

SENATE BILL NO. 561

Offered January 12, 2022

Prefiled January 12, 2022

A BILL to amend and reenact §§ 17.1-406, 18.2-455, 54.1-3909, 54.1-3910, 54.1-3913, 54.1-3915, and 54.1-3938.1 of the Code of Virginia; to amend the Code of Virginia by adding in Title 30 a chapter numbered 64, consisting of sections numbered 30-409 through 30-426, and by adding a section numbered 54.1-3934.1; and to repeal §§ 54.1-3935 and 54.1-3938 of the Code of Virginia, relating to Virginia Attorney Disciplinary Commission; established.

Patron-- Petersen

Referred to Committee on the Judiciary

Be it enacted by the General Assembly of Virginia:

1. That §§ 17.1-406, 18.2-455, 54.1-3909, 54.1-3910, 54.1-3913, 54.1-3915, and 54.1-3938.1 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Title 30 a chapter numbered 64, consisting of sections numbered 30-409 through 30-426, and by adding a section numbered 54.1-3934.1 as follows:

§ 17.1-406. Appeals in criminal matters; cases over which Court of Appeals does not have jurisdiction.

A. Any aggrieved party may appeal to the Court of Appeals from any final conviction in a circuit court of a traffic infraction or a crime. The Commonwealth or any county, city, or town may petition the Court of Appeals for an appeal pursuant to this subsection in any case in which such party previously could have petitioned the Supreme Court for a writ of error under § 19.2-317. The Commonwealth may also petition the Court of Appeals for an appeal in a criminal case pursuant to § 19.2-398.

B. In accordance with other applicable provisions of law, appeals lie directly to the Supreme Court from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus, from any final finding, decision, order, or judgment of the State Corporation Commission, and from proceedings under §§ ~~54.1-3935~~ 30-412 and 54.1-3937. Complaints of the Judicial Inquiry and Review Commission shall be filed with the Supreme Court of Virginia. The Court of Appeals shall not have jurisdiction over any cases or proceedings described in this subsection.

§ 18.2-455. Unprofessional conduct; revocation of license.

Conduct that is made illegal by this article on the part of an attorney at law or any person holding license from the Commonwealth to engage in a profession is unprofessional conduct. Upon hearing pursuant to the provisions of § ~~54.1-3935~~ 30-412, or other statute applicable to the profession concerned, if the defendant ~~be~~ is found guilty of barratry, his license to practice law or any other profession shall be revoked for such period as provided by law.

CHAPTER 64.
VIRGINIA ATTORNEY DISCIPLINARY COMMISSION.

§ 30-409. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Attorney" means a person licensed pursuant to § 54.1-3928 to practice law in the Commonwealth. "Attorney" also means an attorney licensed to practice law in another state who has been permitted on a temporary basis to practice law in the Commonwealth or a person who is not licensed but is holding himself out as a person permitted to practice law in the Commonwealth in violation of the Virginia Rules of Professional Conduct or Unauthorized Practice Rules as promulgated by the Supreme Court of Virginia or any other provision of law.

"Bar Counsel" means an attorney employed by the Virginia State Bar who is vested with the power to investigate complaints alleging professional misconduct against attorneys, submit charges against an attorney for a hearing before the Commission, and prosecute such charges in such a hearing.

"Commission" means the Virginia Attorney Disciplinary Commission.

§ 30-410. *Commission established; membership and terms of office.*

The Virginia Attorney Disciplinary Commission is established in the legislative branch of state government for the purpose of holding disciplinary hearings subsequent to a charge brought by Bar Counsel against attorneys practicing in the Commonwealth and issuing sanctions, as appropriate. It shall be composed of 15 persons who shall be citizens and residents of the Commonwealth. The members of the Commission shall be as follows:

- 1. Three members of the House of Delegates to be appointed by the Speaker of the House of Delegates in accordance with the principles of proportional representation contained in the Rules of the House of Delegates;*
- 2. Three members of the Senate to be appointed by the Senate Committee on Rules;*
- 3. Five retired judges, to be chosen by the vote of a majority of the members elected to each house of the General Assembly;*
- 4. Two attorney members, who are licensed to practice in the Commonwealth and in good standing, to be chosen by the vote of a majority of the members elected to each house of the General Assembly; and*
- 5. Two nonlegislative citizen members, who shall not be active or retired judges and shall never have been licensed attorneys, to be chosen by the vote of a majority of the members elected to each house of the General Assembly.*

The Commission shall elect a chairman and vice-chairman annually from its membership.

