendix at 140.)

Of the 41 comments, the majority, 20, supported the revisions, while 14 opposed them, and six members questioned the changes. The supporters largely included legal aid attorneys, including 16 members from the Legal Services Corporation of Virginia (LSCV), Virginia Poverty Law Center (VPLC), and members of the VSB Access to Justice Committee, while panel members opposed the changes, with the exception of one member.⁵ One Access to Justice Committee member, Martin Wegbreit, opposed the change, stating that dues should be increased to support the program. (Appendix at 106-07.)

A. Analysis of comments in support of revisions

Supporters resoundingly endorsed the percentage fee structure as necessary to sustain and improve the VLRS to fulfill the bar's access to justice mission for low to moderate-income individuals. Succinctly stated, the VLRS helps people talk to a lawyer they could not otherwise consult, but for the program. According to Mark D. Braley, Executive Director of the Legal Services Corporation of Virginia:

It is clear that the VLRS is an important service for Virginians seeking legal representation and that in its current structure, cannot continue to sustain itself financially. Here in legal aid, the VLRS is our most important referral

⁵ Elden Sodowsky was supportive of the percentage fee model "if [it] needs to be implemented to keep the service alive...." (Appendix at 131.)

for Virginians seeking legal assistance. We reject thousands of applicants every year due to their failure to qualify for legal aid services and refer them to VLRS. Certainly, one of the major components of the VSB's mission is to further access to justice for all Virginians. This is accomplished in many ways, two of which are the VSB's support of legal aid services and the lawyer referral service. The proposed changes would simply create a self-sustaining funding mechanism that follows what most states already do and is the preferred model of the ABA. We in legal aid have had the opportunity of meeting with the VLRS staff and wholeheartedly support these changes.

(Appendix at 108.)

Likewise, John E. Whitfield, Executive Director of Blue Ridge Legal Services, stated:

The VLRS performs a valuable role across Virginia in helping Virginians, particularly those with limited means, obtain some measure of access to justice. We have routinely referred hundreds, sometimes thousands, of folks annually to VLRS when we determined that we could not provide them with legal assistance ourselves for various reasons, whether financial eligibility, type of legal problem, or conflict. If not for the VLRS, we would rarely have any other referral option for our rejected applicants.

Accordingly, the continued viability of the VLRS is important to us, to the ability of Virginians to have fuller access to justice. The proposed revisions to the operations of the VLRS seem reasonable and appropriate, and they appear to be the only viable option in order to sustain the VLRS' operations for the long-term. For these reasons, and for those more fully stated in the proposed Rule's commentary, I support the proposed revisions."

(Appendix at 113.)

B. Analysis of comments against revisions

The most frequently cited reasons against the revisions include:

1. The percentage fee would disproportionately burden the solos and small-firm practitioners and will result in panel member attrition;

2. The administrative requirement to report and remit the fee to the VLRS is burdensome and onerous; and

3. The mistaken belief that the percentage fee violates fee-sharing prohibitions either under the Virginia Rules of Professional Conduct or in the U.S. Bankruptcy Code.

1. No disproportionate burden

The percentage fee model benefits all panel members, but particularly solo and small-firm practitioners, by not requiring participating attorneys to absorb a higher cost to participate, or any additional cost, unless and until they collect net fees in excess of \$499.99. Moreover, because the VLRS aggregates marketing costs for all panel attorneys, the program gives participants access to markets they could not otherwise afford or have time to utilize on an individual basis. Solo and small-firm panel members thus benefit from the aggregated marketing and branding, which requires a reliable revenue stream. The proposed percentage fee will provide this much needed revenue source. Additionally, solo and small-firm practitioners benefit from the higher quality referrals and enhanced infrastructure. Conversely, a higher annual fee does not equitably spread costs, creates a higher barrier to VLRS participation for less experienced members, disproportionately burdens those members who are not receiving fee-generating cases, still results in attrition, and does not generate the revenue necessary to sustain the service.⁶

⁶ The PAR reviewers commented: “Some individuals will no doubt want to maintain the status quo. This would be a mistake for the future of the VLRS and VSB. The VLRS has been operating at a deficit for some time. Without its own reliable revenue source, the VLRS lacks flexibility in marketing its services, cannot systematically upgrade

VSB Special Committee on Lawyer Referral Vice Chair Eugene Elliott

noted in his comment in support of the revisions,

Raising either [the annual or consultative] fee or both has to be so substantial that it is self-defeating – too much to attract the client – too much for the lawyers to pay, when they are complaining about the quality of cases they receive.... In short the present operating model used by the VLRS will not work and should not continue to be subsidized from VSB member dues. We must move to a percentage fee model... I believe this is the only way the VSB will be able to provide a viable lawyers referral service going forward. The good news is that we will be adopting a plan that has been successful in many other states. Their experience has been that they are able to provide more lawyers with higher quality referrals and ultimately serve the public with better access to legal services.

(Appendix at 117-118.)

2. No onerous administrative burden

At the Council debate, Edward Weiner, a VSB Past President, Fairfax LRS member, and current Council member, noted that the obligation to remit a percentage of net fees upon the conclusion of the case has not proved onerous in his long experience with the Fairfax LRS. Moreover, accounting software eases any burdens. As reported at Council, a subcommittee of the VSB Special Committee on Lawyer Referral has reviewed software from two LRS software providers and considered the advantages and disadvantages of new software, or alternatively, enhancing the existing VLRS software.

its infrastructure without further subsidy from the VSB, and cannot increase staffing levels commensurate with call volume and in order to maintain a regular schedule of follow-up with members of the public who receive referrals and the attorney panelist.” (Appendix at 5-6.)

