

## COLD Proposed Amendments to Part Six, Section IV, Paragraph 13

The Virginia State Bar's Committee on Lawyer Malpractice Insurance is proposing the following amendments to Part 6, Section IV, Paragraph 13 of the *Rules of the Supreme Court of Virginia*.

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 **May 27, 2005**. The Virginia State Bar Council will consider the proposed amendments when it meets on **June 16, 2005**, in Virginia Beach, Virginia.

### LIMITED RIGHT OF APPEAL BY BAR COUNSEL; FILINGS TO THE CLERK OF THE DISCIPLINARY SYSTEM IN MATTERS BEFORE A THREE-JUDGE CIRCUIT COURT

On April 6, 2005, COLD approved a proposed amendment giving bar counsel a limited right of appeal and requiring that filings in matters before a three-judge circuit court be made to the Clerk of the Disciplinary System.

Part Six, Section IV, Paragraph 13 of the Rules of Court does not afford bar counsel the right to appeal any attorney disciplinary determination, even determinations that are plainly contrary to law. Respondents who believe that district committee, three-judge court or Disciplinary Board determinations are contrary to the law or evidence can, as a matter of right, appeal the determinations. These proposed rule changes would permit bar counsel to challenge the propriety of a procedural or substantive ruling allegedly leading to an erroneous determination but not whether a hearing panel imposed an appropriate disciplinary sanction based upon the evidence presented. The standard of review applicable to appeals by bar counsel would be whether the determination in question is plainly contrary to law. Under the proposed rules, only a respondent would have the right to challenge the sufficiency of the evidence supporting a sanction.

A proposed rule change also requires all three-judge court filings to be made with the Clerk of the Disciplinary System, who will be responsible for forwarding the record to the clerk of the court in which the three judges have been appointed to sit. This change addresses the failure of three-judge court members to receive motions, briefs and voluminous trial records before the judges convene to hear oral argument on outcome determinative motions and appeals on the record.

Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court

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

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

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#### 5. Authority and Duties of the Board

a. The Board shall have jurisdiction to consider:

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

(9) Failure of respondent to make a complete transcript part of the record or to

file an opening brief in a timely manner, as provided in this Paragraph.;

(10) Failure of an Attorney to comply with an order, summons or subpoena issued in connection with a Disciplinary Proceeding; and

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

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#### b. Filings Required by This Paragraph

All filings required by this Paragraph in connection with Disciplinary Board or three-judge Circuit Court Proceedings shall be made with the Clerk of the Disciplinary System, who shall forward the filings to the appropriate tribunal.

#### c. Record on Appeal

The Clerk of the Disciplinary System shall assemble the record on appeal.

#### b.d. Records Retention

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#### e.e. Costs

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#### e.f. Public Notification of Disciplinary Sanctions:

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#### 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:

\* \* \*

b. Certify the Complaint to the Disciplinary Board pursuant to this Paragraph or file a complaint in a three-judge Circuit Court, pursuant to Va. Code § 54.1-3935 as authorized by the Code of Virginia. 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.

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H. District Committee Proceedings

1. Pre-Hearing Matters

a. Charge of Misconduct

\* \* \*

(2) After the Respondent has been served with the Charge of Misconduct, the Respondent shall, within 21 days after service of the Charge of Misconduct:

\* \* \*

(b) file an answer to the Charge of Misconduct and a demand with the Clerk of the Disciplinary System that the ~~p~~Proceedings before the District Committee be terminated and that further ~~p~~Proceedings be conducted pursuant to Va. Code § 54.1-3935 before a three-judge Circuit Court as authorized by the Code of Virginia; and simultaneously provide available dates for a hearing to be scheduled not less than 30 nor more than 120 days from the demand.

Upon such demand and provision of available dates as specified above, further ~~p~~Proceedings before the District Committee shall terminate, and Bar Counsel shall file ~~with the Clerk of the Disciplinary System~~ the three-judge Circuit Court ~~Complaint required by Va. Code § 54.1-3935 to initiate Proceedings before a three-judge Circuit Court. The Clerk of the Disciplinary System shall forward the complaint to the appropriate tribunal.~~

\* \* \*

2. Hearing Procedure

\* \* \*

1. Disposition

\* \* \*

(2) Sanctions

If the District Committee finds that Misconduct has been shown by clear and convincing evidence, then the District Committee shall, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has been the subject of any Disciplinary Proceedings in this or any other jurisdiction and shall give Bar Counsel and the Respondent an opportunity to present material evidence in aggravation or mitigation, as well as argument. In determining what disposition of the Charge of Misconduct is warranted, the District Committee shall

consider the Respondent's Disciplinary Record. A District Committee may:

\* \* \*

(e) certify the Charges of Misconduct to the Board or file a three-judge Circuit Court complaint in a Circuit Court, ~~pursuant to Va. Code § 54.1-3935~~ as authorized by the Code of Virginia.