After the initial appointments, the term of office of each member shall be four years commencing on July 1. No member of the Commission shall be eligible to serve more than two consecutive terms. The remainder of any term to which a member is appointed to fill a vacancy shall not constitute a term in determining the member's eligibility for reappointment.

Commission membership terminates whenever a member resigns or ceases to possess the qualifications that made him eligible for appointment. During any vacancy that may exist while the General Assembly is not in session, the Joint Rules Committee, or the Speaker of the House or Senate Committee on Rules if the vacancy is for a seat held by a member of the House of Delegates or Senate, may appoint a successor to serve until 30 days after the commencement of the next session of the General Assembly. Upon election of a successor by the General Assembly, the new member of the Commission shall serve for the remainder of the term of office of his predecessor.

Any member of the Commission who is the subject of an investigation or hearing by the Commission or is otherwise personally involved therein shall be disqualified by the Commission from acting in such proceedings.

§ 30-411. *Executive director and staff.*

The Commission shall be in the charge of an executive director, who shall be appointed by, subject to confirmation of the General Assembly, and serve at the pleasure of the Joint Rules Committee. The Commission shall fix the compensation of the executive director.

The executive director shall be an experienced lawyer and a graduate of the school of law of an approved institution of higher education.

The executive director may, with prior approval of the Commission, employ and fix the duties and compensation of staff as he deems necessary.

§ 30-412. *Powers and duties of the Commission; disciplinary hearings.*

A. The Commission is vested with the power to hold hearings to determine whether a sanction should be issued against an attorney against whom Bar Counsel has submitted a charge of professional misconduct.

B. Each hearing shall be before a three-member panel of the Commission, at least one member of which shall be a retired judge. The panels shall be randomly selected by a process established by the Commission. The panel and Commission staff shall observe and administer the common and statute law rules of evidence as observed and administered by the courts of the Commonwealth. If the panel unanimously finds the charge to be well founded and sufficient to constitute the basis for sanction of the attorney, it may issue such sanction, up to and including disbarment. Any decision of the panel that is not unanimous shall be dismissed.

C. The attorney may appeal any sanction issued to the Court of Appeals. If the Court of Appeals rules in favor of the Commission, the attorney may further file a petition for appeal with the Supreme Court of Virginia.

D. The executive director shall have the power to approve a consent decree between Bar Counsel and the subject attorney prior to or during a disciplinary hearing. Upon approval of such a decree, the executive director shall issue a written findings of fact about the charge that shall be made public in accordance with the provisions of subsection C of § 30-419.

E. If the Commission finds that a charge made by Bar Counsel was clearly frivolous, the Commission may award to the subject attorney reasonable attorney fees and expenses, to be paid by the Virginia State Bar.

F. The Commission shall have the authority to make rules, not in conflict with the provisions of this chapter or of general law, to govern hearings conducted by it.

§ 30-413. Compensation and expenses.

Members of the Commission shall receive such compensation as provided in § 30-19.12. All members shall be reimbursed for reasonable and necessary expenses incurred in the performance of their duties as provided in §§ 2.2-2813 and 2.2-2825. Compensation to members of the General Assembly for attendance at official meetings of the Commission shall be paid by the offices of the Clerk of the House of Delegates or Clerk of the Senate, as applicable. All other compensation and expenses shall be paid from existing appropriations to the Commission or, if unfunded, shall be approved by the Joint Rules Committee.

§ 30-414. Annual report.

