

**AVOIDING AND RESPONDING TO BAR COMPLAINTS**  
**12TH ANNUAL SMALL FIRM AND SOLO-PRACTITIONER CONFERENCE AND**  
**REGIONAL BENCH BAR FORUM**  
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Travis J. Graham  
(540) 983-9420

**You have been served with notice of a bar complaint. What happens next? How does the process work? Who are the players? What can you expect?**

**This presentation will answer these questions. It is, of course, no substitute for a full review of the rules and the advice of counsel.**

I. The Players

Respondent – The attorney who is the subject of the complaint.

Intake Counsel – A Bar attorney who conducts an initial review of a complaint.

Bar Counsel – Attorneys employed by the Bar; they occupy the role of prosecutor.

Bar Investigator – An employee of the Bar equivalent to a law enforcement officer investigating a case. Most are lawyers, law graduates, or ex-cops.

District Committee – The first adjudicative body to consider a bar complaint. They are composed of lawyers and laypersons, and each committee serves one or more judicial district. They occupy the role of grand jury, although they can impose some types of discipline themselves. Frequently this body does its work through sub-committee of a designated member.

Disciplinary Board – The highest adjudicative body established under the disciplinary rules. It is composed of 20 members, 16 of whom are attorneys.

C.O.L.D. – The Standing Committee on Lawyer Discipline. It oversees the entire process, but has no direct role in handling complaints.

## II. The Process

**Note – unless otherwise indicated, all references to rules are to subparagraphs of Part 6, § IV, Paragraph 13 of the Rules of the Supreme Court of Virginia. The rules are set out in Section VII below.**

### A. Intake of Complaint

#### 1. Sources of Complaints

- a. Clients
- b. Lawyers
- c. Judges
- d. Anonymous

*The Bar makes no distinction between anonymous complaints and others. The investigative process is identical. However, the absence of a named complainant may lead officials to conclude that the burden of proof cannot be met.*

- e. None

*The Bar may open investigations into conduct that is revealed indirectly, such as through newspaper or journal articles, or conduct described in unrelated civil or criminal actions.*

#### 2. Possible Disposition by Intake Counsel (Rule 13-10.)

- a. “N.A.T.”

*Stands for “No Action Taken.” Complaints that obviously lack merit may be summarily dismissed by intake counsel without further action. (Rule 13-10(A).)*

- What types of complaints are dismissed at this stage?

*Complaints that lack any indicia that an attorney has violated any Rule of Professional Conduct. These include complaints that a lawyer simply failed to win a case, most complaints about fees, and complaints about conduct that clearly does not infringe any Rule of Professional Conduct.*

- Notification to lawyer?

*No.*

b. Informal Investigation/Pro-Active Letter

*In some limited circumstances, intake counsel may deal with a simple complaint by writing to the attorney and asking that the problem be remedied. This is not considered a form of discipline. (Rule 13-10(C).) Sometimes the Bar is less than clear in explaining what it wants.*

c. Assignment to Bar Counsel for Preliminary Investigation

*Complaints that make credible allegations of a violation of a Rule of Professional Conduct are assigned to Bar Counsel for investigation. (Rule 13-10(C).)*

B. Preliminary Investigation

1. Notification, Response, Reply

- Duty to respond, handling of privileged materials, deadlines

*Attorneys are required to cooperate with the investigative process. Failure to do so is itself a violation of the ethical rules. (Va. Rule of Prof. Conduct 8.1(c).) An attorney may reveal otherwise confidential information in responding to a complaint. (Va. Rule of Prof. Conduct 1.6(b)(2).)*

- Form of response

*Responses should be in writing.*

- Lawyer up, or not?

*Opinions differ, but probably.*

- Access by Respondent to Materials

*The responding attorney will be furnished with a copy of the complaint, and the complainant will be given a copy of the attorney's response. The attorney is not allowed to see any reply from the complainant, nor to examine the Bar's file. Discovery is limited. (Rule 13-11.)*

- Strategy
- Deadline, Failure to Respond

*There is typically a 21-day deadline to respond. Failure to respond may itself be an ethical violation, and will result in the complaint being escalated to the next level for further investigation. Bar Counsel will grant extensions, but not indefinitely.*

2. Investigation and Interview (Rule 13-10(D).)

- By whom?

