

**Proposed Consolidated Rules of Disciplinary Procedure**

In February 2000, former Virginia State Bar President W. Scott Street, III, appointed Frank B. Miller, III, to chair a Special Committee to Revise and Consolidate the Rules of Disciplinary Procedure. The other committee members are James R. Austin, James J. Burns, Robert L. Freed, Robert J. Merrick and Thomas E. Spahn. All the special committee members have experience with the attorney disciplinary process as volunteers and/or as respondents' counsel.

The special committee's assignment was to combine Part Six, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court, the Virginia State Bar Council Rules of Disciplinary Procedure and the Disciplinary Board Rules of Procedure into one well indexed, user-friendly set of rules. The consolidated rules will become a new version of Paragraph 13, if the Supreme Court of Virginia adopts them.

While proposing new rules was beyond the special committee's power, in some instances the committee made minor changes to existing rules in order to harmonize the rules or fill gaps. When needed changes were more than minor, the committee referred the issues to the Rules Subcommittee of the Standing Committee on Lawyer Discipline (COLD).

The special committee first met for six hours on March 27, 2000, and had lengthy meetings almost every month thereafter through August 2001. Stephen G. Test, chair of the COLD Rules Subcommittee, and Rhysa G. South, a Rules Subcommittee member, assisted the committee with its work. COLD approved a draft of the consolidated rules on September 4, 2001. When the Virginia State Bar Council met on October 19, 2001, Mr. Miller presented the draft rules for Council's consideration. The draft rules are available at [www.vsb.org/profguides/proposed/consolid\\_intro.html](http://www.vsb.org/profguides/proposed/consolid_intro.html) and by mail in hard copy upon request. In addition, *Virginia Lawyers' Weekly* will publish the draft rules. Because the draft rules are exceedingly lengthy, they will not be published in the *Virginia Lawyer* or the *Virginia Lawyer Register*.

To request a hard copy of the draft rules, please contact Gwen Evans at (804) 775-0556. 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 February 8, 2002. The Virginia State Bar Council will consider the proposed amendments when it meets on February 22, 2002, in Richmond.

**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 February 8, 2002. The Virginia State Bar Council will consider the proposed amendments when it meets on February 22, 2002, in Richmond.*

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**Proposed Rule Change Granting Bar Counsel a Limited Right of Appeal from District Committee Determinations**

One of the changes that the Joint Legislative Audit and Review Commission of the Virginia General Assembly (JLARC) recommended following its 1995 review of the Virginia State Bar was that consideration be given to permitting bar counsel to appeal district committee determinations to the Disciplinary Board. In making this recommendation, JLARC noted that one of the potential problems with a decentralized disciplinary system is lack of consistency and uniformity in the imposition of sanctions.

In 1997, the Virginia State Bar Council approved a proposed amendment to Part Six, Section IV, Paragraph 13.B.(10) of the Rules of the Virginia Supreme Court, which governs appeals of district committee determinations. Among other things, the proposed amendments granted bar counsel a limited right of appeal from district committee determinations. The Supreme Court of Virginia entered an order on January 16, 1998, denying without comment the proposed amendments granting bar counsel a limited right of appeal.

The potential problems with a decentralized disciplinary system that JLARC noted more than six years ago persist. Accordingly, on December 4, 2001, the Standing Committee on Lawyer Discipline unanimously approved a rule amendment that would allow bar counsel to appeal a district committee determination to the Disciplinary Board, if at least two members of a three member board panel conclude that the district

committee's determination is plainly contrary to the law or evidence. The appeal, if granted, would be on the record.

A respondent can appeal a district committee determination as a matter of right.

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

B.\* \* \*

(10) Appeal from District Committee's Determination:

(a) By the Respondent.

(a)(i) A Respondent as to whom a District Committee has determined to issue a ~~Public Reprimand~~ or to impose Terms, within ten days after notice thereof, may demand an appeal by filing with the Clerk of the Disciplinary System either a notice of appeal or a written demand that further proceedings be conducted pursuant to Article 6 of Chapter 39 of Title 54.1 of the Code of Virginia. In either case, a copy shall be sent to the District Committee chair and to Bar Counsel.

