VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

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

(VSB Petition ID: 23-5)

PETITION OF THE VIRGINIA STATE BAR

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PETITION

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

COMES NOW the Virginia State Bar ("VSB"), by its president and executive director, and requests review and approval of proposed amendments to Part 6, § IV, Paragraph 13 of the Rules of Supreme Court of Virginia governing the Procedure for Disciplining, Suspending, and Disbarring Attorneys ("Paragraph 13"), as set forth below. The proposed amendments were approved by the Council of the VSB ("Council") on February 25, 2023, by a vote of 59-3 with one abstention (Appendix, p. 200).

I. Overview of the Issues

In an August 16, 2018 Memorandum to the Boyd-Graves Conference, the Committee on Using "Shall" in Legislative Drafting concluded that "*shall* is susceptible to significant ambiguity and the better practice in legislative drafting would be to eliminate *shall* altogether and to use the more precise term intended – such as *must, may, will, should, is,* or *is entitled to*." (Appendix, p. 1).

In November 2020, this Court amended the Rules of Supreme Court of Virginia, Parts 1-5A and 7-11, to replace "shall."

The term "shall" is in Paragraph 13 482 times. On September 28, 2022, the Standing Committee on Lawyer Discipline ("COLD") approved amendments that eliminate the word "shall" from Paragraph 13. (Appendix, pp. 62-184).

The following proposed amendments either are or could be perceived as substantive.

Paragraph 13-23.C: Investigations of Impairment

Paragraph 13-23 governs Board Proceedings Upon Impairment. The proposed amendments substantively change the Investigation of Impairments at Paragraph 13-23.C:

> C. Investigation. Upon receipt of ~~notice or evidence~~ reliable information that raises a substantial question as to whether an Attorney has ~~or may have~~ an Impairment, Bar Counsel ~~shall~~ must cause an Investigation to be made to determine whether there is reason to believe that the Respondent has the Impairment.

(Appendix, p. 107). The addition of "reliable information" and "substantial question" to Paragraph 13-23.C, coupled with the replacement of "shall" with "must," strikes a balance between (1) requiring Bar Counsel to investigate incredible or remote allegations of Impairment and (2) ensuring that potential Impairments are appropriately investigated. The terms "reliable information" and "substantial question" are also the standard for reporting misconduct in Virginia

Rule of Professional Conduct ("RPC") 8.3(a): "A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority."

Paragraphs 13-16.L and 13-18.I.2: Presentation of the Bar's Evidence in District Committee and Disciplinary Board Hearings on Disciplinary Rule Violations

Paragraphs 13-16 and 13-18 are parallel provisions governing proceedings alleging violation(s) of a Disciplinary Rule before the District Committee (13-16) and Virginia State Bar Disciplinary Board ("Board") (13-18). Paragraphs 13-16.L and 13-18.I.2 are parallel provisions regarding the bar's presentation of evidence.

The amendment to Paragraph 13-16.L Presentation of the Bar's Evidence is as follows:

> Bar Counsel or Committee Counsel ~~shall~~ may present witnesses and other evidence supporting the Charge of Misconduct. Respondent ~~shall~~ must 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.

(Appendix, p. 91).

The amendment to Paragraph 13-18.I.2 Order of Hearing is as follows:

> Bar Counsel ~~shall~~ may present witnesses and other evidence supporting the Certification. The Respondent ~~shall~~ must 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.

(Appendix, p. 99).

If the tribunal determines that Bar Counsel has not presented sufficient evidence to support a charge in the Charge of Misconduct or Certification, the tribunal must sustain a motion to strike. *See* Para. 13-16.R; 13-18.J.

Paragraph 13-18.G: Preliminary Explanation in Board Hearings of Disciplinary Rule Violations

Paragraph 13-18.G currently states that the Chair of the Disciplinary Board "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." (Appendix, p. 99). Current practice is for the Chair to ask whether the parties are familiar with the procedures. If both parties state that they are familiar with the procedures, the Chair does not explain them in detail. In order to ensure that the procedures are described where necessary while still allowing the parties to waive the description, the proposed amendment states as follows:

> G. Preliminary Explanation. Absent waiver by the parties, ~~T~~the Chair ~~shall~~ must 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~~ must 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~~ must be excused from participation in the matter.

(Appendix, p. 99).

There are eight replacements of "shall" with "should." In all instances "should" rather than "must" conveys the meaning intended by the previous use of "shall."

- Paragraph 13-2. Authority of the Courts: Nothing in this Paragraph ~~shall~~ should be interpreted so as to eliminate, restrict or impair the jurisdiction of the courts of this Commonwealth to deal with the disciplining of Attorneys as provided by law. (Appendix, p. 69).

- Paragraph 13-4.A. Creation of District Committees: In creating the District Committee areas, Council ~~shall~~ should give due consideration to Attorney population and the community of interest among different judicial circuits within a District Committee area. (Appendix, p. 69).

- Paragraph 13-4.D. Term of Office for District Committee Members: Council ~~shall~~ should appoint members of each District Committee for such terms of service as will allow for the retirement from the District Committee, or completion of the existing terms, of one-third of the District Committee membership at the end of each fiscal year. (Appendix, p. 70).

- Paragraph 13-4.E. Qualification of District Committee Members: Before nominating any individual for membership on a District Committee, the Council members making such recommendation ~~shall~~ should first determine that the nominee is willing to serve on the District Committee and will conscientiously discharge the responsibility as a member of the District Committee. (Appendix, p. 70).

- Paragraph 13-6.A. Appointment of Disciplinary Board Members: Before nominating any individual for membership on the Board, the Bar's nominating committee ~~shall~~ should first determine that the nominee is willing to serve on the Board and will conscientiously discharge the responsibilities as a member of the Board. (Appendix, p. 71).

- Paragraph 13-7.E. Limitation on Private Discipline: Any Respondent who has received two determinations of Private Discipline within the ten-year period immediately preceding the Bar's receipt of the oldest Complaint that the Subcommittee is considering, ~~shall~~ should receive public discipline for any violation of the Disciplinary Rules, unless there are sufficient facts and circumstances to rebut such presumption. (Appendix, pp. 76-77).

- Paragraph 13-7.G. Preferred Venue: In determining to which District Committee a Complaint should be referred, the Clerk ~~shall~~ should consider the volume of Complaints pending before the District Committee and the inconvenience imposed upon the Respondent and the witnesses by the location of the District Committee. (Appendix, p. 77).

- Paragraph 13-12.G. English Required: All communication with the Bar, whether written or oral, ~~shall~~ should be in English. (Appendix, p. 84).

II. Publication and Comment

During its September 28, 2022 meeting, COLD unanimously approved proposed amendments eliminating "shall" from Paragraph 13 and posting the amendments for public comment. On September 29, 2022, the proposed amendments were posted for public comment on the VSB website on the "Actions on Rule Changes and Legal Ethics Opinions" and "News and Information" pages (Appendix, pp. 185-192). Comments were due by December 1, 2022. Notice of the proposed rule was also published in the VSB's October E-News on October 3, 2022 (Appendix, p. 193).

Two comments were received. Monroe Windsor stated that replacement of "shall" is unnecessary (Appendix, p. 198). Danielle Hall-McIvor asked the bar to eliminate "shall" (Appendix, p. 199). During its January 25, 2023 meeting, COLD

reviewed the comments and unanimously approved the amendments for presentation to Council. On February 25, 2023, by a vote of 59-3 with one abstention, Council approved the proposed amendments for submission to this Court.

III. Proposed Amendments

The proposed amendments are set forth in the attached Appendix, pp. 62 to 184.

IV. Conclusion

This Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe procedures for disciplining, suspending, and disbarring attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated Va. S. Ct. R., Pt. 6, § IV. Paragraph 13. COLD proposed, vetted, and approved the elimination of "shall" from Paragraph 13 in compliance with COLD's policies and procedures. Council likewise approved the elimination of "shall" from Paragraph 13 consistent with its procedures, by a vote of 59-3 with one abstention.

THEREFORE, the VSB requests that the Court approve the proposed elimination of "shall" from Paragraph 13 for the reasons stated herein.

Respectfully submitted,
VIRGINIA STATE BAR

By _____
Stephanie E. Grana, President

By _____
Cameron M. Rountree, Executive Director

Dated this 10th day of March, 2023.

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APPENDIX TO PETITION OF THE VIRGINIA STATE BAR

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M E M O R A N D U M

To: John A. C. Keith
Chairman, Boyd-Graves Conference

From: Committee on Using "Shall" in Legislative Drafting

Date: August 16, 2018

EXECUTIVE SUMMARY

This Committee was asked to study the use of the word "shall" in legislative drafting and to make appropriate recommendations.

We have unanimously concluded that *shall* is susceptible to significant ambiguity and that the better practice in legislative drafting would be to eliminate *shall* altogether and to use the more precise term intended—such as *must*, *may*, *will*, *should*, *is*, or *is entitled to*. This is the so-called "ABC Rule," named for the Australian, British and Canadian scholars who strongly advocated it in the late 1980s. The ABC Rule has been recommended by the vast majority of modern scholars of legislative drafting and was adopted in the mid-1990s by the federal Standing Committee on Rules of Practice and Procedure. The alternative approach is the so-called "American Rule," followed by most but not all States. Under the American Rule, the term *shall* is used only to indicate a mandatory duty or obligation. We are informed that the Division of Legislative Services generally tries to follow that rule as well. But the Committee agrees with the scholars and the federal Standing Committee on Rules of Practice and Procedure that, notwithstanding their best intentions, lawyers and legislative drafters have not used *shall* with sufficient consistency to warrant continued confidence in that approach. Our conclusion is confirmed by selected examples drawn from the Code of Virginia and from the Rules of Supreme Court of Virginia.

The Committee recognizes, however, that *shall* is used so frequently throughout the Virginia Code and in the Rules of Supreme Court of Virginia that it would be impractical to propose a sweeping statutory revision that eliminates the misused *shall*s or substitutes them with the better, more accurate replacement. **Accordingly, the Committee recommends that, if approved by the full Conference, the Chair (1) publicize the Conference's recommendation to the bench and bar and (2) designate a working group to coordinate with the Division of Legislative Services, the Code Commission, and the Virginia Rules Advisory Committee to formulate a long-term plan to revise the Code and Rules to implement the ABC Rule**.

DISCUSSION

A. The Problem with *Shall.*

The Committee's literature survey is attached as Exhibit 1.

Legal commentators and scholars have long recognized that the word *shall* is inherently ambiguous. It could mean something mandatory and obligatory (*must*, *is required to*, *is entitled to*), or something permissive (*may*, *should*). It could mean a statement of future action (*will*). Or it could mean simply the present tense (*is*).

The overwhelming majority of commentators and legal scholars eschew *shall* in legislative drafting. The word has been described as "the biggest troublemaker," "slippery," and the creator of "booby traps";[1] "the most misused word in the legal vocabulary";[2] and "flimsy."[3] Bryan Garner has provided a helpful synopsis of the headaches that *shall*'s ambiguity has created for courts:

> In just about every jurisdiction, courts have held that *shall* can mean not just *must* and *may*, but also *will* and *is*. Even in the U.S. Supreme Court, the holdings on *shall* are major cause for concern. The Court has:
>
> • held that a legislative amendment from *shall* to *may* had no substantive effect;
>
> • held that if the government bears the duty, "the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest";
>
> • held that *shall* means "must" for existing rights, but that it need not be construed as mandatory when a new right is created;
>
> • treated *shall* as a "precatory suggestion";
>
> • acknowledged that "[t]hough 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may'";
>
> • held that, when a statute stated that the Secretary of Labor "shall" act within a certain time and the Secretary didn't do so, the "mere use of the word 'shall' was not enough to remove the Secretary's power to act."[4]

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[1] Richard C. Wydick, *Plain English for Lawyers* 63-64 (5th ed. 2005).

[2] Joseph Kimble, *The Many Misuses of Shall*, 3 Scribes J. Leg. Writing 61, 70 (1992).

[3] *Id*.

[4] Bryan A. Garner, *Legal Writing in Plain English* 125-26 (2d ed. 2013) (footnotes and citations omitted).

Garner convincingly adds that "more than 100 pages of reported cases in *Words and Phrases*—a useful encyclopedia of litigated terms—show that the word *shall* is a mess. As Joseph Kimble, a noted drafting expert, puts it: 'Drafters use it mindlessly. Courts read it any which way.'"[5]

B. The ABC and American Rules.

Two schools of thought have different recommendations for dealing with the inherent ambiguity of *shall*. The ABC rule (named after certain Australian, British and Canadian drafters who strongly advocated it in the late 1980s) "holds that legal drafters cannot be trusted to use the word *shall* under any circumstances. Under this view, lawyers are not educable on the subject of *shall*, so the only solution is complete abstinence. As a result, the drafter must always choose a more appropriate word: *must*, *may*, *will*, *is entitled to*, or some other expression."[6]

By contrast, the American Rule holds out hope that lawyers and legislative drafters can get it right. It requires *shall* to be used only to connote a mandatory duty or obligation.[7]

The Committee's survey of jurisdictions is attached as Exhibit 2. Consistent with its namesake, the American Rule appears to be recommended by the vast majority of legislative drafting authorities in sister States that have taken an official position. Minnesota, by contrast, admonishes drafters to "Limit Your Use of 'Shall.' The revisor's office recommends using *must*, not *shall*, to impose duties."[8] The Illinois manual enjoins drafters to use *must* to denote a mandatory obligation or duty and *will* to convey a future obligation—not *shall*.[9]

The ABC Rule has gained more traction at the federal level. In the mid-1990s, the Standing Committee on Rules of Practice and Procedure (which reviews and approves the proposals of the five advisory committees on federal rules) "decided to abolish *shall*."[10] As the various sets of rules have been revised, the 500 *shall*s in the previous rules were weeded out. In those revisions, 375 *shall*s were converted to *must*s (75%), 50 were changed to present-tense verbs, 2 were changed to *will*, 14 were changed to *should*, 25 were changed to variations using *may*, and 35 were eliminated altogether by simply "tightening" the text.[11] One *shall* was left in

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[5] *Id*. at 106 (footnotes and citations omitted).

[6] Bryan A. Garner, *Garner's Dictionary of Legal Usage* 953 (3d ed. 2011).

[7] *Id*. at 952.

[8] Minnesota Rule Drafting Manual with Styles and Forms (2013), https://www.revisor.mn.gov/office/2013-Revisor-Manual.pdf.

[9] The Legislative Reference Bureau, Illinois Bill Drafting Manual, 226 (December 2012), http://www.ilga.gov/commission/lrb/manual.pdf.

[10] Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 2008-09 Scribes Journal of Legal Writing 25, 79 (2008), http://www.uscourts.gov/sites/default/files/lessons_in_drafting.pdf.

[11] *Id*. at 79-84.

the summary judgment provisions of Rule 56 of the Federal Rules of Civil Procedure. The drafters could not agree whether, when the movant shows there are no material facts in dispute and is entitled to judgment as a matter of law, the court "should" or "must" enter summary judgment; so they decided to keep *shall* and live with the ambiguity.[12]

As the style consultant to the Standing Committee reiterated in 2005:

> Banish *shall*. The restyled civil rules, like the restyled appellate and criminal rules, use *must* instead of *shall*. *Shall* is notorious for its misuse and slipperiness in legal documents. No surprise, then, that the Committee changed *shall* to *may* in several instances, to *should* in several other instances, and to the simple present tense when the rule involves no obligation or permission (*There is one form of action; this order controls the course of the action*).[13]

C. Examples from the Virginia Code and Virginia Rules.

There are many examples of the ambiguous use of *shall* in the Virginia Code and in the Rules of Supreme Court of Virginia. A particularly good example is Rule 1:8, providing for the liberal amendment of pleadings, where *shall* is used interchangeably in the same paragraph to mean *must*, *may*, *will*, and *should*:

> Rule 1:8 Amendments [with suggested replacement terms for *shall*]
>
> No amendments ~~shall~~ may be made to any pleading after it is filed save by leave of court. Leave to amend ~~shall~~ should be liberally granted in furtherance of the ends of justice. Unless otherwise provided by order of the court in a particular case, any written motion for leave to file an amended pleading ~~shall~~ must be accompanied by a properly executed proposed amended pleading, in a form suitable for filing. If the motion is granted, the amended pleading accompanying the motion ~~shall~~ will be deemed filed in the clerk's office as of the date of the court's order permitting such amendment. If the motion is granted in part, the court may provide for filing an amended pleading as the court may deem reasonable and proper. Where leave to amend is granted other than upon a

[12] *Id*. at 84-85.

[13] Memorandum from Joseph Kimble, Style Consultant, to All Readers, Guiding Principles for Restyling the [Federal] Civil Rules xviii (Feb. 21, 2005), http://www.uscourts.gov/sites/default/files/guiding_principles.pdf. Various rules committees have noted the adoption of that recommendation in subsequent rule revisions. *See* Fed. R. Civ. P. 1 advisory committee's note to 2007 amendment, https://www.law.cornell.edu/rules/frcp/rule_1; Fed. R. Evid. 101 advisory committee's note to 2011 amendment, https://www.law.cornell.edu/rules/fre/rule_101.

> written motion, whether on demurrer or oral motion or otherwise, the amended pleading ~~shall~~ must be filed within 21 days after leave to amend is granted or in such time as the court may prescribe. In granting leave to amend, the court may make such provision for notice thereof and opportunity to make response as the court may deem reasonable and proper.

Committee members found similar examples throughout the Virginia Code. Here's one near and dear to the hearts of Virginia lawyers:

> § 8.01-271.1. Signing of pleadings, motions, and other papers; oral motions; sanctions [with suggested replacement terms for *shall*].
>
> Except as otherwise provided in §§ 16.1-260 and 63.2-1901, every pleading, written motion, and other paper of a party represented by an attorney ~~shall~~ must be signed by at least one attorney of record in his individual name, and the attorney's address ~~shall~~ must be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney, including a person confined in a state or local correctional facility proceeding pro se, ~~shall~~ must sign his pleading, motion, or other paper and state his address. A minor who is not represented by an attorney must sign his pleading, motion, or other paper by his next friend. Either or both parents of such minor may sign on behalf of such minor as his next friend. However, a parent may not sign on behalf of a minor if such signature is otherwise prohibited by subdivision 6 of § 64.2-716.
>
> . . . If a pleading, written motion, or other paper is not signed, it ~~shall~~ will be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.
>
> . . .
>
> If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, ~~shall~~ [may or must?] impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

In the last quoted paragraph, did the General Assembly intend that the court *must* impose sanctions on the lawyer or party who violates the rule, or that it *may* impose sanctions? The corresponding federal rule says that "the court *may* impose an appropriate sanction." Fed. R. Civ. P. 11(c)(1) (emphasis added). That specificity eliminates the interpretative confusion.

The Code is riddled with countless other examples.

The Supreme Court of Virginia recently confronted an ambiguous *shall* in *Rickman v. Commonwealth*, 294 Va. 531, 808 S.E.2d 395 (2017). The convicted sex offender there claimed that he could not be civilly committed as a sexually violent predator because the circuit court failed to schedule his initial probable-cause hearing within 90 days of his release date. Code § 37.2-906(A)(ii) provides that "the circuit court *shall* . . . schedule a hearing within 90 days to determine whether probable cause exists to believe that the respondent is a sexually violent predator." (Emphasis added). The Court, in an opinion by Justice Kelsey, held that the term *shall* should not be read to mean that the consequence of failing to comply with the 90-day provision was that the proceeding had to be dismissed. The Court distinguished between "mandatory" and "directory" statutes. Using *shall* in a mandatory statute "carries with it a specific, exclusive remedy—sometimes one that is wholly unconcerned with the presence or absence of prejudice or any resulting harm." *Id*. at 537, 808 S.E.2d at 398. By contrast, "a 'shall' command in a directory statute carries no specific, exclusive remedy. Instead, it empowers the court to exercise discretion in fashioning a tailored remedy, if one is called for at all." *Id*. Finding the Sexually Violent Predator Act to be directory, rather than mandatory, the Supreme Court ruled that the circuit court had discretion not to dismiss the civil commitment proceeding for failure to strictly comply with the 90-day requirement. *Id*. at 539-40, 808 S.E.2d at 399-400.

More careful legislative drafting, such as replacing *shall* with *should* in § 37.2-906(A)(ii), could have avoided the interpretative controversy in *Rickman*.

D. The Committee's Recommendation.

The Committee concluded unanimously that the ABC Rule is far superior to the American Rule. Whether expressed as "[a]void *shall*,"[14] "[b]anish *shall*,"[15] or "abandon *shall*,"[16] the advice is spot-on. It is no coincidence that legal scholars and commentators overwhelmingly favor it and that the federal Standing Committee on Rules of Practice and Procedure has embraced it. Eliminating *shall* as an option forces the drafter to use the more accurate term, such as *must, may, will, should, is*, or *is entitled to*, or to tighten the text to avoid using *shall* altogether. We agree that if lawyers "cannot be trusted to use the word *shall*,"[17] it is not reasonable to expect legislative drafters to use *shall* exclusively in its mandatory sense, particularly in the hurly-burly of a short legislative session involving thousands of bills.

The Committee recognizes, however, that rewriting the Code and the Rules to apply the ABC Rule poses a Herculean task. The more prudent alternative is to apply the rule prospectively as new rules and legislation are drafted and existing Code provisions revised.

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[14] Bryan A. Garner, *The Redbook: A Manual of Legal Style* 543 (3d ed. 2013).

[15] Kimble, *supra* note 13.

[16] Michele M. Asprey, *Shall Must Go*, 3 Scribes J. Leg. Writing 79 (1992).

[17] *Garner's Dictionary of Legal Usage*, *supra* note 6, at 953.

Accordingly, we recommend that the Conference request the Chairman to publicize the recommendation to the bench and bar and designate a working group to coordinate with the Division of Legislative Services, the Code Commission, and the Virginia Rules Advisory Committee to formulate a long-term plan to revise the Code and the Rules of Court to implement the ABC Rule.

We believe that following the ABC Rule will lead to greater clarity, improve the readability of laws, and reduce litigation over ambiguous text.

Respectfully submitted,

Stuart A. Raphael, Chairman
W. Coleman Allen, Jr., Esq.
Victor O. Cardwell, Esq.
James J. Duane, Esq.
Hon. Lisa B. Kemler
Melissa G. Ray, Esq.
Benjamin Spencer, Esq.
John Tracy Walker, IV, Esq.

Exhibit 1—Survey of Secondary Sources: Use of "Shall" in Legislative Drafting

No.	Citation	Text	Am	ABC	
1.	Garner, Bryan A., *The Redbook: a Manual of Legal Style* 542-43 (3d ed. 2013)	*Mandatory vs. permissive*. Select words of authority that plainly express whether something is mandatory or permissive. For duties and requirements, preferably use *must* (*is required to*) or *must not* (*is required not to*). To indicate a choice, use *may* (*has discretion to*, *is permitted to*, *has a right to*). To express a right, use *is entitled to* or *has a right to*. For a directory, precatory, or aspirational provision, use *should*. And for a future contingency, use *will*. Avoid *shall*. Even though it is traditional, its multihued meanings cause many interpretive problems. For the rationale explaining these words of authority and examples of their uses and misuses in drafting, see *Garner's Dictionary of Legal Usage* 952-55 (3d ed. 2011); Garner, *Legal Writing in Plain English* 125-26 (2d ed. 2013).		1	
2.	Garner, Bryan A., *Legal Writing in Plain English* 125-26 (2d ed. 2013)	**§ 35. Delete every shall.** *Shall* isn't plain English. Chances are it's not a part of your everyday vocabulary, except in lighthearted questions that begin, "Shall we ... ?" But legal drafters use *shall* incessantly. They learn it by osmosis in law school, and law practice fortifies the habit. Ask a drafter what *shall* means, and you'll hear that it's a mandatory word-opposed to the permissive may. Although this isn't a lie, it's a gross inaccuracy. And it's not a lie only because the vast majority of drafters don't know how shifty the word is. Often, it's true, *shall* is mandatory: Each corporate officer in attendance *shall* sign the official register at the annual meeting. Yet the word frequently bears other meanings-sometimes even masquerading as a synonym of *may*. Remember that *shall* is supposed to mean "has a duty to," but it almost never does mean this when it's preceded by a negative word such as nothing or neither: • Nothing in this Agreement *shall* be construed to make the Owners partners or joint venturers. • Neither the Purchaser nor any Employer *shall* discriminate against any employee or applicant for employment on the basis of race, religion, color, sex, national origin, ancestry; age, handicap or disability; sexual orientation, military-discharge status, marital status, or parental status. · • Neither party *shall* assign this Agreement, directly or indirectly, without the prior written consent of the other party. Does that last example really mean that neither party has a duty to assign the agreement? No. It means that neither party is allowed to (that is, may) assign it.		1	

Exhibit 1—Survey of Secondary Sources: Use of "Shall" in Legislative Drafting

No.	Citation	Text	Am	ABC	
		In just about every jurisdiction, courts have held that *shall* can mean not just *must*[1] and *may*,[2] but also *will*[3] and *is*.[4] Even in the U.S. Supreme Court, the holdings on *shall* are major cause for concern. The Court has: • held that a legislative amendment from *shall* to *may* had no substantive effect;[5] • held that if the government bears the duty, "the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest" ;[6] • held that *shall* means "must" for existing rights, but that it need not be construed as mandatory when a new right is created;[7] • treated *shall* as a "precatory suggestion";[8] • acknowledged that "[t]hough 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may'";[9] • held that, when a statute stated that the Secretary of Labor "shall" act within a certain time and the Secretary didn't do so, the "mere use of the word 'shall' was not enough to remove the Secretary's power to act." [10] These examples, which could be multiplied, show only a few of the travails that *shall* routinely invites. And the more than 100 pages of reported cases in Words and Phrases—a useful encyclopedia of litigated terms—show that the word *shall* is a mess.[11] As Joseph Kimble, a noted drafting expert, puts it: "Drafters use it mindlessly. Courts read it any which way."[12] Increasingly, official drafting bodies are recognizing the problem. For example, most sets of the federal Rules—Civil, Criminal, Appellate, and Evidence—have recently been revamped to remove all *shalls*.[13] (In stating requirements, the rules use the verb *must*.) The improved clarity is remarkable. Meanwhile, many transactional drafters have adopted the *shall*-less style, with the same effect. (In stating contractual promises, they typically use either will or agrees to.) You should do the same. 1. *See, e.g., Bell Atlantic-N.J., Inc. v. Tate*, 962 F. Supp. 608 (D.N.J. 1997). 2. *See, e.g., Northwestern Bell Tel. Co. v. Wentz*, 103 N.W.2d 245 (N.D. 1960). 3. *See, e.g., Cassan v. Fern*, 109 A.2d 482(N.J. Super. 1954).			

Exhibit 1—Survey of Secondary Sources: Use of "Shall" in Legislative Drafting

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		4. *See, e.g., Local Lodge No. 1417, Int'l Ass'n of Machinists. AFL-CIO v. NLRB*, 296 F.2d 357(D.C. Cir. 1961). 5. *Moore v. Illinois Cent. Ry.,* 312 U.S. 630, 635 (1941). 6. *Railroad Co. v. Hecht*, 95 U.S. 168, 170 (1877). 7. *West Wis. Ry. v. Foley*, 94 U.S. 100, 103 (1876). 8. *Scott v. United States*, 436 U.S. 128, 146 (1978) (Brennan, J., dissenting). 9. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 n.9 (1995) (adding that "certain of the Federal Rules use the word 'shall' to authorize, but not to require, judicial action," citing Fed. R. Civ. P. 16(e) and Fed. R. Crim. P. 11(b)). 10. *United States v. Montalvo-Murillo*, 495 U.S. 708, 718 (1990). 11. 39 *Words and Phrases* 111-96 (1953), plus 41 pp. in 1999 pocket part. 12. Joseph Kimble, *The Many Misuses of "Shall,"* 3 Scribes J. Legal Writing 61, 71 (1992). 13. *See* Garner, *Guidelines for Drafting and Editing Court Rules* § 4.2(A), at 29 (1996).			
3.	Garner, Bryan A., *Garner's Dictionary of Legal Usage* 952-54 (3d ed. 2011)	This word [*shall*] runs afoul of several basic principles of good drafting. The first is that a word used repeatedly in a given context is presumed to bear the same meaning throughout. (*Shall* commonly shifts its meaning even in midsentence.) The second principle is strongly allied with the first: when a word takes on too many senses and cannot be confined to one sense in a given document, it becomes useless to the drafter. (Depending on how finely you slice the semantic nuances, *shall* can bear five to eight senses even in a single document. Black's Law Dictionary (9th ed. 2009) lists five main senses.) The third principle has been recognized in the literature on legal drafting since the mid-19th century: good drafting generally ought to be in the present tense, not the future. (*Shall* is commonly used as a future-tense modal verb.) In fact, the selfsame quality in *shall*—the fact that it is a CHAMELEON-HUED WORD—causes it to violate each of those principles. How can *shall* be so slippery, one may ask, when every lawyer knows that it denotes a mandatory action? Well, perhaps every lawyer has heard that it's mandatory, but very few consistently use it in that way. And as a result, courts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice versa. These holdings have been necessary primarily to give		1	

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		effect to slipshod drafting. . . . One solution to the problem that *shall* poses is to restrict it to one sense. This solution—called the "American rule" because it is an approach followed by some careful American drafters—is to use *shall* only to mean "has a duty to" . . . . Another solution is the "ABC rule" so called because, in the late 1980s, it was most strongly advocated by certain Australian, British, and Canadian drafters. The ABC rule holds that legal drafters cannot be trusted to use the word *shall* under any circumstances. Under this view, lawyers are not educable on the subject of *shall*, so the only solution is complete abstinence. As a result, the drafter must always choose a more appropriate word: must, may, will, is entitled to, or some other expression. This view has much to be said for it. American lawyers and judges who try to restrict *shall* to the sense "has a duty to" find it difficult to apply the convention consistently. Indeed, few lawyers have the semantic acuity to identify correct and incorrect *shall*s even after a few hours of study. That being so, there can hardly be much hope of the profession's using *shall* consistently. Small wonder, then, that the ABC rule has fast been gaining ground in the U.S. For example, the federal government's Style Subcommittee—part of the Standing Committee on Rules of Practice and Procedure—a subcommittee that since 1991 has worked on all amendments to the various sets of federal court rules, adopted the approach of disallowing *shall* in late 1992. (This came after a year of using *shall* only to impose a duty on the subject of the verb.) As a result, the rules have become sharper because the drafters are invariably forced into thinking more clearly and specifically about meaning. There is, of course, a third approach: to allow *shall* its traditional promiscuity while pretending, as we have for centuries, that preserving its chastity is either hopeless or unimportant. Of course, that approach breeds litigation, as attested in more than 120 pages of small-type cases reported in Words and Phrases, all interpreting the word *shall*. As long as the mass of the profession remains unsensitized to the problems that *shall* causes, this appears to be the most likely course of inaction.			
4.	Garner, Bryan A., *Garner on Language and Writing* 175-76	[Very similar to *Garner's Dictionary of Legal Usage* 952-54 (3d ed. 2011), above]		1	

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	(2009)				
5.	Kimble, Joseph, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 2008-09 Scribes J. Leg. Writing 25, 78-79 (2008)	The word [*shall*] has been so corrupted by misuse that it has become inherently ambiguous. It should mean "must," but too often it's used to mean or interpreted to mean "should" or "may" — not to mention those instances in which, because no requirement *or* permission is intended, the simple present tense of the verb is called for. No wonder, then, that *Words and Phrases* online cites more than 1,600 appellate cases interpreting *shall*.		1	
6.	Adams, Kenneth A., A Manual of Style for Contract Drafting 32-34 (2d ed. 2008)	USING "SHALL" TO MEAN "HAS A DUTY TO" 2.25 In the example in table 2, Acme is the subject of the sentence. To indicate that Acme has a duty to purchase the Shares from Doe, use *shall*, as in [2-1]. And this manual recommends that in contract drafting you should not use shall for any other purpose. TABLE 2 • LANGUAGE OF OBLIGATION IMPOSED ON SUBJECT OF SENTENCE [2-1] Acme shall purchase the Shares from Doe. . . . ELIMINATING "SHALL"? 2.35 One way to address overuse of shall is through more disciplined use of the word, hence the recommendation in 2.25. 2.36 But some commentators on legal writing-the most vocal among them perhaps being Bryan Garner-advocate doing away with shall entirely because it's too prone to misuse and is inconsistent with general English usage. As Garner says in *A Dictionary of Modern Legal Usage* 940, "few lawyers have the semantic acuity to identify correct and incorrect *shalls* even after a few hours of study. That being so, there can hardly be much hope of the profession's using shall consistently." A useful statement of the anti-shall view, albeit from an Australian perspective, can be found in Michele M. Asprey, *Plain Language for Lawyers* (3d ed. 2003). 2.37 **It would in fact be a good idea to eliminate shall from court rules, statutes, and consumer contracts**. But there's no reason to automatically apply that approach to business contracts-they serve a different function and address a different audience. 2.38 And as explained below, the notion of purging business contracts of shall is problematic in a number		1	

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		of respects.			
7.	Wydick, Richard C., *Plain English for Lawyers* 63-64 (5th ed. 2005)	The biggest troublemaker is *shall*. Sometimes lawyers use it to impose a duty: "The defendant *shall* file an answer within 30 days ... "Other times lawyers use it to express a future action ("the lease shall terminate …') or even an entitlement ("the landlord shall have the right to inspect .. ."). Drafting experts have identified several additional shades of meaning *shall* can carry.[14] To make matters worse, many lawyers do not realize how slippery shall is, so they use it freely, unaware of the booby traps it creates. The legislative drafters in some jurisdictions in the United States try to tame *shall* by using it only in its command sense: *shall* imposes a duty to do something. [15] In recent years, however, many U.S. drafting authorities have come around to the British Commonwealth view: don't use *shall* for any purpose—it is simply too unreliable.[16] Throwing out *shall* leaves us with a fairly well-behaved roster of words to express duty, permission, discretion, entitlement, and the like. These words should be used consistently with the meanings stated below:[17] must = is required to must not = is required not to; is disallowed may = has discretion to; is permitted to may not = is not permitted to; is disallowed from is entitled to = has a right to should = ought to will = [one of the following:] a. (to express a future contingency) b. (in an adhesion contract, to express the strong party's obligations) c. (in a delicate contract between equals, to express both parties' obligations)		1	
8.	Asprey, Michele M., *Shall Must Go*, 3 Scribes J. Leg. Writing 79 (1992)	*Shall Must Go* Why?		1	

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		For several years I have advocated that lawyers abandon *shall*. My reasons are: (1) The word is hardly ever used outside the legal community, and consequently: * Using *shall* puts lawyers out of step with the language of the general community; * Nonlawyers don't understand the special way lawyers use *shall* in documents and laws; and (2) Lawyers misuse it. They confuse the imperative *shall* with the future tense and fail to distinguish between the various senses of shall in their documents. The distinctions drawn between these senses by commentators such as Reed Dickerson and Elmer Driedger are difficult to understand and apply, and have been ignored by most lawyers, who continue to misuse *shall*. *In Place of Shall...* My suggestion is to abandon shall altogether and, in its place, use: * *Must* for the imperative shall - whether we want to impose an obligation or a duty, or make a direction, whether or not we do it by contract or statute, and regardless of what the penalty is; * *Will* for the simple future; and * The present tense for just about everything else - for a statement of fact, legal result or agreement (the law or contract always speaking) . . . . *Id*. at 82-83: Getting rid of shall and choosing between one of the three alternatives listed above (*must*, *will*, or the present tense) forces you to decide what you really mean: an obligation, the future tense, or the present tense to signify a statement of fact, a legal result or agreement, or a condition. Strangely enough, in my experience it's usually very easy to choose the word you need, and you don't have to go through a legal analysis of modalities. The right word just looks right. The issues are clearer. The drafting comes more easily. . . . Most nonlawyers abandoned *shall* long ago. Its time has long passed. Let's let it go.			
9.	Kimble, Joseph, *The Many Misuses of Shall*, 3 Scribes J. Leg. Writing 61, 70-73 (1992)	First, *shall* is the most important word in the world of legal drafting—contracts, wills, trusts, and the many forms of public and private legislation (from statutes to court rules to corporate bylaws). *Shall* is	1	1	

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		the very word that is supposed to create a legal duty. Second, *shall* is the most misused word in the legal vocabulary. Third, this perpetual misuse reflects the sickening failure of most law schools to teach legal drafting. Fourth, a good case can be made for abandoning *shall* entirely. That would at least end the misuses. And it would take us another step closer to plain language. Finally, though, the best solution may not always be that neat. In some documents, the best solution may be to define *shall* and *must* and *may*—the terms of authority. That way, drafters can make clear the degree of duty they intend and the possible consequences of a breach. . . . *Shall* has indeed become a flimsy word. I doubt, however, that simply replacing it with *must* would make a big difference in the amount of litigation. At the same time, I do understand the argument that, having been so thoroughly watered down over such a long period, *shall* has lost its force. Two other arguments for must are made by leading writers: *shall* is archaic; and lawyers are prone to misuse it, confusing it with future tense.[3] Both arguments are valid. Then again... *Shall* is not as easy to dismiss as most legal jargon and legal mannerisms. It has produced volumes of litigation. It is a critical word. If it can be replaced with *must*; fine. But we do give up a potentially useful distinction, or at least we have to make the distinction in other ways. . . . At most, *shall* creates a presumption that the provision is mandatory or the duty absolute. Courts have found many ways to overcome the presumption: (1) Mandatory *shall* would defeat the legislative intent[38] (2) The provision merely guides the conduct of officials or specifies the time for performing an official duty.[39] (3) The official's conduct is not prescribed in order to safeguard someone's rights.[40]			

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		(4) The provision does not go to the essence of the statutory purpose.[41] (5) The provision does not set out consequences for a violation.[42] (6) Mandatory *shall* would infringe on the separation of powers.[43] We could easily expand the list. In every jurisdiction, we find exceptions and qualifications. 38. *Andrews v. Foxworthy*, 373 N.E.2d 1332, 1335 (Ill. 1978). 39. *Id*. 40. *Id*. 41. *Hancock County Rural Elec. Membership Corp. v. City of Greenfield*, 494 N.E.2d 1294, 1296 (Ind. Ct. App. 1986). 42. *Id*. 43. *People v. Davis*, 442 N.E.2d 855, 858 (Ill. 1982).			
10.	Bennett, J.M., *Final Observations on the Use of Shall*, 64 Austl. L.J. 168, 169 (1990)	Precisely because "shall" may be construed, as your contributors put it, "any which way" (or, in plain English, "flexibly"), it is a valuable word that adapts itself to the practical requirements of its circumstances and context - for example, *see Havenbar Pty Ltd v Butterfield* ((1974) 133 CLR 449 at 455). "Must", if construed literally, could not do so and would be likely to work great hardship until rectified (as could well be the case in the equitable charge example previously discussed).			
11.	Main, Jim, *Must Versus Shall*, 63 Austl. L.J. 860 (1989)	I was much impressed with the logic in the article by Professor Eagleson and Miss Asprey in the February 1989 issue of the Journal (at p 75). Since reading the article I have banned the use of "shall" in all my documents. The effect has been, I think, quite significant. In considering what words to use where previously I used "shall" I have come to realise how many different meanings the word has. I am positive the documents prepared without the word are much clearer than those prepared previously.		1	
12.	Eagleson, Robert, and Asprey, Michelle, *We must abandon "shall*," 63 Austl. L.J. 726, 727-28 (1989)	Mr Bennett now adds to the evidence we had provided by drawing attention to fresh cases and reminding us that Stroud's Judicial Dictionary needs some nine pages to cope with the vagaries of legal practice with "shall" since 1601. … With due respect, Mr Bennett misunderstands the point of our comments on the misuse of "shall". We do not suggest that using "must" instead of "shall" cures all poor and imprecise drafting. But it will improve		1	