On or before December 1 of each year, the Commission shall publish a report detailing the activities of the Commission for the prior year. The report shall include the number of complaints dismissed based on (i) failure to fall within the jurisdiction of the Commission, (ii) failure to state a violation of the Virginia Rules of Professional Conduct or Unauthorized Practice Rules, or (iii) failure of the Commission to reach a conclusion that the Virginia Rules of Professional Conduct or Unauthorized Practice Rules were breached; the number of complaints for which the Commission concluded that the Virginia Rules of Professional Conduct or Unauthorized Practice Rules were breached; and the number of cases from which the staff or any member of the Commission recused himself due to an actual or possible conflict.

§ 30-415. Oaths; inspection of books and records; subpoenas.

A. In the conduct of formal hearings, the Commission may (i) administer oaths and affirmations; (ii) order and otherwise provide for the inspection of books and records; and (iii) issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and other records or tangible evidence relevant to any such formal hearing.

B. The power to administer oaths and affirmations, make orders for or concerning the inspection of books and records, or issue subpoenas may be exercised by any member of the Commission, unless the Commission shall otherwise determine.

C. Whenever a subpoena is sought in the Commonwealth pursuant to the laws of another jurisdiction for use in lawyer discipline proceedings, and where the request for the subpoena has been duly approved under the laws of the other jurisdiction, the chairman or another commissioner, if so authorized by the chairman, upon receiving an application from Bar Counsel, may issue a subpoena as provided in this section to compel the attendance of witnesses and production of documents in the county or city in the Commonwealth where the witness resides or is employed or elsewhere as agreed by the witness. The privilege extended by this section shall be available only to those jurisdictions that extend a similar privilege for disciplinary proceedings in the Commonwealth.

D. The circuit courts shall have the power to enforce a subpoena issued pursuant to this section and to adjudge disobedience thereof as contempt.

§ 30-416. Scope of process.

In any formal hearing in any part of the Commonwealth, any process issued pursuant to the provisions of § 30-415 shall be effective throughout the Commonwealth.

§ 30-417. Order compelling witness to attend and testify.

If any person refuses to attend or testify or produce any writings or things required by any such subpoena, the Commission may petition any court of record in the Commonwealth for an order compelling such person to attend and testify or produce the writings or things required by the subpoena before the Commission. The court shall order such person to appear before it at a specified time and place and show cause why he had not attended or testified or produced the writings or things as required. A copy of the order shall be served upon him. If it appears to the court that the subpoena was regularly issued, the court shall order such person to appear before the Commission at the time and place fixed in the order and testify or produce the required writings or things. Upon failure to obey the order, such person shall be dealt with by such court as for contempt of court.

All process in any such case may be served in the manner prescribed by law for service of process in civil actions.

§ 30-418. Depositions.

In any formal hearing, the Commission may order the deposition of a person residing within or without the Commonwealth to be taken in such form and subject to such limitations as may be prescribed in the order. If the subject attorney and Bar Counsel do not stipulate as to the manner of taking the deposition, either the attorney or Bar Counsel may file in the circuit court of the locality in which the deponent resides, or, if he is not a resident or present within the Commonwealth, in the Circuit Court of the City of Richmond, a petition entitled "In the Matter of Proceeding of Virginia Attorney Disciplinary Commission No. (state number)" and stating generally, without identifying the attorney, the nature of the pending matter, the name and residence of the person whose testimony is desired, and directions, if any, of the Commission, asking that an order be made requiring such person to appear and testify before a designated officer. Upon the filing of the petition, the court may make an order requiring such person to appear and testify. A subpoena for such deposition shall be issued by the clerk of the court and the deposition shall be taken and returned, in the manner prescribed by law for depositions in civil actions. Upon failure of the person named in the subpoena to appear and testify, he shall be dealt with by such court as for contempt of court.

§ 30-419. Confidentiality of papers and proceedings; written findings of fact for every hearing to be made public.

A. All papers filed with and proceedings before the Commission, and under §§ 30-417 and 30-418, including the identification of the subject attorney as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged, other than to the Commission during the formal proceedings of a disciplinary hearing, by any person who (i) is interviewed concerning such complaint by a member, employee, or agent of the Commission or (ii) participates in any proceeding of the Commission or in the official recording or transcription thereof, except that the record of any hearing resulting in the sanctioning of an attorney shall lose its confidential character. However, if the Commission finds cause to believe that any witness under oath has willfully and intentionally testified falsely, the Commission may direct the executive director to report such finding and the details leading thereto including any transcript thereof to the attorney for the Commonwealth of the city or county where such act occurred for such disposition as to a charge of perjury as the Commonwealth may be advised. In any subsequent prosecution for perjury based thereon, the proceedings before the Commission relevant thereto shall lose their confidential character.