*The Bar employs investigators, some of whom are attorneys or law graduates, and some of whom are ex-law enforcement.*

- Form of interview

*The interview is typically conducted in person, and is recorded and videotaped. Investigators may interview others besides the responding attorney, including clients, other attorneys, judges, and other witnesses. They do not have to tell you whom they are interviewing.*

- Pitfalls

*Any information collected by the Bar which indicates a violation of an ethical rule may be cause for discipline, regardless of whether it concerns the original complaint.*

C. Possible Actions by Bar Counsel (Rule 13-10(E).)

1. Dismissal

*The Bar Counsel will not file a complaint when, in his or her judgment following a preliminary investigation:*

- *As a matter of law, the conduct questioned or alleged does not constitute misconduct;*
- *The evidence available shows that the Respondent did not engage in the misconduct questioned or alleged;*
- *There is no credible evidence to support any allegation of misconduct by the Respondent; or*

- *The evidence could not be reasonably be expected to support any allegation of misconduct under a clear and convincing evidentiary standard.*

(Rule 13-10(E).)

2. Charge of Misconduct and Referral to District Committee Level (Rule 13-10(F).)

- What does it mean?

*A charge of misconduct and referral to the District Committee level is roughly the equivalent of submission of a charge to a grand jury. It does not necessarily mean that the complaint is well-founded or that discipline will be imposed.*

D. Action at the District Committee Level

1. Referral to Sub-Committee and Possible Actions

- a. Further Investigation (Rule 13-15(A).)

*Possible, but virtually never occurs.*

- b. Dismissal

*Reasons for dismissal are basically the same as the reasons Bar Counsel would elect not to proceed. (Rule 13-15 (B)(1).)*

- c. Private Admonition Without Terms

*The private admonition without terms is the only form of discipline that the District Sub-Committee may impose on its own. (Rule 13-15(B)(2).)*

- d. Finding of Evidence of Misconduct and Referral to Full Committee

*The equivalent of an indictment by a grand jury. This means that the District Sub-Committee has agreed that there has likely been an ethical violation, and has also agreed that the violation may not be remedied by a private admonition without terms. (Rule 13-15(B)(5).)*

- e. Certification to Disciplinary Board

*If the charge involves misconduct that cannot be dealt with by the District Committee, the Sub-Committee may*

*refer it directly to the Disciplinary Board. (Rules 13-15(B)(3).)*

f. Agreed Discipline

*The Sub-Committee may approve an agreed admonition or public or private reprimand, with or without terms. (Rule 13-15 (B)(4).)*

2. Action by District Committee

*If the case is referred to the full District Committee, Bar Counsel will serve a Charge of Misconduct on the responding attorney. The attorney must file an answer. (Rule 13-16(A)(13).)*

a. Dismissal

*For basically the same reasons as discussed above. (Rule 13-16(W).)*

b. Agreed Discipline

*The District Committee may solicit agreement by the attorney to a public or private admonition or reprimand, with or without terms.*

c. Hearing by Full Committee

*The District Committee can hear cases involving misconduct that would warrant an admonition or reprimand, but not suspension or revocation of a license.*

- Format and rules of hearing

*The hearing resembles a judicial hearing or trial, but differs in several respects -- most notably with regard to the rules of evidence and the participation of the complainant. (Rules 13-16(D)(S).)*

- Burden of Proof

*Misconduct must be proven by clear and convincing evidence at all stages of the process.*

- Disposition

*The District Committee will either dismiss the complaint, impose discipline short of suspension or revocation, or certify it to the Disciplinary Board. (Rules 13-16(W)-(X).)*

d. Certification to Disciplinary Board

*Upon a finding of serious misconduct, the case is referred to the Disciplinary Board.*

E. Appeal of District Committee Decision

*A decision by the District Committee to impose discipline may be appealed to the Disciplinary Board. (Rule 13-17.)*

