

Proposed Amendments to Part Six, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court

Comments or questions about the rules should be submitted in writing to Thomas A. Edmonds, Executive Director of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA 23219, no later than June 7, 2002. The Virginia State Bar Council will consider the proposed amendments when it meets on June 13, 2002, in Virginia Beach.

The Standing Committee on Lawyer Discipline approved the proposed amendments on April 30, 2002. The proposed amendments have been incorporated in the consolidated procedural rules that the Virginia State Bar Council approved on February 23, 2002.

The proposed amendments address the confidentiality of disciplinary records and proceedings.

13. PROCEDURE FOR DISCIPLINING, SUSPENDING AND DISBARRING ATTORNEYS.

- B. Authority of the Courts, Council, COLD, the Board, District Committees, Bar Counsel and the Clerk of the Disciplinary System.

* * *

8. Authority and Duties of the Clerk of the Disciplinary System

* * *

d. Public Notification of Disciplinary Sanctions:

- (1) The Clerk shall issue a statement to the media summarizing each Public Reprimand, Suspension or Revocation:
- (2) The Clerk shall notify the following individuals and entities of each Admonition, Public Reprimand, Suspension or Revocation:
 - (a) Clerk of the Supreme Court;
 - (b) Clerks of the Circuit and District Courts in each judicial circuit in the Commonwealth where the Attorney resides or maintains an office.
 - (c) Disciplinary authorities for jurisdictions, federal or state, wherein it is reasonable to expect that the Attorney may be licensed.

* * *

M. ~~N. Dissemination of Disciplinary Information~~ Confidentiality of Disciplinary Records and Proceedings:

1. Except as otherwise provided in this paragraph, the following Disciplinary Proceedings, records, and information are confidential and shall not be disclosed:
 - a. Complaints, unless introduced at a public hearing or incorporated in a Charge of Misconduct or a Certification;

- b. Investigations, except that Investigative Reports admitted as exhibits at a public hearing are public;
- c. Disability proceedings, except that final orders are public;
- d. Notes, memoranda, research, and all other work product of Bar Counsel;
- e. Records, communications, and information protected by Disciplinary Rule 1.6;
- f. Subcommittee records and proceedings, except determinations imposing public discipline; and
- g. Deliberations and working papers of District Committees, the Board or a three-judge Circuit Court.

2. Timing of Disclosure of Disciplinary Record in Sanctions Proceedings

If an Attorney has a Disciplinary Record and is subsequently found by a Subcommittee, a District Committee, the Board or a three-judge Circuit Court empaneled under Va. Code § 54.1-3935 to have engaged in Misconduct, the facts and circumstances giving rise to such Disciplinary Record may be disclosed (i) to the Subcommittee, District Committee, Board or three-judge Circuit Court prior to the imposition of any sanction and (ii) by the Subcommittee, District Committee, Board or three-judge Circuit Court in its findings of fact set forth in its order.

3. ~~Exceptions to Confidentiality:~~

~~All information pertaining to any Investigation, discipline, Suspension, or Revocation shall be confidential and shall not be disclosed, except as follows:~~

- f. ~~All hearings before the District Committees and the Board and their dispositive orders shall be public except the following:~~
 - (1) ~~Disability Proceedings;~~
 - (2) ~~All deliberations;~~
 - (3) ~~All Subcommittee proceedings; and~~
 - (4) ~~Subcommittee orders imposing Private Discipline.~~

4. ~~Post-Sanction Dissemination of Public Discipline to the Media:~~

~~Subject to any prohibition above and following entry of an order by a Subcommittee, District Committee, the Board, or a court imposing disci-~~

pline, other than a *de minimis* Dismissal, Private Reprimand or Dismissal with Terms, the Bar shall issue to the public communications media a statement summarizing such order or pleading.

3. Timing of Public Access to Disciplinary Information:

All records of a matter set for public hearing remain confidential until the matter is dismissed or a public sanction is imposed except:

- a. A Notice of Hearing is public when the matter is placed on the public district committee hearing docket; and
- b. A Certification is public when filed with the Clerk of the Disciplinary System.

