

VIRGINIA:

**IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND**

**IN THE MATTER OF
PART 6, § IV, PARAGRAPH 13 OF THE RULES OF COURT**

PETITION OF THE VIRGINIA STATE BAR

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TABLE OF CONTENTS

I.	Overview of the Issues.....	- 1 -
II.	Publication and Comment	- 4 -
III.	Proposed Amendments	- 5 -
IV.	Conclusion	- 23 -

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PETITION

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

COMES NOW the Virginia State Bar (VSB), by its president and executive director, and requests review and approval of proposed amendments to Paragraph 13 of Part 6, § IV of the Rules of the Supreme Court of Virginia governing the Procedure for Disciplining, Suspending, and Disbarring Attorneys, as set forth below. On February 27, 2021, by a vote of 61-0 with one abstention, Council of the Virginia State Bar approved the proposed amendments.

I. Overview of the Issues

The Standing Committee on Lawyer Discipline (COLD) and Council of the Virginia State Bar have each approved the proposed amendments to the attorney disciplinary procedure that will achieve greater fairness, efficiency, currency, consistency, and transparency in bar Disciplinary and Impairment Proceedings¹ by:

¹ Capitalized terms are defined at Paragraph 13-1 of Paragraph 13 of Part 6, § IV of the Rules of the Supreme Court of Virginia governing the Procedure for Disciplining, Suspending, and Disbarring Attorneys.

1) conforming the Agreed Disposition process at the District Committee level with the process at the Disciplinary Board level by requiring Agreed Disposition proceedings on a Charge of Misconduct pending on the public District Committee docket be open to the public, allowing such proceedings to be conducted telephonically, and disqualifying panel members who review the Agreed Disposition from hearing the Charge of Misconduct (13-4.B; 13-7.A.9);

2) conforming the process for filing a motion for reconsideration or modification of a District Committee's decision following a hearing on a Charge of Misconduct with the process for filing a motion for reconsideration following a Misconduct hearing before the Disciplinary Board (13-16.DD);

3) clarifying that the Chair of the District Committee in which the Complaint is pending has the sole authority to issue a summons or subpoena on behalf of a Respondent in proceedings on a Charge of Misconduct, and setting out the procedure for the requesting of such a summons or subpoena and the filing of a motion to quash or limit such a summons or subpoena (13-7.A.3 and 4; 13-16.E);

4) requiring counsel for a Respondent to seek leave to withdraw in any proceeding pending before the Disciplinary Board or a three-judge Circuit Court, or before a District Committee after a Charge of Misconduct has been issued (13-13.A);

5) defining “Answer” as that term is used in connection with the issuance of a Charge of Misconduct, Certification, and petition for expedited hearing, and clarifying that to effectively request a three-judge Circuit Court in such a proceeding, a Respondent must file both a demand and an Answer to the pending Charge of Misconduct, Certification, or petition for expedited hearing (13-1; 13-16.B and C; 13-18.A, B and D.5);

6) codifying and expanding the Disciplinary Board’s authority to appoint a guardian *ad litem* for a Respondent who is unrepresented and either incarcerated or the subject of an Impairment Proceeding (13-22.A; 13-23.G);

7) requiring Bar Counsel to file a motion with the appropriate tribunal for dismissal of a Charge of Misconduct, Certification, or Disciplinary Proceeding, on the basis that a Respondent has been found to have an Impairment or permanently transferred to the Disabled or Retired class of membership (13-23.A and K);

8) adding several types of Disciplinary Proceedings in which a Respondent may consent to the Revocation of their law license (13-28.A);

9) clarifying that a Respondent should immediately provide notice of the Suspension or Revocation of his/her law license and make appropriate arrangements for client matters as soon as practicable, and that the respective 14-day and 45-day deadlines set out under 13-29 are the maximum time periods for the completion of those tasks (13-29); and

10) clarifying that: a) orders lifting an Impairment Suspension; and b) determinations imposing private discipline disclosed to a District Committee, the Disciplinary Board, or a three-judge Circuit Court, in conjunction with a sanctions, Agreed Disposition, or consent to Revocation proceeding (as authorized by 13-30.B), are public (13-30.A.3 and 6).