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- (b)(ii) When proceeding by notice of appeal, or a written demand that further proceedings be conducted pursuant to Article 6 of Chapter 39 of Title 54.1 of the Code of Virginia, the Respondent shall certify in the notice of appeal or written demand that he or she has ordered from the court reporter the transcript of the proceedings before the District Committee, at the Respondent's cost. Upon receipt of such notice or written demand by the Clerk of the Disciplinary System, the imposition of any reprimand or term shall be stayed. No appeal shall lie from any sanction to which the Respondent has agreed. 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. The transcript is 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 shall retain the Record until the transcript has been received or for 40 days after the notice of appeal or written demand has been received, whichever first occurs, and shall then dispose of the Record as provided in subparagraph D of this rule in case of an appeal to the Disciplinary Board and as provided by subparagraph (c) below in case of an appeal to a three-judge court. Failure of the Respondent to make the transcript a part of the Record as specified herein shall result in dismissal of the appeal by the Disciplinary 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 court process for the appeal only after receipt of the transcript by the Clerk of the Disciplinary System.
- (c)(iii) When proceeding by written demand that further proceedings be conducted pursuant to Article 6 of Chapter 39 of Title 54.1 of the Code of Virginia, such proceeding shall be conducted before a duly convened three judge court as an appeal on the Record pursuant to the same procedure for an appeal before the Board under subparagraph D herein. 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 subparagraph (b) above. Reference in subparagraph D of this rule to "Clerk" or "Clerk of the Disciplinary System" shall mean the Clerk of the designated Circuit Court when appropriate, and to "Board" shall mean the three-judge court.
- b) By Bar Counsel.
- i) Notice of Appeal. — Bar Counsel may, within thirty days of the issuance of a District Committee determination, file with the Clerk of the Disciplinary System a notice of appeal. Bar Counsel shall simultaneously mail or deliver a copy of the notice of appeal to the Respondent and Respondent's counsel, if any. The notice of appeal shall contain a statement that the transcript of the proceeding before the District Committee has been ordered from the court reporter who reported the case and that the transcript will be filed with the Clerk.
  - ii) Record on appeal. — The record shall consist of the transcript of the proceeding before the District Committee and all exhibits introduced or rejected at the District Committee hearing. Bar Counsel shall file with the Clerk the transcript and the exhibits as soon as possible after filing the notice of appeal.
  - iii) Perfecting the appeal. — The Clerk shall notify the Respondent, Respondent's counsel, if any, and Bar Counsel when the record has been filed. Bar Counsel shall thereafter file a petition for appeal with the Clerk within thirty days of such notice, and shall serve on the Respondent and Respondent's counsel, if any, a copy of the petition.
  - iv) Brief in opposition. — A brief in opposition to granting the appeal may be filed with the Clerk of the Disciplinary System within twenty-one days after the petition for appeal is served on the Respondent and Respondent's counsel, if any, and a copy of the brief in opposition served on Bar Counsel.
  - v) Reply brief. — Bar Counsel may file a reply brief with the Clerk within fourteen days after the Respondent's brief is served on Bar Counsel.
  - vi) Standard of review. — Upon receipt of the petition for appeal, the brief in opposition and the reply brief, if any, the Clerk shall forward such briefs, with the record of the proceeding before the

District Committee, to a panel of the Disciplinary Board consisting of a Vice-Chair, a lawyer and a non-lawyer member for review. The panel may meet by telephone conference and may permit oral argument by the Bar Counsel and the Respondent or Respondent's counsel. If two members of the panel conclude that the District Committee's decision is plainly contrary to the law or evidence, the petition shall be granted and an appeal awarded. Otherwise, the District Committee's decision shall be final.

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D. Proceedings Upon Appeal of a District Committee Determination:

- (1) Upon receipt of notice from the Clerk that a Respondent has filed an Appeal from a District Committee ~~Determination~~ or that the Board has granted a petition for appeal, the Board shall place such matter on its docket for review. The Clerk shall notify the ~~Respondent~~ appellant when the entire ~~Record~~ of the proceedings before the District Committee has been received or when 40 days from receipt of the notice of appeal has expired. The ~~Record~~ shall consist of the notice of hearing, the transcript of testimony (if any), 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 the Bar. Upon petition of the Respondent, for good cause shown, the Board may permit the ~~Record~~ to be supplemented to prevent injustice, such supplement to be in such form as the Board may deem appropriate. Thereafter, briefs shall be filed as follows:
  - (a) The ~~Respondent~~ appellant shall file an opening brief in the office of the Clerk of the Disciplinary System within 40 days after the filing by the Clerk of notice to the ~~Respondent~~ appellant regarding the ~~Record~~.
  - (b) The ~~Bar~~ appellee shall file its brief in the office of the Clerk of the Disciplinary System within 25 days after filing of the opening brief.
  - (c) The ~~Respondent~~ appellant may file a reply brief within 14 days after filing of the Bar's brief.