1. Confidentiality of Investigation:

Except for Bar Counsel, no Bar Official shall, during the Investigation of a disciplinary matter or after conclusion of such Investigation without further action having been initiated by the Bar as a result of such Investigation, communicate with a member of the communications media or the public concerning such matter.

3. Exceptions to Confidentiality:

All information pertaining to any Investigation, discipline, Suspension, or Revocation shall be confidential and shall not be disclosed, except as follows:

- h. To the extent necessary in the exercise of their official duties, subject to Paragraph (g) above, COLD and Bar Officials shall have access to all information pertaining to any Investigation, Disciplinary Proceedings, Suspension, or Revocation.

4. Public Statements Concerning Disciplinary Information

To the extent necessary to exercise their official duties, Bar Officials have access to all confidential information; however, except for Bar Counsel, no Bar Official shall communicate with a member of the media or the public concerning a matter that is confidential under this Paragraph.

3. Exceptions to Confidentiality:

All information pertaining to any Investigation, discipline, Suspension, or Revocation shall be confidential and shall not be disclosed, except as follows:

- g. Whenever an inquiry is made to any Bar Official concerning an Attorney's conduct that is within the jurisdiction of the disciplinary system, such inquiry shall be referred to Bar Counsel. If the information sought by the inquiry is confidential under the provisions of this Paragraph, Bar Counsel shall state that under the Rules of this Court no response is permissible at this time. However, if the

information sought by the inquiry, although confidential under the provisions of this Paragraph, has become a matter of public record or has become known to the public, Bar Counsel's response shall be limited to the following, depending on the facts:

- (1) that no Investigation has been initiated, and there may or may not be an Investigation depending upon further development of the facts;
- (2) that an Investigation is being conducted;
- (3) that an Investigation has terminated with a determination that further proceedings were not warranted;
- (4) that an Investigation has been completed, and the results are confidential; or
- (5) that an Investigation has been completed.

If an inquiry is made about a matter that, although confidential under this Paragraph, has become a matter of public record or has become known to the public, Bar Counsel may confirm whether the bar is conducting an Investigation or if an Investigation resulted in a determination that further proceedings were not warranted.

5. Protection of the Public:

3. Exceptions to Confidentiality:

All information pertaining to any Investigation, discipline, Suspension, or Revocation shall be confidential and shall not be disclosed, except as follows:

- b. Such information may be transmitted to a person or agency outside the disciplinary system if such disclosure is necessary to protect the public or the administration of justice. At Bar Counsel's discretion, information may be shared regarding an Investigation with his or her counterpart in other jurisdictions, but only if such other jurisdiction is required or agrees to maintain the confidentiality of such information as provided in this Paragraph.

5. Dissemination of Disciplinary Information to the Courts and Disciplinary Authorities:

Orders of a Subcommittee, District Committee, three Judge Circuit Court, or the Board imposing an Admonition, a Public Reprimand, Suspension, or Revocation shall be public, and shall be mailed to the Clerk of this Court, and to the clerk of each Circuit Court, General District Court and Juvenile And Domestic Relations District Court in each judicial circuit in this Commonwealth where the Attorney resides or maintains an office, and the appropriate officials of any other state in which the Attorney is licensed.

~~Except for a *de minimis* Dismissal, Private Reprimand or Dismissal with Terms, whenever an Attorney has been sanctioned, the Clerk of the Disciplinary System shall forward a summary or a copy of the public order imposing such discipline to the appropriate disciplinary authorities for other jurisdictions, federal or state, wherein it is reasonable to expect that such Attorney may be licensed, and the Clerk of the Disciplinary System may forward such summary or copy to any agency, private or governmental, that disseminates such information to disciplinary authorities, to lawyers, or to the public.~~

Bar Counsel may transmit confidential information to persons or agencies outside of the disciplinary system if such disclosure is necessary to protect the public or the administration of justice.

Bar Counsel may share information regarding an investigation with his or her counterparts in other jurisdictions provided that such jurisdiction agrees to maintain the confidentiality of the information as provided in this Paragraph.