The proposed revisions also include several housekeeping amendments clarifying certain terms and procedures (13-1; 13-6.G.3; 13-22.B, D and F; 13-23.C.1, D, F, I and K; 13-24.C; 13-25.B.1 and G.2), updating outdated statutory references (13-1; 13-23.D), adding an additional basis for the lifting of a license Suspension for noncompliance with a summons or subpoena (13-6.G.3), eliminating duplicative/erroneous language (13-18.D.5), and reorganizing certain provisions (13-11.B and C; 13-18.A and R).

The proposed amendments are included below in Section III.

II. Publication and Comment

COLD unanimously approved posting the proposed amendments for public comment at its meeting on October 14, 2020. The VSB posted the proposed amendments for comment on its website on November 4, 2020, with comments due by December 7, 2020. The VSB also posted notice of the proposed amendments in the bar's E-News published on December 3, 2020, with a link to the proposed amendments.

Two comments were received and are attached to this petition.

On January 20, 2021, COLD reviewed those comments and unanimously approved the proposed amendments. On February 27, 2021, by a vote of 61-0 with one abstention, Council approved the proposed amendments with two minor revisions.²

III. Proposed Amendments

Additions are denoted by underlining and deletions by strikethroughs.

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS

-13-1. DEFINITIONS

* * *

“Answer” means a written response to a Charge of Misconduct, Certification, or petition for expedited hearing, which shall respond to each fact and Misconduct allegation contained in the Charge of Misconduct, Certification, or petition for expedited hearing, and be signed by the Respondent.

* * *

"Complaint" means any written communication ~~to the Bar~~ alleging Misconduct or from which allegations of Misconduct reasonably may be inferred.

* * *

“Costs” means reasonable costs paid by the Bar to outside experts, ~~or~~ consultants, or guardians *ad litem* in a proceeding conducted pursuant to subparagraph 13-22; reasonable travel and out-of-pocket expenses for witnesses; Court Reporter and transcript fees; electronic and telephone conferencing and recording costs, if such

² The revisions consisted of substituting “motion” for “case” in the last sentence of Paragraph 13-16.DD and Paragraph 13-18.R.

procedures are requested by Respondent; copying, mailing, and required publication costs; translator fees; and an administrative charge determined by Council.

* * *

“Impairment Proceeding” means ~~the~~ any proceeding:

* * *

2. Initiated by a District Committee, the Board, or Bar Counsel to determine whether an Attorney has an Impairment;

* * *

“Judge” means a judge within the meaning of Va. Code §~~2.1-37.1~~17.1-900, and any judge appointed or elected under the laws of any other jurisdiction.

* * *

"RESA" means Chapters ~~27.2-9~~ (titled “Real Estate Settlements”) and 10 (titled “Real Estate Settlement Agents”) of Title 55.1 of the Code of Virginia ~~entitled “Real Estate Settlement Agents”~~ (formerly "Consumer Real Estate Settlement Protection Act" or "CRESPA").

* * *

-13-4. ESTABLISHMENT OF DISTRICT COMMITTEES

* * *

B. Panel Quorum. A Panel quorum shall consist of five or more persons. No member of the Subcommittee that considered a Complaint pursuant to subparagraph 13-15 may sit on the Panel that hears the Complaint. One person assigned to a Panel should be a current or former nonlawyer member of a District Committee. If the scheduled nonlawyer is unable to attend, and if an alternate nonlawyer is not reasonably available, participation by a nonlawyer member shall not be required in a proceeding if a quorum is otherwise present. The action of a majority of a quorum shall be the action of the Panel. For the exclusive purposes of considering an Agreed Disposition, pursuant to subparagraph 13-7.A.9, a Panel may act in a meeting in person or through any means of communication by which

all five members participating may simultaneously hear each other during the meeting.