Failure of the ~~Respondent~~ appellant to file an opening brief within the time specified herein shall result in the dismissal of the appeal and affirmation of the ~~sanction imposed~~ decision by the District Committee.

4) Standard of Review:

The standard for review by the Board shall be the same as is provided in Section 9-6.14:17 of the Code of Virginia for review of administrative agency decisions.

3) Oral argument:

Oral argument shall be granted unless waived by the ~~Respondent~~ appellant.

4) Imposition of Sanctions:

Upon review of the ~~Record~~ in its entirety, the Board may:

- a) dismiss the Charges of Misconduct upon a finding that the District Committee ~~Determination~~ is contrary to the law or is not supported by substantial evidence; or
- b) affirm the District Committee ~~Determination~~, in which instance the Board may impose the same or lesser sanction as that imposed by the District Committee, but in no case shall it increase the severity of the sanction imposed by the District Committee; or
- c) reverse the decision of the District Committee and remand the Charges of Misconduct to the District Committee for further proceedings.

**Proposed Rule Change Allowing District Committees to Impose Up to a One Year Suspension as an Alternate Sanction**

Recent rule changes open district committee hearings to the public. If a district committee elects to impose a public reprimand with terms following a hearing, the disposition must specify the alternate sanction to be imposed if the respondent fails to comply with the terms. Usually alternate sanctions are one level higher than the discipline imposed with terms. In other words, an alternate sanction for a public reprimand would usually be a short suspension.

Currently, on the Disciplinary Board can suspend an attorney's license. At its meeting on October 2, 2001, the Standing Committee on Lawyer Discipline (COLD) approved a proposed amendment to the Rules of Court, Part Six, Section IV, Paragraph 13.B.(7), which would allow a district committee to impose up to a one-year suspension as an alternate sanction.

**Part Six, Section IV, Paragraph 13.B.(7) of the Rules of the Virginia Supreme Court**

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

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B. Authority and Duties of the Council, the Standing Committee, Subcommittees, District Committees and Bar Counsel; Investigation and Prosecution of Complaints:

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6) Procedures for District Committee Hearings:

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proposed rule changes

- (7) Disposition: Upon a finding of Misconduct a District Committee may:
  - (a) dismiss with specified Terms;
  - (b) impose a public reprimand, with or without Terms; or
  - c) impose as an alternate sanction to a public reprimand, with Terms, up to a one year suspension of the Respondent's license; or
  - (d) certify the Charges of Misconduct to the Board or file a complaint in a circuit court, pursuant to Section 54.1-3935, Va. Code, 1950, as amended.

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

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I. Resignation:

Any Attorney may at any time surrender his license by tendering his resignation in writing to the Clerk of this Court or the Clerk of the Disciplinary System, but any resignation tendered by an Attorney at a time when charges are pending against him before the Board, a District Committee, or a Court, shall be deemed an admission that such charges are true. This admission shall not be deemed an admission in any proceeding except one relating to the status of the Attorney as a member of the Virginia State Bar. This Court or the Board will by order accept such resignation and revoke the license of such Attorney. Upon acceptance of such resignation by this Court or the Board, Bar Counsel, in his discretion, may dismiss without prejudice any and all files of Charges of Misconduct then pending by notification of such action to the Clerk of the Disciplinary System and the Committee, Court or Board wherein the case lies. Upon tendering his resignation to this Court or the Board, the Attorney shall immediately cease the practice of law and shall comply with the notice requirements set forth in Paragraph K(1), infra.

Proposed Rule Changes Regarding Resignation, Consent to Revocation and Reinstatement

On December 4, 2001, the Standing Committee on Lawyer Discipline (COLD) approved proposed amendments to the Rules of the Virginia Supreme Court, Part Six, Section IV, Paragraph 13.I. and J., which govern resignation and reinstatement.

The proposed changes were precipitated by confusion over how an attorney who has no disciplinary matters pending can resign his or her license to practice law, as well as the reinstatement procedure for an attorney who resigns and later wishes to be readmitted to the bar. In addition, in this age of multi-jurisdictional practices, it has become essential to document the terms on which an attorney, who is the subject of disciplinary proceedings, surrenders his or her license, so that the public can make informed decisions and other jurisdictions can take reciprocal action.

