

VIRGINIA:

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

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

PETITION OF THE VIRGINIA STATE BAR

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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, pursuant to Part 6, § IV of the Rules of this Court, and requests review and approval of proposed amendments to Paragraph 13 of Part 6, § IV of the Rules of Court concerning the Organization and Government of the VSB (referred to hereinafter as “Paragraph 13”) as set forth below. The proposed rule amendments were approved by unanimous vote of the Council of the Virginia State Bar on June 13, 2019.

I. Overview of the Issues

The Standing Committee on Lawyer Discipline (COLD) and Council have each unanimously approved the proposed amendments to the attorney disciplinary procedure included in this petition that: (1) eliminate two “dismissal” sanctions that create a disciplinary record; (2) clarify and enhance the transparency and uniformity of the VSB’s disciplinary process while protecting the confidentiality of

medical, psychological, treatment, and other sensitive information in public disciplinary proceedings; and (3) ensure the Rules are consistent with procedure and practice. The overarching objective of these revisions is to improve the fairness, integrity, and efficiency of the VSB’s disciplinary process.

A. Elimination of Dismissal Sanctions That Create a Disciplinary Record

Currently, Dismissals *De Minimis*¹ and for Exceptional Circumstances are the lowest level sanctions which Subcommittees and District Committees may impose. See ¶ 13-15.B.1.c.; ¶ 13-15.B.1.d.; ¶ 13-16.X.1. and ¶ 13-16.X.2. A Dismissal *De Minimis* means a finding that the Respondent has engaged in Misconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and Respondent has taken reasonable precautions against a recurrence. See ¶ 13-1. A Dismissal for Exceptional Circumstances means a finding that the Respondent has engaged in Misconduct, but exceptional circumstances exist mitigating against further proceedings. See ¶ 13-1.

Each of these “dismissals” is a sanction that creates a disciplinary record. The terminology is inherently misleading to Complainants, Respondents, and the public, and perpetuates confusion as to whether a sanction has actually been imposed. The proposed revisions remove Dismissals *De Minimis* and Dismissals

¹ Paragraph 13-1 capitalizes defined terms used throughout Paragraph 13. The same capitalizations are used in this petition.

for Exceptional Circumstances as disciplinary sanctions in order to eliminate that confusion, and also to bring Virginia into the majority of other states which designate admonition as their lowest disciplinary sanction.

B. Incorporation of Elements of Dismissal Sanctions as Bases for Actual Dismissals by District Committee Subcommittees

The amendments incorporate the elements of Dismissals *De Minimis* and Dismissals for Exceptional Circumstances as bases for actual dismissal of complaints at the Subcommittee stage.

Under the existing rule, a Subcommittee shall dismiss a Complaint when:

1. As a matter of law, the conduct questioned or alleged does not constitute Misconduct;
2. The evidence available shows that the Respondent did not engage in the Misconduct questioned or alleged, or there is no credible evidence to support any allegation of Misconduct by Respondent, or the evidence available could not reasonably be expected to support any allegation of Misconduct under a clear and convincing evidentiary standard; or
3. The Subcommittee concludes that a Dismissal *De Minimis* should be imposed; or
4. The Subcommittee concludes that a Dismissal for Exceptional Circumstances should be imposed; or
5. The action alleged to be Misconduct is protected by superseding law.

See ¶ 13-15.B.1.a-e.

If a Subcommittee imposes either a Dismissal *De Minimis* or Dismissal for Exceptional Circumstances, the Subcommittee has found Misconduct, and the

“dismissal” is a sanction which creates a Disciplinary Record. See ¶ 13-1; 13-15.B.1.c. and d. While the revisions eliminate “dismissals” as sanctions, they expand the Subcommittee’s options to resolve a complaint fairly and flexibly by incorporating the elements of the “dismissal” sanctions as bases for actual dismissals of complaints. Proposed ¶ 13-15.B.1.d. will enable Subcommittees to dismiss complaints in unusual situations where no basis for dismissal exists under ¶ 13-15.B.1., but for reasons of fairness, equity, discretion or legal impediment, dismissal may be appropriate.

A *De Minimis* Dismissal would be limited to a narrow set of circumstances involving technical or other minor misconduct, with negligible or no resulting harm to a client, the public, the legal system or profession, and very little likelihood of a reoccurrence. See proposed ¶ 13-15.B.1.c. Similarly, a Dismissal for Exceptional Circumstances would be reserved for special situations where no other basis for dismissal exists under ¶ 13-15.B.1, but dismissal may nonetheless be warranted, such as, for example, where there is compelling mitigating evidence militating against the imposition of discipline, or a Respondent has already been sufficiently sanctioned in another state or under a different VSB process.² See proposed ¶ 13-15.B.1.d.

² Examples of other VSB disciplinary proceedings include a first offender or adjudication of a Crime proceeding, ¶¶ 13-21 and 13-22, and a reciprocal proceeding, ¶ 13-24.

Similar to the existing limitations on private discipline at ¶ 13-7.E, the amended ¶ 13-15 places presumptive limitations on dismissing cases for *de minimis* violations and exceptional circumstances. Specifically, if any Respondent has received a dismissal for either of these reasons during the ten-year period immediately preceding the VSB's receipt of the oldest Complaint that the Subcommittee is considering, it will be presumed that another dismissal on the same basis is not appropriate. *See* proposed ¶ 13-15.B.

C. Revision of Definition of Admonition

The revisions set Admonition as the lowest disciplinary sanction, thus conforming Virginia to the majority of other jurisdictions. Admonition is currently defined as a finding that Respondent has committed Misconduct but that no substantial harm to the Complainant or the public has occurred, and that no further disciplinary action is necessary. *See* ¶ 13-1, "Admonition." The revised definition retains the "no substantial harm" element and adds as additional bases factors similar but not identical to those for a Dismissal *De Minimis* and Dismissal for Exceptional Circumstances: The Misconduct is minor, and Respondent has taken reasonable precautions against a recurrence or there is otherwise little likelihood of repetition; or there exist exceptional circumstances, which must be set forth in writing. *See* proposed ¶ 13-1, "Admonition." The adoption of those elements into

the definition of Admonition will provide greater options and flexibility to Subcommittees and other tribunals in determining the appropriate sanction.

D. Revisions to Clarify and Enhance the Transparency and Uniformity of the VSB Disciplinary Process

1. Revisions to ¶ 13-30 “Confidentiality of Disciplinary Records and Proceedings” to Promote Transparency and Access to Public Proceedings and Records

Consistent with the public’s general right of access to non-confidential information, the revisions to ¶ 13-30 promote transparency by providing a presumption of open records, hearings, determinations imposing public discipline, and all orders of license suspension; and clarify the proceedings and records that are confidential. Paragraph 13-30 currently identifies records and information which are confidential and may not be disclosed. *See* ¶ 13-30.A. In recognition of the importance of transparency in the bar’s disciplinary processes, the revisions clarify the hearings and dispositions which are public, including all determinations imposing public discipline and orders of summary, interim, or administrative Suspension, as well as the proceedings and documents which are confidential. *See* proposed ¶ 13-30.A. The revisions further clarify the timing of access to public information, with a presumption that most proceedings and filings are open when placed on the public hearing docket or filed with the Clerk or Circuit Court. *See* proposed ¶ 13-30.C. The revisions also recognize the possible need to maintain the

confidentiality of certain highly sensitive information, such as medical, psychological, or treatment information, and create a new mechanism allowing a District Committee, the Board, or a three-judge Circuit Court to seal such information and/or close proceedings, upon a showing of good cause. *See* proposed ¶ 13-30.A.8.