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		one area in which lawyers consistently fail to make themselves clear. If one has to resort to such extremities as the demonstration examples of Mr Bennett in order to justify "shall", then we must abandon it at once.			
13.	Bennett, J.M., *In Defence of "Shall*," 63 Austl. L.J. 522, 523 (1989)	Old legal authorities are usually venerated, as those concerning the interpretation of "shall" and "may" certainly should be. The 5th edition of Stroud's Judicial Dictionary (London, 1986) has nine pages of matter relating to "shall" and cognate expressions. The cited authorities go back to 1601. What lawyer, acting reasonably, will imperil the interests of his client or employer by casting aside centuries of judicial guidance and by preferring some experimental novelty? The price for the failure of the experiment could be high.			
14.	Eagleson, Robert, and Asprey, Michelle, *Must we continue with "shall*," 63 Austl. L.J. 75, 67, 78 (1989)	Not only will the change to "must" benefit the general community; it will also save members of the legal profession from confusion and imprecision. Experts in legal drafting from at least the middle of the last century have complained about the misuse of "shall" in legal documents. Among these commentators are such notable ones as Coode (1852), Dickerson (1965), Dick (1972), Robinson (1973), Callaway (1974-5), Driedger (1976), Piesse (1987) and Thornton (1987). . . . In the interests of our clients and ourselves, we must stop using "shall".		1	
15.	Sutton, Dale E., *Use of Shall in Statutes*, 4 J. Marshall L. Quarterly 204, 204, 217 (1938)	"Shall", as used in statutes, is not only, in many cases, superfluous from the standpoint of good writing, but has too many meanings to make its unnecessary use safe. The courts, in following their well-defined policy of looking to the intent, rather than to the language, have variously held that "shall" is imperative, is directory, means "may", expresses a mandate, either permissive or peremptory, applies to the past, to the future, and to the present. . . . There is no broad and easy way out. More sparing use of "shall" and more careful draftsmanship are the first requisites.	1		

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1.	Memorandum from Joseph Kimble, Style Consultant, to All Readers, Guiding Principles for Restyling the [Federal] Civil Rules xviii (Feb. 21, 2005)	http://www.uscourts.gov/file/document/guiding-principles-restyling-civil-rules: "Banish *shall*. The restyled civil rules, like the restyled appellate and criminal rules, use *must* instead of *shall*. *Shall* is notorious for its misuse and slipperiness in legal documents. No surprise, then, that the Committee changed *shall* to *may* in several instances, to *should* in several other instances, and to the simple present tense when the rule involves no obligation or permission (*There is one form of action; this order controls the course of the action*)."		1	
2.	Fed. R. Civ. P. 1 advisory committee's note to 2007 amendment	https://www.law.cornell.edu/rules/frcp/rule_1: "The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule."		1	
3.	Fed. R. Evid. 101 advisory committee's note to 2011 amendment	https://www.law.cornell.edu/rules/fre/rule_101: "The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule."		1	
4.	Legislative Reference Service Drafting Style Manual (Alabama)	http://lrs.state.al.us/style_manual/style_manual.html at Rule 8: Rule 8. Use of "Shall," "May," and "Must" (a) A duty, obligation, requirement, or condition precedent is best expressed by "shall" rather than "must." In no event should "shall" and "must" be used interchangeably in the same bill. (b) Use "may" to confer a power, privilege, or right. *Examples*: "The applicant 'may demand' (power) an extension of time." "The applicant 'may renew'	1		

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		(privilege) the application." "The applicant 'may appeal' (right) the decision." Do not use substitute phrases for "may" such as "is authorized and empowered to." (c) Use "may not" to express a prohibition. (d) Avoid using hortatory qualifiers, such as "will," "should," and "ought" in the text of a bill.			
5.	Legislative Affairs Agency, Manual of Legislative Drafting (Alaska 2017)	http://w3.legis.state.ak.us/docs/pdf/DraftingManual.pdf at 65: (h) "May," "shall," "must." Use the word "shall" to impose a duty upon someone. The Alaska Supreme Court has stated that the use of the word "shall" denotes a mandatory intent. *Fowler v. Anchorage*, 583 P.2d 817 (Alaska 1978). Use the word ''must" when describing requirements related to objects such as forms or criteria. (Use "must" sparingly, however, because most sentences using it can probably be written more clearly to impose a duty on a person, in which case "shall" would be the proper word.) Use the word "may" to grant a privilege or discretionary power. *Rutter v. State, Alaska Board of Fisheries*, 963 P .2d 1007 (Alaska 1998), p. 5. Use the words "may not" to impose a prohibition upon someone. For a further discussion, see Martineau, Drafting Legislation and Rules in Plain English (1991), pp. 81 - 82. For example: The commissioner shall issue a license ... , i.e., it is the commissioner's duty to do so. The information on the form must include ... , i.e., the form is required to have something in particular on it. The commissioner may inspect records ... , i.e., the commissioner may if it is necessary or proper, but the commissioner is not obligated to do so. The commissioner may not issue a license ... , i.e., under the defined circumstances, it is beyond the power of the commissioner to issue the license.	1		

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		A person may not operate a ... without a license ... , i.e., under the circumstances, a person is not permitted to do the specified act without a license. Do not use "must not" or "shall not." Also, do not use the "No ... may" construction; use "may not." For instance, avoid "No fish trap may be ... ,"and use "A fish trap may not be ... " When drafting a constitutional provision, however, follow the style of the provision you are amending.			
6.	Arizona Legislative Council The Arizona Legislative Bill Drafting Manual (2017-2018)	https://leg.colorado.gov/sites/default/files/drafting-manual-20170119.pdf at 100: **5.34 USE OF "SHALL," "MAY," "MAY NOT" AND "SHALL NOT"** Shall "Shall" is properly used to indicate that something is mandatory. Use "shall" to prescribe a duty to act, rather than to declare a legal result. Do not say "THE EQUIPMENT SHALL REMAIN THE PROPERTY OF THE UNITED STATES." Instead use: **"THE EQUIPMENT REMAINS...."** Avoid using "shall" to confer a right, as with "the director shall receive compensation." Instead use "**THE DIRECTOR'S COMPENSATION IS**" or "**THE DIRECTOR IS ELIGIBLE TO RECEIVE COMPENSATION.**" If "shall be" can be replaced with "is" or "are," do so. See §§ 5.14 and 5.15 for examples of the improper use of "shall." May "May" is permissive and confers a privilege or power. Normally, the use of "may" implies discretion or permission. Use "may" when giving a person or entity the option to act or not act. May not and shall not "May not" prohibits an action. "Shall not" literally imposes a duty not to act. These phrases are often viewed as equivalent expressions of prohibition, but the drafter is strongly encouraged to use "may not" to	1		

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		prohibit an action. Incorrect use with a negative subject Avoid the negative subject with affirmative "SHALL" as in "NO PERSON SHALL...." Literally, this means that no one is required to act. It negates the obligation but not the permission to act. However, "NO PERSON MAY" negates the permission also and is in reality the stronger proscription. Strict rules of drafting suggest the desirability of reversing subject and verb. The legal subject should be stated affirmatively and preferably in the singular form, as "A PERSON MAY NOT...." Consequences of inconsistent or inaccurate use A prime drafting concern is to preserve the distinction between mandatory and permissive directives. The inconsistent or inaccurate use of "shall" and "may" has occasionally allowed judicial selection rather than legislative direction to determine the applicable verb form in laws. Additionally, even if "may" is used, the courts have imposed an affirmative duty if the object of the statute shows such a legislative intent. Pioneer Mutual Benefit Ass'n. v. Corp. Commission, 59 Ariz. 112, 123 P.2d 828 (1942).			
7.	Bureau of Legislative Research Legislative Drafting Manual (Arkansas, November 2010)	http://www.arkleg.state.ar.us/bureau/legal/Publications/2010%20Legislative%20Drafting%20Manual.pdf at pp. 56-57: (4) "Can", "may", "must", "shall", "should", "will", and "would". (A) Can. • "Can" refers to capability. • Do not use "can" to grant permission. (B) May. • "May" refers to permission. • Permission or the grant of a power or privilege is best expressed by "may".	1		

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		(C) Must. • Do not use "must" when "shall" is meant. (D) Shall. • A duty or obligation is best expressed by "shall." • Instead of using "shall be", use "is". • Avoid using a negative subject with an affirmative "shall": Example: No person shall... (This means that no one is required to act. It negates the obligation, but not the permission to act.) • Use of "A person may not ..." negates the obligation and the permission. "Shall not" should be used only to mean "has a duty not to"			

Do Not Use A Future Tense Verb:	Use A Present Tense Verb:
if a member shall resign	if a member resigns
it shall be unlawful	it is unlawful
no person shall be entitled	no person is entitled
no person shall be guilty	no person is guilty
no person shall be deemed guilty	no person is guilty
the property shall remain	the property remains
this section shall not be construed to	this section does not
who shall serve	who serves
who shall violate	who violates

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		A common problem in legislative drafting is that the word "shall" is often used to indicate a legal result rather than a command. This is known as a false imperative. **Incorrect**: The committee shall consist of the Director of the Arkansas Crime Information Center, the Director of the Department of Arkansas State Police, and the Director of the Department of Health. **Correct**: The committee consists of the Director of the Arkansas Crime Information Center, the Director of the Department of Arkansas State Police, and the Director of the Department of Health. OR The members of the committee are the Director of the Arkansas Crime Information Center, the Director of the Department of Arkansas State Police, and the Director of the Department of Health. (E) Should. • Do not use "should" to state an obligation or duty. (F) Will. • Do not use "will" when "shall" is meant. (G) Would. • Do not use "would" when "shall" is meant.			
8.	Office of Legislative Legal Services Colorado Legislative Drafting Manual (January 17, 2017)	https://leg.colorado.gov/sites/default/files/drafting-manual-20170119.pdf at F-49: **Guidelines for the Use of "Shall" and "Must"** The easiest way to approach this word choice is to first try following the drafting manual	1		

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		regarding the use of "shall". If using the phrase "has a duty to" doesn't make sense (considering the exception for the use of the passive voice), then don't use "shall". "Must" is a possibility, but you should consider whether you really need to use an authority verb. **Excerpt from Drafting Manual** If the words in quotes from the right-hand column below convey your intended meaning, then use the word or words from the left-hand column. shall = a person "has a duty to" (*but see* paragraph (a)(I)(C) below regarding the passive voice) must = a thing or person "is required to" meet a condition for a consequence to apply. "Must" does not mean that a person has a duty. (a) (I) (C) *In the passive voice*. . . . If you use the passive voice (because the actors are unknown, unmistakable, or too numerous to list) and the context indicates a legislative intent that a person has a duty, use "shall", not "must", even though the subject of the sentence is a thing. . . . **Step-by-step Analysis** 1. Figure out whether the subject of your sentence is a **person** or a **thing** (remember that the statutory definition of "person", §2-4-401 (8), C.R.S., includes entities). 2. Figure out whether there is or should be a **duty** or only a **condition**. a. Things can't have duties, only people can. b. A duty is something that a court will enforce, for instance, by applying a penalty or entering an injunction. c. A condition is simply a prerequisite for a consequence to apply. A court will not apply a penalty or enter an injunction to require a person or thing to meet the condition, but may determine that a consequence does or doesn't apply. 3. If the subject is a person and: a. There is a duty, use "shall". b. There is not a duty, use "must" or another present-tense verb. Think outside the box: is this even an authority verb issue? Can I express this better with another present-tense			

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<table>
<tr><th>No.</th><th>Citation</th><th>URL/Text</th><th>Am</th><th>ABC</th><th></th></tr>
<tr><td></td><td></td><td>verb?
4. If the subject is a thing:
a. First, figure out whether your sentence is active or passive voice (try to use active voice).
b. In the active voice, "shall" is not an option because a thing can't have a duty. Use "must" or another present-tense verb.
c. In the passive voice, if the object of the sentence is a person who has a duty, use "shall".
<table>
<tr><th colspan="2">Person</th><th colspan="2">Thing</th><th></th></tr>
<tr><th colspan="2">Is There a Duty?</th><th colspan="2">Is There a Duty?</th><th></th></tr>
<tr><th>No</th><th>Yes</th><th>No</th><th>Yes</th><th>Voice</th></tr>
<tr><td rowspan="2">Don't use "shall"
Maybe use "must"</td><td rowspan="2">Use "shall"</td><td rowspan="2">Don't use "shall"
Maybe use "must"</td><td>Use "shall"</td><td>Passive</td></tr>
<tr><td>(Can't be a duty)
Don't use "shall"
Maybe use "must"</td><td>Active</td></tr>
</table></td><td></td><td></td><td></td></tr>
<tr><td>9.</td><td>Legislative Commissioners' Office of the Connecticut General Assembly Manual for Drafting Regulations (Ct. 2015)</td><td>http://www.cga.ct.gov/lco/pdfs/Regulations_Drafting_Manual.pdf
at pp. 41-42:
• When introducing a defined term, avoid using the word "shall".
<table>
<tr><th>YES:</th><th>NO:</th></tr>
<tr><td>… means …</td><td>… shall mean …</td></tr>
<tr><td>… has the same meaning as…</td><td>… shall have the same meaning as…</td></tr>
<tr><td>… includes …</td><td>… shall include …</td></tr>
<tr><td>… does not include …</td><td>… shall not include …</td></tr>
</table>
"Shall" vs. "Must" vs. "Will"</td><td>1</td><td></td><td></td></tr>
</table>

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<table>
<tr><th>No.</th><th>Citation</th><th>URL/Text</th><th>Am</th><th>ABC</th><th></th></tr>
<tr><td></td><td></td><td>

In keeping with the Regulation Review Committee's directive to agencies regarding mandates, use "shall" when the agency seeks to impose a mandate and does not confer any discretion in carrying out the action so directed. Never use "must".
Avoid using "may not". Instead, use "shall not" or "no person shall".
Use "will" to denote something that will happen in the future, not to denote a requirement.

<table>
<tr><td>… The seller shall maintain such food under conditions that will inhibit the growth of bacteria …</td></tr>
</table>
<table>
<tr><th>YES:</th><th>NO:</th></tr>
<tr><td>… shall …</td><td>… must …</td></tr>
<tr><td>No person shall …
OR
A person shall not …</td><td>A person may not …</td></tr>
<tr><td>The billing provider shall update the billing provider agreement annually.</td><td>The billing provider must update the billing provider agreement annually.</td></tr>
<tr><td>Medicaid shall reimburse a provider for SBCH services, provided the following requirements are met: …</td><td>Medicaid will reimburse a provider for SBCH services, provided the following requirements are met: …</td></tr>
<tr><td>Small water and sewerage companies shall not be required to comply with section 16-1-56 of the Regulations of Connecticut State Agencies.
OR
Small water and sewerage companies are not required to comply with section 16-1-56 of the Regulations of Connecticut State Agencies.</td><td>Small water and sewerage companies will not be required to comply with section 16-1-56 of the Regulations of Connecticut State Agencies.</td></tr>
</table>
</td><td></td><td></td><td></td></tr>
</table>

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No.	Citation	URL/Text	Am	ABC	
10.	Legislative Council Division of Research Delaware Legislative Drafting Manual (January 2017)	http://legis.delaware.gov/LawsOfDE/BillDraftingManual at p. 88-91: **Rule 11. Use of "Shall", "Must", "May", and Substitutes.** (a) "Shall" means that a person has a duty. Consider the following when using "shall": (1) Use "shall" if the verb it qualifies is a transitive verb in the active voice and the subject is animate. (2) A transitive verb is a verb that takes, or precedes, a direct object. In sentences in the active voice, a direct object is the part of the sentence receiving the transitive verb's action. For a discussion of the active voice, see Drafting Rule 6. (3) A subject is animate when it can respond to a statutory command. For example, an individual, a corporation, and a court are animate. **Example of the proper use of "shall":** The court shall enforce the collection of a tax judgment. (b) "Must" means that a person or thing is required to meet a condition for a consequence to apply. "Must" does not mean that a person has a duty. Consider the following when using "must": (1) Use "must" if the verb it qualifies is an active verb in the passive voice, or is an inactive verb, or if the subject is inanimate. (2) An active verb expresses meaning more emphatically and vigorously than its weaker counterpart, an inactive verb. Furthermore, an active verb is "in the passive voice" when it is preceded by a form of the verb "be", examples of which include "is", "was", "has been", "had been", and "will have been". (3) An inactive verb is one that expresses no action, but simply expresses a state of being. Inactive verbs are also known as "linking verbs". Some of the most common inactive verbs are: "is", "are", "was", "were", "am", "be", "being", "been", "became", "become", "remains", "appears", or "seems".	1		

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11.	Legislative Reference Bureau Hawaii Legislative Drafting Manual, Tenth Edition (2012)	http://lrbhawaii.info/reports/legrpts/lrb/2012/legdftman12.pdf at p. 23: c. Use "may" to express authority, power, or privilege; use "shall" to express a duty, obligation, or requirement; use "may not" to express prohibition. Use the "comptroller *may*" instead of "the comptroller is hereby authorized"; "the governor *may*" instead of "it shall be lawful for the governor to …" Use "shall" instead of the phrases "is hereby authorized and directed," or "it is the duty." Use "will" to express future tense, but not as a substitute for "shall." Do not use "must" when meaning "shall." Avoid the use of "should" as a step between "may" and "shall" –there is no middle ground.	1		
12.	Legislation Drafting Manual Concise Version Research & Legislation, LSO (Idaho)	https://legislature.idaho.gov/wp-content/uploads/research/draftingmanual.pdf at p. 26: **GUIDELINES FOR THE USE OF "SHALL" AND "MUST"** The easiest way to approach this word choice is to first try following the drafting manual regarding the use of "shall". If using the phrase "has a duty to" doesn't make sense (considering the exception for the use of the passive voice), then don't use "shall". "Must" is a possibility, but you should consider whether you really need to use an authority verb. **Excerpt from Drafting Manual** If the words in quotes from the right-hand column below convey your intended meaning, then use the word or words from the left-hand column. shall = a person "has a duty to" (*but see* paragraph (a)(1)(C) below regarding the passive voice) must = a thing or person "is required to" meet a condition for a consequence to apply. "Must" does not mean that a person has a duty. (a)(1)(C) <u>In the passive voice</u> … If you use the passive voice (because the actors are unknown, unmistakable, or too numerous to list) and the context indicates a legislative intent that a person has a duty, use "shall", not "must", even though the subject of the sentence is a thing …	1		

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No.	Citation	URL/Text	Am	ABC	
		Step-by-step Analysis 1. Figure out whether the subject of your sentence is a **person** or a **thing** (remember that the statutory definition of "person", §2-4-401 (8), C.R.S., includes entities). 2. Figure out whether there is or should be a **duty** or only a **condition**. a. Things can't have duties, only people can. b. A duty is something that a court will enforce, for instance, by applying a penalty or entering an injunction c. A condition is simply a prerequisite for a consequence to apply. A court will not apply a penalty or enter an injunction to require a person or thing to meet the condition, but may determine that a consequence does or doesn't apply. 3. If the subject is a person and: a. There is a duty, use "shall". b. There is a duty, use "must" or another present-tense verb. Think outside the box: is this even an authority verb issue? Can I express this better with another present-tense verb? 4. If the subject is a thing: a. First, figure out whether your sentence is **active** or **passive** voice (try to use active voice). b. In the active voice, "shall" is not an option because a thing can't have a duty. Use "must" or another present-tense verb. c. In the passive voice, if the **object** of the sentence is a person who has a duty, use "shall".			

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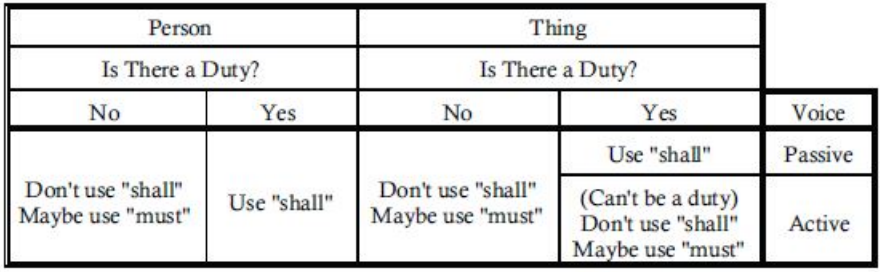
No.	Citation	URL/Text	Am	ABC	
					
13.	The Legislative Reference Bureau, Illinois Bill Drafting Manual (December 2012)	http://www.ilga.gov/commission/lrb/manual.pdf at p. 226 **SHALL, WILL** Use "will" to express simple futurity. Do not use "shall" for that purpose. An example follows: The clerk must send a notice that the hearing **will** (futurity; Not: **shall**) be held on a specified date. Do not use "will" to express a duty or obligation. An example follows: The Director **must** (duty; Not: **will**) file the report with the General Assembly.		1	
14.	Office of Code Revision Legislative Services Agency Drafting Manual for the Indiana General Assembly (December 19, 2012)	http://iga.in.gov/legislative/2014/publications/handbooks/ p. 11-12: **(12) Commanding, Authorizing, Forbidding, and Negating** To create a right, say "is entitled to". For example, "A member is entitled to reimbursement for expenses" means that the member has a right to receive the reimbursement. To create discretionary authority, say "may". For example, "A member may seek reimbursement for expenses" means that the member, at the member's discretion, is permitted or allowed to seek recovery of the reimbursement. To create a duty, say "shall".	1		

Person		Thing		
Is There a Duty?		Is There a Duty?		
No	Yes	No	Yes	Voice
Don't use "shall" Maybe use "must"	Use "shall"	Don't use "shall" Maybe use "must"	Use "shall"	Passive
			(Can't be a duty) Don't use "shall" Maybe use "must"	Active

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		For example, "A member shall seek reimbursement for expenses" means that the member is commanded or directed to seek recovery of the reimbursement. To create a condition precedent, say "must". For example, "To receive reimbursement, a member must submit a form for expenses" means that the member is obliged or required to submit the form to recover the reimbursement. To negate a right, say "is not entitled to". For example, "A member is not entitled to seek reimbursement for expenses" means that the member has no right to seek recovery of the reimbursement. To negate discretionary authority, say "may not". For example, "A member may not seek reimbursement for expenses" means that the member is not permitted or allowed to seek recovery of the reimbursement. To negate a duty or a condition precedent, say "is not required to". For example, "A member is not required to seek reimbursement for expenses" means that the member may, but does not have to, seek recovery of the reimbursement. To create a duty not to act, say "shall not". For example, "A member shall not seek reimbursement for expenses" means that the member is commanded or directed to not seek recovery of the reimbursement. [The guidelines above are taken from: Dickerson, F.R., Legal Drafting, West Publishing Company (1981), p.182.] Avoid false imperatives. A false imperative attempts to create a duty but does not specify to whom the duty belongs or the consequences of the failure. Consider the following by Jery Payne of *The Legislative Lawyer:* *The solution to avoiding the false imperative is to substitute a short definition in place of the imperative to determine if it makes sense. If the drafter would make the following mental substitutions, then the language will remain logical:* *shall: has a duty to*			

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		shall not: has a duty not to *If the drafter is considering using "shall" or "shall not," the drafter need merely substitute the definition and consider whether the definition makes sense. For example, "The commission shall keep a cash reserve," reads "The commission has a duty to keep a cash reserve." If the substitute phrase makes sense, then the use is proper. Here is another example, "Service shall be made on the parties," reads "Service has a duty to be made on the parties." This is nonsense. Service does not have volition. Service cannot even exist until it is made. Therefore, it is a command that service bring itself into existence. This provision needs to be rewritten.* [Payne, Jery. "The False Imperative." *The Legislative Lawyer.* National Conference of State Legislatures, 18 Dec. 2010. Web. 26 June 2012. <www.ncsl.org>] Avoid using hortatory qualifiers. Hortatory qualifiers include terms such as "will", "should", "ought", and "want". Hortatory language urges a particular course of action or conduct. Rather than conveying information, it generally presents an argument for or against something and is better suited for use in documents and speeches intended to inspire or incite the audience. Note, however, that the use of "will" is acceptable when the future tense is appropriate. (See **Tense**, page 9.)			
15.	Bill Drafting Manual Kentucky General Assembly (2011)	http://www.lrc.ky.gov/lrcpubs/ib117.pdf at p. 23-24: **Sec. 303. Use of "Shall" and "May"** A duty, obligation, or prohibition is best expressed by "shall," and a power or privilege is best expressed by "may." "Shall" should never be used to express the future. Its proper function is mandatory, and generally its use is permissible only when "must" or "has a duty to" could be substituted. In statutory usage "shall" does not denote the future tense any more than "may" does. **Sec. 804. Format for a Bill Summary** The general rule for preparation of narrative bill summaries is to begin each segment in your summary with a root verb. The action in the bill is in process of being accomplished. Say "create a board . . ." rather than "creates a board…" or "a board is created. . . ." The following words are most useful for beginning your segments: authorize, enable or permit, create or establish, direct or require, grant, appropriate, limit, exempt, prohibit or forbid, increase or decrease, change, reclassify (for cities), include or exclude,	1		

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		redefine, add, amend, repeal. In segments dealing with amendments to existing statutes, if the description of the subject of the action necessarily falls near the end of the segment, use the term "relating to" immediately after the number of the section amended. For example, say: "Amend KRS 287.215, relating to the State Board of Podiatry, to redefine the terms, compensation, selection, and qualifications of members." End each segment except the last with a semicolon. Please use articles. Try not to use the term "the Act" or "this Act" in a summary. Do not use the words "shall" or "may." In mandatory legislation, the language "shall" is expressed in a summary by saying "require" or "direct." Permissive language is expressed in the summary by the terms "authorize" or "permit." Avoid the words "specify," "provide," and "stipulate" as segment openers unless absolutely necessary. Each segment but the first begins with a lowercase letter. Use Arabic numerals if possible. Omit severability clauses in summarizing. Emergency clauses, however, must be indicated in the summary: simply say "EMERGENCY" as the final word in the summary. The emergency clause, if any, customarily is placed at or near the end of the bill and is preceded by a "Whereas." If the effective date is extraordinary, say "EFFECTIVE XXXXX XX, 2012" as your last segment. All such effective date and emergency segments should appear in all capital letters. Appropriations must be in the summary, in their exact dollar amounts, expressed in Arabic numerals. Any taxation provisions made by the bill must also be in the summary.			
16.	House Legislative Services Drafting Style and Usage Manual (Louisiana, November 2015)	http://www.ncsl.org/Portals/1/Documents/relacs/manuals/2016LAHouseDraftingManual.pdf at p. 4-3; 4-7; 5-7; 5-8 ***B. Present tense*** Present tense is a grammatical tense the principal function of which is to locate a situation or event in present time. The law is regarded as always speaking, so use present tense when drafting. In most drafting situations this is easy and natural.	1		

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		A significant change in employment status constitutes an adverse employment action under Title VII. There are two other verb tenses a drafter might be tempted to use but should avoid: The first is the conditional future, as in "If the petition **shall have been filed** prior to...". While we do see this verb tense in some older statutes, it sounds so antiquated that contemporary drafters are not likely to use it. The second is the use of "shall" as a helping verb, which changes the tense of the verb to future. In his comments "Legislative Bill Drafting", which accompany the Louisiana Revised Statutes of 1950, Carlos Lazarus says "It is always preferable to say: 'This Section **does not apply** to minors or interdicts' than it is to say: 'This Section **shall not apply** to minors or interdicts.' 'Shall' should only be used to denote requirements or prohibitions." ***C. Singular and plural*** R.S. 1:7 provides that words used in the singular include words used in the plural and the plural the singular. The singular should be used whenever possible, as sentences written in the plural can become even more convoluted when amended. Some words to consider using when drafting in the singular are each, every, any, and a person. The following example is written in the plural. Note how confusing it can become: A. All employees who in good faith believe that their employer is in violation of this Chapter shall submit written notice of the alleged violation to their employers. Employers who receive such written notice from their employees shall have sixty days from receipt of the notice to investigate the matter and remedy any violation of this Chapter.			

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		Alternatively, see the original sentence written in the singular: A. An employee who in good faith believes that his employer is in violation of this Chapter shall submit written notice of the alleged violation to the employer. An employer who receives such written notice from an employee shall have sixty days from receipt of the notice to investigate the matter and remedy any violation of this Chapter. In the following example, "provided that" is used for no other reason than to glue together two distinct requirements: School board members shall not be paid for more than one hundred forty-four days in any one year; provided that no member shall be compensated for more than twelve meetings per month. If the preceding example is read literally and the "provided that" establishes a proviso, this sentence means that if a member is paid for more than twelve meetings in a month, then he may be paid for more than one hundred forty-four meetings in a year. Using a semicolon alone will suffice. School board members shall not be paid for more than one hundred forty-four days in any one year; no member shall be compensated for more than twelve meetings per month. **4.3 SIMPLIFY, SIMPLIFY, SIMPLIFY** ***A. Buried verbs*** One way to make writing unnecessarily complex is to use a weak verb in combination with the noun form of a verb rather than using the intended verb itself. Because drafters should endeavor not to make drafting unnecessarily complex, use the intended verb. For example:			

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		❖ "decide" rather than "make a decision" ❖ "rebut" rather than "offer a rebuttal ❖ "indemnify" rather than "provide an indemnification to" ❖ "resolve" rather than "reach a resolution" ❖ "apply" rather than "submit an application" ❖ "determine" rather than "make a determination" ***B. Unacceptable substitutes for "shall" or "may"*** ***Do not use "must" as a substitute for "shall".*** Do not use legalese substitutes, such as the following, for "shall" or "may": ❖ is directed to ❖ must ❖ has the duty to ❖ is hereby authorized to ❖ is required to ❖ shall have the power to ❖ is entitled to ❖ is lawful to ❖ is empowered to **5.3 THE BODY OF THE BILL; THE SUBSTANTIVE SIDE** ***A. Ironing out the substance of the bill*** As discussed in Chapter 1, Steps in Drafting, a drafter must analyze a member's request to determine the issue or problem that needs to be addressed. In doing so, the drafter must think through the issue from beginning to end to ensure proper drafting and placement in the laws. To achieve this, the drafter may want to give consideration to the following: ❖ What is the bill's purpose? Will the bill create a duty or an obligation? Statutory sentences are written to do one or more of the following: 1) Require, authorize, or prohibit.			

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		2) Set conditions, procedures, or consequences relative to No. 1. 3) Create and otherwise provide for the purpose and structure of a public entity. ❖ Who are the actors involved? Who will be affected by what the bill does? ❖ Are there any procedures needed to implement the purpose of the bill? How will those procedures be implemented? Who will implement those procedures? ❖ How will the bill's purpose be enforced? Who will be responsible for enforcement? ❖ What will be the consequences for failure to follow the bill's purpose? Will there be any penalties? ❖ Are there any special conditions? Will there be any exemptions or exceptions in the application of the new law? Once the drafter has considered the previous questions in relation to a member's request, the drafter should use those answers to ensure that all provisions necessary to accomplish the member's goal are included in the bill draft. It may be helpful for the drafter to review similar provisions of law for guidance and example. ***B. Using shall and may*** In considering the aforementioned guidelines, a drafter will need to determine the appropriate use of "shall" or "may". According to R.S. 1:3, the word "shall" is mandatory and the word "may" is permissive. This seems straightforward, but there are many complicating factors. *1) Shall.* "Shall" indicates that a person or entity has a **duty or obligation** to perform an action. Some things to consider when creating a duty or obligation:			

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		❖ Make it clear **who** has the duty or obligation. One of the best ways to make this clear is to use simple, active voice sentences. ❖ The consequences of failure to perform the duty or obligation should be clear; if there are no consequences, "shall" may have no effect. Be aware what existing consequences may be applicable simply as result of placement in the law. ❖ Consider possible circumstances under which compliance would not be possible or practical. ❖ Be careful with "shall" when the intent is to grant discretion, e.g. **"the committee shall approve the nomination"** indicates that the committee has no discretion; it is simply required to take the action. Consider whether a statement such as "the nomination is subject to committee approval" expresses the desired meaning. ❖ The use of "shall" as a helping verb may result in an unintended shift to passive voice. If a statute says an action "shall be prohibited", it implies that some person or entity has a responsibility to prohibit the action (raising the question "shall be prohibited by whom?"). If the intent is to draft a statute that prohibits the action, "is prohibited" or "is hereby prohibited" states this intent clearly. *2) May.* If authorizing an action but requiring that procedures be followed when the authority is exercised, be sure to make it clear that the requirements apply **only if** the authority is exercised. When authorizing an action subject to certain conditions, be sure to make it clear whether the authority is limited by the conditions. "The board may reject bids for just cause" is open to an argument that the board could reject bids for other reasons. "The board may reject bids but only for just cause" is not open to such an argument.			

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17.	Legislative Council, Maine State Legislature Maine Legislative Drafting Manual (August 2009)	http://www.maine.gov/legis/ros/manual/Draftman2009.pdf at p. 90-92 **Section 1. Legal action verbs: shall, must and may.** In stating the legislative objective, the drafter must pay particular attention to the verb forms used to direct, limit or permit action or inaction. **A. Mandatory and permissive language.** **(1) Shall.** Although "shall" is somewhat uncommon in general English usage, it may be used correctly in legal drafting. Drafters, however, must pay close attention to the proper use of "shall." Below are examples of the proper and improper use of "shall." **(a) Imposing a duty.** "Shall" is properly used to impose a duty on a person or body or to mandate action by a person or body. Use it to say a person or a body "has a duty to" do something or "has to" do something. **Examples:** An association that issues shares by series shall keep a record of every certificate that it issues. The commissioner shall adopt rules. **(b) Not in conditional sentences.** "Shall" should not be used in conditional sentences. **Examples:**	1		

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Do not write:	Write:
If it shall have been established ...	If it is established ... OR If it has been established ...
When the officers shall have completed their investigation ...	When the officers complete their investigation ...
To be eligible for parole, a prisoner shall demonstrate ...	To be eligible for parole, a prisoner must demonstrate ...

(c) Not to confer a right. Avoid using "shall" to confer a right when the recipient is the subject of an active sentence. A right should not be stated as a duty to enjoy the right.

Examples:

Do not write:	Write:
The director shall receive compensation of $12,000 a year.	The director is entitled to compensation of $12,000 a year.

(d) Future law. Similarly, don't use "shall" to say what the law is or how it applies in the future.

Examples:

Do not write:	Write:
A person shall be eligible to apply for tax relief.	A person is eligible to apply for tax relief.
A person who traps lobsters in violation of this section shall be guilty of a Class E crime.	A person who traps lobsters in violation of this section is guilty of a Class E crime.
Grammatical errors shall not invalidate a rule.	Grammatical errors do not invalidate a rule.
It shall be unlawful ...	It is unlawful ...
Funds shall carry to ...	Funds carry to ...

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		(e) Definitions. In drafting definitions: | Do not write: | Write: | | "Bottle" shall mean a container ... | "Bottle" means a container ... | **(2) Must.** **(a) When not a person.** "Must," rather than "shall," should be used when the subject is not a person or body. **Examples:** A copy of the signed contract must be given to the debtor. A record must be kept whenever a certificate is issued. **(b) To express requirements.** Use "must" rather than "shall" to express requirements, that is, statements about what people or things *must be* rather than what they *must do*. "Must" is usually correct in passive sentences imposing requirements. **Examples:** Applicants must be at least 17 years of age. Professions must be licensed by the State. **(c) In conditional sentences.** "Must" rather than "shall" is proper in conditional sentences. **Example:**			

No.	Citation	URL/Text	Am	ABC	
		To be eligible for benefits, an applicant must demonstrate ... **(3) May.** "May" means "is permitted to," "is authorized to," "is entitled to" or "has power to." "May" authorizes or permits rather than commands. **Example:** The commissioner may call a special meeting when necessary. If calling a special meeting is discretionary, "may" is the proper word. If the commissioner is required to call a special meeting, use "the commissioner shall ..." **(4) Will.** "Will" should never be used as a command word. For a discussion of "will" as used in the future tense, see page 79. **B. Prohibitive and restrictive language.** Drafters should use positive language whenever possible to express ideas. Laws, however, are frequently prohibitive or restrictive in nature. Drafters must use care in wording these sections. **(1) Prohibiting action.** Do not use "shall not." Use "may not" to prohibit an action. "May not" is broader than "shall not" as "may not" negates the authority to perform an action as well as prohibiting the action itself. Correlative expressions to "shall not" and "may not" are "no person shall" and "no person may." Avoid "no person may" and never use "no person shall." Literally, "no person shall" means "no person has a duty to." Consider this sentence: "No person shall conduct a picket line without a permit issued under this section." Literally, this means "No person has a duty to conduct a picket line without a permit issued under this section." If "may" replaced "shall" in the sentence, it would mean "No person is authorized to conduct a picket line ..." "No person may" in this context makes more sense. In most instances, however, "no person may ..." is verbal overkill. It provides unneeded emphasis. "A person" is probably sufficient to include			

Exhibit 2—Survey of Jurisdictions: Use of "Shall" in Legislative Drafting

No.	Citation	URL/Text	Am	ABC	
		anyone who should be included. **Example:** A person may not conduct a picket line ... **(2) Negating duty or condition.** To negate a duty or a condition precedent, or to say a thing is not required, use "need not" or "is not required." **Example:** If fewer than 7 people object to a rule, a hearing need not be held (or "a hearing is not required"). **(3) Negating right or privilege.** To negate a right, use "is not entitled to." **Example:** The director is not entitled to compensatory time off.			
18.	Massachusetts General Court Legislative Research and Drafting Manual (2010)	https://malegislature.gov/Content/Documents/General/LegislativeDraftingManual.pdf **3. "Shall" and "may".** a. A duty, mandate, obligation, requirement or condition precedent is expressed by "shall." b. Use "shall" if the verb it qualifies is in the active voice. Example: "The aggrieved party shall file (active verb in active voice) the application." c. Use "may" to confer a power, privilege, or right. Examples: "The applicant may demand (power) an extension of time." "The applicant may appeal (right) the decision."	1		

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		d. Use "shall not" to express a prohibition. e. Do not use qualifiers, such as "will," "should" and "ought," in the text of a bill.			
19.	Minnesota Rules, Drafting Manual *with Styles and Forms* (2013)	https://www.revisor.mn.gov/static/office/2013-Revisor-Manual.pdf at Section 3: **Limit Your Use of "Shall"** The revisor's office recommends using *must*, not *shall*, to impose duties. Most speakers of English stopped using *shall* to mean "is ordered to" in the seventeenth century. Dictionaries show that we generally use *shall* as a formal form of *will* so to most readers the lawyer's shall is an obsolete legalism. If you prefer the traditional *shall*, minimize its use as follows: *Shall*. Use *shall* only when you are imposing a duty on a person or body: "The licensee shall give the debtor a copy of the signed contract." or "An association that issues shares by series shall keep a record of every certificate that it issues." In conditions, don't use *shall* at all. Use present perfect tense, not future perfect. Don't write, "If it *shall* have been established..." Write, "If it has been established..." Don't write, "When the officers *shall* have completed their investigation..." Write, "When the officers have completed their investigation..." *Must*. Use *must*, not *shall*, to talk about a thing rather than a person: "A copy of the signed contract must be given to the debtor," or "A record must be kept whenever a certificate is issued." Use *must* to express requirements, that is, statements about what people or things must be rather than what they must do: "Public members of the board must be broadly representative of the public interest and		1	

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		must not be members of health professions licensed by the state of Minnesota..." *Need not*. *Use need not* or *is not required to*, to say that a thing is not required: "If fewer than seven people object to the rule, a hearing need not be held," or "no hearing is required." *Should*. Do not use *should* in rules. A statement that a person should do something is not a rule. *May*. Use *may* to mean "is permitted to" or "is authorized to" or "has power to": "The commissioner may call a special meeting of the board when necessary." When you use *may*, be sure that your sentence does not grant impermissibly broad discretion to any agency or official. The amount of discretion permitted depends on the matter being regulated and on the statutory language that grants the rulemaking authority. *Must not*. Use *must not* to mean "is forbidden to" or "is prohibited from." Don't use *shall not*. Say "no person may" or "a person must not," not "no person shall." *Means*. In definitions, write *means*, not *shall mean*. Write "have the meanings given them," instead of "shall have the meanings given them." *Is*. Don't use *shall* to say what the law is, to make a statement that is true by operation of law. For example, say that a person *is* eligible for a grant under certain conditions, not that he or she *shall* be eligible.			
20.	Montana Legislative Services Division, Bill Drafting Manual (2016)	http://leg.mt.gov/content/Publications/2016_Bill_Drafting_Manual.pdf p. 16-17 **(5) Mandates and prohibitions** When qualifying a verb in the active voice, "shall" is used as mandatory and "may not" or "may only" as prohibitory. **preferred** The applicant shall sign the application.	1		

Exhibit 2—Survey of Jurisdictions: Use of "Shall" in Legislative Drafting

No.	Citation	URL/Text	Am	ABC	
		avoid The applicant must sign the application. **preferred** The applicant may not submit more than one application. **avoid** The applicant must not submit more than one application. **avoid** The applicant shall not submit more than one application. **preferred** The applicant may submit only one application. Use "shall" only in an imperative or mandatory sense and "may" in a permissive sense. When a right, privilege, or power is conferred, "may" should be used. Do not use "shall" to confer a right because that implies a duty to enjoy the right. **preferred** The officer is entitled to an annual salary of $40,000. **preferred** The officer must receive an annual salary of $40,000. **avoid** The officer shall receive an annual salary of $40,000. **preferred** The annual salary is $40,000. **avoid** The annual salary shall be $40,000.			