Under the proposed amendment, an attorney, with no disciplinary matters pending, can resign from the bar by submitting a sworn and notarized application indicating that the attorney has no knowledge of any complaint, investigation, action, or proceeding in any jurisdiction involving allegations of misconduct by the attorney. If the bar's investigation confirms the application, the Clerk of the Disciplinary Board will forward a resignation order to the Disciplinary Board for entry. Bar counsel can object to an application, if the bar's investigation reveals that the application is incorrect, and request the board to hold a hearing on the resignation application.

An attorney who resigns from the bar rather than electing associate membership status, will be treated as a new applicant and must satisfy the usual admission requirements plus any outstanding financial obligations from his or her prior bar membership.

Under the proposed amendment, an attorney, with disciplinary matters pending, who wishes to surrender his or her license to practice law, must acknowledge in writing that the material facts upon which the disciplinary proceedings are based are true and that the attorney could not successfully defend the disciplinary proceedings. The proposed rule permits the Disciplinary Board to settle any dispute arising from the terms on which an attorney with disciplinary matters pending wishes to surrender his or her license.

A. Application

A sworn and notarized application to resign from the practice of law shall be submitted to the Clerk of the Disciplinary System. The application shall state that the resignation is not being offered to avoid disciplinary action and that the Attorney has no knowledge of any complaint, investigation, action, or proceeding in any jurisdiction involving allegations of Misconduct by the Attorney. An application to resign will not prevent or preclude any disciplinary proceeding or action against an Attorney.

B. Procedure

The Clerk of the Disciplinary System shall submit applications for resignation to Bar Counsel, who shall investigate each application and determine whether, based upon the information available, the statements in the sworn application appear to be true and complete. If Bar Counsel files a written objection to the application with the Clerk of the Disciplinary System, the Board shall hold a hearing on whether the application should be accepted. If Bar Counsel does not file an objection, the Board may enter an order accepting the Attorney's resignation without a hearing. A resignation shall be effective only upon entry of an order accepting it.

## proposed rule changes

### C. Notice Requirement

Upon entry of an order accepting an Attorney's resignation, the former Attorney shall immediately cease the practice of law and make appropriate arrangements for the disposition of matters in the Attorney's care in conformity with the wishes of the Attorney's client.

### J. Consent to Revocation

A. An Attorney may not resign while the Attorney is the subject of a disciplinary complaint, investigation, action, or proceeding involving allegations of Misconduct. An application to resign will not prevent or preclude any disciplinary proceeding or action against the Attorney.

B. An Attorney who is the subject of a disciplinary complaint, investigation or proceeding involving allegations of Misconduct may consent to Revocation, but only by delivering to the Clerk of the Disciplinary System an affidavit declaring the Attorney's consent to Revocation and stating:

- (1) That the consent is freely and voluntarily rendered, that the Attorney is not being subjected to coercion or duress, and that the Attorney is fully aware of the implications of consenting to Revocation;
- (2) That the Attorney is aware that there is currently pending a complaint, an investigation into, or a proceeding involving, allegations of Misconduct, the nature of which shall be specifically set forth in the affidavit;
- (3) That the Attorney acknowledges that the material facts upon which the allegations of Misconduct are predicated are true; and
- 4) That the Attorney submits the consent to Revocation because the Attorney knows that if disciplinary proceedings based on the alleged Misconduct were brought or prosecuted to a conclusion, the Attorney could not successfully defend them.

The admissions offered in the affidavit consenting to Revocation shall not be deemed an admission in any proceeding except one relating to the status of the Attorney as a member of the Bar.

C. The Clerk of the Disciplinary System shall submit the affidavit to Bar Counsel, who shall investigate the affidavit and determine whether, based upon the information available, the statements in the sworn application appear to be true and complete. If Bar Counsel files a written objection to the affidavit with the Clerk of the Disciplinary System, the Board shall hold a hearing on whether the affidavit and consent to Revocation should be accepted. If Bar Counsel does not file

an objection, the Board shall enter an order revoking the Attorney's license to practice law by consent without a hearing.

D. Upon entry of such an order of Revocation by consent, the revoked Attorney shall immediately cease the practice of law and shall comply with the notice requirements set forth in Paragraph L.(1), infra.