F. Action by Disciplinary Board

*After certification to the Disciplinary Board, the responding attorney will be served with the Certification and must respond. The respondent can choose a hearing before a panel of the Disciplinary Board or a three-judge panel. (Rule 13-18(A).)*

1. Agreed Discipline

*The Disciplinary Board may offer the opportunity to agree to discipline, and will set a deadline by which the responding attorney must agree.*

2. Hearing Before Three-Judge Panel or Panel of Disciplinary Board

- Format of hearing

*The format of the hearing is set out in Rules 13-18((D)-(N). It resembles, but is not identical to, a judicial hearing or trial.*

G. Appeal to Supreme Court

*An appeal of right lies to the Supreme Court of Virginia from any ruling of the Disciplinary Board. (Rule 13-26.)*

III. Actions Not Involving Misconduct

A. Impairment (Rule 13-23.)

B. Criminal Conviction

- What crimes?

*Lying, cheating, or stealing. (Rule 13-22.)*

C. Reciprocal Actions

*The Bar may impose reciprocal discipline on an attorney who is disciplined in another state. (Rule 13-24.)*

IV. Public Records of Discipline

*Complaints themselves and investigative files are confidential unless introduced into evidence. Files concerning impairment are confidential. No public record is made of private discipline, although the Bar may rely on records of such discipline in future proceedings. All proceedings before the District Committee, the Disciplinary Board, or any three-judge panel are public. (Rule 13-30.)*



V. Words of Wisdom from Bar Personnel

*“A written engagement letter is key.”*

*“Apologize for mistakes, and fix them.”*

*“Communicate with your client. If you have a difficult client you hate to communicate with, communicate even more.”*

*“Be reasonable, and don’t be offensive.”*

*“Keep good records.”*

*“Don’t ignore a complaint, don’t stonewall, and don’t lie.”*

*If you did it, just take your lumps and move on.”*

*“We are mostly concerned with stealing money, but the other big ones are conflicts of interest, mishandling of confidential information, and lying.”*

*“We have a zero tolerance for mishandling of money.”*

*“The District Committee is often pickier than bar counsel.”*

*“Use the ethics hotline.”*

*“The ethics hotline is largely irrelevant.”*

*“We are here to protect the public, but we don’t want to railroad anyone.”*

VI. Other

A. Ethics Hotline

- *Opinions differ on value and use in disciplinary proceedings.*

B. Committee on Lawyer Discipline (C.O.L.D.)

- *Not directly involved in the handling of complaints.*

VII. Selected Rules: Part 6, § IV, Paragraph 13

**13-10 Processing of Complaints by Bar Counsel**

A. Review.

Bar Counsel shall review all Complaints. If, following review of a Complaint, Bar Counsel determines that the conduct questioned or alleged does not present an issue under the Disciplinary Rules, Bar Counsel shall not open an Investigation, and the Complaint shall be dismissed.

B. No Dismissal by Complainant.

No Complaint or allegation of Misconduct shall be dismissed at any stage of the process solely upon a request by a Complainant to withdraw his or her Complaint.

C. Summary Resolution.

Bar Counsel shall decide whether a Complaint is appropriate for an informal or abbreviated Investigation. When a Complaint involves minor allegations of Misconduct susceptible to early resolution, Bar Counsel may assign the Complaint to a staff member, a District Committee member, or use any other means practicable to speedily investigate and resolve the allegations of Misconduct. If the Complaint is resolved through this process, Bar Counsel shall then dismiss the Complaint. Such dismissal shall not become a part of the Respondent's Disciplinary Record. If Bar Counsel chooses not to proceed under this subsection, or, having elected to proceed under this subsection, the Complaint is not resolved within 90 days from the date of filing, Bar Counsel shall proceed pursuant to the following subsections.

D. Preliminary Investigation.

A preliminary Investigation may consist of obtaining a response, in writing, from the Respondent to the Complaint and sharing the response, if any, with the Complainant, so the Complainant may have an opportunity to provide additional information.