* * *

-13-6. DISCIPLINARY BOARD

* * *

G. Additional Board Powers. The Board shall have the following powers in addition to all other powers granted to the Board:

* * *

3. To impose an interim Suspension if an Attorney fails to comply with a summons or subpoena issued by any member of the Board, the Clerk, or Bar Counsel, ~~or any lawyer member of a District Committee~~ for trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm. In the event of alleged noncompliance, Bar Counsel may file with the Board and serve on the Attorney a notice of noncompliance requesting the Board to suspend the Attorney's License. The noncompliance notice must advise the Attorney that he or she may petition the Board within 10 days of service of the notice to withhold entry of a Suspension order and to hold a hearing, at which time the Attorney shall have the burden of proving good cause for the alleged noncompliance. If 10 days after service of the notice of noncompliance the Attorney has not petitioned the Board to withhold entry of an interim Suspension order, the Board shall summarily enter an Order suspending the Attorney's License until such time as the Attorney fully complies with the summons or subpoena or a determination is made as to whether the Attorney's noncompliance violated the Disciplinary Rules. If the Board finds at any hearing conducted hereunder that the Attorney has failed to establish good cause for the alleged noncompliance, the Board shall enter an Order suspending the Attorney's License. A suspension imposed under this subparagraph shall remain in place until: i) the Attorney fully complies with the summons or subpoena; ii) a determination is

made as to whether the Attorney's noncompliance violated the Disciplinary Rules; or iii) the Complaint or Disciplinary Proceeding in which the summons or subpoena was issued is closed. An Attorney suspended pursuant to this subparagraph G.3. is subject to the provisions of subparagraph 13-29;

* * *

-13-7. DISTRICT COMMITTEES

A. Powers. Each District Committee and Section thereof shall have the power to:

* * *

3. ~~Summon and e~~Examine witnesses under oath to be administered by any member of the District Committee;
4. Issue, ~~through any of its Attorney members or through Bar Counsel,~~ any summons or subpoena necessary to compel the attendance of witnesses and the production of documents or evidence necessary or material to any Investigation or Disciplinary Proceeding, or through its Chair, any summons or subpoena permitted under subparagraph 13-16.E. Any such summons or subpoena issued to a non-Attorney shall have the force of and be enforced as a summons or subpoena issued by a Circuit Court. A subpoena duces tecum which compels the Respondent to produce documents may be served upon the Respondent by certified mail at the Respondent's last address of record for membership purposes with the Bar or, if service cannot be effected at the Respondent's last address on record, or if the Respondent is a Foreign Lawyer, or a lawyer engaged *pro hac vice* in the practice of law in Virginia, or a lawyer not admitted in Virginia, by first class mail to the Clerk of this Court.

* * *

9. Approve, ~~through a Subcommittee acting by a unanimous vote,~~ an Agreed Disposition of a Complaint or Charge of Misconduct

submitted by Bar Counsel and the Respondent, either through a Subcommittee acting by a unanimous vote, or, once a Charge of Misconduct is placed on the public District Committee hearing docket, a Panel of the District Committee acting by a majority vote. No appeal will lie from any sanction to which Respondent has agreed. If the Agreed Disposition is not accepted by a Panel of the District Committee, no member of the Panel which considered the Agreed Disposition shall be assigned to the Panel that hears the Complaint or Charge of Misconduct.

* * *

-13-11. LIMITED RIGHT TO DISCOVERY

There shall be no right to discovery in connection with disciplinary matters, including matters before three-judge Circuit Courts, except:

* * *

- B. Bar Counsel shall furnish to Respondent a copy of the Investigative Report considered by the Subcommittee when the Subcommittee set the Complaint for hearing before the District Committee or certified the Complaint to the Board, with the following limitations:
1. Bar Counsel shall not be required to produce any information or document obtained in confidence from any law enforcement or disciplinary agency, or any documents that are protected by the attorney-client privilege or work product doctrine, unless attached to or referenced in the Investigative Report; and
 2. Bar Counsel shall not be required to reveal other communications between the Investigator and Bar Counsel, or between Bar Counsel and the Subcommittee; ~~and.~~
 3. ~~Bar Counsel shall make a timely disclosure to the Respondent of all known evidence that tends to negate the Misconduct of the Respondent or mitigate its severity or which, upon a finding of Misconduct, would tend to support imposition of a lesser sanction than might be otherwise imposed. Bar counsel shall~~

~~comply with the duty to disclose this evidence regardless of whether the information is confidential under this Paragraph. If Bar Counsel discloses under this subparagraph information that is otherwise confidential, Bar Counsel shall promptly notify the Attorney or Complainant who is the subject of the disclosure unless Bar Counsel decides that giving such notice would prejudice a disciplinary investigation. Notice shall be in writing and shall be deemed effective when mailed by first class mail to the Bar's last known address of the subject Complainant or Attorney.~~

