

# Proposed Rule Changes on Public Access to the Disciplinary Process, Summary Suspensions, and Disability Proceedings

Comments should be directed to Thomas A. Edmonds, Executive Director, Virginia State Bar, Suite 1500, 707 East Main Street, Richmond, Virginia 23219 and should be received no later than June 12, 2001.

The Standing Committee on Lawyer Discipline approved amendments to the Rules of Court, Part Six, Paragraph 13.B. and K., 13.E. and 13.F. at its meeting on April 3, 2001. Explanations of the proposed rule changes and the text of the amendments are set out below.

## **Rules of Court, Part Six, Section IV, Paragraph 13.B. and K.**

The proposed amendments to 13.B. and K. are directed toward implementing the recommendation of the Task Force on Public Access to the Attorney Disciplinary Process that the process be further opened to the public and the imposition of private discipline limited.

Key aspects of the proposed amendments of Paragraph 13.B. and K. are set out below:

- The policy that the Standing Committee on Lawyer Discipline adopted on March 7, 2000, limiting private discipline determinations to two per lawyer, would be incorporated in the amended rule.
- The standard for imposing private versus public discipline that the American Bar Association adopted in 1991 would also be incorporated in the amended rule.
- District committee hearings, except for deliberations, would be open to the public.
- District committee chairs would be authorized to maintain order during public hearings.
- Currently, following a full investigation and review of the investigative report, if one member of a three person subcommittee, consisting of two lawyers and one lay person, votes to set a matter for hearing, the matter is set for hearing. This would not change under this proposed rule.
- The notice of a district committee hearing would be served upon the respondent at least 42 days before the district committee hearing date instead of 21 days as currently provided. The Clerk's Office would not post a hearing date on the public docket until 21 days after the notice is sent. In the intervening 21 day period, bar counsel and the respondent could negotiate an agreed disposition providing for private discipline and present it to a subcommittee for consideration.
- Currently, one subcommittee member can reject a proposed agreed disposition, causing a case to be referred for hearing. This would not change under the amended rule.
- Except in disability cases, dispositive district committee orders would be public.

### **13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS. —**

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- B. Authority and Duties of the Council, the Standing Committee, Subcommittees, District Committees and

Bar Counsel; Investigation and Prosecution of Complaints:

(1) \* \* \*

(2) \* \* \*

(3) \* \* \*

(4) Authority and Duties of District Committees; Jurisdiction; Venue:

(a) The principal duty of a District Committee shall be to consider, adjudicate and make disposition of Complaints filed with the District Committee pursuant to this Rule. Where appropriate, the District Committee or Subcommittee shall also counsel with Respondents about their conduct. In addition, members of a District Committee, other than non-lawyer members, may participate in the investigation of Complaints, provided that a member participating in such investigation shall not participate in a District Committee's consideration, adjudication and disposition of such Complaint.

(b) A District Committee shall have jurisdiction over all Complaints filed with it against any Respondent. Venue shall not be jurisdictional, but venue shall lie in the following order of preference in any district where:

(i) any portion of the alleged Misconduct occurred; or

(ii) the Respondent resides; or

(iii) the Respondent maintains an office; or

(iv) the address of the Respondent on record with the Virginia State Bar as the Respondent's address for licensing purposes lies.

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 committee a Complaint should be referred, the Clerk 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 committee.

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 by the Clerk

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 shall forward the Notice of Objection to the ~~Chairman~~ of the Board, whose decision on the matter shall be final.

- (c) Subject to the rules of procedure prescribed by Council, each District Committee shall have the power:
- (i) to elect a ~~chairman~~, vice-~~chairman~~, secretary and assistant secretary and such other officers as it considers appropriate;
  - (ii) to conduct hearings and adjudicate Charges of Misconduct as provided in this Rule;
  - (iii) to summon and examine witnesses under oath administered by any member of the District Committee;
  - (iv) to compel the attendance of witnesses and the production of documents necessary or material to any inquiry; ~~and~~
  - (v) to rule on the admissibility of evidence; and
  - (vi) to maintain order in all its proceedings through its chair.

Any summons or subpoena may be issued on behalf of a District Committee by any lawyer member thereof or by Bar Counsel.

