

VIRGINIA:

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

**IN THE MATTER OF
SUPREME COURT RULES, PART 6, § IV,
PARAGRAPH 13 AND PARAGRAPH 3**

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 and Paragraph 3 of Part 6, § IV of the Rules of Court governing the Organization and Government of the Virginia State Bar, as set forth below.

These proposed rule changes were initially proposed and approved by the Rules Subcommittee of the Standing Committee on Lawyer Discipline (COLD), then approved by COLD, published for comment by the VSB, and then brought before Council for its consideration at its June 14, 2018 meeting.

**I. Proposed Revisions to Subparagraphs 13-1 and 13-9
of Paragraph 13
[Guardian Ad Litem's Fee and Cost Changes]**

A. Overview

Pursuant to Part 6, § IV, Paragraph 13-23.G of the Rules of Court, a guardian ad litem shall be appointed by the Disciplinary Board (the Board) in impairment matters when a respondent is not represented by counsel. The Board has also appointed guardians ad litem in other disciplinary proceedings when the respondent's law license is under suspension for an impairment and the respondent is not represented by counsel in the disciplinary proceeding. The proposed amendments will allow the Board the discretion to assess fees and costs of a guardian ad litem to be paid by a respondent when the guardian ad litem has been appointed by the Board.

The VSB endeavors to have guardians ad litem perform services on a pro bono basis. If a pro bono arrangement is not possible, the VSB compensates guardians ad litem at the same rate provided by the Supreme Court of Virginia for guardians ad litem appointed in Virginia courts. Under the proposed provision, assessment of the fees and costs of the guardian ad litem against the respondent will be at the discretion of the Board.

The purpose of this proposed rule change is to prevent abuse of appointments of guardians ad litem. For instance, a fee might be assessed by the Board in a misconduct case where a guardian ad litem had to be appointed because of a pending impairment proceeding and where the respondent seeks to use the guardian ad litem to fight the misconduct charge rather than retain counsel.

B. Publication for comment

On February 8, 2018, COLD approved the proposed amendments to subparagraphs 13-1 and 13-9 regarding fees and costs of guardians ad litem and the bar posted notice of the proposed amendments on its website on March 14, 2018, with a request for written comments and questions. Three comments were submitted, which are attached to this petition.

C. Approval by Council

The amendments regarding assessment of guardian ad litem's fees and costs were revised by Council at its meeting on June 14, 2018, to clarify that the assessment is not mandatory, but rather is at the discretion of the Board. Specifically, the language "if assessed by the Board" was added to the language in the definition of "Costs," and in Paragraph 13-9.E.7, the introductory phrase "[w]ith respect to Guardian Ad Litem's fees and costs" was added for further clarification. With those amendments in place, Council unanimously approved the proposed amendments at its meeting on June 14, 2018.

D. Proposed revisions to Paragraph 13-1 and 13-9

The proposed revisions to Paragraph 13-1 and 13-9 approved by Council are as follows:

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:

* * *

“Costs” means reasonable costs paid by the Bar to outside experts or consultants; reasonable travel and out-of-pocket expenses for witnesses; Court Reporter and transcript fees; Guardian Ad Litem’s fees and costs, if assessed by the Board; electronic and telephone conferencing and recording costs, if such procedures are requested by Respondent; copying, mailing, and required publication costs; ; translator fees; and an administrative charge determined by Council.

* * *

13-9 CLERK OF THE DISCIPLINARY SYSTEM

* * *

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

1. All cases in which a final determination of Misconduct is made by a Subcommittee, District Committee, three-judge Circuit Court, the Board or this Court;
2. All cases against a Respondent who consents to revocation;
3. All proceedings under this Paragraph in which there is a finding that a Respondent has been found guilty of a Crime;
4. All reciprocal cases under this Paragraph in which a final determination imposing discipline is made;
5. All Reinstatement cases under this Paragraph;
6. All cases before the Board in which sanctions were imposed for violations of CRESPA and/or the Bar’s CRESPA regulations; and
7. With respect to Guardian Ad Litem’s fees and costs, all Disciplinary Proceedings in which a Guardian Ad Litem is appointed and the Board, in its discretion, assesses the Guardian Ad Litem’s fees and costs against Respondent.

* * *

II. Permanent Retirement: Transition from Impairment to Retirement [Revisions to subparagraph 13-23 and Paragraph 3]

A. Overview

The National Task Force on Lawyer Well-Being report inspired these amendments that emphasize the importance of supporting lawyers in planning their transition to retirement. They are intended to facilitate retirement for a lawyer suffering from a permanent impairment, such as irreversible cognitive decline, by allowing the lawyer to exit the profession with dignity instead of having his or her law license suspended because of an impairment. With these amendments, a lawyer with a permanent impairment who is the subject of an impairment proceeding could transfer to the Disabled and Retired class of membership as described in proposed Paragraph 13-23.K. The retirement would be permanent for the protection of the public. The proposed language in Paragraph 3(d) would prohibit any person who elected to take a permanent impairment retirement from reactivating their membership.

