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Procedures for Disciplining Attorneys in Virginia

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NOTES AND COMMENTS

PROCEDURES FOR DISCIPLINING ATTORNEYS IN VIRGINIA

The bar enjoys the privilege of self-discipline, but along with this privilege there is a commensurate responsibility to protect the public from attorneys who are unworthy to practice.¹ There are those who feel that the profession is not adequately discharging this responsibility.² The American Bar Association Special Committee on Evaluation of Disciplinary Enforcement found disciplinary procedures antiquated, ineffectual, and, in some instances, nonexistent and concluded "that the present enforcement structure is failing to rid the profession of a substantial number of malefactors."³ Some of the general criticisms made by the ABA Special Committee apply to the present disciplinary system in Virginia, but a proposed amendment to the Rules of Court, if adopted, will make significant improvements.

THE PRESENT DISCIPLINARY SYSTEM

The Bar Procedures

In Virginia, the existing disciplinary system is divided into two parts: proceedings before the bar and proceedings before the court.⁴ The supreme court has the authority to discipline attorneys practicing in the state⁵ and to delegate this function to the bar by means of the Rules of Court.⁶ Rule 13 of the Rules for the Integration of the Virginia State Bar⁷

¹Powell, *The State of the Legal Profession*, 90 A.B.A. REP. 391, 399 (1965).

²See, e.g., Clark, *Disciplinary Procedures for the Bar*, 39 PA. B. ASS'N Q. 484 (1968).

³AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 2-3 (Final Draft, June, 1970) [hereinafter cited as ABA SPECIAL COMM.].

⁴A short summary of the mechanics of the existing procedures in Virginia may be found in G. BRAND, *BAR ASSOCIATIONS, ATTORNEYS AND JUDGES* 1018 (1956); *Id.* at 225 (Supp. 1959). Most disciplinary actions which come before the courts are the result of a verified complaint filed by the bar after an independent investigation, but bringing such complaints is not the bar's exclusive prerogative. A private citizen may make a complaint to a court and begin disbarment proceedings. See VA. CODE ANN. § 54-74(1) (Repl. Vol. 1972); *Defoe v. Friedlander*, 211 Va. 121, 176 S.E.2d 448 (1970).

⁵VA. CODE ANN. § 54-48(c) (Repl. Vol. 1972). See also text accompanying note 37 *infra*.

⁶VA. CODE ANN. § 54-49 (Repl. Vol. 1972).

⁷VA. SUP. CT. RULES pt. VI, art. IV, R. 13 (As published in 205 Va. 1011, 1040-42 (1964) and amended in 210 Va. 411 (1969)) [hereinafter cited as RULE 13].

provides that there shall be a committee of seven to fourteen members, selected by the Council of the State Bar in each congressional district and that these committees shall have the duty to hear and investigate complaints of misconduct made against any attorney within that district.⁸

Under this procedure, when a complainant reports a grievance to a member of one of the committees, he is interviewed and required to sign a complaint.⁹ This complaint, which serves as the basis for the proceedings, is presented to the chairman of the committee who assigns a committee-member to investigate the matter.¹⁰ Based on the results of this investigation, the full committee decides if the complaint should be dismissed or if it merits a formal hearing.¹¹ If a hearing is determined to be necessary, a copy of the written complaint is given to the attorney in question.¹² A hearing before the district committee is an adversary proceeding where the complaint is prosecuted by a member of the committee,¹³ who bears the burden of proving the misconduct.¹⁴ The committee has the power, supported by the contempt power of the courts, to subpoena witnesses and evidence for the hearing.¹⁵ The accused attorney has the right to have subpoenas issued for witnesses and evidence on his behalf and the right to be represented by counsel in these proceedings.¹⁶

The decentralized district committee system described above is typical of American disciplinary systems¹⁷ and is one of the chief targets for critics of existing procedures. Disciplinary agencies which rely on complaints alone and have no self-initiated investigations cannot uncover some of the most serious forms of professional misconduct.¹⁸ This is because many laymen fail to bring legitimate grievances to the attention of the committee because they fear reprisal from the attorney they com-

⁸RULE 13(a).