E. When an Attorney's license is revoked by consent, Bar Counsel, in his or her discretion, may dismiss without prejudice any and all Complaints or Charges of Misconduct then pending by notifying the Clerk of the Disciplinary System and the District Committee, Board or Court wherein the matter or matters lie.

### K. Reinstatement:

The filing by a former Attorney of a petition for reinstatement shall constitute a waiver of all confidentiality relating to the petition, and to the complaint or complaints that resulted in, or were pending at the time when, the former Attorney resigned or his or her license was revoked.

#### 1) After Resignation

If after resigning from the bar, a former Attorney wishes to resume practicing law in the Commonwealth of Virginia, the former Attorney must apply to the Board of Bar Examiners, satisfy the character and fitness requirements and pass the Bar examination. Before being readmitted to the Bar, the former Attorney must also satisfy any membership obligations that were delinquent when the former Attorney resigned.

#### (4) Reinstatement After Revocation

Any Attorney whose license has been revoked may petition this Court for reinstatement, setting forth in his or her petition the reason he or she should be reinstated. The following requirements shall apply: (1) the petition shall be filed under oath or affirmation with penalty of perjury; (2) no petition may be filed sooner than five years from the effective date of the revocation; and (3) the revoked Attorney must certify in the petition that he or she has met the requirements of the following subparagraph. This Court may deny the petition or refer it to the Board for recommendation. Upon such reference, the Board shall hold a hearing and file its recommendation, together with the record before it, with the Clerk of this Court. The Board may recommend approval or disapproval of the petition. Final action will be taken by this Court.

No license to practice law shall be reinstated for any revoked Attorney unless the Attorney demonstrates to the Board that he or she (1) within the five (5) years prior to filing the petition has

attended ~~sixty (60)~~ sixty hours of continuing legal education of which at least ten ~~(10)~~ shall be in the area of legal ethics or professionalism, and has taken the Multistate Professional Responsibility Examination and received a scaled score of 85 or higher; (2) has reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of the Attorney's misconduct; and (3) has paid the Bar all costs that have been assessed against him or her, together with any interest due thereon.

In addition to meeting the foregoing requirements, an Attorney whose license to practice law was revoked must also show by clear and convincing evidence that he or she is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law.

~~The filing by an Attorney of a petition for reinstatement shall constitute a waiver of all confidentiality relating to the petition, and to the Complaint or Complaints that resulted in, or were pending at the time of, the revocation of the Attorney's license.~~

Upon approval of a petition by this Court, the revoked Attorney shall meet the following requirements prior to and as a condition of his or her reinstatement: (1) take and pass the written portion of the Virginia State Bar examination; (2) if required by the Board, obtain and maintain a professional liability insurance policy issued by a company authorized to write such insurance in Virginia at the cost of the Attorney in an amount and for such term as are set by the Board; and (3) if required by the Board, obtain and maintain a blanket fidelity bond or dishonesty insurance policy issued by a company authorized to write such bonds or insurance in Virginia at the cost of the Attorney in an amount and for such term as are set by the Board.

**(13) Reinstatement After Disciplinary Suspension for More than One Year.**

No license to practice law shall be reinstated for any Attorney whose license has been suspended for more than one year unless the Attorney demonstrates to the Board that he or she (1) has attended twelve hours of continuing legal education, of which at least two hours shall be in the area of legal ethics or professionalism, for every year or fraction thereof that the Attorney's license has been suspended; (2) has taken the Multistate Professional Responsibility Examination since imposition of discipline and received a scaled score of 85 or higher; (3) has reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of the Attorney's misconduct; and (4) has paid to the Bar all costs that have been assessed against him or her, together with any interest due thereon.

~~1) The requirements of this subparagraph J shall apply to all petitions filed after July 1, 2000.~~

(4) Investigation of Disability in Reinstatement Matters

A) Upon receipt of notice or evidence that an individual seeking Reinstatement is or may be suffering from a Disability, Bar Counsel shall cause an Investigation to be made to determine whether there is reason to believe that the Disability exists.

B) As part of the Investigation of whether a Disability exists, and for good cause shown in the interest of public protection, Bar Counsel may petition the Board to order the individual:

i) to undergo at his or her expense a psychiatric, physical or other medical examination by a qualified physician or other health care provider selected by the Board; and

ii) to provide appropriate releases to health care providers authorizing the release of his or her psychiatric, physical or other medical records to Bar Counsel and the Board for purposes of the Investigation and any subsequent Reinstatement Proceedings.

iii) The Board shall hold a hearing to determine whether such examination(s) and release(s) are appropriate, upon notice to the individual petitioning for Reinstatement.