C. Bar Counsel shall make a timely disclosure to the Respondent of all known evidence that tends to negate the Misconduct of the Respondent or mitigate its severity or which, upon a finding of Misconduct, would tend to support imposition of a lesser sanction than might be otherwise imposed. Bar Counsel shall comply with the duty to disclose this evidence regardless of whether the information is confidential under this Paragraph. If Bar Counsel discloses under this subparagraph information that is otherwise confidential, Bar Counsel shall promptly notify the Attorney or Complainant who is the subject of the disclosure unless Bar Counsel decides that giving such notice would prejudice a disciplinary investigation. Notice shall be in writing and shall be deemed effective when mailed by first-class mail to the Bar's last known address of the subject Complainant or Attorney.

* * *

-13-13. PARTICIPATION AND DISQUALIFICATION OF COUNSEL

A. Attorney for Respondent. A Respondent may be represented by a member of the Bar, or any member of the bar of any other jurisdiction while engaged *pro hac vice* in the practice of law in Virginia, at any time with respect to a Complaint. In any proceeding before the Board or a three-judge Circuit Court, or in a District Committee matter in which a Charge of Misconduct has been issued, counsel of record for a Respondent shall not withdraw except upon motion for good cause shown.

* * *

-13-16. DISTRICT COMMITTEE PROCEEDINGS

* * *

B. Response by Respondent Required. After the Respondent has been served with the Charge of Misconduct, the Respondent shall, within 21 days after service of the Charge of Misconduct:

1. File an aAnswer to the Charge of Misconduct with the Clerk, which aAnswer shall be deemed consent to the jurisdiction of the District Committee; or
2. File an aAnswer to the Charge of Misconduct and a demand with the Clerk that the proceedings before the District Committee be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand. Upon the filing of such an Answer and such a 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. The hearing shall be scheduled as soon as practicable. However, the 30- to 120-day time frame shall not constitute a deadline for the hearing to be held.

C. Failure of Respondent to Respond. If the Respondent fails to file an aAnswer, or an aAnswer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the District Committee.

* * *

E. Subpoenae, Summonses and Counsel. The Respondent may be represented by counsel. The Respondent may request ~~Bar Counsel or the~~ Chair of the District Committee to issue summonses or subpoenae for witnesses and documents. Such a request must be filed with the Clerk with a copy to Bar Counsel. Requests for summonses and subpoenae shall be granted, unless, in the judgment of the Chair of the District Committee, such request is unreasonable. ~~Either~~ Bar Counsel or any party subject to a

summons or subpoena or Respondent may file with the Clerk a motion ~~move~~ the District Committee to quash or limit such summonses or subpoenae.

* * *

DD. Reconsideration of Action by the District Committee. No motion for reconsideration or modification of the District Committee's decision following a hearing on a Charge of Misconduct shall be considered unless it is filed with the Clerk, along with all supporting exhibits, within 10 days after the hearing before the District Committee.

1. A Charge of Misconduct dismissed by a District Committee may be reconsidered only upon:
 - (a) A finding by a majority vote of the Panel that heard the matter originally that material evidence not known or available when the matter was originally presented has been discovered; or
 - (b) A unanimous vote of the Panel that heard the matter originally.
2. No action by a District Committee imposing a sanction or certifying a matter to the Board shall be reconsidered unless a majority of the Panel that heard the matter votes to reconsider the sanction.
3. No member shall vote to reconsider a District Committee action unless it appears to such member that reconsideration is necessary to prevent an injustice or warranted by specific exceptional circumstances militating against adherence to the initial action of the District Committee.
4. District Committee members may be polled on the issue of whether to reconsider an earlier District Committee action.
5. Any reconsideration of an earlier District Committee action must occur at a District Committee meeting, whether in person or by any means of communication which allows all members participating to simultaneously hear each other.

If such a motion is timely filed, the Clerk shall promptly forward copies to each member of the hearing Panel. The Panel may deny the motion without response from the other party. No relief shall be granted without allowing the other party an opportunity to oppose the motion in writing. If no relief is granted, the District Committee shall enter its order disposing of the motion.