B. Publication for comment

On March 7, 2018, COLD approved the proposed amendments to subparagraph 13-23 and Paragraph 3 regarding retirement of impaired lawyers. The VSB posted notice of the proposed amendments on its website on April 16, 2018, with a request for written comments and questions. No comments were received.

C. Approval by Council

On June 14, 2018, Council unanimously approved the proposed amendments regarding retirement in subparagraph 13-23 and Paragraph 3.

D. Proposed revisions to Paragraph 13-23 and Paragraph 3

The proposed revisions to Paragraph 13-23 and Paragraph 3 are as follows:

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS

* * *

13-23 Board Proceedings Upon Impairment

A. Suspension for Impairment. The Board shall have the power to issue an order of Suspension to a Respondent who has an Impairment. The term of such Suspension shall be indefinite, and, except as provided below, shall be terminated only upon determination by the Board that Respondent no longer has the Impairment. A Respondent who intends to rely upon evidence of an Impairment in mitigation of Misconduct shall, absent good cause excusing his or her failure to do so, provide notice not less than 14 days prior to the hearing to Bar Counsel and the District Committee or Board of his or her intention to do so. A finding of Impairment or transfer to the Disabled and Retired class of membership under Paragraph 13-23.K may be utilized by Bar Counsel to dismiss any pending Complaints or allegations of Misconduct on the basis of ~~the existence of exceptional circumstances~~ a finding of Impairment or a transfer to the Disabled and Retired class of membership militating against further proceedings, which ~~circumstances of Impairment~~ shall be set forth in the Dismissal.

* * *

K. Bar Counsel may terminate and close an Impairment Proceeding if the Respondent transfers to the Disabled and Retired class of membership pursuant to Part 6, Section IV, Paragraph 3 of the Rules of Court and files a declaration with the Clerk of the Disciplinary System and the Virginia State Bar's Membership Department that the Respondent will not seek transfer from the Disabled and

Retired class of membership. The declaration shall be endorsed by the Respondent and the Respondent's counsel or Guardian Ad Litem. Termination of the Impairment Proceeding shall not be considered a final order in an Impairment Proceeding under Paragraph 13-30. The Respondent's transfer to the Disabled and Retired class of membership and filing of the declaration pursuant to this subparagraph may be utilized by Bar Counsel to dismiss any pending Complaints or allegations of Misconduct on the basis of transfer to the Disabled and Retired class of membership, militating against further proceedings, which shall be set forth in the Dismissal.

* * *

3. CLASSES OF MEMBERSHIP

* * *

(d) Disabled and Retired Members—Any member of the Virginia State Bar upon attaining the age of 70 or on the basis of a permanent disability, may submit to the executive director of the Virginia State Bar a written request to be transferred to the disabled and retired class of membership. Members who are electing this status based on a permanent disability must submit adequate medical and/or psychological documentation with the request. Members qualifying for transfer to the disabled and retired class shall not be entitled to practice law. Further, such members shall not be eligible to vote or hold office in the Virginia State Bar. Disabled and retired members who have not filed a declaration with the Clerk of the Disciplinary System and the Virginia State Bar's Membership Department that the member will not seek transfer from the Disabled and Retired class of membership pursuant to Paragraph 13-23 may submit a petition to the executive director in writing for reinstatement to active or associate membership and state in the petition each circumstance that has changed since the member elected disabled or retired status. Adequate medical and/or psychological documentation must be submitted with the petition showing that the member is fit and capable of practicing law. If there are any misconduct complaints or proceedings pending when the executive director receives a petition for reinstatement, or if the member appears to suffer from a disability, the executive director shall defer consideration of the petition until the misconduct or disability issues are resolved. The Executive Committee of the Virginia State Bar shall consider and act on any such petition, taking into account the recommendation of the executive director. The Executive Committee may deny a petition for reinstatement if the member is publicly disciplined or is determined to have a disability raising a serious question as to the

member's fitness or capacity to practice law. If the Executive Committee approves the petition, the member shall be returned to active or associate status upon payment of the appropriate dues, satisfaction of any other required membership obligations, and payment of any outstanding financial obligations to the ~~bar~~Virginia State Bar. Medical and/or psychological information provided pursuant to this subparagraph (d) is confidential and shall not be disclosed by the ~~bar~~Virginia State Bar.