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21.	Legislative Counsel Bureau Bill Drafting Manual (Nevada, October 1, 1970)	http://leg.state.nv.us/Division/Research/Publications/InterimReports/1967/Bulletin065.pdf at 38-39 Unless there is some reason (such as the necessity for uniformity in an existing statute) not to use them, the following preferred expressions should be utilized. It will be noted that in most cases the preferred form is the shorter, clearer and exactly to the point. Avoid saying: — Say: it is directed — shall it is the duty of — shall it shall be the duty of — shall is authorized — shall is empowered — shall it shall be lawful — shall (e) "Shall" and "may." Use "may" when: A right, privilege or power is conferred (unless there is doubt that the right or privilege can be legally enforced, in which case use "is entitled"). Use "may not" when: A right, privilege or power is abridged or prohibited (but to assure affirmative prohibition of an act, use "it is unlawful") Use "shall" when: The duty to act is imposed. Use "shall not" when: A prohibition against acting is imposed.	1		
22.	Legislative Drafting Manual (New Mexico, 2015)	https://www.nmlegis.gov/Publications/Legislative_Procedure/drafting_manual.pdf at p. 182: ***"Shall", "May" and "Will"*** Use "shall" to indicate mandatory language. Do not use "must". ***Example: Mandatory***	1		

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No.	Citation	URL/Text	Am	ABC	
		The board shall promulgate rules in accordance. . . . Use "may" to indicate permissive language. ***Example: Permissive*** The director may appoint a deputy director who. . . . Avoid the use of "will". Statutes are written primarily in the present tense.			
23.	Legislation Council North Dakota Legislative Drafting Manual (2017)	http://www.legis.nd.gov/legislative-drafting-manual at p. 93 Use **shall** when you are imposing a duty on a person or body that is the subject in the sentence. Use **shall** in a mandatory or imperative sense. Example: "The licensee **shall** give the debtor a copy of the signed contract." Use **must** in reference to a thing rather than a person and to express status requirements, that is, statements about what people or things must be rather than what they must do. Examples: "The contract **must** contain two signatures." "A candidate **must** be a resident of the county." Use **may** to confer a power, privilege, or right. Examples: "The applicant **may demand** (power) an extension of time." "The applicant **may renew** (privilege) the application." "The applicant **may appeal** (right) the decision." Whenever possible an obligation or discretion to act should be positively stated. However, if a right, privilege, or power is intended to be denied, **may not** should be used. Example: "The applicant **may not submit** (active voice) more than one application." Avoid use of "shall not" and "no person shall" because these phrases mean that **no one is required** to act. A statute that includes one of these phrases negates the obligation but not the permission to act. "A person may not" negates the permission to act and functions correctly as a complete prohibition. Avoid use of "cannot" because "cannot" means the person referred to does not have the ability or capacity to act. Avoid using hortatory qualifiers, such as **will**, **should**, and **ought**, in the text of an Act. These terms may be more appropriate in a resolution instead of a bill.	1		

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		Use **is entitled to** when describing a benefit or right a person may claim or exercise, such as "a state employee is entitled to expense reimbursement. . . ." In these instances, using "shall receive" or similar mandatory phrasing would negate the option of not claiming or exercising a benefit or right.			
24.	Rule Drafting Manual Ohio Legislative Service Commission (May 2006)	https://www.lsc.ohio.gov/documents/private/rules/adminruledraftmanual06_06.pdf at 46: **5.8 MATTERS OF FORM AND STYLE** **5.8.3 MOOD** Use "shall" to require a person to take an action. "Shall" denotes a command, a mandatory duty. Use "may" to authorize, but not require, a person to take an action. "May" denotes a discretionary action, one that may or may not be taken at the actor's initiative.	1		
25.	Bill Drafting Manual Legislative Counsel Committee (Oregon 2014)	https://www.oregonlegislature.gov/lc/PDFs/draftingmanual.pdf at p. 4.4 - 4.5: **3. "SHALL," "MAY," "MUST"; "SHALL NOT," "MAY NOT."** To impose an obligation to act, use "shall." To confer a right, power or privilege, use "may." Do not use "shall" to grant permission or "may" to impose a duty. To prohibit an action, use "may not." See ORS 174.100 (4). Do not use "shall not" to prohibit an action. Although ORS 174.100 (4) makes "shall not" and "may not" equivalent expressions of prohibition, the office has a strong preference for "may not." If you are amending a section in which there is already extensive use of "shall not" (used as a prohibition), you may use "shall not" (to express a prohibition) in order to avoid extensive changes to the statute. Note that there are instances of "shall not" in ORS that are not actually prohibitions. For example, ORS 192.580 (3) (1999 Edition) said, "The provisions of subsection (2) of this section shall not apply in the case of records …." The intended meaning is probably that the provisions "do not" apply. "Shall not" must not be mindlessly replaced with "may not." The drafter must understand the function of the phrase "shall not" before determining whether and how it should be changed. In a condition precedent, you may use "must." For example, "An applicant must be at least 18 years of age." To express an imperative in the passive voice, you may use "must." For example, "The report must be filed …."	1		

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		Avoid using "shall" in a manner that indicates a legal result rather than a command. For example, use "This (year) Act becomes operative on …" instead of "This (year) Act shall become operative on …." Or, use "ORS xxx.yyy does not apply to …." rather than "ORS xxx.yyy shall not apply to…." **4. "MAY" SOMETIMES CONSTRUED AS MANDATORY.** Under certain circumstances, "may" has been held to be mandatory in statutes conferring power upon a public officer or agency when the action concerns the public interest or the rights of individuals. Unfortunately, "may at the director's discretion" is not an acceptable cure. No general rule can be set out to determine the effect of the use of "may" in all cases. It will be construed to further the intent and purpose of the Act in which it is found, and this intent will be gathered from a consideration of the Act as a whole. For example, ORS 654.335 (a section in the Employers' Liability Act, 1999 Ed.) read as follows: The contributory negligence of a person injured shall not be a defense, but **may** be taken into account by the jury in fixing the amount of damages. In Donaghy v. Ore.-Wash. R. Nav. Co., 133 Or. 663 (1930), the Oregon Supreme Court said that the word "may" in ORS 654.335 (1999 Edition) should be construed as "must." If a provision using "may" is likely to be construed to concern the public interest or the rights of individuals and to be mandatory, and if the drafter wants to authorize and not to command, the intent should be made clear by using a separate sentence for this purpose; for example, "The exercise of this power is within the discretion of the director." Even if "shall" is used, it is possible for a provision to be construed as less than mandatory. If so construed, strict compliance with the provision is not required. A court may permit some variation in the minor details of a procedure even though "shall" has been used, assuming that the legislature did not intend that minor matters and immaterial details in statutes be so firmly fixed that the courts cannot relax such requirements in proper cases. Mandatory provisions usually contain both a command and a prohibition against varying the terms of the command, even though the prohibition may exist only by implication. If the prohibition is expressed affirmatively and imposes a sanction or penalty, the legislative intent that the provision be mandatory is as clear as it can be made.			

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<table>
<tr><th>No.</th><th>Citation</th><th>URL/Text</th><th>Am</th><th>ABC</th><th></th></tr>
<tr><td>26.</td><td>Office of Legal Services Legislative Drafting Guide (Tennessee 2018)</td><td>http://www.capitol.tn.gov/joint/staff/legal/2018%20Drafting%20Guide.pdf
at 15-17:

(e) LEGAL ACTION VERBS

In stating the legislative objective, the drafter must pay particular attention to the verb forms the drafter uses to establish the duty, right, power, entitlement, or disentitlement. There has been much change in how legal action verbs have been used over the years. The trend has been to discourage the routine use of "shall" and substitute words that have a more specific meaning attached to them. Because there has been change, the drafter will find that much of the existing law will not reflect the modern trend away from the routine use of "shall." Therefore, when amending existing law, the drafter should exercise discretion on the appropriate action verb to use, keeping in mind the multiple considerations when updating archaic and outdated language as discussed in subsection (e) of Chapter 3. The following chart may be helpful when determining the drafter's needs.

<table><tr><td>Shall</td><td>Has a duty to, Has to</td></tr><tr><td>Must</td><td>Is required to (to achieve an end)</td></tr><tr><td>Shall Not</td><td>Is prohibited</td></tr><tr><td>May</td><td>Is permitted to, Has a right to, Has discretion to, Is authorized to [+ verb]</td></tr><tr><td>Is Entitled To</td><td>Has a right to [+ noun]</td></tr><tr><td>Will</td><td>Expresses a policy or a future contingency in the manner of normal English</td></tr><tr><td>Can</td><td>Is legally or physically capable</td></tr><tr><td>Cannot</td><td>Is legally or physically incapable</td></tr></table></td><td>1</td><td></td><td></td></tr>
</table>

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		(1) The goal of the drafter should be to reduce the use of "shall" by using it only to impose a duty on a person or body or to mandate action by a person or body. That is, the drafter should only use "shall" to say a person or a body "has a duty to" do something or "has to" do something. CORRECT: The commissioner shall adopt rules. INCORRECT: The commissioner must adopt rules. (2) "Shall" should not be used in sentences that require an action to achieve an end. "Must" rather than "shall" is the proper action verb to use when the action is only required to achieve an end. CORRECT: To be eligible for parole, a prisoner must demonstrate... INCORRECT: To be eligible for parole, a prisoner shall demonstrate... (3) Avoid using "shall" to confer a right. If "shall be" can be replaced with "is" or "are," make the replacement. CORRECT: The director is entitled to compensation of twelve thousand dollars ($12,000) a year. CORRECT: Compensation for the director is twelve thousand dollars ($12,000) a year. INCORRECT: The director shall receive compensation of twelve thousand dollars ($12,000) a year. (4) Do not use "shall" to state what the law is or how it applies in the future. A common problem in legislative drafting is that the word "shall" is often used to indicate a legal result rather than a command. This is known as a "false imperative."			

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No.	Citation	URL/Text	Am	ABC	
		CORRECT: Nine (9) members shall be appointed to the board. INCORRECT: The board shall be composed of nine (9) members as follows: (5) When using "shall" to mandate an action in which the outcome is in the discretion of the actor, include alternative actions the actor may take. CORRECT: The commissioner shall approve or deny an application within thirty (30) days. INCORRECT: The commissioner shall approve an application within thirty (30) days. (6) Use "must" rather than "shall" to express requirements, that is, statements about what people or things must be rather than what they must do. "Must" is usually correct in passive sentences imposing requirements. CORRECT: Professions must be licensed by the state. INCORRECT: Professions shall be licensed by the state. (7) "May" means "is permitted to," "is authorized to," "is entitled to" or "has power to." "May" authorizes or permits rather than commands. (8) If the drafter finds that "shall" or "may" could both be used, redraft the sentence to avoid the use of either legal action verb.			

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No.	Citation	URL/Text	Am	ABC	
		CORRECT: The appointee qualifies for office by taking the official oath and filing the required bond. INCORRECT: The appointee shall qualify for office by taking the official oath and filing the required bond. INCORRECT: The appointee may qualify for office by taking the official oath and filing the required bond.			
27.	Texas Legislative Council Drafting Manual (January 2017)	http://www.tlc.state.tx.us/docs/legref/draftingmanual.pdf at p. 111-113: **SEC. 7.30. "SHALL," "MUST," "MAY," ETC.**[2] Use "shall" only to denote a duty imposed on a person or entity. The commissioner *shall* issue a license. (It is the commissioner's duty to do so.) Use "must" to denote a condition precedent. The existence of a condition precedent means that a person, action, or other thing is required to comply with a stated condition as a prerequisite to having full legitimacy. The condition may be stated in a variety of ways, but typically the condition requires the person, action, or other thing to: (1) meet certain stated conditions; (2) possess certain stated characteristics; or (3) consist of certain stated components. Before entering the premises, the inspector *must* obtain the consent of the property owner. (Obtaining the consent of the property owner is a condition to the inspector's authority to enter the premises.) To be eligible for appointment, a person *must* be at least 18 years of age. (A person is ineligible unless the person possesses the characteristic of being at least 18 years of age.) The board may appoint three persons to serve as an advisory committee to the board. The advisory committee *must* be composed of an engineer, an architect, and an attorney. (The required components of the advisory committee are the three specified professionals.)	1		

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		A drafter may find the choice of whether to use "shall" or "must" difficult, particularly when using the passive voice. In general, "must" is used if the sentence's subject is an inanimate object (i.e., is not a person or body on which a duty can be imposed). The application *must* be in writing. (A required characteristic of an application is that it be in writing; an application that is not in writing is invalid.) There are circumstances in which either "shall" or "must" is correct, and the better choice depends on the context or point of emphasis. A report *must* be filed on the form provided by the agency. (A required characteristic of a report is that it be on the form provided by the agency; a report not fi led on the correct form is invalid.) A report *shall* be filed on the form provided by the agency. (An unidentified person or entity has the duty to fi le a report on a form provided by the agency. A preferable, more direct way of emphasizing the duty would be to identify the actor, if the actor is known, and use the active voice. See Section 7.21 of this manual.) A drafter might also choose a drafting approach that eliminates the decision of whether to use "shall" or "must." Under this approach, the provision simply states a legal fact. The appointee qualifies for office by taking the official oath and filing the required bond. (The method by which the appointee qualifies for office is stated as a factual matter.) Use "may" to denote a privilege or discretionary power. The commissioner *may* inspect records. (The commissioner has authority to inspect records, but may not be compelled to do so.) *NOT* The commissioner *can* inspect records. The commissioner *has the right to* inspect records. The commissioner *has authority to* inspect records. Use "is entitled to" to denote a right, as opposed to a discretionary power. A qualified person *is entitled to* a license. (The person has a right to a license.)			

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		Use "may not" to denote a prohibition. The clerk *may not* release the report. (The clerk is prohibited from releasing the report.) **NOTE:** To define a criminal offense, use the format recommended in Section 3.09(b) of this manual. **SEC. 7.31. MODIFIERS.** Place modifying words and phrases so there is no doubt about what they modify. Poor placement of modifiers is probably the main contributor to ambiguity in statutes. Consider the following examples: SECTION 4. A person is not required to hold an exterminator's license to apply a Class A insecticide or trap mice on the person's own property. Does the qualification "on the person's own property" apply only to "trap mice" or does it also qualify "apply a Class A insecticide"? This ambiguity may be cured by one of the following reformulations, depending on the meaning intended: SECTION 4. A person is not required to hold an exterminator's license to do the following on the person's own property: (1) apply a Class A insecticide; or (2) trap mice. *OR* SECTION 4. A person is not required to hold an exterminator's license to: (1) trap mice on the person's own property; or (2) apply a Class A insecticide. Placing the limiting modifier "only" in each possible position in the following sentence produces several different meanings: The river authority may provide wastewater service in the district. 1. No one else may provide wastewater service in the district:			

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No.	Citation	URL/Text	Am	ABC	
		Only the river authority may provide wastewater service in the district. *OR* The river authority only may provide wastewater service in the district. 2. The actions of the river authority are limited to providing wastewater service in the district: The river authority may only provide wastewater service in the district. _____ [2] See Section 311.016, Government Code.			
28.	Drafting Manual (Utah 12/24/2014)	http://le.utah.gov/documents/LDM/draftingManual.html at 2(b)(iv): **iv. Indicative Mood** A statute should be in the present indicative, not in the subjunctive; and in the present perfect, not in the future perfect. A common mistake in drafting legislation: "is the use of 'shall' or 'shall not' to declare a legal result rather than to give a command. For example, . . . ' The record for judicial review shall consist exclusive of' . . . 'A Government employee shall have a right of action against the Government . . .' This usage is known as a false imperative because it does not give a command to someone to do something but rather declares a legal result. [Legislation] is self executing. If it says something 'is,' it is. Thus, if in a [statute] a word has a certain meaning, it is only necessary to say that the word 'means . . . .' This usage is the indicative mood. . . . In addition to the use of shall in these circumstances being technically incorrect, the use of the indicative mood has two other advantages. Most important, it allows the use of shall only in those instances when the imperative mood is appropriate, this is when a command is given. . . . Elimination of the unnecessary shall, of course, also reduces the number of words in the provision."[m] Click below to see examples of how false imperatives can be changed to the indicative mood.	1		

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		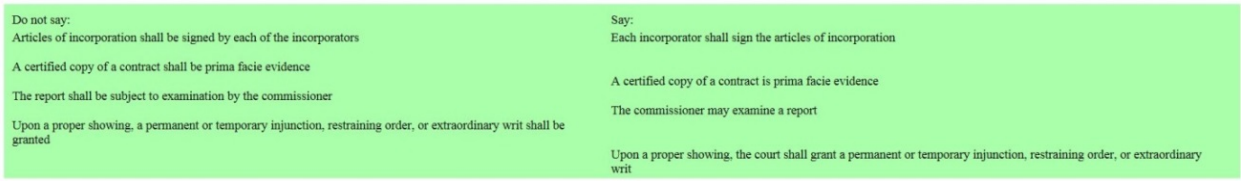 _____ [m] Martineau and Salerno, Legal, Legislative, and Rule Drafting in Plain English , p. 47-48 (2005). One author explains: "the indicative mood is the mood used to indicate - that is, to make a statement of fact. Use it for a stipulation ('This Act applies after the date of the enactment of the Act') or a condition ('If the Secretary determines X, then the Secretary may Y'). Do not use the subjunctive mood ('If the Secretary were to determine X, then the Secretary may Y')." Dorsey, Legislative Drafter's Deskbook: A Practical Guide , p. 190 (2006). See also, e.g. , National Conference of Commissioners on Uniform State Laws, Drafting Rules, Rule 103 (2006 ed.); Haggard, Legal Drafting in a Nutshell, p. 281-282 (2nd ed. 2003).			
29.	Office of the Code Reviser Bill Drafting Guide (Washington 2017)	http://www.leg.wa.gov/CodeReviser/Pages/bill_drafting_guide.aspx at 64-65: (g) **"Shall," "may," and "must."** (i) A statute should be drafted in the present tense because it speaks at the time it is read. Thus, the word "shall" should not be used to state a proposition in the future tense. "Evidence is admissible . . ." is preferable to "Evidence shall be admissible . . ." See *Sutherland* § 21:10. (ii) "Shall" should only be used to mean "has a duty to." That is, to require the performance of an act. For example, "the governor shall appoint a director . . ." Avoid using a negative subject with an affirmative shall, "A person may not . . ." is preferable to "No person shall . . ." The latter means that no one is required to act. So read, it negates the obligation, but not the permission, to act. On the other hand, "A person may not . . ." negates also the permission and is, therefore, the stronger prohibition. To avoid confusion, the drafter should use the affirmative form, "A person may not . . . ," rather than negative forms such as "No person may . . ." or "No person shall . . ." "Shall not" should only be used to mean "has a duty not to." "May" indicates discretion and is used to confer a right, privilege, or power. *Faunce v. Carter*, 26 Wn.2d 211, 215 (1946); but cf. *Buell v. City of Toppenish*, 174 Wash. 79 (1933).	1		

Exhibit 2—Survey of Jurisdictions: Use of "Shall" in Legislative Drafting

No.	Citation	URL/Text	Am	ABC	
		Do not confuse the words "may" and "might." "May" confers authority, as in "A person may file a petition." "Might" describes a possibility, as in "They might want coffee." For a discussion of "may," "shall," and "must," see *Garner*. (iii) To determine whether the use of "shall" or "may" is correct, a helpful test is to mentally substitute for the word "may" the words "has the authority to" and substitute for the word "shall" the words "has the duty to." This reading will make it readily apparent whether the usage is correct. (iv) "Must" creates a condition precedent. Use "must" if the verb it qualifies is an inactive verb or an active verb in the passive voice. Examples: The applicant "must be" (inactive verb) an adult. Prior convictions "must be set forth" (active verb in passive voice) in the application. Use "must not" if the verb it qualifies is an inactive verb or an active verb in the passive voice. Example: The applicant "must not be" (inactive verb) a convicted felon. The application "must not be filed" before the end of the reporting period. Active voice is preferable to passive voice. If the word "must" seems appropriate because of passive voice, the drafter should improve the phrase to avoid ambiguity. See (h)(iii) of this subsection.			
30.	West Virginia Legislature Bill Drafting Manual (December 2017)	http://www.wvlegislature.gov/legisdocs/code/Drafting_Manual.pdf at 39; 63: **Imperative and Permissive Construction** To impose an obligation to act, use "shall". To confer a right, privilege or power, use "may". Do not combine powers and duties. **CORRECT:** The commissioner shall issue the permit. (It is the commissioner's duty to issue the permit.) **CORRECT:** The commissioner may hold a hearing. (The commissioner may hold a hearing, but is not obligated to do so.) **INCORRECT:** The commissioner has the following powers and duties: (This does not specify which acts are mandatory and which are discretionary.)	1		

No.	Citation	URL/Text	Am	ABC	
		Do not use the word "shall" to confer a right. That implies a duty to enjoy the right. **CORRECT:** His or her annual salary is $28,000. **INCORRECT:** He or she shall receive an annual salary of twenty-eight thousand dollars. To prohibit an action, use "may not". But, avoid "No person may" and instead use "A person may not". **Definitions** Say "means"; not "shall mean". **Voice** Use active rather than passive voice, especially when imposing duties, to avoid confusion as to who has the duty to act. **CORRECT:** The secretary shall file the annual report. **INCORRECT:** The annual report shall be filed. ********** "May", "shall", "must", and "should." May is permissive. It confers a discretionary right, power, or privilege. "The commissioner <u>may</u> inspect records." *The commissioner may if it is necessary or proper, but the commissioner is not obligated to do so.* Shall is mandatory. It imposes a duty or obligation to act. "The commissioner <u>shall</u> issue a license." *It is the commissioner's duty to do so.* Avoid the use of "must" whenever possible, unless used as a condition precedent with inanimate subjects.			

Exhibit 2—Survey of Jurisdictions: Use of "Shall" in Legislative Drafting

No.	Citation	URL/Text	Am	ABC	
		"The information on the form must include the date and time of the incident." Avoid the use of "should" or "ought".			
31.	Office of the Parliamentary Counsel Drafting Guidance (U.K. December 2017)	https://www.gov.uk/government/publications/drafting-bills-for-parliament at p. 4: **"Shall"** 1.2.9 Office policy is to avoid the use of the legislative "shall".[1] There may of course be exceptions. One reason for using "shall" might be where the text is being inserted into an Act that already uses it. _____ 1. For reasons for avoiding "shall", see for example Xanthaki H., Thornton's Legislative Drafting (Bloomsbury Professional, London, 5th ed., 2013).		1	

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:

"Adjudication of a Crime Proceeding" means the proceeding which follows the summary Suspension of an Attorney after receipt by the Clerk of the Disciplinary System of initial notification from any court of competent jurisdiction stating that an Attorney has been found guilty of a Crime, irrespective of whether sentencing has occurred.

"Admonition" means a finding that Respondent has committed Misconduct but:

1. No substantial harm to the Complainant or the public has occurred; or

2. The Misconduct is minor and Respondent has taken reasonable precautions against a recurrence or there is otherwise little likelihood of repetition; or

3. There exist exceptional circumstances, which must be set forth in writing.

An Admonition may be imposed as a

1. Private sanction by a Subcommittee *sua sponte*;

2. Private or public sanction based upon an Agreed Disposition approved by a Subcommittee; or

3. Public sanction imposed by a District Committee, the Board, or a three-judge Circuit Court.

"Agreed Disposition" means the disposition of a Disciplinary Proceeding agreed to by Respondent and Bar Counsel and approved by a Subcommittee, District Committee, the Board or a Circuit Court.

"Answer" means a written response to a Charge of Misconduct, Certification, or petition for expedited hearing, which ~~shall~~must respond to each fact and Misconduct allegation contained in the Charge of Misconduct, Certification, or petition for expedited hearing, and be signed by the Respondent.

"Attorney" means a member of the Bar, a Corporate Counsel Registrant, Foreign Lawyer, Foreign Legal Consultant, and any member of the bar of any other jurisdiction while engaged, *pro hac vice* or otherwise, in the practice of law in Virginia.

"Bar" means the Virginia State Bar.

"Bar Counsel" means 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.

"Bar Official" means any Bar officer or any member, employee, or counsel of Council, the Board, a District Committee, or COLD.

"Board" means the Bar Disciplinary Board.

"Certification" means the document issued by a Subcommittee or a District Committee when it has elected to certify allegations of Misconduct to the Board for its consideration, which document ~~shall~~must include sufficient facts to reasonably notify Bar Counsel and Respondent of the basis for such Certification and the Disciplinary Rules alleged to have been violated.

"Certification for Sanction Determination" means the document issued by a District Committee to certify to the Board that a sanction within the power of the Board is in order where the District Committee has found that Respondent failed to fulfill the terms of a Public Reprimand with Terms issued either by a Subcommittee on the basis of an Agreed Disposition or by a District Committee.

"Chair" unless otherwise specified, means the Chair, Vice Chair, or Acting Chair of a District Committee, or a Section, Panel, or Subcommittee of a District Committee, or of the Board or any Panel of the Board.

"Charge of Misconduct" means the notice given by the Bar to a Respondent, setting forth generally the Misconduct alleged to have been committed by the Respondent, and identifying the specific Disciplinary Rule(s) alleged to have been violated by the Respondent. The Charge of Misconduct ~~shall~~must also include the date, time, and place of the hearing.

"Circuit Court" means a court designated as such by Va. Code §17.1-500.

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

"COLD" means the Standing Committee on Lawyer Discipline.

"Complainant" means the initiator of a Complaint.

"Complaint" means any written communication alleging Misconduct or from which allegations of Misconduct reasonably may be inferred.

"Committee Counsel" means an Attorney District Committee member assigned to prosecute a Complaint.

"Corporate Counsel Registrant" means a person who has been recorded by the Virginia State Bar as a Corporate Counsel Registrant pursuant to Rule 1A:5.

"Costs" means reasonable costs paid by the Bar to outside experts, consultants, or guardians *ad litem* in a proceeding conducted pursuant to subparagraph 13-22; reasonable travel and out-of-pocket expenses for witnesses; Court Reporter and transcript fees; 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.

"Council" means the Council of the Bar.

"Court Reporter" means a person who is qualified to transcribe proceedings in a Circuit Court.

"CRESPA" *See* "RESA."

"Crime" means:

1. Any offense declared to be a felony by federal or state law;

2. Any other offense involving theft, fraud, forgery, extortion, bribery, or perjury;

3. An attempt, solicitation or conspiracy to commit any of the foregoing; or

4. Any of the foregoing found by a foreign jurisdiction.

"Disbarment" has the same meaning as Revocation.

"Disciplinary Proceeding" means any proceeding governed by this Paragraph except an Impairment Proceeding.

"Disciplinary Record" means any tangible or electronic record of:

1. Any proceeding in which the Respondent has been found to have committed Misconduct, including those proceedings in which (a) the Board's or three-judge Circuit Court's finding of Misconduct has been appealed to this Court; (b) the Respondent's License has been revoked upon consent to revocation or Respondent has been found guilty of a Crime; or (c) the Respondent has received a sanction pursuant to this Paragraph; and

2. Any proceeding in which the Respondent has been found to have committed a violation of CRESPA or RESA; and

3. Any proceeding in this or any other jurisdiction which resulted in a sanction creating a disciplinary record at the time it was imposed.

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

"Disciplinary Rules" means:

1. the Virginia Rules of Professional Conduct and Virginia Code of Professional Responsibility, as applicable; and

2. the disciplinary rules of any other jurisdiction applicable under Rule 8.5 of the Virginia Rules of Professional Conduct.

"Dismissal" means the dismissal of a Complaint or Disciplinary Proceeding by Bar Counsel, a Subcommittee, a District Committee, the Board or a Circuit Court.

"Dismissal *De Minimis*" means a finding that the Respondent has engaged in Misconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and Respondent has taken reasonable precautions against a recurrence of same.

"Dismissal for Exceptional Circumstances" means a finding that the Respondent has engaged in Misconduct but there exist exceptional circumstances mitigating against further proceedings, which circumstances ~~shall~~must be set forth in writing.

"District Committee" means one of the District Committees appointed as hereinafter provided or, where the context requires, a Panel, a Section, or a Subcommittee thereof.

"District Committee Determination" means the written decision of a District Committee or a Subcommittee of a District Committee, relating to a Complaint or Charge of Misconduct.

"Executive Committee" means the Executive Committee of the Bar.

"Executive Director" means the Executive Director of the Bar and any deputy or assistant designated by Council to act as Executive Director.

"Files" means those files maintained by the Clerk of the Disciplinary System, and office of Bar Counsel with respect to each Complaint.

"Foreign Lawyer" means a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation, but is neither licensed by the Court or authorized under its rules to practice law generally in the Commonwealth of Virginia, nor disbarred or suspended from practice in any jurisdiction.

"Foreign Legal Consultant" means a person who has been issued a foreign legal consultant certificate by the Virginia Board of Bar Examiners pursuant to Rule 1A:7.

"Impairment" means any physical or mental condition that materially impairs the fitness of an Attorney to practice law.

"Impairment Proceeding" means any proceeding:

1. Initiated by Bar Counsel to petition the Board to order the Respondent to undergo examination(s) and provide releases for records;

2. Initiated by a District Committee, the Board, or Bar Counsel to determine whether an Attorney has an Impairment;

3. That follows the summary Suspension of an Attorney who may have an Impairment; or

4. That follows a request by Respondent to terminate an Impairment Suspension.

"Investigation" means any inquiry by Bar Counsel, Committee Counsel, or the Bar's designee concerning any alleged Misconduct or Crime committed by an Attorney or any Impairment of an Attorney.

"Investigative Report" means the report prepared as a result of an Investigation.

"Investigator" means a person designated by the Bar to conduct an Investigation.

"Judge" means a judge within the meaning of Va. Code §17.1-900, and any judge appointed or elected under the laws of any other jurisdiction.

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

"License" means the license or authority to practice law granted by this Court.

"Memorandum Order" means the opinion and order of the Board entered following a Disciplinary Proceeding that ~~shall~~must contain a brief statement of the findings of fact; the nature of the Misconduct shown by such findings of fact; the Disciplinary Rules found to have been violated by clear and convincing evidence; the sanction imposed; the notice requirements, if any, imposed upon Respondent; the time in which Terms are required to be satisfied by Respondent, if Terms are imposed; the alternative sanction, if Respondent fails to comply with any Terms that are imposed; the name and address of the Court Reporter who served at the hearing; the names of the members of the Board that constituted the Panel; and that Costs ~~shall~~must be reimbursed by Respondent.

"Misconduct" means any:

1. Unlawful conduct described in Va. Code § 54.1-3935;

2. Violation of the Disciplinary Rules;

3. Conviction of a Crime;

4. Conviction of any other criminal offense or commission of a deliberately wrongful act that reflects adversely on the Attorney's honesty, trustworthiness, or fitness as an Attorney; or

5. Violation of RESA or any regulations adopted pursuant thereto.

"Panel" means a group of members of a Section, District Committee, or the Board hearing a disciplinary matter that constitutes the quorum required by this Paragraph.

"Paragraph" means Paragraph 13 of the Rules of this Court, Part Six, Section IV.

"Petitioner" means:

1. An Attorney seeking Reinstatement after a Revocation; or

2. An Attorney seeking termination of an Impairment Suspension; or

3. A Bar Counsel or District Committee Chair seeking an expedited hearing before the Board and alleging that an Attorney is engaging in Misconduct likely to result in injury to or loss of property of a client or other entity, or alleging an Attorney poses imminent danger to the public.

"Private Discipline" means any form of discipline that is not public.

"Private Reprimand" means a form of non-public discipline that declares privately the conduct of the Respondent improper but does not limit the Respondent's right to practice law.

"Proceeding" means the same as Disciplinary Proceeding.

"Public Reprimand" means a form of public discipline that declares publicly the conduct of the Respondent improper, but does not limit the Respondent's right to practice law.

"Receivership" means a receivership created pursuant to Va. Code § 54.1-3900.01 or § 54.1-3936.

"Reinstatement" means the restoration by this Court of an Attorney's License in the manner provided in this Paragraph.

"Reinstatement Proceeding" means the proceeding which takes place upon referral from this Court of a Petition for Reinstatement by an Attorney whose License was previously revoked.

"RESA" means Chapters 9 (titled "Real Estate Settlements") and 10 (titled "Real Estate

Settlement Agents") of Title 55.1 of the Code of Virginia (formerly "Consumer Real Estate Settlement Protection Act" or "CRESPA").

"Respondent" means any Attorney:

1. Who is the subject of a Complaint;

2. Who is the subject of any proceeding under this Paragraph, Va. Code §§ 54.1-3900.01, 54.1-3935, 54.1-3936, or RESA; or

3. Who is the subject of an Adjudication of a Crime Proceeding, Proceedings upon Disbarment, Revocation or Suspension in another jurisdiction, Impairment Proceeding, or Reinstatement Proceeding.

"Revocation" means any revocation of an Attorney's License and, when applied to a lawyer not admitted or authorized to practice law in Virginia, means the exclusion from the admission to, or the exercise of any privilege to, practice law in Virginia.

"Section" means a subgroup of a District Committee that has the same powers, authority, and duties as the District Committee.

"Subcommittee" means a subgroup of a District Committee or any Section thereof, convened for the purpose of performing the functions of a Subcommittee as described in this Paragraph.

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

"Suspension" means the temporary suspension of an Attorney's License for either a fixed or indefinite period of time and, when applied to a lawyer not admitted or authorized to practice law in Virginia, means the temporary or indefinite exclusion from the admission to, or the exercise of any privilege to, practice law in Virginia.

"Terms" ~~shall~~ means those conditions imposed on the Respondent by a Subcommittee, District Committee, Board, or Circuit Court, that require the Respondent to perform certain remedial actions as a necessary condition for the imposition of an Admonition, a Private or Public Reprimand, or a Suspension pursuant to this Paragraph.

"Va. Code" means the 1950 Code of Virginia, as amended.

13-1.1. BURDEN OF PROOF

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

13-2. AUTHORITY OF THE COURTS

Nothing in this Paragraph ~~shall~~should be interpreted so as to eliminate, restrict or impair the jurisdiction of the courts of this Commonwealth to deal with the disciplining of Attorneys as provided by law. Every Judge ~~shall have~~has authority to take such action as may be necessary or appropriate to protect the interests of clients of any Attorney whose License is subject to a Suspension or Revocation. Every Circuit Court ~~shall have~~has the power to enforce any order, summons or subpoena issued by the Board, a District Committee or Bar Counsel and to adjudge disobedience thereof as contempt.

13-3. GENERAL ADMINISTRATIVE AUTHORITY OF COUNCIL

Council ~~shall have~~has general administrative authority over and responsibility for the disciplinary system created pursuant to this Paragraph.

13-4. ESTABLISHMENT OF DISTRICT COMMITTEES

A. Creation of District Committees. Council ~~shall~~must appoint a sufficient number of District Committees to carry out the purposes of this Paragraph. District Committees ~~shall be~~ are established in geographical areas consisting of one or more judicial circuits. In creating the District Committee areas, Council ~~shall~~ should give due consideration to Attorney population and the community of interest among different judicial circuits within a District Committee area. Each District Committee ~~shall~~ consists of ten, or in the discretion of Council, 20, 30 or 40 members. Three members of a ten-member District Committee, six members of a 20-member District Committee, nine members of a 30-member District Committee, and 12 members of a 40-member District Committee ~~shall~~must be nonlawyers. All other members ~~shall~~must be active members of the Bar. Former members of a District Committee may serve on a District Committee Subcommittee or participate in a District Committee hearing whenever the District Committee Chair determines that such service is necessary for the orderly administration of the District Committee's work.

B. Panel Quorum. A Panel quorum ~~shall~~ consists of five or more persons. No member of the Subcommittee that considered a Complaint pursuant to subparagraph 13-15 may sit on the Panel that hears the Complaint. One person assigned to a Panel should be a current or former nonlawyer member of a District Committee. If the scheduled nonlawyer is unable to attend, and if an alternate nonlawyer is not reasonably available, participation by a nonlawyer member ~~shall~~is not ~~be~~ required in a proceeding if a quorum is otherwise present. The action of a majority of a quorum ~~shall be~~is the action of the Panel. For the exclusive purposes of considering an Agreed Disposition, pursuant to subparagraph 13-7.A.9, a Panel may act in a meeting in person or through any means of communication by which all five members participating may simultaneously hear each other during the meeting.

C. Geographic Criteria. Each member of a District Committee ~~shall~~must be a resident of or have his or her office in the District Committee area for which such member is appointed. Members ~~shall~~are, to the extent practicable, ~~be~~ appointed from different geographical sections of their districts.

D. Term of Office. Council ~~shall~~should appoint members of each District Committee for such terms of service as will allow for the retirement from the District Committee, or completion of the existing terms, of one-third of the District Committee membership at the end of each fiscal year. A District Committee member's term ~~shall be~~is for three years, and, upon completion of such term, such member is eligible for appointment to a second successive three-year term. A member who has served two full successive terms of three years each on a District Committee ~~shall~~is not ~~be~~ eligible to serve again until one year after the expiration of the second term.

E. Qualifications of Members. Before nominating any individual for membership on a District Committee, the Council members making such recommendation ~~shall~~should first determine that the nominee is willing to serve on the District Committee and will conscientiously discharge the responsibility as a member of the District Committee. Council members making the nominations ~~shall~~must also obtain a statement from the nominees, in writing, that the nominees are willing to serve on the District Committee, if elected. In order to be considered as a potential appointee to a District Committee, each potential appointee ~~shall~~must execute the following: (1) a waiver of confidentiality with respect to his or her Disciplinary Record and any pending Complaints and a release allowing production of his or her Disciplinary Record and any pending Complaints from any jurisdiction for purposes of the appointment process; and (2) an authorization for the Bar to conduct a criminal records check of all jurisdictions for any conviction of a Crime and provide the results to the members of Council and the staff of the Bar for purposes of the appointment process. No member of Council ~~shall~~can be a member of a District Committee; however, this rule ~~shall~~does not apply to the chair or president of any conference of the Virginia State Bar, such as the Conference of Local Bar Associations, Diversity Conference, Senior Lawyers Conference, or Young Lawyers Conference, who are ex-officio members of Council. An ex-officio member of Council who is also a member of a District Committee ~~shall~~ cannot vote on the selection or confirmation of nominees for any District Committee.

F. Persons Ineligible for Appointment. Any potential appointee ~~shall be~~is ineligible for appointment to a District Committee if such potential appointee has: (1) ever been convicted in any jurisdiction of a Crime; (2) ever committed any criminal act that reflects adversely on the potential appointee's honesty, trustworthiness or fitness as a member of a District Committee; (3) a Disciplinary Record in any jurisdiction consisting of a Disbarment, Revocation, Suspension imposed at any time or Public Reprimand imposed within the ten years immediately preceding the proposed appointment date; or (4) a Disciplinary Record in any jurisdiction,

imposed within the five years immediately preceding the proposed appointment date, consisting of Private Discipline or an Admonition, except for a *de minimis* dismissal or a dismissal for exceptional circumstances. The Standing Committee on Lawyer Discipline ~~shall have~~has the sole discretion to determine whether a *de minimis* dismissal or a dismissal for exceptional circumstances ~~shall~~ disqualifiesy~~~~ a potential appointee.