All records of proceedings before the Commission that do not result in the sanctioning of an attorney shall be kept in the confidential files of the Commission.

However, an attorney who is under investigation by the Commission, or any person authorized by him, may divulge information pertaining to a complaint filed against such attorney as may be necessary for the attorney to investigate the allegations in the complaint in preparation for the proceedings before the Commission.

B. There shall be no ex parte communications between Bar Counsel and the members of the Commission regarding the subject matter of any investigation or charge prior to or during a formal disciplinary hearing.

C. Notwithstanding the provisions of subsection A, the Commission shall issue a written findings of fact at the conclusion of every hearing, whether or not it resulted in sanctions of the subject attorney, that shall be made available to the public.

§ 30-420. Reinstatement hearing.

An attorney who has been put on probation or whose license has been suspended or revoked by the Commission in a proceeding pursuant to § 30-412 may request a hearing, which shall be granted by the Commission, to have such sanction reviewed, not more than once annually during the term of the sanction. Bar Counsel shall be notified of such hearing, and shall have the opportunity to be heard. The hearing shall be before a three-member panel of the Commission, the makeup of which shall be different than the panel that issued the original sanction pursuant to § 30-412. The Commission shall have the power to remove or shorten any period of probation or suspension, or reinstate the attorney's license, subject to the payment of annual dues owed to the Virginia State Bar or submission of compliance with the Mandatory Continuing Legal Education Rules of the Supreme Court of Virginia.

§ 30-421. Privilege.

The filing of papers with and the giving of testimony before the Commission shall be privileged, except where such filing of papers or giving of testimony is motivated or accompanied by actual malice. No other publication of such papers or proceedings shall be privileged in any action for defamation except that a writing that was privileged before its filing with the Commission shall not lose such privilege by such filing.

§ 30-422. Witness fees; mileage; exception.

A. Each witness shall receive for his attendance the same fees and all witnesses shall receive the same mileage allowed by law to a witness in civil cases. The amount shall be paid by the Commission from funds appropriated for the use of the Commission.

B. This section shall not apply to an officer or employee of the Commonwealth or a political subdivision thereof, or an officer or an employee of a court of the Commonwealth.

§ 30-423. Costs.

No award of attorney fees or costs shall be made in any proceeding before the Commission or appealed to the Supreme Court of Virginia, except in accordance with subsection E of § 30-412.

§ 30-424. Assistance and information.

State and local public bodies and departments, officers and employees thereof, and officials and all personnel of the courts of the Commonwealth shall cooperate with and give reasonable assistance and information to the Commission and any authorized representative thereof in connection with any investigations or proceedings within the jurisdiction of the Commission.

§ 30-425. Service of process; execution of orders.

It shall be the duty of the sheriffs and sergeants in the several counties, cities, and towns, upon request of the Commission or its authorized representative, to serve process and execute all lawful orders of the Commission or entered by the court at its request without costs therefor.

§ 30-426. Transmission of certain information to the House Committee for Courts of Justice and the Senate Committee on the Judiciary.

The Commission shall transmit to the House Committee for Courts of Justice and the Senate Committee on the Judiciary, upon request of the chairman of either committee, any evidence that it has in its possession with reference to any pending disciplinary proceeding involving a licensed attorney whose name has been placed before the committee for consideration for election as a judge of a court of the Commonwealth and the record of any previous disciplinary action taken against the attorney.

§ **54.1-3909**. Rules and regulations defining practice of law and prescribing procedures for practice of law by law students, codes of ethics, use of limited liability companies, and disciplinary procedure.

The Supreme Court may promulgate rules and regulations:

Defining the practice of law.

Prescribing procedures for the limited practice of law by third-year law students.