* * *

-13-18. BOARD PROCEEDINGS UPON CERTIFICATION

A. Filing by Respondent. 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:

1. File an ~~a~~Answer to the Certification with the Clerk, which ~~a~~Answer shall be deemed consent to the jurisdiction of the Board; ~~or file an answer to the Certification and a demand with the Clerk that the proceedings before the Board be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand.~~
2. File an Answer to the Certification and a demand with the Clerk that the proceedings before the Board be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand. Upon the filing of an Answer and such demand and provision of available dates as specified above, further proceedings before the Board shall terminate, and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held.

B. No Filing by Respondent. If the Respondent fails to file an ~~a~~Answer, or an ~~a~~Answer and a demand, and provide available dates, as specified

above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

* * *

D. Expedited Hearings.

* * *

5. At least five days prior to the date set for hearing, the Respondent shall either file an aAnswer to the petition with the Clerk, which aAnswer shall be conclusively deemed consent to the jurisdiction of the Board; ~~or file an answer and a demand with the Clerk, which answer shall be conclusively deemed consent to the jurisdiction of the Board;~~ or file an aAnswer and a demand with the Clerk that proceedings before the Board be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 days nor more than 120 days from the date of the Board order. Upon the filing of an Answer and such demand and provision of available dates as specified above, further proceedings before the Board shall be terminated and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30- to 120-day time frame shall not constitute a deadline for the hearing to be held. If any order of summary Suspension has been entered, such Suspension shall remain in effect until the court designated under Va. Code § 54.1-3935 enters a final order disposing of the issue before it. If the Respondent fails to file an aAnswer, or an aAnswer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

* * *

R. Reconsideration of Board Action. No motion for reconsideration or modification of the Board's decision shall be considered unless it is filed with the Clerk within 10 days after the hearing before the Board. The moving party shall file the motion and all supporting exhibits with the Clerk.

Such motion shall be granted only to prevent manifest injustice upon the ground of:

1. 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
2. Evidence which 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 would have clearly produced a different result if the evidence had been introduced at the hearing.
3. ~~If such a motion is timely filed, the Clerk shall promptly forward copies to each member of the hearing panel. The panel may deny the motion without response from Bar Counsel. 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.~~

If such a motion is timely filed, the Clerk shall promptly forward copies to each member of the hearing Panel. The Panel may deny the motion without response from the other party. No relief shall be granted without allowing the other party an opportunity to oppose the motion in writing. If no relief is granted, the Board shall enter its order disposing of the motion.

* * *

-13-22. BOARD PROCEEDINGS UPON A GUILTY PLEA OR AN ADJUDICATION OF A CRIME

A. Action Upon Receipt of Notification. Whenever the Clerk receives written notification from any court of competent jurisdiction stating that an Attorney (the “Respondent”) has been found guilty or convicted of a Crime by a Judge or jury, pled guilty to a Crime or entered a plea wherein the facts found by a court would justify a finding of guilt, irrespective of whether sentencing has occurred, a member of the Board shall forthwith and summarily enter an order of Suspension requiring the Respondent to appear at a specified time and place for a hearing before the Board to show cause why the Respondent’s License to practice law should not be further suspended or revoked. A copy of the written notification from the court shall

be served upon the Respondent with the Board's order of Suspension. The Board may appoint a guardian *ad litem* to represent the interests of a Respondent who is incarcerated and unrepresented by counsel at any time it appears that such an appointment may be appropriate to protect the interests of the Respondent.

B. Time of Hearing, Continuance and Interim Hearing. The hearing shall be set not less than 14 or more than 30 days after the date of the Board's order. Upon written request of the Respondent, the hearing may be continued until ~~any probation ordered by a court has ended or after~~ sentencing has occurred. Upon 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 shall, upon request of the Respondent, hold an interim hearing and shall terminate ~~such a~~ summary Suspension while the ~~probation,~~ sentencing, or appeal is pending, if the Board finds that ~~such the~~ summary Suspension, if not terminated, would be likely to exceed the discipline imposed by the Board upon a hearing on the merits of the case.

* * *

D. Burden of Proof. At the hearing, the Respondent shall have the burden of proving that he or she was not convicted of a Crime and why his or her License should not be further suspended or revoked.