2. Revisions to Clerk’s Duties to Publicize Sanctions, the Requirement of Summary Orders in District Committee Proceedings, and Transition of District Committee Filings to Clerk

The revisions to the Clerk of the Disciplinary System’s Duties to Publicize Sanctions ¶ 13-9; Requirement of Summary Orders in District Committee Proceedings ¶ 13-16; and District Committee Filings with Clerk ¶ 13-16, ensure both uniformity in VSB disciplinary proceedings and prompt dissemination of public sanctions in all disciplinary proceedings. The amendments designate the Clerk to receive District Committee filings, consistent with Disciplinary Board proceedings and the Clerk’s status as official custodian of the records of the disciplinary system. To further conform District Committee proceedings to proceedings before the Disciplinary Board and three-judge Circuit Courts and assure timely public notice of sanctions issued following a District Committee hearing, the revisions require (1) the District Committee to issue a Summary Order outlining its findings upon conclusion of a hearing; and (2) the Clerk to notify the public of sanctions imposed upon issuance of such a Summary Order. These

revisions ensure the prompt dissemination of public sanctions issued at the District Committee level. *See* proposed ¶¶ 13-9 and 13-16.Y.

3. Disqualification of Subcommittee Members Who Considered a Complaint From Serving on District Committee Hearing Panel

The proposed amendments to ¶ 13-4.B. instill greater integrity and fairness into the District Committee hearing process by prohibiting members of the Subcommittee who considered a Complaint from participating in any subsequent District Committee hearing of the Complaint. This revision is analogous to disqualification of Disciplinary Board members who considered a rejected Agreed Disposition from participation in a subsequent hearing of the matter under the currently existing ¶ 13-6.H.

4. No Appeal from Agreed Dispositions at the Board Level

Proposed amendments to ¶¶ 13-6.H. and 13-26.A. ensure uniformity in disciplinary proceedings by clarifying that no appeal will lie from Agreed Dispositions at the Board level, consistent with Agreed Dispositions at the District Committee level.

E. Revise “Disciplinary Proceedings” to Exempt “Impairment Proceedings” and Related Amendments

Impairment Proceedings are not disciplinary in nature. The purpose of Impairment Proceedings is to determine whether the Respondent is physically and mentally fit to practice law. While the bar does not currently treat an Impairment

Proceeding as a disciplinary matter, these amendments explicitly exempt Impairment matters from the defined term “Disciplinary Proceedings” to further clarify the non-disciplinary nature of those proceedings.

F. Clarify that the Clerk Determines Compliance with Prerequisites for Reinstatement After a Disciplinary Suspension of More than One Year

Paragraph 13-25.D. requires lawyers who have been under a disciplinary suspension for more than one year to meet certain requirements before seeking reinstatement of their law licenses. This amendment clarifies that the Clerk determines compliance with those prerequisites, consistent with the Clerk’s existing duty to determine compliance with the prerequisites for reinstatement following revocation. *See* proposed ¶ 13-25.E.

G. Housekeeping Amendments

1. Amend Paragraph 13-1 definition of “Private Discipline” to simplify and clarify that Private Discipline means any form of discipline that is not public. *See* proposed ¶ 13-1.
2. Revise definition of “Clerk of the Disciplinary System” to clarify the scope of the records of which the Clerk is the official custodian and allow for the use of the shortened term “Clerk” throughout Paragraph 13. *See* proposed ¶¶ 13-1, *et seq.*
3. Amend Paragraph 13-1 definition of “Disciplinary Record” to include any proceeding, in this or any other jurisdiction, which resulted in a sanction, and clarify that Disciplinary Record does not include interim or summary Suspensions (such as suspensions for failure to comply with bar subpoenas, show cause suspensions issued in criminal conviction and reciprocal

- proceedings, and impairment suspensions). *See* proposed ¶ 13-1.
4. Replace “Disciplinary Rule” and “Disciplinary Rules” with “Rule of Professional Conduct” or “Rules of Professional Conduct” when Referring to Specific Provisions of the Rules of Professional Conduct throughout Paragraph 13. *See* proposed ¶¶ 13-5; 13-7.J. and K.; and 13-30.A.5. and I.
 5. Clarify “Disciplinary Record” as the appropriate factor to be considered in assessing an appropriate sanction as opposed to the overly broad “Disciplinary Proceeding” currently used. *See* proposed ¶¶ 13-16 and 13-18.
 6. Clarify Persons Ineligible for Appointment in the Disciplinary System.

This amendment requires that any potential appointee to a District Committee or the Disciplinary Board must not have a Disciplinary Record in any jurisdiction which includes private discipline imposed in the previous five years, except for a *de minimis* dismissal or a dismissal for exceptional circumstances. *See* proposed ¶¶ 13-4.F. and 13-6.B.

7. Implement use of “this Court” when referring to the Supreme Court of Virginia throughout Paragraph 13. *See* proposed ¶¶ 13-6.G.2; 13-7.A.4; 13-9.G.1; 13-12.C.; and 13-25.E. and G.6.e. and e.ii.

The proposed amendments are included below in Section III.

II. Publication and Comments

The proposed amendments were posted for comment on the VSB’s website on January 24, 2019 with comments due by February 18, 2019. These revisions were included in the February 2019 E-Newsletter published January 31, 2019 with

a link to the proposed rule revisions on the VSB website. The proposed amendments were revised and approved unanimously by COLD on March 6, 2019. The revised paragraph 13 revisions approved by COLD on March 6th were posted on the VSB website and as a news item in early March with comments due by April 8th. The same revised rules were in the April 2019 E-Newsletter published April 3, 2019 with a link to the proposed rule revisions on the VSB website.

One comment was received from Sandra Bowen dated January 31, 2019, which is attached. COLD reviewed and considered the comment from Ms. Bowen in making the revisions approved by COLD on March 6th and reposted for comment thereafter. No additional comments were received.

The Paragraph 13 amendments were unanimously approved by Council at its June 13, 2019 meeting.

III. Proposed Rule Changes

Additions are denoted by underlining and deletions by stippling.