3. ~~Exceptions to Confidentiality:~~

~~All information pertaining to any Investigation, discipline, Suspension, or Revocation shall be confidential and shall not be disclosed, except as follows:~~

- e. ~~Whenever Bar Counsel or a Chair of the Board or District Committee discovers evidence of possible criminal activity on the part of an Attorney, Bar Counsel or the Chair of the Board or the District Committee shall forward such evidence to the appropriate Commonwealth's Attorney or United States Attorney. The Attorney concerned shall be notified whenever this information is transmitted pursuant to this subparagraph unless Bar Counsel decides that giving such notice will prejudice a disciplinary or related criminal investigation in this State or another jurisdiction.~~

If Bar Counsel or a Chair of the Board or a Chair of a District Committee discovers evidence of criminal activity by an Attorney, Bar Counsel, the Chair of the Board or a Chair of a District Committee shall forward such evidence to the appropriate commonwealth's attorney, United States Attorney or other law enforcement agency. The Attorney concerned shall be notified whenever this information is transmitted pursuant to this subparagraph unless Bar Counsel decides that giving such notice will prejudice a disciplinary investigation.

6. Disclosure of Information to Government Entities:

3. ~~Exceptions to Confidentiality:~~

~~All information pertaining to any Investigation, discipline, Suspension, or Revocation shall be confidential and shall not be disclosed, except as follows:~~

- d. ~~By order of this court, such information may be disclosed to the designated staff of the Joint Legislative Audit and Review Commission ("JLARC") incident to its discharge of its official duties, provided JLARC is required or agrees to maintain the confidentiality of such information as provided in this Paragraph.~~

By order of this Court, confidential information may be disclosed to the Joint Legislative Audit and Review Commission or other governmental entities incident to their discharge of official duties, provided the entity is required or agrees to maintain the confidentiality of the information provided.

7. Waiver of Confidentiality:

3. ~~Exceptions to Confidentiality:~~

~~All information pertaining to any Investigation, discipline, Suspension, or Revocation shall be confidential and shall not be disclosed, except as follows:~~

- e. ~~Such information, excluding notes, memoranda, research, and all other work product of Bar Counsel, may upon written request be disclosed when and to the extent confidentiality is waived by the Respondent, by the Complainant, or, if such information is protected by Disciplinary Rule 1.6, by Respondent's client.~~

Confidential information, excluding notes, memoranda, research, and all other work product of Bar Counsel, may upon written request be disclosed when and to the extent confidentiality is waived by the Respondent, by the Complainant, and, if protected by Disciplinary Rule 1.6, by Respondent's client.

2. ~~Testimony as to Public Disciplinary Proceedings:~~

~~In no case shall COLD, Bar Counsel, a member of a District Committee, Committee Counsel, or member of the Board be subject to subpoena or otherwise compelled to testify in any proceeding regarding any matter investigated or considered in such person's official capacity, except that in a Disciplinary Proceeding an Investigator may be compelled to testify by Respondent or Bar Counsel, subject to rulings of the court or Chair pursuant to this Paragraph.~~

8. Testimony about Disciplinary Proceedings:

- a. In no case shall Bar Counsel, a member of COLD, a member of a District Committee, a member of the Board, or a Committee Counsel be subject to a subpoena or otherwise compelled to testify in any proceeding regarding any matter investigated or considered in such person's official capacity, except that an Investigator may be compelled to testify in a Disciplinary Proceeding, subject to rulings of the court or Chair.

b. In no case shall the Clerk of the Disciplinary System be subject to a subpoena or otherwise compelled to testify regarding any matter investigated or considered in the disciplinary system, or the records of any such matter, dealt with by the Clerk of the Disciplinary System in his or her official capacity.

9. In no case shall confidential records of the attorney disciplinary system be subject to subpoena.

6.10. Virginia Lawyer Referral Service:

Bar Counsel shall notify the Virginia Lawyer Referral Service when a Complaint involving any Attorney member of the service is referred to a District Committee for Investigation or when any Attorney member of the service is disciplined. Bar Counsel shall also notify the Virginia Lawyer Referral Service when any Complaint involving an Attorney member of the service is dismissed following Investigation or when any Attorney member of the service complies with Terms imposed.

The Standing Committee on Lawyer Discipline approved the proposed amendments on April 30, 2002. The proposed amendments have been incorporated in the consolidated procedural rules that the Virginia State Bar Council approved on February 23, 2002.