* * *

F. Procedure Demand for Three-Judge Circuit Court. ~~The procedure applicable to Proceedings related to Misconduct shall apply to Proceedings relating to guilty pleas or Adjudication of a Crime.~~ If the Respondent elects to have further Proceedings conducted pursuant to Va. Code § 54.1-3935, the Respondent shall file a demand with the Clerk not later than ten days prior to the date set for the hearing before the Board, and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall be terminated and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held. ~~The order of~~ Any summary Suspension issued by the Board shall

remain in effect until the court designated under Va. Code § 54.1-3935 enters a final order, ~~disposing of the issue before it~~ unless earlier terminated pursuant to subparagraph 13-22.B. If the Respondent fails to file a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

-13-23. BOARD PROCEEDINGS UPON IMPAIRMENT

A. Suspension for Impairment. The Board shall have the power to issue an order of Suspension to a Respondent who 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 has the Impairment. 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 notice not less than 14 days prior to the hearing to Bar Counsel and the District Committee or Board of his or her intention to do so. A finding of Impairment ~~or transfer to the Disabled and Retired class of membership under Paragraph 13-23.K~~ may be utilized by Bar Counsel to: (1) dismiss any pending Complaints or allegations of Misconduct; and (2) move to dismiss a Charge of Misconduct, Certification or Disciplinary Proceeding, on the basis of a finding of Impairment ~~or a transfer to the Disabled and Retired class of membership~~ militating against further proceedings, which circumstances of Impairment shall be set forth in the Dismissal.

* * *

C. Investigation. Upon receipt of notice or evidence that an Attorney 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 has the Impairment. As a part of the Investigation of whether an Impairment exists, and for good cause shown in the interest of public protection Bar Counsel may petition the Board to order the Respondent:

1. To undergo a psychiatric, physical or other medical examinations by qualified physicians or other health care providers selected by the Board;

* * *

D. Summary Suspension. Upon receipt of a notice from the Clerk with supporting documentary evidence that an Attorney has been: a) adjudicated by a court of competent jurisdiction to be incompetent or incapacitated; have an Impairment, or that an Attorney has been or b) involuntarily admitted to a hospital (as defined in Va. Code §37.1-1-§37.2-100) for evaluation or treatment of any addiction, inebriety, insanity, intellectual disability, 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.

* * *

F. Procedure. 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 an Impairment Proceeding when not testifying.

G. Guardian Ad Litem. The Board may appoint a guardian *ad litem* to represent the interests of a Respondent at any time when it appears that such an appointment may be appropriate to protect the interests of a Respondent who is the subject of an Impairment Proceeding and unrepresented by counsel. If no guardian *ad litem* has been appointed for, and no counsel has made an appearance on behalf of, a Respondent, ~~the~~ notice of any hearing to determine whether the Respondent 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 the interests of such Respondent ~~at the hearing.~~

* * *

I. Termination of Suspension. In cases where a Suspension is based upon an adjudication ~~of an Impairment by a court, under Paragraph 13-23.D,~~ the Board shall promptly enter an order terminating such Suspension upon receipt of an order from a court of competent jurisdiction finding that the Respondent is no longer incompetent or incapacitated ~~documentary evidence of adjudication by a court of competent jurisdiction that the Respondent's~~

~~Impairment has terminated, the Board shall promptly enter an order terminating such Suspension.~~

* * *

K. Transfer of Membership Status. Bar Counsel may terminate and close an Impairment Proceeding if the Respondent transfers to the Disabled or Retired class of membership pursuant to Part 6, Section IV, Paragraph 3 of the Rules of Court and files a declaration with the Clerk of the ~~Disciplinary System~~ and the Virginia State Bar's Membership Department that the Respondent will not seek transfer from the Disabled or Retired class of membership. The declaration shall be endorsed by the Respondent and, as applicable, the Respondent's counsel or ~~G~~-guardian *Aad Litem*. ~~Termination of the Impairment Proceeding shall not be considered a final order in an Impairment Proceeding under Paragraph 13-30.~~ The Respondent's transfer to the Disabled or Retired class of membership and filing of the declaration pursuant to ~~this subparagraph as described above~~ may also be utilized by Bar Counsel to: (1) dismiss any pending Complaints or allegations of Misconduct on the basis of transfer to the Disabled or Retired class of membership, militating against further proceedings, which shall be set forth in the Dismissal; and (2) move to dismiss a Charge of Misconduct, Certification, or Disciplinary Proceeding, on the basis of transfer to the Disabled or Retired class of membership, militating against further proceedings, which shall be set forth in the Dismissal.