13.PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS

13-1 DEFINITIONS

As used in this Paragraph, the following terms shall have the meaning herein stated unless the context clearly requires otherwise:

* * *

“Admonition” means a finding that Respondent has committed Misconduct but:
~~private sanction imposed by a Subcommittee *sua sponte*, a private or public~~

~~sanction based upon an Agreed Disposition approved by a Subcommittee, or a public sanction imposed by a District Committee or the Board upon a finding that Misconduct has been established, but that no substantial harm to the Complainant or the public has occurred, and that no further disciplinary action is necessary.~~

1. No substantial harm to the Complainant or the public has occurred; or
2. The Misconduct is minor and Respondent has taken reasonable precautions against a recurrence or there is otherwise little likelihood of repetition; or
3. There exist exceptional circumstances, which must be set forth in writing.

An Admonition may be imposed as a

1. Private sanction by a Subcommittee *sua sponte*;
2. Private or public sanction based upon an Agreed Disposition approved by a Subcommittee; or
3. Public sanction imposed by a District Committee, or the Board, or a three-judge Circuit Court.

* * *

~~“Clerk of the Disciplinary System” means the Clerk of the Disciplinary System employee of the Bar who, together with such assistants as may be required, provides administrative support to the disciplinary system and serves as official custodian of the Disciplinary Records~~ records of the disciplinary system, unless the context indicates otherwise.

* * *

~~“Disciplinary Proceeding” means any proceeding governed by this Paragraph~~ except an Impairment Proceeding.

~~“Disciplinary Record” means any tangible or electronic record of:~~

1. Any proceeding in which the Respondent has been found ~~guilty of to~~ have committed Misconduct, including those proceedings in which (a) the Board's or three-judge Circuit Court's finding of Misconduct has been appealed to this Court; (b) the Respondent's License has been revoked upon consent to revocation or Respondent has been found guilty of a Crime; or (c) the Respondent has received a sanction pursuant to this Paragraph; and
- ~~2. Any proceeding which has been resolved by (a) a *De Minimis* Dismissal; (b) a Dismissal for Exceptional Circumstances; or (c) an Admonition; and~~
- ~~3.2.~~ Any proceeding in which the Respondent has been found ~~guilty of to~~ have committed a violation of CRESPA or RESA; and
- ~~4.3.~~ Any proceeding in this or any other jurisdiction which resulted in a sanction creating a disciplinary record at the time it was imposed.

“Disciplinary Record” does not include administrative, interim, summary, or Impairment Suspensions.

* * *

“Private Discipline” means ~~an Admonition without Terms issued by a Subcommittee sua sponte, a Private Reprimand or any form of discipline which~~ that is not public.

* * *

“Summary Order” means a bench order entered by the Chair or three-judge Circuit Court following a Disciplinary Proceeding that outlines in summary form the findings as to the allegations of Misconduct, the sanctions to be imposed, if any, the effective date of any sanctions imposed and any notice requirements.

* * *

13-1.1 BURDEN OF PROOF

The burden of proof in all Disciplinary Proceedings and Impairment Proceedings is clear and convincing evidence.

* * *

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 ~~District Committee~~ Panel ~~shall~~ should be a ~~present~~ 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 ~~District Committee~~ Panel.

* * *

F. Persons Ineligible for Appointment. Any potential appointee shall be ineligible for appointment to a District Committee if such potential appointee has: (1) ever been convicted in any jurisdiction of a Crime; (2) ever committed any criminal act that reflects adversely on the potential appointee's honesty, trustworthiness or fitness as a member of a District Committee; (3) a Disciplinary Record in any jurisdiction consisting of a Disbarment, Revocation, Suspension imposed at any time or Public Reprimand imposed within the ten years immediately preceding the proposed appointment date; or (4) a Disciplinary Record in any jurisdiction, imposed within the five years immediately preceding the proposed appointment date, consisting of Private Discipline or an Admonition, except for a *de minimis* dismissal or a dismissal for exceptional circumstances, ~~or an Admonition imposed within the five years immediately preceding the proposed appointment date.~~ The Standing Committee on Lawyer Discipline shall have the sole discretion to determine whether a *de minimis* dismissal or a dismissal for exceptional circumstances shall disqualify a potential appointee.

* * *

13-5 AUTHORITY AND DUTIES OF COLD

All powers and duties of Council, with respect to the Disciplinary System, except the power to appoint District Committee members, may be exercised by COLD, subject to the direction and control of Council. Notwithstanding any rule to the contrary, any member of COLD may attend proceedings of the Subcommittees, District Committees or the Board. Service by an Attorney on COLD shall be deemed to be a professional relationship within the meaning of ~~Disciplinary Rules~~ Rules of Professional Conduct 1.6, 1.7, 1.9, 1.10 and 3.7. Such service shall be deemed the holding of public office within the meaning of ~~Disciplinary Rules~~ Rules of Professional Conduct 1.11 and 1.12. Consent under ~~Disciplinary Rules~~ Rules of Professional Conduct 1.6, 1.7 and 1.9 shall be deemed to include Bar Counsel's consent on behalf of the Bar. The membership of COLD shall consist of twelve persons, ten of whom shall be active members of the Bar and two shall be nonlawyers. In addition, a vice chair of the Board shall be an ex-officio, nonvoting member.

13-6 DISCIPLINARY BOARD

* * *

B. Persons Ineligible for Appointment. Any potential appointee shall be ineligible for appointment to the Board if such potential appointee has: (1) ever been convicted in any jurisdiction of a Crime; (2) ever committed any criminal act that reflects adversely on the potential appointee's honesty, trustworthiness or fitness as a member of a District Committee; (3) a Disciplinary Record in any jurisdiction consisting of a Disbarment, Revocation, Suspension imposed at any time or Public Reprimand imposed within the ten years immediately preceding the proposed appointment date; or (4) a Disciplinary Record in any jurisdiction, imposed within the five years immediately preceding the proposed appointment date, consisting of Private Discipline or an Admonition, except for a *de minimis* dismissal or a dismissal for exceptional circumstances, ~~or an Admonition imposed within the five years immediately preceding the proposed appointment date~~. The Standing Committee on Lawyer Discipline shall have the sole discretion to determine whether a *de minimis* dismissal or a dismissal for exceptional circumstances shall disqualify a potential appointee.

* * *

D. Meetings and Quorum. The Board shall meet on reasonable notice by the Chair or a Vice Chair. A Panel of five members shall constitute a quorum, and the action of a majority of a Panel shall constitute action of the Board. One of the

five persons assigned to any Panel shall be a present or former nonlawyer member. ~~If the~~ unless the scheduled nonlawyer is unable to attend and an alternate nonlawyer member or former member is not reasonably available. In such event, participation by a nonlawyer shall not be required in any ~~P~~proceeding if a quorum is otherwise present.

E. Roster. ~~The Clerk of the Disciplinary System~~ shall establish a roster of Board members sufficient to constitute a quorum for action on the matter to which they are being assigned. Former members of the Board may serve on a Panel of the Board or participate in Board matters whenever the Chair, Vice Chair or Clerk ~~of the Disciplinary System~~ determines that such service is necessary for the orderly administration of the Board's work.