K.L. General Provisions:

1) \* \* \*

**Proposed Rule Change Regarding Lawyers' Eligibility for Service on District Committees and the Disciplinary Board**

The Standing Committee on Lawyer Discipline (COLD) approved proposed amendments to the Rules of Court, Part Six, Section IV, Paragraph 13.B.(2)(a)(iii), C.(1)(c) and K.(9)(b)(iii) at its meeting on October 2, 2001. The proposed amendments to 13.B.(2)(a)(iii) and C.(1)(c) would permit COLD to determine whether a lawyer who receives a de minimus dismissal or a dismissal for exceptional circumstances within five years immediately preceding the proposed appointment is eligible for service on a district committee or the Disciplinary Board.

The proposed amendment to 13.K.(9)(b)(iii) would automatically terminate the service of a sitting district committee or Disciplinary Board member who receives a dismissal with terms, as well as a private reprimand, a public reprimand, an admonition, suspension or revocation. COLD would determine

whether the final imposition of any other form of attorney discipline would terminate a member from further service.

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

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B. Authority and Duties of the Council, the Standing Committee, Subcommittees, District Committees and Bar Counsel; Investigation and Prosecution of Complaints.—

(1) \* \* \*

(2) Appointment of Committees, Panels and Subcommittees:

(a) Effect of prior disciplinary record or criminal record on eligibility for appointment:

(i) In order to be considered as a potential appointee to a District Committee, each potential appointee shall execute the following:

(A) A waiver of confidentiality with respect to his or her prior disciplinary record and any pending complaints which allows production of any prior disciplinary record and any pending complaints from any jurisdiction to the members of Council and the staff of the Virginia State Bar for purposes of the appointment process; and

(B) An authorization for the Virginia State Bar to conduct a criminal records check of all jurisdictions for any convictions of any crimes and provide the results to the members of Council and the staff of the Virginia State Bar for purposes of the appointment process.

(ii) Any potential appointee who has ever been convicted of a crime in any jurisdiction shall be ineligible for appointment to a District Committee. For purposes of this subparagraph (ii), "crime" means (A) any offense declared to be a felony by federal or state law; (B) any other offense, whether federal or state, involving theft, fraud, forgery, extortion, bribery, or perjury; (C) an attempt, solicitation or conspiracy to commit any of the foregoing; or (D) any other criminal act which reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

(iii) Any potential appointee who has any attorney disciplinary record, in any juris-

diction, consisting of (A) revocation; (B) suspension; (C) public reprimand imposed within the ten (10) years immediately preceding the proposed appointment date; or (D) private discipline, except for a de minimis dismissal or a dismissal for exceptional circumstances, or an admonition imposed within the five (5) years immediately preceding the proposed appointment date, shall be ineligible for appointment to a District Committee. The Standing Committee on Lawyer Discipline shall have the sole discretion to determine whether a de minimis dismissal or a dismissal for exceptional circumstances shall disqualify a potential appointee.

(b) \* \* \*

(c) \* \* \*

(d) \* \* \*

(e) \* \* \*

C. The Board and Procedure Before the Board:—

(1) Effect of prior disciplinary record or criminal record on eligibility for appointment:

(a) In order to be considered as a potential appointee to the Board, each potential appointee shall execute the following:

(i) A waiver of confidentiality with respect to his or her prior disciplinary record and any pending complaints which allows production of any prior disciplinary record and any pending complaints from any jurisdiction to the members of Council and the staff of the Virginia State Bar for purposes of the appointment process; and

(ii) An authorization for the Virginia State Bar to conduct a criminal records check of all jurisdictions for any convictions of any crimes and provide the results to the members of Council and the staff of the Virginia State Bar for purposes of the appointment process.

