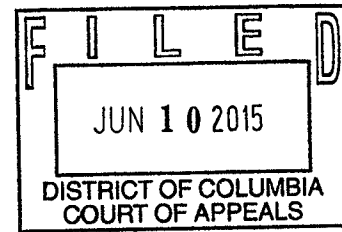


District of Columbia
Court of Appeals

No. M-245-14



NOTICE
(FILED – June 10, 2015)

This court is considering whether to adopt a proposal transmitted by the Board of Governors of the District of Columbia Bar to amend Rule XI of the District of Columbia Rules Governing the Bar, by changing the title of Bar Counsel to “Disciplinary Counsel;” and to make conforming changes to other rules. The full text of the proposed amendments is available on this court’s website at www.dcappeals.gov. Additional information about the proposal is available on the Bar’s website at <http://www.dcb.org/about-the-bar/reports/upload/Bar-Counsel-Title-Change-Proposal.pdf>. Hard copies may be obtained by calling Ms. Karen Savransky at the District of Columbia Bar, at (202) 737-4700, extension 3286.

This notice is published to afford interested parties an opportunity to submit written comments concerning the above-mentioned proposal. Ten copies of any comments should be addressed to the Clerk, D.C. Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001 by August 10, 2015. All comments submitted pursuant to this notice will be available to the public.

Rules Governing the District of Columbia Bar

Proposed Revisions to Section 7 of Rule II

[Unmarked text is the current D.C. rule; proposed additions: **bold and double underscoring**; proposed deletions: strike-through, as in ~~deleted~~.]

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Rule II. Membership

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Section 7. Voluntary Resignation of Membership

Whenever a member of the District of Columbia Bar who is in good standing and not under investigation as provided in Rule XI §7, files with the Secretary of the Bar and with ~~Bar Counsel~~ **Disciplinary Counsel** written notice of such member's election to discontinue the practice of law in the District of Columbia, and to terminate his membership in the Bar, such person shall, upon written notice of the acceptance of such resignation from the Secretary after consultation with ~~Bar Counsel~~ **Disciplinary Counsel**, cease to be a member of the District of Columbia Bar, and his name shall be removed from the membership register.

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Rule XI. Disciplinary Proceedings

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Section 3. Disciplinary sanctions.

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(c) Temporary suspension or probation.

(1) On petition of the Board authorized by its Chairperson or Vice Chairperson, supported by an affidavit showing that an attorney appears to pose a substantial threat of serious harm to the public or has failed to respond to an order of the Board in a matter where ~~Bar Counsel~~ **Disciplinary Counsel**'s investigation involves allegations of serious misconduct, the Court may issue an order, with such notice as the Court may prescribe, temporarily suspending the attorney or imposing temporary conditions of probation on the attorney, or both. "Serious misconduct" for this purpose means fraud, dishonesty, misappropriation, commingling, overdraft of trust accounts, criminal conduct other than criminal contempt, or instances of neglect that establish a pattern of misconduct in the pending investigation.

* * *

(d) Dissolution or amendment of orders of temporary suspension or probation.

An attorney temporarily suspended or placed on probation for failure to file a response to a Board order pursuant to subsection (c) of this section shall be reinstated and the temporary suspension or probation dissolved when (1) ~~Bar Counsel~~ **Disciplinary Counsel** notifies the Court that the attorney has responded to the Board's order or (2) the Court determines that an adequate response has been filed by the attorney.

An attorney temporarily suspended or placed on probation on the ground that the attorney appears to pose a substantial threat of serious harm to the public may, for good cause, request dissolution or amendment of the temporary order by petition filed with the Court, which shall also be served on the Board and on ~~Bar Counsel~~ **Disciplinary Counsel**. A petition for dissolution shall be set for immediate hearing before the Board or a panel of at least three of its members designated by its Chairperson or, in the Chairperson's absence, by the Vice Chairperson. The Board or its designated panel shall hear the petition forthwith and submit its report and recommendation to the Court with the utmost speed consistent with fairness. Upon receipt of the report, the Court shall consider the petition promptly, with or without a hearing as the Court may elect, and shall enter an appropriate order.

Section 4. The Board on Professional Responsibility

* * *

- (e) *Powers and duties of the Board.* The Board shall have the power and duty:
- (1) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effect the purposes of this rule.
 - (2) To appoint ~~Bar Counsel~~Disciplinary Counsel, Special ~~Bar Counsel~~Disciplinary Counsel, and such assistant ~~Bar Counsel~~Disciplinary Counsel and staff as may be required to perform the duties and functions of that office (see section 6), and to fix their compensation. ~~Bar Counsel~~Disciplinary Counsel shall serve at the pleasure of the Board, subject to the Court's oversight authority over all disciplinary matters. Any Special ~~Bar Counsel~~Disciplinary Counsel and all assistant ~~Bar Counsel~~Disciplinary Counsel shall serve at the pleasure of the Board. As used hereafter in this rule, the term "~~Bar Counsel~~Disciplinary Counsel" shall refer collectively to ~~Bar Counsel~~Disciplinary Counsel, any Special ~~Bar Counsel~~Disciplinary Counsel, and all assistant ~~Bar Counsel~~Disciplinary Counsel unless the context requires otherwise.
 - (3) To appoint an Executive Attorney, who shall serve at the pleasure of the Board, and such staff as may be required to perform the duties and functions of that office (see section 7), and to fix their compensation.
 - (4) To appoint two or more Hearing Committees, each consisting of two members of the Bar and one person who is not a lawyer, and such alternate Hearing Committee members as may be required, who shall conduct hearings under this rule and such other hearings as the Court or the Board may direct, and shall submit their findings and recommendations, together with the record, to the Board or, if required under this rule, to the Court.
 - (5) To assign, through the Executive Attorney, periodically and on a rotating basis, an attorney member of a Hearing Committee as a Contact Member to review and approve or suggest modifications of recommendations by ~~Bar Counsel~~Disciplinary Counsel for dismissals, informal admonitions, and the institution of formal charges.
 - (6) To assign, through the Executive Attorney, formal charges and a petition for negotiated disposition to a Hearing Committee, and to refer a petition for reinstatement to ~~Bar Counsel~~Disciplinary Counsel to determine whether ~~Bar Counsel~~Disciplinary Counsel opposes reinstatement and, if so, to assign, through the Executive Attorney, the petition for reinstatement to a Hearing Committee.
 - (7) To review the findings and recommendations of Hearing Committees submitted to the Board, and to prepare and forward its own findings and recommendations, together with the record of proceedings before the Hearing Committee and the Board, to the Court.
 - (8) To reprimand attorneys subject to the disciplinary jurisdiction of the Court and the Board.
 - (9) To prepare the Board's proposed budget for submission to the Board of Governors.
 - (10) To adopt rules, procedures, and policies not inconsistent with this rule or any other rules of this Court