⁹The requirement of a written complaint may be waived if the subject is something that can be independently investigated, e.g. fraud. Interview with Joseph E. Hess, Secretary of the 6th District Committee of the Virginia State Bar, in Buena Vista, Virginia, Feb. 25, 1972 [hereinafter cited as *Hess Interview*]. The requirement of a written complaint, signed by the complainant, is viewed as an unnecessary formality by some. See ABA SPECIAL COMM. 71.

¹⁰*Hess Interview*, *supra* note 9.

¹¹*Id.*

¹²RULE 13(a).

¹³Interview with H. Marston Smith, Chairman of the Committee on Disciplinary Procedures of the Virginia State Bar, in Warsaw, Virginia, Feb. 24, 1972. [hereinafter cited as *Smith Interview*].

¹⁴*Id.*

¹⁵RULE 13(e).

¹⁶*Id.*

¹⁷See G. BRAND, *BAR ASSOCIATIONS, ATTORNEYS AND JUDGES* (1956, Supp. 1959).

¹⁸ABA SPECIAL COMM. 6. See also Clark, *Disciplinary Procedures for the Bar*, 39 PA. B. ASS'N Q. 484, 485 (1968).

plain against¹⁹ or because they are unaware of the existence of the committee or the identities of its members. In addition, if the client is involved with the attorney in an illegal scheme, the client is certainly not going to bring such misconduct to the committee's attention. Sources other than specific complaints by laymen are even less productive.²⁰ For example, the failure of attorneys to report instances of misconduct has been cited by the ABA Special Committee.²¹

The district committees' failure to initiate their own investigations has been attributed to a reluctance on the part of the committee members to prosecute attorneys with whom they have close professional or social ties.²² Likewise, there may be a reluctance to prosecute a prominent attorney or a member of a prominent firm.²³ There may be a more fundamental reason for the failure of the committees to initiate investigations as frequently as they might. The committee members in Virginia are volunteers, serving without pay, and must take time from their private practices to perform their committee functions.²⁴

Another criticism of the decentralized committee is the lack of uniformity and standardization. Everything not set out by the statutes or Rules of Court is left entirely to the discretion of the individual committees within the guidelines of the Code of Professional Responsibility and

¹⁹ABA SPECIAL COMM. 74-75.

²⁰For example, in the 6th district thus far this year, of the 12 complaints received, 10 came from clients, 2 from attorneys, and none originated with the committee. *Hess Interview, supra* note 9. In the 9th district, where 9 complaints have been received, 4 came from clients, 3 from attorneys, and 2 from members of the committee. Letter from Alan D. Groseclose, Secretary of the 9th District Committee of the Virginia State Bar, to the *Washington & Lee Law Review*, March 14, 1972, on file in the Washington & Lee Law Library [hereinafter cited as *Groseclose Letter*].

²¹Far from reporting infractions, the Committee contends "that lawyers will not appear or cooperate in proceedings against other lawyers but instead will exert their influence to stymie the proceedings . . ." ABA SPECIAL COMM. 1.

A Virginia source however, while agreeing that approximately seventy-five percent of the complaints received by the district committees came from clients rather than attorneys, maintained that the reason for this was that clients were in a better position to observe misconduct than attorneys and were more likely to report such misconduct to the committees than to other attorneys. Interview with James R. Wrenn Jr., Special Counsel of the Virginia State Bar, in Richmond, Va., April 3, 1972.

²²ABA SPECIAL COMM. 5, 24. This difficulty exists to some extent in Virginia. For example, the commonwealth's attorney is to prosecute disbarments according to the statute (VA. CODE ANN. § 54-74(3) (Repl. Vol. 1972)). But frequently the commonwealth's attorney who should prosecute the action asks to be relieved due to friendship with the accused attorney. *Smith Interview, supra* note 13. Some of the district committees would like to have the duty of prosecution removed from the commonwealth's attorneys. *Groseclose letter, supra* note 20.

²³ABA SPECIAL COMM. 26.

²⁴*Smith Interview, supra* note 13.