F. Jurisdiction. The Board shall have jurisdiction to consider: (1) Appeals from Public or Private Reprimands, with or without Terms, or Admonitions, with or without Terms, imposed by District Committees or Dismissals that otherwise create a Disciplinary Record; (2) Complaints and Certifications submitted to it by a Subcommittee or a District Committee; (3) Misconduct by reason of conviction of a Crime; (4) Impairment Proceedings; (5) Revocation or Suspension in another jurisdiction; (6) Petitions from Bar Counsel or the Chair of a District Committee seeking summary Suspension upon a belief that an Attorney is engaging in Misconduct likely to result in injury to or loss of property of a client or other entity or alleging an Attorney poses imminent danger to the public; (7) Petitions for Reinstatement referred to the Board for its recommendation to ; (8) Violations of RESA or any regulations adopted pursuant thereto; (9) Failure of Respondent to make a complete transcript part of the Record, as provided in this Paragraph; (10) Failure of an Attorney to comply with an order, summons or subpoena issued in connection with a Disciplinary Proceeding or Impairment Proceeding; and (11) Failure of Respondent to fulfill the terms of a Public Reprimand with Terms certified to it by a District Committee for sanction determination.

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

* * *

2. On its own motion or upon request by Bar Counsel or the Respondent, to summon and examine witnesses under oath or affirmation administered by any member of the Board and to

compel the attendance of witnesses and the production of documents necessary or material to any proceeding. Any summons or subpoena may be issued by any Board member or the Clerk of the Disciplinary System and shall have the force of and may 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, and if the Respondent is a Foreign Lawyer, a lawyer engaged pro hac vice in the practice of law in Virginia, or a lawyer not admitted in Virginia, when mailed by first class mail to the Clerk of the Supreme Court of Virginia this Court.

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 of the Disciplinary System . . .

* * *

- H. Agreed Disposition. Whenever Bar Counsel and Respondent are in agreement as to the disposition of a Disciplinary Proceeding, the parties may submit a proposed Agreed Disposition to five members of the Board selected by the Chair. The five members so selected will constitute a Panel. If the proposed Agreed Disposition is accepted by a majority of the Panel so selected, the Agreed Disposition will be adopted by order of the Board. No appeal will lie from any sanction to which Respondent has agreed. If the Agreed Disposition is not accepted by the Panel, the Disciplinary Proceeding will then be set for hearing before another Panel of the Board at the earliest possible date. No member of the Panel which considered the proposed Agreed Disposition shall be assigned to the Panel which hears the Disciplinary Proceeding.

13-7 DISTRICT COMMITTEES

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

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. 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, and if the Respondent is a Foreign Lawyer, a lawyer engaged pro hac vice in the practice of law in Virginia, or a lawyer not admitted in Virginia, when mailed by first class mail to the Clerk of ~~the Supreme Court of Virginia~~ this Court.

* * *

G. Preferred Venue. If preferred venue does not lie with any District Committee able to adjudicate the Complaint against a Respondent, such Complaint may be filed with and adjudicated by a District Committee designated by the Clerk ~~of the Disciplinary System~~. In determining to which District Committee a Complaint should be referred, the Clerk ~~of the Disciplinary System~~ shall consider the volume of Complaints pending before the District Committee and the inconvenience imposed upon the Respondent and the witnesses by the location of the District Committee.

H. Objections to Venue. Either the Respondent or Bar Counsel may object to venue by filing a notice of objection with the Clerk ~~of the Disciplinary System~~ within ten days of notification of the referral of the Complaint to a District Committee. Objections to venue shall be deemed waived unless made within this ten-day time period. Upon receipt of a timely filed notice of objection, the Clerk ~~of the Disciplinary System~~ shall forward the notice of objection to the Chair of the Board for decision.

* * *

J. Service by a Member of the Bar and Professional Relationship. Service by a member of the Bar on a District Committee shall be deemed to be a professional relationship within the meaning of ~~Disciplinary Rules~~ Rules of

Professional Conduct 1.6, 1.7, 1.9, 1.10 and 3.7. Such service shall be deemed the holding of public office within the meaning of ~~Disciplinary Rules~~ Rules of Professional Conduct 1.11 and 1.12.

K. Consent by Bar Counsel. Consent under ~~Disciplinary Rules~~ Rules of Professional Conduct 1.6, 1.7 and 1.9 shall be deemed to include Bar Counsel's consent on behalf of the Bar.

L. Recusal or Disqualification of District Committee Members. In the event of recusal or disqualification of so many District Committee members that the District Committee is unable to discharge its responsibilities under this Rule, the District Committee may supplement its membership with members from other District Committees to achieve a quorum. If every member of a District Committee is recused or is disqualified from considering Charges of Misconduct, the Clerk of the ~~Disciplinary System~~ shall assign the Charges of Misconduct to another District Committee.

13-8 BAR COUNSEL

A. Authority. Bar Counsel shall have the authority, to the extent provided in this Paragraph and subject to the general supervision of COLG, to:

1. Initiate, investigate, present or prosecute Complaints or other Proceedings

* * *

B. Acting Bar Counsel. In the event of disqualification or recusal of Bar Counsel in any Proceeding, . . .

13-9 CLERK OF THE DISCIPLINARY SYSTEM

A. Current Dockets. The Clerk of the ~~Disciplinary System~~ shall maintain a docket of current Attorney discipline and RESA matters pending before the District Committees, the Board or courts of this Commonwealth.

B. Records Retention. The Clerk of the ~~Disciplinary System~~ shall retain all Files with respect to any Disciplinary Record for a period of at least five years from the date of the final Order in the Disciplinary Proceeding that created that

Disciplinary Record. The Clerk may destroy all other Files upon the expiration of one year after the Dismissal.

* * *

D. Preservation of Determinations and Orders. The Clerk ~~of the Disciplinary System~~ shall preserve a copy of all District Committee Determinations and Board or court orders in which an Attorney has been found to have engaged in Misconduct, to be impaired, to have committed a violation of RESA or requested Reinstatement.

E. Costs. The Clerk ~~of the Disciplinary System~~ shall assess Costs against the Respondent in the following cases:

* * *

G. Public Notification of Sanctions. The Clerk shall issue a statement to the communications media and individuals and entities listed below summarizing each public Admonition, Public Reprimand, Suspension, or Revocation upon receipt of a Summary Order, District Committee Determination, or Memorandum Order approving an Agreed Disposition:

1. The Clerk of ~~the Supreme Court~~ this Court;
2. Clerks of the Circuit and District Courts in each judicial circuit in the Commonwealth where the Attorney resides or maintains an office; and
3. Disciplinary authorities for jurisdictions, federal or state, wherein it is reasonable to expect that the Attorney may be licensed.

* * *

13-12 SUBSTANTIAL COMPLIANCE, NOTICE AND EVIDENTIARY RULINGS, AND ADDRESS NOTIFICATION

* * *

B. Time Deadlines. Where specific time deadlines are provided, such deadlines shall be jurisdictional, except when the Clerk of the Disciplinary System, Bar Counsel, a District Committee or the Board is granted specific authority herein to extend or otherwise modify any such deadline.