E. Disposition by Bar Counsel after Preliminary Investigation.

Bar Counsel may conduct a preliminary Investigation of any Complaint to determine whether it should be referred to the District Committee. Bar Counsel shall not file a Complaint with a District Committee following a preliminary Investigation when, in Bar Counsel's judgment:

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;
3. There is no credible evidence to support any allegation of Misconduct by the Respondent; or

4. The evidence available could not reasonably be expected to support any allegation of Misconduct under a clear and convincing evidentiary standard.

F. Referral to District Committee.

Bar Counsel shall notify the District Committee Chair that a Complaint has been referred to a District Committee for investigation. Thereafter, the Complaint shall be investigated and a report thereof made to a Subcommittee.

G. Report to Subcommittee.

When submitting an Investigative Report to the Subcommittee, Bar Counsel or Committee Counsel may also send a recommendation as to the appropriate disposition of the Complaint.

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### **13-11 Limited Right to Discovery**

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

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

shall promptly notify the Attorney or Complainant who is the subject of the disclosure unless Bar Counsel decides that giving such notice would prejudice a disciplinary investigation. Notice shall be in writing and shall be deemed effective when mailed by first-class mail to the Bar's last known address of the subject Complainant or Attorney.

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### 13-15 Subcommittee Action

- A. Referral. Following receipt of the report of Investigation and Bar Counsel's recommendation, the Subcommittee may refer the matter to Bar Counsel for further Investigation.
- 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 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
    - e. 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.

- 2. Impose an Admonition without Terms. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record. Respondent, within ten days after the issuance of an Admonition without Terms, may request a hearing before the District Committee.

3. Certify to the Board. Certify the Complaint to the Board pursuant to this Paragraph or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935. Certification shall be based on a reasonable belief that the Respondent has engaged or is engaging in Misconduct that, if proved, would justify a Suspension or Revocation. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record.
  4. Approve an Agreed Disposition. Approve an Agreed Disposition imposing one of the following conditions or sanctions:
    - a. Admonition, with or without Terms; or
    - b. Private Reprimand, with or without Terms; or
    - c. Public Reprimand, with or without Terms.
  5. Set the Complaint for Hearing before the District Committee. In making this determination, the Subcommittee shall have access to Respondent's prior Disciplinary Record.
- C. Vote Required for Action. All actions taken by Subcommittees, except for approval of Agreed Dispositions, shall be by majority vote.
- D. Report of the Subcommittee. All decisions of the Subcommittee shall be reported to the District Committee in a timely fashion.
- 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.
- F. Procedure in All Terms Cases. If a Subcommittee imposes Terms, the Subcommittee shall specify the time period within which compliance with the Terms shall be completed. If Terms have been imposed against a Respondent, that Respondent shall deliver a certification of compliance with such Terms to Bar Counsel within the time period specified by the Subcommittee. If a Subcommittee issues an Admonition with Terms, a Private Reprimand with Terms, or a Public Reprimand with Terms based on an Agreed Disposition, the Agreed Disposition shall specify the alternative disposition to be imposed if the Terms are not complied with or if the Respondent does not certify compliance with Terms to Bar Counsel. If the Respondent does not comply with the Terms imposed or does not certify compliance with Terms to Bar Counsel within the

time period specified, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the District Committee at its next available hearing date as determined in the discretion of the District Committee Chair. The burden of proof shall be on the Respondent to show timely compliance and timely certification by clear and convincing evidence. If the District Committee determines that the Respondent failed to comply with the Terms or failed to certify compliance within the stated time period, the alternative disposition shall be imposed. Bar Counsel shall be responsible for monitoring compliance with Terms and reporting any noncompliance to the District Committee.

- G. Alternative Disposition for Public Reprimand with Terms. The alternative disposition for a Public Reprimand with Terms shall be a Certification For Sanction Determination unless the Respondent has entered into an Agreed Disposition for the imposition of an alternative disposition of a specific period of Suspension of License.

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### **13-16 District Committee Proceedings**

- A. Charge of Misconduct. If the Subcommittee determines that a hearing should be held before a District Committee, Bar Counsel shall, at least 42 days prior to the date fixed for the hearing, serve upon the Respondent by certified mail the Charge of Misconduct, a copy of the Investigative Report considered by the Subcommittee and any exculpatory materials in the possession of Bar Counsel.
- 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, 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 that the proceedings before the District Committee be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 nor more than 120 days from the date of the demand. Upon such demand and provision of available dates as specified above, further proceedings before the District Committee shall terminate, and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held.

