

# Hearing by Three-Judge Panel; Scheduling Hearing Date; Service of Request for Hearing

*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, Virginia 23219, no later than January 23, 2004. The Virginia State Bar Council will consider the proposed amendments when it meets on **February 18, 2004**, in Richmond, Virginia.*

On August 6, 2003, COLD approved a proposed amendment requiring a respondent who elects to have a three-judge panel hear a disciplinary proceeding to provide available dates for the hearing to be held within 120 days of the respondent's demand for a three-judge panel.

The proposed change will facilitate the Supreme Court of Virginia's appointment of three judges, usually one sitting judge and two retired judges, by identifying possible hearing dates and allowing prospective judges to decline to serve if they have conflicts on all the days identified. Having the respondent identify available dates upon election of a three-judge panel will also eliminate the lengthy delays frequently encountered in securing and coordinating available hearing dates with three judges, the respondent, respondent's counsel and bar counsel after appointment of a three-judge panel.

Finally, the proposed change will ensure that, absent exceptional circumstances, three-judge panel matters are heard within four months of the respondent's election of a panel, thereby improving the efficiency of the attorney disciplinary process.

## 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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#### H. District Committee Proceedings

##### 1. Pre-Hearing Matters

###### a. Charge of Misconduct

- (1) If the Subcommittee determines that a hearing should be held before a District Committee, Bar Counsel shall, at least 42 days prior to the date fixed for the hearing, serve upon the Respondent by certified mail the Charge of Misconduct, a copy of the Investigative Report considered by the Subcommittee and any exculpatory materials in the possession of Bar Counsel.
- (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:
  - (a) file an answer that shall be conclusively deemed to be a consent to

the jurisdiction of the District Committee; or

- (b) file a demand with the Clerk of the Disciplinary System that the proceedings before the District Committee be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935, ~~whereupon further proceedings before the District Committee shall terminate, and Bar Counsel shall file the Complaint required by Va. Code § 54.1-3935.~~ and simultaneously provide available dates for a hearing to be held within 120 days of the demand.

Upon such demand and provision of available dates as specified above, further proceedings before the District Committee shall terminate, and Bar Counsel shall file the Complaint required by Va. Code § 54.1-3935.

- (3) If the Respondent fails to file an answer or demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the District Committee.

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#### I. 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 that shall be conclusively deemed to be a consent to the jurisdiction of the Board; or
  - (b) file a demand that the proceedings before the Board be terminated and that further proceedings be con-

ducted pursuant to Va. Code § 54.1-3935, ~~whereupon further proceedings before the Board shall terminate, and Bar Counsel shall file the Complaint required by Va. Code § 54.1-3935;~~ and simultaneously provide available dates for a hearing to be held within 120 days of the demand.

Upon such demand and provision of available date as specified above,

further proceedings before the Board shall terminate, and Bar Counsel shall file the Complaint required by Va. Code § 54.1-3935.

(2) If the Respondent fails to file an answer or demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

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## Use of Term "Disability"

*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 January 23, 2004. The Virginia State Bar Council will consider the proposed amendments when it meets on **February 18, 2004**, in Richmond, Virginia.*

On December 3, 2003, COLD approved a proposed amendment which would replace the term "Disability" with "Impairment" throughout Paragraph 13. Given the legal ramifications of the term "Disability," the committee concluded that "Impairment" more accurately describes the conditions that may adversely affect an attorney's practice of law and ability to abide by the Rules of Professional Conduct.

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

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

#### A. Definitions

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~~"Disability"~~ "Impairment" means:

- ~~a. the status of being a drug addict or an alcoholic, or of being mentally ill as those terms are defined in Va. Code §37.1-1(a), or~~
- ~~b. any physical or mental condition that materially impairs the fitness of an Attorney to practice law.~~

~~"Disability Impairment Proceeding" means the proceeding which follows the summary Suspension of an Attorney who suffers from a Disability or follows a request by Respondent to have the Suspension lifted. :~~

- a. initiated by Bar Counsel to petition the Board to order the Respondent to undergo examination(s) and provide releases for records;
- b. initiated by Bar Counsel to determine whether an Attorney has an Impairment;
- c. that follows the summary Suspension of an Attorney who may have an Impairment; or

d. that follows a request by Respondent to terminate an Impairment Suspension.