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Section 5. Hearing Committees

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(d) *Duties of Contact Members.* A Contact Member designated under section 4(e)(5) of this rule shall have the power and duty to review and approve or suggest modifications of recommendations by ~~Bar Counsel~~Disciplinary Counsel for dismissals, informal admonitions, the institution of formal charges, and the deferral or abatement of disciplinary investigations pending the outcome of related criminal or civil litigation. In the event of a disagreement between ~~Bar Counsel~~Disciplinary Counsel and the Contact Member regarding the disposition recommended by ~~Bar Counsel~~Disciplinary Counsel, the matter shall be referred by the Executive Attorney to the Chairperson of a Hearing Committee other than that of the Contact Member for decision. The decision of the Hearing Committee Chairperson to whom the matter is referred shall be final.

(e) *Recusal of Contact Members.* No Hearing Committee member shall take part in any formal disciplinary proceeding regarding a matter which that member reviewed as a Contact Member.

Section 6. ~~Bar Counsel~~Disciplinary Counsel

(a) *Powers and duties.* ~~Bar Counsel~~Disciplinary Counsel shall have the power and duty:

(1) To employ and supervise such staff as may be necessary for the performance of ~~Bar Counsel~~Disciplinary Counsel's duties, subject to budget limitations established by the Board.

(2) To investigate all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of this Court which may come to the attention of ~~Bar Counsel~~Disciplinary Counsel or the Board from any source whatsoever, where the apparent facts, if true, may warrant discipline. Except in matters requiring dismissal because the complaint is clearly unfounded on its face or falls outside the disciplinary jurisdiction of the Court, no disposition shall be recommended or undertaken by ~~Bar Counsel~~Disciplinary Counsel until the accused attorney shall have been afforded an opportunity to respond to the allegations.

* * *

(4) To prosecute all disciplinary proceedings before Hearing Committees, the Board, and the Court. When appearing before the Court, ~~Bar Counsel~~Disciplinary Counsel may, after notice to the Board, argue for a disposition other than that contained in the report and recommendation of the Board.

* * *

(8) To submit to the Court at regular intervals, at least twice a year, a list of cases resulting in informal admonitions by ~~Bar Counsel~~Disciplinary Counsel or reprimands by the Board.

(b) *Prohibition of private practice.* ~~Bar Counsel~~Disciplinary Counsel shall not engage in the private practice of law, except that the Board may authorize a reasonable period of transition after appointment.

Section 7. The Executive Attorney

(a) *Powers and duties.* The Executive Attorney shall have the power and duty:

(1) To employ and supervise such staff as may be necessary for the performance of the Executive Attorney's duties, subject to budget limitations established by the Board.

(2) To assign, periodically and on a rotating basis, an attorney member of a Hearing Committee as a Contact Member to review and approve or suggest modifications of recommendations by ~~Bar Counsel~~Disciplinary Counsel for dismissals, informal admonitions, and the institution of formal charges.

* * *

(8) To act as Special ~~Bar Counsel~~Disciplinary Counsel when appointed by the Board.

(9) To act as legal advisor to the Board.

(10) To represent the Board in any court proceeding when designated by the Board to do so.

(11) To argue before this Court the position of the Board, when designated by the Board to do so, in any case in which ~~Bar Counsel~~Disciplinary Counsel disagrees with a report and recommendation of the Board.

* * *

Section 8. Investigations and Hearings

(a) *Investigations.* All investigations, whether upon complaint or otherwise, shall be conducted by ~~Bar Counsel~~Disciplinary Counsel. An attorney under investigation has an obligation to respond to ~~Bar Counsel~~Disciplinary Counsel's written inquiries in the conduct of an investigation, subject to constitutional limitations. In the event of an attorney's failure to respond to such an inquiry, ~~Bar Counsel~~Disciplinary Counsel may request the Board to enter an appropriate order.

(b) *Disposition of investigations.* Upon the conclusion of an investigation, ~~Bar Counsel~~Disciplinary Counsel may, with the prior approval of a Contact Member, dismiss the complaint, informally admonish the attorney under investigation, or institute formal charges; or may, with the prior approval of a member of the Board on Professional Responsibility, enter into a diversion agreement. An attorney who receives an informal admonition may request a formal hearing before a Hearing Committee, in which event the admonition shall be vacated and ~~Bar Counsel~~Disciplinary Counsel shall institute formal charges.

(c) *Petitions.* Formal disciplinary proceedings before a Hearing Committee shall be instituted by ~~Bar Counsel~~Disciplinary Counsel by the filing of a petition under oath with the Executive Attorney. A copy of the petition shall be served upon the attorney, and another copy shall be sent to the Clerk of the Court. The petition shall be sufficiently clear and specific to inform the

attorney of the alleged misconduct. Upon receipt of the petition, without waiting for the attorney to file an answer, the Executive Attorney shall schedule a hearing and assign the matter to a Hearing Committee.

(d) *Notice of hearing.* After a hearing has been scheduled, the Executive Attorney shall serve notice of the hearing upon ~~Bar Counsel~~Disciplinary Counsel and the attorney, or the attorney's counsel, stating the date and place of the hearing. The date of the hearing shall be at least fifteen days after the date of service of the notice. Service shall be made in accordance with section 19(e) of this rule. The notice shall also advise the attorney that, at the hearing, the attorney shall have the right to be represented by counsel, to cross-examine witnesses, and to present evidence in defense or mitigation of the charges.