G. Interim Vacancies. Whenever a vacancy occurs on a District Committee, the Executive Committee may fill the vacancy. Bar Counsel or a majority of the members of a District Committee may request the Executive Committee to declare that a District Committee position held by any particular District Committee member has become vacant when, in the judgment of Bar Counsel or the Committee majority, such member has become, or has been for any reason, unavailable for or delinquent in the conduct of the District Committee's business. Similarly, upon request of Bar Counsel, the Executive Committee ~~shall have~~has the power to declare such vacancy. Before such vacancy is declared, the particular District Committee member ~~shall~~must be afforded notice and a reasonable opportunity to be heard.

13-5. AUTHORITY AND DUTIES OF COLD

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

13-6. DISCIPLINARY BOARD

A. Appointment of Members. This Court ~~shall~~must appoint, upon recommendation of Council, 20 members of the Board, 16 of whom ~~shall~~must be active members of the Bar and four of whom ~~shall~~must be nonlawyers. One Attorney member ~~shall~~must be designated by the Court as Chair and two Attorney members as Vice Chairs, upon recommendations of Council. Before nominating any individual for membership on the Board, the Bar's nominating committee ~~shall~~should first determine that the nominee is willing to serve on the Board and will conscientiously discharge the responsibilities as a member of the Board. All nominees ~~shall~~must have previously served on a district committee. The Bar nominating committee ~~shall~~must also obtain a statement from the nominees, in

writing, that the nominees are willing to serve on the Board, if elected and appointed. In order to be considered as a potential appointee to the Board, each potential appointee ~~shall~~must execute the following: (1) a waiver of confidentiality with respect to his or her Disciplinary Record and any pending Complaints and a release allowing production of his or her Disciplinary Record and pending Complaints from any jurisdiction for purposes of the appointment process; and (2) an authorization for the Bar to conduct a criminal records check of all jurisdictions for any conviction of a Crime and provide the results to the members of Council and the staff of the Bar for purposes of the appointment process.

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

C. Term of Office. Members ~~shall~~ serve staggered terms of three years each. No member ~~shall~~may serve more than two consecutive three-year terms but ~~shall be~~a member is eligible for reappointment after the lapse of one or more years following expiration of the previous three-year term. At the expiration of the initial term of any member so appointed for less than a three-year term, such member ~~shall be~~is eligible for immediate reappointment to the Board for two additional consecutive three-year terms.

D. Meetings and Quorum. The Board ~~shall~~ meets on reasonable notice by the Chair or a Vice Chair. A Panel of five members ~~shall~~ constitutes a quorum, and the action of a majority of a Panel ~~shall~~ constitutes action of the Board. For the exclusive purposes of considering an Agreed Disposition, pursuant to subparagraph 13-6.H, a Panel may act in a meeting in person or through any means of communication by which all five members participating may simultaneously hear each other during the meeting. One of the five persons assigned to any Panel ~~shall~~must be a present or former nonlawyer member unless the scheduled nonlawyer is unable to attend and an alternate nonlawyer member or former member is not reasonably available. In such event, participation by a nonlawyer ~~shall~~is not ~~be~~ required in any proceeding if a quorum is otherwise present.

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

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

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

1. To sanction a Respondent for failing to comply with an order issued by the Board. This sanction can include an interim Suspension. Before imposing an interim Suspension, the Board ~~shall~~must issue a notice to the Respondent advising the Respondent that he or she may petition the Board within ten days after service of the notice to withhold entry of an interim Suspension order and to hold an evidentiary hearing. If ten days after service of the notice the Respondent has not petitioned the Board to withhold entry of an interim Suspension order, the Board ~~shall~~must enter an Order suspending the Attorney's License until such time as the Attorney remedies the failure to comply or a determination is made as to whether the Attorney has violated any Disciplinary Rules. An Attorney suspended pursuant to this subparagraph G.1. is subject to the provisions of subparagraph 13-29;

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

the production of documents necessary or material to any proceeding. Any summons or subpoena may be issued by any Board member or the Clerk and ~~shall have~~has the force of and may be enforced as a summons or subpoena issued by a Circuit Court. A subpoena duces tecum which compels the Respondent to produce documents may be served upon the Respondent by certified mail at the Respondent's last address of record for membership purposes with the Bar or, if service cannot be effected at the Respondent's last address on record, or the Respondent is a Foreign Lawyer, or a lawyer engaged pro hac vice in the practice of law in Virginia, or a lawyer not admitted in Virginia, by first class mail to the Clerk of this Court.

3. To impose an interim Suspension if an Attorney fails to comply with a summons or subpoena issued by any member of the Board, the Clerk, or Bar Counsel, for trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm. In the event of alleged noncompliance, Bar Counsel may file with the Board and serve on the Attorney a notice of noncompliance requesting the Board to suspend the Attorney's License. The noncompliance notice must advise the Attorney that he or she may petition the Board within 10 days of service of the notice to withhold entry of a Suspension order and to hold a hearing, at which time the Attorney ~~shall have~~has the burden of proving good cause for the alleged noncompliance. If 10 days after service of the notice of noncompliance the Attorney has not petitioned the Board to withhold entry of an interim Suspension order, the Board ~~shall~~must summarily enter an Order suspending the Attorney's License. If the Board finds at any hearing conducted hereunder that the Attorney has failed to establish good cause for the alleged noncompliance, the Board ~~shall~~must enter an Order suspending the Attorney's License. A suspension imposed under this subparagraph ~~shall~~must remain in place until: i) the Attorney fully complies with the summons or subpoena; ii) a determination is made as to whether the Attorney's noncompliance violated the Disciplinary Rules; or iii) the Complaint or Disciplinary Proceeding in which the summons or subpoena was issued is closed. An Attorney suspended pursuant to this subparagraph G.3. is subject to the provisions of subparagraph 13-29;

4. To rule on the admissibility of evidence, through a panel Chair, which rulings may be overruled by a majority of the Panel; and

5. To act through its Chair or one of the Vice Chairs (an officer) on any non-dispositive pre-hearing matters and on any dispositive matters where all parties are in agreement, subject to the following qualification and exception: (1) any pre-hearing ruling on a non-dispositive matter made by an officer of the Board ~~shall be~~is subject to being overruled by a majority vote of the Panel which actually hears the matter; and (2) Agreed

Dispositions must be approved by a Panel.

H. Agreed Disposition. Whenever Bar Counsel and Respondent are in agreement as to the disposition of a Disciplinary Proceeding, the parties may submit a proposed Agreed Disposition to five members of the Board selected by the Chair. The five members so selected will constitute a Panel. If the proposed Agreed Disposition is accepted by a majority of the Panel so selected, the Agreed Disposition will be adopted by order of the Board. No appeal will lie from any sanction to which Respondent has agreed. If the Agreed Disposition is not accepted by the Panel, the Disciplinary Proceeding will then be set for hearing before another Panel of the Board at the earliest possible date. No member of the Panel which considered the proposed Agreed Disposition ~~shall~~may be assigned to the Panel which hears the Disciplinary Proceeding. In the event the Panel rejects the proposed Agreed Disposition, the Panel may advise Bar Counsel and Respondent as to the reason for the rejection. Bar Counsel and Respondent may then meet privately and determine whether to revise the proposed Agreed Disposition and the Panel may reconsider any revised proposed Agreed Disposition within a timeframe determined by the Panel.

13-7. DISTRICT COMMITTEES

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

1. Elect a Chair, Vice Chair and Secretary, and such other officers as it considers appropriate;

2. Conduct hearings and adjudicate Charges of Misconduct as provided in this Paragraph;

3. Examine witnesses under oath to be administered by any member of the District Committee;

4. Issue, through Bar Counsel, any summons or subpoena necessary to compel the attendance of witnesses and the production of documents or evidence necessary or material to any Investigation or Disciplinary Proceeding, or through its Chair, any summons or subpoena permitted under subparagraph 13-16.E. Any such summons or subpoena issued to a non-Attorney ~~shall have~~has the force of and ~~may be enforced~~is enforceable as a summons or subpoena issued by a Circuit Court. A subpoena duces tecum which compels the Respondent to produce documents may be served upon the Respondent by certified mail at the Respondent's last address of record for membership purposes with the Bar or, if service cannot be effected at the Respondent's last address on record, or if the Respondent is a Foreign Lawyer, or a lawyer engaged *pro hac vice* in the practice of law in Virginia, or a lawyer not admitted in

Virginia, by first class mail to the Clerk of this Court.

5. Direct Bar Counsel to file a notice of noncompliance requesting the Board to suspend an Attorney's License until such time as the Attorney fully complies with a subpoena requiring production of trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm;

6. Rule on the admissibility of evidence and other matters relating to the conduct of a Disciplinary Proceeding;

7. Rule on motions to limit or quash any summons or subpoena;

8. Maintain order in all its proceedings through its Chair; and

9. Approve an Agreed Disposition of a Complaint or Charge of Misconduct submitted by Bar Counsel and the Respondent, either through a Subcommittee acting by a unanimous vote, or, once a Charge of Misconduct is placed on the public District Committee hearing docket, a Panel of the District Committee acting by a majority vote. No appeal will lie from any sanction to which Respondent has agreed. If the Agreed Disposition is not accepted by a Panel of the District Committee, no member of the Panel which considered the Agreed Disposition ~~shall~~ may be assigned to the Panel that hears the Complaint or Charge of Misconduct.

B. Creation of Subcommittees. The Chair ~~shall~~must appoint one or more Subcommittees of each District Committee. Where a District Committee is divided into two or more Sections, there ~~shall~~must be one or more Subcommittees of each Section, as determined by the respective District Committee Section Chair. Each Subcommittee ~~shall~~must consist of three members of that District Committee or that Section of the District Committee. Two members of a Subcommittee ~~shall~~must be members of the Bar, one of whom ~~shall~~must be appointed by the District Committee or Section Chair to act as Chair of that Subcommittee, and one member of the Subcommittee ~~shall~~must be a nonlawyer member.

C. Subcommittee Quorums. A quorum of a Subcommittee ~~shall~~ consists of three members, who may act in a meeting in person or through any means of communication by which all three members participating may simultaneously hear each other during the meeting.

D. District Committee Jurisdiction. A District Committee ~~shall have~~has jurisdiction over all Complaints referred to it.

E. Limitation on Private Discipline. Private Discipline ~~shall be~~is imposed only in

cases of minor Misconduct, when there is little or no injury to any of the following: a client, the public, the legal system or the profession, and when there is little likelihood of repetition by the Respondent. When any Respondent has received two determinations of Private Discipline, excepting only *de minimis* Dismissals, during any ten-year period, it ~~shall be~~is presumed that further Private Discipline is not an appropriate disposition. Any Respondent who has received two determinations of Private Discipline within the ten-year period immediately preceding the Bar's receipt of the oldest Complaint that the Subcommittee is considering, ~~shall~~should receive public discipline for any violation of the Disciplinary Rules, unless there are sufficient facts and circumstances to rebut such presumption.

F. Venue. Venue ~~shall~~is not ~~be~~ jurisdictional, but venue ~~shall~~ lies with the District Committee, in the following order of preference, where:

1. Any portion of the alleged Misconduct occurred;

2. The Respondent resides;

3. The Respondent maintains an office;

4. The Respondent has an address on record with the Bar as the Respondent's address for membership purposes; or

5. The Complainant resides.

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

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

I. Complaints Referred to District Committee or Subcommittee. A District Committee or Subcommittee ~~shall~~ considers, adjudicates and disposes of Complaints referred to the District Committee pursuant to this Paragraph. Where appropriate, the District Committee or Subcommittee ~~shall~~may also counsel Respondents concerning their conduct. In addition, members of a District

Committee, other than nonlawyer members, may participate in the Investigation of Complaints, provided that a member participating in such Investigation ~~shall~~must not participate in a District Committee's consideration, adjudication and disposition of such Complaint or Charge of Misconduct.

J. Service by a Member of the Bar and Professional Relationship. Service by a member of the Bar on a District Committee ~~shall be~~is deemed to be a professional relationship within the meaning of Rules of Professional Conduct 1.6, 1.7, 1.9, 1.10 and 3.7. Such service ~~shall be~~is deemed the holding of public office within the meaning of Rules of Professional Conduct 1.11 and 1.12.

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

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

13-8. BAR COUNSEL

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

1. Initiate, investigate, present or prosecute Complaints or other proceedings before Subcommittees, District Committees, the Board and Circuit Courts. Bar Counsel may represent the Bar in matters pending in this Court. In the course of performing such functions, Bar Counsel ~~shall~~ acts independently and exercises prosecutorial autonomy and discretion;

2. Examine criminal history record information relating to any Attorney or former Attorney from any state or federal law enforcement agency;

3. Examine financial books and records, once a Complaint has been filed, including, without limitation, any and all escrow accounts, trust accounts, estate accounts, fiduciary accounts and operating or other accounts, maintained by the Attorney, the Attorney's law firm or any other third party organization by whom the Attorney is employed or with whom the Attorney is associated;

4. Examine the accounts described in the preceding subparagraph A.3. at any time when Bar Counsel reasonably believes that such accounts may not be

in compliance with the Disciplinary Rules. In every instance in which Bar Counsel initiates examination of accounts or issues any summons or subpoena in the conduct of an examination or an Investigation concerning accounts, other than on the basis of a Complaint against the Attorney, Bar Counsel ~~shall~~must file a written statement as part of the record setting forth the reasons supporting the belief that the accounts may not comply with the Disciplinary Rules. A copy of this written statement ~~shall~~must be served upon the Attorney who is the subject of the Investigation when an examination has begun or any summons or subpoena has been issued;

5. Issue such summons for the attendance of witnesses and subpoenae for the production of documents necessary or material to any Investigation, District Committee or Board proceeding; and

6. File a notice of noncompliance requesting the Board to suspend the Attorney's License until such time as the Attorney fully complies with a subpoena issued by the Bar Counsel, a District Committee or the Board, for the production of trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm.

B. Acting Bar Counsel. In the event of disqualification or recusal of Bar Counsel in any proceeding, the allegation of Misconduct ~~shall~~must be prosecuted by a District Committee member designated by the District Committee Chair if the Proceeding is before a District Committee, or by the Attorney General or his designee if the Proceeding is before the Board or a three-judge Circuit Court.

13-9. CLERK OF THE DISCIPLINARY SYSTEM

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

B. Records Retention. The Clerk ~~shall~~must retain all Files with respect to any Disciplinary Record for a period of at least five years from the date of the final Order in the Disciplinary Proceeding that created that Disciplinary Record. The Clerk may destroy all other Files upon the expiration of one year after the Dismissal.

C. File Destruction. Whenever a File is destroyed, the following information ~~shall~~must be preserved:

1. The name and Bar identification number of Respondent;

2. The name and last known address of the Complainant;

3. The date the matter was initially received by the Bar;

4. A summary of the Complaint or allegation of Misconduct;

5. The date of the Dismissal or any sanction(s) imposed; and

6. The disposition of the matter, including the basis for Dismissal or the sanction(s) imposed.

Such summary information ~~shall~~must be retained for at least five years whenever the Complaint or allegation of Misconduct is dismissed with no Disciplinary Record having been created, and for at least ten years whenever a Disciplinary Record has been created, an Impairment determined, a Reinstatement Proceeding held or a finding of Misconduct involving a RESA violation is made.

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

E. Costs. The Clerk ~~shall~~must 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 RESA and/or the Bar's RESA 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.

F. Review of Costs Assessment. If the Respondent disagrees with the amount of

Costs as calculated by the Clerk, or if the Respondent asserts that the immediate payment thereof would constitute a hardship, the Respondent may petition the Board for review within ten days of the notice assessing Costs. The Chair, upon written request of Respondent, included with his petition, may grant Respondent a hearing on the Costs issue. The decision of the Chair ~~shall be~~is final and non-appealable. Interest at the judgment rate ~~shall~~ commences on the Costs assessed 30 days after the issuance of the notice of assessment, unless otherwise prescribed by the Board. If the Respondent fails to pay the Costs and interest so assessed within 30 days of the notice of assessment or within such other time as the Board may order, then the Costs assessed and interest ~~shall be~~are a debt subject to collection by the Bar, and the Board ~~shall~~must issue an order of Suspension against the Respondent until such time as Respondent ~~shall~~ pays all of the Costs and accrued interest.

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

1. The Clerk of this Court;

2. Clerks of the Circuit and District Courts in each judicial circuit in the Commonwealth where the Attorney resides or maintains an office; and

3. Disciplinary authorities for jurisdictions, federal or state, wherein it is reasonable to expect that the Attorney may be licensed.

13-10. PROCESSING OF COMPLAINTS BY BAR COUNSEL

A. Review. Bar Counsel ~~shall~~must 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~~ must not open an Investigation, and the Complaint ~~shall~~must be dismissed.

B. No Dismissal by Complainant. No Complaint or allegation of Misconduct ~~shall~~may 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~~may 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~~must then dismiss the Complaint. Such dismissal ~~shall~~does 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~~ must 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~~must 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~~must notify the District Committee Chair that a Complaint has been referred to a District Committee for investigation. Thereafter, the Complaint ~~shall~~must 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.

13-11. LIMITED RIGHT TO DISCOVERY

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

A. Issuance of such summonses and subpoenae as are authorized; and

B. Bar Counsel ~~shall~~must 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~~is 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; and

2. Bar Counsel ~~shall~~is not ~~be~~ required to reveal other communications between the Investigator and Bar Counsel, or between Bar Counsel and the Subcommittee.

C. Bar Counsel ~~shall~~must 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~~must 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~~must 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~~must be in writing and ~~shall be~~is deemed effective when mailed by first-class mail to the Bar's last known address of the subject Complainant or Attorney.

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

A. Substantial Compliance. Except where this Paragraph provides specific time deadlines, substantial compliance with the provisions hereof ~~shall be~~is sufficient, and no allegation of Misconduct ~~shall~~may be dismissed on the sole ground that any such provision has not been strictly complied with.

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

C. Service. Whenever any notice or other writing directed to the Respondent is required or permitted under this Rule, such notice or other writing ~~shall be~~is deemed effective and served when mailed by certified mail to the Respondent at the Respondent's last address on record for membership purposes with the Bar or,

if service cannot be effected at the Respondent's last address on record, or if the Respondent is a Foreign Lawyer, or a lawyer engaged pro hac vice in the practice of law in Virginia, or a lawyer not admitted in Virginia, by first class mail to the Clerk of this Court.

D. Evidentiary Rulings. In any Disciplinary Proceeding, evidentiary rulings ~~shall~~must be made favoring receipt into evidence of all reasonably probative evidence to satisfy the ends of justice. The weight given such evidence received ~~shall be~~is commensurate with its evidentiary foundation and likely reliability.

E. Rights of Counsel for Complainant or Witness. Neither counsel for the Complainant, if there is one, nor counsel for any witnesses, may examine or cross-examine any witness, introduce any evidence or present any argument.

F. Notice of Impairment Evidence. A Respondent who intends to rely upon evidence of an Impairment in mitigation of Misconduct ~~shall~~must, 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.

G. English Required. All communication with the Bar, whether written or oral, ~~shall~~ should be in English.

13-13. PARTICIPATION AND DISQUALIFICATION OF COUNSEL

A. Attorney for Respondent. A Respondent may be represented by a member of the Bar, or any member of the bar of any other jurisdiction while engaged *pro hac vice* in the practice of law in Virginia, at any time with respect to a Complaint. In any proceeding before the Board or a three-judge Circuit Court, or in a District Committee matter in which a Charge of Misconduct has been issued, counsel of record for a Respondent ~~shall~~must not withdraw except upon motion for good cause shown.

B. Signature Required by Respondent. A Respondent must sign his or her written response to any Complaint, Charge of Misconduct or Certification.

C. Disqualification. An Attorney ~~shall~~must not represent a Respondent with respect to a Complaint or allegation of Misconduct:

1. While such Attorney is a current employee or current officer of the Bar or is a member of Council, COLD, the Board, or a District Committee;

2. For 90 days after such Attorney ceases to be an employee or officer of the Bar or a member of Council, COLD, the Board, or a District Committee;

3. At any time, after such Attorney ceases to be an employee or officer of the

Bar or a member of Council, COLD, the Board or a District Committee, if such Attorney was personally involved in the subject matter of the Complaint, allegation of Misconduct or any related matter while acting as such employee, officer or member;

4. At any time after such Attorney ceased to be a liaison from COLD to a District Committee before which the Disciplinary Proceeding involving such Complaint or Charge of Misconduct was pending during the time such Attorney was such liaison; or

5. If such Attorney is a partner or an associate of, or is a member, shareholder or has a similar relationship with an Attorney who is a current member of COLD or an officer of the Bar, or who was a member of COLD or an officer of the Bar within the previous 90 days.

6. If such Attorney is a partner or an associate of, or is a member, shareholder or has a similar relationship with an Attorney who is a current member of the Board or was a member of the Board within the previous 90 days, unless the Attorney's representation of the Respondent with respect to a Complaint or allegation of Misconduct preceded the Board member's appointment to the Board. In such cases, the Attorney may continue to represent the Respondent as follows:

   a. Before a Three Judge Court in proceedings conducted pursuant to Va. Code § 54.1-3935, or any appeal therefrom;

   b. Before any District Committee.

7. If such Attorney is a partner or an associate of, or is a member, shareholder or has a similar relationship with an Attorney who is a member of a District Committee, before that District Committee, or if the District Committee is divided into sections, before the District Committee section of which the Attorney's partner or associate is a member.

D. No Imputation of Conflict. Except as set forth in subparagraph C, there ~~shall be~~is no imputation of conflict that disqualifies an Attorney from representing a Respondent with respect to a Complaint or Charge of Misconduct.

13-14. DISQUALIFICATION OF DISTRICT COMMITTEE MEMBER OR BOARD MEMBER

A. Personal or Financial Interest. A member or former member of a District Committee or the Board ~~shall~~must be disqualified from adjudicating any matter with respect to which the member has any personal or financial interest that might affect or reasonably be perceived to affect the member's ability to be impartial. The Chair ~~shall~~must rule on the issue of disqualification, subject to being

overruled by a majority of the Panel or Subcommittee.

B. Complaint Against a Member. Upon the referral of any Complaint against a member or former member of a District Committee or the Board to a District Committee for Investigation, the member ~~shall~~must be recused from any service on the District Committee or the Board until the Dismissal of the Complaint without the imposition of any form of discipline.

C. Imposition of Discipline. Upon the final imposition of a Private Reprimand, a Public Reprimand, an Admonition, a Suspension or a Revocation against a member or former member of a District Committee or the Board, the member ~~shall~~must automatically be terminated from membership or further service on the District Committee or Board. Upon the final imposition of any other form of Attorney discipline, COLD ~~shall have~~ has sole discretion to determine whether the member ~~shall be~~ is terminated from membership or further service on the District Committee or the Board.

D. Interpretation. Unless otherwise stated, all questions of interpretation under this subparagraph 13-14 ~~shall be~~are decided by the tribunal before which the proceeding is pending, except that COLD ~~shall~~ determines discretionary termination of membership or further service.

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

1. The District Committee or Board member or any member of his or her firm is involved in any significant way with the matter on which the District Committee or Board would act;

2. The Board member or any member of the Board member's firm was serving on the District Committee that certified the matter to the Board or has otherwise acted on the matter;

3. A Judge would be required to withdraw from consideration of, or presiding over, the matter under the Canons of Judicial Conduct adopted by this Court;

4. The District Committee or Board member previously represented the Respondent; or

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

13-15. SUBCOMMITTEE ACTION

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~~must dismiss the Complaint when:

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

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

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

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

e. The action alleged to be Misconduct is protected by superseding law.

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

2. Impose an Admonition without Terms. In making this determination, the Subcommittee ~~shall~~must 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~~is 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~~must 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~~must 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~~must be by majority vote.

D. Report of the Subcommittee. All decisions of the Subcommittee ~~shall~~must 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~~must 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~~must 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~~must promptly mail a copy of the Certification to the Clerk, Bar Counsel, the Respondent and the Complainant.

F. Procedure in All Terms Cases. If a Subcommittee imposes Terms, the Subcommittee ~~shall~~must specify the time period within which compliance with the Terms ~~shall~~must be completed. If Terms have been imposed against a

Respondent, that Respondent ~~shall~~must 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~~must 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~~must serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding ~~shall~~must 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~~is 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~~must be imposed. Bar Counsel ~~shall be~~is 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~~must 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.

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~~must, 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~~must, within 21 days after service of the Charge of Misconduct:

1. File an Answer to the Charge of Misconduct with the Clerk, which Answer ~~shall be~~ is 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 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 the filing of an Answer and such a demand, and provision of available dates as specified above, further proceedings before the District Committee ~~shall~~must terminate, and Bar Counsel ~~shall~~must file the complaint required by Va. Code § 54.1-3935. The hearing ~~shall~~must be scheduled as soon as practicable. However, the 30- to 120-day time frame ~~shall not constitute~~is not 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~~is 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 file with the Clerk and provide to each other and the Chair, a list of and copies of all exhibits proposed to be introduced at the Misconduct stage of the hearing;

2. Encourage Bar Counsel and Respondent to confer and discuss stipulations; and

3. Direct Bar Counsel and Respondent to file with the Clerk and provide to each other and 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 the Chair of the District Committee to issue summonses or subpoenae for witnesses and documents. Such a request must be filed with the Clerk with a copy to Bar Counsel. Requests for summonses and subpoenae ~~shall~~will be granted, unless, in the judgment of the Chair of the District Committee, such request is unreasonable. Bar Counsel or any party subject to a summons or subpoena may file with the Clerk a motion to quash or limit such summonses or subpoenae.

F. Continuances. Once a District Committee has scheduled a hearing, no continuance ~~shall~~will 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~~must be open to the public.

H. Public Docket. The Clerk's Office ~~shall~~must 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~~must 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~~must 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~~must be taken and preserved by a Court Reporter. All exhibits or copies thereof received in evidence or refused by the District Committee ~~shall~~must be filed with the Clerk.

J. Opening Remarks by the Chair. After swearing the Court Reporter, who thereafter ~~shall~~must administer oaths or affirmations to witnesses, the Chair ~~shall~~must make opening remarks in the presence of the Respondent and the Complainant, if present. The Chair ~~shall~~must 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~~must be excused from participation in the matter.

K. Motion to Exclude Witnesses. Witnesses other than the Complainant and the Respondent ~~shall~~must 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~~may present witnesses and other evidence supporting the Charge of Misconduct. Respondent ~~shall~~must 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~~must be afforded the opportunity to present witnesses and other evidence on behalf of Respondent. Bar Counsel or Committee's Counsel ~~shall~~must 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~~ rules 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~~must 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~~must be dismissed.

S. Argument. The District Committee ~~shall~~must 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~~must 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~~is 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~~must 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~~must, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has a Disciplinary Record in this or any other jurisdiction and ~~shall~~must 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~~must consider the Respondent's Disciplinary Record. A District Committee may:

1. Conclude that an Admonition, with or without Terms, should be imposed;

2. Issue a Public Reprimand, with or without Terms; or

3. Certify the Charge of Misconduct to the Board or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935.

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

1. Brief findings of the facts established by the evidence except that explicit findings are not required in proceedings conducted pursuant to Va. Code § 54.1-3935;

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~~must promptly provide written notice to the Complainant, the Respondent and Bar Counsel of such Dismissal and the factual and legal basis therefor.

2. Issues a Public Reprimand, with or without Terms, or an Admonition, with or without Terms, the Chair ~~shall~~must 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~~must 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~~must promptly mail to the Clerk a copy of the Certification. A copy of the Certification ~~shall~~must be sent to Bar Counsel, Respondent and the Complainant.

AA. District Committee Determination Finality. 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~~ becomes final.

BB. Enforcement of Terms. In all cases where Terms are included in the disposition, the District Committee ~~shall~~must specify the time period within which compliance ~~shall~~must be completed and, if required, the time period within which the Respondent ~~shall~~must deliver a written certification of compliance to Bar Counsel. The District Committee ~~shall~~must 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~~is 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~~must serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding ~~shall~~must 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~~is 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~~must be imposed. Any show cause proceeding involving the question of compliance ~~shall be~~is 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~~must be a Certification for Sanction Determination. Upon a decision to issue a Certification for Sanction Determination, Bar Counsel ~~shall~~must 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.

DD. Reconsideration of Action by the District Committee. No motion for reconsideration or modification of the District Committee's decision following a hearing on a Charge of Misconduct ~~shall~~may be considered unless it is filed with the Clerk, along with all supporting exhibits, within 10 days after the hearing before 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~~may be reconsidered unless a majority of the Panel that heard the matter votes to reconsider the sanction.

3. No member ~~shall~~may 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.

If such a motion is timely filed, the Clerk ~~shall~~must promptly forward copies to

each member of the hearing Panel. The Panel may deny the motion without response from the other party. No relief ~~shall~~may be granted without allowing the other party an opportunity to oppose the motion in writing. If no relief is granted, the District Committee ~~shall~~must enter its order disposing of the motion.

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

A. Notice of Appeal; Demand. Within ten days after service on the Respondent of the District Committee Determination, the Respondent may file with the Clerk either a notice of appeal to the Board or a notice of appeal and a written demand that further proceedings be conducted pursuant to Va. Code § 54.1-3935. In either case, the Respondent ~~shall~~must send copies to the District Committee Chair and to Bar Counsel. Upon such demand, further proceedings before the Board ~~shall~~must terminate, and Bar Counsel ~~shall~~must file the complaint required by Va. Code § 54.1-3935. The hearing ~~shall~~must be scheduled as soon as practicable. If the Respondent fails to file a demand, as specified above, the Respondent ~~shall be~~is deemed to have consented to the jurisdiction of the Board.

B. Staying of Discipline. If the Clerk receives a timely notice of appeal from a Public Reprimand, with or without Terms, or an Admonition, with or without Terms, the sanctions ~~shall~~must be stayed during the pendency of the appeal.

C. Filing the Transcript and Record on Appeal. The Respondent ~~shall~~must certify in the notice of appeal or written demand that he or she has ordered from the Court Reporter a complete transcript of the proceedings before the District Committee, at the Respondent's cost. Upon receipt of the notice of appeal or written demand, Bar Counsel ~~shall~~must forward those portions of the record in his or her possession to the Clerk. The transcript is a part of the record when it is received in the office of the Clerk within 40 days after filing of the notice of appeal or written demand. The Clerk ~~shall~~must retain the records until the transcript has been received or for 40 days after the notice of appeal or written demand has been received, whichever occurs first, and ~~shall~~must then dispose of the record as prescribed in the records retention policy set forth in this Paragraph. Failure of the Respondent to make the complete transcript a part of the Record as specified herein ~~shall~~must result in Dismissal of the appeal by the Board, whether initiated by notice of appeal or written demand, and affirmance of the sanction imposed by the District Committee. Bar Counsel ~~shall~~ initiates the three-judge Circuit Court process for the appeal only after receipt of the transcript by the Clerk.

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

E. Appeal from Agreed Sanction Prohibited. No appeal ~~shall~~ lies from any sanction to which the Respondent has agreed.

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~~must, within 21 days after service of the Certification:

1. File an Answer to the Certification with the Clerk, which Answer ~~shall be~~is deemed consent to the jurisdiction of the Board; or

2. File an Answer to the Certification and a demand with the Clerk 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. Upon the filing of an Answer and such demand and provision of available dates as specified above, further proceedings before the Board ~~shall~~must terminate, and Bar Counsel ~~shall~~must file the complaint required by Va. Code § 54.1-3935. The hearing ~~shall~~must be scheduled as soon as practicable. However, the 30- to 120-day time frame ~~shall not constitute~~is not 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~~is deemed to have consented to the jurisdiction of the Board.

C. Notice of Hearing. The Board ~~shall~~must set a date, time, and place for the hearing, and ~~shall~~must 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~~must be under oath and ~~shall~~must 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~~must 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~~must 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~~must 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~~must either file an Answer to the petition with the Clerk, which Answer ~~shall be~~is conclusively deemed consent to the jurisdiction of the Board; or file an Answer and a demand with the Clerk 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 the filing of an Answer and such demand and provision of available dates as specified above, further proceedings before the Board ~~shall~~must be terminated and Bar Counsel ~~shall~~must file the complaint required by Va. Code § 54.1-3935. The hearing ~~shall~~must be scheduled as soon as practicable. However, the 30- to 120-day time frame ~~shall~~does not constitute a deadline for the hearing to be held. If any order of summary Suspension has been entered, such Suspension ~~shall~~must 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~~is 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, 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, 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~~may 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~~must be filed with the Clerk.

G. Preliminary Explanation. Absent waiver by the parties, t~~T~~he Chair ~~shall~~must 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~~must 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~~must be excused from participation in the matter.

H. Attendance at Hearing. Witnesses other than the Complainant and the Respondent ~~shall~~must 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~~must be permitted but are not required.

2. Bar Counsel ~~shall~~may present witnesses and other evidence supporting the Certification. The Respondent ~~shall~~must 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~~must be afforded the opportunity to present witnesses and other evidence. Bar Counsel ~~shall~~must 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~~must 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~~must 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~~ deliberates in private. If the Board finds by clear and convincing evidence that the Respondent has engaged in Misconduct, the Board ~~shall~~must, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has a Disciplinary Record in this or any other jurisdiction and ~~shall~~must give Bar Counsel and the Respondent an opportunity to present material evidence and arguments in aggravation or mitigation. The Board ~~shall~~ deliberates 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~~must 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~~must 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~~must 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~~must specify the time period within which compliance ~~shall~~must be completed and, if required, the time period within which the Respondent ~~shall~~must deliver a written certification of compliance to Bar Counsel. The Board ~~shall~~must 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~~is 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~~must serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding ~~shall~~must be set for hearing before the Board at its next available hearing date. The burden of proof ~~shall be~~is 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~~is~~must be~~ imposed. Any show cause proceeding involving the question of compliance ~~shall be~~ is 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~~must issue the Summary Order. Thereafter, the Board ~~shall~~must issue the Memorandum Order. A Board member ~~shall~~must prepare the Summary Order and Memorandum Order for the signature of the Chair or the Chair's designee. Dissenting opinions may be filed. Upon disposition of a matter conducted pursuant to Va. Code § 54.1-3935, the three-judge Circuit Court ~~shall~~must issue the Summary Order and the Memorandum Order, except that explicit findings of fact are not required.

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~~may be considered unless it is filed with the Clerk within 10 days after the hearing before the Board. The moving party ~~shall~~must file the motion and all supporting exhibits with the Clerk. Such motion ~~shall~~may 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.

If such a motion is timely filed, the Clerk ~~shall~~must promptly forward copies to each member of the hearing Panel. The Panel may deny the motion without response from the other party. No relief ~~shall~~may be granted without allowing the other party an opportunity to oppose the motion in writing. If no relief is granted, the Board ~~shall~~must enter its order disposing of the motion.

13-19. BOARD PROCEEDINGS UPON APPEAL

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

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

C. Record on Appeal. The record ~~shall~~ consists of the Charge of Misconduct, the complete transcript of the Proceeding, any exhibits received or refused by the District Committee, the District Committee Determination, and all briefs, memoranda or other papers filed with the District Committee by the Respondent

or the Bar. Upon petition of the Respondent, for good cause shown, the Board may permit the record to be supplemented to prevent injustice, such supplement to be in such form as the Board may deem appropriate.

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

1. The appellant ~~shall~~must file an opening brief within 40 days after the mailing of the notice to the appellant regarding the record by the Clerk. Failure of the appellant to file an opening brief within the time specified herein ~~shall~~must result in the Dismissal of the appeal and affirmance of the decision by the District Committee.

2. The appellee ~~shall~~must file its brief within 25 days after filing of the opening brief.

3. The appellant may file a reply brief within 14 days after filing of the appellee's brief.

E. Standard of Review. In reviewing a District Committee Determination, the Board ~~shall~~must ascertain whether there is substantial evidence in the record upon which the District Committee could reasonably have found as it did.

F. Oral Argument. Oral argument ~~shall~~must be granted, unless waived by the appellant.

G. Imposition of Sanctions. Upon review of the record in its entirety, the Board may:

1. Dismiss the Charge of Misconduct upon a finding that the District Committee Determination is contrary to the law or is not supported by substantial evidence;

2. Affirm the District Committee Determination, in which instance the Board may impose the same or any lesser sanction as that imposed by the District Committee. In no case ~~shall~~may it increase the severity of the sanction imposed by the District Committee; or

3. Reverse the decision of the District Committee and remand the Charge of Misconduct to the District Committee for further proceedings.

13-20. BOARD PROCEEDINGS UPON CERTIFICATION FOR SANCTION DETERMINATION

A. Initiation of Proceedings. Upon receipt of the Certification for Sanction Determination from a District Committee, the Clerk ~~shall~~must issue a notice of

hearing on the Certification for Sanction Determination giving Respondent the date, time and place of the Proceeding and a copy of the Certification for Sanction Determination.

B. Proceedings Upon the Record. The proceeding ~~shall~~must be conducted upon the record which ~~shall~~ consists of the Public Reprimand with Terms determination issued by either a Subcommittee or a District Committee, the transcript of the District Committee show cause hearing, and the Certification for Sanction Determination.

C. Evidence. ~~Evidence only~~Only evidence of mitigation and aggravation with respect to compliance or certification ~~shall~~will be permitted in the proceeding.

D. Argument. Argument ~~shall~~must be conducted as in the sanction phase of a Misconduct case.

E. Sanctions. The Board may impose a sanction of Suspension or Revocation of License.

13-21. BOARD PROCEEDINGS UPON A FIRST OFFENDER PLEA

A. Action Upon Receipt of Notification. Whenever the Clerk receives written notification from any court of competent jurisdiction stating that an Attorney has entered a plea to a Crime under a first offender statute, and that the court has found facts that would justify a finding of guilt and ordered that the Attorney be put on probation, the Board ~~shall~~must forthwith enter an order requiring the Attorney to appear at a specified time and place for a hearing before the Board to determine whether the Attorney's License should be revoked or suspended or, if not, whether the Attorney should be required to give notice, by certified mail, of the plea and probation ordered by the court, including the terms and duration of the probation, to all clients for whom the Attorney is currently handling matters, and to all opposing attorneys and the presiding judges in pending litigation. A copy of the written notification from the court ~~shall~~must be served with the order fixing the time and place of the hearing. The hearing ~~shall~~must be set not less than 14 or more than 30 days after the date of the Board's order.

B. Burden of Proof. At the hearing, the Attorney ~~shall have~~has the burden of proving why his or her License should not be suspended or revoked and why he or she should not be required to give notice of the plea and probation ordered by the court.

C. Demand for Three Judge Court. If the Attorney elects to have further proceedings conducted pursuant to Va. Code § 54.1-3935, the Attorney ~~shall~~must file a demand with the Clerk not later than ten days prior to the date set for the Board hearing, 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 Board ~~shall~~must be terminated and Bar Counsel ~~shall~~must file the complaint required by Va. Code § 54.1-3935. The hearing ~~shall~~must be scheduled as soon as practicable. However, the 30- to 120-day time frame ~~shall~~does not constitute a deadline for the hearing to be held. If the Respondent fails to file a demand, and provide available dates, as specified above, the Respondent ~~shall be~~is deemed to have consented to the jurisdiction of the Board.

D. Attorney Compliance with Notice Requirements. If the Board or court suspends or revokes the Attorney's License, the Attorney must comply with the notice requirements set out in subparagraph 13-29. If the Board or court orders the Attorney to give notice of the plea and court ordered probation, the Attorney ~~shall~~must give such notice within 14 days after the effective date of the Board's order and furnish proof to the Bar within 60 days of the effective date of the order that such notices have been timely given. Issues concerning the adequacy of the notice ~~shall~~must be determined by the Board, which may suspend or revoke the Attorney's License for failure to comply with the above notice requirements.