- (5) Investigations:
- (a) Complaints Unrelated to the Virginia Rules of Professional Conduct or the Code of Professional Responsibility: All Complaints of Misconduct filed with the Virginia State Bar shall be reviewed by Bar Counsel. If, following review of the Complaint, Bar Counsel determines that the conduct questioned or alleged does not present an issue under the Virginia Rules of Professional Conduct or the Virginia Code of Professional Responsibility, Bar Counsel shall not open an investigative file.
  - (b) Informal or Abbreviated Investigations: When Bar Counsel determines to open an investigative file, he or she may decide if the Complaint is appropriate for an informal or abbreviated investigation. It is contemplated that this type of investigation would be generally appropriate when the Complaint of Misconduct involves less serious allegations of Misconduct. Bar Counsel may assign such a Complaint to a staff member, a District Committee member, or use any other means practicable to speedily investigate and conclude the allegation of Misconduct. If the Complaint is resolved through this process to the satisfaction of the Complainant, the Respondent and the Bar, Bar Counsel shall

then dismiss the Complaint. Such dismissal shall not become part of the Respondent's Disciplinary Record. In the event Bar Counsel chooses not to proceed under this subsection (b) or, having elected to proceed under this subsection (b), the Complaint is not resolved within ninety days from the date of filing the Complaint, Bar Counsel shall proceed pursuant to subsection (c), below.

- (c) Preliminary Investigation, Filing of a Complaint with the District Committee and Action by Subcommittee:
- (i) Bar Counsel shall conduct a preliminary investigation of any Complaint to determine whether the same should be filed with a District Committee. Bar Counsel shall decline filing a Complaint with a District Committee following a preliminary investigation when, in Bar Counsel's judgment:
    - (a) As a matter of law, the conduct questioned or alleged does not constitute Misconduct;
    - (b) The evidence available shows that the Respondent did not engage in the Misconduct questioned or alleged;
    - (c) There is no credible evidence to support any allegation of Misconduct by the Respondent; or
    - (d) The evidence available could not reasonably be expected to support any allegation of Misconduct under a "clear and convincing" evidentiary standard.

When filing a Complaint with a District Committee, Bar Counsel shall notify the District Committee ~~Chairman~~ thereof of Bar Counsel's recommendation that the matter be investigated by a member of Bar Counsel's staff, by a District Committee member or both. The District Committee ~~Chairman~~ shall promptly notify Bar Counsel of any disagreement with Bar Counsel's recommendation. If Bar Counsel and the District Committee ~~Chairman~~ are unable to agree, the Standing Committee or member thereof, serving as its designee, shall determine by whom the investigation is to be conducted. Thereafter, in accordance with procedural rules established by the Council, the Complaint shall be investigated and a report thereof made to the Subcommittee.

- (ii) Action by the Subcommittee: When submitting a Report of Investigation to the Subcommittee, Bar Counsel or Committee Counsel shall include a recommendation as to the appropriate disposition

of the Complaint and shall indicate any agreement with the Respondent with respect to such recommendation. Following receipt of the report, the Subcommittee shall:

- (a) refer the matter to Bar Counsel for further investigation; or
- (b) dismiss the Complaint with or without Terms; provided, however, that if the Subcommittee dismisses the Complaint with Terms and the Respondent fails to comply with such Terms, the Subcommittee shall set the Complaint for a hearing before the District Committee; and provided further that a Respondent, within ten days of the issuance of the dismissal, may request a hearing before the District Committee whenever the dismissal creates a "Disciplinary Record," as that term is defined in ¶13.A., supra; or
- (c) certify the Complaint to the Disciplinary Board pursuant to Subsection (12), infra, or file a complaint in the circuit court, pursuant to Section 54.1-3935, Va. Code, 1950 as amended. Certification hereunder shall be based on a reasonable belief that the Respondent has engaged or is engaged in Misconduct which, if proved, would justify a suspension or revocation of the Respondent's license to practice law; or
- (d) impose one of the following conditions or sanctions pursuant to an agreed disposition:
  - i. a private reprimand, with or without Terms;
  - ii. a public reprimand, with or without Terms; or
- (e) set the Complaint for hearing before the District Committee.

Notwithstanding any other provision of these Rules, any member of the Subcommittee may require that the Complaint be set for hearing.

No action under (ii)(d) above shall be taken by the Subcommittee except by unanimous vote and with the concurrence of both Bar Counsel and Respondent.