The proposed amendments would allow bar counsel, either *sua sponte* or at the direction of a district committee or the Disciplinary Board, to file a notice of noncompliance requesting the board to suspend an attorney who fails without good cause to comply with a summons or subpoena duces tecum for trust account or other records until such time as the attorney fully complies with the summons, subpoena duces tecum or a determination is made as to whether the attorney violated the Rules of Professional Conduct, whichever comes first.

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS.

* * *

B. Authority and Duties of the Courts, Council, COLD, the Board, District Committees, Bar Counsel and the Clerk of the Disciplinary System:

* * *

5. Authority and Duties of the Board

a. The Board shall have jurisdiction to consider:

* * *

8) violations of CRESPA or any regulations adopted pursuant thereto; and

9) failure of Respondent to make a complete transcript part of the Record as provided in this Paragraph; and

10) failure of an Attorney to comply with an order, summons or subpoena issued in connection with a Disciplinary Proceeding.

b. The Board shall have the following powers in addition to all other powers granted to the Board:

(1) to sanction a Respondent for failing to comply with an order issued by the Board. The sanction can include an interim Suspension. Before imposing an interim Suspension, the Board shall issue a notice to the Respondent advising the Respondent that he or she may petition the Board within ten days after service of the notice to withhold entry of an interim Suspension order and to hold an evidentiary hearing. If ten days after service of the notice, the Respondent has not petitioned the Board to withhold entry of an interim Suspension order, the Board shall enter an Order suspending the Attorney's license until such time as the Attorney remedies the failure to comply or a determination is made as to whether the Attorney has violated any Disciplinary Rules. An Attorney suspended pursuant to this subparagraph is subject to the provisions of subparagraph M. in cases where, it is felt public or the clients of a Respondent are in jeopardy, such action can be *sua sponte* or on motion by Bar Counsel, with appropriate notice to the Respondent, Respondent's counsel, or (in the event of Disability) Respondent's guardian *ad litem*;

(2) on its own motion or upon request by Bar Counsel or the Respondent, to summon and examine witnesses under oath or affirmation administered by any member of the Board and to compel the attendance of witnesses and the production of documents necessary or material to any proceeding; any summons or subpoena may be issued by any Board member or the Clerk of the Disciplinary System and any summons or subpoena issued to a non-Attorney shall have the force of and may be enforced as a summons or subpoena issued by a Circuit Court.

(3) to impose an interim Suspension if an Attorney fails to comply with a summons or subpoena issued by any member of the Board, the Clerk of the Disciplinary System, Bar Counsel or any lawyer member of a District Committee for trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm. In the event of alleged noncompliance, Bar Counsel may file with the Board and serve on the Attorney a notice of noncompliance.

requesting the Board to suspend the Attorney's license. The noncompliance notice must advise the Attorney that he or she may petition the Board within 10 days of service of the notice to withhold entry of a Suspension order and to hold a hearing, at which time the Attorney shall have the burden of proving good cause for the alleged noncompliance. If 10 days after service of the notice of noncompliance, the Attorney has not petitioned the Board to withhold entry of an interim Suspension order, the Board shall enter an Order suspending the Attorney's license until such time as the Attorney fully complies with the summons or subpoena or a determination is made as to whether the Attorney's noncompliance violated the Disciplinary Rules. An Attorney suspended pursuant to this subparagraph is subject to the provisions of subparagraph M.

~~(34)~~ to rule on the admissibility of evidence . . .

~~(45)~~ The Board may act through its Chair or one of the Vice Chairs

* * *

6. Authority and Duties of District Committees:

a. Each District Committee and Section thereof shall have the power:

* * *

(4) to issue, through any of its Attorney members or through Bar Counsel, any summons or subpoena necessary to compel the attendance of witnesses and the production of documents or evidence necessary or material to any Investigation or Disciplinary Proceeding. Any such summons or subpoena issued to a non-Attorney shall have the force of and be enforced as a summons or subpoena issued by a Circuit Court.

(5) to direct Bar Counsel to file a notice of noncompliance requesting the Board to suspend an Attorney's license until such time as the Attorney fully complies with a subpoena requiring production of trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm.

~~(56)~~ to rule on the admissibility of evidence . . .