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

A. Action Upon Receipt of Notification. Whenever the Clerk receives written notification from any court of competent jurisdiction stating that an Attorney (the "Respondent") has been found guilty or convicted of a Crime by 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, a member of the Board ~~shall~~must forthwith and summarily enter an order of Suspension requiring the Respondent to appear at a specified time and place for a hearing before the Board to show cause why the Respondent's License to practice law should not be further suspended or revoked. A copy of the written notification from the court ~~shall~~must be served upon the Respondent with the Board's order of Suspension. The Board may appoint a guardian *ad litem* to represent the interests of a Respondent who is incarcerated and unrepresented by counsel at any time it appears that such an appointment may be appropriate to protect the interests of the Respondent.

B. Time of Hearing, Continuance and Interim Hearing. The hearing ~~shall~~must be set not less than 14 or more than 30 days after the date of the Board's order. Upon written request of the Respondent, the hearing may be continued until after sentencing has occurred. Upon receipt by the Board of a certified copy of a notice of appeal from the conviction, proceedings before the Board ~~shall~~must, upon request of the Respondent, be continued pending disposition of such appeal. The Board ~~shall~~must, upon request of the Respondent, hold an interim hearing and ~~shall~~must terminate a summary Suspension while the sentencing or appeal is pending, if the Board finds that the summary Suspension, if not terminated, would be likely to exceed the discipline imposed by the Board upon a hearing on the

merits of the case.

C. Reversal of Conviction. Upon presentation to the Board of a certified copy of an order setting aside the verdict or reversing the conviction on appeal, any Suspension ~~shall~~must be automatically terminated and any Revocation ~~shall~~must be vacated, and the License ~~shall~~must be deemed automatically reinstated. Discharge or Dismissal of a guilty plea or termination of probation ~~shall~~must not result in the automatic termination of the Suspension or vacation of the Revocation. Nothing herein ~~shall~~ precludes further proceedings against the Respondent upon allegations of Misconduct arising from the facts leading to such conviction.

D. Burden of Proof. At the hearing, the Respondent ~~shall have~~has the burden of proving that he or she was not convicted of a Crime and why his or her License should not be further suspended or revoked.

E. Action by the Board and Notice to Respondent. If the Board finds at the hearing that the Respondent has been found guilty or convicted of a Crime by 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~~must be issued, and a copy thereof served upon the Respondent in which the Board ~~shall~~must continue the Suspension or issue an order of Suspension against the Respondent for a stated period not in excess of five years; or issue an order of Revocation against the Respondent.

F. Demand for Three-Judge Circuit Court. If the Respondent elects to have further proceedings conducted pursuant to Va. Code § 54.1-3935, the Respondent ~~shall~~must file a demand with the Clerk not later than ten days prior to the date set for the hearing before the Board, 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 Board ~~shall~~must be terminated and Bar Counsel ~~shall~~must file the complaint required by Va. Code § 54.1-3935. The hearing ~~shall~~must be scheduled as soon as practicable. However, the 30- to 120-day time frame ~~shall~~does not constitute a deadline for the hearing to be held. Any summary Suspension issued by the Board ~~shall~~must remain in effect until the court designated under Va. Code § 54.1-3935 enters a final order, unless earlier terminated pursuant to subparagraph 13-22.B. If the Respondent fails to file a demand, and provide available dates, as specified above, the Respondent ~~shall be~~is deemed to have consented to the jurisdiction of the Board.

13-23. BOARD PROCEEDINGS UPON IMPAIRMENT

A. Suspension for Impairment. The Board ~~shall have~~has the power to issue an order of Suspension to a Respondent who has an Impairment. The term of such Suspension ~~shall be~~ is indefinite, and, except as provided below, ~~shall~~can 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~~must, 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 may be utilized by Bar Counsel to: (1) dismiss any pending Complaints or allegations of Misconduct; and (2) move to dismiss a Charge of Misconduct, Certification or Disciplinary Proceeding, on the basis of a finding of Impairment militating against further proceedings, which circumstances of Impairment ~~shall~~must be set forth in the Dismissal.

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

C. Investigation. Upon receipt of ~~notice or evidence~~ reliable information that raises a substantial question as to whether an Attorney has ~~or may have~~ an Impairment, Bar Counsel ~~shall~~must cause an Investigation to be made to determine whether there is reason to believe that the Respondent has the Impairment. As a part of the Investigation of whether an Impairment exists, and for good cause shown in the interest of public protection Bar Counsel may petition the Board to order the Respondent:

1. To undergo psychiatric, physical or other medical examinations by qualified physicians or other health care providers selected by the Board;

2. To provide appropriate releases to health care providers authorizing the release of Respondent's psychiatric, physical or other medical records to Bar Counsel and the Board for purposes of the Investigation and any subsequent Impairment proceedings.

Upon notice to the Respondent, the Board ~~shall~~must hold a hearing to determine whether any such examination or release is appropriate.

D. Summary Suspension. Upon receipt of a notice from the Clerk with supporting documentary evidence that an Attorney has been: a) adjudicated by a court of competent jurisdiction to be incompetent or incapacitated; or b) involuntarily admitted to a hospital (as defined in Va. Code §37.2-100) for evaluation or treatment of any addiction, inebriety, insanity, intellectual disability, or mental

illness, any member of the Board ~~shall~~must summarily issue on behalf of the Board an order of Suspension against the Respondent and cause the order to be served on such Respondent.

E. Action by Board after a Hearing.

1. If Bar Counsel determines that there is reason to believe that an Attorney has an Impairment, Bar Counsel ~~shall~~must file a petition with the Board, and the Board ~~shall~~must promptly hold a hearing to determine whether such Impairment exists. A copy of the petition ~~shall~~must be served on the Respondent. If the Board determines that an Impairment exists, it ~~shall~~must enter an order of Suspension.

2. The Board ~~shall~~must hold a hearing upon petition of a Respondent who is subject to a Suspension for Impairment that alleges that the Impairment no longer exists. Evidence that the Respondent is no longer hospitalized ~~shall not be~~is not conclusive to the Board's determination of the Respondent's ability to resume the practice of law.

F. Procedure. Such hearing ~~shall~~must be conducted substantially in accordance with the procedures established in proceedings related to Misconduct, except that the public and witnesses, other than the Respondent, ~~shall~~must be excluded throughout an Impairment Proceeding when not testifying.

G. Guardian *Ad Litem*. The Board may appoint a guardian *ad litem* to represent the interests of a Respondent at any time when it appears that such an appointment may be appropriate to protect the interests of a Respondent who is the subject of an Impairment Proceeding and unrepresented by counsel. If no guardian *ad litem* has been appointed for, and no counsel has made an appearance on behalf of, a Respondent, the notice of any hearing to determine whether the Respondent has an Impairment ~~shall~~must order Respondent to advise the Board whether Respondent has retained counsel for the hearing. Unless counsel for such Respondent enters an appearance with the Board within ten days of the date of the notice, the Board ~~shall~~must appoint a guardian *ad litem* to represent the interests of such Respondent.

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

I. Termination of Suspension. In cases where a Suspension is based upon an adjudication by a court under Paragraph 13-23.D, the Board ~~shall~~must promptly enter an order terminating such Suspension upon receipt of an order from a court of competent jurisdiction finding that the Respondent is no longer incompetent or

incapacitated.

J. Enforcement. The Board ~~shall have~~has the power to sanction an Attorney for failure to comply with its orders and subpoenae issued in connection with an Impairment Proceeding. The sanction can include a summary Suspension in a case where it is 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*.

K. Transfer of Membership Status. Bar Counsel may terminate and close an Impairment Proceeding if the Respondent transfers to the Disabled or Retired class of membership pursuant to Part 6, Section IV, Paragraph 3 of the Rules of Court and files a declaration with the Clerk and the Virginia State Bar's Membership Department that the Respondent will not seek transfer from the Disabled or Retired class of membership. The declaration ~~shall~~must be endorsed by the Respondent and, as applicable, the Respondent's counsel or guardian *ad litem*. The Respondent's transfer to the Disabled or Retired class of membership and filing of the declaration as described above may also be utilized by Bar Counsel to: (1) dismiss any pending Complaints or allegations of Misconduct; and (2) move to dismiss a Charge of Misconduct, Certification, or Disciplinary Proceeding, on the basis of transfer to the Disabled or Retired class of membership, militating against further proceedings, which ~~shall~~must be set forth in the Dismissal.

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

A. Definitions Specific to Paragraph 13-24. The following terms ~~shall~~ have the meaning set forth below unless the content clearly requires otherwise:

1. "State Jurisdiction" means any state, United States Territory, or District of Columbia law licensing or attorney disciplinary authority, including the highest court of any such Jurisdiction, authorized to impose attorney discipline effective throughout the Jurisdiction.

2. "Jurisdiction" ~~shall~~ refers to either a "State Jurisdiction" or any federal court or agency authorized to discipline attorneys, including the United States military.

B. Initiation of Proceedings. Upon receipt of a notice from the Clerk that another Jurisdiction has, as a disciplinary measure, suspended or revoked the law license of an Attorney ("Respondent") or has suspended or revoked Respondent's privilege to practice law in that Jurisdiction, and that such action has become final (the "Suspension or Revocation Notice"), any Board member ~~shall~~must enter on behalf of the Board an order requiring Respondent to show cause why discipline

that is the same or equivalent to the discipline imposed in the other Jurisdiction should not be imposed by the Board. If the Suspension or Revocation Notice is from a State Jurisdiction and the suspension or revocation has not been suspended or stayed, then the Board's order ~~shall~~must suspend Respondent's License pending final disposition of the Proceeding hereunder. The Board ~~shall~~must serve upon Respondent by certified mail the following: a copy of the Suspension or Revocation Notice; a copy of the Board's order; and a notice fixing the date, time and place of the hearing before the Board to determine what action should be taken in response to the Suspension or Revocation Notice and stating that the purpose of the hearing is to provide Respondent an opportunity to show cause why the same or equivalent discipline that was imposed in the other Jurisdiction should not be imposed by the Board. Notwithstanding the above, notice of a suspension or revocation for merely administrative reasons, such as the failure to pay dues or the failure to complete required continuing legal education, ~~shall~~is not ~~be~~ considered a Suspension or Revocation Notice.

C. Opportunity for Response. Respondent may file a written response, which ~~shall~~must be confined to argument and exhibits supporting one or more of the following grounds for dismissal or imposition of lesser discipline:

1. The record of the proceeding in the other Jurisdiction would clearly show that such proceeding was so lacking in notice or opportunity to be heard as to constitute a denial of due process;

2. The imposition by the Board of the same or equivalent discipline upon the same proof would result in an injustice;

3. The same conduct would not be grounds for disciplinary action or for the same or equivalent discipline in Virginia; or

4. The misconduct found in the other Jurisdiction would warrant the imposition of substantially lesser discipline in the Commonwealth of Virginia.

Any such written response must be filed with the Clerk within 14 days of the date of mailing of the Board order, via certified mail, to Respondent's last address of record with the Bar.

D. Scheduling and Continuance of Hearing. Unless continued by the Board for good cause, the hearing ~~shall~~must be set not less than 21 nor more than 30 days after the date of the Board's order.

E. Provision of Copies. The Clerk ~~shall~~must furnish to the Board members designated for the hearing and make available to Respondent copies of the Suspension or Revocation Notice, the Board's order against the Respondent, the notice of hearing, any notice of continuance of the hearing, and any written

response or materials filed by Respondent or by Bar Counsel.

F. Hearing Procedures. Insofar as applicable, the procedures for Proceedings on allegations of Misconduct ~~shall~~must govern. Bar Counsel has discretion to put forth evidence and argument that one or more of the grounds specified in Paragraph 13-24.C exists. If Respondent does not file a timely written response, but appears at the hearing and expresses intent to present evidence or argument supporting the existence of one or more of the grounds specified in Paragraph 13-24.C, Respondent ~~shall~~must make a proffer to the Board. The Board may refuse to consider such evidence or argument as untimely. If the Board in its discretion is willing to consider such evidence or argument, then Bar Counsel, upon motion, may be entitled to a continuance.

G. Burden of Proof. The burden of proof to establish the existence of one or more of the grounds specified in Paragraph 13-24.C is clear and convincing evidence. Unless one or more of the grounds specified in Paragraph 13-24.C has been established by clear and convincing evidence, the Board ~~shall~~must conclude that Respondent was afforded due process by the other Jurisdiction and the findings of the other Jurisdiction ~~shall~~must be conclusive of all matters for purposes of the Proceeding before the Board.

H. Action by the Board. If the Board determines that none of the grounds specified in Paragraph 13-24.C exist by clear and convincing evidence, it ~~shall~~must impose the same or equivalent discipline as imposed in the other Jurisdiction. If the Board finds by clear and convincing evidence the existence of one or more of the grounds specified in Paragraph 13-24.C, the Board ~~shall~~must enter an order it deems appropriate. A copy of any order imposing discipline ~~shall~~must be served upon Respondent via certified mail, return receipt requested. Any such order ~~shall be~~is final and binding, subject only to appeal as set forth in the Rules of Court.

13-25. BOARD PROCEEDINGS FOR REINSTATEMENT

A. Waiver of Confidentiality. The filing by a former Attorney of a petition for Reinstatement ~~shall~~ constitutes a waiver of all confidentiality relating to the petition, and to the Complaint or Complaints that resulted in, or were pending at the time the former Attorney resigned or his or her License was revoked.

B. Investigation of Impairment in Reinstatement Matters. Upon receipt of notice or evidence that an individual seeking Reinstatement has or may have an Impairment, Bar Counsel ~~shall~~must cause an Investigation to be made to determine whether there is reason to believe that the Impairment exists. As part of the Investigation of whether an Impairment exists, and for good cause shown in the interest of public protection, Bar Counsel may petition the Board to order the individual:

1. To undergo at his or her expense psychiatric, physical or other medical

examinations by qualified physicians or other health care providers selected by the Board;

2. 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 Reinstatement Proceedings. The Board ~~shall~~must hold a hearing to determine whether such examination(s) and releases(s) are appropriate, upon notice to the individual petitioning for Reinstatement.

C. Readmission After Resignation. If after resigning from the Bar, a former Attorney wishes to resume practicing law in the Commonwealth of Virginia, the former Attorney must apply to the Board of Bar Examiners, satisfy the character and fitness requirements, and either pass the Bar examination or meet all eligibility requirements for admission without examination under Rule 1A:1. Before being readmitted to the Bar, the former Attorney must also satisfy any membership obligations that were delinquent when the former Attorney resigned.[1]

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

1. Attended 12 hours of continuing legal education, of which at least two hours ~~shall~~must be in the area of legal ethics or professionalism, for every year or fraction thereof of the Suspension;

2. Taken the Multistate Professional Responsibility Examination since imposition of discipline and received a scaled score of 85 or higher;

3. Reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of the Attorney's Misconduct;

4. Paid to the Bar all Costs that have been assessed against him or her, together with any interest due thereon at the judgment rate at the time the Costs are paid; and

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

Compliance with subparagraph 13-25.D will be determined by the Clerk. The Clerk will notify the Attorney of compliance or noncompliance. Upon a

[1] The Supreme Court amended Paragraph 13-25.C by order entered March 1, 2023, effective April 30, 2023. Because COLD and Council approved these proposed amendments prior to the March 1, 2023 order, this amendment was not included in the version of Paragraph 13 approved by COLD and Council.

determination of compliance with the requirements of subparagraph 13-25.D, the Clerk will forward the request and supporting documentation to the Board for approval or disapproval of Reinstatement.

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

F. Threshold Requirements for Reinstatement After Revocation. After a Revocation, Petitioner's License ~~shall~~must not be considered for Reinstatement unless the Petitioner has provided clear and convincing evidence of proof of compliance with the following requirements:

1. No petition may be filed sooner than five years from the effective date of the Revocation;

2. The petition has been filed under oath or affirmation with penalty of perjury;

3. Within five years prior to the filing of the petition, Petitioner has attended 60 hours of continuing legal education, of which at least ten hours ~~shall~~must be in the area of legal ethics or professionalism;

4. The Petitioner has taken the Multistate Professional Responsibility Examination and received a scaled score of 85 or higher;

5. The Petitioner has reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of Petitioner's Misconduct;

6. The Petitioner has paid the Bar all Costs previously assessed against Petitioner, together with any interest due thereon at the judgment rate;

7. The Petitioner has reimbursed the Bar for any sums of money paid as a result of a receivership involving Petitioner's law practice; and

8. The Petitioner has posted with his or her petition for Reinstatement a $5,000 cash bond for payment of Costs resulting from the Reinstatement Proceedings.

G. Reinstatement Proceedings After a Revocation. If the threshold requirements of subparagraph 13-25.F have been met, the following processes ~~shall~~must ensue:

1. Investigation. Bar Counsel ~~shall~~must conduct such Investigation and make such inquiry as it deems appropriate. On request of Bar Counsel, the Petitioner ~~shall~~must promptly sign such forms and give such permission as are necessary to permit inquiry of the Petitioner's background through the Internal Revenue Service, the National Criminal Information Center, the National Criminal Information Network and any other similar information network or system. The petition for Reinstatement ~~shall~~must not proceed without such forms and permissions being signed by Petitioner and returned to Bar Counsel.

2. Bill of Particulars. On written request by Bar Counsel, served by certified mail, return receipt requested, a Petitioner seeking Reinstatement ~~shall~~must file with the Clerk within 21 days after service of the request a bill of particulars setting forth the grounds for Reinstatement. The petition for Reinstatement ~~shall~~must not proceed without such bill of particulars being filed with the Clerk.

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

4. Notice. Reasonable notice of filing of the petition and the date of the hearing ~~shall~~must be distributed by mail or electronic means by the Clerk to all members of the Bar of the circuit in the jurisdictions in which the Petitioner resided, and of the circuit in which the Petitioner maintained a principal office, at the time of the Revocation. The Clerk ~~shall~~must also distribute by mail or electronic means the notice to the members of the District Committee who heard the original Complaint, to members of the Board who heard the original Complaint, to the members of the District Committee for the judicial circuit in which the Petitioner currently resides, to the complaining witness or witnesses on all Complaints pending against the Petitioner before the Board, a District Committee or a court at the date of the Revocation or Suspension and to such other individuals as the Clerk deems appropriate. The Clerk ~~shall~~must publish a synopsis of the petition in the Virginia Lawyer and in a newspaper of general circulation in the judicial circuit where the Petitioner currently resides and where the Petitioner maintained a principal office at the time of the Revocation or Suspension. The entire petition, as well as the transcript, exhibits, pleadings and orders from the original Disciplinary Proceedings and Bill of Particulars, together with the documents referred to in subparagraph 13-25.F above, ~~shall~~must be available for inspection and copying at the office of the Bar on reasonable notice and on payment of costs incurred to make the copies.

5. Proof of Good Character. Petitioner must prove by clear and convincing evidence that Petitioner is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law. After a Revocation, an attorney's license ~~shall~~must not be reinstated without such proof.

6. Powers of the Board in Reinstatement Cases. The Board is empowered to hold a hearing and make its recommendation to this Court either to approve or disapprove the petition.

   a. Hearing. On the date set for the hearing, the Petitioner ~~shall have~~ has the right to representation by counsel, to examine and cross-examine witnesses and to present evidence. The testimony and other incidents of the hearing ~~shall~~must be transcribed and preserved, together with all exhibits (or copies thereof) received into evidence or refused. Bar Counsel ~~shall~~must appear and represent the Commonwealth and its citizens. Bar Counsel ~~shall have~~has the right to cross-examine, call witnesses and present evidence in opposition to the petition. Board members may examine witnesses called by either party. Legal advice to the Board, if required, ~~shall~~must be rendered by the Office of the Attorney General.

   b. Factors to be Considered. In considering the matter prior to making a recommendation to this Court, the Board may consider the following factors:

      i. The severity of the Petitioner's Misconduct, including, but not limited to, the nature and circumstances of the Misconduct;

      ii. The Petitioner's character, maturity and experience at the time of his or her Revocation;

      iii. The time elapsed since the Petitioner's Revocation;

      iv. Restitution to the clients and/or the Bar;

      v. The Petitioner's activities since Revocation, including, but not limited to, his or her conduct and attitude during that period of time;

      vi. The Petitioner's present reputation and standing in the community;

vii. The Petitioner's familiarity with the Virginia Rules of Professional Conduct and his or her current proficiency in the law;

viii. The sufficiency of the punishment undergone by the Petitioner;

ix. The Petitioner's sincerity, frankness and truthfulness in presenting and discussing factors relating to his or her Revocation and Reinstatement; and

x. The impact upon public confidence in the administration of justice if the Petitioner's License is restored.

c. Character Witnesses. Up to five character witnesses supporting and up to five character witnesses opposing the petition ~~shall~~may be heard. In addition, the Board may consider any letters submitted regarding the Petitioner's character and fitness.

d. Character and Fitness Determination. The Board ~~shall~~must offer an opinion in its recommendation as to whether the Petitioner is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law.

e. Determination by the Board. The Board ~~shall~~must, within 60 days after the receipt of the transcript, forward the record and its recommendations to this Court. A copy of the recommendation ~~shall~~must be forwarded to the Petitioner and Bar Counsel.

i. If the Board recommends Reinstatement, it may be conditioned upon Petitioner obtaining malpractice insurance coverage and/or a blanket fidelity bond or dishonesty insurance coverage in an amount(s) set by the Board from an approved professional insurance carrier for a definite term or on an ongoing basis.

ii. At the conclusion of the Reinstatement Proceeding, the Clerk ~~shall~~must determine the Costs associated with such Proceeding. The Clerk ~~shall~~must refund any remaining surplus or ~~shall~~must assess to the Petitioner any deficiencies that exist and submit a report on same to the Clerk of this Court as part of the Board's recommendation order.

iii. Upon approval of a petition by this Court, the Petitioner ~~shall~~must meet the following requirements prior to and as a

condition of his or her Reinstatement:

a) Pay to the Bar any Costs assessed in connection with the Reinstatement Proceeding;

b) Take and pass the written portion of the Virginia State Bar examination;

c) If required by the Board, obtain and maintain a professional liability insurance policy issued by a company authorized to write such insurance in Virginia at the cost of the Petitioner in an amount and for such term as set by the Board; and

d) If required by the Board, obtain and maintain a blanket fidelity bond or dishonesty insurance policy issued by a company authorized to write such bonds or insurance in Virginia at the Petitioner's cost in an amount and for such term as set by the Board.

13-26. APPEAL FROM BOARD DETERMINATIONS

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

B. Determination. This Court ~~shall~~must hear the case and make such determination in connection therewith as it ~~shall~~ deems 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~~must represent the interests of the Commonwealth and its citizens as appellees.

13-27. RESIGNATION

A. Application. A sworn and notarized application to resign from the practice of law ~~shall~~must be submitted to the Clerk. The application ~~shall~~must state that the resignation is not being offered to avoid disciplinary action and that the Attorney has no knowledge of any complaint, investigation, action, or proceeding in any jurisdiction involving allegations of Misconduct by the Attorney. An application

to resign will not prevent or preclude any disciplinary proceeding or action against an Attorney.

B. Procedure. The Clerk ~~shall~~must submit applications for resignation to Bar Counsel, who ~~shall~~must investigate each application and determine whether, based upon the information available, the statements in the sworn application appear to be true and complete. If Bar Counsel files a written objection to the application with the Clerk, the Board ~~shall~~must hold a hearing on whether the application should be accepted. If Bar Counsel does not file an objection, the Board may enter an order accepting the Attorney's resignation without a hearing. A resignation ~~shall be~~is effective only upon entry of an order accepting it. Upon entry of an order accepting an Attorney's resignation, the former Attorney ~~shall~~must immediately cease the practice of law and make appropriate arrangements for the disposition of matters in the Attorney's care in conformity with the wishes of the Attorney's clients.

C. When Not Permitted. An Attorney may not resign while the Attorney is the subject of a disciplinary complaint, investigation, action, or proceeding involving allegations of Misconduct.

13-28. CONSENT TO REVOCATION

A. When Permitted. An Attorney who is the subject of a disciplinary complaint, Investigation or Proceeding may consent to Revocation, but only by delivering to the Clerk an affidavit declaring the Attorney's consent to Revocation and stating that:

1. The consent is freely and voluntarily rendered, that the Attorney is not being subjected to coercion or duress, and that the Attorney is fully aware of the implications of consenting to Revocation;

2. The Attorney is aware that there is currently pending a disciplinary complaint, Investigation, or Proceeding, the nature of which ~~shall~~must be specifically set forth in the affidavit;

3. The Attorney acknowledges that the material facts upon which the disciplinary complaint, Investigation, or Proceeding are predicated are true; and

4. The Attorney submits the consent to Revocation because the Attorney knows that if disciplinary Proceedings based on the alleged conduct were brought or prosecuted to a conclusion, the Attorney could not successfully defend them.

B. Admissions. The admissions offered in the affidavit consenting to Revocation ~~shall~~are not ~~be~~ deemed an admission in any proceeding except one relating to the

status of the Attorney as a member of the Bar.

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

D. Attorney Action Required upon Revocation. Upon entry of such an order of Revocation by consent, the revoked Attorney ~~shall~~must immediately cease the practice of law and ~~shall~~must comply with the notice requirements set forth in subparagraph 13-29.

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

13-29. DUTIES OF DISBARRED OR SUSPENDED RESPONDENT

After a Suspension against a Respondent is imposed by either a Summary Order or Memorandum Order and no stay of the Suspension has been granted by this Court, or after a Revocation against a Respondent is imposed by either a Summary Order or Memorandum Order, Respondent ~~shall~~must forthwith give notice, by certified mail, of his or her Revocation or Suspension to all clients for whom he or she is currently handling matters and to all opposing Attorneys and the presiding Judges in pending litigation. The Respondent ~~shall~~must also make appropriate arrangements for the disposition of matters then in his or her care in conformity with the wishes of his or her clients. The Respondent ~~shall~~must give such notice immediately and in no event later than 14 days of the effective date of the Revocation or Suspension, and make such arrangements as are required herein as soon as is practicable and in no event later than 45 days of the effective date of the Revocation or Suspension. The Respondent ~~shall~~must also furnish proof to the Clerk within 60 days of the effective date of the Revocation or Suspension that such notices have been timely given and such arrangements have been made for the disposition of matters. The Board ~~shall~~must decide all issues concerning the adequacy of the notice and arrangements required herein. The burden of proof ~~shall be~~ is on the Respondent to show compliance. If the Respondent fails to show compliance, the Board may impose a sanction of Revocation or additional Suspension for failure to comply with the requirements of this subparagraph 13-29.

13-30. CONFIDENTIALITY OF DISCIPLINARY RECORDS AND PROCEEDINGS

A. Confidential Matters. Except as otherwise provided in this subparagraph 13-30, or in subparagraph 13-11, all District Committee, Board, and three-judge Circuit Court hearings and all determinations imposing public discipline and orders of summary, interim, or administrative Suspension are public; and the following proceedings, records, and information are confidential and ~~shall~~must not be disclosed:

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

2. Investigations, except that Investigative Reports admitted as exhibits at a public hearing are public;

3. Impairment Proceedings, except that all orders imposing or terminating a Suspension are public;

4. Notes, memoranda, research, and all other work product of Bar Counsel;

5. Records, communications, and information protected by Rule of Professional Conduct 1.6;

6. Subcommittee records and proceedings, except: i) determinations imposing public discipline; and ii) determinations imposing private discipline which have been disclosed to a District Committee, the Board or a three-judge Circuit Court empaneled under Va. Code §54.1-3935, pursuant to subparagraph 13-30.B, are public;

7. Deliberations and working papers of District Committees, the Board or a three-judge Circuit Court; and

8. Records or information sealed or proceedings closed for good cause shown by order of a District Committee, the Board, or three-judge Circuit Court.

B. Timing of Disclosure of Disciplinary Record in Review of Agreed Dispositions and Sanctions Proceedings. If an Attorney has a Disciplinary Record and is subsequently found by a Subcommittee, a District Committee, the Board or a three-judge Circuit Court empaneled under Va. Code § 54.1-3935 to have engaged in Misconduct, the facts and circumstances giving rise to such Disciplinary Record may be disclosed (i) to the Subcommittee, District Committee, Board or three-judge Circuit Court prior to the imposition of any sanction and (ii) by the Subcommittee, District Committee, Board or three-judge Circuit Court in its order. The facts and circumstances giving rise to such Disciplinary Record may also be disclosed to the Board during a hearing

concerning whether an affidavit and consent to Revocation should be accepted. An Attorney's Disciplinary Record, and the facts and circumstances giving rise to such Disciplinary Record, may also be disclosed to a Subcommittee, District Committee, the Board, or a three-judge Circuit Court as part of the review of an Agreed Disposition.

C. Timing of Public Access to Disciplinary Information.

1. A Charge of Misconduct is public when the matter is placed on the public District Committee hearing docket; and

2. A Certification or petition for expedited hearing is public when filed with the Clerk; and

3. All notices, orders, pleadings, and other documents filed with the Clerk or Circuit Court in any Disciplinary Proceeding set for hearing are public upon such filing.

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

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

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

G. Disclosure of Criminal Activity. If Bar Counsel or a Chair of the Board or a Chair of a District Committee discovers evidence of criminal activity by an Attorney, Bar Counsel, the Chair of the Board or a Chair of a District Committee ~~shall~~must forward such evidence to the appropriate Commonwealth's Attorney, United States Attorney or other law enforcement agency. The Attorney concerned ~~shall~~must be notified whenever this information is transmitted pursuant to this subparagraph 13-30 unless Bar Counsel decides that giving such notice will prejudice a disciplinary investigation.

H. Disclosure of Information to Government Entities. By order of this Court, confidential information may be disclosed to the Joint Legislative Audit and Review Commission or other governmental entities incident to their discharge of official duties, provided the entity is required or agrees to maintain the confidentiality of the information provided.

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

J. Testimony about Disciplinary Proceedings.

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

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

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

L. Virginia Lawyer Referral Service. Bar Counsel ~~shall~~must notify the Virginia Lawyer Referral Service when a Complaint involving any Attorney member of the service is referred to a District Committee for Investigation or when any Attorney member of the service is disciplined. Bar Counsel ~~shall~~must also notify the Virginia Lawyer Referral Service when any Complaint involving an Attorney member of the service is dismissed following Investigation or when any Attorney member of the service complies with Terms imposed.

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~~must not share information that is protected

from disclosure by other state or federal privacy laws. Bar Counsel may, but ~~shall~~must not be required to, notify the subject Attorney of the informal referral or transmission of confidential information to the Lawyer Assistant 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~~must not report information about the subject Attorney to Bar Counsel, and Bar Counsel ~~shall~~must not receive such information from the Lawyer Assistance Program.

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

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

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS

13-1. DEFINITIONS

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

"Adjudication of a Crime Proceeding" means the proceeding which follows the summary Suspension of an Attorney after receipt by the Clerk of the Disciplinary System of initial notification from any court of competent jurisdiction stating that an Attorney has been found guilty of a Crime, irrespective of whether sentencing has occurred.

"Admonition" means a finding that Respondent has committed Misconduct but:

1. No substantial harm to the Complainant or the public has occurred; or

2. The Misconduct is minor and Respondent has taken reasonable precautions against a recurrence or there is otherwise little likelihood of repetition; or

3. There exist exceptional circumstances, which must be set forth in writing.

An Admonition may be imposed as a

1. Private sanction by a Subcommittee *sua sponte*;

2. Private or public sanction based upon an Agreed Disposition approved by a Subcommittee; or

3. Public sanction imposed by a District Committee, the Board, or a three-judge Circuit Court.

"Agreed Disposition" means the disposition of a Disciplinary Proceeding agreed to by Respondent and Bar Counsel and approved by a Subcommittee, District Committee, the Board or a Circuit Court.

"Answer" means a written response to a Charge of Misconduct, Certification, or petition for expedited hearing, which must respond to each fact and Misconduct allegation contained in the Charge of Misconduct, Certification, or petition for expedited hearing, and be signed by the Respondent.

"Attorney" means a member of the Bar, a Corporate Counsel Registrant, Foreign Lawyer, Foreign Legal Consultant, and any member of the bar of any other jurisdiction while engaged, *pro hac vice* or otherwise, in the practice of law in Virginia.

"Bar" means the Virginia State Bar.

“Bar Counsel” means 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.

“Bar Official” means any Bar officer or any member, employee, or counsel of Council, the Board, a District Committee, or COLD.

“Board” means the Bar Disciplinary Board.

“Certification” means the document issued by a Subcommittee or a District Committee when it has elected to certify allegations of Misconduct to the Board for its consideration, which document must include sufficient facts to reasonably notify Bar Counsel and Respondent of the basis for such Certification and the Disciplinary Rules alleged to have been violated.

“Certification for Sanction Determination” means the document issued by a District Committee to certify to the Board that a sanction within the power of the Board is in order where the District Committee has found that Respondent failed to fulfill the terms of a Public Reprimand with Terms issued either by a Subcommittee on the basis of an Agreed Disposition or by a District Committee.

“Chair” unless otherwise specified, means the Chair, Vice Chair, or Acting Chair of a District Committee, or a Section, Panel, or Subcommittee of a District Committee, or of the Board or any Panel of the Board.

“Charge of Misconduct” means the notice given by the Bar to a Respondent, setting forth generally the Misconduct alleged to have been committed by the Respondent, and identifying the specific Disciplinary Rule(s) alleged to have been violated by the Respondent. The Charge of Misconduct must also include the date, time, and place of the hearing.

“Circuit Court” means a court designated as such by Va. Code §17.1-500.

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

“COLD” means the Standing Committee on Lawyer Discipline.

“Complainant” means the initiator of a Complaint.

"Complaint" means any written communication alleging Misconduct or from which allegations of Misconduct reasonably may be inferred.

“Committee Counsel” means an Attorney District Committee member assigned to prosecute a Complaint.

"Corporate Counsel Registrant" means a person who has been recorded by the Virginia State Bar as a Corporate Counsel Registrant pursuant to Rule 1A:5.

"Costs" means reasonable costs paid by the Bar to outside experts, consultants, or guardians *ad litem* in a proceeding conducted pursuant to subparagraph 13-22; reasonable travel and out-of-pocket expenses for witnesses; Court Reporter and transcript fees; 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.

"Council" means the Council of the Bar.

"Court Reporter" means a person who is qualified to transcribe proceedings in a Circuit Court.

"CRESPA" *See* "RESA."

"Crime" means:

1. Any offense declared to be a felony by federal or state law;

2. Any other offense involving theft, fraud, forgery, extortion, bribery, or perjury;

3. An attempt, solicitation or conspiracy to commit any of the foregoing; or

4. Any of the foregoing found by a foreign jurisdiction.

"Disbarment" has the same meaning as Revocation.

"Disciplinary Proceeding" means any proceeding governed by this Paragraph except an Impairment Proceeding.

"Disciplinary Record" means any tangible or electronic record of:

1. Any proceeding in which the Respondent has been found to have committed Misconduct, including those proceedings in which (a) the Board's or three-judge Circuit Court's finding of Misconduct has been appealed to this Court; (b) the Respondent's License has been revoked upon consent to revocation or Respondent has been found guilty of a Crime; or (c) the Respondent has received a sanction pursuant to this Paragraph; and

2. Any proceeding in which the Respondent has been found to have committed a violation of CRESPA or RESA; and

3. Any proceeding in this or any other jurisdiction which resulted in a sanction creating a disciplinary record at the time it was imposed.

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

"Disciplinary Rules" means:

1. the Virginia Rules of Professional Conduct and Virginia Code of Professional Responsibility, as applicable; and

2. the disciplinary rules of any other jurisdiction applicable under Rule 8.5 of the Virginia Rules of Professional Conduct.

"Dismissal" means the dismissal of a Complaint or Disciplinary Proceeding by Bar Counsel, a Subcommittee, a District Committee, the Board or a Circuit Court.

"Dismissal *De Minimis*" means a finding that the Respondent has engaged in Misconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and Respondent has taken reasonable precautions against a recurrence of same.

"Dismissal for Exceptional Circumstances" means a finding that the Respondent has engaged in Misconduct but there exist exceptional circumstances mitigating against further proceedings, which circumstances must be set forth in writing.

"District Committee" means one of the District Committees appointed as hereinafter provided or, where the context requires, a Panel, a Section, or a Subcommittee thereof.

"District Committee Determination" means the written decision of a District Committee or a Subcommittee of a District Committee, relating to a Complaint or Charge of Misconduct.

"Executive Committee" means the Executive Committee of the Bar.

"Executive Director" means the Executive Director of the Bar and any deputy or assistant designated by Council to act as Executive Director.

"Files" means those files maintained by the Clerk of the Disciplinary System, and office of Bar Counsel with respect to each Complaint.

"Foreign Lawyer" means a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation, but is neither licensed by the Court or authorized under its rules to practice law generally in the Commonwealth of Virginia, nor disbarred or suspended from practice in any jurisdiction.

"Foreign Legal Consultant" means a person who has been issued a foreign legal consultant certificate by the Virginia Board of Bar Examiners pursuant to Rule 1A:7.

"Impairment" means any physical or mental condition that materially impairs the fitness of an Attorney to practice law.

"Impairment Proceeding" means any proceeding:

1. Initiated by Bar Counsel to petition the Board to order the Respondent to undergo examination(s) and provide releases for records;

2. Initiated by a District Committee, the Board, or Bar Counsel to determine whether an Attorney has an Impairment;

3. That follows the summary Suspension of an Attorney who may have an Impairment; or

4. That follows a request by Respondent to terminate an Impairment Suspension.

"Investigation" means any inquiry by Bar Counsel, Committee Counsel, or the Bar's designee concerning any alleged Misconduct or Crime committed by an Attorney or any Impairment of an Attorney.

"Investigative Report" means the report prepared as a result of an Investigation.

"Investigator" means a person designated by the Bar to conduct an Investigation.

"Judge" means a judge within the meaning of Va. Code §17.1-900, and any judge appointed or elected under the laws of any other jurisdiction.

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

"License" means the license or authority to practice law granted by this Court.

"Memorandum Order" means the opinion and order of the Board entered following a Disciplinary Proceeding that must contain a brief statement of the findings of fact; the nature of the Misconduct shown by such findings of fact; the Disciplinary Rules found to have been violated by clear and convincing evidence; the sanction imposed; the notice requirements, if any, imposed upon Respondent; the time in which Terms are required to be satisfied by Respondent, if Terms are imposed; the alternative sanction, if Respondent fails to comply with any Terms that are imposed; the name and address of the Court Reporter who served at the hearing; the names of the members of the Board that constituted the Panel; and that Costs must be reimbursed by Respondent.

"Misconduct" means any:

1. Unlawful conduct described in Va. Code § 54.1-3935;

2. Violation of the Disciplinary Rules;

3. Conviction of a Crime;

4. Conviction of any other criminal offense or commission of a deliberately wrongful act that reflects adversely on the Attorney's honesty, trustworthiness, or fitness as an Attorney; or

5. Violation of RESA or any regulations adopted pursuant thereto.

"Panel" means a group of members of a Section, District Committee, or the Board hearing a disciplinary matter that constitutes the quorum required by this Paragraph.

"Paragraph" means Paragraph 13 of the Rules of this Court, Part Six, Section IV.

"Petitioner" means:

1. An Attorney seeking Reinstatement after a Revocation; or

2. An Attorney seeking termination of an Impairment Suspension; or

3. A Bar Counsel or District Committee Chair seeking an expedited hearing before the Board and alleging that an Attorney is engaging in Misconduct likely to result in injury to or loss of property of a client or other entity, or alleging an Attorney poses imminent danger to the public.

"Private Discipline" means any form of discipline that is not public.

"Private Reprimand" means a form of non-public discipline that declares privately the conduct of the Respondent improper but does not limit the Respondent's right to practice law.

"Proceeding" means the same as Disciplinary Proceeding.

"Public Reprimand" means a form of public discipline that declares publicly the conduct of the Respondent improper, but does not limit the Respondent's right to practice law.

"Receivership" means a receivership created pursuant to Va. Code § 54.1-3900.01 or § 54.1-3936.

"Reinstatement" means the restoration by this Court of an Attorney's License in the manner provided in this Paragraph.

"Reinstatement Proceeding" means the proceeding which takes place upon referral from this Court of a Petition for Reinstatement by an Attorney whose License was previously revoked.