No Respondent shall be permitted to receive more than two (2) determinations of private discipline, excepting only "de minimis dismissals." Any Respondent who has received two (2) determinations of private discipline shall receive public discipline for any violation of the Rules of Professional Conduct or the Code of Professional Responsibility. Private discipline shall be imposed only in

cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the Respondent.

In any case where Terms are included in the disposition, the Subcommittee shall specify the time period within which compliance shall be completed and the alternative disposition in the event the Terms are not complied with. Bar Counsel shall be responsible for monitoring compliance with Terms and reporting any noncompliance to the Subcommittee. If the Respondent fails to comply with the Terms within the stated time period, as determined by the Subcommittee, the alternative disposition shall be imposed.

All Subcommittee actions shall be reported to the District Committee as provided in the Rules of Procedure adopted by the Council.

(6) Procedures for District Committee Hearings:

- (a) Notice of Hearing: If the Subcommittee determines that a hearing should be held before a District Committee, Bar Counsel shall, at least ~~twenty-one~~ forty-two days prior to the date fixed for the hearing, serve upon the Respondent by certified mail a notice of the hearing. The notice, called the Charge of Misconduct throughout the remainder of this ¶13, shall contain a statement of the time and place designated by the District Committee for the hearing, a clear and concise statement of the alleged Misconduct and any disciplinary rules alleged to have been violated.
- (b) Procedure at Hearing: District Committee hearings, except deliberations, shall be open to the public. The hearing shall be conducted as an adversary proceeding before a District Committee. The District Committee shall hear witnesses and receive exhibits. The Charges of Misconduct shall be prosecuted by Bar Counsel or Committee Counsel. The Respondent may be represented by counsel, may cause witnesses and documents to be summonsed and subpoenaed by the District Committee, and may cross-examine witnesses. The testimony shall be taken and preserved, together with all exhibits (or copies thereof) received in evidence or refused by the District Committee. At the conclusion of the evidence of the Bar and at the conclusion of all the evidence, a motion to strike the evidence of the Bar as to some or all charges may be made on behalf of the Respondent. If the motion is sustained, the charges not supported by the evidence shall be dismissed.

The Clerk's Office shall publish a docket of all matters set for hearing before a District Committee or certified to the Board. For every matter for which a Notice of Hearing before a District Committee has been mailed by the Office of Bar Counsel, the Clerk shall

place it on the docket twenty-one days after the date of the Notice. For every Complaint certified to the Board by a Subcommittee, the Clerk shall place it on the docket on receipt of the Statement of the Certified Charges from the Subcommittee.

- (c) Determination by District Committee: At the conclusion of the hearing, if the District Committee determines that the evidence fails to show Misconduct by the Respondent, it shall dismiss the proceeding.

If the District Committee determines that the evidence shows Misconduct by the Respondent, the District Committee ~~Chairman~~ shall issue its determination in writing, setting forth the following:

- (i) brief findings of the facts established by the evidence; and
- (ii) the nature of the Misconduct shown by the facts so established, including any disciplinary rules violated by the Respondent; and
- (iii) the disposition made by the District Committee.

The writing shall constitute the "District Committee's Determination" for purposes of further proceedings under this Rule.

- (7) Disposition: Upon a finding of Misconduct a District Committee may:

- (a) dismiss with specified Terms;
- ~~(b)~~ ~~impose a private reprimand, with or without Terms;~~
- ~~(c)~~ impose a public reprimand, with or without Terms; or
- ~~(d)~~ (c) certify the Charges of Misconduct to the Board or file a complaint in a circuit court, pursuant to Section 54.1-3935, Va. Code, 1950, as amended.

In any case where Terms are included in the disposition, the District Committee shall specify the time period within which compliance shall be completed and the alternative disposition in the event the Terms are not complied with. Bar Counsel shall be responsible for monitoring compliance with Terms and reporting any non-compliance to the District Committee. If the Respondent fails to comply with the Terms within the stated time period, as determined by the District Committee, the alternative disposition shall be imposed.

- (8) Notice to Respondent and Bar Counsel: The District Committee ~~Chairman~~ by certified or registered mail, return receipt requested, shall promptly notify the Respondent and Bar Counsel of the District Committee's Determination.

- (9) Notice to the Complainant:

- (a) If the Subcommittee has dismissed the Complaint or the District Committee has dismissed the Charges of Misconduct, the District Committee ~~Chairman~~ by mail shall promptly and simultaneously notify the Complainant, the Respondent and Bar Counsel of such dismissal and the factual and legal bases therefor.