* * *

III. Permitting the VSB to Share Confidential Information with Lawyer Assistance Program [Revisions to subparagraphs 13-1 and 13-30]

These amendments are responsive to paragraph 22.3 of the report of the National Task Force on Lawyer Well-Being, which recommends that the confidentiality rules be amended to allow Bar Counsel¹ to share confidential information with lawyer assistance programs. Bar Counsel is in a unique position to receive information about a lawyer's mental health or substance abuse issues. These amendments promote early intervention by a lawyer assistance program to help a lawyer in need of services. The amendment to Paragraph 13-1 defines a Lawyer Assistance Program. The amendment to Paragraph 13-30 addresses the provision of confidential information by Bar Counsel to a lawyer assistance program.

¹ The definitional section of Paragraph 13 defines "Bar Counsel" as "the Attorney who is appointed as such by Council and who is approved by the Attorney General pursuant to Va. Code §2.2-510, and such deputies, assistants, and Investigators as may be necessary to carry out the duties of the office, except where the duties must specifically be performed by the individual appointed pursuant to Va. Code §2.2-510."

B. Publication and comment

On March 7, 2018, COLD approved the proposed amendments to subparagraphs 13-1 and 13-30 regarding contact by Bar Counsel with lawyer assistance programs. The bar posted notice of the proposed amendments, with a request for written comments and questions, on its website on April 16, 2018. No comments were received.

C. Approval by Council

On June 14, 2018, the amendments regarding the transmission of confidential information to a lawyer assistance program were unanimously approved by Council.

D. Proposed revisions to Paragraphs 13-1 and 13-30

The proposed revisions to Paragraphs 13-1 and 13-30 are as follows:

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS

13-1 Definitions

* * *

“Lawyer Assistance Program” means a mental health and/or substance abuse treatment program for Attorneys that is approved by the Bar.

* * *

13-30 Confidentiality of Disciplinary Records and Proceedings

* * *

M. Disclosure of Information to Lawyer Assistance Program. If Bar Counsel believes that an Attorney may benefit from the services of a Lawyer Assistance Program, Bar Counsel may make an informal referral to a Lawyer Assistance Program and may share information deemed confidential under this Paragraph as part of that referral. Bar Counsel shall not share information that is protected from disclosure by other state or federal privacy laws. Bar Counsel may, but shall not be required to, notify the subject Attorney of the informal referral or transmission of confidential information to the Lawyer Assistance Program. Unless the subject Attorney has signed a release allowing the Lawyer Assistance Program to share information with Bar Counsel, the Lawyer Assistance Program shall not report information about the subject Attorney to Bar Counsel, and Bar Counsel shall not receive such information from the Lawyer Assistance Program.

* * *

IV. Conclusion

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

Respectfully submitted,
VIRGINIA STATE BAR



Leonard C. Heath, President



Karen A. Gould, Executive Director

Dated this 19th day of June, 2018

From: Rhetta M. Daniel [mailto:rhettamdaniel@rhettaesq.com]
Sent: Thursday, February 15, 2018 10:27 AM
To: publiccomment
Subject: Rule would allow fee-shifting for lawyer's GAL

The Virginia State Bar sinks to a new low.

Let's punish the impaired, disabled and mentally ill attorneys even more with punitive costs.

After all, the VSB only has a \$8,911,684.00++++ (6/30/17) - now over \$9.7 Million illegal Slush Fund a/k/a Client Protection Fund.

Rhetta M. Daniel

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Rhetta M. Daniel, Esquire
Attorney at Law
Email: rhettamdaniel@gmail.com
Website: rhettaesq.com

Mailing Address:

3420 Pump Road, # 170
Richmond, VA 23233

(804) 641-9574 (Office)
(866) 431-2331 (FAX)

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From: Joseph Painter [mailto:custer76@outlook.com]
Sent: Thursday, March 01, 2018 10:22 AM
To: publiccomment
Subject: GAL fees

To assess GAL fees is grossly unjust. GAL's are appointed when the attorney cannot afford to hire an attorney. It is hypocritical to assess fees in such cases.

From: attyabeg@aol.com [mailto:attyabeg@aol.com]
Sent: Monday, March 05, 2018 9:38 AM
To: publiccomment
Subject: Proposed Rules Regarding Misconduct by Guardians

Anything that can deter abuses by attorneys appointed as Guardians is to be strongly supported. Those abuses impact on the most vulnerable in our society, and to prey on them is despicable. Strongly support efforts to address such problems.

August Bequai, Esq.
1800 Old Meadow Road, Suite 115
McLean, VA 22102-1809
Tel.: (703) 893-4806
Fax: (703) 827-7761
attyabeg@aol.com

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