(e) *Attorney's answer.* The attorney shall file an answer to the petition within twenty days after service of the petition unless the time is extended by the Hearing Committee Chairperson. The attorney shall serve a copy of the answer upon ~~Bar Counsel~~Disciplinary Counsel and file the original with the Executive Attorney. If the attorney fails to file an answer within the time provided, the Hearing Committee Chairperson may authorize the filing of an answer at any time before the hearing upon a showing of mistake, inadvertence, surprise, or excusable neglect.

(f) *Failure to answer and default.*

Notwithstanding any action taken pursuant to section 3 (c), if the attorney fails to answer a petition as provided by section 8 (e) of this rule, ~~Bar Counsel~~Disciplinary Counsel may file a motion for default with the Hearing Committee to which the matter has been assigned; the motion must be supported by sworn proof of the charges in the specification and by proof of actual notice of the petition or proper publication as approved by the Court. The Hearing Committee Chairperson may enter an order of default and the petition shall be deemed admitted subject to ex parte proof by ~~Bar Counsel~~Disciplinary Counsel sufficient to prove the allegations, by clear and convincing evidence, based upon documentary evidence, sworn affidavits, and/or testimony. ~~Bar Counsel~~Disciplinary Counsel shall notify the attorney of the entry of a default order.

An order of default is limited to the allegations set forth in ~~Bar Counsel~~Disciplinary Counsel's petition and shall be included in the Hearing Committee's report and recommendation filed with the Board. The Hearing Committee shall issue its report and recommendation based upon the documentary evidence, sworn affidavits, or testimony presented by ~~Bar Counsel~~Disciplinary Counsel, and the report shall set forth proposed findings of fact and conclusions of law.

* * *

Section 8.1. Diversion

(a) *Availability of diversion.* Subject to the limitations herein, diversion may be offered by ~~Bar Counsel~~Disciplinary Counsel to an attorney under investigation for a disciplinary violation.

(b) *Limitations on diversion.*

Diversion shall be available in cases of alleged minor misconduct, but shall not be available where:

- (1) the alleged misconduct resulted in prejudice to a client or another person;
- (2) discipline previously has been imposed or diversion previously has been offered and accepted, unless ~~Bar Counsel~~Disciplinary Counsel finds the presence of exceptional

circumstances justifying a waiver of this limitation;

(3) the alleged misconduct involves fraud, dishonesty, deceit, misappropriation or conversion of client funds or other things of value, or misrepresentation; or

(4) the alleged misconduct constitutes a criminal offense under applicable law, except for the offenses of driving under the influence and operating a motor vehicle while impaired (or a similar conviction in another jurisdiction).

(c) *Procedures for diversion.* At the conclusion of an investigation, ~~Bar Counsel~~Disciplinary Counsel may, in ~~Bar Counsel~~Disciplinary Counsel's sole discretion, offer to an attorney being investigated for misconduct the option of entering a diversion program in lieu of other procedures available to ~~Bar Counsel~~Disciplinary Counsel. The attorney shall be free to accept or reject the offer of diversion. If the attorney accepts diversion, a written diversion agreement shall be entered into by both parties including, *inter alia*, the time of commencement and completion of the diversion program, the content of the program, and the criteria by which successful completion of the program will be measured. The diversion agreement shall state that it is subject to review by a member of the Board, to whom it shall be submitted for review and approval after execution by ~~Bar Counsel~~Disciplinary Counsel and the attorney.

(d) *Content of diversion program.* The diversion program shall be designed to remedy the alleged misconduct of the attorney. It may include participation in formal courses of education sponsored by the Bar, a law school, or another organization; completion of an individualized program of instruction specified in the agreement or supervised by another Bar entity; or any other arrangement agreed to by the parties which is designed to improve the ability of the attorney to practice in accordance with the Rules of Professional Conduct.

(e) *Proceedings after completion or termination of diversion program.* Except as provided in subsection (b)(2) of this section, if the attorney successfully completes a diversion program, ~~Bar Counsel~~Disciplinary Counsel's investigation shall be closed, and the attorney shall have no record of misconduct resulting therefrom. If the attorney does not successfully complete the diversion program, ~~Bar Counsel~~Disciplinary Counsel shall take such other action as is authorized and prescribed under section 8(b).

Section 9. Post-hearing Proceedings

* * *

(c) *Disposition by the Board.* Promptly after the conclusion of oral argument or, if there is no argument, promptly after reviewing the Hearing Committee record, the Board shall either adopt or modify the recommendation of the Hearing Committee, remand the case to the Hearing Committee for further proceedings, direct ~~Bar Counsel~~Disciplinary Counsel to issue an informal admonition, or dismiss the petition.

* * *

(e) *Exceptions to the report.* The attorney or ~~Bar Counsel~~Disciplinary Counsel, or both, may file with the Court exceptions to the report of the Board within twenty days from the date of service of a copy thereof. The Court, for good cause shown, may grant an additional period for filing exceptions, not to exceed twenty days.

(f) *Exceptions when no report is filed.* If the Board issues a reprimand, directs ~~Bar Counsel~~Disciplinary Counsel to issue an informal admonition, or dismisses the petition, the attorney or ~~Bar Counsel~~Disciplinary Counsel, or both, may file with the Court exceptions to the Board's decision within twenty days from the date of service of a copy thereof. The Court, for good cause shown, may grant an additional period for filing exceptions, not to exceed twenty days.

(g) *Suspension pending final action by the Court.*

(1) Upon receipt of a report from the Board recommending discipline in the form of disbarment, suspension requiring proof of fitness as a condition of reinstatement, or suspension of one year or more without a fitness requirement, the Court shall order the attorney to show cause within thirty days why the Court should not enter an order of suspension pending final action on the Board's recommendation. The attorney shall be required to show cause even if the Board recommends as discipline a partial (but not an entire) stay of the suspension in favor of probation. Unless the Court requests, ~~Bar Counsel~~Disciplinary Counsel need not reply to the attorney's response. To prevent suspension under this subsection, the attorney shall have the burden of demonstrating a substantial likelihood of success with respect to the exceptions the attorney has taken to the Board's report.