- ~~(b) If the Subcommittee or District Committee determines to issue a private or public reprimand, with or without Terms, or a dismissal upon Terms, then u~~ Upon expiration of the period for appeal, if any, the District Committee ~~Chairman~~ shall promptly send the Complainant a copy of the District Committee's Determination. If the Respondent appeals the District Committee's Determination as provided in this rule, the District Committee ~~Chairman~~ shall promptly notify the Complainant of the District Committee's Determination and Respondent's demand for review by the Board.

- (c) If the Respondent fails to comply with the Terms imposed by the a Subcommittee or District Committee, the District Committee ~~Chairman~~ shall notify the Complainant upon imposition of the alternative disposition. If the Subcommittee or District Committee determines to certify the matter to the Board, the District Committee ~~Chairman~~ shall mail a copy of the District Committee Determination to the Complainant simultaneously with the mailing of the District Committee Determination to the Respondent.

- (10) Appeal from District Committee's Determination:

- (a) A Respondent as to whom a District Committee has determined to issue a ~~private or~~ public reprimand or to impose Terms, within ten days after notice thereof, may demand an appeal by filing with the Clerk of the Disciplinary System either a notice of appeal or a written demand that further proceedings be conducted pursuant to Article 6 of Chapter 39 of Title 54.1 of the *Code of Virginia*. In either case, a copy shall be sent to the District Committee ~~Chairman~~ and to Bar Counsel.

- (b) When proceeding by notice of appeal or a written demand that further proceedings be conducted pursuant to Article 6 of Chapter 39 of Title 54.1 of the Code of Virginia, the Respondent shall certify in the notice of appeal or written demand that he or she has ordered from the court reporter the transcript of the proceedings before the District Committee, at the Respondent's cost. Upon receipt of such notice or written demand by the Clerk of the Disciplinary System, the imposition of any reprimand or term shall be stayed. No appeal shall lie from any sanction to which the Respondent has agreed. 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. The transcript is 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 shall retain the Record until the transcript has been received or for 40 days after the notice of appeal or written demand has been received, whichever first occurs, and shall then dispose of the Record as provided in subparagraph D of this rule in case of an appeal to the Disciplinary Board and as provided by subparagraph (c) below in case of an appeal to a three-judge court. Failure of the Respondent to make the transcript a part of the Record as specified herein shall result in dismissal of the appeal by the Disciplinary Board, whether initiated by notice of appeal or written demand, and affirmation of the sanction imposed by the District Committee. Bar Counsel shall initiate the three-judge court process for the appeal only after receipt of the transcript by the Clerk of the Disciplinary System.

(c) When proceeding by written demand that further proceedings be conducted pursuant to Article 6 of Chapter 39 of Title 54.1 of the *Code of Virginia*, such proceeding shall be conducted before a duly convened three-judge court as an appeal on the Record pursuant to the same procedure for an appeal before the Board under subparagraph D herein. ~~except that all such proceedings shall be public.~~ 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 subparagraph (b) above. Reference in subparagraph D of this rule to "Clerk" or "Clerk of the Disciplinary System" shall mean the Clerk of the designated Circuit Court when appropriate, and to "Board" shall mean the three-judge court.

(11) Issuance of Reprimand: Upon the expiration of the period for appeal of a public reprimand, if notice of appeal has not been given by the Respondent, the District Committee shall issue the reprimand to the Respondent and, if the reprimand is a public reprimand, Bar Counsel shall issue a public statement thereof as provided in the Rules of Procedure adopted by Council.

(12) Certification to the Board: If the Subcommittee has elected to certify the Complaint or the District Committee has elected to certify the Charges of Misconduct to the Board, it will promptly mail to the Clerk of the Disciplinary System a statement of the certified charges which shall include sufficient facts to reasonably notify Bar Counsel and the Respondent of the basis for such certification and the Disciplinary Rules alleged to have been violated.

