

## **SPECIAL COMMITTEE ON THE PROCEDURAL RULES OF THE DISCIPLINARY SYSTEM**

*Frank B. Miller III, Chair*

The procedural rules governing the attorney disciplinary process are currently found in Paragraph 13 of the Rules of Court, the Virginia State Bar Council Rules of Disciplinary Procedure and the Virginia State Bar Disciplinary Board Rules of Procedure. These rules are published annually in the *Professional Guidelines*, that is distributed to each member of the bar. Promulgated by three different entities, the procedural rules have developed in piecemeal fashion over many years. Some rules are duplicates, others are inconsistent and there are no tables of contents or indices. Finding specific rules can be difficult even for persons who consult them frequently.

In 1999, Virginia State Bar President W. Scott Street III, appointed a special committee to review the procedural rules governing the attorney disciplinary process. The attorney members of the special committee are: James R. Austin, James J. Burns, Robert L. Freed, Thomas E. Spahn and Frank B. Miller III, chair. Robert J. Merrick is a lay member of the special committee. Rhysa G. South serves, and Stephen B. Test formerly served, as liaison between the special committee and the Standing Committee on Lawyer Discipline (COLD).

The special committee is an exceptionally dedicated and distinguished group of volunteers. Between 1985 and 1999, special committee members devoted over 100 years of service to the bar. Special committee members have served on the Virginia State Bar Council, the disciplinary board, district committees, standing committees, special committees, sections and various bar commissions. The special committee members are particularly well versed in the attorney disciplinary process: Two special committee members chaired the board; the lay member of the special committee served on the board for six years and is president-elect of the Virginia Law Foundation; another member currently sits on the board; four members served on district committees; two members served on COLD; and three special committee members have represented respondents in attorney disciplinary matters.

The special committee met on at least 16 occasions and prepared and revised a minimum of 15 drafts. Between full committee meetings, special committee members worked on individual assignments.

One of the special committee's most important decisions was to incorporate all the procedural rules in Paragraph 13 of the Rules of Court, thereby eliminating the council's and the disciplinary board's power to propound separate sets of procedural rules. The council has not added any procedural rules for several years, so ending its authority to do so was not controversial. However, a few board members expressed concern over loss of the board's rule making authority. Members of the board and special committee discussed this concern on several occasions. The consensus was that the board can use pretrial orders to facilitate the fair and efficient resolution of disciplinary matters on its docket. Thus, if the court adopts the consolidated and revised procedural rules that the special committee has incorporated in an extensively amended Paragraph 13, there will be one set of procedural rules governing attorney disciplinary matters.

Former President Street specifically directed the special committee to make the procedural rules more user-friendly. To do this, the special committee had to order the rules logically, develop uniform stylistic conventions, define frequently used terms, identify inconsistencies and fill gaps. The special committee also added a table of contents and is developing an index to help users locate specific rules.

While the special committee referred most policy matters to COLD, in certain instances, changes or additions were necessary to properly effectuate existing rules and practices. For example, the existing rules employ, but fail to define, the terms "agreed disposition," "bar official" and "de minimis dismissal." The duties of the clerk of the disciplinary system are not specified. There is no standard for a motion to strike. The present rules do not address whether use of teleconferencing or video conferencing is permissible in district committee or board proceedings. The terms "complaint" and "charges of misconduct" are used interchangeably. The definition of "judge" encompasses only state court judges. In instances such as these, the special committee added new provisions and definitions needed to dispel confusion and conform the new rules to existing practices.

The COLD liaisons to the special committee regularly informed COLD about the special committee's work. During the course of its deliberations, the special committee referred the following policy issues to COLD: whether candidates and members with a disciplinary or criminal records should sit on a district committee or the board; bar counsel's authority to examine an attorney's state and federal criminal history records in the course of investigating and prosecuting a bar complaint; allowing former board members to participate in board proceedings if necessary to

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establish a quorum; summary suspension of an attorney who enters a plea under a first offender statute; authorizing bar counsel to initiate a disability investigation and to petition the board to order an attorney, where there is good cause to believe he or she is disabled, to undergo an independent medical examination and/or execute medical record releases; and the confidentiality of certain disciplinary proceedings and records.

On April 20, 2001, bar leaders advised the court of the special committee's plan to consolidate all the procedural rules in Paragraph 13. A draft of the consolidated rules was presented to the disciplinary board in early July 2001. On July 26, 2001, Mr. Miller, chair of the special committee, reviewed the proposed consolidated rules with board members and officers. The COLD rules subcommittee reviewed a draft of the consolidated rules on August 29, 2001, and made several revisions. Mr. Miller presented the revised draft of the consolidated rules to COLD on October 21, 2001, at which time COLD approved the proposed consolidated rules, with minor changes. Mr. Miller presented the revised draft of the consolidated rules to the executive committee and council as an informational item on October 19 and 20, 2001, and reviewed the changes the special committee made to the rules.

Due to the cost of publishing more than 60 pages of rules in a bar magazine and mailing the magazine to all bar members, the bar posted the rules on its Web site in December 2001. Notice of the proposed consolidation of the procedural rules, including their availability on the bar's Web site and in hard copy upon request, was published in the December 2001 *Virginia Lawyer* and the January 2002 *Virginia Lawyer Register*. Written comments were solicited on or before February 8, 2002. The bar furnished hard copies of the proposed consolidated rules to several individuals who requested them. The bar did not receive any comments.

On February 22, 2002, Mr. Miller again went over the proposed consolidated rules with the executive committee and answered questions. On February 23, 2002, Mr. Miller presented the consolidated rules to the council as an action item. The council unanimously approved the proposed consolidated rules, as well as five rule changes presented by COLD that were beyond the purview of the special committee's work. The Virginia State Bar submitted the consolidated procedural rules, which incorporate the five rule changes approved by the council at COLD's request, to the Court for consideration by petition dated March 21, 2002.

The Supreme Court responded to the petition with its letter of May 10, 2002, advising that the Court has decided to grant the petition, with three exceptions. The amended petition should reach the Court in the very near future. Once approval has been secured and an effective date for the revised rules established, the work of the committee will end. We plan to have an index to make the revised rules more user-friendly.

The committee is especially appreciative of the assistance and guidance it received from the office of bar counsel and the clerk of the disciplinary system, all of whom gave freely of their time. Special thanks go to Barbara Ann Williams, bar counsel; Harry M. Hirsch, deputy bar counsel; and Barbara Sayers Lanier, clerk of the disciplinary system, for the extra thought and effort each contributed to the work—all of which made the project a very pleasant one.