* * *

(i) *Counsel in disciplinary matters before the Court.* Proceedings before the Board and the Court shall be conducted by ~~Bar Counsel~~Disciplinary Counsel. If ~~Bar Counsel~~Disciplinary Counsel disagrees with the findings or recommendation of the Board, the position of the Board may be presented before the Court, upon request of the Board, by the Executive Attorney or other counsel. The Court in its discretion may appoint an attorney to present the views of a minority of the Board.

* * *

Section 10. Disciplinary Proceedings Based Upon Conviction of Crime

(a) *Notification.* If an attorney is found guilty of a crime or pleads guilty or *nolo contendere* to a criminal charge in a District of Columbia court, the clerk of that court shall, within ten days from the date of such finding or plea, transmit to this Court and to ~~Bar Counsel~~Disciplinary Counsel a certified copy of the court record or docket entry of the finding or plea. ~~Bar Counsel~~Disciplinary Counsel shall forward the certified copy to the Board. Upon learning that the certified copy has not been timely transmitted by the clerk of the court in which the finding or plea was made, or that an attorney has been found guilty of a crime or has pleaded guilty or *nolo contendere* to a criminal charge in a court outside the District of Columbia or in any federal court, ~~Bar Counsel~~Disciplinary Counsel shall promptly obtain a certified copy of the court record or docket entry of the finding or plea and transmit it to this Court and to the Board. The attorney shall also file with this Court and the Board, within ten days from the date of such finding or plea, a certified copy of the court record or docket entry of the finding or plea.

* * *

(d) *Action by the Board—Serious crimes.* Upon receipt of a certified copy of a court record demonstrating that an attorney has been found guilty of a serious crime or has pleaded guilty or *nolo contendere* to a charge of serious crime, or any crime that appears to be a serious crime as defined in subsection (b) of this section, ~~Bar Counsel~~Disciplinary Council shall initiate a formal proceeding in which the sole issue to be determined shall be the nature of the final discipline to be imposed. However, if the Court determines under subsection (c) of this section that the crime is not a serious crime, the proceeding shall go forward on any charges under the Rules of Professional Conduct that ~~Bar Counsel~~Disciplinary Council may institute. A disciplinary proceeding under this subsection may proceed through the Hearing Committee to the Board, and the Board may hold such hearings and receive such briefs and other documents as it deems appropriate, but the proceeding shall not be concluded until all direct appeals from conviction of the crime have been completed.

(e) *Other crimes.* Upon the receipt of a certified copy of a court record demonstrating that an attorney has been found guilty of a crime other than a serious crime, or has pleaded guilty or *nolo contendere* to a charge of crime other than a serious crime, ~~Bar Counsel~~Disciplinary Council shall investigate the matter and proceed as appropriate under section 8 of this rule.

* * *

Section 11. Reciprocal Discipline

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(b) *Notification.* It shall be the duty of ~~Bar Counsel~~Disciplinary Council to obtain copies of all orders of discipline from other disciplining courts. Upon learning that an attorney subject to the disciplinary jurisdiction of this Court has been disciplined by another disciplining court, ~~Bar Counsel~~Disciplinary Council shall obtain a certified copy of the disciplinary order and file it with this Court. In addition, any attorney subject to the disciplinary jurisdiction of this Court, upon being subjected to professional disciplinary action by another disciplining court, shall promptly inform ~~Bar Counsel~~Disciplinary Council of such action in writing.

* * *

(d) *Temporary suspension and show cause order.*
Upon receipt of a certified copy of an order demonstrating that an attorney subject to the disciplinary jurisdiction of this Court has been suspended or disbarred by another disciplining court, the Court shall forthwith enter an order (1) suspending the attorney from the practice of law in the District of Columbia pending final disposition of any reciprocal disciplinary proceeding, and (2) directing the attorney to show cause within thirty days why identical reciprocal discipline should not be imposed. ~~Bar Counsel~~Disciplinary Council shall reply to the attorney's response to the show cause order no later than fifteen days after service of the response. Alternatively, no later than fifteen days after the attorney's response was due, ~~Bar Counsel~~Disciplinary Council may object to the imposition of reciprocal discipline based upon the factors set forth in subsection (c) of this section. In either case, ~~Bar Counsel~~Disciplinary Council shall provide the Court with the relevant portions of the record of the proceeding in the

other disciplining court, the statute and the rules that governed it, and a short statement identifying all of the issues that the matter presents.

If ~~Bar Counsel~~ **Disciplinary Counsel** opposes the imposition of identical discipline, ~~Bar Counsel~~ **Disciplinary Counsel** shall

- (1) recommend appropriate non-identical discipline or
- (2) request that the matter be referred to the Board for its recommendation as to discipline. The attorney may reply within ten days after service of ~~Bar Counsel~~ **Disciplinary Counsel**'s submission.

(e) *Action by the Court.*

Upon receipt of the attorney's response to the show cause order, if any, and of any submission by ~~Bar Counsel~~ **Disciplinary Counsel**, the Court may refer the matter to the Board for its consideration and recommendation. If the Court decides that a referral to the Board is unnecessary, it shall impose identical discipline unless the attorney demonstrates by clear and convincing evidence, or the Court finds on the face of the record, that one or more of the grounds set forth in subsection (c) of this section exists.

If the Court determines that identical discipline should not be imposed, it may impose such discipline as it deems appropriate. In deciding what non-identical discipline to impose, the Court shall accept the facts found by the disciplining court unless it has made a finding under (1), (2), or (5) of subsection (c) of this section. If the Court has made a finding under one of these subsections, it shall direct ~~Bar Counsel~~ **Disciplinary Counsel** to institute such proceedings as may be appropriate, including an original disciplinary proceeding. In the absence of such a finding, the Court shall impose final discipline.

* * *

Section 12. Disbarment by Consent

(a) *Required affidavit.* An attorney who is the subject of an investigation or a pending proceeding based on allegations of misconduct may consent to disbarment, but only by delivering to ~~Bar Counsel~~ **Disciplinary Counsel** an affidavit declaring the attorney's consent to disbarment and stating:

* * *

(b) *Action by the Board and the Court.* Upon receipt of the required affidavit, ~~Bar Counsel~~ **Disciplinary Counsel** shall file it and any related papers with the Board for its review and approval. Upon such approval, the Board shall promptly file it with the Court. The Court thereafter may enter an order disbaring the attorney on consent.