Legal Ethics Opinions of the Virginia State Bar Committee on Legal Ethics.²⁵ Thus, evidence brought before one committee might conceivably result in a dismissal of the complaint while the same evidence might lead to the instigation of disbarment proceedings if brought before another committee. An offense may be grounds for a reprimand in one district while the same offense may be grounds for substantially harsher punishment or none at all in another district.²⁶ There are also variations in procedure. For example, in some districts the accused attorney is notified that there is a complaint against him as soon as an investigator is appointed,²⁷ while in others he has no notice until the investigator has made his report to the committee and it has decided whether to dismiss the complaint or launch a formal hearing.²⁸

A third criticism of this decentralized system has been made by the district committees themselves.²⁹ The committees have no disciplinary power of their own. Their only alternatives are to dismiss the complaint,³⁰ file a bill in equity requesting that the attorney in question be reprimanded and enjoined from further misconduct,³¹ or file a verified complaint with the court requesting disciplinary action in the form of suspension or disbarment.³² Many matters which come to the attention

²⁵Letter from James R. Wrenn, Jr., Special Counsel of the Virginia State Bar, to the *Washington & Lee Law Review*, March 27, 1972, on file in the Washington and Lee Law Library [hereinafter cited as *Wrenn Letter*].

²⁶ABA SPECIAL COMM. 28.

²⁷*Smith Interview*, *supra* note 13; *Groseclose Letter*, *supra* note 20.

²⁸*Hess Interview*, *supra* note 9. The Special Counsel for the Virginia State Bar interprets paragraph (a) of present Rule 13 as follows "[T]he Committee notifies an attorney against whom a complaint has been filed 'if the Committee finds that the report [by the Committee member who made an initial investigation to determine if there was any merit in the complaint] justifies further investigation . . .'" (parenthetical retained). *Wrenn Letter*, *supra* note 25. See Seventh Dist. Comm. of the Va. State Bar v. Gunter, 212 Va. 278, 279, 183 S.E.2d 713, 714 (1971). Of course if the investigation required an examination of the attorney's files, he would necessarily be made aware of the complaint against him before the conclusion of the investigation. The difference may be minor as long as the attorney is eventually given notice, but it would seem to be fairer to the attorney if he is notified as soon as possible, especially in minor matters where he could assist in clearing up the dispute. See note 33 *infra*. However, in some instances it may be impractical from an investigative standpoint to give notice at the first presentation of a complaint.

²⁹*Smith Interview*, *supra* note 20; *Hess Interview*, *supra* note 9; *Groseclose Letter*, *supra* note 20.

³⁰RULE 13(b).

³¹RULE 13(d).

³²RULE 13(c). The decision as to which penalty is to be sought is left with the committee; there are apparently no statewide standards. One committee expressed its own guidelines as follows: "Our unwritten policy is that if the attorney has shown moral turpitude (as opposed to procrastination or negligence) or if the attorney's continued practice is a danger to the public, we would seek suspension or disbarment." *Groseclose Letter*, *supra* note 20.

of the committees are comparatively minor though technically unethical.³³ Yet, since the committee has no disciplinary power of its own, it must choose either to dismiss the complaint or to bring an action in court. If it chooses the former, the committee may damage its credibility and the trust of the public, yet the latter choice would bring highly adverse and possibly undeserved publicity to the attorney.³⁴

The Court Procedures

If a committee decides to seek disciplinary action in the courts, it may bring either an action for a reprimand and an injunction or an action for suspension or disbarment. In both instances the action is prosecuted by the commonwealth's attorney,³⁵ who may be assisted by the Attorney General. A single judge, sitting in equity, hears suits requesting reprimands and injunctions and may either dismiss the complaint or grant the relief requested.³⁶

If the committee determines that the alleged misconduct is serious enough to merit suspension or disbarment, it will act to institute the proceedings set out in section 54-74 of the Virginia Code.³⁷ The commit-

³³The largest single category of complaints is disputes between the client and the attorney regarding a fee. *Smith Interview*, *supra* note 13. DuPont, *Psychology in Billing*, 20 VA. B. NEWS No. 4, at 34 (Jan.-Feb. 1972). This is generally considered by the committees to be a civil matter and not a question of ethics. *Hess Interview*, *supra* note 9.

³⁴*Smith Interview*, *supra* note 13; ABA SPECIAL COMM. 7, 92.