- C. Failure of Respondent to Respond. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the District Committee.
- 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 provide to each other, with a copy to 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 serve on each other, with a copy to the Chair, lists setting forth the name of each witness the party intends to call.
- E. Subpoenae, Summonses and Counsel. The Respondent may be represented by counsel. The Respondent may request Bar Counsel or the Chair of the District Committee to issue summonses or subpoenae for witnesses and documents. Requests for summonses and subpoenae shall be granted, unless, in the judgment of the Chair of the District Committee, such request is unreasonable. Either Bar Counsel or Respondent may move the District Committee to quash such summonses or subpoenae.
- F. Continuances. Once a District Committee has scheduled a hearing, no continuance shall be granted unless in the judgment of the Chair the continuance is necessary to prevent injustice.
- G. Public Hearings. District Committee hearings, except deliberations, shall be open to the public.
- H. Public Docket. The Clerk's Office shall maintain a public docket of all matters set for hearing before a District Committee or certified to the Board. For every matter before a District Committee for which a Charge of Misconduct has been mailed by the Office of the Bar Counsel, the Clerk shall place it on the docket 21 days after the date of the Charge of Misconduct. 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.
- 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 preserved in the District Committee file on the matter.

- J. Opening Remarks by the Chair. After swearing the Court Reporter, who thereafter shall administer oaths or affirmations to witnesses, the Chair shall make opening remarks in the presence of the Respondent and the Complainant, if present. The Chair shall also inquire of the members present whether any member has any personal or financial interest that may affect, or be reasonably perceived to affect, his or her ability to be impartial. Any member answering in the affirmative shall be excused from participation in the matter.
- K. Motion to Exclude Witnesses. Witnesses other than the Complainant and the Respondent shall be excluded until excused from a public hearing on motion of Bar Counsel, the Respondent or the District Committee.
- L. Presentation of the Bar's Evidence. Bar Counsel or Committee Counsel shall present witnesses and other evidence supporting the Charge of Misconduct. Respondent shall be afforded the opportunity to cross-examine the Bar's witnesses and to challenge any evidence introduced on behalf of the Bar. District Committee members may also examine witnesses offered by Bar Counsel or Committee Counsel.
- M. Presentation of the Respondent's Evidence. Respondent shall be afforded the opportunity to present witnesses and other evidence on behalf of Respondent. Bar Counsel or Committee's Counsel shall be afforded the opportunity to cross-examine Respondent's witnesses and to challenge any evidence introduced on behalf of Respondent. District Committee members may also examine witnesses offered on behalf of Respondent.
- N. No Participation by Other Counsel. Neither counsel for the Complainant, if there be one, nor counsel for any witness, may examine or cross-examine any witness, introduce any other evidence, or present any argument.
- O. Depositions. Depositions may be taken only when witnesses are unavailable, in accordance with Rule 4:7(a)(4) of the Rules of this Court.
- P. Testimony by Videoconferencing and Telephone. Testimony by videoconferencing and/or telephonic means may be utilized, if in compliance with the Rules of this Court.
- Q. Admissibility of Evidence. The Chair shall rule on the admissibility of evidence, which rulings may be overruled by a majority of the remaining District Committee members participating in the hearing.
- R. Motion to Strike. At the conclusion of the Bar's evidence or at the conclusion of all of the evidence, the District Committee on its own motion, or the Respondent or the Respondent's counsel may move to strike the Bar's evidence as to one or more allegations of Misconduct contained in the Charge of Misconduct. A motion to strike an allegation of Misconduct shall be sustained if the Bar has failed to introduce sufficient evidence that would under any set of circumstances support



the conclusion that the Respondent engaged in the alleged Misconduct that is the subject of the motion to strike. If the Chair sustains the motion to strike an allegation of Misconduct, subject to being overruled by a majority of the remaining members of the Committee, that allegation of Misconduct shall be dismissed.