(c) *Access to records of disbarment by consent.* The order disbaring an attorney on consent shall be a matter of public record. However, the affidavit required under subsection (a) of this section shall not be publicly disclosed or made available for use in any other proceeding except by order of the Court or upon written consent of the attorney.

Section 12.1. Negotiated discipline other than disbarment by consent.

(a) Availability of negotiated discipline.

An attorney who is the subject of an investigation by ~~Bar Counsel~~Disciplinary Counsel, or of a pending petition under section 8 (c) of this rule charging misconduct, may negotiate with ~~Bar Counsel~~Disciplinary Counsel a disposition of the charges and sanction at any time before a Hearing Committee has submitted to the Board a report containing its findings and recommendation with respect to discipline.

(b) Documentation of a negotiated disposition.

(1) A petition for negotiated disposition, signed by ~~Bar Counsel~~Disciplinary Counsel and the attorney, shall contain:

(i) A statement of the nature of the matter that was brought to ~~Bar Counsel~~Disciplinary Counsel's attention;

* * *

(iii) A statement of any promises that have been made by ~~Bar Counsel~~Disciplinary Counsel to the attorney; and

* * *

(2) In further support of a petition for negotiated disposition, the attorney shall submit an affidavit which includes averments that:

(i) The disposition is freely and voluntarily entered into, the attorney is not being subjected to coercion or duress and is fully aware of the implications of the disposition, and ~~Bar Counsel~~Disciplinary Counsel has made no promises to the attorney other than what is contained in the petition for negotiated disposition;

* * *

(c) Hearing Committee review.

A petition for negotiated disposition and accompanying affidavit shall be submitted to the Executive Attorney, who in turn shall assign it to a Hearing Committee for review. The Board may adopt procedures for assignment of petitions for negotiated disposition to Hearing Committees, taking into account such matters as the pendency (and at what stage) of a related section 8 (c) proceeding.

A Hearing Committee receiving a proposed negotiated disposition shall hold a limited hearing. The hearing shall be public and the proceeding a matter of public record. Prior to the hearing, ~~Bar Counsel~~Disciplinary Counsel shall furnish to any complainant the petition for negotiated disposition and affidavit, together with notice of the hearing and of the complainant's opportunity to be present. Also before the hearing, the Hearing Committee or the Chairperson may review ~~Bar Counsel~~Disciplinary Counsel's investigative file in camera or meet with ~~Bar Counsel~~Disciplinary Counsel ex parte to discuss the basis for ~~Bar Counsel~~Disciplinary Counsel's recommendation of a negotiated disposition.

The Hearing Committee conducting the review shall recommend to the Court approval of a petition for negotiated disposition if it finds that:

* * *

(3) The sanction agreed upon is justified. If the Hearing Committee rejects a petition for negotiated disposition, it may not modify the proposed disposition on its own initiative, but instead shall afford ~~Bar Counsel~~Disciplinary Counsel and the attorney an opportunity to revise the petition, and shall review any revised petition they submit.

(d) *Review by the Court of a recommendation.*

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No review by the Board or the Court may be had from a refusal of ~~Bar Counsel~~Disciplinary Counsel to agree to a disposition or from the rejection of a petition for negotiated disposition by a Hearing Committee.

(e) *Limitations on reference to a negotiated disposition or admissions by an attorney.*

Neither a Hearing Committee nor the Board may inquire of ~~Bar Counsel~~Disciplinary Counsel or an attorney who is the subject of a contested disciplinary proceeding whether the parties considered entering into a negotiated disposition, nor may a Hearing Committee or the Board, in imposing discipline following a section 8 (c) proceeding, consider whether the attorney offered or declined to enter into a negotiated disposition. If a section 8 (c) proceeding commences or resumes after a petition for negotiated disposition has been rejected, admissions made by the attorney in the petition or accompanying affidavit, or in the associated hearing, may not be used as evidence against the attorney except for purposes of impeachment.

Section 13. Incompetent and Incapacitated Attorneys

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(b) *Application for medical examination.* If, at any time prior to its final disposition of a disciplinary proceeding, the Board has good cause to believe that the mental or physical condition of the attorney is relevant to the subject matter of the complaint and is a factor which should be considered in the pending proceeding, the Board shall direct ~~Bar Counsel~~Disciplinary Counsel to apply to the Court for an order requiring the attorney to submit to an appropriate examination. The application shall be by petition, with notice to the attorney, and shall be accompanied by a statement from ~~Bar Counsel~~Disciplinary Counsel setting forth in detail the reasons for the application and the relevance of the examination to the pending proceeding.

* * *

Section 14. Disbarred and Suspended Attorneys

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(g) *Required affidavit and registration statement.* Within ten days after the effective date of an order of disbarment or suspension, the disbarred or suspended attorney shall file with the Court and the Board an affidavit:

* * *

(3) Certifying that a copy of the affidavit has been served on ~~Bar Counsel~~Disciplinary Counsel.

The affidavit shall also state the residence or other address of the attorney to which communications may thereafter be directed. The Board may require such additional proof as it deems necessary. In addition, for five years following the effective date of a disbarment or suspension order, a disbarred or suspended attorney shall continue to file a registration statement in accordance with Rule II, stating the residence or other address to which communications may thereafter be directed, so that the attorney may be located if a complaint is made about any conduct of the attorney occurring before the disbarment or suspension. See also section 16(c).

* * *

Section 15. Protection of Clients' Interests When Attorney Becomes Unavailable

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(b) *Initiation of proceeding.* Any person may apply to the Board for action to be taken under this section. The Board may also act on direction from the Court, on notice from ~~Bar Counsel~~Disciplinary Counsel or from any other source, or on its own motion.