~~4. Perfecting an Appeal from District Committee's Determination~~

~~a. By the Respondent~~

~~(1) Notice of Appeal. Within ten days after notice is mailed of a District Committee's issuance of an Admonition, with or without Terms, or a Public Reprimand, with or without Terms, a Respondent may file with the Clerk of the Disciplinary System either a notice of appeal to the Board or a written demand that further Proceedings be conducted in a Circuit Court pursuant to Va. Code § 54.1-3935. In either case, the Respondent shall send copies to the District Committee Chair and to Bar Counsel.~~

~~(2) Staying of Discipline. If the Clerk of the Disciplinary System receives a timely notice of appeal from a Public Reprimand, with or without Terms, or an Admonition, with or without Terms, the sanction shall be stayed during the pendency of the appeal.~~

~~(3) Filing the Transcript and Record on Appeal. The Respondent shall certify in the notice of appeal or written demand that he or she has ordered from the Court Reporter a complete transcript of the proceedings before the District Committee, at the Respondent's cost. Upon receipt of the notice of appeal or written demand, Bar Counsel shall forward those portions of the record in his or her possession to the Clerk of the Disciplinary System. The transcript is a part of the record when it is received in the office of the Clerk of the Disciplinary System within 40 days after filing of the notice of appeal or written demand. The Clerk of the Disciplinary System shall retain the records until the transcript has been received or for 40 days after the notice of appeal or written demand has been received, whichever occurs first, and shall then dispose of the record as prescribed in the records retention policy set forth in this Paragraph. Failure of the Respondent to make the complete transcript a part of the Record as specified herein shall result in Dismissal of the appeal by the Board, whether initiated by notice of appeal or written demand, and affirmance of the sanction imposed~~

by the District Committee. Bar Counsel shall initiate the three judge Circuit Court process for the appeal only after receipt of the transcript by the Clerk of the Disciplinary System.

- (4) ~~Appeal to a Circuit Court. An appeal to a Circuit Court pursuant to Va. Code § 54.1-3935 shall be conducted before a duly convened three judge Circuit Court as an appeal on the record using the same procedure prescribed for an appeal before the Board under this Paragraph. The Clerk of the Disciplinary System shall forward the record to the clerk of the designated Circuit Court only upon receipt of the transcript as provided in the preceding paragraph.~~
- (5) ~~Appeal from Agreed Sanction Prohibited. No appeal shall lie from any sanction to which the Respondent has agreed.~~

#### I. Procedure For Appealing a District Committee Determination

##### 1. Agreed Disposition

No appeal shall be permitted from a determination based upon an Agreed Disposition.

##### 2. Record on Appeal

The record shall consist of the notice of hearing, the complete transcript of the Proceeding, any exhibits received or refused by the District Committee, the District Committee Determination, and all briefs, memoranda or other papers filed with the District Committee by the Respondent or Bar Counsel.

##### 3. By the Respondent

###### a. Notice of Appeal

Within ten days after notice is mailed of a District Committee Determination imposing discipline, a Respondent may file with the Clerk of the Disciplinary System a notice of appeal on the record specifying whether the appeal is to the Board or a three-judge Circuit Court as authorized by the Code of Virginia. In either case, the Respondent shall send a copy of the notice of appeal to Bar Counsel.

###### b. Staying of Discipline

If the Clerk of the Disciplinary System receives a timely notice of appeal from a District Committee Determination imposing discipline, the sanction shall be stayed during the pendency of the appeal.

###### c. Certification that Transcript has been Ordered

The Respondent shall certify in the notice of appeal that he or she has ordered from the Court Reporter a complete transcript of the District Committee Proceeding, at the Respondent's cost.

d. Upon receipt of the notice of appeal, Bar Counsel shall forward those portions of the record in his or her possession to the Clerk of the Disciplinary System. The transcript becomes part of the record if received by the Clerk of the Disciplinary System no later than 40 days after the notice of appeal is filed. Failure of the Respondent to make the complete transcript and opening brief a part of the record as specified herein shall result in Dismissal of the appeal by the Board, whether the appeal was to the Board or a three-judge Circuit Court, and affirmance of the District Committee Determination. If an appeal is dismissed, the Clerk of the Disciplinary System shall dispose of the record as prescribed in the records retention policy set forth in this Paragraph.

e. In an appeal to a three-judge Circuit Court, the Clerk of the Disciplinary System shall forward the notice of appeal, the record and the briefs to the clerk of the appropriate Circuit Court only upon timely filing of the notice of appeal, the transcript and the opening brief as provided in this Paragraph.