\* \* \*

"Investigation" means any inquiry by Bar Counsel, Committee Counsel, or the Bar's designee concerning any alleged Misconduct or Crime committed by an Attorney or any ~~Disability~~ Impairment of an Attorney.

\* \* \*

"Petitioner" means:

\* \* \*

b. an Attorney seeking termination of a ~~Disability~~ an Impairment Suspension; or

\* \* \*

"Respondent" means any Attorney:

\* \* \*

c. who is the subject of an Adjudication of a Crime Proceeding, Proceedings upon Disbarment, Revocation or Suspension in another jurisdiction, ~~Disability~~ Impairment Proceeding, or Reinstatement Proceeding.

\* \* \*

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:

\* \* \*

(4) Disability Impairment Proceedings;

\* \* \*

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

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b. Records Retention

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(2) Whenever a File is destroyed, the following information shall be preserved:

\* \* \*

Such summary information shall be retained for at least five years whenever the Complaint or Charge of Misconduct is dismissed with no Disciplinary Record having been created, and for at least ten years whenever a Disciplinary Record has been created, a ~~Disability an~~ Impairment determined, a Reinstatement Proceeding held or a finding of Misconduct involving a CRESPA violation made.

\* \* \*

E. Substantial Compliance, Notice, and Evidentiary Rulings

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5. A Respondent who intends to rely upon evidence of an Impairment in mitigation of Misconduct shall, absent good cause excusing his or her failure to do so, provide reasonable notice prior to the hearing to Bar Counsel and the District Committee or Board of his or her intention to do so.

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I. Board Proceedings

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5. Proceedings upon ~~Disability~~ Impairment

a. Suspension for ~~Disability~~ Impairment

The Board shall have the power to issue an order of Suspension to a Respondent ~~who suffers from a Disability~~ has an Impairment. The term of such Suspension shall be indefinite, and, except as provided below, shall be terminated only upon determination by the Board that Respondent no longer ~~suffers from the Disability~~ has the Impairment. A Respondent who intends to rely upon evidence of a ~~Disability~~ an Impairment in mitigation of Misconduct shall, absent good cause excusing his or her failure to do so, provide reasonable notice prior to the hearing to Bar Counsel and the District Committee or Board of his or her intention

to do so. A finding of Disability Impairment may be utilized by Bar Counsel to dismiss any pending Complaints or Charges of Misconduct on the basis of the existence of exceptional circumstances militating against further proceedings, which circumstances of ~~Disability Impairment~~ shall be set forth in the Dismissal.

b. Burden of Proof

Whenever the existence of a ~~Disability an~~ Impairment is alleged in a Proceeding under this Rule or in mitigation of Charges of Misconduct, the burden of proving such a ~~Disability an~~ Impairment shall rest with the party asserting its existence. The issue of the existence of an Attorney's ~~Disability~~ Impairment may be raised by any person at any time, and if a District Committee or the Disciplinary Board, during the course of a hearing on Charges of Misconduct against a Respondent, believes that the Respondent may then ~~be suffering from a Disability~~ have an Impairment, the District Committee or the Disciplinary Board may postpone the hearing and initiate a ~~Disability an~~ Impairment Proceeding under this Rule. In Proceedings to terminate a Suspension for ~~Disability~~ Impairment, the burden of proving the termination of a ~~Disability an~~ Impairment shall be on the Respondent.

c. Investigation

(1) Upon receipt of notice or evidence that an Attorney ~~is or may be suffering from a Disability~~ has or may have an Impairment, Bar Counsel shall cause an Investigation to be made to determine whether there is reason to believe that the Respondent ~~suffers from the Disability~~ has the Impairment.

(2) As a part of the Investigation of whether a ~~Disability an~~ Impairment exists, and for good cause shown in the interest of public protection:

(a) Bar Counsel may petition the Board to order the Respondent:

\* \* \*

(ii) to provide appropriate releases to health care providers authorizing the release of Respondent's psychiatric, physical or other medical records to Bar Counsel and the Board for purposes of the Investigation and any subsequent ~~Disability~~ Impairment proceedings.