- S. Argument. The District Committee shall afford a reasonable opportunity for argument on behalf of the Respondent and Bar Counsel on the allegations of Misconduct.
- T. Deliberations. The District Committee members shall deliberate in private on the allegations of Misconduct. After due deliberation and consideration, the District Committee shall vote on the allegations of Misconduct.
- U. Change in District Committee Composition. When a hearing has been adjourned for any reason and any of the members initially constituting the quorum for the hearing cannot be present, the hearing of the matter may be completed by furnishing a transcript of the subsequent proceedings conducted in one or more member's absence to any such absent member or members; or substituting another District Committee member for any absent member or members and furnishing a transcript of the prior proceedings in the matter to such substituted member or members.
- V. Show Cause for Compliance with Terms. Any show cause proceeding involving the question of compliance with Terms shall be deemed a new hearing and not a continuation of the hearing that resulted in the imposition of Terms.
- W. Dismissal. After due deliberation and consideration, the District Committee may dismiss the Charge of Misconduct, or any allegation thereof, as not warranting further action when in the judgment of the District Committee:
  - 1. As a matter of law the conduct questioned or alleged does not constitute Misconduct;
  - 2. The evidence presented shows that the Respondent did not engage in the Misconduct alleged, or there is no credible evidence to support any allegation of Misconduct by Respondent, or the evidence does not reasonably support any allegation of Misconduct under a clear and convincing evidentiary standard;
  - 3. The action alleged to be Misconduct is protected by superseding law;  
or
  - 4. The District Committee is unable to reach a decision by a majority vote of those constituting the hearing panel, the Charge of Misconduct, or any allegation thereof, shall be dismissed on the basis that the evidence does not reasonably support the Charge of Misconduct, or

one or more allegations thereof, under a clear and convincing evidentiary standard.

- 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 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. Conclude that an Admonition, with or without Terms, should be imposed;
  4. Issue a Public Reprimand, with or without Terms; or
  5. Certify the Charge of Misconduct to the Board or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935.
- Y. District Committee Determinations. 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:
1. Brief findings of the facts established by the evidence;
  2. The nature of the Misconduct shown by the facts so established, including the Disciplinary Rules violated by the Respondent; and
  3. The sanctions imposed, if any, by the District Committee.
- 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; 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.
- BB. Enforcement of Terms. In all cases where Terms are included in the disposition, the District Committee shall specify the time period within which compliance shall be completed and, if required, the time period within which the Respondent shall deliver a written certification of compliance to Bar Counsel. The District Committee shall specify the alternative disposition if the Terms are not complied with or, if required, compliance is not certified to Bar Counsel. Bar Counsel shall be responsible for monitoring compliance and reporting any noncompliance to the District Committee. Whenever it appears that the Respondent has not complied with the Terms imposed, including written certification of compliance if required, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the District Committee at its next available hearing date as determined in the discretion of the District Committee Chair. The burden of proof shall be on the Respondent to show compliance by clear and convincing evidence. If the Respondent has failed to comply with the Terms, including written certification of compliance if required, within the stated time period as determined by the District Committee, the alternative disposition shall be imposed. Any show cause proceeding involving the question of compliance shall be deemed a new matter and not a continuation of the matter that resulted in the imposition of Terms.
- 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.
- DD. Reconsideration of Action by the District Committee.
1. A Charge of Misconduct dismissed by a District Committee may be reconsidered only upon:

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

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**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.
  2. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall terminate, and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day time frame shall not constitute a deadline for the hearing to be held.
- B. No Filing by Respondent. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

C. Notice of Hearing. The Board shall set a date, time, and place for the hearing, and shall serve notice of such hearing upon the Respondent at least 21 days prior to the date fixed for the hearing.