"RESA" means Chapters 9 (titled "Real Estate Settlements") and 10 (titled "Real Estate

Settlement Agents") of Title 55.1 of the Code of Virginia (formerly "Consumer Real Estate Settlement Protection Act" or "CRESPA").

"Respondent" means any Attorney:

1. Who is the subject of a Complaint;

2. Who is the subject of any proceeding under this Paragraph, Va. Code §§ 54.1-3900.01, 54.1-3935, 54.1-3936, or RESA; or

3. Who is the subject of an Adjudication of a Crime Proceeding, Proceedings upon Disbarment, Revocation or Suspension in another jurisdiction, Impairment Proceeding, or Reinstatement Proceeding.

"Revocation" means any revocation of an Attorney's License and, when applied to a lawyer not admitted or authorized to practice law in Virginia, means the exclusion from the admission to, or the exercise of any privilege to, practice law in Virginia.

"Section" means a subgroup of a District Committee that has the same powers, authority, and duties as the District Committee.

"Subcommittee" means a subgroup of a District Committee or any Section thereof, convened for the purpose of performing the functions of a Subcommittee as described in this Paragraph.

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

"Suspension" means the temporary suspension of an Attorney's License for either a fixed or indefinite period of time and, when applied to a lawyer not admitted or authorized to practice law in Virginia, means the temporary or indefinite exclusion from the admission to, or the exercise of any privilege to, practice law in Virginia.

"Terms" means those conditions imposed on the Respondent by a Subcommittee, District Committee, Board, or Circuit Court, that require the Respondent to perform certain remedial actions as a necessary condition for the imposition of an Admonition, a Private or Public Reprimand, or a Suspension pursuant to this Paragraph.

"Va. Code" means the 1950 Code of Virginia, as amended.

13-1.1. BURDEN OF PROOF

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

13-2. AUTHORITY OF THE COURTS

Nothing in this Paragraph should be interpreted so as to eliminate, restrict or impair the jurisdiction of the courts of this Commonwealth to deal with the disciplining of Attorneys as provided by law. Every Judge has authority to take such action as may be necessary or appropriate to protect the interests of clients of any Attorney whose License is subject to a Suspension or Revocation. Every Circuit Court has the power to enforce any order, summons or subpoena issued by the Board, a District Committee or Bar Counsel and to adjudge disobedience thereof as contempt.

13-3. GENERAL ADMINISTRATIVE AUTHORITY OF COUNCIL

Council has general administrative authority over and responsibility for the disciplinary system created pursuant to this Paragraph.

13-4. ESTABLISHMENT OF DISTRICT COMMITTEES

A. Creation of District Committees. Council must appoint a sufficient number of District Committees to carry out the purposes of this Paragraph. District Committees are established in geographical areas consisting of one or more judicial circuits. In creating the District Committee areas, Council should give due consideration to Attorney population and the community of interest among different judicial circuits within a District Committee area. Each District Committee consists of ten, or in the discretion of Council, 20, 30 or 40 members. Three members of a ten-member District Committee, six members of a 20-member District Committee, nine members of a 30-member District Committee, and 12 members of a 40-member District Committee must be nonlawyers. All other members must be active members of the Bar. Former members of a District Committee may serve on a District Committee Subcommittee or participate in a District Committee hearing whenever the District Committee Chair determines that such service is necessary for the orderly administration of the District Committee's work.

B. Panel Quorum. A Panel quorum consists of five or more persons. No member of the Subcommittee that considered a Complaint pursuant to subparagraph 13-15 may sit on the Panel that hears the Complaint. One person assigned to a Panel should be a current or former nonlawyer member of a District Committee. If the scheduled nonlawyer is unable to attend, and if an alternate nonlawyer is not reasonably available, participation by a nonlawyer member is not required in a proceeding if a quorum is otherwise present. The action of a majority of a quorum is the action of the Panel. For the exclusive purposes of considering an Agreed Disposition, pursuant to subparagraph 13-7.A.9, a Panel may act in a meeting in person or through any means of communication by which all five members participating may simultaneously hear each other during the meeting.

C. Geographic Criteria. Each member of a District Committee must be a resident of

or have his or her office in the District Committee area for which such member is appointed. Members are, to the extent practicable, appointed from different geographical sections of their districts.

D. Term of Office. Council should appoint members of each District Committee for such terms of service as will allow for the retirement from the District Committee, or completion of the existing terms, of one-third of the District Committee membership at the end of each fiscal year. A District Committee member's term is for three years, and, upon completion of such term, such member is eligible for appointment to a second successive three-year term. A member who has served two full successive terms of three years each on a District Committee is not eligible to serve again until one year after the expiration of the second term.

E. Qualifications of Members. Before nominating any individual for membership on a District Committee, the Council members making such recommendation should first determine that the nominee is willing to serve on the District Committee and will conscientiously discharge the responsibility as a member of the District Committee. Council members making the nominations must also obtain a statement from the nominees, in writing, that the nominees are willing to serve on the District Committee, if elected. In order to be considered as a potential appointee to a District Committee, each potential appointee must execute the following: (1) a waiver of confidentiality with respect to his or her Disciplinary Record and any pending Complaints and a release allowing production of his or her Disciplinary Record and any pending Complaints from any jurisdiction for purposes of the appointment process; and (2) an authorization for the Bar to conduct a criminal records check of all jurisdictions for any conviction of a Crime and provide the results to the members of Council and the staff of the Bar for purposes of the appointment process. No member of Council can be a member of a District Committee; however, this rule does not apply to the chair or president of any conference of the Virginia State Bar, such as the Conference of Local Bar Associations, Diversity Conference, Senior Lawyers Conference, or Young Lawyers Conference, who are ex-officio members of Council. An ex-officio member of Council who is also a member of a District Committee cannot vote on the selection or confirmation of nominees for any District Committee.

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

on Lawyer Discipline has the sole discretion to determine whether a *de minimis* dismissal or a dismissal for exceptional circumstances disqualifies a potential appointee.

G. Interim Vacancies. Whenever a vacancy occurs on a District Committee, the Executive Committee may fill the vacancy. Bar Counsel or a majority of the members of a District Committee may request the Executive Committee to declare that a District Committee position held by any particular District Committee member has become vacant when, in the judgment of Bar Counsel or the Committee majority, such member has become, or has been for any reason, unavailable for or delinquent in the conduct of the District Committee's business. Similarly, upon request of Bar Counsel, the Executive Committee has the power to declare such vacancy. Before such vacancy is declared, the particular District Committee member must be afforded notice and a reasonable opportunity to be heard.

13-5. AUTHORITY AND DUTIES OF COLD

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

13-6. DISCIPLINARY BOARD

A. Appointment of Members. This Court must appoint, upon recommendation of Council, 20 members of the Board, 16 of whom must be active members of the Bar and four of whom must be nonlawyers. One Attorney member must be designated by the Court as Chair and two Attorney members as Vice Chairs, upon recommendations of Council. Before nominating any individual for membership on the Board, the Bar's nominating committee should first determine that the nominee is willing to serve on the Board and will conscientiously discharge the responsibilities as a member of the Board. All nominees must have previously served on a district committee. The Bar nominating committee must also obtain a statement from the nominees, in writing, that the nominees are willing to serve on the Board, if elected and appointed. In order to be considered as a potential appointee to the Board, each potential appointee must execute the following: (1) a waiver of confidentiality with respect to his or her Disciplinary Record and any

pending Complaints and a release allowing production of his or her Disciplinary Record and pending Complaints from any jurisdiction for purposes of the appointment process; and (2) an authorization for the Bar to conduct a criminal records check of all jurisdictions for any conviction of a Crime and provide the results to the members of Council and the staff of the Bar for purposes of the appointment process.

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

C. Term of Office. Members serve staggered terms of three years each. No member may serve more than two consecutive three-year terms but a member is eligible for reappointment after the lapse of one or more years following expiration of the previous three-year term. At the expiration of the initial term of any member so appointed for less than a three-year term, such member is eligible for immediate reappointment to the Board for two additional consecutive three-year terms.

D. Meetings and Quorum. The Board meets on reasonable notice by the Chair or a Vice Chair. A Panel of five members constitutes a quorum, and the action of a majority of a Panel constitutes action of the Board. For the exclusive purposes of considering an Agreed Disposition, pursuant to subparagraph 13-6.H, a Panel may act in a meeting in person or through any means of communication by which all five members participating may simultaneously hear each other during the meeting. One of the five persons assigned to any Panel must be a present or former nonlawyer member unless the scheduled nonlawyer is unable to attend and an alternate nonlawyer member or former member is not reasonably available. In such event, participation by a nonlawyer is not required in any proceeding if a quorum is otherwise present.

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

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

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

1. To sanction a Respondent for failing to comply with an order issued by the Board. This sanction can include an interim Suspension. Before imposing an interim Suspension, the Board must issue a notice to the Respondent advising the Respondent that he or she may petition the Board within ten days after service of the notice to withhold entry of an interim Suspension order and to hold an evidentiary hearing. If ten days after service of the notice the Respondent has not petitioned the Board to withhold entry of an interim Suspension order, the Board must enter an Order suspending the Attorney's License until such time as the Attorney remedies the failure to comply or a determination is made as to whether the Attorney has violated any Disciplinary Rules. An Attorney suspended pursuant to this subparagraph G.1. is subject to the provisions of subparagraph 13-29;

2. On its own motion or upon request by Bar Counsel or the Respondent, to summon and examine witnesses under oath or affirmation administered by any member of the Board and to compel the attendance of witnesses and the production of documents necessary or material to any proceeding. Any summons or subpoena may be issued by any Board member or the Clerk and has the force of and may be enforced as a summons or subpoena issued by a Circuit Court. A subpoena duces tecum which compels the Respondent to produce documents may be served upon the Respondent by certified mail at the Respondent's last address of record for membership

purposes with the Bar or, if service cannot be effected at the Respondent's last address on record, or the Respondent is a Foreign Lawyer, or a lawyer engaged pro hac vice in the practice of law in Virginia, or a lawyer not admitted in Virginia, by first class mail to the Clerk of this Court.

3. To impose an interim Suspension if an Attorney fails to comply with a summons or subpoena issued by any member of the Board, the Clerk, or Bar Counsel, for trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm. In the event of alleged noncompliance, Bar Counsel may file with the Board and serve on the Attorney a notice of noncompliance requesting the Board to suspend the Attorney's License. The noncompliance notice must advise the Attorney that he or she may petition the Board within 10 days of service of the notice to withhold entry of a Suspension order and to hold a hearing, at which time the Attorney has the burden of proving good cause for the alleged noncompliance. If 10 days after service of the notice of noncompliance the Attorney has not petitioned the Board to withhold entry of an interim Suspension order, the Board must summarily enter an Order suspending the Attorney's License. If the Board finds at any hearing conducted hereunder that the Attorney has failed to establish good cause for the alleged noncompliance, the Board must enter an Order suspending the Attorney's License. A suspension imposed under this subparagraph must remain in place until: i) the Attorney fully complies with the summons or subpoena; ii) a determination is made as to whether the Attorney's noncompliance violated the Disciplinary Rules; or iii) the Complaint or Disciplinary Proceeding in which the summons or subpoena was issued is closed. An Attorney suspended pursuant to this subparagraph G.3. is subject to the provisions of subparagraph 13-29;

4. To rule on the admissibility of evidence, through a panel Chair, which rulings may be overruled by a majority of the Panel; and

5. To act through its Chair or one of the Vice Chairs (an officer) on any non-dispositive pre-hearing matters and on any dispositive matters where all parties are in agreement, subject to the following qualification and exception: (1) any pre-hearing ruling on a non-dispositive matter made by an officer of the Board is subject to being overruled by a majority vote of the Panel which actually hears the matter; and (2) Agreed Dispositions must be approved by a Panel.

H. Agreed Disposition. Whenever Bar Counsel and Respondent are in agreement as to the disposition of a Disciplinary Proceeding, the parties may submit a proposed Agreed Disposition to five members of the Board selected by the Chair. The five members so selected will constitute a Panel. If the proposed Agreed Disposition is accepted by a majority of the Panel so selected, the Agreed Disposition will be adopted by order of the Board. No appeal will lie from any sanction to which

Respondent has agreed. If the Agreed Disposition is not accepted by the Panel, the Disciplinary Proceeding will then be set for hearing before another Panel of the Board at the earliest possible date. No member of the Panel which considered the proposed Agreed Disposition may be assigned to the Panel which hears the Disciplinary Proceeding. In the event the Panel rejects the proposed Agreed Disposition, the Panel may advise Bar Counsel and Respondent as to the reason for the rejection. Bar Counsel and Respondent may then meet privately and determine whether to revise the proposed Agreed Disposition and the Panel may reconsider any revised proposed Agreed Disposition within a timeframe determined by the Panel.

13-7. DISTRICT COMMITTEES

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

1. Elect a Chair, Vice Chair and Secretary, and such other officers as it considers appropriate;

2. Conduct hearings and adjudicate Charges of Misconduct as provided in this Paragraph;

3. Examine witnesses under oath to be administered by any member of the District Committee;

4. Issue, through Bar Counsel, any summons or subpoena necessary to compel the attendance of witnesses and the production of documents or evidence necessary or material to any Investigation or Disciplinary Proceeding, or through its Chair, any summons or subpoena permitted under subparagraph 13-16.E. Any such summons or subpoena issued to a non-Attorney has the force of and is enforceable as a summons or subpoena issued by a Circuit Court. A subpoena duces tecum which compels the Respondent to produce documents may be served upon the Respondent by certified mail at the Respondent's last address of record for membership purposes with the Bar or, if service cannot be effected at the Respondent's last address on record, or if the Respondent is a Foreign Lawyer, or a lawyer engaged *pro hac vice* in the practice of law in Virginia, or a lawyer not admitted in Virginia, by first class mail to the Clerk of this Court.

5. Direct Bar Counsel to file a notice of noncompliance requesting the Board to suspend an Attorney's License until such time as the Attorney fully complies with a subpoena requiring production of trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm;

6. Rule on the admissibility of evidence and other matters relating to the

conduct of a Disciplinary Proceeding;

7. Rule on motions to limit or quash any summons or subpoena;

8. Maintain order in all its proceedings through its Chair; and

9. Approve an Agreed Disposition of a Complaint or Charge of Misconduct submitted by Bar Counsel and the Respondent, either through a Subcommittee acting by a unanimous vote, or, once a Charge of Misconduct is placed on the public District Committee hearing docket, a Panel of the District Committee acting by a majority vote. No appeal will lie from any sanction to which Respondent has agreed. If the Agreed Disposition is not accepted by a Panel of the District Committee, no member of the Panel which considered the Agreed Disposition may be assigned to the Panel that hears the Complaint or Charge of Misconduct.

B. Creation of Subcommittees. The Chair must appoint one or more Subcommittees of each District Committee. Where a District Committee is divided into two or more Sections, there must be one or more Subcommittees of each Section, as determined by the respective District Committee Section Chair. Each Subcommittee must consist of three members of that District Committee or that Section of the District Committee. Two members of a Subcommittee must be members of the Bar, one of whom must be appointed by the District Committee or Section Chair to act as Chair of that Subcommittee, and one member of the Subcommittee must be a nonlawyer member.

C. Subcommittee Quorums. A quorum of a Subcommittee consists of three members, who may act in a meeting in person or through any means of communication by which all three members participating may simultaneously hear each other during the meeting.

D. District Committee Jurisdiction. A District Committee has jurisdiction over all Complaints referred to it.

E. Limitation on Private Discipline. Private Discipline is imposed only in cases of minor Misconduct, when there is little or no injury to any of the following: a client, the public, the legal system or the profession, and when there is little likelihood of repetition by the Respondent. When any Respondent has received two determinations of Private Discipline, excepting only *de minimis* Dismissals, during any ten-year period, it is presumed that further Private Discipline is not an appropriate disposition. Any Respondent who has received two determinations of Private Discipline within the ten-year period immediately preceding the Bar's receipt of the oldest Complaint that the Subcommittee is considering, should receive public discipline for any violation of the Disciplinary Rules, unless there are sufficient facts and circumstances to rebut such presumption.

F. Venue. Venue is not jurisdictional, but venue lies with the District Committee, in the following order of preference, where:

1. Any portion of the alleged Misconduct occurred;

2. The Respondent resides;

3. The Respondent maintains an office;

4. The Respondent has an address on record with the Bar as the Respondent's address for membership purposes; or

5. The Complainant resides.

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

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

I. Complaints Referred to District Committee or Subcommittee. A District Committee or Subcommittee considers, adjudicates and disposes of Complaints referred to the District Committee pursuant to this Paragraph. Where appropriate, the District Committee or Subcommittee may also counsel Respondents concerning their conduct. In addition, members of a District Committee, other than nonlawyer members, may participate in the Investigation of Complaints, provided that a member participating in such Investigation must not participate in a District Committee's consideration, adjudication and disposition of such Complaint or Charge of Misconduct.

J. Service by a Member of the Bar and Professional Relationship. Service by a member of the Bar on a District Committee is deemed to be a professional relationship within the meaning of Rules of Professional Conduct 1.6, 1.7, 1.9, 1.10 and 3.7. Such service is deemed the holding of public office within the meaning of Rules of Professional Conduct 1.11 and 1.12.

K. Consent by Bar Counsel. Consent under Rules of Professional Conduct 1.6, 1.7

and 1.9 is deemed to include Bar Counsel's consent on behalf of the Bar.

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

13-8. BAR COUNSEL

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

1. Initiate, investigate, present or prosecute Complaints or other proceedings before Subcommittees, District Committees, the Board and Circuit Courts. Bar Counsel may represent the Bar in matters pending in this Court. In the course of performing such functions, Bar Counsel acts independently and exercises prosecutorial autonomy and discretion;

2. Examine criminal history record information relating to any Attorney or former Attorney from any state or federal law enforcement agency;

3. Examine financial books and records, once a Complaint has been filed, including, without limitation, any and all escrow accounts, trust accounts, estate accounts, fiduciary accounts and operating or other accounts, maintained by the Attorney, the Attorney's law firm or any other third party organization by whom the Attorney is employed or with whom the Attorney is associated;

4. Examine the accounts described in the preceding subparagraph A.3. at any time when Bar Counsel reasonably believes that such accounts may not be in compliance with the Disciplinary Rules. In every instance in which Bar Counsel initiates examination of accounts or issues any summons or subpoena in the conduct of an examination or an Investigation concerning accounts, other than on the basis of a Complaint against the Attorney, Bar Counsel must file a written statement as part of the record setting forth the reasons supporting the belief that the accounts may not comply with the Disciplinary Rules. A copy of this written statement must be served upon the Attorney who is the subject of the Investigation when an examination has begun or any summons or subpoena has been issued;

5. Issue such summons for the attendance of witnesses and subpoenae for the production of documents necessary or material to any Investigation, District Committee or Board proceeding; and

6. File a notice of noncompliance requesting the Board to suspend the Attorney's License until such time as the Attorney fully complies with a subpoena issued by the Bar Counsel, a District Committee or the Board, for the production of trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm.

B. Acting Bar Counsel. In the event of disqualification or recusal of Bar Counsel in any proceeding, the allegation of Misconduct must be prosecuted by a District Committee member designated by the District Committee Chair if the Proceeding is before a District Committee, or by the Attorney General or his designee if the Proceeding is before the Board or a three-judge Circuit Court.

13-9. CLERK OF THE DISCIPLINARY SYSTEM

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

B. Records Retention. The Clerk must retain all Files with respect to any Disciplinary Record for a period of at least five years from the date of the final Order in the Disciplinary Proceeding that created that Disciplinary Record. The Clerk may destroy all other Files upon the expiration of one year after the Dismissal.

C. File Destruction. Whenever a File is destroyed, the following information must be preserved:

1. The name and Bar identification number of Respondent;

2. The name and last known address of the Complainant;

3. The date the matter was initially received by the Bar;

4. A summary of the Complaint or allegation of Misconduct;

5. The date of the Dismissal or any sanction(s) imposed; and

6. The disposition of the matter, including the basis for Dismissal or the sanction(s) imposed.

Such summary information must be retained for at least five years whenever the Complaint or allegation of Misconduct is dismissed with no Disciplinary Record having been created, and for at least ten years whenever a Disciplinary Record has been created, an Impairment determined, a Reinstatement Proceeding held or a

finding of Misconduct involving a RESA violation is made.

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

E. Costs. The Clerk must 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 RESA and/or the Bar's RESA 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.

F. Review of Costs Assessment. If the Respondent disagrees with the amount of Costs as calculated by the Clerk, or if the Respondent asserts that the immediate payment thereof would constitute a hardship, the Respondent may petition the Board for review within ten days of the notice assessing Costs. The Chair, upon written request of Respondent, included with his petition, may grant Respondent a hearing on the Costs issue. The decision of the Chair is final and non-appealable. Interest at the judgment rate commences on the Costs assessed 30 days after the issuance of the notice of assessment, unless otherwise prescribed by the Board. If the Respondent fails to pay the Costs and interest so assessed within 30 days of the notice of assessment or within such other time as the Board may order, then the Costs assessed and interest are a debt subject to collection by the Bar, and the Board must issue an order of Suspension against the Respondent until such time as Respondent pays all of the Costs and accrued interest.

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

1. The Clerk of this Court;

2. Clerks of the Circuit and District Courts in each judicial circuit in the Commonwealth where the Attorney resides or maintains an office; and

3. Disciplinary authorities for jurisdictions, federal or state, wherein it is reasonable to expect that the Attorney may be licensed.

13-10. PROCESSING OF COMPLAINTS BY BAR COUNSEL

A. Review. Bar Counsel must 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 must not open an Investigation, and the Complaint must be dismissed.

B. No Dismissal by Complainant. No Complaint or allegation of Misconduct may 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 may 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 must then dismiss the Complaint. Such dismissal does 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 must 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 must 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 must notify the District Committee Chair that a Complaint has been referred to a District Committee for investigation. Thereafter, the Complaint must 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.

13-11. LIMITED RIGHT TO DISCOVERY

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

A. Issuance of such summonses and subpoenae as are authorized; and

B. Bar Counsel must 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 is not 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; and

2. Bar Counsel is not required to reveal other communications between the Investigator and Bar Counsel, or between Bar Counsel and the Subcommittee.

C. Bar Counsel must 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 must 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 must 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 must be in writing and is deemed effective when mailed by first-class mail to the Bar's last known address of the subject Complainant or Attorney.

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

A. Substantial Compliance. Except where this Paragraph provides specific time deadlines, substantial compliance with the provisions hereof is sufficient, and no allegation of Misconduct may be dismissed on the sole ground that any such provision has not been strictly complied with.

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

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

D. Evidentiary Rulings. In any Disciplinary Proceeding, evidentiary rulings must be made favoring receipt into evidence of all reasonably probative evidence to satisfy the ends of justice. The weight given such evidence received is commensurate with its evidentiary foundation and likely reliability.

E. Rights of Counsel for Complainant or Witness. Neither counsel for the Complainant, if there is one, nor counsel for any witnesses, may examine or cross-examine any witness, introduce any evidence or present any argument.

F. Notice of Impairment Evidence. A Respondent who intends to rely upon evidence of an Impairment in mitigation of Misconduct must, 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.

G. English Required. All communication with the Bar, whether written or oral, should be in English.

13-13. PARTICIPATION AND DISQUALIFICATION OF COUNSEL

A. Attorney for Respondent. A Respondent may be represented by a member of the Bar, or any member of the bar of any other jurisdiction while engaged *pro hac vice* in the practice of law in Virginia, at any time with respect to a Complaint. In any proceeding before the Board or a three-judge Circuit Court, or in a District Committee matter in which a Charge of Misconduct has been issued, counsel of record for a Respondent must not withdraw except upon motion for good cause shown.

B. Signature Required by Respondent. A Respondent must sign his or her written response to any Complaint, Charge of Misconduct or Certification.

C. Disqualification. An Attorney must not represent a Respondent with respect to a Complaint or allegation of Misconduct:

1. While such Attorney is a current employee or current officer of the Bar or is a member of Council, COLD, the Board, or a District Committee;

2. For 90 days after such Attorney ceases to be an employee or officer of the Bar or a member of Council, COLD, the Board, or a District Committee;

3. At any time, after such Attorney ceases to be an employee or officer of the Bar or a member of Council, COLD, the Board or a District Committee, if such Attorney was personally involved in the subject matter of the Complaint, allegation of Misconduct or any related matter while acting as such employee, officer or member;

4. At any time after such Attorney ceased to be a liaison from COLD to a District Committee before which the Disciplinary Proceeding involving such Complaint or Charge of Misconduct was pending during the time such Attorney was such liaison; or

5. If such Attorney is a partner or an associate of, or is a member, shareholder or has a similar relationship with an Attorney who is a current member of COLD or an officer of the Bar, or who was a member of COLD or an officer of the Bar within the previous 90 days.

6. If such Attorney is a partner or an associate of, or is a member, shareholder or has a similar relationship with an Attorney who is a current member of the Board or was a member of the Board within the previous 90 days, unless the Attorney's representation of the Respondent with respect to a Complaint or allegation of Misconduct preceded the Board member's appointment to the Board. In such cases, the Attorney may continue to represent the Respondent as follows:

   a. Before a Three Judge Court in proceedings conducted pursuant to Va. Code § 54.1-3935, or any appeal therefrom;

   b. Before any District Committee.

7. If such Attorney is a partner or an associate of, or is a member, shareholder or has a similar relationship with an Attorney who is a member of a District Committee, before that District Committee, or if the District Committee is divided into sections, before the District Committee section of which the Attorney's partner or associate is a member.

D. No Imputation of Conflict. Except as set forth in subparagraph C, there is no imputation of conflict that disqualifies an Attorney from representing a Respondent with respect to a Complaint or Charge of Misconduct.

13-14. DISQUALIFICATION OF DISTRICT COMMITTEE MEMBER OR BOARD MEMBER

A. Personal or Financial Interest. A member or former member of a District Committee or the Board must be disqualified from adjudicating any matter with respect to which the member has any personal or financial interest that might affect or reasonably be perceived to affect the member's ability to be impartial. The Chair must rule on the issue of disqualification, subject to being overruled by a majority of the Panel or Subcommittee.

B. Complaint Against a Member. Upon the referral of any Complaint against a member or former member of a District Committee or the Board to a District Committee for Investigation, the member must be recused from any service on the District Committee or the Board until the Dismissal of the Complaint without the imposition of any form of discipline.

C. Imposition of Discipline. Upon the final imposition of a Private Reprimand, a Public Reprimand, an Admonition, a Suspension or a Revocation against a member or former member of a District Committee or the Board, the member must automatically be terminated from membership or further service on the District Committee or Board. Upon the final imposition of any other form of Attorney discipline, COLD has sole discretion to determine whether the member

is terminated from membership or further service on the District Committee or the Board.

D. Interpretation. Unless otherwise stated, all questions of interpretation under this subparagraph 13-14 are decided by the tribunal before which the proceeding is pending, except that COLD determines discretionary termination of membership or further service.

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

1. The District Committee or Board member or any member of his or her firm is involved in any significant way with the matter on which the District Committee or Board would act;

2. The Board member or any member of the Board member's firm was serving on the District Committee that certified the matter to the Board or has otherwise acted on the matter;

3. A Judge would be required to withdraw from consideration of, or presiding over, the matter under the Canons of Judicial Conduct adopted by this Court;

4. The District Committee or Board member previously represented the Respondent; or

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

13-15. SUBCOMMITTEE ACTION

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 must dismiss the Complaint when:

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

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

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

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

e. The action alleged to be Misconduct is protected by superseding law.

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

2. Impose an Admonition without Terms. In making this determination, the Subcommittee must 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 is 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 must 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 must have access to Respondent's prior Disciplinary Record.

C. Vote Required for Action. All actions taken by Subcommittees, except for approval of Agreed Dispositions, must be by majority vote.

D. Report of the Subcommittee. All decisions of the Subcommittee must 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 must 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 must 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 must promptly mail a copy of the Certification to the Clerk, Bar Counsel, the Respondent and the Complainant.

F. Procedure in All Terms Cases. If a Subcommittee imposes Terms, the Subcommittee must specify the time period within which compliance with the Terms must be completed. If Terms have been imposed against a Respondent, that Respondent must 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 must 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 must serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding must 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 is 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 must be imposed. Bar Counsel is 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 must 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.

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 must, 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 must, within 21 days after service of the Charge of Misconduct:

1. File an Answer to the Charge of Misconduct with the Clerk, which Answer is 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 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 the filing of an Answer and such a demand, and provision of available dates as specified above, further proceedings before the District Committee must terminate, and Bar Counsel must file the complaint required by Va. Code § 54.1-3935. The hearing must be scheduled as soon as practicable. However, the 30- to 120-day time frame is not 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 is 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 file with the Clerk and provide to each other and the Chair, a list of and copies of all exhibits proposed to be introduced at the Misconduct stage of the hearing;

2. Encourage Bar Counsel and Respondent to confer and discuss stipulations; and

3. Direct Bar Counsel and Respondent to file with the Clerk and provide to each other and 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 the Chair of the District Committee to issue summonses or subpoenae for witnesses and documents. Such a request must be filed with the Clerk with a copy to Bar Counsel. Requests for summonses and subpoenae will be granted, unless, in the judgment of the Chair of the District Committee, such request is unreasonable. Bar Counsel or any party subject to a summons or subpoena may file with the Clerk a motion to quash or limit such summonses or subpoenae.

F. Continuances. Once a District Committee has scheduled a hearing, no continuance will be granted unless in the judgment of the Chair the continuance is necessary to prevent injustice.

G. Public Hearings. District Committee hearings, except deliberations, must be open to the public.

H. Public Docket. The Clerk's Office must 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 must 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 must place it on the docket on receipt of the statement of the certified charges from the Subcommittee.

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

J. Opening Remarks by the Chair. After swearing the Court Reporter, who thereafter must administer oaths or affirmations to witnesses, the Chair must make opening remarks in the presence of the Respondent and the Complainant, if present. The Chair must 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 must be excused from participation in the matter.

K. Motion to Exclude Witnesses. Witnesses other than the Complainant and the Respondent must 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 may present witnesses and other evidence supporting the Charge of Misconduct. Respondent must 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 must be afforded the opportunity to present witnesses and other evidence on behalf of Respondent. Bar Counsel or Committee's Counsel must 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 rules 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 must 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 must be dismissed.

S. Argument. The District Committee must 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 deliberate in private on the allegations of Misconduct. After due deliberation and consideration, the District Committee must 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 is 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, must 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 must, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has a Disciplinary Record in this or any other jurisdiction and must

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 must consider the Respondent's Disciplinary Record. A District Committee may:

1. Conclude that an Admonition, with or without Terms, should be imposed;

2. Issue a Public Reprimand, with or without Terms; or

3. Certify the Charge of Misconduct to the Board or file a complaint in a Circuit Court, pursuant to Va. Code § 54.1-3935.

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

1. Brief findings of the facts established by the evidence except that explicit findings are not required in proceedings conducted pursuant to Va. Code § 54.1-3935;

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 must promptly provide written notice to the Complainant, the Respondent and Bar Counsel of such Dismissal and the factual and legal basis therefor.

2. Issues a Public Reprimand, with or without Terms, or an Admonition, with or without Terms, the Chair must 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 must 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

must promptly mail to the Clerk a copy of the Certification. A copy of the Certification must be sent to Bar Counsel, Respondent and the Complainant.

AA. District Committee Determination Finality. 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 becomes final.

BB. Enforcement of Terms. In all cases where Terms are included in the disposition, the District Committee must specify the time period within which compliance must be completed and, if required, the time period within which the Respondent must deliver a written certification of compliance to Bar Counsel. The District Committee must specify the alternative disposition if the Terms are not complied with or, if required, compliance is not certified to Bar Counsel. Bar Counsel is 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 must serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding must 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 is 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 must be imposed. Any show cause proceeding involving the question of compliance is 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 must be a Certification for Sanction Determination. Upon a decision to issue a Certification for Sanction Determination, Bar Counsel must 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.

DD. Reconsideration of Action by the District Committee. No motion for reconsideration or modification of the District Committee's decision following a hearing on a Charge of Misconduct may be considered unless it is filed with the Clerk, along with all supporting exhibits, within 10 days after the hearing before 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 may be reconsidered unless a majority of the Panel that heard the matter votes to reconsider the sanction.

3. No member may 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.

If such a motion is timely filed, the Clerk must promptly forward copies to each member of the hearing Panel. The Panel may deny the motion without response from the other party. No relief may be granted without allowing the other party an opportunity to oppose the motion in writing. If no relief is granted, the District Committee must enter its order disposing of the motion.

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

A. Notice of Appeal; Demand. Within ten days after service on the Respondent of the District Committee Determination, the Respondent may file with the Clerk either a notice of appeal to the Board or a notice of appeal and a written demand that further proceedings be conducted pursuant to Va. Code § 54.1-3935. In either case, the Respondent must send copies to the District Committee Chair and to Bar Counsel. Upon such demand, further proceedings before the Board must terminate, and Bar Counsel must file the complaint required by Va. Code § 54.1-3935. The hearing must be scheduled as soon as practicable. If the Respondent fails to file a demand, as specified above, the Respondent is deemed to have consented to the jurisdiction of the Board.

B. Staying of Discipline. If the Clerk receives a timely notice of appeal from a

Public Reprimand, with or without Terms, or an Admonition, with or without Terms, the sanctions must be stayed during the pendency of the appeal.

C. Filing the Transcript and Record on Appeal. The Respondent must certify in the notice of appeal or written demand that he or she has ordered from the Court Reporter a complete transcript of the proceedings before the District Committee, at the Respondent's cost. Upon receipt of the notice of appeal or written demand, Bar Counsel must forward those portions of the record in his or her possession to the Clerk. The transcript is a part of the record when it is received in the office of the Clerk within 40 days after filing of the notice of appeal or written demand. The Clerk must retain the records until the transcript has been received or for 40 days after the notice of appeal or written demand has been received, whichever occurs first, and must then dispose of the record as prescribed in the records retention policy set forth in this Paragraph. Failure of the Respondent to make the complete transcript a part of the Record as specified herein must result in Dismissal of the appeal by the Board, whether initiated by notice of appeal or written demand, and affirmance of the sanction imposed by the District Committee. Bar Counsel initiates the three-judge Circuit Court process for the appeal only after receipt of the transcript by the Clerk.

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

E. Appeal from Agreed Sanction Prohibited. No appeal lies from any sanction to which the Respondent has agreed.

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 must, within 21 days after service of the Certification:

1. File an Answer to the Certification with the Clerk, which Answer is deemed consent to the jurisdiction of the Board; or

2. File an Answer to the Certification and a demand with the Clerk 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. Upon the filing of an Answer and such demand and provision of available dates as specified above, further proceedings before the Board must terminate, and Bar Counsel must file

the complaint required by Va. Code § 54.1-3935. The hearing must be scheduled as soon as practicable. However, the 30- to 120-day time frame is not 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 is deemed to have consented to the jurisdiction of the Board.

C. Notice of Hearing. The Board must set a date, time, and place for the hearing, and must 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 must be under oath and must 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 must 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 must 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 must 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 must either file an Answer to the petition with the Clerk, which Answer is conclusively deemed consent to the jurisdiction of the Board; or file an Answer and a demand with the Clerk 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 the filing of an Answer and such demand and provision of available dates as specified above, further proceedings before the Board must be terminated and Bar Counsel must file the complaint required by Va. Code § 54.1-3935. The hearing must be scheduled as soon as practicable. However, the 30- to 120-day time frame does not constitute a deadline for the hearing to be held. If any order of summary Suspension has been entered, such Suspension must 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 is 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, 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, 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 may 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 must be filed with the Clerk.

G. Preliminary Explanation. Absent waiver by the parties, the Chair must 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 must 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 must be excused from participation in the matter.

H. Attendance at Hearing. Witnesses other than the Complainant and the Respondent must 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 must be permitted but are not required.

2. Bar Counsel may present witnesses and other evidence supporting the Certification. The Respondent must 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 must be afforded the opportunity to present witnesses and other evidence. Bar Counsel must 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 must 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 must 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 deliberates in private. If the Board finds by clear and convincing evidence that the Respondent has engaged in Misconduct, the Board must, prior to determining the appropriate sanction to be imposed, inquire whether the Respondent has a Disciplinary Record in this or any other jurisdiction and must give Bar Counsel and the Respondent an opportunity to present material evidence and arguments in aggravation or mitigation. The Board deliberates 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 must 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 must 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, must 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 must specify the time period within which compliance must be completed and, if required, the time period within which the Respondent must deliver a written certification of compliance to Bar Counsel. The Board must specify the alternative disposition if the Terms are not complied with or, if required, compliance is not certified to Bar Counsel. Bar Counsel is 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 must serve notice requiring the Respondent to show cause why the alternative disposition should not be imposed. Such show cause proceeding must be set for hearing before the Board at its next available hearing date. The burden of proof is 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 must be imposed. Any show cause proceeding involving the question of compliance is 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 must issue the Summary Order. Thereafter, the Board must issue the Memorandum Order. A Board member must prepare the Summary Order and Memorandum Order for the signature of the Chair or the Chair's designee. Dissenting opinions may be filed. Upon disposition of a matter conducted pursuant to Va. Code § 54.1-3935, the three-judge Circuit Court must issue the Summary Order and the Memorandum Order, except that explicit findings of fact are not required.

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 may be considered unless it is filed with the Clerk within 10 days after the hearing before the Board. The moving party must file the motion and all supporting exhibits with the Clerk. Such motion may 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.

If such a motion is timely filed, the Clerk must promptly forward copies to each member of the hearing Panel. The Panel may deny the motion without response from the other party. No relief may be granted without allowing the other party an opportunity to oppose the motion in writing. If no relief is granted, the Board must enter its order disposing of the motion.

13-19. BOARD PROCEEDINGS UPON APPEAL

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

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

C. Record on Appeal. The record consists of the Charge of Misconduct, the complete transcript of the Proceeding, any exhibits received or refused by the District Committee, the District Committee Determination, and all briefs, memoranda or other papers filed with the District Committee by the Respondent or the Bar. Upon petition of the Respondent, for good cause shown, the Board may permit the record to be supplemented to prevent injustice, such supplement to be in such form as the Board may deem appropriate.

D. Briefing. Thereafter, briefs must be filed in the office of the Clerk, as follows:

1. The appellant must file an opening brief within 40 days after the mailing of the notice to the appellant regarding the record by the Clerk. Failure of the appellant to file an opening brief within the time specified herein must result in the Dismissal of the appeal and affirmance of the decision by the District Committee.

2. The appellee must file its brief within 25 days after filing of the opening brief.

3. The appellant may file a reply brief within 14 days after filing of the appellee's brief.

E. Standard of Review. In reviewing a District Committee Determination, the Board must ascertain whether there is substantial evidence in the record upon which the District Committee could reasonably have found as it did.

F. Oral Argument. Oral argument must be granted, unless waived by the appellant.

G. Imposition of Sanctions. Upon review of the record in its entirety, the Board may:

1. Dismiss the Charge of Misconduct upon a finding that the District Committee Determination is contrary to the law or is not supported by substantial evidence;

2. Affirm the District Committee Determination, in which instance the Board may impose the same or any lesser sanction as that imposed by the District Committee. In no case may it increase the severity of the sanction imposed by the District Committee; or

3. Reverse the decision of the District Committee and remand the Charge of Misconduct to the District Committee for further proceedings.

13-20. BOARD PROCEEDINGS UPON CERTIFICATION FOR SANCTION DETERMINATION

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

B. Proceedings Upon the Record. The proceeding must be conducted upon the record which consists of the Public Reprimand with Terms determination issued by either a Subcommittee or a District Committee, the transcript of the District Committee show cause hearing, and the Certification for Sanction Determination.

C. Evidence. Only evidence of mitigation and aggravation with respect to compliance or certification will be permitted in the proceeding.

