

Inside the Bar Counsel's Office

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This is a pop quiz on attorney disciplinary procedure.

1. If a complainant withdraws a bar complaint, can the bar still investigate and prosecute the complaint?
2. Are attorney disciplinary proceedings stayed or abated when conduct giving rise to the disciplinary charges is also the subject of pending criminal or civil litigation?
3. If a member of the Virginia Lawyer Referral Service is charged with ethical misconduct, does it affect his or her participation in the service?
4. Can a panel of five district committee members, not including a lay member, hear an attorney disciplinary matter?
5. Must a district committee's decision on charges of attorney misconduct be unanimous?
6. Does a district committee's dismissal of a bar complaint on the grounds that the alleged attorney misconduct is of insufficient magnitude to warrant disciplinary action and that the attorney has taken precautions against recurrence of the same create a disciplinary record?
7. Can the Disciplinary Board dismiss a bar complaint for exceptional circumstances?
8. Can the Disciplinary Board impose a private reprimand?
9. What happens to pending disciplinary charges when an attorney surrenders his or her license?
10. Who investigates and hears charges that an attorney has violated the Virginia Consumer Real Estate Settlement Protection Act or any regulations adopted pursuant thereto?

You are in very good company if you could not answer all these questions without referring to the 1998 Professional Guidelines, which include Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme

Court, the Virginia State Bar Council Rules of Disciplinary Procedure and the Virginia State Bar Disciplinary Board Rules of Procedure. Moreover, if you could not find the answers to all the questions posed above, even after carefully perusing the 1998 Professional Guidelines, you still are in good company. If the truth be known, some of us in the Office of Bar Counsel cannot always put our fingers on a particular rule in short order.

The attorney self-regulation process has evolved over the last sixty years, as have disciplinary procedures and the rules governing them. Under the system implemented in 1938, when the rules of the Virginia Supreme Court were amended to create the present integrated bar, district committees received and investigated complaints of attorney misconduct. If a district committee concluded that a lawyer had engaged in misconduct, the committee filed a formal complaint with the local circuit court, requesting that the attorney be disciplined.

When the decentralized district committee system proved overly cumbersome and inefficient, the bar undertook to revamp it. The linchpin of this effort was the proposal of new attorney disciplinary procedures, titled "Procedures for Disciplining, Suspending and Disbarring Attorneys," which the Virginia Supreme Court adopted in 1976 as Part 6, Section IV, Paragraph 13 of its rules ("Paragraph 13"). Paragraph 13 took effect on September 1, 1976.

In June 1976, pursuant to Paragraph 13.B.(1), the Virginia State Bar Council adopted District Committee Rules of Procedure, the forerunner to the present Council Rules of Disciplinary Procedure. The district committee rules took effect on September 1, 1976. Shortly thereafter, the Virginia State Bar Disciplinary Board was constituted. Pursuant to Paragraph 13.C.(4)(a), which authorizes the board "to adopt such rules and regulations not inconsistent herewith as may be convenient for the conduct of its business," the Disciplinary Board promulgated its own set of rules on January 1, 1977.

Over the ensuing years, the procedural rules governing the attorney disciplinary process have been amended many times. Amendments to the Virginia State Bar Council Rules of Disciplinary Procedure and the Vir-

Virginia State Bar Disciplinary Board Rules of Procedure require a majority vote of the respective bodies, following publication of the proposed amendments and consideration of any comments from the bar or the public. Similarly, before the bar can petition the Virginia Supreme Court to adopt or amend a Paragraph 13 provision, a proposed rule must be published for comment and approved by a majority vote of Council. Proposed amendments to Paragraph 13, the Virginia State Bar Council Rules of Disciplinary Procedure and the Virginia State Bar Disciplinary Board Rules of Procedure, are regularly published in the *Virginia Lawyer* and the *Virginia Lawyer Register*.