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Section 16. Reinstatement

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(d) *Contested petitions for reinstatement.*

(1) A petition for reinstatement by a disbarred attorney or an attorney suspended for misconduct rather than for disability and required to provide proof of rehabilitation shall be filed with the Board. If the attorney is not eligible for reinstatement, or if the Board determines that the petition is insufficient or defective on its face, the Board may dismiss the petition; otherwise it shall refer the petition to ~~Bar Counsel~~Disciplinary Counsel for a determination of whether ~~Bar Counsel~~Disciplinary Counsel opposes the petition. If ~~Bar Counsel~~Disciplinary Counsel

opposes reinstatement, the Executive Attorney shall promptly schedule a hearing before a Hearing Committee at which the attorney seeking reinstatement shall have the burden of proof by clear and convincing evidence. Such proof shall establish:

* * *

(e) *Uncontested petitions for reinstatement.* A petition for reinstatement by a disbarred attorney or a suspended attorney who is required to prove fitness to practice as a condition of reinstatement, which is uncontested by ~~Bar Counsel~~ Disciplinary Counsel following a suitable investigation, may be considered by the Court on the available record and submissions of the parties. In every uncontested matter, ~~Bar Counsel~~ Disciplinary Counsel shall submit to the Court a report stating why ~~Bar Counsel~~ Disciplinary Counsel is satisfied that the attorney meets the criteria for reinstatement. The Court may grant the petition, deny it, or request a recommendation by the Board concerning reinstatement.

* * *

Section 17. Confidentiality

(a) *Disciplinary proceedings.* Except as otherwise provided in this rule or as the Court may otherwise order, all proceedings involving allegations of misconduct by an attorney shall be kept confidential until either a petition has been filed under section 8 (c) or an informal admonition has been issued. All proceedings before the Hearing Committee and the Board shall be open to the public, and the petition, together with any exhibits introduced into evidence, any pleadings filed by the parties, and any transcript of the proceeding, shall be available for public inspection. If an informal admonition is issued, the letter of admonition from ~~Bar Counsel~~ Disciplinary Counsel informing the attorney of the grounds for the admonition shall be available for public inspection. ~~Bar Counsel~~ Disciplinary Counsel's files and records, however, shall not be available for public inspection except to the extent that portions thereof are introduced into evidence in a proceeding before the Hearing Committee.

* * *

(c) *Informal admonitions.* ~~Bar Counsel~~ Disciplinary Counsel may disclose information pertaining to proceedings resulting in informal admonitions to any court, to any other judicial tribunal or disciplinary agency, to any duly authorized law enforcement officer or agency conducting an investigation, to any representative of a public agency considering an attorney for judicial or public employment or appointment, or to any representative of another bar considering the application of an attorney for admission to such bar. ~~Bar Counsel~~ Disciplinary Counsel may also make such disclosure to a duly authorized representative of the District of Columbia Bar with respect to any person whom the Bar is considering for possible employment, appointment to a Bar position related to attorney discipline or legal ethics, or recommendation to this Court for appointment to any board, committee, or other body.

* * *

(e) *Limited disclosure on motion.* The Court on motion, filed *ex parte* and under seal by ~~Bar Counsel~~Disciplinary Counsel, may authorize disclosure of otherwise confidential information to a duly constituted grand jury for use in the performance of its official duties. ~~Bar Counsel~~Disciplinary Counsel's motion shall be filed only in response to grand jury subpoena. For good cause shown, the Court on motion may authorize disclosure of otherwise confidential information through discovery or appropriate processes in any civil, criminal, or administrative action, subject to such protective order as the Court may deem appropriate, or may authorize disclosure of otherwise confidential information to local, state or federal governmental agencies not associated with law enforcement or attorney discipline subject to appropriate protections of confidentiality.

(f) *Cooperation with law enforcement and other disciplinary authorities.* Notwithstanding any other provision of this Rule, ~~Bar Counsel~~Disciplinary Counsel may file a written request with the Board for permission to communicate information about any disciplinary matter to law enforcement agencies, the Committee on Admissions, the Committee on Unauthorized Practice, the Clients' Security Trust Fund, or a state or federal attorney disciplinary agency, board, or committee that has a legitimate interest in such matter. Permission to communicate such information may be granted, in writing, by the Chairperson of the Board or the Chairperson's designated Board member upon good cause shown and subject to any limitations or conditions the Board may impose, including appropriate protections of confidentiality. Communication under this provision may be made either during the course of ~~Bar Counsel~~Disciplinary Counsel's investigation or following such investigation.

Section 18. Subpoenas

(a) *Issuance of subpoenas.* In carrying out this rule, any member of the Board, any member of a Hearing Committee in matters before the Committee, the Executive Attorney, or ~~Bar Counsel~~Disciplinary Counsel in matters under investigation may, subject to Superior Court Civil Rule 45, compel by subpoena the attendance of witnesses and the production of pertinent books, papers, documents, and other tangible objects at the time and place designated in the subpoena. An attorney who is a respondent in a disciplinary proceeding or is under investigation by ~~Bar Counsel~~Disciplinary Counsel may, subject to Superior Court Civil Rule 45, compel by subpoena the attendance of witnesses and the production of pertinent books, papers, documents, and other tangible objects before a Hearing Committee after formal disciplinary proceedings are instituted. Subpoena and witness fees and mileage costs shall be the same as those in the Superior Court.

* * *

(e) *Subpoena pursuant to law of another jurisdiction.* Whenever a subpoena is sought in the District of Columbia pursuant to the law of another jurisdiction for use in lawyer discipline or disability investigations or proceedings in that jurisdiction, and where the application for issuance of the subpoena has been duly approved or authorized under the law of that jurisdiction, ~~Bar Counsel~~Disciplinary Counsel (in a case where the request is by the disciplinary authority of the foreign jurisdiction) or an attorney admitted to practice in this jurisdiction (in a case where the request is by a respondent in a proceeding in the foreign jurisdiction), may issue a subpoena as provided in this Section to compel the attendance of witnesses and production of documents in

the District of Columbia, or elsewhere as agreed by the witnesses, for use in such foreign investigations or proceedings or in defense thereof. Service, enforcement and challenges to such subpoenas shall be as provided in this Section and incorporated rules.