-13-24. BOARD PROCEEDINGS UPON DISBARMENT, REVOCATION OR SUSPENSION IN ANOTHER JURISDICTION

* * *

C. Opportunity for Response. ~~Within 14 days of the date of mailing of the Board order, via certified mail, to Respondent's last address of record with the Bar, Respondent shall~~ may file with the Clerk a written response, which shall be confined to argument and exhibits supporting one or more of the following grounds for dismissal or imposition of lesser discipline:

1. The record of the proceeding in the other Jurisdiction would clearly show that such proceeding was so lacking in notice or

opportunity to be heard as to constitute a denial of due process;

2. The imposition by the Board of the same or equivalent discipline upon the same proof would result in an injustice;
3. The same conduct would not be grounds for disciplinary action or for the same or equivalent discipline in Virginia; or
4. The misconduct found in the other Jurisdiction would warrant the imposition of substantially lesser discipline in the Commonwealth of Virginia.

Any such written response must be filed with the Clerk within 14 days of the date of mailing of the Board order, via certified mail, to Respondent's last address of record with the Bar.

* * *

-13-25. BOARD PROCEEDINGS FOR REINSTATEMENT

* * *

B. Investigation of Impairment in Reinstatement Matters. Upon receipt of notice or evidence that an individual seeking Reinstatement 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 Impairment exists. As part of the Investigation of whether an Impairment exists, and for good cause shown in the interest of public protection, Bar Counsel may petition the Board to order the individual:

1. To undergo at his or her expense a psychiatric, physical or other medical examinations by a-qualified physicians or other health care providers selected by the Board;

* * *

G. Reinstatement Proceedings After a Revocation. If the threshold requirements of subparagraph 13-25.F have been met, the following processes shall ensue:

* * *

2. Bill of Particulars. On written request by Bar Counsel, served by certified mail, return receipt requested, a Petitioner seeking Reinstatement shall file with the Clerk within 21 days after service of the request, ~~an original and six copies of~~ a bill of particulars setting forth the grounds for Reinstatement. The petition for Reinstatement shall not proceed without such ~~B~~bill of ~~P~~particulars being filed with the Clerk.

* * *

-13-28. CONSENT TO REVOCATION

A. When Permitted. 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 an affidavit declaring the Attorney's consent to Revocation and stating that:

1. 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. The Attorney is aware that there is currently pending a disciplinary complaint, an investigation into, or a Proceeding involving, allegations of Misconduct, the nature of which shall be specifically set forth in the affidavit;
3. The Attorney acknowledges that the material facts upon which the disciplinary complaint, investigation or Proceeding allegations of Misconduct are predicated are true; and
4. 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.

* * *

-13-29. DUTIES OF DISBARRED OR SUSPENDED RESPONDENT

After a Suspension against a Respondent is imposed by either a Summary Order or Memorandum Order and no stay of the Suspension has been granted by this Court, or after a Revocation against a Respondent is imposed by either a Summary Order or Memorandum Order, ~~that~~ Respondent shall forthwith give notice, by certified mail, of his or her Revocation or Suspension to all clients for whom he or she is currently handling matters and to all opposing Attorneys and the presiding Judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his or her care in conformity with the wishes of his or her clients. The Respondent shall give such notice immediately and in no event later than ~~within~~ 14 days of the effective date of the Revocation or Suspension, and make such arrangements as are required herein as soon as is practicable and in no event later than ~~within~~ 45 days of the effective date of the Revocation or Suspension. The Respondent shall also furnish proof to the ~~Bar~~ Clerk within 60 days of the effective date of the Revocation or Suspension that such notices have been timely given and such arrangements have been made for the disposition of matters. The Board shall decide all issues concerning the adequacy of the notice and arrangements required herein, ~~and~~. The burden of proof shall be on the Respondent to show compliance. If the Respondent fails to show compliance, the Board may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph 13-29.