D. Expedited Hearings.

1. If Bar Counsel or a District Committee Chair has reasonable cause to believe that an Attorney is engaging in Misconduct which is likely to result in injury to, or loss of property of, one or more of the Attorney's clients or any other person, and that the continued practice of law by the Attorney poses an imminent danger to the public, Bar Counsel or the District Committee Chair may petition the Board to issue an order requiring the Attorney to appear before the Board for a hearing in accordance with the procedures set forth below.
2. The petition shall be under oath and shall set forth the nature of the alleged Misconduct, the factual basis for the belief that immediate action by the Board is reasonable and necessary and any other facts which may be relevant to the Board's consideration of the matter, including any prior Disciplinary Record of the Attorney.
3. Upon receipt of the petition, the Chair or Vice-Chair of the Board shall issue an order requiring the Respondent to appear before the Board not less than 14 nor more than 30 days from the date of the order for a hearing to determine whether the Misconduct has occurred and the imposition of sanctions is appropriate. The Board's order shall be served on the Respondent no fewer than ten days prior to the date set for hearing.
4. If the Respondent, at the time the petition is received by the Board, is the subject of an order then in effect by a Circuit Court pursuant to Va. Code § 54.1-3936 appointing a receiver for his accounts, the Board shall issue a further order summarily suspending the License of the Respondent until the Board enters its order following the expedited hearing.
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 that proceedings before the Board be terminated and that further proceedings be conducted pursuant to Va. Code § 54.1-3935; and simultaneously provide available dates for a hearing not less than 30 days nor more than 120 days from the date of the Board order. Upon such demand and provision of available dates as specified above, further proceedings before the Board shall be terminated and Bar Counsel shall file the complaint required by Va. Code § 54.1-3935. The hearing shall be scheduled as soon as practicable. However, the 30 to 120 day

time frame shall not constitute a deadline for the hearing to be held. If any order of summary Suspension has been entered, such Suspension shall remain in effect until the court designated under Va. Code § 54.1-3935 enters a final order disposing of the issue before it. If the Respondent fails to file an answer, or an answer and a demand, and provide available dates, as specified above, the Respondent shall be deemed to have consented to the jurisdiction of the Board.

- 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.
- G. Preliminary Explanation. The Chair shall state in the presence of the Respondent and the Complainant, if present, a summary of the alleged Misconduct, the nature and purpose of the hearing, the procedures to be followed during the hearing, and the dispositions available to the Board following the hearing. The Chair shall also inquire of the members present whether any member has any personal or financial interest that may affect, or be reasonably perceived to affect, his or her ability to be impartial. Any member answering in the affirmative shall be excused from participation in the matter.
- H. Attendance at Hearing. Witnesses other than the Complainant and the Respondent shall be excluded until excused from a public hearing on motion of Bar Counsel, the Respondent or the Board.
- I. Order of Hearing.
1. Brief opening statements by Bar Counsel and by the Respondent or the Respondent's counsel shall be permitted but are not required.

2. Bar Counsel shall present witnesses and other evidence supporting the Certification. The Respondent shall be afforded the opportunity to cross-examine the Bar's witnesses and to challenge any evidence introduced on behalf of the Bar. Board members may also examine witnesses offered by Bar Counsel.
  3. Respondent shall be afforded the opportunity to present witnesses and other evidence. Bar Counsel shall be afforded the opportunity to cross-examine Respondent's witnesses and to challenge any evidence introduced on behalf of Respondent. Board members may also examine witnesses offered on behalf of a Respondent.
  4. Bar Counsel may rebut the Respondent's evidence.
  5. Bar Counsel may make the initial closing argument.
  6. The Respondent or the Respondent's counsel may then make a closing argument.
  7. Bar Counsel may then make a rebuttal closing argument.
- J. Motion to Strike. At the conclusion of the Bar's evidence or at the conclusion of all the evidence, the Board on its own motion, or the Respondent or the Respondent's counsel may move to strike the Bar's evidence as to one or more allegations of Misconduct contained in the Certification. A motion to strike an allegation of Misconduct shall be sustained if the Bar has failed to introduce sufficient evidence that would under any set of circumstances support the conclusion that the Respondent engaged in the alleged Misconduct that is the subject of the motion to strike. If the Chair sustains the motion to strike an allegation of Misconduct, subject to being overruled by a majority of the remaining members of the Board, that allegation of Misconduct shall be dismissed from the Certification.
- 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 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.
- L. Dismissal for Failure of the Evidence. If the Board concludes that the evidence fails to show under a clear and convincing evidentiary standard that the Respondent engaged in the Misconduct, the Board shall dismiss any allegation of Misconduct not so proven.
- M. Disposition Upon a Finding of Misconduct. If the Board concludes that there has been presented clear and convincing evidence that the Respondent has engaged in Misconduct, after considering evidence and arguments in aggravation and

mitigation, the Board shall impose one of the following sanctions and state the effective date of the sanction imposed:

1. Admonition, with or without Terms;
  2. Public Reprimand, with or without Terms;
  3. Suspension of the License of the Respondent;
    - a. For a stated period not exceeding five years; provided, however, if the Suspension is for more than one year, the Respondent must apply for Reinstatement as provided in this Paragraph; or
    - b. For a stated period of one year or less, with or without terms; or
  4. Revocation of the Respondent's License.
- N. Dismissal for Failure to Reach a Majority Decision. If the Board is unable to reach a decision by a majority vote of those constituting the hearing panel, the Certification, or any allegation thereof, shall be dismissed on the basis that the evidence does not reasonably support the Certification, or one or more allegations thereof, under a clear and convincing evidentiary standard.
- O. Enforcement of Terms. In all cases where Terms are included in the disposition, the Board shall specify the time period within which compliance shall be completed and, if required, the time period within which the Respondent shall deliver a written certification of compliance to Bar Counsel. The Board shall specify the alternative disposition if the Terms are not complied with or, if required, compliance is not certified to Bar Counsel. Bar Counsel shall be responsible for monitoring compliance and reporting any noncompliance to the Board. Whenever it appears that the Respondent has not complied with the Terms imposed, including written certification of compliance if required, Bar Counsel shall serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding shall be set for hearing before the Board at its next available hearing date. The burden of proof shall be on the Respondent to show compliance by clear and convincing evidence. If the Respondent has failed to comply with the Terms, including written certification of compliance if required, within the stated time period, as determined by the Board, the alternative disposition shall be imposed. Any show cause proceeding involving the question of compliance shall be deemed a new matter and not a continuation of the matter that resulted in the imposition of Terms.
- P. Orders, Findings and Opinions. Upon disposition of a matter, the Board shall issue the Summary Order. Thereafter, the Board shall issue the Memorandum Order. A Board member shall prepare the Summary Order and Memorandum Order for the signature of the Chair or the Chair's designee. Dissenting opinions may be filed.
- Q. Change in Composition of Board Hearing Panel. Whenever a hearing has been adjourned for any reason and one or more of the members initially constituting the



quorum for the hearing are unable to be present, the hearing of the matter may be completed by furnishing a transcript of the subsequent proceedings conducted in one or more member's absence to such absent member, or substituting another Board member for any absent member and furnishing a transcript of the prior proceedings in the matter to such substituted member(s).

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:

1. Illness, injury or accident which prevented the Respondent or a witness from attending the hearing and which could not have been made known to the Board within a reasonable time prior to the hearing; or
2. Evidence which was not known to the Respondent at the time of the hearing and could not have been discovered prior to, or produced at, the hearing in the exercise of due diligence and would have clearly produced a different result if the evidence had been introduced at the hearing.
3. If such a motion is timely filed, the Clerk of the Disciplinary System shall promptly forward copies to each member of the hearing panel. The panel may deny the motion without response from Bar Counsel. No relief shall be granted without allowing Bar Counsel an opportunity to oppose the motion in writing. If no relief is granted, the Board shall enter its order disposing of the case.

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### **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 using the procedures outlined in Rule 5:21(b) of the Rules of the Supreme Court of Virginia. 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. If a Respondent appeals to the Supreme Court, then the Bar may file assignments of cross-error pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia.
- B. Determination. This Court shall hear the case and make such determination in connection therewith as it shall deem right and proper.

- C. Office of the Attorney General. In all appeals to this Court, the Office of the Attorney General, or the Bar Counsel, if so requested by the Attorney General, shall represent the interests of the Commonwealth and its citizens as appellees.

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