C. Service. Whenever any notice or other writing directed to the Respondent is required or permitted under this Rule, such notice or other writing shall be deemed effective and served when mailed by certified mail to the Respondent at the Respondent's last address on record for membership purposes with the Bar or, if service cannot be effected at the Respondent's last address on record, and if the Respondent is a Foreign Lawyer, a lawyer engaged pro hac vice in the practice of law in Virginia, or a lawyer not admitted in Virginia, when mailed by first class mail to the Clerk of the ~~Supreme Court of Virginia~~ this Court.

* * *

13-14 DISQUALIFICATION OF DISTRICT COMMITTEE MEMBER OR BOARD MEMBER

* * *

E. Ineligibility. Any member or former member of a District Committee or the Board shall be ineligible to serve in a Disciplinary Proceeding or Impairment Proceeding in which:

* * *

5. The District Committee or Board member, upon reasonable notice to the Clerk of the ~~Disciplinary System~~ or to the Chair presiding over a matter, disqualifies himself or herself from participation in the matter, because such member believes that he or she is unable to participate objectively in consideration of the matter or for any other reason.

13-15 SUBCOMMITTEE ACTION

* * *

B. Other Actions. Once the Investigation is complete to the Subcommittee's satisfaction, it will take one of the following actions.

1. Dismiss. It shall dismiss the Complaint when:

a. As a matter of law the conduct questioned or alleged does not constitute Misconduct; or

b. The evidence available shows that the Respondent did not engage in the Misconduct questioned or alleged, or there is no credible evidence to support any allegation of Misconduct by Respondent, or the evidence available could not reasonably be expected to support any allegation of Misconduct under a clear and convincing evidentiary standard; or

c. The evidence available shows that the conduct questioned or alleged was *de minimis*, there is little or no injury to any of the following: a client, the public, the legal system or profession, and there is no or very little likelihood of repetition by the Respondent; or

d. There exist exceptional circumstances mitigating against further proceedings, which circumstances shall be set forth in writing, unless they relate to Respondent's health or other information that the Subcommittee determines should remain confidential; or

~~e. The Subcommittee concludes that a Dismissal *De Minimis* should be imposed; or~~

~~d. The Subcommittee concludes that a Dismissal for Exceptional Circumstances should be imposed; or~~

ee. The action alleged to be Misconduct is protected by superseding law. In making the determination in the preceding subparagraphs B.1.c. and B.1.d., the Subcommittee shall have access to Respondent's prior Disciplinary Record. Respondent, within ten days after the issuance of a dismissal which creates a Disciplinary Record, may request a hearing before the District Committee. In dismissing cases under Paragraph 13-15.B.1.c.

or d., the Subcommittee shall have access to Respondent's prior Disciplinary Record and any prior dismissals issued pursuant to Paragraph 13-15.B.1.c. or d. When any Respondent has received a dismissal under Paragraph 13-15.B.1.c. or d. during the ten-year period immediately preceding the Bar's receipt of the oldest Complaint that the Subcommittee is considering, it shall be presumed that another dismissal on the same basis is not an appropriate disposition, unless there are sufficient facts and circumstances to rebut such presumption.

* * *

E. Notice of Action of the Subcommittee. If a Subcommittee has dismissed the Complaint, the Chair shall promptly provide written notice to the Complainant, the Respondent and Bar Counsel of such Dismissal and the factual and legal basis therefor. If a Subcommittee determines to issue an Admonition with or without Terms, or a Private or Public Reprimand with or without Terms, the Chair shall promptly send the Complainant, the Respondent and Bar Counsel a copy of the Subcommittee's determination. If a Subcommittee elects to certify a Complaint to the Board, the Subcommittee Chair shall promptly mail a copy of the Certification to the Clerk of the Disciplinary System, Bar Counsel, the Respondent and the Complainant.

* * *

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 answer to the Charge of Misconduct with the Clerk, which answer shall be deemed consent to the jurisdiction of the District Committee; or
2. File an answer to the Charge of Misconduct and a demand with the Clerk ~~of the Disciplinary System . . .~~

* * *

D. Pre-Hearing Orders. The Chair may, *sua sponte* or upon motion of the Respondent or Bar Counsel, enter such pre-hearing order as is necessary for the orderly conduct of the hearing before the District Committee. Such order may establish time limits and:

1. Direct Bar Counsel and Respondent to file with the Clerk and provide to each other, with a copy to and the Chair, a list of and copies of all exhibits proposed to be introduced at the Misconduct stage of the hearing;
2. Encourage Bar Counsel and Respondent to confer and discuss stipulations; and
3. Direct Bar Counsel and Respondent to file with the Clerk and serve on provide to each other, with a copy to and the Chair, lists setting forth the name of each witness the party intends to call.

* * *

I. Oral Testimony and Exhibits. Oral testimony shall be taken and preserved by a Court Reporter. All exhibits or copies thereof received in evidence or ~~marked~~ refused by the District Committee shall be filed with the Clerk ~~preserved in the District Committee file on the matter.~~

* * *

X. Sanctions. If the District Committee finds that Misconduct has been shown by clear and convincing evidence, then the District Committee shall, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has ~~been the subject of any Disciplinary Proceedings~~ a Disciplinary Record in this or any other jurisdiction and shall give Bar Counsel and the Respondent an opportunity to present material evidence in aggravation or mitigation, as well as argument. In determining what disposition of the Charge of Misconduct is warranted, the District Committee shall consider the Respondent's Disciplinary Record. A District Committee may:

1. ~~Conclude that a Dismissal *De Minimis* should be imposed;~~

- ~~2. Conclude that a Dismissal for Exceptional Circumstances should be imposed;~~
- ~~3.1.~~ Conclude that an Admonition, with or without Terms, should be imposed;
- ~~4.2.~~ Issue a Public Reprimand, with or without Terms; or
- ~~5.3.~~ Certify the Charge of Misconduct to the Board or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935.

Y. Summary Orders and District Committee Determinations. Upon conclusion of a hearing, the Chair must issue a Summary Order. If the District Committee finds that the evidence shows the Respondent engaged in Misconduct by clear and convincing evidence, then the Chair shall issue the District Committee's Determination, in writing, setting forth the following:

* * *

Z. Notices.

If the District Committee:

1. Issues a Dismissal, the Chair shall promptly provide written notice to the Complainant, the Respondent and Bar Counsel of such Dismissal and the factual and legal basis therefor.
2. Issues a Public Reprimand, with or without Terms; ~~or an Admonition, with or without Terms; a Dismissal *De Minimis*; or a Dismissal for Exceptional Circumstances,~~ the Chair shall promptly send the Complainant, the Respondent and Bar Counsel a copy of the District Committee's Determination.
3. Finds that the Respondent failed to comply with the Terms imposed by the District Committee, the Chair shall notify the Complainant, the Respondent and Bar Counsel of the imposition of the alternative disposition.
4. Has elected to certify the Complaint, the Chair of the District Committee shall promptly mail to the Clerk ~~of the Disciplinary~~

~~System~~a copy of the Certification. A copy of the Certification shall be sent to Bar Counsel, Respondent and the Complainant.