³⁵VA. CODE ANN. § 54-74(3) (Repl. Vol. 1972).

³⁶*Cf.* 33 ANNUAL REP. VA. ST. B. 68 (1971); Appendix *infra*. There is no standard set forth for the quantum of proof required to find guilt. It may be the same standard as for disbarment: "clear proof." See text accompanying notes 42-44 *infra*.

³⁷VA. CODE ANN. § 54-74 (Repl. Vol. 1972) is not the only recognized source of the power to disbar. There is an inherent power in the courts to suspend or disbar an attorney. This power exists independently of VA. CODE ANN. §§ 54-48, -49, -74 (Repl. Vol. 1972) and is not diminished by those sections. *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934); *Legal Club v. Light*, 137 Va. 249, 119 S.E. 55 (1923); *In re Leigh*, 15 Va. (1 Munf.) 183 (1810). See also *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-79 (1866). ABA SPECIAL COMM. criticizes statutes which tend to limit the inherent powers of the court to discipline attorneys who are considered to be officers of the courts. *Id.* at 10-18.

This power may be codified in VA. CODE ANN. § 54-73 (Repl. Vol. 1972) which states:

Any court before which an attorney has qualified, on proof being made that he has been convicted of a felony or of any malpractice, or of any corrupt unprofessional conduct, shall revoke his license to practice therein or suspend the same for such time as the court may prescribe.

Id.

It has been held that any suspension or disbarment proceedings which are not in accordance with the statutory provisions similar to VA. CODE ANN. § 54-74 (Repl. Vol. 1972) are effective only vis a vis the particular forum which issued the rule. *Ex parte Fisher*, 33 Va. (6 Leigh.) 506 (1835).

tee must file a verified complaint with the circuit court or other court of record, and the judge may then issue "a rule against such attorney . . . to show cause why his license to practice law shall not be revoked or suspended."³⁸ If the judge issues the rule to show cause, a panel of three judges, consisting of the judge who issued the rule and two others appointed by the chief justice of the supreme court, hears the case.³⁹ In Virginia, as in almost all other jurisdictions, disbarment proceedings are no longer tried by a jury.⁴⁰

Despite the fact that they make a determination of guilt or innocence which may result in the loss of the accused attorney's livelihood, it has been consistently held that these proceedings are not criminal in nature.⁴¹ This determination has important consequences. First, the standard of proof required is not the criminal standard.⁴² In *Norfolk & Portsmouth Bar Association v. Drewry*,⁴³ it was held that "reasonable strictness of proof is necessary before guilt should be held to be established—not proof beyond a reasonable doubt but clear proof."⁴⁴

³⁸Va. CODE ANN. § 54-74(1) (Repl. Vol. 1972). The judge may deny or grant the motion, and there is no appeal from his decision. *DeFoe v. Friedlander*, 211 Va. 121, 176 S.E.2d 448 (1970).

³⁹Va. CODE ANN. § 54-74(2) (Repl. Vol. 1972).

⁴⁰See ABA SPECIAL COMM. 136. Jury trial was provided by an old Virginia statute, ch. 76, §§ 5, 6, [1818-19] Va. Acts. This was held to require that the statutory provisions including the jury requirement be followed in order to effect complete disbarment, though the court without a jury could disbar an attorney from its own forum. *Ex parte Fisher*, 33 Va. (6 Leigh) 506 (1835).

⁴¹*Maddy v. First Dist. Comm. of the Va. State Bar*, 205 Va. 652, 139 S.E.2d 56 (1964); *Tucker v. Seventh Dist. Comm. of the Va. State Bar*, 202 Va. 840, 120 S.E.2d 366 (1961); *Campbell v. Third Dist. Comm. of the Va. State Bar*, 179 Va. 244, 18 S.E.2d 883 (1942); *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934). The rationale is that the primary purpose of the proceedings is not to punish the attorney but to protect the public. This would seem to be very close to the rationale for criminal proceedings. In fact, other jurisdictions have termed proceedings for disbarment quasi-criminal for the same reasons given to justify the above determination. *In re Ruffalo*, 390 U.S. 544, 551 (1968); *Furman v. State Bar*, 12 Cal. 2d 212, 83 P.2d 12, 21 (1938); *State v. Denman*, 36 Tenn. App. 613, 259 S.W.2d 891, 897 (1952); *In re Greer*, 61 Wash. 2d 741, 380 P.2d 482, 485 (1963). Quasi-criminal seems to be a more honest term in recognizing the punitive aspects of the proceedings, but there does not seem to be any difference in the cases with regard to the rights accorded the accused.