(b) Any potential appointee who has ever been convicted of a crime in any jurisdiction shall be ineligible for appointment to the Board. For purposes of this subparagraph (b), "crime" means (i) any offense declared to be a felony by federal or state law; (ii) any other offense, whether federal or state, involving theft, fraud, forgery, extortion, bribery, or perjury; (iii) an attempt, solicitation or conspiracy to commit any of the foregoing; or (iv) any other criminal act which

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reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

- (c) Any potential appointee who has any attorney disciplinary record, in any jurisdiction, of (i) revocation, (ii) suspension, (iii) public reprimand imposed within the ten (10) years immediately preceding the proposed appointment date, or (iv) private discipline, except for a de minimis dismissal or a dismissal for exceptional circumstances, or an admonition imposed within the five (5) years immediately preceding the proposed appointment date, shall be ineligible for appointment to the Board. The Standing Committee on Lawyer Discipline shall have the sole discretion to determine whether a de minimis dismissal or a dismissal for exceptional circumstances shall disqualify a potential appointee.

- (2) \* \* \*
- (3) \* \* \*
- (4) \* \* \*
- (5) \* \* \*
- (6) \* \* \*
- (7) \* \* \*

K. General Provisions:—

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(9) Disqualification:

- (a) \* \* \*

(b) District Committee or Board Member:

- (i) A member of a District Committee or the Board shall be disqualified from adjudicating any matter with respect to which the member has any personal or financial interest that might affect or reasonably be perceived to affect the member's ability to be impartial.
- (ii) Upon the referral of any Complaint against a sitting member of a District Committee or the Board to a District Committee for investigation, the member shall be recused from any service on the District Committee or the Board until the dismissal of the Complaint without the imposition of any form of discipline.
- (iii) ~~Effective July 1, 2001, u~~Upon the final imposition of a dismissal with terms, a private reprimand, a public reprimand, an admonition, a suspension or a revo-

cation against a sitting member of a District Committee or the Board, the member shall automatically be terminated from membership on the District Committee or Board. Upon the final imposition of any other form of attorney discipline, the Standing Committee on Lawyer Discipline shall have sole discretion to determine whether the member shall be terminated from further service on the District Committee or the Board.

**Proposed Rule Change Regarding Pleas to Crimes under the First Offender Statute**

On December 4, 2001, the Standing Committee on Lawyer Discipline (COLD) approved revised, proposed amendments to the Rules of the Virginia Supreme Court, Part Six, Section IV, Paragraph 13.E., which governs proceedings upon adjudication of a Crime. Paragraph 13 defines a "Crime" as "an offense declared to be a felony by federal or state law; any other offense, which federal or state, involving theft, fraud, forgery, extortion, bribery or perjury; or an attempt, solicitation or conspiracy to commit any of the foregoing." The Virginia State Bar Council tabled the original proposed amendments to Paragraph 13.E. when it met on October 19, 2001.

Under the new proposed amendments, where a court accepts an attorney's plea to a Crime under a first offender statute and finds facts that would justify a finding of guilt, a hearing notice would issue from the Disciplinary Board requiring the attorney to appear for a board hearing. At the hearing, the attorney would have the burden of proving why the attorney's license to practice law should not be revoked or suspended and, if board does not revoke or suspend the attorney's license, why the attorney should not be required to give notice of the plea to current clients, opposing counsel and presiding judges in pending litigation.

The amended rule provides that the hearing shall be set not less than fourteen nor more than thirty days after issuance of the board's order.

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

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E. Proceedings upon Adjudication of a Crime:

1) Pleas under First Offender Statutes

- i) Whenever the Clerk of the Disciplinary System receives written notification from any court of competent jurisdiction stating that an Attorney has entered a plea to a Crime under a first offender statute, and that the court has found facts that would justify a finding of guilt and ordered that the Attorney be put on probation, the Board shall forthwith enter an order requiring the Attorney to appear at a specified time and place for a hearing before the Board to determine whether the Attor-

ney's license to practice law should be revoked or suspended or, if not, whether the Attorney should be required to give notice, by certified mail, of the plea and probation ordered by the court, including the terms and duration of the probation, to all clients for whom the Attorney is currently handling matters and to all opposing attorneys and the presiding judges in pending litigation.

ii) A copy of the written notification from the court shall be served with the order fixing the time and place of the hearing. The hearing shall be set not less than fourteen nor more than thirty days after the date of the Board's order. At the hearing, the Attorney shall have the burden of proving why his or her license should not be suspended or revoked and why he or she should not be required to give notice of the plea and probation ordered by the court.

iii) If the Attorney elects to have further proceedings conducted pursuant to Article 6,

Chapter 39, Title 54.1 of the Code, the Attorney shall file a demand therefor not later than ten days prior to the date set for the Board hearing.

iv) If the Board or court suspends or revokes the Attorney's license to practice law, the Attorney must comply with the notice requirements set out in Paragraph L(1), infra. If the Board or court orders the Attorney to give notice of the plea and court ordered probation, the Attorney shall give such notice within 14 days after the effective date of the Board's order and furnish proof to the bar within 60 days of the effective date of the order that such notices have been timely given.

v) Issues concerning the adequacy of the notice shall be determined by the Board, which may suspend or revoke the Attorney for failure to comply with the above notice requirements.