(f) *Request for foreign subpoena in aid of proceeding in this jurisdiction.* In a lawyer discipline or disability investigation or proceeding pending in this jurisdiction, both ~~Bar Counsel~~Disciplinary Counsel and a respondent may apply for the issuance of subpoenas in other jurisdictions, pursuant to the rules of those jurisdictions, where such application is in aid of such investigation or proceeding or in defense thereto, and to the extent that ~~Bar Counsel~~Disciplinary Counsel or the respondent could issue compulsory process or obtain formal prehearing discovery under the provisions of this Rule or the rules issued by the Board on Professional Responsibility.

Section 19. Miscellaneous Matters

(a) *Immunity.* Complaints submitted to the Board or ~~Bar Counsel~~Disciplinary Counsel shall be absolutely privileged, and no claim or action predicated thereon may be instituted or maintained. Members of the Board, its employees, members of Hearing Committees, ~~Bar Counsel~~Disciplinary Counsel, and all assistants and employees of ~~Bar Counsel~~Disciplinary Counsel, all persons engaged in counseling, evaluating or monitoring other attorneys pursuant to a Board or Court order or a diversion agreement, and all assistants or employees of persons engaged in such counseling, evaluating or monitoring shall be immune from disciplinary complaint under this rule and from civil suit for any conduct in the course of their official duties.

(b) *Complaints against members of the disciplinary system.* Disciplinary complaints against members of the Board involving activities other than those performed within the scope of their duties as Board members shall be submitted directly to the Court. Disciplinary complaints against Hearing Committee members, the Executive Attorney, or ~~Bar Counsel~~Disciplinary Counsel involving activities other than those performed within the scope of their duties as such shall be submitted directly to the Board.

* * *

(e) *Service.* Service upon the attorney of a petition instituting formal disciplinary proceedings shall be made by personal service by any person authorized by the Chairperson of the Board, or by registered or certified mail, return receipt requested, to the address shown in the most recent registration statement filed by the attorney pursuant to Rule II, or other last known address. Service by registered or certified mail shall not be effective unless ~~Bar Counsel~~Disciplinary Counsel files in the record of the proceeding proof of receipt of the petition by the attorney. Service of any other paper or notice required by this rule shall, unless otherwise provided in this rule, be made in accordance with Superior Court Civil Rule 5.

* * *

(g) *Expenses.* The salaries of ~~Bar Counsel~~Disciplinary Counsel and the Executive Attorney, their expenses, the expenses of the members of the Board and Hearing Committees, and other expenses incurred in the implementation or administration of this rule shall be paid out of the funds of the Bar.

Section 20. Approved Depositories for Lawyers' Trust Accounts and District of Columbia Interest on Lawyers' Trust Accounts Program

(a) To be listed as an approved depository for lawyers' trust accounts, a financial institution shall file an undertaking with the Board on Professional Responsibility (BPR), on a form to be provided by the board's office, agreeing (1) promptly to report to the Office of ~~Bar Counsel~~ **Disciplinary Counsel** each instance in which an instrument that would properly be payable if sufficient funds were available has been presented against a lawyer's or law firm's specially designated account at such institution at a time when such account contained insufficient funds to pay such instrument, whether or not the instrument was honored and irrespective of any overdraft privileges that may attach to such account; and (2) for financial institutions that elect to offer and maintain District of Columbia IOLTA (DC IOLTA) accounts, to fulfill the requirements of subsections (f) and (g) below. In addition to undertaking to make the above-specified reports and, for financial institutions that elect to offer and maintain DC IOLTA accounts, to fulfill the requirements of subsections (f) and (g) below, approved depositories, wherever they are located, shall also undertake to respond promptly and fully to subpoenas from the Office of ~~Bar Counsel~~ **Disciplinary Counsel** that seek a lawyer's or law firm's specially designated account records, notwithstanding any objections that might be raised based upon the territorial limits on the effectiveness of such subpoenas or upon the jurisdiction of the District of Columbia Court of Appeals to enforce them. Such undertakings shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of ~~Bar Counsel~~ **Disciplinary Counsel**. The failure of an approved depository to comply with any of its undertakings hereunder shall be grounds for immediate removal of such institution from the list of BPR- approved depositories.

(b) Reports to ~~Bar Counsel~~ **Disciplinary Counsel** by approved depositories pursuant to paragraph (a) above shall contain the following information:

(1) In the case of a dishonored instrument, the report shall be identical to the over-draft notice customarily forwarded to the institution's other regular account holders.

(2) In the case of an instrument that was presented against insufficient funds but was honored, the report shall identify the depository, the lawyer or law firm maintaining the account, the account number, the date of presentation for payment and the payment date of the instrument, as well as the amount of overdraft created thereby.

The report to the Office of ~~Bar Counsel~~ **Disciplinary Counsel** shall be made simultaneously with, and within the time period, if any, provided by law for notice of dishonor. If an instrument presented against insufficient funds was honored, the institution's report shall be mailed to ~~Bar Counsel~~ **Disciplinary Counsel** within five (5) business days of payment of the instrument.

(c) The establishment of a specially designated account at an approved depository shall be conclusively deemed to be consent by the lawyer or law firm maintaining such account to that institution's furnishing to the Office of ~~Bar Counsel~~ **Disciplinary Counsel** all reports and information required hereunder. No approved depository shall incur any liability by virtue of its compliance with the requirements of this rule, except as might otherwise arise from bad faith, intentional misconduct, or any other acts by the approved depository or its employees which, unrelated to this rule, would create liability.

(d) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia

Court of Appeals, the District of Columbia Bar, the District of Columbia Board on Professional Responsibility, the Office of ~~Bar Counsel~~**Disciplinary Counsel**, or the District of Columbia Bar Foundation as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule means only that the institution has undertaken to meet the reporting and other requirements enumerated in paragraph (a) and (b) above.

APPENDIX A

District of Columbia Rules of Professional Conduct

Proposed Revisions to Certain Rules and Related Comments

[Unmarked text is the current D.C. rule; proposed additions: **bold and double underlining**;
proposed deletions: strike-through, as in ~~deleted~~.]