-13-30. CONFIDENTIALITY OF DISCIPLINARY RECORDS AND PROCEEDINGS

A. Confidential Matters. Except as otherwise provided in this subparagraph 13-30, or in subparagraph 13-11, all District Committee, Board, and three-judge Circuit Court hearings and all determinations imposing public discipline and orders of summary, interim, or administrative Suspension are public; and the following proceedings, records, and information are confidential and shall not be disclosed:

* * *

3. Impairment Proceedings, except that all orders imposing or terminating a Suspension ~~orders~~ are public;

* * *

6. Subcommittee records and proceedings, except: i) determinations imposing public discipline; and ii) determinations imposing private discipline which have been disclosed to a District Committee, the Board or a three-judge Circuit Court empaneled under Va. Code §54.1-3935, pursuant to subparagraph 13-30.B, are public;

* * *

IV. Conclusion

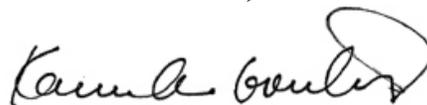
The Virginia State Bar, by its president and executive director, respectfully requests the Court adopt the foregoing amendments to Part 6, § IV, Paragraph 13 of the Rules of Court, for the reasons stated above.

Respectfully submitted,

VIRGINIA STATE BAR



Brian L. Buniva, President



Karen A. Gould, Executive Director

Dated: March 8th, 2021

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: John Crouch <crouchandcrouch@gmail.com>
Sent: Friday, November 13, 2020 12:24 PM
To: publiccomment <PublicComment@vsb.org>
Subject: EXTERNAL SENDER Comment on Proposed Amendments to Part 6, Section IV, Paragraph 13

Definition of Complaint —
Removing the words “to the Bar” makes the definition so broad that it’s almost unlimited. How does it limit disciplinary cases to things someone asks the bar to do something about, or that a judge sees and decides to act on, or other specific situations that require action, such as criminal convictions or discipline in other states? Upon flipping through all of 13 to see how the word “Complaint” is used, I do not see anything that even practically and informally imposes a limit. It really does look like any accusation of an ethics violation, in anything, written anywhere, that comes to the attention of the bar, would have to be initially reviewed by Bar Counsel under 13-10 A (which the proposal does not modify): “Bar Counsel shall review all Complaints.” Is that the intention?

13-11 C:
“Bar counsel shall comply with the duty to disclose this evidence regardless of whether the information is confidential under this Paragraph.”
What is “this Paragraph”? Yes, the Definitions section makes clear that it always means the entire “Paragraph 13,” but many readers would not perceive it that way, because Paragraph 13 is 60 pages long and does not merely stretch, but inverts, the ordinary meaning of the word “Paragraph”. If I hadn’t been concerned about whether the words “this Paragraph” in 13-11 C included the immediately preceding confidentiality provisions in 13-11 B, I would have completely missed that definition.

That’s it. The rest, as far as I understand it, seems salutary. The most substantive changes close loopholes that could let dangerous or harmful misconduct be covered up when it should be made public.

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Fellow, International Academy of Family Lawyers (Formerly IAML)
and International Academy of Collaborative Professionals

From: [Matt Hardin](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER Public Comment - Amendment to Disciplinary Rules
Date: Thursday, December 3, 2020 10:54:51 AM

To whom it may concern:

I write to strenuously oppose the proposed amendment to disciplinary rule 13-11 (B) (3), which is the proposed deletion of one paragraph of the existing rules found within the Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13.

The paragraph, as it currently reads, provides *Brady*-style due process protections for lawyers who are accused of misconduct. Just as a prosecutor in a criminal trial is required by principles of due process to disclose known exculpatory evidence to the defendant, bar counsel is currently required to disclose known exculpatory evidence to an accused attorney.

Removing that paragraph creates a situation in which attorneys will be deprived of basic due process protections if they are ever accused of misconduct, and incentivizes bar counsel to “hide the ball” and employ unfair trial strategies against members of the bar. There has been no publicized instance where *Brady*-style disclosures caused any harm to the bar or the public, and I fail to understand why the proposal to eliminate such protections was quietly slipped into the broader package of more common-sense amendment to the rules. It appears we are going “backwards” rather than forwards when we strip due process protections away from accused attorneys. This is especially concerning in a profession that serves as a bulwark against the erosion of such rights for others.

I urge you to let the current version of Rule 13-11 (B) (3) stand, and to reject the portion of the proposed amendments that would delete it.

Thank you,

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