~~(67)~~ to maintain order . . .

~~(78)~~ to approve, through a Subcommittee acting by a unanimous vote, an Agreed Disposition

* * *

7. Authority and Duties of Bar Counsel

a.) Bar Counsel shall have the authority, to the extent provided in this Paragraph and subject to the general supervision of COLD:

(1) To initiate, investigate, present or prosecute Complaints or other proceedings before Subcommittees, District Committees, the Board and Circuit Courts. Bar Counsel may represent the Bar in matters pending before this Court. In the course of performing such functions, Bar Counsel shall act independently and exercise prosecutorial autonomy and discretion. ~~This includes, but is not limited to, the authority to examine criminal history record information relating to any Respondent from any state or federal law enforcement agency.~~

~~(2)~~ To examine criminal history record information relating to any Attorney or former Attorney from any state or federal law enforcement agency.

~~(23)~~ To examine financial books and records, once a Complaint has been filed, including, without limitation, any and all escrow accounts, trust accounts, estate accounts, fiduciary accounts, and operating or other accounts, maintained by the Attorney, the Attorney's law firm, or any other third party organization by whom the Attorney is employed or with whom the Attorney is associated.

~~(34)~~ To examine the accounts described in the preceding subparagraph at any time when Bar Counsel reasonably believes that such accounts may not be in compliance with the Disciplinary Rules. In every instance in which Bar Counsel initiates examination of accounts or issues any summons or subpoena in the conduct of an examination or an Investigation concerning accounts, other than on the basis of a Complaint against the Attorney, Bar Counsel shall file a written statement as part of the record setting forth the reasons supporting the belief that the accounts may not comply with the Disciplinary Rules. A copy of this written statement shall be delivered to the Attorney who is the subject of the Investigation when an examination has begun or any summons or subpoena has been issued.

~~(45)~~ In the exercise of this authority, Bar Counsel may authorize the issuance of such summons or subpoena as Bar Counsel reasonably deems necessary for the effective conduct of an Investigation or an examination of such accounts. To issue such summons for the attendance of witnesses and subpoenae for the production of documents necessary or material to any Investigation, District

Committee or Disciplinary Board proceeding.

~~In every instance in which Bar Counsel initiates examination of accounts or issues any summons or subpoena in the conduct of an examination or an investigation concerning accounts, other than on the basis of a Complaint against the Attorney, Bar Counsel shall file a written statement as part of the record setting forth the reasons supporting the belief that the accounts may not comply with the Disciplinary Rules. A copy of this written statement shall be delivered to the Attorney who is the subject of the investigation when an examination has begun or any summons or subpoena has been issued.~~

- 6) To file a notice of noncompliance requesting the Board to suspend the Attorney's license until such time as the Attorney fully complies with a subpoena issued by Bar Counsel, a District Committee or the Board, for the production of trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm.

- (b) the evidence presented shows that the Respondent did not engage in the Misconduct alleged, or there is no credible evidence to support any allegation of Misconduct by Respondent, or the evidence does not reasonably support any allegation of Misconduct under a clear and convincing evidentiary standard; or
- (c) the action alleged to be Misconduct is protected by superseding law.

If a District Committee is unable to reach a decision by a majority vote of those constituting the hearing panel, the Charge of Misconduct, or any allegation thereof, shall be dismissed on the basis that the evidence does not reasonably support the Charge of Misconduct, or one or more allegations thereof, under a clear and convincing evidentiary standard.

* * *

I. Board Proceedings

* * *

2. Hearing Procedures

* * *

f. Disposition

- (1) If the Board concludes that the evidence fails to show under a clear and convincing evidentiary standard that the Respondent engaged in the Misconduct, the Board shall dismiss any Charge of Misconduct not so proven.
- (2) If the Board concludes that there has been presented clear and convincing evidence that the Respondent has engaged in Misconduct, after considering evidence and arguments in aggravation or mitigation, the Board shall impose one of the following sanctions and state the effective date of the sanction imposed:
- (a) Dismissal with Terms;
 - (b) Admonition, with or without Terms;
 - (c) Public Reprimand, with or without Terms;
 - (d) Suspension of the License of the Respondent for a stated period not exceeding five years; provided, however, if the Suspension is for more than one year, the Respondent must apply for Reinstatement as provided in this Paragraph; or
 - (e) Revocation of the Respondent's License.