Virginia recognizes that the proceedings are not strictly civil either, but rather they are sui generis. *Maddy v. First Dist. Comm. of the Va. State Bar*, 205 Va. 652, 658, 139 S.E.2d 56, 60 (1964).

⁴²*Maddy v. First Dist. Comm. of the Va. State Bar*, 205 Va. 652, 139 S.E.2d 56 (1964); *Tucker v. Seventh Dist. Comm. of the Va. State Bar*, 202 Va. 840, 120 S.E.2d 366 (1961); *Campbell v. Third Dist. Comm. of the Va. State Bar*, 179 Va. 244, 18 S.E.2d 883 (1942).

⁴³161 Va. 833, 172 S.E. 282 (1934).

⁴⁴161 Va. 833, 843, 172 S.E. 282, 286 (1934). Clear proof is the Virginia standard. In other jurisdictions the standards are different. See Annot., 105 A.L.R. 984 (1936).

Although the standard of proof is lower than in a criminal proceeding, the location of the burden of proof is the same despite what a literal interpretation of "rule . . . to show cause why his license to practice law shall not be revoked or suspended"⁴⁵ might imply. This rule has historically been used to commence disciplinary actions against attorneys,⁴⁶ but it has never been defined in Virginia jurisprudence.⁴⁷ Apparently the burden of persuasion remains on the complainant,⁴⁸ just as in other actions in Virginia.⁴⁹ Other jurisdictions have held that the burden of producing evidence may be on the attorney when the complainant shows what appears to be unethical conduct,⁵⁰ and some have gone so far as to place the burden of persuasion on the attorney to justify his conduct.⁵¹

Regardless of the location of the burden of persuasion, an attorney could only be required to meet specific allegations of misconduct of which he was given notice, or the proceedings would be inconsistent with the demands of due process. In disbarment proceedings, due process is satisfied if the accused attorney is given notice of the charges and an opportunity to explain his conduct or defend against the charges.⁵² Though notice of the charges is necessary, a minor variance between what is alleged by the bar and what is proved before the three-judge panel has been found to be harmless error⁵³ in the recent case of *Seventh District Committee of the Virginia State Bar v. Gunter*.⁵⁴ The court thought it immaterial that

⁴⁵VA. CODE ANN. § 54-74(1) (Repl. Vol. 1972).

⁴⁶See 4 W. BLACKSTONE, COMMENTARIES *287.

⁴⁷The rule has been defined elsewhere as a notice motion which requires a party to appear and show cause why a certain act should not be done or permitted. It requires the party to meet the prima facie case made by the applicant's verified complaint or affidavit. *Morehouse v. Pacific Hardware & Steel Co.*, 177 F. 337 (1910); *Boyd v. Louisville & Jefferson County Planning & Zoning Comm'n*, 313 Ky. 196, 230 S.W.2d 444 (1949); *Marshank v. Superior Court*, 180 Cal. App. 2d 602, 4 Cal. Rptr. 593 (Dist. Ct. App. 1960).

⁴⁸The burden usually rests on the party asserting a proposition in civil suits in Virginia. See MICHIES JURISPRUDENCE OF VA. & W. VA. *Evidence* § 29 (1949).

⁴⁹*Smith Interview*, *supra* note 13.

⁵⁰See, e.g., *In re Kunstler*, 248 App. Div. 393, 289 N.Y.S. 107 (1936); *In re Salus*, 321 Pa. 106, 184 A. 70 (1936).

⁵¹*People v. Lindsey*, 86 Colo. 458, 283 P. 539 (1929).

⁵²See, e.g., *In re Ruffalo*, 390 U.S. 544 (1968); *Ex parte Wall*, 107 U.S. 265 (1883); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1873); *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1869); *Maddy v. First Dist. Comm. of the Va. State Bar*, 205 Va. 652, 139 S.E.2d 56 (1964); *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934).