C. \* \* \*  
D. \* \* \*

E. \* \* \*  
F. \* \* \*  
G. \* \* \*  
H. \* \* \*  
I. \* \* \*  
J. \* \* \*

K. General Provisions:

- (1) \* \* \*
  - (2) \* \* \*
  - (3) \* \* \*
  - (4) \* \* \*
  - (5) Confidentiality and Publicity: All information pertaining to the investigation, disciplining, suspending, and disbarment of an Attorney shall be confidential and shall not be disclosed, except as follows:
    - (a) \* \* \*
    - (b) \* \* \*
    - (c) \* \* \*
    - (d) \* \* \*
    - (e) \* \* \*
    - (f) All ~~proceedings~~ hearings before District Committees and the Board and ~~its~~ their dispositive orders; ~~shall be public~~ except the following:
      - (i) Disability proceedings,
      - (ii) all Subcommittee proceedings, and
      - (iii) Subcommittee orders imposing private discipline; ~~shall be public.~~
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**Rules of Court, Part Six, Section IV, Paragraph 13.E.**

The proposed amendments to Paragraph 13.E. clarify that the Disciplinary Board can suspend on a summary basis an attorney who pleads guilty to a Crime as defined by Paragraph 13, or who enters a plea wherein the facts found by a court would justify a finding of guilt, as well as attorneys who are convicted of Crimes. Such pleas are often entered pursuant to Virginia Code § 18.2-251, commonly known as the first offender statute.

In connection with that statute and other pleas involving court-ordered probation and/or delayed sentencing, the proposed amendments specify that a show cause hearing to determine whether an attorney's license should be revoked or further suspended may be continued, upon the attorney's written request, until any court ordered probation has ended or until after sentencing has occurred.

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E. Proceedings upon Adjudication of a Crime:

(1) Summary Suspension:

Whenever the Clerk of the Disciplinary System receives written notification from any court of competent jurisdiction stating that an Attorney has been found guilty or convicted of a Crime by ~~verdict of a judge or jury, pled guilty to a Crime or entered a plea wherein the facts found by a court would justify a finding of guilt,~~ irrespective of whether sentencing has occurred, the Board shall forthwith enter an order summarily suspending the license of the Attorney and shall forthwith serve upon the Attorney (a) a copy of the written notification from the court, (b) a copy of the Board's order, and (c) a notice fixing the time and place of a hearing to determine whether the license of the Attorney should be revoked or further suspended. The hearing shall be set not less than fourteen nor more than thirty days after the date of the Board's order. Upon written request of the Respondent, the hearing shall be continued until any probation ordered by a court has ended or after sentencing has occurred, and on receipt by the Board of a certified copy of a notice of appeal from the conviction, proceedings before the Board shall, upon request of the Respondent, be continued pending disposition of such appeal. The Board may, upon request of the Respondent, hold an interim hearing and terminate such suspension during the pendency of ~~such probation,~~ sentencing or appeal if it finds that such suspension, if not terminated, would be likely to exceed the discipline imposed by the Board upon a hearing on the merits of the case.

Upon presentation to the Board of a certified copy of an order setting aside the verdict or reversing the conviction on appeal, any suspension of the license shall be automatically terminated and any revocation of the license shall be vacated, and the license shall be deemed automatically reinstated. Discharge or dismissal of a guilty plea or termination of probation shall not result in the automatic termination of the suspension or revocation of an attorney's license hereunder. Nothing herein shall preclude further proceedings against the Respondent upon Charges of Misconduct arising from the facts leading to such conviction.

(2) Action By the Board:

If the Board shall find at the hearing that the Respondent has been found guilty or convicted of a Crime by ~~the verdict of a judge or jury, pled guilty to a Crime or entered a plea wherein the facts found by a court would justify a finding of guilt,~~ an order shall be issued and served upon the Respondent in which the Board shall:

- (a) Suspend, or continue the suspension of, the license of the Respondent for a stated period not in excess of five years; or

- (b) Revoke the license of the Respondent.

(3) Procedure:

The procedure applicable to hearings relating to Misconduct shall apply to hearings relating to a Crime, except that if the Attorney elects to have further proceedings conducted pursuant to Article 6, Chapter 39, Title 54.1 of the Code, he shall file his demand therefor not later than ten days prior to the date set for the hearing. In the event the Attorney files a demand that the proceedings before the Board be terminated, and that further proceedings be conducted by a three-judge Circuit Court, the order of the Board suspending the license of the Attorney shall remain in full force and effect until the conclusion of the hearing conducted by the three-judge court, at which time said Court shall deal with the order of suspension as part of its ruling; subject, however, to the provisions of Section 54.1-3935 of the Code of Virginia.