##### 4. By Bar Counsel

###### a. Notice of Appeal

Within ten days after notice is mailed of a District Committee Determination, Bar Counsel may file with the Clerk of the Disciplinary System a notice of appeal on the record specifying whether the appeal is to the Board or a three-judge Circuit Court. In either case, Bar Counsel shall send a copy of the notice of appeal to the Respondent and Respondent's counsel, if any.

###### b. Staying of Determination

If the Clerk of the Disciplinary System receives a timely notice of appeal from a District Committee Determination, the determination shall be stayed during the pendency of the appeal.

###### c. Certification that Transcript has been Ordered

Bar Counsel shall certify in the notice of appeal that he or she has ordered from the Court Reporter a complete transcript of the District Committee Proceedings, at the Bar's cost, and Bar Counsel shall forward those portions of the record in his or her possession to the Clerk of the Disciplinary System.

###### d. Election of a Three-Judge Circuit Court

Within 10 days after service of a notice of appeal by Bar Counsel to the Board, the Respondent may file with the Clerk of the Disciplinary System a demand that the appeal be heard on the record by a three-judge Circuit Court. If such demand is made, the Respondent shall send a copy to Bar Counsel.

e. Record on Appeal

The transcript becomes part of the record if received by the Clerk of the Disciplinary System no later than 40 days after the notice of appeal is filed. Failure of Bar Counsel to make the complete transcript and opening brief a part of the record as specified herein shall result in Dismissal of the appeal by the Board, whether the appeal was to the Board or a three-judge Circuit Court, and affirmance of the District Committee Determination. If an appeal is dismissed, the Clerk of the Disciplinary System shall dispose of the record as prescribed in the records retention policy set forth in this Paragraph.

- f. In an appeal to a three-judge Circuit Court, the Clerk of the Disciplinary System shall forward the notice of appeal, the record and the briefs to the clerk of the appropriate Circuit Court only upon timely filing of the notice of appeal, the transcript and the opening brief as provided in this Paragraph.

5. Briefing Schedule

Upon receipt of notice from the Clerk of the Disciplinary System that a Respondent or Bar Counsel has filed an appeal from a District Committee Determination, the Board shall place such matter on its docket for review. The Clerk of the Disciplinary System shall notify the appellant when the entire record of the District Committee Proceeding has been received or when the time for appeal has expired. Upon petition of the Respondent or Bar Counsel, for good cause shown, the Board may permit the record to be supplemented to prevent injustice. The supplement shall be in the form the Board deems appropriate. Thereafter, briefs shall be filed in the office of the Clerk of the Disciplinary System, as follows.

- a. The appellant shall file an opening brief within 40 days after the Clerk of the Disciplinary System mails the notice to the appellant that the record is complete. Failure of the appellant to file an opening brief within the time specified herein shall result in the Dismissal of the appeal and affirmance of the District Committee Determination.
- b. The deadline for the appellee to file an opposing brief is 25 days after the opening brief is filed.
- c. The deadline for the appellant to file a reply brief is 14 days after the appellee's brief is filed.

6. Standard of Review

- a. In reviewing the record of a District Committee Determination in an appeal by a Respondent, the Board or a three-judge Circuit Court shall ascertain whether there is substantial evidence in the record supporting the District Committee Determination and/or whether the District Committee Determination is plainly contrary to the law.

- b. In reviewing the record of a District Committee Determination in an appeal by Bar Counsel, the Board or a three-judge Circuit Court shall ascertain whether the District Committee Determination is plainly contrary to the law.

7. Oral Argument

Oral argument shall be granted unless waived by the appellant.

8. Determination on Appeal

Upon review of the record in its entirety, the Board or three-judge Circuit Court may:

- a. dismiss the Charges of Misconduct; or
- b. affirm the District Committee Determination, in which instance the Board or a three-judge Circuit Court shall impose the same or any lesser sanction as that imposed by the District Committee; or
- c. reverse in whole or in part the District Committee Determination and remand in whole or in part the Charges of Misconduct to the District Committee for further Proceedings.