⁵³See also, *Re Mayberry*, 295 Mass. 155, 3 N.E.2d 248 (1936); *Bar Ass'n v. Casey*, 196 Mass. 100, 81 N.E. 892 (1907); *Bar Ass'n v. Greenwood*, 168 Mass. 169, 46 N.E. 568 (1897).

⁵⁴212 Va. 278, 183 S.E.2d 713 (1971). The court also held that the attorney-client privilege (between the accused attorney and his counsel) did not protect communications which would perpetrate a fraud on the committee. This decision brought Virginia into accord with the majority rule on this point. See, e.g. *United States v. Friedman*, 445 F.2d

the committee did not prove the exact date on which the attorney altered certain papers since there was proof that he had altered them. However a major variance or alteration in the charges during the proceedings has been held to be a violation of due process by the United States Supreme Court.⁵⁵ In Virginia, the opportunity to defend includes the right to counsel,⁵⁶ and the right to subpoena witnesses and other evidence.⁵⁷

At the conclusion of the trial, the three-judge panel may dismiss the complaint, reprimand the attorney, or suspend or revoke his license.⁵⁸ The judges have complete discretion over the choice of penalty.⁵⁹ Either party may appeal the decision of the panel to the supreme court, though if the attorney is disbarred by the three-judge panel and appeals, he is suspended while his appeal is pending.⁶⁰

Thus there are many problems in the existing disciplinary system. These include a lack of uniformity in the procedures before both the district committees and the three-judge panels; excessive burden on the judicial system;⁶¹ and an ineffective initiation process. The bar and the court are currently considering a Suggested Amendment of Rule 13 of the Rules for the Integration of the Virginia State Bar which may provide solutions to some of the problems mentioned above.

THE PROCEEDINGS UNDER THE SUGGESTED AMENDMENT

The Suggested Amendment to Rule 13 may make several important improvements in the disciplinary system. The Amendment provides im-

1076 (9th Cir. 1971); *United States v. Bob*, 106 F.2d 37 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939); *Strong v. Abner*, 268 Ky. 502, 105 S.W.2d 599 (1937); *Thomas v. Jones*, 105 W. Va. 46, 141 S.E. 434 (1928). Early Virginia precedent to the contrary was overruled. *See Parker v. Carter*, 18 Va. (4 Munf.) 120 (1814); *Clay v. Williams*, 16 Va. (2 Munf.) 332 (1811).

⁵⁵*In re Ruffalo*, 390 U.S. 544 (1968).

⁵⁶VA. CODE ANN. § 54-74(7) (Repl. Vol. 1972); RULE 13(e).

⁵⁷RULE 13(e).

⁵⁸VA. CODE ANN. § 54-74(4) (Repl. Vol. 1972). In the year ending June 30, 1971, there were three reprimands, one revocation (disbarment), one suspension, and one surrender of a license. Text accompanying notes 101-03 *infra*. 33 ANNUAL REP. VA. ST. B. 68 (1971). *See Appendix infra*.

⁵⁹*Blum v. Tenth Dist. Comm. of the Va. State Bar*, 210 Va. 5, 8, 168 S.E.2d 121, 124 (1969); *Maddy v. First Dist. Comm. of the Va. State Bar*, 205 Va. 652, 139 S.E.2d 56 (1964).

⁶⁰VA. CODE ANN. § 54-74(5) (Repl. Vol. 1972). Temporary suspension is intended to protect the public from disbarred attorneys in the event the appeal is lost, but it could impose a great hardship on an attorney who wins his appeal for he would have lost all revenue in the interim. This provision has not yet been challenged.