**Part Six, Section IV, Paragraph 13.F.**

Paragraph 13.F. governs disability proceedings before the Virginia State Bar Disciplinary Board. The proposed amendments would effect the following changes:

- Allow bar counsel to initiate an investigation, upon notice or evidence that an attorney may be suffering from a disability, to determine whether there is reason to believe that a disability exists.
- As a part of the investigation, for good cause shown in the interest of public protection, the amended rule would permit bar counsel to petition the Disciplinary Board to order an attorney to undergo examination by a qualified physician or other health care provider and to order the provision of appropriate medical releases to bar counsel and the Disciplinary Board for purposes of the investigation and any disability proceedings.
- Under the amended rule, upon petition of bar counsel, a district committee, the Disciplinary Board, or an attorney who is attempting to prove he or she is no longer disabled, the Disciplinary Board would hold a hearing to consider the issue of disability.
- The Disciplinary Board could appoint a guardian ad litem for an unrepresented attorney believed to be disabled.
- The Disciplinary Board would be authorized to suspend summarily an attorney who failed to comply with a Board order entered in connection with a disability proceeding if the Board determined that the public and/or the clients of the attorney were in jeopardy.

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F. Disability:

(1) Suspension for Disability:

The Board shall have the Ppower to suspend the license of an Attorney who is under a Disability.

The term of such suspension shall be indefinite, and except as provided in (7)(c)(i) below shall be terminated only upon determination by the Board that the Disability no longer exists. A finding of a Disability may be considered by a District Committee or the Board in mitigation as provided in Subsection C(6). A finding of a Disability may be utilized by Bar Counsel to dismiss any pending Complaints or Charges of Misconduct on the basis of the existence of exceptional circumstances militating against further proceedings, which circumstances of a Disability shall be set forth in the dismissal documentation.

(42) Burden of Proof:

Whenever the existence of a Disability is alleged in a proceeding under this Rule for the suspension of the license of an Attorney or in mitigation of Charges of Misconduct, the burden of proving such a Disability shall rest with the party asserting its existence. The issue of a Disability may be raised by any person at any time and if a District Committee or the Disciplinary Board, during the course of hearing Charges of Misconduct against a Respondent, believes that the Respondent may then be suffering from a Disability, the District Committee or the Disciplinary Board may postpone the hearing and initiate a Disability proceedings under this Rule. In proceedings to terminate a suspension for a Disability, the burden of proving the termination of a Disability shall be on the Attorney.

(2) Suspension for Disability:

~~The Board shall have the Power to suspend the license of an Attorney who is under a Disability. The term of such suspension shall be indefinite, and except as provided in (6)(a) below shall be terminated only upon determination by the Board that the Disability no longer exists. A finding of Disability shall not terminate any proceeding upon Charges of Misconduct involving the Respondent, but may be considered by the Board in mitigation as provided in Subsection C (6).~~

(3) Investigation and Summary Suspension:

(a) Suspension upon Proof of Prior Adjudication of, or Hospitalization for, Disability:

Upon receipt of a notice or evidence that an Attorney is or may be suffering from a Disability, Bar Counsel shall cause an Investigation to be made to determine whether there is reason to believe that the Disability exists, from the Clerk of the Disciplinary System with supporting documentary evidence that an Attorney has been adjudicated by a Court of competent jurisdiction to suffer from Disability, or that the Attorney has been involuntarily admitted to a hospital (as defined in Section 37.1-1 of the Code of Virginia) for treatment of any addiction, inebriety, insanity or mental illness, the Board shall enter an order suspending the license of the Attorney and serve the order on the Attorney.

(b) Suspension in Absence of Prior Adjudication of, or Hospitalization for, Disability:

~~Upon receipt of notice or evidence that an Attorney is or may be suffering from Disability and in the absence of prior adjudication of or hospitalization for Disability, Bar Counsel shall cause an investigation to be made to determine whether there is probable cause to believe that the Disability exists. If Bar Counsel determines that there is probable cause to believe that the Attorney suffers Disability, he shall file a petition with the Board, which shall promptly hold a hearing to determine whether such Disability exists. A copy of the petition shall be served on the Attorney. As a part of the Investigation of whether a Disability exists, and for good cause shown in the interest of public protection, Bar Counsel may petition the Board to order the Attorney:~~

- i) to undergo a psychiatric, physical or other medical examination by a qualified physician or other health care provider selected by the Board; and
- (ii) to provide appropriate releases to health care providers authorizing the release of his or her psychiatric, physical or other medical records to Bar Counsel and the Board for purposes of the Investigation and any subsequent Disability proceedings.