AA. District Committee Determination Finality ~~and Public Statement~~.

Upon the expiration of the ten-day period after service on the Respondent of a District Committee Determination, if either a notice of appeal or a notice of appeal and a written demand that further Proceedings be conducted before a three-judge Circuit Court pursuant to Va. Code § 54.1-3935 has not been filed by the Respondent, the District Committee Determination shall become final, ~~and the Clerk of the Disciplinary System shall issue a public statement as provided for in this Paragraph for the dissemination of public disciplinary information.~~

* * *

CC. Alternative Disposition and Procedure for Public Reprimand with Terms. The alternative disposition for a Public Reprimand with Terms shall be a Certification for Sanction Determination. Upon a decision to issue a Certification for Sanction Determination, Bar Counsel shall order the transcript of the show cause hearing and file it and a true copy of the Public Reprimand with Terms determination with the Clerk ~~of the Disciplinary System~~.

* * *

13-17 PERFECTING AN APPEAL OF A DISTRICT COMMITTEE DETERMINATION BY THE RESPONDENT

A. Notice of Appeal; Demand. Within ten days after service on the Respondent of the District Committee Determination, the Respondent may file with the Clerk ~~of the Disciplinary System~~ . . .

B. Staying of Discipline. If the Clerk ~~of the Disciplinary System~~ . . .

C. Filing the Transcript and Record on Appeal. The Respondent shall certify in the notice of appeal or written demand that he or she has ordered from the Court Reporter a complete transcript of the proceedings before the District Committee, at the Respondent's cost. Upon receipt of the notice of appeal or written demand, Bar Counsel shall forward those portions of the record in his or her possession to the Clerk ~~of the Disciplinary System~~. The transcript is a part of the record when it is received in the office of the Clerk ~~of the Disciplinary System~~ within 40 days after filing of the notice of appeal or written demand. The Clerk ~~of~~

~~the Disciplinary System~~ shall retain the records until the transcript has been received or for 40 days after the notice of appeal or written demand has been received, whichever occurs first, and shall then dispose of the record as prescribed in the records retention policy set forth in this Paragraph. Failure of the Respondent to make the complete transcript a part of the Record as specified herein shall result in Dismissal of the appeal by the Board, whether initiated by notice of appeal or written demand, and affirmance of the sanction imposed by the District Committee. Bar Counsel shall initiate the three-judge Circuit Court process for the appeal only after receipt of the transcript by the Clerk of ~~the Disciplinary System~~.

D. Appeal to a Circuit Court. An appeal to a Circuit Court pursuant to Va. Code § 54.1-3935 shall be conducted before a duly convened three-judge Circuit Court as an appeal on the record using the same procedure prescribed for an appeal of a District Committee Determination before the Board under this Paragraph. ~~The Clerk of the Disciplinary System~~ shall forward the record to the clerk of the designated Circuit Court only upon receipt of the transcript as provided in the preceding subparagraph C.

* * *

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 answer to the Certification with the Clerk of ~~the Disciplinary System~~, which answer shall be deemed consent to the jurisdiction of the Board; or file an answer to the Certification and a demand with the Clerk of ~~the Disciplinary System~~ 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.

* * *

D. Expedited Hearings

* * *

5. At least five days prior to the date set for hearing, the Respondent shall either file an answer to the petition with the Clerk of the Disciplinary System, which answer shall be conclusively deemed consent to the jurisdiction of the Board; or file an answer and a demand with the Clerk of the Disciplinary System . . .

E. Pre-Hearing Orders. The Chair may, *sua sponte* or upon motion of the Respondent or Bar Counsel, enter such pre-hearing order as is necessary for the orderly conduct of the hearing before the Board in Misconduct cases. Such order may establish time limits and:

1. Direct Bar Counsel and the Respondent to provide to each other, with a copy to the Clerk of the Disciplinary System, a list of and copies of all exhibits proposed to be introduced at the Misconduct stage of the hearing;
2. Encourage Bar Counsel and the Respondent to confer and discuss stipulations; and
3. Direct Bar Counsel and the Respondent to provide to each other, with a copy to the Clerk of the Disciplinary System, lists setting forth the name of each witness the party intends to call.

F. Continuance of a Hearing. Absent exceptional circumstances, once the Board has scheduled a hearing, no continuance shall be granted unless, in the judgment of the Chair, the continuance is necessary to prevent injustice. No continuance will be granted because of a conflict with the schedule of the Respondent or the Respondent's counsel unless such continuance is requested in writing by the Respondent or the Respondent's counsel within 14 days after mailing of a notice of hearing. Any request for a continuance shall be filed with the Clerk of the Disciplinary System.

* * *

K. Deliberations. As soon as practicable after the conclusion of the evidence and arguments as to the issue of Misconduct, the Board shall deliberate in

private. If the Board finds by clear and convincing evidence that the Respondent has engaged in Misconduct, the Board shall, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has ~~been the subject of any Disciplinary Proceeding~~ a Disciplinary Record in this or any other jurisdiction and shall give Bar Counsel and the Respondent an opportunity to present material evidence and arguments in aggravation or mitigation. The Board shall deliberate in private on the issue of sanctions. The Board may address any legal questions to the Office of the Attorney General.

* * *

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 ~~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:

* * *

3. If such a motion is timely filed, the Clerk ~~of the Disciplinary System~~ . . .

13-19 BOARD PROCEEDINGS UPON APPEAL

A. Docketing An Appeal. Upon receipt of notice from the Clerk ~~of the Disciplinary System~~ that a Respondent has filed an appeal from a District Committee Determination the Board shall place such matter on its docket for review.

B. Notice to the Appellant. The Clerk ~~of the Disciplinary System~~ shall notify the appellant when the entire record of the Proceeding before the District Committee has been received or when the time for appeal has expired.

* * *

D. Briefing. Thereafter, briefs shall be filed in the office of the Clerk ~~of the Disciplinary System~~, as follows:

1. The appellant shall file an opening brief within 40 days after the mailing of the notice to the appellant regarding the record by the Clerk of the Disciplinary System . . .

* * *

13-20 BOARD PROCEEDINGS UPON CERTIFICATION FOR SANCTION DETERMINATION

A. Initiation of Proceedings. Upon receipt of the Certification for Sanction Determination from a District Committee, the Clerk of the Disciplinary System shall issue a notice of hearing on the Certification for Sanction Determination giving Respondent the date, time and place of the Proceeding and a copy of the Certification for Sanction Determination.

* * *

13-21 BOARD PROCEEDINGS UPON A FIRST OFFENDER PLEA

A. Action Upon Receipt of Notification. Whenever the Clerk of the Disciplinary System . . .

* * *

C. Demand for Three Judge Court. If the Attorney elects to have further proceedings conducted pursuant to Va. Code § 54.1-3935, the Attorney shall file a demand with the Clerk of the Disciplinary System...

