

Proposed Amendments to Part Six, Section IV, Paragraph 13

On April 1, 2003, COLD approved proposed amendments that would replace the word “dismissal” with “admonition” in the phrase “dismissal with terms” as defined and used in Part Six, Section IV, Paragraph 13 of the Rules of Court and clarify the definitions of “dismissals de minimis” and dismissals for exceptional circumstances.

Contrary to what the term “dismissal” suggests to the public and many lawyers, a dismissal with terms is predicated upon one or more findings of attorney misconduct and becomes part of the respondent’s disciplinary record. If the amendments are adopted, what was formerly referred to as a “dismissal with terms” will be called an “admonition with terms.”

COLD believes that changing the description of a dismissal with terms will avoid confusion over whether there was a finding of misconduct resulting in a disciplinary record, while preserving the availability of this lesser sanction in matters where greater discipline is unwarranted.

The proposed amendments also make it clear that “dismissals de minimis” are predicated upon one or more findings of misconduct of small magnitude, further mitigated by precautions the respondent has taken to prevent a recurrence. The proposed amendments also clarify that dismissals for exceptional circumstances are predicated upon one or more findings of misconduct and that the facts constituting “exceptional circumstances” must be set forth in writing whenever a dismissal for exceptional circumstances is imposed.

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 30, 2003. The Virginia State Bar Council will consider the proposed amendments when it meets on June 18, 2002, in Virginia Beach.

RECHARACTERIZATION OF “DISMISSAL WITH TERMS” PART 6, SECTION IV, PARAGRAPH 13.A.; 13.B.5; 13.B.8.; 13.F.3.; 13.G.1., 4., 5.; 13.H.2.; 13.I.2., OF THE RULES OF THE VIRGINIA SUPREME COURT

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

A. Definitions

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“Admonition” means a private sanction imposed by a Subcommittee sua sponte, a private or public sanction based upon an agreed disposition approved by a Subcommittee, or a public sanction imposed by a District Committee or the Board upon a finding that Misconduct has been established, but that no substantial harm to the Complainant or the public has occurred, and that no further disciplinary action is necessary.

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“~~Dismissal~~ De Minimis Dismissal” means a finding that the Respondent has engaged in ~~the alleged or questioned~~ Misconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and Respondent has taken reasonable precautions against a recurrence of same.

“Dismissal for Exceptional Circumstances” means a finding that the Respondent has engaged in Misconduct but there exist exceptional circumstances mitigating against further proceedings, which circumstances shall be set forth in writing.

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“Disciplinary Record” means any tangible or electronic record of:

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- b. any proceeding in which a Complaint or Charge of Misconduct has been resolved by (1) dismissed with Terms; (1)(2) a De Minimis Dismissal dismissed for exceptional circumstances; (2)(3) a Dismissal for Exceptional Circumstances dis-

~~missed upon a finding that the alleged or questioned Misconduct is not of sufficient magnitude to warrant disciplinary action and the Respondent has taken reasonable precautions against a recurrence of the same Misconduct; or (3)(4) resolved with an Admonition; and,~~

- c. any proceeding in which the Respondent has been found guilty of a violation of CRESPA; and

d. any proceeding which resulted in a sanction which created a disciplinary record at the time it was imposed.

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~~“Dismissal with Terms” means a non-public Dismissal issued by a Subcommittee conditioned upon compliance by the Respondent with the Terms of the Dismissal within the time period specified in the Dismissal.~~

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“Private Discipline” means an Admonition without Terms issued by a Subcommittee sua sponte, a Dismissal, a Private Reprimand, or any form of discipline which is not public.

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- 13.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:

1. Appeals from Public or Private Reprimands, with or without Terms, or Admonitions, with or without Terms, Dismissals with Terms imposed by District Committees or Dismissals that otherwise create a Disciplinary Record;

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13.B.8.d. Public Notification of Disciplinary Sanctions

1. The Clerk shall issue a statement to the communications media summarizing each public Admonition, Public Reprimand, Suspension or Revocation.
2. The Clerk shall notify the following individuals and entities of each public Admonition, Public Reprimand, Suspension or Revocation.

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13.F. Participation and Disqualification of Counsel in Disciplinary Proceedings

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3. Disqualification of Counsel, District Committee or Board Members, in Disciplinary Proceedings.

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- c. Upon the final imposition of a ~~Dismissal With Terms~~, a Private Reprimand, a Public Reprimand, an Admonition, a Suspension or a Revocation against a member or former member of a District Committee or the Board, the member shall automatically be terminated from membership or further service on the District Committee or Board. Upon the final determination of any other form of Attorney discipline, COLD shall have sole discretion to determine whether the member shall be terminated from membership or further service on the District Committee or the Board.