Prescribing a code of ethics governing the professional conduct of attorneys including the practice of law or patent law through professional law corporations, limited liability companies, and partnerships, and a code of judicial ethics.

Prescribing procedures for disciplining, suspending, and disbaring attorneys, *consistent with Chapter 64 (§ 30-409 et seq.) of Title 30*.

§ **54.1-3910**. Organization and government of Virginia State Bar.

A. The Supreme Court may promulgate rules and regulations organizing and governing the Virginia State Bar. The Virginia State Bar shall act as an administrative agency of the Court for the purpose of investigating and reporting violations of rules and regulations adopted by the Court under this article. All advisory opinions issued by the Virginia State Bar's Standing Committees on Legal Ethics, Lawyer Advertising and Solicitation, and Unauthorized Practice of Law shall be incorporated into the Code of Virginia pursuant to § **30-154**. All persons engaged in the practice of law in the Commonwealth shall be active members in good standing of the Virginia State Bar.

B. *The Virginia State Bar shall be in the charge of an executive director, who shall be appointed by the Chief Justice of the Supreme Court and confirmed by, and serve at the pleasure of, the General Assembly.*

§ **54.1-3913**. State Bar Fund; receipts; disbursements.

The State Bar Fund is continued as a special fund in the state treasury. All fees collected from the members of the Virginia State Bar as provided in § **54.1-3912** shall be paid into the state treasury immediately upon collection and credited to the State Bar Fund. All moneys paid into the Fund are hereby appropriated to the Virginia State Bar for (i) the purpose of administering the provisions of this article and (ii) *disbursement to the Virginia Attorney Disciplinary Commission in accordance with its needs for the purpose of administering the provisions of Chapter 64 (§ 30-409 et seq.) of Title 30*. All disbursements from the Fund shall be made by the State Treasurer upon warrants of the Comptroller issued upon vouchers signed by an authorized officer of the Virginia State Bar in accordance with rules and regulations promulgated by the Supreme Court.

§ **54.1-3915**. Restrictions as to rules and regulations.

Notwithstanding the foregoing provisions of this article, the Supreme Court shall not promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys ~~which that~~ are inconsistent with any statute; ~~nor shall it promulgate any rule or regulation or method of procedure which eliminates the jurisdiction of the courts to deal with the discipline of attorneys. In no case shall an attorney who demands to be tried by a court of competent jurisdiction for the violation of any rule or regulation adopted under this article be tried in any other manner.~~

§ **54.1-3934.1**. *Procedures for attorney discipline.*

All disciplinary procedures against an attorney, except for those initiated by the Virginia State Bar for failure to pay annual dues or comply with the requirement of the Mandatory Continuing Legal Education Rules of the Supreme Court of Virginia, shall be under the jurisdiction of the Virginia Attorney Disciplinary Commission pursuant to Chapter 64 (§ 30-409 et seq.) of Title 30. Bar Counsel shall investigate any complaints of professional misconduct against an attorney, and, if he deems such complaints to be well-founded, may submit a charge to the Virginia Attorney Disciplinary Commission for a formal hearing, which he shall have the duty to prosecute.

§ **54.1-3938.1**. Subpoena issued pursuant to law of another jurisdiction.

Whenever a subpoena is sought in ~~this~~ *the* Commonwealth pursuant to the laws of another jurisdiction for use in lawyer ~~discipline or~~ disability proceedings, and where the request for the subpoena has been duly approved under the laws of the other jurisdiction, the chair or a vice-chair of the Virginia State Bar Disciplinary Board, upon receiving an application from Bar Counsel, may issue a subpoena as provided in this section to compel the attendance of witnesses and production of documents in the county or city in the Commonwealth where the witness resides or is employed or elsewhere as agreed by the witness. The circuit courts shall have the power to enforce a subpoena issued pursuant to this section and to adjudge disobedience thereof as contempt. The privilege extended by this section shall be available only to those jurisdictions that extend a similar privilege for disciplinary proceedings in ~~this~~ *the* Commonwealth.

2. That §§ **54.1-3935** and **54.1-3938**; of the Code of Virginia are repealed.