* * *

Rule 1.6--Confidentiality of Information

* * *

Comment

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Bar Sponsored Counseling Programs

[31] Paragraph (i) adds a provision dealing specifically with the disclosure obligations of lawyers who are assisting in the counseling programs of the D.C. Bar's Lawyer Counseling Committee. Members of that committee, and lawyer-intervenors who assist the committee in counseling, may obtain information from lawyer-counsees who have sought assistance from the counseling programs offered by the committee. It is in the interest of the public to encourage lawyers who have alcohol or other substance abuse problems to seek counseling as a first step toward rehabilitation. Some lawyers who seek such assistance may have violated provisions of the Rules of Professional Conduct, or other provisions of law, including criminal statutes such as those dealing with embezzlement. In order for those who are providing counseling services to evaluate properly the lawyer-counselee's problems and enhance the prospects for rehabilitation, it is necessary for the counselors to receive completely candid information from the lawyer-counselee. Such candor is not likely if the counselor, for example, would be compelled by Rule 8.3 to report the lawyer-counselee's conduct to ~~Bar Counsel~~ **Disciplinary Counsel**, or if the lawyer-counselee feared that the counselor could be compelled by prosecutors or others to disclose information.

* * *

Rule 1.11--Successive Government and Private or Other Employment

* * *

(e) If a client requests in writing that the fact and subject matter of a representation subject to paragraph (d) not be disclosed by submitting the signed statements referred to in paragraph (d), such statements shall be prepared concurrently with undertaking the representation and filed with

~~Bar Counsel~~ **Disciplinary Counsel** under seal. If at any time thereafter the fact and subject matter of the representation are disclosed to the public or become a part of the public record, the signed statements previously prepared shall be promptly submitted as required by paragraph (d).

* * *

Rule 1.12--Third-Party Neutrals

* * *

(d) If a client requests in writing that the fact and subject matter of a representation subject to paragraph (a) not be disclosed by submitting the signed statements referred to in paragraph (c), such statements shall be prepared concurrently with undertaking the representation and filed with ~~Bar Counsel~~ **Disciplinary Counsel** under seal. If at any time thereafter the fact and subject matter of the representation are disclosed to the public or become a part of the public record, the signed statements previously prepared shall be promptly submitted as required by paragraph (c).

* * *

Comment

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[5] With respect to statements filed with ~~Bar Counsel~~ **Disciplinary Counsel** pursuant to paragraph (d), see Comments [8] and [9] to Rule 1.11.

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Rule 3.4--Fairness to Opposing Party and Counsel

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Comment

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[5] Because of the duty of confidentiality under Rule 1.6, the lawyer is generally forbidden to volunteer information about physical evidence received from a client without the client's informed consent. In some cases, the ~~Office of Bar Counsel~~ **Office of Disciplinary Counsel** will accept physical evidence from a lawyer and then turn it over to the appropriate persons; in those cases this procedure is usually the best means of delivering evidence to the proper authorities

without disclosing the client's confidences. However, ~~Bar Counsel~~ Disciplinary Counsel may refuse to accept evidence; thus lawyers should keep the following in mind before accepting evidence from a client, and should discuss with ~~Bar Counsel's~~ Disciplinary Counsel's office the procedures that may be employed in particular circumstances.

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Rule 8.3--Reporting Professional Misconduct

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Comment

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[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the ~~Office of Bar Counsel~~ Office of Disciplinary Counsel. A lawyer who believes that another lawyer has a significant problem of alcohol or other substance abuse which does not require reporting to ~~Bar Counsel~~ Disciplinary Counsel under this rule, may nonetheless wish to report the perceived situation to the Lawyer Counseling Committee, operated by the D.C. Bar, which assists lawyers having such problems.

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Rule 8.4--Misconduct

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Comment

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[2] Paragraph (d)'s prohibition of conduct that "seriously interferes with the administration of justice" includes conduct proscribed by the previous Code of Professional Responsibility under DR 1-102(A)(5) as "prejudicial to the administration of justice." The cases under paragraph (d) include acts by a lawyer such as: failure to cooperate with ~~Bar Counsel~~ Disciplinary Counsel; failure to respond to ~~Bar Counsel's~~ Disciplinary Counsel's inquiries or subpoenas; failure to abide by agreements made with ~~Bar Counsel~~ Disciplinary Counsel; failure to appear in court for

a scheduled hearing; failure to obey court orders; failure to turn over the assets of a conservatorship to the court or to the successor conservator; failure to keep the Bar advised of respondent's changes of address, after being warned to do so; and tendering a check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client. Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples.

* * *

Rule 9.1--Nondiscrimination

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Comment

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[3] If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by ~~Bar Counsel~~ **Disciplinary Counsel** may be deferred or abated where there is substantial similarity between the complaint filed with ~~Bar Counsel~~ **Disciplinary Counsel** and material allegations involved in such other proceedings. *See* §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.

RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS
Proposed Revision to the Commentary of Rule 49(e)

[Unmarked text is the current D.C. rule; proposed additions: **bold and double underscoring**;
proposed deletions: strike-through, as in ~~deleted~~.]

* * *

Rule 49. Unauthorized Practice of Law.

* * *

Commentary to § 49 (e):

Section (e) is new. It clarifies the procedures and effect of proceedings commenced by the Committee, and sets forth expressly the relief available in the Court of Appeals in formal proceedings initiated by the Committee, and the method for appealing a decision of the designated hearing judge.

The powers and procedures provided in sections (d) and (e) are not the exclusive means for enforcing the provisions of this Rule. ~~Bar Counsel~~ **Disciplinary Counsel** may initiate an original proceeding before the Court of Appeals for contempt where it alleges that the respondent has violated Rule 49 by practicing law while disbarred; *In re Burton*, 614 A.2d 46 (D.C. 1992); and it may rely on unauthorized law practice in opposing reinstatement of an attorney suspended from the Bar; *Matter of Stanton*, 532 A.2d 95 (D.C. 1987). The courts of the District of Columbia have subject matter jurisdiction to consider original complaints of unauthorized practice of law initiated by private parties, and to issue relief if such practice is found. *J.H. Marshall & Assoc., Inc. v. Burlison*, 313 A.2d 587 (D.C. 1973).

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