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13.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) the evidence available shows that the Respondent did not engage in the Misconduct questioned or alleged, or there is no credible evidence to support any allegation of Misconduct by Respondent, or the evidence available could not reasonably be expected to support any allegation of Misconduct under a clear and convincing evidentiary standard; or
- (3) the Subcommittee concludes that a Dismissal De Minimis should be imposed ~~the alleged or questioned Misconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and Respondent has taken rea-~~

~~sonable precautions against recurrence of same;~~ or

- (4) the Subcommittee concludes that ~~the Respondent has engaged in Misconduct, and that an Admonition without Terms the Complaint should be imposed~~ dismissed with Terms; or

- (5) the Subcommittee concludes that a Dismissal for Exceptional Circumstances should be imposed ~~there exist exceptional circumstances mitigating against further proceedings, which circumstances shall be set forth in writing. In making this determination, the Subcommittee shall have access to Respondent's prior disciplinary record;~~ or

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

In making the determination in subparagraphs (3), (4) or (5), the Subcommittee shall have access to Respondent's prior disciplinary record. Respondent, within ten days after the issuance of ~~the a~~ dismissal which creates a Disciplinary Record or an Admonition without Terms, may request a hearing before the District Committee ~~if the dismissal creates a Disciplinary Record.~~

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- d. Approve an Agreed Disposition imposing one of the following conditions or sanctions:

- (4) ~~Dismissal with Terms~~ Admonition, with or without Terms;

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4. Notice of Action of Subcommittee

If a Subcommittee has dismissed the Complaint, the Chair shall promptly provide written notice to the Complainant, the Respondent and Bar Counsel of such Dismissal and the factual and legal basis therefor. If a Subcommittee determines to issue an Admonition with or without Terms ~~Dismissal with Terms~~, or a Private or Public Reprimand with or without Terms, the Chair shall promptly send the Complainant, the Respondent and Bar Counsel a copy of the Subcommittee's determination.

If a Subcommittee elects to certify a Complaint to the Board, the Subcommittee Chair shall promptly mail a copy of the Certification to the Clerk of the Disciplinary System, Bar Counsel, the Respondent and the Complainant.

5. Enforcement of Terms

If a Subcommittee imposes Terms, the Subcommittee shall specify the time period within which compliance with the Terms shall be completed. If Terms have been imposed against a Respondent, that Respondent shall deliver a Certification of compliance with such Terms to Bar Counsel within the time period specified by the Subcommittee.

If a Subcommittee issues an Admonition ~~Dismissal~~ with Terms, a Private Reprimand with Terms or a Public Reprimand with Terms based on an Agreed Disposition, the Agreed Disposition shall specify the alternative disposition to be imposed if the Terms are not complied with or if the Respondent does not certify compliance with Terms to Bar Counsel. If the Respondent does not comply with the Terms imposed or does not certify compliance with Terms to Bar Counsel within the time period specified, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the District Committee at its next available hearing date. The burden of proof shall be on the Respondent to show timely compliance and timely Certification by clear and convincing evidence. If the District Committee determines that the Respondent failed to comply with the Terms within the stated time period, the alternative disposition shall be imposed. Bar Counsel shall be responsible for monitoring compliance with Terms and reporting any noncompliance to the District Committee.

~~be imposed~~ ~~dismiss the Complaint~~ ~~when there exist exceptional circumstances mitigating against further proceedings, which circumstances shall be set forth in writing by the Chair; or~~

- (c) conclude that issue an Admonition, with or without Terms should be imposed a Dismissal with Terms;
- (d) issue a Public Reprimand, with or without Terms; or
- (e) certify the Charges of Misconduct to the Board or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935.

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n. Notice to the Respondent and Bar Counsel

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If the District Committee issues a Public Reprimand, with or without Terms, or an Admonition, with or without Terms ~~Dismissal with Terms~~, the Chair shall promptly send the Complainant, the Respondent and Bar Counsel a copy of the District Committee's Determination.

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o. Issuance of Public Reprimand or ~~Dismissal with Terms~~ Admonition

Upon the expiration of the ten-day period after notice of a District Committee's determination is mailed, if Notice of Appeal has not been filed by the Respondent, the District Committee shall issue the Public Reprimand, with or without Terms, or ~~Dismissal with Terms~~ Admonition, with or without Terms, to the Respondent. ~~If the reprimand is a Public Reprimand;~~ ¶The Clerk of the Disciplinary System shall issue a public statement as provided for in this Paragraph for the dissemination of public disciplinary information.

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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, ~~Dismissal with 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

13.H. District Committee Proceedings

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2. Hearing Procedure

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1. Disposition

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(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:

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- (a) conclude that a Dismissal De Minimis should be imposed ~~dismiss the Complaint when the alleged Misconduct is clearly not of sufficient magnitude to warrant disciplinary action, and the Respondent has taken reasonable precautions against a recurrence of same; or~~
- (b) conclude that a Dismissal for Exceptional Circumstances should

appeal from a Public Reprimand, with or without Terms, or an Admonition, with or without Terms, ~~Dismissal with Terms~~, the sanction shall be stayed during the pendency of the appeal.

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I. Board Proceedings

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2. Hearing Procedures

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f. Disposition

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(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 aggra-

vation and mitigation, the Board shall impose one of the following sanctions and state the effective date of the sanction imposed:

~~(a)~~ ~~Dismissal with Terms~~;

~~(a)~~~~(b)~~ Admonition, with or without Terms;

~~(b)~~~~(c)~~ Public Reprimand, with or without Terms;

~~(c)~~~~(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

~~(d)~~~~(e)~~ Revocation of the Respondent's License. 