D. Argument. Argument must be conducted as in the sanction phase of a Misconduct case.

E. Sanctions. The Board may impose a sanction of Suspension or Revocation of License.

13-21. BOARD PROCEEDINGS UPON A FIRST OFFENDER PLEA

A. Action Upon Receipt of Notification. Whenever the Clerk receives written notification from any court of competent jurisdiction stating that an Attorney has entered a plea to a Crime under a first offender statute, and that the court has found facts that would justify a finding of guilt and ordered that the Attorney be put on probation, the Board must forthwith enter an order requiring the Attorney to appear at a specified time and place for a hearing before the Board to determine whether the Attorney's License should be revoked or suspended or, if not, whether the Attorney should be required to give notice, by certified mail, of the

plea and probation ordered by the court, including the terms and duration of the probation, to all clients for whom the Attorney is currently handling matters, and to all opposing attorneys and the presiding judges in pending litigation. A copy of the written notification from the court must be served with the order fixing the time and place of the hearing. The hearing must be set not less than 14 or more than 30 days after the date of the Board's order.

B. Burden of Proof. At the hearing, the Attorney has the burden of proving why his or her License should not be suspended or revoked and why he or she should not be required to give notice of the plea and probation ordered by the court.

C. Demand for Three Judge Court. If the Attorney elects to have further proceedings conducted pursuant to Va. Code § 54.1-3935, the Attorney must file a demand with the Clerk not later than ten days prior to the date set for the Board hearing, 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 Board must be terminated and Bar Counsel must file the complaint required by Va. Code § 54.1-3935. The hearing must be scheduled as soon as practicable. However, the 30- to 120-day time frame does not constitute a deadline for the hearing to be held. If the Respondent fails to file a demand, and provide available dates, as specified above, the Respondent is deemed to have consented to the jurisdiction of the Board.

D. Attorney Compliance with Notice Requirements. If the Board or court suspends or revokes the Attorney's License, the Attorney must comply with the notice requirements set out in subparagraph 13-29. If the Board or court orders the Attorney to give notice of the plea and court ordered probation, the Attorney must give such notice within 14 days after the effective date of the Board's order and furnish proof to the Bar within 60 days of the effective date of the order that such notices have been timely given. Issues concerning the adequacy of the notice must be determined by the Board, which may suspend or revoke the Attorney's License for failure to comply with the above notice requirements.

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

A. Action Upon Receipt of Notification. Whenever the Clerk receives written notification from any court of competent jurisdiction stating that an Attorney (the "Respondent") has been found guilty or convicted of a Crime by 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, a member of the Board must forthwith and summarily enter an order of Suspension requiring the Respondent to appear at a specified time and place for a hearing before the Board to show cause why the Respondent's License to practice law should not be further suspended or revoked. A copy of the written notification

from the court must be served upon the Respondent with the Board's order of Suspension. The Board may appoint a guardian *ad litem* to represent the interests of a Respondent who is incarcerated and unrepresented by counsel at any time it appears that such an appointment may be appropriate to protect the interests of the Respondent.

B. Time of Hearing, Continuance and Interim Hearing. The hearing must be set not less than 14 or more than 30 days after the date of the Board's order. Upon written request of the Respondent, the hearing may be continued until after sentencing has occurred. Upon receipt by the Board of a certified copy of a notice of appeal from the conviction, proceedings before the Board must, upon request of the Respondent, be continued pending disposition of such appeal. The Board must, upon request of the Respondent, hold an interim hearing and must terminate a summary Suspension while the sentencing or appeal is pending, if the Board finds that the summary Suspension, if not terminated, would be likely to exceed the discipline imposed by the Board upon a hearing on the merits of the case.

C. Reversal of Conviction. Upon presentation to the Board of a certified copy of an order setting aside the verdict or reversing the conviction on appeal, any Suspension must be automatically terminated and any Revocation must be vacated, and the License must be deemed automatically reinstated. Discharge or Dismissal of a guilty plea or termination of probation must not result in the automatic termination of the Suspension or vacation of the Revocation. Nothing herein precludes further proceedings against the Respondent upon allegations of Misconduct arising from the facts leading to such conviction.

D. Burden of Proof. At the hearing, the Respondent has the burden of proving that he or she was not convicted of a Crime and why his or her License should not be further suspended or revoked.

E. Action by the Board and Notice to Respondent. If the Board finds at the hearing that the Respondent has been found guilty or convicted of a Crime by 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 must be issued, and a copy thereof served upon the Respondent in which the Board must continue the Suspension or issue an order of Suspension against the Respondent for a stated period not in excess of five years; or issue an order of Revocation against the Respondent.

F. Demand for Three-Judge Circuit Court. If the Respondent elects to have further proceedings conducted pursuant to Va. Code § 54.1-3935, the Respondent must file a demand with the Clerk not later than ten days prior to the date set for the hearing before the Board, 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 Board must be terminated and Bar Counsel must file the complaint required by Va. Code § 54.1-3935. The hearing must be scheduled as

soon as practicable. However, the 30- to 120-day time frame does not constitute a deadline for the hearing to be held. Any summary Suspension issued by the Board must remain in effect until the court designated under Va. Code § 54.1-3935 enters a final order, unless earlier terminated pursuant to subparagraph 13-22.B. If the Respondent fails to file a demand, and provide available dates, as specified above, the Respondent is deemed to have consented to the jurisdiction of the Board.

13-23. BOARD PROCEEDINGS UPON IMPAIRMENT

A. Suspension for Impairment. The Board has the power to issue an order of Suspension to a Respondent who has an Impairment. The term of such Suspension is indefinite, and, except as provided below, can 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 must, 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 may be utilized by Bar Counsel to: (1) dismiss any pending Complaints or allegations of Misconduct; and (2) move to dismiss a Charge of Misconduct, Certification or Disciplinary Proceeding, on the basis of a finding of Impairment militating against further proceedings, which circumstances of Impairment must be set forth in the Dismissal.

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

C. Investigation. Upon receipt of reliable information that raises a substantial question as to whether an Attorney has an Impairment, Bar Counsel must cause an Investigation to be made to determine whether there is reason to believe that the Respondent has the Impairment. As a part of the Investigation of whether an Impairment exists, and for good cause shown in the interest of public protection Bar Counsel may petition the Board to order the Respondent:

1. To undergo psychiatric, physical or other medical examinations by qualified physicians or other health care providers selected by the Board;

2. To provide appropriate releases to health care providers authorizing the

release of Respondent's psychiatric, physical or other medical records to Bar Counsel and the Board for purposes of the Investigation and any subsequent Impairment proceedings.

Upon notice to the Respondent, the Board must hold a hearing to determine whether any such examination or release is appropriate.

D. Summary Suspension. Upon receipt of a notice from the Clerk with supporting documentary evidence that an Attorney has been: a) adjudicated by a court of competent jurisdiction to be incompetent or incapacitated; or b) involuntarily admitted to a hospital (as defined in Va. Code §37.2-100) for evaluation or treatment of any addiction, inebriety, insanity, intellectual disability, or mental illness, any member of the Board must summarily issue on behalf of the Board an order of Suspension against the Respondent and cause the order to be served on such Respondent.

E. Action by Board after a Hearing.

1. If Bar Counsel determines that there is reason to believe that an Attorney has an Impairment, Bar Counsel must file a petition with the Board, and the Board must promptly hold a hearing to determine whether such Impairment exists. A copy of the petition must be served on the Respondent. If the Board determines that an Impairment exists, it must enter an order of Suspension.

2. The Board must hold a hearing upon petition of a Respondent who is subject to a Suspension for Impairment that alleges that the Impairment no longer exists. Evidence that the Respondent is no longer hospitalized is not conclusive to the Board's determination of the Respondent's ability to resume the practice of law.

F. Procedure. Such hearing must be conducted substantially in accordance with the procedures established in proceedings related to Misconduct, except that the public and witnesses, other than the Respondent, must be excluded throughout an Impairment Proceeding when not testifying.

G. Guardian *Ad Litem*. The Board may appoint a guardian *ad litem* to represent the interests of a Respondent at any time when it appears that such an appointment may be appropriate to protect the interests of a Respondent who is the subject of an Impairment Proceeding and unrepresented by counsel. If no guardian *ad litem* has been appointed for, and no counsel has made an appearance on behalf of, a Respondent, the notice of any hearing to determine whether the Respondent has an Impairment must order Respondent to advise the Board whether Respondent has retained counsel for the hearing. Unless counsel for such Respondent enters an appearance with the Board within ten days of the date of the notice, the Board must appoint a guardian *ad litem* to represent the interests of such Respondent.

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

I. Termination of Suspension. In cases where a Suspension is based upon an adjudication by a court under Paragraph 13-23.D, the Board must promptly enter an order terminating such Suspension upon receipt of an order from a court of competent jurisdiction finding that the Respondent is no longer incompetent or incapacitated.

J. Enforcement. The Board has the power to sanction an Attorney for failure to comply with its orders and subpoenae issued in connection with an Impairment Proceeding. The sanction can include a summary Suspension in a case where it is 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*.

K. Transfer of Membership Status. Bar Counsel may terminate and close an Impairment Proceeding if the Respondent transfers to the Disabled or Retired class of membership pursuant to Part 6, Section IV, Paragraph 3 of the Rules of Court and files a declaration with the Clerk and the Virginia State Bar's Membership Department that the Respondent will not seek transfer from the Disabled or Retired class of membership. The declaration must be endorsed by the Respondent and, as applicable, the Respondent's counsel or guardian *ad litem*. The Respondent's transfer to the Disabled or Retired class of membership and filing of the declaration as described above may also be utilized by Bar Counsel to: (1) dismiss any pending Complaints or allegations of Misconduct; and (2) move to dismiss a Charge of Misconduct, Certification, or Disciplinary Proceeding, on the basis of transfer to the Disabled or Retired class of membership, militating against further proceedings, which must be set forth in the Dismissal.

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

A. Definitions Specific to Paragraph 13-24. The following terms have the meaning set forth below unless the content clearly requires otherwise:

1. "State Jurisdiction" means any state, United States Territory, or District of Columbia law licensing or attorney disciplinary authority, including the highest court of any such Jurisdiction, authorized to impose attorney discipline effective throughout the Jurisdiction.

2. "Jurisdiction" refers to either a "State Jurisdiction" or any federal court or agency authorized to discipline attorneys, including the United States military.

B. Initiation of Proceedings. Upon receipt of a notice from the Clerk that another Jurisdiction has, as a disciplinary measure, suspended or revoked the law license of an Attorney ("Respondent") or has suspended or revoked Respondent's privilege to practice law in that Jurisdiction, and that such action has become final (the "Suspension or Revocation Notice"), any Board member must enter on behalf of the Board an order requiring Respondent to show cause why discipline that is the same or equivalent to the discipline imposed in the other Jurisdiction should not be imposed by the Board. If the Suspension or Revocation Notice is from a State Jurisdiction and the suspension or revocation has not been suspended or stayed, then the Board's order must suspend Respondent's License pending final disposition of the Proceeding hereunder. The Board must serve upon Respondent by certified mail the following: a copy of the Suspension or Revocation Notice; a copy of the Board's order; and a notice fixing the date, time and place of the hearing before the Board to determine what action should be taken in response to the Suspension or Revocation Notice and stating that the purpose of the hearing is to provide Respondent an opportunity to show cause why the same or equivalent discipline that was imposed in the other Jurisdiction should not be imposed by the Board. Notwithstanding the above, notice of a suspension or revocation for merely administrative reasons, such as the failure to pay dues or the failure to complete required continuing legal education, is not considered a Suspension or Revocation Notice.

C. Opportunity for Response. Respondent may file a written response, which must be confined to argument and exhibits supporting one or more of the following grounds for dismissal or imposition of lesser discipline:

1. The record of the proceeding in the other Jurisdiction would clearly show that such proceeding was so lacking in notice or opportunity to be heard as to constitute a denial of due process;

2. The imposition by the Board of the same or equivalent discipline upon the same proof would result in an injustice;

3. The same conduct would not be grounds for disciplinary action or for the same or equivalent discipline in Virginia; or

4. The misconduct found in the other Jurisdiction would warrant the imposition of substantially lesser discipline in the Commonwealth of Virginia.

Any such written response must be filed with the Clerk within 14 days of the date of mailing of the Board order, via certified mail, to Respondent's last address of

record with the Bar.

D. Scheduling and Continuance of Hearing. Unless continued by the Board for good cause, the hearing must be set not less than 21 nor more than 30 days after the date of the Board's order.

E. Provision of Copies. The Clerk must furnish to the Board members designated for the hearing and make available to Respondent copies of the Suspension or Revocation Notice, the Board's order against the Respondent, the notice of hearing, any notice of continuance of the hearing, and any written response or materials filed by Respondent or by Bar Counsel.

F. Hearing Procedures. Insofar as applicable, the procedures for Proceedings on allegations of Misconduct must govern. Bar Counsel has discretion to put forth evidence and argument that one or more of the grounds specified in Paragraph 13-24.C exists. If Respondent does not file a timely written response, but appears at the hearing and expresses intent to present evidence or argument supporting the existence of one or more of the grounds specified in Paragraph 13-24.C, Respondent must make a proffer to the Board. The Board may refuse to consider such evidence or argument as untimely. If the Board in its discretion is willing to consider such evidence or argument, then Bar Counsel, upon motion, may be entitled to a continuance.

G. Burden of Proof. The burden of proof to establish the existence of one or more of the grounds specified in Paragraph 13-24.C is clear and convincing evidence. Unless one or more of the grounds specified in Paragraph 13-24.C has been established by clear and convincing evidence, the Board must conclude that Respondent was afforded due process by the other Jurisdiction and the findings of the other Jurisdiction must be conclusive of all matters for purposes of the Proceeding before the Board.

H. Action by the Board. If the Board determines that none of the grounds specified in Paragraph 13-24.C exist by clear and convincing evidence, it must impose the same or equivalent discipline as imposed in the other Jurisdiction. If the Board finds by clear and convincing evidence the existence of one or more of the grounds specified in Paragraph 13-24.C, the Board must enter an order it deems appropriate. A copy of any order imposing discipline must be served upon Respondent via certified mail, return receipt requested. Any such order is final and binding, subject only to appeal as set forth in the Rules of Court.

13-25. BOARD PROCEEDINGS FOR REINSTATEMENT

A. Waiver of Confidentiality. The filing by a former Attorney of a petition for Reinstatement constitutes a waiver of all confidentiality relating to the petition, and to the Complaint or Complaints that resulted in, or were pending at the time the former Attorney resigned or his or her License was revoked.

B. Investigation of Impairment in Reinstatement Matters. Upon receipt of notice or evidence that an individual seeking Reinstatement has or may have an Impairment, Bar Counsel must cause an Investigation to be made to determine whether there is reason to believe that the Impairment exists. As part of the Investigation of whether an Impairment exists, and for good cause shown in the interest of public protection, Bar Counsel may petition the Board to order the individual:

1. To undergo at his or her expense psychiatric, physical or other medical examinations by qualified physicians or other health care providers selected by the Board;

2. 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 Reinstatement Proceedings. The Board must hold a hearing to determine whether such examination(s) and releases(s) are appropriate, upon notice to the individual petitioning for Reinstatement.

C. Readmission After Resignation. If after resigning from the Bar, a former Attorney wishes to resume practicing law in the Commonwealth of Virginia, the former Attorney must apply to the Board of Bar Examiners, satisfy the character and fitness requirements, and either pass the Bar examination or meet all eligibility requirements for admission without examination under Rule 1A:1. Before being readmitted to the Bar, the former Attorney must also satisfy any membership obligations that were delinquent when the former Attorney resigned.[1]

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

1. Attended 12 hours of continuing legal education, of which at least two hours must be in the area of legal ethics or professionalism, for every year or fraction thereof of the Suspension;

2. Taken the Multistate Professional Responsibility Examination since imposition of discipline and received a scaled score of 85 or higher;

3. Reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of the Attorney's Misconduct;

[1] The Supreme Court amended Paragraph 13-25.C by order entered March 1, 2023, effective April 30, 2023. Because COLD and Council approved these proposed amendments prior to the March 1, 2023 order, this amendment was not included in the version of Paragraph 13 approved by COLD and Council.

4. Paid to the Bar all Costs that have been assessed against him or her, together with any interest due thereon at the judgment rate at the time the Costs are paid; and

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

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

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

F. Threshold Requirements for Reinstatement After Revocation. After a Revocation, Petitioner's License must not be considered for Reinstatement unless the Petitioner has provided clear and convincing evidence of proof of compliance with the following requirements:

1. No petition may be filed sooner than five years from the effective date of the Revocation;

2. The petition has been filed under oath or affirmation with penalty of perjury;

3. Within five years prior to the filing of the petition, Petitioner has attended 60 hours of continuing legal education, of which at least ten hours must be in the area of legal ethics or professionalism;

4. The Petitioner has taken the Multistate Professional Responsibility Examination and received a scaled score of 85 or higher;

5. The Petitioner has reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of Petitioner's Misconduct;

6. The Petitioner has paid the Bar all Costs previously assessed against Petitioner, together with any interest due thereon at the judgment rate;

7. The Petitioner has reimbursed the Bar for any sums of money paid as a result of a receivership involving Petitioner's law practice; and

8. The Petitioner has posted with his or her petition for Reinstatement a $5,000 cash bond for payment of Costs resulting from the Reinstatement Proceedings.

G. Reinstatement Proceedings After a Revocation. If the threshold requirements of subparagraph 13-25.F have been met, the following processes must ensue:

1. Investigation. Bar Counsel must conduct such Investigation and make such inquiry as it deems appropriate. On request of Bar Counsel, the Petitioner must promptly sign such forms and give such permission as are necessary to permit inquiry of the Petitioner's background through the Internal Revenue Service, the National Criminal Information Center, the National Criminal Information Network and any other similar information network or system. The petition for Reinstatement must not proceed without such forms and permissions being signed by Petitioner and returned to Bar Counsel.

2. Bill of Particulars. On written request by Bar Counsel, served by certified mail, return receipt requested, a Petitioner seeking Reinstatement must file with the Clerk within 21 days after service of the request a bill of particulars setting forth the grounds for Reinstatement. The petition for Reinstatement must not proceed without such bill of particulars being filed with the Clerk.

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

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

deems appropriate. The Clerk must publish a synopsis of the petition in the Virginia Lawyer and in a newspaper of general circulation in the judicial circuit where the Petitioner currently resides and where the Petitioner maintained a principal office at the time of the Revocation or Suspension. The entire petition, as well as the transcript, exhibits, pleadings and orders from the original Disciplinary Proceedings and Bill of Particulars, together with the documents referred to in subparagraph 13-25.F above, must be available for inspection and copying at the office of the Bar on reasonable notice and on payment of costs incurred to make the copies.

5. Proof of Good Character. Petitioner must prove by clear and convincing evidence that Petitioner is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law. After a Revocation, an attorney's license must not be reinstated without such proof.

6. Powers of the Board in Reinstatement Cases. The Board is empowered to hold a hearing and make its recommendation to this Court either to approve or disapprove the petition.

   a. Hearing. On the date set for the hearing, the Petitioner has the right to representation by counsel, to examine and cross-examine witnesses and to present evidence. The testimony and other incidents of the hearing must be transcribed and preserved, together with all exhibits (or copies thereof) received into evidence or refused. Bar Counsel must appear and represent the Commonwealth and its citizens. Bar Counsel has the right to cross-examine, call witnesses and present evidence in opposition to the petition. Board members may examine witnesses called by either party. Legal advice to the Board, if required, must be rendered by the Office of the Attorney General.

   b. Factors to be Considered. In considering the matter prior to making a recommendation to this Court, the Board may consider the following factors:

      i. The severity of the Petitioner's Misconduct, including, but not limited to, the nature and circumstances of the Misconduct;

      ii. The Petitioner's character, maturity and experience at the time of his or her Revocation;

      iii. The time elapsed since the Petitioner's Revocation;

iv. Restitution to the clients and/or the Bar;

v. The Petitioner's activities since Revocation, including, but not limited to, his or her conduct and attitude during that period of time;

vi. The Petitioner's present reputation and standing in the community;

vii. The Petitioner's familiarity with the Virginia Rules of Professional Conduct and his or her current proficiency in the law;

viii. The sufficiency of the punishment undergone by the Petitioner;

ix. The Petitioner's sincerity, frankness and truthfulness in presenting and discussing factors relating to his or her Revocation and Reinstatement; and

x. The impact upon public confidence in the administration of justice if the Petitioner's License is restored.

c. Character Witnesses. Up to five character witnesses supporting and up to five character witnesses opposing the petition may be heard. In addition, the Board may consider any letters submitted regarding the Petitioner's character and fitness.

d. Character and Fitness Determination. The Board must offer an opinion in its recommendation as to whether the Petitioner is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law.

e. Determination by the Board. The Board must, within 60 days after the receipt of the transcript, forward the record and its recommendations to this Court. A copy of the recommendation must be forwarded to the Petitioner and Bar Counsel.

i. If the Board recommends Reinstatement, it may be conditioned upon Petitioner obtaining malpractice insurance coverage and/or a blanket fidelity bond or dishonesty insurance coverage in an amount(s) set by the Board from an approved professional insurance carrier for a definite term or on an ongoing basis.

ii. At the conclusion of the Reinstatement Proceeding, the

Clerk must determine the Costs associated with such Proceeding. The Clerk must refund any remaining surplus or must assess to the Petitioner any deficiencies that exist and submit a report on same to the Clerk of this Court as part of the Board's recommendation order.

iii. Upon approval of a petition by this Court, the Petitioner must meet the following requirements prior to and as a condition of his or her Reinstatement:

a) Pay to the Bar any Costs assessed in connection with the Reinstatement Proceeding;

b) Take and pass the written portion of the Virginia State Bar examination;

c) If required by the Board, obtain and maintain a professional liability insurance policy issued by a company authorized to write such insurance in Virginia at the cost of the Petitioner in an amount and for such term as set by the Board; and

d) If required by the Board, obtain and maintain a blanket fidelity bond or dishonesty insurance policy issued by a company authorized to write such bonds or insurance in Virginia at the Petitioner's cost in an amount and for such term as set by the Board.

13-26. APPEAL FROM BOARD DETERMINATIONS

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

B. Determination. This Court must hear the case and make such determination in connection therewith as it deems 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, must represent the interests of the Commonwealth and its citizens as appellees.

13-27. RESIGNATION

A. Application. A sworn and notarized application to resign from the practice of law must be submitted to the Clerk. The application must state that the resignation is not being offered to avoid disciplinary action and that the Attorney has no knowledge of any complaint, investigation, action, or proceeding in any jurisdiction involving allegations of Misconduct by the Attorney. An application to resign will not prevent or preclude any disciplinary proceeding or action against an Attorney.

B. Procedure. The Clerk must submit applications for resignation to Bar Counsel, who must investigate each application and determine whether, based upon the information available, the statements in the sworn application appear to be true and complete. If Bar Counsel files a written objection to the application with the Clerk, the Board must hold a hearing on whether the application should be accepted. If Bar Counsel does not file an objection, the Board may enter an order accepting the Attorney's resignation without a hearing. A resignation is effective only upon entry of an order accepting it. Upon entry of an order accepting an Attorney's resignation, the former Attorney must immediately cease the practice of law and make appropriate arrangements for the disposition of matters in the Attorney's care in conformity with the wishes of the Attorney's clients.

C. When Not Permitted. An Attorney may not resign while the Attorney is the subject of a disciplinary complaint, investigation, action, or proceeding involving allegations of Misconduct.

13-28. CONSENT TO REVOCATION

A. When Permitted. An Attorney who is the subject of a disciplinary complaint, Investigation or Proceeding may consent to Revocation, but only by delivering to the Clerk an affidavit declaring the Attorney's consent to Revocation and stating that:

1. The consent is freely and voluntarily rendered, that the Attorney is not being subjected to coercion or duress, and that the Attorney is fully aware of the implications of consenting to Revocation;

2. The Attorney is aware that there is currently pending a disciplinary complaint, Investigation, or Proceeding, the nature of which must be specifically set forth in the affidavit;

3. The Attorney acknowledges that the material facts upon which the disciplinary complaint, Investigation, or Proceeding are predicated are true; and

4. The Attorney submits the consent to Revocation because the Attorney

knows that if disciplinary Proceedings based on the alleged conduct were brought or prosecuted to a conclusion, the Attorney could not successfully defend them.

B. Admissions. The admissions offered in the affidavit consenting to Revocation are not deemed an admission in any proceeding except one relating to the status of the Attorney as a member of the Bar.

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

D. Attorney Action Required upon Revocation. Upon entry of such an order of Revocation by consent, the revoked Attorney must immediately cease the practice of law and must comply with the notice requirements set forth in subparagraph 13-29.

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

13-29. DUTIES OF DISBARRED OR SUSPENDED RESPONDENT

After a Suspension against a Respondent is imposed by either a Summary Order or Memorandum Order and no stay of the Suspension has been granted by this Court, or after a Revocation against a Respondent is imposed by either a Summary Order or Memorandum Order, Respondent must forthwith give notice, by certified mail, of his or her Revocation or Suspension to all clients for whom he or she is currently handling matters and to all opposing Attorneys and the presiding Judges in pending litigation. The Respondent must also make appropriate arrangements for the disposition of matters then in his or her care in conformity with the wishes of his or her clients. The Respondent must give such notice immediately and in no event later than 14 days of the effective date of the Revocation or Suspension, and make such arrangements as are required herein as soon as is practicable and in no event later than 45 days of the effective date of the Revocation or Suspension. The Respondent must also furnish proof to the Clerk within 60 days of the effective date of the Revocation or Suspension that such notices have been timely given and such arrangements have been made for the disposition of matters. The Board must decide all issues concerning the adequacy of the notice and arrangements required herein. The burden of proof is on the Respondent to show compliance. If the Respondent fails to show compliance, the Board may impose a sanction of Revocation or

additional Suspension for failure to comply with the requirements of this subparagraph 13-29.

13-30. CONFIDENTIALITY OF DISCIPLINARY RECORDS AND PROCEEDINGS

A. Confidential Matters. Except as otherwise provided in this subparagraph 13-30, or in subparagraph 13-11, all District Committee, Board, and three-judge Circuit Court hearings and all determinations imposing public discipline and orders of summary, interim, or administrative Suspension are public; and the following proceedings, records, and information are confidential and must not be disclosed:

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

2. Investigations, except that Investigative Reports admitted as exhibits at a public hearing are public;

3. Impairment Proceedings, except that all orders imposing or terminating a Suspension are public;

4. Notes, memoranda, research, and all other work product of Bar Counsel;

5. Records, communications, and information protected by Rule of Professional Conduct 1.6;

6. Subcommittee records and proceedings, except: i) determinations imposing public discipline; and ii) determinations imposing private discipline which have been disclosed to a District Committee, the Board or a three-judge Circuit Court empaneled under Va. Code §54.1-3935, pursuant to subparagraph 13-30.B, are public;

7. Deliberations and working papers of District Committees, the Board or a three-judge Circuit Court; and

8. Records or information sealed or proceedings closed for good cause shown by order of a District Committee, the Board, or three-judge Circuit Court.

B. Timing of Disclosure of Disciplinary Record in Review of Agreed Dispositions and Sanctions Proceedings. If an Attorney has a Disciplinary Record and is subsequently found by a Subcommittee, a District Committee, the Board or a three-judge Circuit Court empaneled under Va. Code § 54.1-3935 to have engaged in Misconduct, the facts and circumstances giving rise to such Disciplinary Record may be disclosed (i) to the Subcommittee, District

Committee, Board or three-judge Circuit Court prior to the imposition of any sanction and (ii) by the Subcommittee, District Committee, Board or three-judge Circuit Court in its order. The facts and circumstances giving rise to such Disciplinary Record may also be disclosed to the Board during a hearing concerning whether an affidavit and consent to Revocation should be accepted. An Attorney's Disciplinary Record, and the facts and circumstances giving rise to such Disciplinary Record, may also be disclosed to a Subcommittee, District Committee, the Board, or a three-judge Circuit Court as part of the review of an Agreed Disposition.

C. Timing of Public Access to Disciplinary Information.

1. A Charge of Misconduct is public when the matter is placed on the public District Committee hearing docket; and

2. A Certification or petition for expedited hearing is public when filed with the Clerk; and

3. All notices, orders, pleadings, and other documents filed with the Clerk or Circuit Court in any Disciplinary Proceeding set for hearing are public upon such filing.

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

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

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

G. Disclosure of Criminal Activity. If Bar Counsel or a Chair of the Board or a Chair of a District Committee discovers evidence of criminal activity by an Attorney, Bar Counsel, the Chair of the Board or a Chair of a District Committee must forward such evidence to the appropriate Commonwealth's Attorney, United

States Attorney or other law enforcement agency. The Attorney concerned must be notified whenever this information is transmitted pursuant to this subparagraph 13-30 unless Bar Counsel decides that giving such notice will prejudice a disciplinary investigation.

H. Disclosure of Information to Government Entities. By order of this Court, confidential information may be disclosed to the Joint Legislative Audit and Review Commission or other governmental entities incident to their discharge of official duties, provided the entity is required or agrees to maintain the confidentiality of the information provided.

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

J. Testimony about Disciplinary Proceedings.

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

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

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

L. Virginia Lawyer Referral Service. Bar Counsel must notify the Virginia Lawyer Referral Service when a Complaint involving any Attorney member of the service is referred to a District Committee for Investigation or when any Attorney member of the service is disciplined. Bar Counsel must also notify the Virginia Lawyer Referral Service when any Complaint involving an Attorney member of the service is dismissed following Investigation or when any Attorney member of the service complies with Terms imposed.

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 must not share information that is protected from disclosure by other state or federal privacy laws. Bar Counsel may, but must not be required to, notify the subject Attorney of the informal referral or transmission of confidential information to the Lawyer Assistant Program. Unless the subject Attorney has signed a release allowing the Lawyer Assistance Program to share information with Bar Counsel, the Lawyer Assistance Program must not report information about the subject Attorney to Bar Counsel, and Bar Counsel must not receive such information from the Lawyer Assistance Program.

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

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

Virginia State Bar
Public Comment Request

1111 East Main Street, Suite 700
Richmond, Virginia 23219-0026
Telephone: (804) 775-0500

Facsimile: (804) 775-0501 VOICE/TTY 711 or (800) 828-1120

Release Date: September 29, 2022

The Virginia State Bar

Seeks Public Comment on Paragraph 13

RICHMOND - Virginia State Bar is seeking public comment on proposed amendments to the Rules of Supreme Court of Virginia, Part 6, Section IV, Paragraph 13 ("Paragraph 13") regarding the clarification of the term "shall," which appears 482 times in Paragraph 13.

In an August 16, 2018 Memorandum to the Boyd-Graves Conference, the Committee on Using "Shall" in Legislative Drafting concluded that "*shall* is susceptible to significant ambiguity and the better practice in legislative drafting would be to eliminate shall altogether and to use the more precise term intended – such as *must, may, will, should, is,* or *is entitled to*."

In November 2020, the Supreme Court of Virginia amended the Rules of Supreme Court of Virginia, Parts 1-5A and 7-11, to clarify the meaning of "shall."

The Committee on Lawyer Discipline ("COLD") has approved amendments to Paragraph 13 that eliminate the word "shall." During this process, COLD identified certain changes that either are substantive or could be perceived as substantive, as identified below.

Paragraph 13-23.C

The recommended changes include a substantive change to Paragraph 13-23.C, as follows:

C. Investigation. Upon receipt of ~~notice or evidence~~ reliable information that raises a substantial question as to whether an Attorney has ~~or may have~~ an Impairment, Bar Counsel ~~shall~~ must cause an Investigation to be made to determine whether there is reason to believe that the Respondent has the Impairment.

COLD concluded that adding the terms "reliable information" and "substantial question" to Paragraph 13-23.C, while also changing "shall" to "must," strikes a balance between (1) requiring bar counsel to investigate incredible or remote allegations of Impairment and (2) ensuring that potential Impairments are appropriately investigated.

Paragraphs 13-16.L and 13-18.I.1

Paragraphs 13-16.L and 13-18.I.1 are parallel provisions regarding District Committee and Disciplinary Board hearings. The revision reads:

> Bar Counsel ~~shall~~ may present witnesses and other evidence supporting the Certification. The Respondent ~~shall~~ must 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.

COLD concluded that "may" is appropriate in the first line, instead of "must." If the tribunal determines that Bar Counsel has not presented sufficient evidence to support a charge in the Certification, the tribunal must sustain a motion to strike. See Para. 13-16.R; 13-18.J.

Paragraph 13-18.G

Paragraph 13-18.G currently states that the Chair of the Disciplinary Board "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." Current practice is for the Chair to ask whether the parties are familiar with the procedures and, if both state that they are, the Chair does not explain the procedures in detail. In order to ensure that the procedures are described where necessary while still allowing the parties to waive the description, COLD approved the following revision:

> G. Preliminary Explanation. Absent waiver by the parties, ~~T~~the Chair ~~shall~~ must 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~~ must 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~~ must be excused from participation in the matter.

There are eight instances where COLD approved replacing shall with "should." In all these examples, COLD concluded that the use of "should," rather than "must," conveys the meaning intended by the previous use of "shall."

- Paragraph 13-2: Nothing in this Paragraph ~~shall~~ should be interpreted so as to eliminate, restrict or impair the jurisdiction of the courts of this Commonwealth to deal with the disciplining of Attorneys as provided by law.

- Paragraph 13-4.A: In creating the District Committee areas, Council ~~shall~~ should give due consideration to Attorney population and the community of interest among different judicial circuits within a District Committee area.

- Paragraph 13-4.D: Council ~~shall~~ should appoint members of each District Committee for such terms of service as will allow for the retirement from the District Committee, or completion of the existing terms, of one-third of the District Committee membership at the end of each fiscal year.

- Paragraph 13-4.E: Before nominating any individual for membership on a District Committee, the Council members making such recommendation ~~shall~~ should first determine that the nominee is willing to serve on the District Committee and will conscientiously discharge the responsibility as a member of the District Committee.

- Paragraph 13-6.A: Before nominating any individual for membership on the Board, the Bar's nominating committee ~~shall~~ should first determine that the nominee is willing to serve on the Board and will conscientiously discharge the responsibilities as a member of the Board.

- Paragraph 13-7.E: Any Respondent who has received two determinations of Private Discipline within the ten-year period immediately preceding the Bar's receipt of the oldest Complaint that the Subcommittee is considering, ~~shall~~ should receive public discipline for any violation of the Disciplinary Rules, unless there are sufficient facts and circumstances to rebut such presumption.

- Paragraph 13-7.G: In determining to which District Committee a Complaint should be referred, the Clerk ~~shall~~ should consider the volume of Complaints pending before the District Committee and the inconvenience imposed upon the Respondent and the witnesses by the location of the District Committee.

- Paragraph 13-12.G: All communication with the Bar, whether written or oral, ~~shall~~ should be in English.

The proposed amendments may be inspected below or at the office of the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia 23219-0060, between the hours of 9:00 am and 4:30 pm, Monday through Friday.

Any individual, business, or other entity may submit written comments in support of or in opposition to the proposed opinion to Cameron Rountree, executive director of the Virginia State Bar, not later than **December 1, 2022**. Comments may be submitted via email to publiccomment@vsb.org.

Professional Guidelines

An agency of the Supreme Court of Virginia

Search

- VSB Home

- Rules and Regulations
- Rules of Professional Conduct
- Legal Ethics Opinions
- Unauthorized Practice of Law Opinions
- Organization & Government of the Virginia State Bar
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- Actions on Rule Changes and Legal Ethics Opinions

The Virginia State Bar

Professional Guidelines

Search the Professional Guidelines Search

Home > Actions on Rule Changes and Legal Ethics Opinions > amendments to Paragraph 13 regarding clarification of the term "shall."

Proposed | amendments to Paragraph 13 regarding clarification of the term "shall." Pending approval by VSB Council and the Supreme Court of Virginia.

View the Current Rule

Update 2/7/23:

At its meeting on January 25, 2023, the Committee on Lawyer Discipline unanimously approved recommending the proposed Paragraph 13 revisions to VSB Council for approval at its February 25, 2023, meeting.

Virginia State Bar is seeking public comment on proposed amendments to the Rules of Supreme Court of Virginia, Part 6, Section IV, Paragraph 13 ("Paragraph 13") regarding the clarification of the term "shall," which appears 482 times in Paragraph 13.

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View proposed Paragraph 13 (PDF posted 9/29/22)

Originally posted: September 29, 2022

Updated: February 7, 2023

1111 East Main Street, Suite 700 | Richmond, Virginia 23219-0026
All Departments (804) 775-0500
Voice/TTY 711 or (800) 828-1120
Office Hours: Mon.-Fri. 8:15 am to 4:45 pm (excluding holidays)
The Clerk's Office does not accept filings after 4:45 pm

Virginia State Bar
An agency of the Supreme Court of Virginia

NEWS AND INFORMATION

September 29, 2022

VSB Seeks Comments on Proposed Amendments to Supreme Court Rules Regarding Clarification of "Shall"

The Virginia State Bar is seeking public comment on proposed amendments to the Rules of Supreme Court of Virginia, Part 6, Section IV, Paragraph 13 ("Paragraph 13") regarding the clarification of the term "shall," which appears 482 times in Paragraph 13.

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Inspection and Comment

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Updated: Sep 29, 2022

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Governance

At a **special meeting** on September 7, the Virginia State Bar Council voted on two actions, one regarding the approval of a new executive director for the Bar, and the other regarding meetings and the Virginia Freedom of Information Act.

The Supreme Court of Virginia approved the recommendation of the VSB Council to appoint **Cameron M. Rountree** as the Executive Director and Chief Operating Officer of the Virginia State Bar on September 8.

On September 19, the **Supreme Court of Virginia** approved Legal Ethics Opinions 1897 and 1898, effective immediately. The Court also approved amendments to the Rules of the Court, Part One, Rule 1:5 regarding Counsel and Parties Appearing Without Counsel, effective November 13, 2022.

The VSB seeks public comment on **Legal Ethics Opinion 1893**, a proposed advisory on representing children and “next friends” as plaintiffs in personal injury cases.

The VSB seeks public comment on proposed amendments to the Rules of Supreme Court of Virginia, **Part 6, Section IV, Paragraph 13** (“Paragraph 13”) regarding the clarification of the term “shall,” which appears 482 times in Paragraph 13.

Volunteers are needed to serve on **VSB boards and committees**. All appointments will be for the terms specified, beginning on July 1, 2023.

The **Hon. Stephen R. McCullough** succeeded Chief Justice S. Bernard Goodwyn as the Justice Co-Chair of the Virginia Access to Justice Commission, effective September 1, 2022, for a term of three years.

Active Lawyers in the 18th Circuit: Please remember to vote for your representative on Bar Council before the October 6 deadline. Questions about your ballot? Please contact Andrew Aarbitell at Intelliscan.

Compliance

If you haven't paid your dues: Take action by the October 11 deadline to AVOID SUSPENSION. Log in now to complete outstanding renewal requirements.

Please be aware that all active lawyers must complete 12 hours of **MCLE**, including 2 hours in ethics/professionalism and 4 hours from live, interactive programs by October 31.

SURVEY: Active lawyers were emailed to weigh in on whether they would prefer to have dues, CLE hours, and insurance status due on the same day (July 31) as it was in the past, or to continue with the current process of having different due dates for compliance. In the new scenario, there would still be a time period between completing CLE hours and reporting them. If you missed the email and you are an active lawyer, **take the survey now.**

Discipline

Disciplinary hearings are public meetings found on the disciplinary docket.

Recent disciplinary system actions:

Edward Emad Moawad, license revoked, effective September 19, 2022.

Brian Jeffrey Rosenberg, license suspended, effective September 12, 2022.

Paul Andrew Murphy, license suspended, effective September 16, 2022.

Janet A. Smith, public reprimand, effective September 6, 2022.

S.W. Dawson, public reprimand, effective September 21, 2022.

Timothy Williams Barbrow, public reprimand, effective September 28, 2022.

Justin Todd Daniel, public reprimand, effective September 28, 2022.