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

A. Action Upon Receipt of Notification. Whenever the Clerk of the Disciplinary System . . .

* * *

F. Procedure. 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 of the ~~Disciplinary System~~ . . .

13-23 BOARD PROCEEDINGS UPON IMPAIRMENT

* * *

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

* * *

D. Summary Suspension. Upon receipt of a notice from the Clerk of the ~~Disciplinary System~~ . . .

* * *

H. Examination. Following a psychiatric, physical or other medical examination, written reports of the results of such examination, along with written reports from other qualified physicians or other health care providers who have examined Respondent, may be considered as evidence by the Board. Such reports shall be filed with the Clerk of the ~~Disciplinary System~~.

* * *

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

* * *

B. Initiation of Proceedings. Upon receipt of a notice from the Clerk of the Disciplinary System . . .

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 file with the Clerk of the Disciplinary System 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:

* * *

E. Provision of Copies. The Clerk of the Disciplinary System . . .

* * *

13-25 BOARD PROCEEDINGS FOR REINSTATEMENT

* * *

D. Reinstatement After Disciplinary Suspension for More than One Year. After a Suspension for more than one year, the License of the Attorney subject to the Suspension shall not be reinstated—considered for Reinstatement unless the Attorney demonstrates to the Board has provided the Clerk clear and convincing evidence of proof of compliance that he or she has:

1. Attended 12 hours of continuing legal education, of which at least two hours shall be in the area of legal ethics or professionalism, for every year or fraction thereof of the Suspension;
2. Taken the Multistate Professional Responsibility Examination since imposition of discipline and received a scaled score of 85 or higher;
3. Reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of the Attorney's Misconduct;
4. Paid to the Bar all Costs that have been assessed against him or her, together with any interest due thereon at the judgment rate at the time the Costs are paid; and

5. Reimbursed the Bar for any sums of money it may have paid as a result of a receivership involving Petitioner's law practice.

Compliance with subparagraph 13-25.D will be determined by the Clerk. The Clerk will notify the Attorney of compliance or noncompliance. Upon a determination of compliance with the requirements of subparagraph 13-25.D, the Clerk will forward the request and supporting documentation to the Board for approval or disapproval of Reinstatement.

E. Petition for Reinstatement After Revocation. After a Revocation, a Petitioner may file with the Clerk ~~of the Disciplinary System~~ a petition for Reinstatement, setting forth in that petition the reasons why his or her License should be reinstated. The Petitioner must comply with the requirements of subparagraph 13-25.F as a precondition to filing the petition. Compliance with subparagraph 13-25.F ~~shall~~ will be determined by the Clerk ~~of the Disciplinary System~~ after the petition is filed, and the Clerk ~~of the Disciplinary System~~ ~~shall~~ will notify the Petitioner of compliance or noncompliance. Upon a determination of compliance with the requirements of subparagraph 13-25.F, the Clerk ~~of the Disciplinary System~~ ~~shall~~ will enter the petition on the docket of the Board and ~~shall~~ refer it to the office of Bar Counsel for investigation. The Board may recommend approval or disapproval of the petition. Final action on the petition shall be taken by ~~the Supreme Court of Virginia~~ this Court.

* * *

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 ~~of the Disciplinary System~~ 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 Bill of Particulars being filed with the Clerk ~~of the Disciplinary System~~.

3. Hearing Date. The date of the hearing shall be determined by the Clerk of the Disciplinary System in consultation with the Bar Counsel and the Petitioner.

4. Notice. Reasonable notice of filing of the petition and the date of the hearing shall be distributed by mail or electronic means by the Clerk of the Disciplinary System to all members of the Bar of the circuit in the jurisdictions in which the Petitioner resided, and of the circuit in which the Petitioner maintained a principal office, at the time of the Revocation. The Clerk of the Disciplinary System shall also distribute by mail or electronic means the notice to the members of the District Committee who heard the original Complaint, to members of the Board who heard the original Complaint, to the members of the District Committee for the judicial circuit in which the Petitioner currently resides, to the complaining witness or witnesses on all Complaints pending against the Petitioner before the Board, a District Committee or a court at the date of the Revocation or Suspension and to such other individuals as the Clerk of the Disciplinary System deems appropriate. The Clerk of the Disciplinary System . . .

* * *

6. Powers of the Board in Reinstatement Cases. . .

* * *

e. Determination by the Board. The Board shall, within 60 days after the receipt of the transcript, forward the record and its recommendations to the Supreme Court of Virginia this Court...

* * *

ii. At the conclusion of the Reinstatement Proceeding, the Clerk of the Disciplinary System shall determine the Costs associated with such Proceeding. The Clerk of the Disciplinary System shall refund any remaining surplus or shall assess to the Petitioner any deficiencies that exist and submit a report on same to the

Clerk of the ~~Supreme Court of Virginia~~ this Court as part of the Board's recommendation order.

* * *

13-26 APPEAL FROM BOARD DETERMINATIONS

A. Right of Appeal. As a matter of right any Respondent may appeal to this Court from an order of Admonition, Public Reprimand, Suspension, or Disbarment imposed by the Board, except for any sanction to which Respondent has agreed, using the procedures outlined in Rule 5:21(b) of the Rules of ~~the Supreme Court of Virginia~~ this Court. An appeal shall lie once the Memorandum Order described in this Paragraph has been served on the Respondent. No appeal shall lie from a Summary Order or Agreed Disposition. If a Respondent appeals to ~~the Supreme Court~~ this Court, then the Bar may file assignments of cross-error pursuant to Rule 5:28 of the Rules of ~~the Supreme Court of Virginia~~ this Court.

* * *

13-27 RESIGNATION

A. Application. A sworn and notarized application to resign from the practice of law shall be submitted to the Clerk ~~of the Disciplinary System~~ . . .

B. Procedure. The Clerk ~~of the Disciplinary System~~ shall submit applications for resignation to Bar Counsel, who shall investigate each application and determine whether, based upon the information available, the statements in the sworn application appear to be true and complete. If Bar Counsel files a written objection to the application with the Clerk ~~of the Disciplinary System~~, . . .

* * *

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 ~~of the Disciplinary System~~ an affidavit declaring the Attorney's consent to Revocation and stating that:

* * *

C. Procedure. The Clerk of the Disciplinary System shall submit the affidavit to Bar Counsel, who shall investigate the affidavit and determine whether, based upon the information available, the statements in the sworn application appear to be true and complete. If Bar Counsel files a written objection to the affidavit with the Clerk of the Disciplinary System, the Board shall hold a hearing on whether the affidavit and consent to Revocation should be accepted. If Bar Counsel does not file an objection, the Board shall enter an order revoking the Attorney's License by consent without a hearing.

* * *

E. Dismissal of Complaints or Allegations of Misconduct. When an Attorney's License is revoked by consent, Bar Counsel, in his or her discretion, may dismiss without prejudice any and all Complaints or allegations of Misconduct then pending by notifying the Clerk of the Disciplinary System and the District Committee, Board or court wherein the matter or matters lie.