The Board shall hold a hearing to determine whether such examination(s) and release(s) are appropriate, upon notice to the Attorney.

(4) Hearing Procedure: The Board shall conduct a hearing to determine whether a Disability exists in the following instances:

- (a) ~~Upon petition of Bar Counsel or a District Committee alleging that an Attorney is under a Disability.~~
- (b) ~~Upon petition of an Attorney who has been suspended from practice for Disability and who alleges that the Disability no longer exists. Evidence that the Attorney is no longer hospitalized as provided in (3)(a) above shall not be conclusive to the Board's determination of the Attorney's ability to resume the practice of law.~~

Summary Suspension

Upon receipt of a notice from the Clerk of the Disciplinary System with supporting documentary evidence that an Attorney has been adjudicated by a court of competent jurisdiction to suffer from a Disability, or that the Attorney has been involuntarily admitted to a hospital (as defined in Va. Code §37.1-1) for treatment of any addiction, inebriety, insanity or mental illness, the Board shall enter an order suspending the license of the Attorney and serve the order on the Attorney.

(5) ~~General Provisions: The following additional provisions apply to Disability hearings:~~

~~(a) Guardian Ad Litem:~~

~~The notice of any hearing to determine whether an Attorney suffers from Disability shall request the Attorney to advise the Board whether he has retained counsel to represent him at the hearing. Unless counsel for the Attorney enters an appearance with the Board within ten (10) days of the date of the notice, the Board shall appoint a guardian ad litem to represent the Attorney at the hearing.~~

~~(b) Examination:~~

~~The Board may require the Attorney to undergo a psychiatric, physical or other medical examination by a qualified physician selected by the Board. A written report of the results of such examination, along with written reports from any other physicians who have examined the Attorney, may be considered as evidence by the Board.~~

Hearing

If Bar Counsel determines that there is reason to believe that the Attorney suffers a Disability, Bar Counsel shall file a petition with the Board, which shall promptly hold a hearing to determine whether such a Disability exists. A copy of the petition shall be served on the Attorney. If the Board determines that a Disability exists, it shall enter an order suspending the license of the Attorney.

6) Hearing Procedure: The Board shall conduct a hearing to determine whether a Disability exists in the following instances:

a) Upon petition of Bar Counsel, a District Committee or the Disciplinary Board alleging that an Attorney is under a Disability.

b) Upon petition of an Attorney who has been suspended from practice for a Disability and who alleges that the Disability no longer exists. Evidence that the Attorney is no longer hospitalized shall not be conclusive to the Board's determination of the Attorney's ability to resume the practice of law.

c) Such hearing shall be conducted substantially in accordance with the procedures established in proceedings related to Misconduct.

7) General Provisions:

The following general provisions shall apply to Disability hearings:

a) Guardian Ad Litem

The notice of any hearing to determine whether an Attorney suffers from a Disability shall request the Attorney to advise the Board whether he or she has retained counsel for the hearing. Unless counsel for the Attorney enters an appearance with the Board within ten (10) days of the date

of the notice, the Board shall appoint a guardian ad litem to represent the Attorney at the hearing.

b) Examination

Written reports of the results of any examination of an attorney conducted pursuant to this Disability rule, along with written reports from other qualified physicians or other health care providers who have examined the Attorney, may be considered as evidence by the Board. Such reports shall be filed with the Clerk of the Disciplinary System.

~~(6)~~ (c) Termination of Suspension:

~~(a)~~(i) In cases where a suspension for a Disability is based upon an the adjudication of a Disability by a Court, as provided in (3)(a) above, upon receipt of documentary evidence of adjudication by a Court of competent jurisdiction that the Attorney's Disability has terminated, the Board shall promptly enter an order terminating the suspension of the Attorney's license.

~~(b)~~ In all other cases the Board shall hold a hearing on the issue of termination of the Disability promptly upon receipt of a request from the Attorney.

d) Enforcement

The Board shall have the power to sanction an Attorney for failure to comply with its orders and subpoenas. The sanction can include a summary suspension in a case where it is felt determined that the public and/or the clients of the Attorney are in jeopardy; such action can be *sua sponte* or on motion by Bar Counsel, with appropriate notice to the Attorney, and the Attorney's counsel or guardian ad litem.