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d. Summary Suspension

Upon receipt of a notice from the Clerk of the Disciplinary System with supporting documentary evidence that an Attorney has been

adjudicated by a court of competent jurisdiction to ~~suffer from Disability~~ have an Impairment, or that an Attorney has been involuntarily admitted to a hospital (as defined in Va. Code § 37.1-1) for treatment of any addiction, inebriety, insanity or mental illness, any member of the Board shall summarily issue on behalf of the Board an order of Suspension against the Respondent and cause the order to be served on such Respondent.

e. Action by Board after a Hearing

- (1) If Bar Counsel determines that there is reason to believe that an Attorney ~~suffers from a Disability~~ has an Impairment, Bar Counsel shall file a petition with the Board, and the Board shall promptly hold a hearing to determine whether such ~~Disability~~ Impairment exists. A copy of the petition shall be served on the Respondent. If the Board determines that a ~~Disability~~ an Impairment exists, it shall enter an order of Suspension.
- (2) The Board shall hold a hearing upon petition of a Respondent who is subject to a Suspension for ~~Disability~~ Impairment that alleges that the ~~Disability~~ Impairment no longer exists. Evidence that the Respondent is no longer hospitalized shall not be conclusive to the Board's determination of the Respondent's ability to resume the practice of law.

f. Procedure

- (1) Such hearing shall be conducted substantially in accordance with the procedures established in proceedings related to Misconduct, except that the public and witnesses, other than the Complainant and the Respondent, shall be excluded throughout a ~~Disability~~ an Impairment Proceeding when not testifying.

(2) Guardian Ad Litem

The notice of any hearing to determine whether the Respondent ~~suffers from a Disability~~ has an Impairment shall order Respondent to advise the Board whether Respondent has retained counsel for the hearing. Unless counsel for such Respondent enters an appearance with the Board within ten days of the date of the notice, the Board shall appoint a guardian *ad litem* to represent such Respondent at the hearing.

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h. Termination of Suspension

In cases where a Suspension is based upon an adjudication of a ~~Disability~~ an Impairment by a court, upon receipt of documentary evidence of adjudication by a court of competent jurisdiction that the Respondent's ~~Disability~~ Impairment has terminated, the Board shall promptly enter an order terminating such Suspension.

i. Enforcement

The Board shall have the power to sanction an Attorney for failure to comply with its orders and subpoenae issued in connection with a ~~Disability~~ an Impairment Proceeding. The sanction can include a ~~S~~summary Suspension in a case where it is determined that the public and/or the clients of the Attorney are in jeopardy; such action can be *sua sponte* or on motion by Bar Counsel, with appropriate notice to the Attorney and the Attorney's counsel or guardian *ad litem*.

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7. Reinstatement

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d. Investigation of ~~Disability~~ Impairment in Reinstatement Matters

- (1) Upon receipt of notice or evidence that an individual seeking Reinstatement ~~is or may be suffering from a Disability~~ has or may have an Impairment, Bar Counsel shall cause an Investigation to be made to determine whether there is reason to believe that the ~~Disability~~ Impairment exists.
- (2) As part of the Investigation of whether a ~~Disability~~ an Impairment exists, and for good cause shown in the interest of public protection, Bar Counsel may petition the Board to order the individual:

\* \* \*

N. 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:

\* \* \*

c. ~~Disability~~ Impairment proceedings, except that final orders are public;

\* \* \*

## Enforcement of Terms Imposed by the Disciplinary Board

*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 January 23, 2003. The Virginia State Bar Council will consider the proposed amendments when it meets on **February 18, 2004**, in Richmond, Virginia*

On November 3, 2003, COLD approved a proposed amendment clarifying what happens when a Respondent fails to comply with Terms imposed by the Disciplinary Board.

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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#### I. Board Proceedings

\* \* \*

#### 2. Hearing Procedures

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##### g. Enforcement of Terms

In all cases where Terms are included in the disposition, the Board shall specify the time period within which compliance shall be completed and, if required, the time period within which the Respondent shall deliver a written certification of compliance to Bar Counsel. The Board shall specify the alternative disposition if the Terms are not complied with or, if required, compliance is not

certified to Bar Counsel. Bar Counsel shall be responsible for monitoring compliance and reporting any noncompliance to the Board. Whenever it appears that the Respondent has not complied with the Terms imposed, including written certification of compliance if required, 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 Board at its next available hearing date. The burden of proof shall be on the Respondent to show compliance by clear and convincing evidence. If the Respondent has failed to comply with the Terms, including written certification of compliance if required, within the stated time period, as determined by the Board, the alternative disposition shall be imposed. Any show cause proceeding involving the question of compliance shall be deemed a new matter and not a continuation of the matter that resulted in the imposition of Terms.