* * *

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 Disciplinary Proceedings, records, and information are confidential and shall not be disclosed:

1. Complaints, unless filed in a Disciplinary Proceeding set for hearing or introduced at a public hearing or incorporated in a Certification, petition for expedited hearing, or pending Charge of Misconduct, when the matter Charge of Misconduct is placed on the public District Committee hearing docket or a Certification;

2. Investigations, except that Investigative Reports admitted as exhibits at a public hearing are public;
3. Impairment ~~p~~Proceedings, except that ~~final~~all Suspension orders are public;
4. Notes, memoranda, research, and all other work product of Bar Counsel;
5. Records, communications, and information protected by ~~Disciplinary Rule~~Rule of Professional Conduct 1.6;
6. Subcommittee records and proceedings, except determinations imposing public discipline; ~~and~~
7. Deliberations and working papers of District Committees, the Board, or a three-judge Circuit Court; and
8. Records or information sealed or proceedings closed for good cause shown by order of a District Committee, the Board, or three-judge Circuit Court.

B. Timing of Disclosure of Disciplinary Record in Review of Agreed Dispositions and Sanctions Proceedings. If an Attorney has a Disciplinary Record and is subsequently found by a Subcommittee, a District Committee, the Board, or a three-judge Circuit Court empaneled under Va. Code § 54.1-3935 to have engaged in Misconduct, the facts and circumstances giving rise to such Disciplinary Record may be disclosed (i) to the Subcommittee, District Committee, Board or three-judge Circuit Court prior to the imposition of any sanction and (ii) by the Subcommittee, District Committee, Board or three-judge Circuit Court in its findings of fact set forth in its order. The facts and circumstances giving rise to such Disciplinary Record may also be disclosed to the Board during a hearing concerning whether an affidavit and consent to Revocation should be accepted. An Attorney's Disciplinary Record, and the facts and circumstances giving rise to such Disciplinary Record, may also be disclosed to a Subcommittee, District Committee, the Board, or a three-judge Circuit Court as part of the review of an Agreed Disposition.

C. Timing of Public Access to Disciplinary Information. ~~All records of a matter set for public hearing remain confidential until the matter is dismissed or a~~

~~public sanction is imposed except:~~

1. A Charge of Misconduct is public when the matter is placed on the public District Committee hearing docket; and
2. A Certification or petition for expedited hearing is public when filed with the Clerk ~~of the Disciplinary System;~~ and
3. All notices, orders, pleadings, and other documents filed with the Clerk or Circuit Court in any Disciplinary Proceeding set for hearing are public upon such filing.

D. Public Statements Concerning Disciplinary Information. To the extent necessary to exercise their official duties, Bar Officials have access to all confidential information; however, except for Bar Counsel, no Bar Official shall communicate with a member of the media or the public concerning a matter that is confidential under this Paragraph. If an inquiry is made about a matter that, although confidential under this Paragraph, has become a matter of public record or has become known to the public, Bar Counsel may confirm whether the Bar is conducting an Investigation or if an Investigation resulted in a determination that further proceedings were not warranted.

E. Protection of the Public. Bar Counsel may transmit confidential information to persons or agencies outside of the disciplinary system if ~~such disclosure~~ Bar Counsel has reason to believe disclosure is necessary to protect the public or the administration of justice.

F. Disclosure to Other Jurisdictions. Bar Counsel may share confidential information regarding an Investigation with his or her counterparts in other jurisdictions provided that such jurisdiction agrees to maintain the confidentiality of the information as provided in this Paragraph.

* * *

I. Waiver of Confidentiality. Confidential information, excluding notes, memoranda, research, and all other work product of Bar Counsel, may upon written request be disclosed when and to the extent confidentiality is waived by Bar Counsel, the Respondent, by the Complainant, and, if protected by Disciplinary Rule Rule of Professional Conduct 1.6, by Respondent's client.

J. Testimony about Disciplinary Proceedings.

1. In no case shall Bar Counsel, a member of COLD, a member of a District Committee, a member of the Board, or a Committee Counsel be subject to a subpoena or otherwise compelled to testify in any proceeding regarding any matter investigated or considered in such person's official capacity, except that an Investigator may be compelled to testify in a Disciplinary Proceeding, subject to rulings of the three-judge Circuit Court or Chair.

2. In no case shall the Clerk ~~of the Disciplinary System~~ be subject to a subpoena or otherwise compelled to testify regarding any matter investigated or considered in the disciplinary system, or the records of any such matter, dealt with by the Clerk ~~of the Disciplinary System~~ in his or her official capacity, except that the Clerk ~~of the Disciplinary System~~ may be compelled to testify in a Disciplinary Proceeding or Impairment Proceeding in order to authenticate records of the Clerk ~~of the Disciplinary System~~.

K. Records of the Disciplinary System. In no case shall confidential records of the attorney disciplinary system be subject to subpoena.

* * *

13-31 DISMISSAL OF COMPLAINTS AND ALLEGATIONS OF MISCONDUCT UPON REVOCATION WITHOUT CONSENT, OR UPON DEATH

When an Attorney's License is revoked without consent, or upon the death of an Attorney, Bar Counsel, in his or her discretion, may dismiss without prejudice any and all Complaints or allegations of Misconduct then pending against said Attorney by notifying the Clerk ~~of the Disciplinary System~~, the Complainant(s) and the District Committee, Board or court wherein the matter(s) lies.

* * *

IV. Conclusion

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

Respectfully submitted,

VIRGINIA STATE BAR



Marni E. Byrum, President



Karen A. Gould, Executive Director

Dated: June 26, 2019

From: Sandra Bowen <SBowen@btclawva.com>

Sent: Thursday, January 31, 2019 7:17 PM

To: publiccomment <PublicComment@vsb.org>

Subject: Proposed | amendments to Paragraph 13 approved on January 9, 2019, by the Committee on Lawyer Discipline.

Having been through the disciplinary process before and consulting with attorneys facing discipline in recent years, my concerns about making the proposal to make the filings and record disciplinary proceedings open to the public would chill members of the public from making well-grounded complaints out of fear that their private concerns will be made the subject of public comment or even posted on social media. Although clients waive attorney client privilege when they file a complaint I do not believe they will understand the full scope of the exposure their private matters might receive by the public if the entire record of the proceeding is open to the public. I think the disposition orders discreetly provide a summary of facts that support the committee's determination. I think this perspective needs to be given greater weight than any other considerations such as "transparency". Not everything has to be transparent.

The second concern I have is that the mechanism for parties to affirmatively seal the record assumes a more sophisticated awareness than many clients bring to the complaint process and creates an unreasonable burden on a client.

I cannot imagine how the term "Dismissal De Minimis" is confusing to anyone and the term properly, concisely and adequately informs anyone with an interest in the proceeding.

I do not offer comments very often but felt compelled to do so with regard to this proposed Rule change as I understand the changes.

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