(42) Summary Suspension:

Whenever the Clerk of the Disciplinary System receives written notification from any court of competent jurisdiction stating that an Attorney has been found guilty or convicted of a Crime by verdict of a judge or jury, irrespective of whether sentencing has occurred, the Board shall forthwith enter an order summarily suspending the license of the Attorney and shall forthwith serve upon the Attorney (a) a copy of the written notification from the court, (b) a copy of

the Board's order, and (c) a notice fixing the time and place of a hearing to determine whether the license of the Attorney should be revoked or further suspended. The hearing shall be set not less than fourteen nor more than thirty days after the date of the Board's order. Upon written request of the Respondent, the hearing shall be continued until after sentencing has occurred, and on receipt by the Board of a certified copy of a notice of appeal from the conviction, proceedings before the Board shall, upon request of the Respondent, be continued pending disposition of such appeal. The Board may, upon request of the Respondent, hold an interim hearing and terminate such suspension during the pendency of such sentencing or appeal if it finds that such suspension, if not terminated, would be likely to exceed the discipline imposed by the Board upon a hearing on the merits of the case.

Upon presentation to the Board of a certified copy of an order setting aside the verdict or reversing the conviction on appeal, any suspension of the license shall be automatically terminated and any revocation of the license shall be vacated, and the license shall be deemed automatically reinstated. Nothing herein shall preclude further proceedings against the Respondent upon Charges of Misconduct arising from the facts leading to such conviction.


(23) Action By the Board:

If the Board shall find at the hearing that the Respondent has been found guilty of a Crime by the verdict of a judge or jury, an order shall be issued and served upon the Respondent in which the Board shall:

- (a) Suspend, or continue the suspension of, the license of the Respondent for a stated period not in excess of five years; or
- (b) Revoke the license of the Respondent.

(34) Procedure:

The procedure applicable to hearings relating to Misconduct shall apply to hearings relating to a Crime, except that if the Attorney elects to have further proceedings conducted pursuant to Article 6, Chapter 39, Title 54.1 of the Code, he shall file his demand therefor not

later than ten days prior to the date set for the hearing. In the event the Attorney 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 the Board suspending the license of the Attorney shall remain in full force and effect until the conclusion of the hearing conducted by the three-judge court, at which time said Court shall deal with the order of suspension as part of its ruling; subject, however, to the provisions of Section 54.1-3935 of the Code of Virginia. 

### Notice Regarding District Committee Hearings Open to the Public

On October 10, 2001, the Supreme Court of Virginia approved amendments to Part Six, Section IV, Paragraph 13 of the Rules of Court, which will open district committee hearings to the public.

The new rules become effective on January 1, 2002. The Standing Committee on Lawyer Discipline has decided as a policy matter that only hearings in cases set for hearing after January 1, 2002, will be open to the public. For example, if a hearing date after January 1, 2002, were set in a case before December 31, 2001, that hearing will not be open to the public. On the other hand, if a hearing date is set after the new rules become effective on January 1, 2002, the hearing will be open to the public.

District committee dockets listing the time and place of hearings open to the public will be posted on the Virginia State Bar Web site at [www.vsb.org](http://www.vsb.org).

### Proposed Amendment to Part 6, § IV, ¶ 5 of the Supreme Court Rules to Make All Past Presidents of the VSB ex officio Members of Council.

*Comments or questions 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 February 8, 2002. The Virginia State Bar Council will consider the proposed amendments when it meets on February 22, 2002, in Richmond.*

Any person who has served as President of the Virginia State Bar shall serve as an ex officio member of the Council, provided he or she remains an active member in good standing of the Virginia State Bar, and provided further that he or she shall not be eligible for reimbursement of travel and/or lodging expenses incurred in attending meetings of the Council following the completion of his or her term as Immediate Past President.

**The entire rule be found on the VSB Web site at [www.vsb.org/profguides/proposed.html](http://www.vsb.org/profguides/proposed.html), or to request a hard copy, please call (804) 775-0551.**