Although Paragraph 13 is the principle repository of procedural rules governing attorney discipline, over the years piece-meal amendments to the Council and Disciplinary Board rules have produced a patchwork quilt of procedural requirements. For example, if you attempted to research the questions posed above, you might not have known where to look first — Paragraph 13, the Council rules or the Disciplinary Board rules. Once you decided where to look, you probably discovered the rules are not indexed. You may have also noticed that some of the rules are ordered in a rather random fashion. But more importantly, if you took the time necessary to compare the three sets of rules, you might have found a few substantive omissions or discrepancies, as well as many stylistic inconsistencies.

For all these reasons, W. Scott Street, III, President of the Virginia State Bar, has appointed a Special Committee to Rewrite the Rules of Disciplinary Procedure. Frank B. Miller, III chairs the committee, which is staffed by attorneys and lay persons, all of whom have prior experience with the attorney disciplinary process as volunteers and/or respondents' counsel. The committee will review all the procedural rules and consolidate, organize and index them. The resulting product will be submitted to the Virginia State Bar Council for its consideration. The committee's objective is to produce a user friendly set of rules that promote fairness and efficiency, without imposing an unnecessary administrative burden upon the Clerk of the Disciplinary System. If the Council approves the new procedural rules, the Virginia State Bar will petition the Virginia Supreme Court to adopt them and amend Paragraph 13 accordingly.

As a companion project to the recently adopted Virginia Rules of Professional Responsibility, the new rules of disciplinary procedure should facilitate attorney self-regulation and render the procedural processes by which attorney self-regulation is effected more readily comprehensible to members of the bar and the public.

In the meantime, if you are interested in the answers to the pop quiz but do not want to search the existing rules, the correct responses and citations to the rules can be found below.

1. Council Rule V.F.; Disciplinary Board Rule IV.D.1. No potential attorney disciplinary matter, or charges of misconduct, can be dismissed solely upon a complainant's request to withdraw the complaint.
2. Council Rule VI.A. A district committee can defer or abate processing of a complaint because of substantial similarity to material allegations of pending criminal or civil litigation. There is no analogous Disciplinary Board rule.
3. Council Rule VI.M. The Virginia Lawyer Referral Service can remove from its referral lists any bar member who, after a bar investigation, is charged with misconduct and referred to a district committee, the Disciplinary Board or a court.
4. Paragraph 13.B.(2)(d); Disciplinary Board Rule C.(2). Paragraph 13 provides that one person on a district committee hearing panel shall be a non-lawyer; however, the rule also states, "If the scheduled non-lawyer person is unable to attend, and if an alternate non-lawyer is not reasonably available, participation by non-lawyer members shall not be required in a proceeding if a quorum is otherwise present." Disciplinary Board Rule C.(2) is comparable.
5. Paragraph 13.B.(2)(d). Paragraph 13 provides for decisions of district committee cases by a majority vote. The same is true of Disciplinary Board cases under Paragraph 13.C.(2).
6. Council Rules I. and V.B.4.f.(1)(c.). Disciplinary records include dismissals of misconduct charges where the respondent is found to have taken precautions to prevent a recurrence of conduct clearly not of sufficient magnitude to warrant disciplinary action.
7. Council Rule V.B.4.f.(1)(e.). A district committee can dismiss a bar complaint, where "there exist exceptional circumstances militating against further proceedings;" there is not a corresponding Disciplinary Board rule.
8. Paragraph 13.C.(6)(c)(ii); Board Rule IV.D.9.b.(2)(b). While the Disciplinary Board cannot impose a pri-

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vate reprimand, the board can issue an admonition, with or without terms, that becomes part of a respondent's disciplinary record but is not published.

9. Paragraph 13.I. When an attorney surrenders his or her license, all pending disciplinary charges are deemed admitted with in any subsequent proceedings related to the attorney's bar status. Bar counsel may dismiss complaints still under investigation without prejudice.
10. Paragraph 13.C.(3)(h). The Disciplinary Board has jurisdiction to consider violation of the Virginia Consumer Real Estate Settlement Protection Act or any regulations adopted pursuant thereto. 

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