##### g. h. Orders, Findings, and Opinions

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##### h. i. Change in Composition of Board Hearing Panel

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## Reconsideration of Action by the Disciplinary Board

*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 January 23, 2004. The Virginia State Bar Council will consider the proposed amendments when it meets on **February 18, 2004**, in Richmond, Virginia.*

On December 3, 2003, COLD approved a proposed amendment setting out the procedures for reconsideration of a decision of the Disciplinary Board. These procedures were part of the former Board Rules of Procedure, but were not merged into Paragraph 13 when the rules were consolidated. The committee voted unanimously to publish this draft for presentation to Council in February 2004.

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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#### I. Board Proceedings

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#### 2. Hearing Procedures

\* \* \*

##### g. Enforcement of Terms

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##### g. h. Orders, Findings, and Opinions

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##### h. i. Change in Composition of Board Hearing Panel

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##### i. Reconsideration of Action by the Board

1. No motion for reconsideration or modification of the Board's decision shall be considered unless it is filed with the Clerk of the Disciplinary system within 10 days after the hearing before the Board. The moving party shall file an original and six copies of both the motion and all supporting exhibits with

the Clerk of the Disciplinary System. Such motion shall be granted only to prevent manifest injustice upon the ground of

(a) illness, injury or accident which prevented the Respondent or a witness from attending the hearing and which could not have been made known to the Board within a reasonable time prior to the hearing, or

(b) evidence which

(i) was not known to the Respondent at the time of the hearing and could not have

been discovered prior to, or produced at, the hearing in the exercise of due diligence and

(ii) would have clearly produced a different result if the evidence had been introduced at the hearing.

2. If such a motion is timely filed, the Clerk of the Disciplinary System shall promptly forward copies to each member of the hearing panel. The panel may deny the motion without response from Bar Counsel.
3. No relief shall be granted without allowing Bar Counsel an opportunity to oppose the motion in writing. If no relief is granted, the Board shall enter its order disposing of the case.

## Referral of a Complaint to a District Committee

*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 January 23, 2003. The Virginia State Bar Council will consider the proposed amendments when it meets on **February 18, 2004**, in Richmond, Virginia.*

On November 3, 2003, COLD approved a proposed amendment clarifying that Bar Counsel, not District Committee chairs refer Complaints to District Committees for investigation.

### 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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##### C. Initial Processing of Complaints by Bar Counsel

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##### 6. Referral to District Committee

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~~When referring a Complaint to a District Committee, Bar Counsel shall notify the District Committee Chair that a Complaint has been referred to a District Committee for investigation of Bar Counsel's recommendation that a member of Bar Counsel's staff, a District Committee member, or both, investigate the matter. The District Committee Chair shall promptly notify Bar Counsel of any disagreement with Bar Counsel's recommendation. If Bar Counsel and the District Committee Chair are unable to agree, COLD or its designee member, shall determine who shall conduct the investigation. Thereafter, the Complaint shall be investigated and a report thereof made to the a Subcommittee.~~

## Enforcement of Terms Imposed by a District Committee

*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 January 23, 2003. The Virginia State Bar Council will consider the proposed amendments when it meets on **February 18, 2004**, in Richmond, Virginia.*

On November 3, 2003, COLD approved a proposed amendment clarifying what happens when a Respondent fails to comply with Terms imposed by 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.

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##### H. District Committee Proceedings

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#### 2. Hearing Procedure

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- p. Enforcement of Terms In all cases where Terms are included in the disposition, the District Committee shall specify the time period within which ~~both~~ compliance shall be completed and, if required, the time period within which the Respondent shall deliver a written certification of compliance to Bar Counsel. The District Committee shall specify the alternative disposition if the Terms are not complied with or, if required,

compliance is not certified to Bar Counsel. Bar Counsel shall be responsible for monitoring compliance ~~with Terms~~ and reporting any noncompliance to the District Committee. Whenever it appears that the Respondent has not complied with the Terms imposed, including written certification of compliance if required, 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 compliance by clear and convincing evidence. If the Respondent ~~has failed~~ fails to comply with the Terms, including written certification of compliance if required, within the stated time period, as determined by the District Committee, the alternative disposition shall be imposed. Any show cause proceeding involving the question of compliance shall be deemed a new matter and not a continuation of the matter that resulted in the imposition of Terms.

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