3. No ethical prohibition against fee sharing by nonprofit LRS

In Virginia, as in many jurisdictions, a nonprofit LRS may collect a percentage fee and reinvest those funds in the operation of the service. *See Va. Sup. Ct. Rule of Professional Conduct 7.3(d)(2) and Rule 6.*⁷ The ethical concern that fee sharing with the VLRS will affect the panel member's independence of judgment is not implicated as "[a] bar association [operating a referral service] seeks not individual profit but the fulfillment of public and professional objectives. It has legitimate, nonprofit interest in making legal services more readily available to the public." LEO 1751, "Referral Service Operated Through Local Bar and Receiving a Percentage of Attorney's Fee Rather Than a Flat Fee," May 7, 2001. (Appendix at 141, 142.) Finally, 11 U.S.C. § 504(c) provides an exception to the prohibition in bankruptcy for "a bona fide public service attorney referral program that operates in accordance with non-Federal law regulating attorney referral services and with rules of professional responsibility applicable to attorney acceptance of referrals."

⁷ Rule 7.3 Solicitation of Clients.

(d) A lawyer shall not compensate, give, or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer's services except that a lawyer may:

(2) pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service;

Comment [6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit lawyer referral service. A legal service plan is a pre-paid or group legal services plan or a similar delivery system that assists potential clients to secure legal representation. Not-for-profit lawyer referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule permits a lawyer to pay only the usual charges of a not-for-profit lawyer referral service.

V. THE COUNCIL MEETING

Council met on October 26, 2018. At the outset of the meeting, Council unanimously approved amendments (a) narrowing the indemnity obligation found at proposed Rule III.A.3 and (b) clarifying Rule III.B.2.d., which restricts VLRS membership based on disciplinary history.⁸ (Appendix at 155, 156.)

Early in the debate Council member Philip Ferguson from Suffolk moved to amend the proposed fee structure to make it consistent with the Fairfax LRS percentage fee structure of 10 percent on fees \$500 and over. That motion was then bifurcated into two motions without objection (reduce the percentage fee from 15% to 10%; and no percentage fee on fees of less than \$500). Mr. Ferguson's motion was tabled by agreement until the debate was concluded.

As mentioned earlier, some Council members questioned whether the service had to be self-sustaining in light of the bar's mission to support access to justice. Council member Bill Moffet of Abingdon asked whether the VSB and the Special Committee on Lawyer Referral had considered raising the annual fee for all members or raising the consultation fee for the public to support the service, instead of implementing a percentage fee. The Lawyer Referral Committee leaders reviewed for Council the alternatives, as well as the arguments in favor of the percentage fee in lieu of a higher annual fee.

⁸ Leadership of the Special Committee on Lawyer Referral determined these amendments should be brought forward with the proposal, but did not have time to take them to the full Lawyer Referral Committee for a vote to include in the proposal.

Some Council members expressed concern that panel members would leave VLRS if a percentage fee is imposed. Council members who have participated in both the VLRS and Fairfax LRS, including Jay Myerson, a former Fairfax Bar Association president, and VSB past president Edward Weiner, spoke in favor of the percentage fee structure, noting that the percentage fee model has been successful in Fairfax. Myerson and Weiner emphasized their continued involvement in the Fairfax LRS in order to have access to fee-generating cases they would not otherwise have had, without marketing or infrastructure expenses. Myerson stated he supported the VLRS changes because the current losses “are unsustainable” and urged Council to uphold its fiduciary obligation to make the VLRS self-sustaining.

Members of Council also debated lowering the proposed percentage from 15 to 10 percent. VSB Special Committee on Lawyer Referral Chair Jack Harris noted that most services with a 15 percent revenue model generate sufficient income to break even and sometimes generate the revenue necessary to market and improve the service for the public and attorney members, whereas the 10 percent model sometimes generates sufficient income to enable the service to break even, but seldom generates revenue in excess of costs. Jack Harris also noted that the Lawyer Referral Committee could propose to the Supreme Court of Virginia that the percentage be decreased if the model generates excess fees.

Nancy Reed of Luray, a member of Council, small-firm practitioner and VLRS member, spoke in favor of the 15 percent fee rather than 10 percent, stating that she participates to provide the public access to legal services, does not expect fee generating cases from the VLRS, and thus does not object to a fee structure which ensures the availability of the service and exacts no additional cost unless and until a member receives a fee-generating case.

At the conclusion of the discussion, the motion to reduce the percentage fee from 15 percent to 10 percent failed by a vote of 16 to 41, but the motion to forego a percentage fee on cases generating a net fee of less than \$500 passed by a vote of 42 to 15. The revised proposed rule, in accordance with the vote, read as follows:

The panel member agrees to remit to the VLRS fifteen percent (15%) of all net fees collected by the panel member on any VLRS referral which generates net attorneys' fees of \$500 or more, except that the panel member shall keep the consultation fee, if any. Net fees are defined as the total fees remaining after deduction of out-of-pocket costs.

See VLRS Proposed Rule § V.C. (Petition at 15), amended in accordance with the Council vote. The motion to approve the proposed rule, as amended, passed by a vote of 54-2.

VI. CONCLUSION

The VSB Council approved the proposed rule revisions, as amended above, by a vote of 54-2, at its October 26, 2018, meeting. The rule revisions are based on

comprehensive and careful study by the Special Committee on Lawyer Referral of the PAR review and other bars' LRS rules, practices, and procedures. The Virginia State Bar respectfully requests that the Court approve the revised VLRS rules and add them to Part Six, § IV, Rules of the Supreme Court of Virginia, "Organization & Government of the VSB," as Paragraph 23 for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

/S/

Leonard C. Heath, Jr., President

/S/

Karen A. Gould, Executive Director

Dated this 5th day of November, 2018.