The Standing Committee on Lawyer Discipline approved the proposed amendments on April 30, 2002. The proposed amendments have been incorporated in the consolidated procedural rules that the Virginia State Bar Council approved on February 23, 2002.

The proposed amendments provide that a hung panel will result in the Disciplinary Board and a district committee dismissing a charge of misconduct.

13. PROCEDURE FOR DISCIPLINING, SUSPENDING AND DISBARRING ATTORNEYS.

H. District Committee Proceedings:

1. * * *

2. Hearing Procedure:

* * *

l. Disposition:

(1) Dismissal:

After due deliberation and consideration, the District Committee may dismiss the Charge of Misconduct, or any allegation thereof, as not warranting further action when in the judgment of the District Committee:

- (a) as a matter of law the conduct questioned or alleged does not constitute Misconduct;

- (3) If the Board is unable to reach a decision by a majority vote of those constituting the hearing panel, the Charge of Misconduct, or any allegation thereof, shall be dismissed on the basis that the evidence does not reasonable support the Charge of Misconduct, or on or more allegations thereof, under a clear and convincing evidentiary standard.

committee shall have access to Respondent's prior disciplinary record; or

- (4) the action alleged to be Misconduct is protected by superseding law.

Respondent, within 10 days after the issuance of the dismissal, may request a hearing before the District Committee if the dismissal creates a Disciplinary Record.

The Standing Committee on Lawyer Discipline approved the proposed amendments on April 29, 2002. The proposed amendments have been incorporated in the consolidated procedural rules that the Virginia State Bar Council approved on February 23, 2002.

The proposed amendments clarify that a subcommittee can consider an attorney's prior disciplinary record in deciding whether to dismiss a matter in a manner that creates a disciplinary record, certify a matter to the Disciplinary Board or refer a matter to a district committee for hearing.

13. PROCEDURE FOR DISCIPLINING, SUSPENDING AND DISBARRING ATTORNEYS.

* * *

G. Subcommittee Action:

1. Following receipt of the report of Investigation and Bar Counsel's recommendation, the Subcommittee may refer the matter to Bar Counsel for further Investigation. Once the Investigation is complete to the Subcommittee's satisfaction, it shall take one of the following actions:
 - a. dismiss the Complaint when:
 - (1) as a matter of law the conduct questioned or alleged does not constitute Misconduct; or
 - (2) (a) the evidence available shows that the Respondent did not engage in the Misconduct questioned or alleged, or (b) there is no credible evidence to support any allegation of Misconduct by Respondent, or (c) the evidence available could not reasonably be expected to support any allegation of Misconduct under a clear and convincing evidentiary standard; or
 - (3) (a) the alleged or questioned Misconduct is clearly not of sufficient magnitude to warrant disciplinary action, and Respondent has taken reasonable precautions against recurrence of same, or (b) the Subcommittee concludes that the Respondent has engaged in Misconduct, and that the Complaint should be dismissed with Terms, or (c) there exist exceptional circumstances mitigating against further proceedings, which circumstances shall be set forth in writing. In making this determination, the Sub-

- b. certify the Complaint to the Disciplinary Board pursuant to this Paragraph or file a complaint in a Circuit Court pursuant to Va. Code §54.1-3935. Certification shall be based on a reasonable belief that the Respondent has engaged or is engaging in Misconduct that, if proved, would justify a Suspension or Revocation. In making this determination, the Subcommittee shall have access to Respondent's prior disciplinary record; or

- c. approve an Agreed Disposition imposing one of the following conditions or sanctions:

- (1) a Dismissal with Terms
- (2) a Private Reprimand, with or without Terms; or
- (3) a Public Reprimand, with or without Terms.

No action under this subsection shall be taken by the Subcommittee except by unanimous vote and with the concurrence of both Bar Counsel and Respondent. No appeal shall lie from an Agreed Disposition. In making this determination, the Subcommittee shall have access to Respondent's prior disciplinary record

- d. set the Complaint for hearing before the District Committee. In making this determination, the Subcommittee shall have access to Respondent's prior disciplinary record 