H.J. Board Proceedings

1. Pre-Hearing Matters

- a. Procedure on Certification to the Board

- (1) After a Subcommittee or District Committee certifies a matter to the Board, and the Respondent has been served with the Certification, the Respondent shall, within 21 days after service of the Certification:

- (a) file an answer with the Clerk of the Disciplinary System to the Certification, which answer shall be deemed consent to the jurisdiction of the Board; or
- (b) file an answer with the Clerk of the Disciplinary System to the Certification and a demand that the ~~p~~Proceedings before the Board be terminated and that further ~~p~~Proceedings be conducted ~~pur-~~uant to Va. Code § 54.1-3935 before a three-judge Circuit Court as authorized by the Code of Virginia; and simultaneously provide available dates for a hearing to be scheduled not less than 30 nor more than 120 days from the demand.

Upon such demand and provision of available dates as specified above, further ~~p~~Proceedings before the Board shall terminate, and Bar Counsel shall file a three-judge Circuit Court ~~C~~complaint ~~required~~ by Va. Code § 54.1-3935 with the

Clerk of the Disciplinary System, who shall forward the complaint to the clerk of the appropriate Circuit Court. Failure of the Respondent to provide available dates for a hearing, as specified above, shall result in the Board retaining jurisdiction.

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b. Expedited Hearings

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(5) ~~At least five days prior to the date set for hearing, Within 10 days of service of a petition for expedited hearing, the Respondent shall either file with the Clerk of the Disciplinary System a format an answer to the petition, which shall be conclusively deemed to be a consent to the jurisdiction of the Board, or file a an answer and a demand that pProceedings before the Board be terminated and that further pProceedings be conducted before a three-judge Circuit Court pursuant to Article 6 of Chapter 39 of Title 54.1 of the Code of Virginia, as authorized by the Code of Virginia, whereupon further pProceedings before the Board shall be terminated and Bar Counsel shall file a three-judge Circuit Court complaint with the Clerk of the Disciplinary System under Va. Code § 54.1-3935. Failure to file such a timely demand within the time prescribed herein shall be a conclusive waiver of the right to subsequently file such demand and shall result in the Board retaining jurisdiction.~~

(6) ~~If proceedings continue before the Board, the conduct of the hearing shall be as provided herein. If pProceedings continue pursuant to Va. Code § 54.1-3935 before a three-judge Circuit Court as authorized by the Code of Virginia, the court designated pursuant to that section shall conduct the hearing provided for therein no more than 60 days from the date of filing of the complaint. shall issue an order requiring the Respondent to appear before the court not less than 30 or more than 60 days from the date the three-judge Circuit Court complaint was filed. If any an order of summary Suspension has been entered, such the Suspension shall remain in effect until the three-judge Circuit Court designated under Va. Code § 54.1-3935 enters a final an order disposing of the issue complaint before it.~~

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5. Proceedings upon First Offender Plea, Guilty Plea or Adjudication of a Crime

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d. Procedure

The procedure applicable to Proceedings related to Misconduct shall apply to Proceedings relating to guilty pleas or Adjudication of a Crime, except that if the

Respondent elects to have further Proceedings conducted pursuant to Va. Code § 54.1-3935 before a three-judge Circuit Court as authorized by the Code of Virginia, the Respondent shall file the Respondent's demand therefor not later than ten days prior to the date set for the hearing before the Board. If the Respondent files a demand that the Proceedings before the Board be terminated, and that further Proceedings be conducted by a three-judge Circuit Court, the order of Suspension issued by the Board shall remain in effect until the three-judge Circuit Court issues its ruling, ~~subject, however, to the provisions of Va. Code § 54.1-3935.~~

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~~J.K. Appeal from Procedure For Appealing a Board or Three-Judge Circuit Court Determinations~~

1. ~~Agreed Disposition~~

~~No appeal shall be permitted from a determination based upon an Agreed Disposition.~~

~~2. Right By the Respondent~~

~~a. As a matter of right any A Respondent may appeal to this Court from~~

~~(1) an order of Admonition, Public Reprimand, Suspension, or Disbarment Revocation imposed by the Board or a three-judge Circuit Court. An appeal shall lie once the Memorandum Order described in this Paragraph has been served on the Respondent. No appeal shall lie from a Summary Order.~~

~~(2) an order of the Board or a three-judge Circuit Court in an appeal affirming a District Committee Determination imposing discipline.~~

~~An appeal shall be permitted once the Memorandum Order described in this Paragraph has been served on the Respondent. No appeal shall be permitted from a Summary Order.~~

2. ~~Notice of Appeal~~

~~The Respondent shall file with the Clerk of the Disciplinary System a notice of appeal and assignments of error within 30 days after the Memorandum Order of the Board is served on the Respondent. This action within the time prescribed is jurisdictional.~~