Private discipline: 2 private reprimands, 5 private admonitions

Pro Bono / Access to Justice

VSB Pro Bono Conference: Economic Justice

- October 19 in Virginia Beach
- Virtual or in-person options and 6.0 hours FREE CLE
- Pro Bono Awards Dinner & Celebration emceed by VSB President Stephanie E. Grana
- Keynote address by Justice Stephen R. McCullough

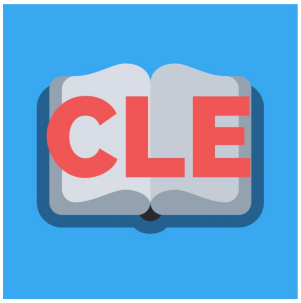
Register and support pro bono in the Commonwealth.

Hunton Andrews Kurth litigator **Lonnie "Chip" D. Nunley III** is the recipient of the 2022 Lewis F. Powell Jr. Pro Bono Award. Nunley was selected based on his annual pro bono work ranging from 600–1,100 hours in the four years since the VSB began collecting pro bono reports. He will receive the award at the Pro Bono Conference.

We are hiring a Deputy Executive Director, an Assistant Bar Counsel, and a Director of Information Technology.

The VSB offers excellent state benefits and the opportunity to serve the people of Virginia while improving the legal profession and the justice system.

NEED CLE?



Check out these **free and low-cost VSB-sponsored CLE** opportunities before the October 31 compliance deadline.

Several local and specialty bars have a **variety of CLE opportunities available** across the Commonwealth before the October 31 CLE deadline. See the full list here.

Election Law Update
Thursday, October 20, 12–1:30 pm
Webinar CLE, sponsored by the Local Government Law Section
1.5 hours live/interactive CLE *pending*
Must be a member of the VSB to register.

Awards and Events

Don't miss the VSB Young Lawyers Conference **Annual Bench-Bar Dinner in Celebration of Women and Minorities in the Legal Profession**.

Thursday, October 13
University of Mary Washington
Fredericksburg

Purchase tickets online.

AWARD NOMINATIONS: Nominate a lawyer for the:

- Harry L. Carrico Professionalism Award (Due Dec 2)
- William R. Rakes Leadership in Education Award (Due Dec 2)
- Edward L. Chambers Lifetime Bar Service Award (Due Feb 1)

Please take a moment to consider nominating a respected peer for these prestigious awards.

SAVE THE DATE: Back in person, plan to attend the 53rd Criminal Law Seminar: February 3 in Charlottesville and February 10 in Williamsburg.

Nota Bene

Virginia lawyers practicing in **Prince George's County, MD**: To avoid delays and complications, please send filings, pleadings, and payments to the Clerk of the Circuit Court, NOT to the Chief and Administrative Judge.

Virginia Lawyer

In the mail! The Pro Bono Issue:
Join us in celebrating the lawyers who give both time and money to helping make Equal Justice Under Law more than an aspiration. Learn the ways you can make an enormous impact in a short amount of time through pro bono.

Virginia Lawyer reaches almost all 50,000 VSB lawyers, judges, and law schools in Virginia and across the country. Contact Dee Norman for more information on advertising your firm, your services, or your law school.

Quiz: Is a pumpkin a vegetable?*

**No. A pumpkin is a fruit because it grows from a flower.*

Stay connected to your Bar:

From: Monroe Windsor
To: publiccomment
Subject: EXTERNAL SENDER Proposed amendments to Paragraph 13 regarding clarification of the term "shall."
Date: Tuesday, November 1, 2022 10:55:10 AM
Attachments: image001.png
image002.png
image003.png

As an attorney who practiced in Texas for 33 years before practicing in Virginia, the consternation over the word, "shall," is utterly perplexing.

Texas law evolved so that two terms were primarily used in statutes. "Shall" is the mandatory term. "May" is the permissive term. This has eliminated the ambiguity of other possible terms, even in complicated statutes where the criteria vary between mandatory and permissive.

One issue that seems to present a problem in Virginia is the situation where a court "shall" consider several factors in reaching its decision. This situation arises in Virginia family law cases, where a judge is required to consider several factors in making an equitable distribution or awarding support. Unless the statute so states, the judge must consider the factor, but is not required to give specific weight to a factor. If there was no evidence on a factor, then there is nothing for the judge to consider.

Additionally, I do not see how "must," "will," or "should" are clearer than "shall." I feel that "will" is an especially bad choice, since it seems to refer to some vague time in the future.

I would propose using fewer terms to refer to mandatory or permissive aspects of a statute or rule.

-Mike Windsor

MONROE "MIKE" WINDSOR
Associate
703.583.6060
703.583.6066
Direct 703.565.5156
maw@comptonduling.com

12701 Marblestone Drive, Suite 350 ● Woodbridge, VA 22192

From: Dannielle Hall-McIvor
To: publiccomment
Subject: EXTERNAL SENDER Amendments to Paragraph 13
Date: Wednesday, November 2, 2022 2:29:25 PM

> You don't often get email from dmcivor@vbschools.com. Learn why this is important

Please eliminate “shall.”
If you have questions, please contact me. Thanks-

_____

Dannielle Hall-McIvor
Senior School Board Attorney
Virginia Beach City Public Schools
2512 George Mason Dr.
Virginia Beach, VA 23456-9105
T: 757.263.1216
E: dmcivor@vbschools.com

MINUTES OF THE VIRGINIA STATE BAR
COUNCIL MEETING

Date: February 25, 2023, 9:00 am
Location: Omni Richmond Hotel, 100 S. 12th Street, Richmond

The VSB Council met in-person on Saturday, February 25, 2023. At 9:05 a.m., President Stephanie E. Grana called the meeting to order. Sixty-two (62) Council members attended in-person satisfying Pt. 6., § IV, Para. 7 of the Rules of the Supreme Court of Virginia. There was no remote participation.

Council members in attendance:

President Stephanie E. Grana
President-elect Chidi I. James
Member D.J. Hansen
Member Ryan G. Ferguson
Member Naveed Kalantar
Member Bretta Zimmer Lewis
Member Corrynn J. Peters
Member Thomas G. Shaia
Member Derek A. Davis
Member Benjamin M. Mason
Member Veronica E. Meade
Member Susan B. Tarley
Member E. M. Wright, Jr.
Member P. George Eliades II
Member Timothy R. Baskerville
Member Mark D. Dix
Member Samuel T. Towell
Member Susheela Varky
Member Henry I. Willett III
Member Thomas A. Edmonds
Member Joel R. McClellan
Member Allen F. Bareford
Member Richard H. Howard-Smith
Member Ann Marie Park
Member Carole H. Capsalis
Member Jennifer S. Golden
Member Adam M. Krischer
Member David E. Sher
Member Nicholas J. Gehrig
Member Sebastian M. Norton
Member Todd A. Pilot
Member Susan M. Butler
Member Gary V. Davis
Member Kyung “Kathryn” N. Dickerson
Member Brian C. Drummond
Member Sandra L. Havrilak
Member Tamika D. Jones
Member Luis A. Perez-Pietri
Member Susan M. Pesner
Member Robert B. “Bob” Walker
Member Michael M. York
Member R. Penn Bain
Member Susan F. Pierce
Member Daniel P. Frankl
Member Kevin W. Holt
Member Eugene N. Butler
Member William T. Wilson
Member Peter K. McDermott II
Member W. Grant Back
Member Bruce H. Russell II
Member Bradley D. Fleming
Member D. Sue Baker
Member Anna B. Bristle
Member at Large James W. Hundley
Member at Large Lenard T. “Len” Myers, Jr.
Member at Large Molly E. Newton
Member at Large Lonnie D. “Chip” Nunley III
Member at Large Patricia E. Smith
Member at Large Nicole E. Upshur
Member at Large Lisa A. Wilson
CLSBA Chair Luis A. Perez-Pietri
Young Lawyers Conference President Craig E. Ellis

Absent:
Immediate Past President Jay B. Myerson
Member W. Huntington “Hunter” Byrnes, Sr.
Member Craig B. Davis
Member G. L. “Rex” Flynn, Jr.
Member Matthew R. Foster
Member Stephen K. Gallagher
Member G. Andrew Hall
Member Carly J. Hart
Member Shaun R. Huband
Member Neil S. Lowenstein
Member Charlene A. Morring
Member Nathan J. Olson
Member Debra L. Powers
Member Cullen D. Seltzer
Member Neil S. Talegaonkar
Member at Large Joanna L. Suyes
Diversity Conference Chair Alicia R. Johnson
Senior Lawyer Conference Chair Gary C. Hancock

Council Invitees:

Valerie O’Brien	Virginia Trial Lawyers Association
K. Danielle Payne	Virginia Association of Criminal Defense Lawyers

Also attending:

Cameron M. Rountree	VSB	Executive Director and Chief Operating Officer
Janet P. Van Cuyk	VSB	Deputy Executive Director
Renu M. Brennan	VSB	Bar Counsel
Marni E. Byrum	VSB	Budget and Finance Committee chair
Rhetta M. Daniel		
Sylvia S. Daniel	VSB	Assistant to the Deputy Executive Director
DaVida M. Davis	VSB	Director of Regulatory Compliance
Edward J. “Ed” Dillon	VSB	Deputy Bar Counsel
Nancy L. Donner	VSB	Office Services Coordinator & Council Liaison
Courtney M. Frazier	VSB	Diversity Conference member
JW Grenadier		American Legal News
Emily F. Hedrick	VSB	Ethics Counsel
Crystal T. Hendrick	VSB	Director of Finance and Procurement
R. Braxton Hill IV	VSB	Committee on Lawyer Discipline chair
Nicholas J. “Nick” Kuriger	VSB	Director of Information Technology
Shawne D. Moore	VSB	Assistant to the Executive Director
Caryn B. Persinger	VSB	Director of Communications
Dolly C. Shaffner	VSB	Meetings Coordinator
Aidan Stengel	VSB	IT Specialist
Maureen D. Stengel	VSB	Director of Bar Services

I. Reports and Information Items

A. President's Report

Stephanie Grana reported on her activities. Her written report was included in the materials provided to Council.

B. Executive Director's Report

Cameron Rountree reported on matters relating to the VSB. His written report was included in the materials provided to Council.

C. Financial Report

Crystal Hendrick presented the financial report as of December 31, 2022. Her written report was included in the materials provided to Council.

D. Bar Counsel Report

Renu Brennan reported on the activities in the Office of Bar Counsel. Her written report was included in the materials provided to Council.

E. Conference of Local & Specialty Bar Associations Report

Chair Luis Perez reported on the activities of the Conference of Local & Specialty Bar Associations. His written report was included in the materials provided to Council.

F. Diversity Conference Report

Member Courtney Frazier reported on the activities of the Diversity Conference. The Chair's Report was included in the materials provided to Council.

G. Senior Lawyers Conference Report

Member Thomas Edmonds reported on the activities of the Senior Lawyers Conference. The Report of the Senior Lawyers Conference was included in the materials provided to Council.

H. Young Lawyer Conference Report

Conference President Craig Ellis reported on the activities of the Young Lawyers Conference. His written report was included in the materials provided to Council.

I. Opportunity for Questions, Comments, Ideas

The following individuals were given an opportunity to speak:

- William T. "Bill" Wilson, Bar Council member, 25th Judicial Circuit
- JW Grenadier
- Rhetta M. Daniel

II. Action Items

A. Minutes of the October 21, 2022 Meeting

A motion was made by Chidi James and seconded by Thomas Edmonds, to vote to approve the minutes of the October 21, 2022 meeting. Bar Council approved the minutes of the June 16, 2022 meeting. Members Timothy Baskerville, Thomas Edmonds, David Sher, and William Wilson voted "yes" verbally. All other members voted using the electronic Poll Everywhere voting tool. The electronic voting results are appended to these minutes.

B. Fiscal Year 2024 Proposed Budget

Marni Byrum presented the Fiscal Year 2024 Proposed Budget. A copy of the memorandum dated February 2, 2023, from the Director of Finance, was included in the materials provided to Bar Council. After a discussion, a motion was made by William Wilson and seconded by Leonard Myers, to vote to approve the proposed budget and send it to the Supreme Court for approval. Bar Council voted to approve the Fiscal Year 2024 Proposed Budget and send it to the Supreme Court for approval. Members Timothy Baskerville, Thomas Edmonds, and William Wilson voted "yes" verbally. All other members voted using the electronic Poll Everywhere voting tool. The electronic voting results are appended to these minutes.

C. Review of Proposed Paragraph 13 changes clarifying the meaning of "shall" in Paragraph 13

R. Braxton Hill IV presented a review of the proposed Paragraph 13 changes clarifying the meaning of "shall" in Paragraph 13. A copy of the memo dated February 1, 2023, from Bar Counsel and Senior Assistant Bar Counsel, re: the Review of the Committee on Lawyer Discipline's Proposed Changes Clarifying the Meaning of "Shall" in the Rules of the Supreme Court, Part Six, Section IV, Paragraph 13 ("Paragraph 13") was included in the materials provided to Bar Council. After a discussion, a motion was made by Bradley Fleming and seconded by Bruce Russell, to vote to accept the recommendations of the Committee on Lawyer Discipline and to forward the recommendations to the Supreme Court. Bar Council voted to send the committee's recommended changes to the Supreme Court. Members Timothy Baskerville and Thomas Edmonds voted "yes" verbally. All other members voted using the electronic Poll Everywhere voting tool. The electronic voting results are appended to these minutes.

D. Approval of Nominating Committee Recommendations for Volunteer Entity Vacancies

Susan Tarley presented the Nominating Committee Report dated January 17, 2023. Copies of the report were included in the materials provided to the Bar Council. A motion was made by Chidi James and seconded by Bruce Russell, to vote to accept the Committee's recommendations for American Bar Association House of Delegates and Client's Protection Fund for appointment, and to accept and send the Committee's candidate recommendations for Council Member at Large, Disciplinary Board and Mandatory Continuing Legal Education Board to the Supreme Court for appointment to the appropriate

entity. Members Timothy Baskerville and Thomas Edmonds voted “yes”. verbally. All other members voted using the electronic Poll Everywhere voting tool. The electronic voting results are appended to these minutes.

- American Bar Association House of Delegates
  - Biberaj, Buta
  - James, Chidi I.
  - Little, Melissa A.
  - McQuade, Martha JP
  - VSB President-elect
  - YLC committee member

- Clients’ Protection Fund
  - Bentley, Lori J.
  - Gibney, Yvonne S.
  - Mellette, Peter M.

- Council Member at Large
  - Newton, Molly E.
  - Nunley III, Lonnie D.
  - Wilson, Lisa A.

- Disciplinary Board
  - Anderson, Alan S.
  - Boyce, Dawn E.
  - Davis, Reba H.
  - Nash, Mary Beth
  - Simon, Alexander N.
  - Smith, Dr. Theodore
  - Wilks, Reiss F.

- Mandatory Continuing Legal Education Board
  - Armstrong, Thomas A.
  - Carmichael, Jessica N.
  - Martingayle, Kevin E.
  - Stephenson, Scott A.

E. Legal Ethics Opinion 1893

Michael York presented the memo from Ethics Counsel to Bar Council for Proposed Legal Ethics Opinion 1893, Representing Child with Parent as “Next Friend” and a draft opinion revised January 12, 2023. A copy of the memo and draft opinion were included in the materials provided to Bar Council. After a discussion, a motion was made by Chidi James and seconded by Bruce Russell, to vote to accept the recommendations of the Ethics Committee and forward the memo and draft opinion to the Supreme Court. Bar Council voted to send the memo and draft opinion to the Supreme Court. Members Timothy Baskerville and Thomas Edmonds voted “yes verbally. All other members voted using the electronic Poll Everywhere voting tool. The electronic voting results are appended to these minutes.

F. Approval of 2023-2024 Disciplinary Board Chair and Vice-Chair Recommendations

Sandra Havrilak presented a Memorandum dated January 30, 2023, from the Clerk of the Disciplinary System requesting Approval of 2023-2024 Disciplinary Board Chair and Vice-Chair Recommendations. A copy of the memorandum was included in the materials provided to Bar Counsel. A motion was made by Chidi James, and seconded by Bruce Russell, to vote to accept the chair and vice-chair recommendations of the Disciplinary Board and refer the recommendations of the Board to the Supreme Court. Bar Council voted to accept and send the Board's recommendations to the Supreme Court for appointment. Members Timothy Baskerville and Thomas Edmonds voted "yes" verbally. All other members voted using the electronic Poll Everywhere voting tool. The electronic voting results are appended to these minutes.

1. Elevate Kamala H. Lannetti, First Vice-Chair, to Chair.
2. Elevate David J. Gogal, Second Vice-Chair, to First Vice-Chair.
3. Recommend Jennifer D. Royer to fill the Second Vice-Chair vacancy created by Mr. Gogal's elevation to First Vice-Chair.

At 11:04 a.m. the meeting was adjourned.

Response #	Started At (CST)	Screen Name	Public ID	**A. Do you approve the minutes from the October 21, 2022 meeting?**
1	2/25/2023 9:24	e m wright jr	212938	Yes
2	2/25/2023 9:24	Ann Marie Park	714069	Yes
3	2/25/2023 9:24	Richard Howard-Smith	715799	Yes
4	2/25/2023 9:24	Kyung Dickerson	371439	Yes
5	2/25/2023 9:24	James W. Hundley	322877	Yes
6	2/25/2023 9:24	Patricia Smith	551990	Yes
7	2/25/2023 9:24	Daniel P. Frankl	176603	Yes
8	2/25/2023 9:24	Michael York	111233	Yes
9	2/25/2023 9:24	Gary V Davis	496895	Yes
10	2/25/2023 9:25	Susan Pesner	414709	Yes
11	2/25/2023 9:24	Peter McDermott	806722	Yes
12	2/25/2023 9:25	Courtney Frazier (DC)	879427	Yes
13	2/25/2023 9:24	Nicole Upshur	778172	Yes
14	2/25/2023 9:24	Carole capsalis	717866	Yes
15	2/25/2023 9:24	Robert B Walker	1015697	Yes
16	2/25/2023 9:24	Luis Perez	987392	Yes
17	2/25/2023 9:24	DJ Hansen	301522	Yes
18	2/25/2023 9:24	Ryan Ferguson	585455	Abstain
19	2/25/2023 9:24	Penn Bain	211938	Yes
20	2/25/2023 9:24	W. Grant Back	440765	Yes
21	2/25/2023 9:24	Anna Bristle	228589	Yes
22	2/25/2023 9:24	Susan Butler	746936	Yes
23	2/25/2023 9:24	Tamika Jones	955325	Yes
24	2/25/2023 9:24	Corrynn Peters	761655	Yes
25	2/25/2023 9:24	Adam Krischer	860581	Yes
26	2/25/2023 9:25	Todd Pilot	222112	Yes
27	2/25/2023 9:24	Joel McClellan	433892	Yes
28	2/25/2023 9:24	Chidi James	372570	Yes
29	2/25/2023 9:24	Mark Dix	621535	Yes
30	2/25/2023 9:24	Susan Pierce	118933	Yes
31	2/25/2023 9:24	Lenard Myers	814450	Yes
32	2/25/2023 9:24	Tom Shaia	29116	Yes
33	2/25/2023 9:24	Derek Davis	421154	Yes
34	2/25/2023 9:24	Sam Towell	684491	Yes
35	2/25/2023 9:24	George Eliades	910071	Yes
36	2/25/2023 9:24	Brad Fleming	228543	Yes
37	2/25/2023 9:24	Allen Bareford	241823	Yes
38	2/25/2023 9:24	Brian Drummond	245414	Yes
39	2/25/2023 9:24	Susheela Varky	159472	Abstain
40	2/25/2023 9:24	David P. Weber	996770	Abstain
41	2/25/2023 9:24	EUGENE BUTLER	939393	Yes
42	2/25/2023 9:24	Susie Baker	32859	Yes
43	2/25/2023 9:24	Lonnie Nunley	893841	Yes
44	2/25/2023 9:24	Benjamin Mason	617045	Yes
45	2/25/2023 9:24	Stephanie Grana	24911	Yes
46	2/25/2023 9:24	Craig Ellis YLC	944654	Yes
47	2/25/2023 9:24	Sandra Havrilak	236715	Yes
48	2/25/2023 9:24	Nick Gehrig	802971	Yes
49	2/25/2023 9:24	Sebastian Norton	11606	Yes
50	2/25/2023 9:24	Jennifer Golden	692358	Yes
51	2/25/2023 9:24	Kevin W Holt	205036	Yes
52	2/25/2023 9:24	Bretta Lewis	930775	Yes
53	2/25/2023 9:25	Lisa Wilson	766788	Yes
54	2/25/2023 9:24	Bruce Russell	952365	Yes
55	2/25/2023 9:25	Veronica Meade	104849	Yes
57	2/25/2023 9:25	Molly Newton	469441	Yes

Response #	Started At (CST)	Screen Name	Public ID	B. Do you approve the FY 2024 Proposed Budget subject to General Assembly action?
1	2/25/2023 9:32	e m wright jr	212938	Yes
2	2/25/2023 9:32	Ann Marie Park	714069	Yes
3	2/25/2023 9:33	Richard Howard-Smith	715799	Yes
4	2/25/2023 9:32	Kyung Dickerson	371439	Yes
5	2/25/2023 9:33	James W. Hundley	322877	Yes
6	2/25/2023 9:32	Patricia Smith	551990	Yes
7	2/25/2023 9:32	Daniel P. Frankl	176603	Yes
8	2/25/2023 9:33	David Sher	861134	Yes
9	2/25/2023 9:33	Michael York	111233	Yes
10	2/25/2023 9:33	Gary V Davis	496895	Yes
11	2/25/2023 9:32	Susan Pesner	414709	Yes
12	2/25/2023 9:32	Susan Tarley	312285	Yes
13	2/25/2023 9:32	Peter McDermott	806722	Yes
14	2/25/2023 9:34	Courtney Frazier (DC)	879427	Yes
15	2/25/2023 9:33	Nicole Upshur	778172	Yes
16	2/25/2023 9:32	Carole capsalis	717866	Yes
17	2/25/2023 9:32	Robert B Walker	1015697	Yes
18	2/25/2023 9:32	Luis Perez	987392	Yes
19	2/25/2023 9:32	DJ Hansen	301522	Yes
20	2/25/2023 9:32	Ryan Ferguson	585455	Yes
21	2/25/2023 9:32	William Wilson	641442	Yes
22	2/25/2023 9:32	Penn Bain	211938	Yes
23	2/25/2023 9:33	W. Grant Back	440765	Yes
24	2/25/2023 9:32	Anna Bristle	228589	Yes
25	2/25/2023 9:32	Susan Butler	746936	Yes
26	2/25/2023 9:32	Tamika Jones	955325	Yes
27	2/25/2023 9:32	Corrynn Peters	761655	Yes
28	2/25/2023 9:32	Adam Krischer	860581	Yes
29	2/25/2023 9:33	Todd Pilot	222112	Yes
30	2/25/2023 9:32	Joel McClellan	433892	Yes
31	2/25/2023 9:32	Chidi James	372570	Yes
32	2/25/2023 9:32	Mark Dix	621535	Yes
33	2/25/2023 9:32	Susan Pierce	118933	Yes
34	2/25/2023 9:32	Lenard Myers	814450	Yes
35	2/25/2023 9:33	Tom Shaia	29116	Yes
36	2/25/2023 9:33	Derek Davis	421154	Yes
37	2/25/2023 9:33	Sam Towell	684491	Yes
38	2/25/2023 9:32	George Eliades	910071	Yes
39	2/25/2023 9:32	Brad Fleming	228543	Yes
40	2/25/2023 9:33	Naveed Kalantar	298562	Yes
41	2/25/2023 9:32	Allen Bareford	241823	Yes
42	2/25/2023 9:32	Brian Drummond	245414	Yes
43	2/25/2023 9:32	Susheela Varky	159472	Yes
44	2/25/2023 9:33	David P. Weber	996770	Yes
45	2/25/2023 9:32	EUGENE BUTLER	939393	Yes
46	2/25/2023 9:32	Susie Baker	32859	Yes
47	2/25/2023 9:32	Lonnie Nunley	893841	Yes
48	2/25/2023 9:32	Benjamin Mason	617045	Yes
49	2/25/2023 9:33	Craig Ellis YLC	944654	Yes
50	2/25/2023 9:32	Sandra Havrilak	236715	Yes
51	2/25/2023 9:33	Nick Gehrig	802971	Yes
52	2/25/2023 9:33	Sebastian Norton	11606	Yes
53	2/25/2023 9:33	Jennifer Golden	692358	Yes
54	2/25/2023 9:32	Kevin W Holt	205036	Yes
55	2/25/2023 9:32	Bretta Lewis	930775	Yes
56	2/25/2023 9:33	Lisa Wilson	766788	Yes
57	2/25/2023 9:32	Veronica Meade	104849	Yes
58	2/25/2023 9:32	Molly Newton	469441	Yes
59	2/25/2023 9:32	Bruce Russell	3939	Yes
60	2/25/2023 9:33	Henry I. Willett III	273049	Yes

Response #	Started At (CST)	Screen Name	Public ID	**C: Do you approve the Proposed Paragraph 13 changes clarifying the meaning of "shall"?**
1	2/25/2023 9:40	e m wright jr	212938	Yes
2	2/25/2023 9:40	Ann Marie Park	714069	Yes
3	2/25/2023 9:40	Richard Howard-Smith	715799	Yes
4	2/25/2023 9:40	Kyung Dickerson	371439	Yes
5	2/25/2023 9:40	James W. Hundley	322877	Yes
6	2/25/2023 9:40	Patricia Smith	551990	Yes
7	2/25/2023 9:41	Daniel P. Frankl	176603	Yes
8	2/25/2023 9:40	David Sher	861134	Yes
9	2/25/2023 9:41	Michael York	111233	Yes
10	2/25/2023 9:40	Gary V Davis	496895	Yes
11	2/25/2023 9:40	Susan Pesner	414709	Yes
12	2/25/2023 9:40	Susan Tarley	312285	Yes
13	2/25/2023 9:41	Peter McDermott	806722	Yes
14	2/25/2023 9:41	Courtney Frazier (DC)	879427	Yes
15	2/25/2023 9:40	Nicole Upshur	778172	Yes
16	2/25/2023 9:41	Carole capsalis	717866	Yes
17	2/25/2023 9:40	Robert B Walker	1015697	Yes
18	2/25/2023 9:40	Luis Perez	987392	Yes
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24	2/25/2023 9:41	Susan Butler	746936	Yes
25	2/25/2023 9:40	Tamika Jones	955325	Yes
26	2/25/2023 9:40	Corrynn Peters	761655	Yes
27	2/25/2023 9:40	Adam Krischer	860581	Yes
28	2/25/2023 9:40	Todd Pilot	222112	Yes
29	2/25/2023 9:40	Joel McClellan	433892	Yes
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34	2/25/2023 9:40	Tom Shaia	29116	Abstain
35	2/25/2023 9:41	Derek Davis	421154	Yes
36	2/25/2023 9:40	Sam Towell	684491	Yes
37	2/25/2023 9:41	George Eliades	910071	No
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43	2/25/2023 9:40	David P. Weber	996770	No
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51	2/25/2023 9:40	Nick Gehrig	802971	Yes
52	2/25/2023 9:40	Sebastian Norton	11606	Yes
53	2/25/2023 9:41	Jennifer Golden	692358	Yes
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56	2/25/2023 9:40	Lisa Wilson	766788	Yes
57	2/25/2023 9:40	Veronica Meade	104849	Yes
58	2/25/2023 9:40	Molly Newton	469441	Yes
59	2/25/2023 9:41	Henry I. Willett III	273049	Yes
60	2/25/2023 9:40	Bruce Russell	431368	Yes
61	2/25/2023 9:41	Ryan Ferguson	38867	Yes

Response #	Started At (CST)	Screen Name	Public ID	D. Do you approve the Nominating Committee Recommendations for Volunteer Entity Vacancies?
1	2/25/2023 9:53	e m wright jr	212938	Yes
2	2/25/2023 9:53	Ann Marie Park	714069	Yes
3	2/25/2023 9:53	Richard Howard-Smith	715799	Yes
4	2/25/2023 9:53	Kyung Dickerson	371439	Yes
5	2/25/2023 9:53	James W. Hundley	322877	Yes
6	2/25/2023 9:53	Patricia Smith	551990	Yes
7	2/25/2023 9:53	Daniel P. Frankl	176603	Yes
8	2/25/2023 9:53	David Sher	861134	Yes
9	2/25/2023 9:53	Michael York	111233	Yes
10	2/25/2023 9:53	Gary V Davis	496895	Yes
11	2/25/2023 9:53	Susan Pesner	414709	Yes
12	2/25/2023 9:53	Susan Tarley	312285	Yes
13	2/25/2023 9:54	Peter McDermott	806722	Yes
14	2/25/2023 9:53	Courtney Frazier (DC)	879427	Yes
15	2/25/2023 9:53	Nicole Upshur	778172	Yes
16	2/25/2023 9:53	Carole capsalis	717866	Yes
17	2/25/2023 9:53	Robert B Walker	1015697	Yes
18	2/25/2023 9:53	Luis Perez	987392	Yes
19	2/25/2023 9:53	DJ Hansen	301522	Yes
20	2/25/2023 9:53	William Wilson	641442	Yes
21	2/25/2023 9:53	Penn Bain	211938	Yes
22	2/25/2023 9:53	W. Grant Back	440765	Yes
23	2/25/2023 9:53	Anna Bristle	228589	Yes
24	2/25/2023 9:53	Susan Butler	746936	Yes
25	2/25/2023 9:53	Tamika Jones	955325	Yes
26	2/25/2023 9:53	Corrynn Peters	761655	Yes
27	2/25/2023 9:53	Adam Krischer	860581	Yes
28	2/25/2023 9:53	Todd Pilot	222112	Yes
29	2/25/2023 9:53	Joel McClellan	433892	Yes
30	2/25/2023 9:53	Chidi James	372570	Yes
31	2/25/2023 9:53	Mark Dix	621535	Yes
32	2/25/2023 9:53	Susan Pierce	118933	Yes
33	2/25/2023 9:53	Lenard Myers	814450	Yes
34	2/25/2023 9:53	Tom Shaia	29116	Yes
35	2/25/2023 9:53	Derek Davis	421154	Yes
36	2/25/2023 9:53	Sam Towell	684491	Yes
37	2/25/2023 9:53	George Eliades	910071	Yes
38	2/25/2023 9:53	Brad Fleming	228543	Yes
39	2/25/2023 9:53	Naveed Kalantar	298562	Yes
40	2/25/2023 9:53	Allen Bareford	241823	Yes
41	2/25/2023 9:53	Brian Drummond	245414	Yes
42	2/25/2023 9:53	Susheela Varky	159472	Yes
43	2/25/2023 9:54	David P. Weber	996770	Yes
44	2/25/2023 9:53	EUGENE BUTLER	939393	Yes
45	2/25/2023 9:53	Susie Baker	32859	Yes
46	2/25/2023 9:54	Lonnie Nunley	893841	Yes
47	2/25/2023 9:53	Benjamin Mason	617045	Yes
48	2/25/2023 9:54	Stephanie Grana	24911	Yes
49	2/25/2023 9:53	Craig Ellis YLC	944654	Yes
50	2/25/2023 9:53	Sandra Havrilak	236715	Yes
51	2/25/2023 9:53	Nick Gehrig	802971	Yes
52	2/25/2023 9:54	Sebastian Norton	11606	Yes
53	2/25/2023 9:53	Jennifer Golden	692358	Yes
54	2/25/2023 9:53	Kevin W Holt	205036	Yes
55	2/25/2023 9:53	Bretta Lewis	930775	Yes
56	2/25/2023 9:53	Lisa Wilson	766788	Yes
57	2/25/2023 9:53	Veronica Meade	104849	Yes
58	2/25/2023 9:53	Molly Newton	469441	Yes
59	2/25/2023 9:53	Henry I. Willett III	273049	Yes
60	2/25/2023 9:54	Ryan Ferguson	38867	Yes
61	2/25/2023 9:53	Bruce Russell	717797	Yes

Response #	Started At (CST)	Screen Name	Public ID	**E: Do you approve the proposed LEO 1893: Representing Child with Parent as "Next Friend"?**
1	2/25/2023 9:58	e m wright jr	212938	Yes
2	2/25/2023 9:58	Ann Marie Park	714069	Yes
3	2/25/2023 9:58	Kyung Dickerson	371439	Yes
4	2/25/2023 9:58	James W. Hundley	322877	Yes
5	2/25/2023 9:58	Patricia Smith	551990	Yes
6	2/25/2023 9:58	Daniel P. Frankl	176603	Yes
7	2/25/2023 9:58	David Sher	861134	Yes
8	2/25/2023 9:58	Michael York	111233	Yes
9	2/25/2023 9:58	Gary V Davis	496895	Yes
10	2/25/2023 9:58	Susan Pesner	414709	Yes
11	2/25/2023 9:58	Susan Tarley	312285	Yes
12	2/25/2023 9:58	Peter McDermott	806722	Yes
13	2/25/2023 9:58	Courtney Frazier (DC)	879427	Yes
14	2/25/2023 9:58	Nicole Upshur	778172	Yes
15	2/25/2023 9:58	Carole capsalis	717866	Yes
16	2/25/2023 9:58	Robert B Walker	1015697	Yes
17	2/25/2023 9:58	Luis Perez	987392	Yes
18	2/25/2023 9:58	DJ Hansen	301522	Yes
19	2/25/2023 9:58	William Wilson	641442	Yes
20	2/25/2023 9:58	Penn Bain	211938	Yes
21	2/25/2023 9:58	W. Grant Back	440765	Yes
22	2/25/2023 9:58	Anna Bristle	228589	Yes
23	2/25/2023 9:58	Tamika Jones	955325	Yes
24	2/25/2023 9:58	Corrynn Peters	761655	Yes
25	2/25/2023 9:58	Adam Krischer	860581	Yes
26	2/25/2023 9:58	Todd Pilot	222112	Yes
27	2/25/2023 9:58	Joel McClellan	433892	Yes
28	2/25/2023 9:58	Chidi James	372570	Yes
29	2/25/2023 9:58	Mark Dix	621535	Yes
30	2/25/2023 9:58	Susan Pierce	118933	Yes
31	2/25/2023 9:58	Lenard Myers	814450	No
32	2/25/2023 9:58	Tom Shaia	29116	Yes
33	2/25/2023 9:58	Derek Davis	421154	Yes
34	2/25/2023 9:58	Sam Towell	684491	Yes
35	2/25/2023 9:58	George Eliades	910071	Yes
36	2/25/2023 9:58	Brad Fleming	228543	Yes
37	2/25/2023 9:58	Naveed Kalantar	298562	Yes
38	2/25/2023 9:58	Allen Bareford	241823	Yes
39	2/25/2023 9:58	Brian Drummond	245414	Yes
40	2/25/2023 9:58	Susheela Varky	159472	Yes
41	2/25/2023 9:58	David P. Weber	996770	Yes
42	2/25/2023 9:58	EUGENE BUTLER	939393	Yes
43	2/25/2023 9:58	Lonnie Nunley	893841	Yes
44	2/25/2023 9:58	Benjamin Mason	617045	Yes
45	2/25/2023 9:58	Stephanie Grana	24911	Yes
46	2/25/2023 9:58	Craig Ellis YLC	944654	Yes
47	2/25/2023 9:58	Sandra Havrilak	236715	Yes
48	2/25/2023 9:58	Nick Gehrig	802971	Yes
49	2/25/2023 9:58	Sebastian Norton	11606	Yes
50	2/25/2023 9:58	Jennifer Golden	692358	Yes
51	2/25/2023 9:58	Kevin W Holt	205036	Yes
52	2/25/2023 9:58	Bretta Lewis	930775	Yes
53	2/25/2023 9:58	Lisa Wilson	766788	Yes
54	2/25/2023 9:58	Veronica Meade	104849	Yes
55	2/25/2023 9:58	Molly Newton	469441	Yes
56	2/25/2023 9:58	Henry I. Willett III	273049	Yes
57	2/25/2023 9:58	Ryan Ferguson	38867	No
58	2/25/2023 9:58	Susan Butler	883334	Yes
59	2/25/2023 9:58	Bruce Russell	826232	Yes

Response #	Started At (CST)	Screen Name	Public ID	**F: Do you approve the Recommendations of the 2023-2024 Disciplinary Board Chair and Vice-Chair?**
1	2/25/2023 10:00	e m wright jr	212938	Yes
2	2/25/2023 10:00	Ann Marie Park	714069	Yes
3	2/25/2023 10:00	Richard Howard-Smith	715799	Yes
4	2/25/2023 10:00	Kyung Dickerson	371439	Yes
5	2/25/2023 10:00	James W. Hundley	322877	Yes
6	2/25/2023 10:00	Patricia Smith	551990	Yes
7	2/25/2023 10:00	Daniel P. Frankl	176603	Yes
8	2/25/2023 10:00	David Sher	861134	Yes
9	2/25/2023 10:00	Michael York	111233	Yes
10	2/25/2023 10:00	Gary V Davis	496895	Yes
11	2/25/2023 10:00	Susan Pesner	414709	Yes
12	2/25/2023 10:00	Susan Tarley	312285	Yes
13	2/25/2023 10:00	Peter McDermott	806722	Yes
14	2/25/2023 10:00	Courtney Frazier (DC)	879427	Yes
15	2/25/2023 10:00	Nicole Upshur	778172	Yes
16	2/25/2023 10:00	Carole capsalis	717866	Yes
17	2/25/2023 10:00	Robert B Walker	1015697	Yes
18	2/25/2023 10:00	Luis Perez	987392	Yes
19	2/25/2023 10:00	DJ Hansen	301522	Yes
20	2/25/2023 10:01	William Wilson	641442	Yes
21	2/25/2023 10:00	Penn Bain	211938	Yes
22	2/25/2023 10:00	W. Grant Back	440765	Yes
23	2/25/2023 10:00	Anna Bristle	228589	Yes
24	2/25/2023 10:00	Tamika Jones	955325	Yes
25	2/25/2023 10:00	Corrynn Peters	761655	Yes
26	2/25/2023 10:00	Adam Krischer	860581	Yes
27	2/25/2023 10:01	Todd Pilot	222112	Yes
28	2/25/2023 10:00	Joel McClellan	433892	Yes
29	2/25/2023 10:00	Chidi James	372570	Yes
30	2/25/2023 10:00	Mark Dix	621535	Yes
31	2/25/2023 10:00	Susan Pierce	118933	Yes
32	2/25/2023 10:00	Lenard Myers	814450	Yes
33	2/25/2023 10:00	Tom Shaia	29116	Yes
34	2/25/2023 10:01	Derek Davis	421154	Yes
35	2/25/2023 10:00	Sam Towell	684491	Yes
36	2/25/2023 10:00	George Eliades	910071	Yes
37	2/25/2023 10:00	Brad Fleming	228543	Yes
38	2/25/2023 10:01	Naveed Kalantar	298562	Yes
39	2/25/2023 10:00	Allen Bareford	241823	Yes
40	2/25/2023 10:00	Brian Drummond	245414	Yes
41	2/25/2023 10:00	Susheela Varky	159472	Yes
42	2/25/2023 10:00	David P. Weber	996770	Yes
43	2/25/2023 10:00	EUGENE BUTLER	939393	Yes
44	2/25/2023 10:00	Susie Baker	32859	Yes
45	2/25/2023 10:00	Benjamin Mason	617045	Yes
46	2/25/2023 10:00	Stephanie Grana	24911	Yes
47	2/25/2023 10:00	Craig Ellis YLC	944654	Yes
48	2/25/2023 10:01	Sandra Havrilak	236715	Yes
49	2/25/2023 10:00	Nick Gehrig	802971	Yes
50	2/25/2023 10:00	Sebastian Norton	11606	Yes
51	2/25/2023 10:00	Jennifer Golden	692358	Yes
52	2/25/2023 10:00	Kevin W Holt	205036	Yes
53	2/25/2023 10:00	Bretta Lewis	930775	Yes
54	2/25/2023 10:00	Lisa Wilson	766788	Yes
55	2/25/2023 10:00	Veronica Meade	104849	Yes
56	2/25/2023 10:00	Molly Newton	469441	Yes
57	2/25/2023 10:00	Henry I. Willett III	273049	Yes
58	2/25/2023 10:00	Ryan Ferguson	38867	Yes
59	2/25/2023 10:00	Susan Butler	883334	Yes
60	2/25/2023 10:00	Bruce Russell	225656	Yes