3. ~~Further Proceedings~~

~~Further proceedings shall be as provided in this Court's procedure for filing an appeal from a trial court and procedure following perfection of appeal. For the purposes of determining dates of filing, the date of filing the record with the clerk of this Court shall be deemed to be the date of the issuance of the certificate of the clerk of this Court under Rule 5.23. The Clerk of the Disciplinary System shall immediately notify the Respondent and his counsel, if any, by certified mail, of the date on which the record is filed.~~

4. Determination

~~This Court shall hear the case and make such determination in connection therewith as it shall deem right and proper.~~

3. By Bar Counsel

Bar Counsel may appeal to this Court from a Memorandum Order issued by the Board or a three-judge Circuit Court. An appeal shall be permitted once the Memorandum Order described in this Paragraph has been served on Bar Counsel. No appeal shall be permitted from a Summary Order.

4. The appellant shall file with the Clerk of the Disciplinary System a notice of appeal and assignments of error within 30 days after the Memorandum Order of the Board or a three-judge Circuit Court is served. The transcript or a written statement of fact shall be filed with the Clerk of the Disciplinary System within 60 days of service of the Memorandum Order of the Board or the three-judge Circuit Court. An appeal shall be deemed granted by compliance with these filing requirements. Failure to comply with any of these filing requirements is jurisdictional and shall result in dismissal of the appeal.

5. Further Proceedings

The Clerk of the Disciplinary System shall assemble and file the record as provided in Part 5 of the Rules of this Court. The Clerk of the Disciplinary System shall immediately notify the Respondent, by certified mail, and Respondent's counsel, if any, and Bar Counsel, by first class mail, of the date on which the record is filed. Further Proceedings shall be as provided in the Rules of this Court for cases in which an appeal has been perfected. The date of filing the record with the clerk of this Court shall be deemed to be the date of the issuance of the certificate of the clerk of this Court under Rule 5:23.

6. Standard of Review

a. In reviewing the record of a Board or three-judge Circuit Court determination in an appeal by a Respondent, the Court shall ascertain whether there is substantial evidence in the record supporting the Board or three-judge Circuit Court determination and/or whether the Board or three-judge Circuit Court determination is plainly contrary to the law.

b. In reviewing the record of a Board or three-judge Circuit Court determination in an appeal by Bar Counsel, the Court shall ascertain whether the determination is plainly contrary to the law.

~~5.7.~~ Office of the Attorney General

In all appeals to this Court, the Office of the Attorney General, or the Bar Counsel, if so requested by the Attorney General, shall represent the interests of the Commonwealth and its citizens as appellees.

~~6.8.~~ Stay Pending Appeal

Upon the entry by the Board or a three-judge Circuit Court of either a Summary or Memorandum Order of Suspension, this Court may, upon petition of the Respondent, stay the effect of such an order of suspension prior to or during the pendency of the appeal. Any order of Admonition, Public Reprimand and any order in an appeal affirming a District Committee Determination of a *De Minimis* Dismissal or a Dismissal for Exceptional Circumstances shall be automatically stayed prior to or during the pendency of an appeal ~~therefrom~~. No stay shall be granted in cases where the Respondent's license to practice law has been revoked by either the Summary or Memorandum Order of the Board or a three-judge Circuit Court.

~~K.L.~~ Resignation

\* \* \*

~~L.M.~~ Consent to Revocation

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~~M.N.~~ Duties of Disbarred or Suspended Respondent

\* \* \*

~~N.O.~~ Confidentiality of Disciplinary Records and Proceedings:

\* \* \*

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 as authorized by the Code of Virginia ~~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.

\* \* \*

~~O.P.~~ \* \* \*

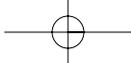


**REVISE DEFINITION OF "CERTIFICATION"**

On April 6, 2005, COLD approved a proposed amendment revising the definition of "Certification." This amendment eliminates the reference to "charges of misconduct" since a subcommittee which elects to certify a case to the Board does not have before it "charges of misconduct." The defined term "Charges of Misconduct" refers to a notice of hearing. Such a notice is issued only after a subcommittee has elected to set a case for trial before a district committee.

Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court

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



\* \* \*

A. Definitions

As used in this Paragraph, the following terms shall have the meaning herein stated unless the context clearly requires otherwise:

\* \* \*

“Certification” means the document issued by a Subcommittee or a District Committee when it has elected to certify ~~the Charges of Misconduct~~ allegations of Misconduct to the Board for its consideration, which document shall include sufficient facts to reasonably notify Bar Counsel and Respondent of the basis for such Certification and the Disciplinary Rules alleged to have been violated.

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