⁶¹Each of the twenty-four verified complaints considered in 1971 required three judges to hear the trial. This means that seventy-two judges were engaged in activity which could very well have been handled by the bar. *See Appendix*.

munity for all statements made without malice in the course of any proceeding before the bar.⁶² This protection may make the public less reluctant to report complaints to the district committees. The district committees would be retained⁶³ and the proceedings before the committees would be substantially the same except that the committees would have certain disciplinary powers. They would have the authority to informally admonish an attorney at the conclusion of a preliminary investigation⁶⁴ and to issue private reprimands at the conclusion of any formal hearings.⁶⁵ Possession of this minor disciplinary authority would relieve the district committees of the dilemma of either dismissing a complaint or exposing an attorney to adverse publicity for a minor charge which might not be proven.⁶⁶ There would be no appeal from such a reprimand and the attorney's only redress would be to demand that the charges be taken before a newly created Disciplinary Board.⁶⁷

The Board would consist of twelve members appointed by the court upon recommendation of the Council of the Virginia State Bar.⁶⁸ It would be the duty of this Board to hear complaints brought before it by petitions

⁶²Preliminary draft of Suggested Amendment to Rule 13 of the Rules for Integration of the Virginia State Bar § (1) [hereinafter cited as Amendment]. Such conditional immunity was rejected by the ABA Special Committee, which recommended that absolute immunity be granted in order to protect complainants against suits designed to "teach the complainant a lesson." If an attorney alleged that the complaint was made maliciously, he could bring suit with little expense to himself while forcing the complainant to incur the expense and effort of defending the action. The Committee found no justification for imposing conditions on the immunity because, since the proceedings are not public, there is no damage sustained by the attorney. The desirability of having all complaints, even doubtful ones, brought to the district committee's attention seems to outweigh the slight possibility of injury to the attorney from malicious complaints. ABA SPECIAL COMM. 74-75.

This Amendment does not provide immunity from criminal prosecution. Such immunity could probably only be provided by statute. ABA SPECIAL COMM. 90-91.

⁶³Amendment § (b).

⁶⁴*Id.* § (f)(i).

⁶⁵*Id.* This hearing may be called a "probable cause hearing" but there is opposition to this term because of the connotations of criminal procedure. Such overtones are quite misleading since the phrase refers to probable cause to file a complaint with the Disciplinary Board. *Smith Interview, supra* note 13. Whatever the name, the proceedings will be essentially the same as the formal hearing in the existing procedure and the accused attorney will have all the same rights. Compare Amendment § (f)(i) with RULE 13(e).

⁶⁶See text accompanying note 34 *supra*.

⁶⁷Amendment § (f)(i). The possibility that the Disciplinary Board might impose a harsher penalty than the district committee had imposed may deter all but those who are most emphatic about their innocence from taking this step, but since the hearing is a *de novo* proceeding, there is no expectation of constitutional problems with this provision. *Smith Interview, supra* note 13.

⁶⁸The official name of this body would be "The Virginia State Bar Disciplinary Board." Amendment (a).

from the district committees or from private individuals, investigate such complaints, and to discipline attorneys found guilty.⁶⁹ The accused attorney would be given an opportunity to answer the petition, but if he failed to do so, the allegations would be taken as admitted.⁷⁰ If the charges were denied, a de novo hearing would be held.⁷¹ The action would be prosecuted by a newly created officer, the Bar Counsel,⁷² and the burden of proof would be on him.⁷³

At the conclusion of this hearing the Board would dismiss the complaint, issue a private reprimand, publicly censure the attorney, suspend him or disbar him.⁷⁴ There are no standards specified in the Amendment for determining what quantum of proof is required to prove the charges⁷⁵ or what penalty should be imposed for particular misconduct.

The most dramatic change in the procedure is that the order which

⁶⁹*Id.* § (f)(ii).

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.* § (c)(ii). The office of Bar Counsel, which would be similar to the existing Special Counsel, may be responsive to the ABA Special Committee's recommendation that the bar seek full time professional staff for disciplinary enforcement. ABA SPECIAL COMM. 48-56. The ABA recommendation envisioned a larger staff, but the Virginia plan is apparently limited by the financial resources of the bar. *Smith Interview, supra* note 13. At least one of the district committees have requested such an officer to replace the commonwealth's attorneys as prosecutors. *Groseclose Letter, supra* note 20.

The Bar Counsel would have wide powers, including investigating power. The amendment provides:

(c) *Bar Counsel.* Bar Counsel and such assistants as may be appointed shall have the power and duty:

- (i) to investigate all matters involving alleged misconduct by an attorney subject to the jurisdiction of this Court called to his attention whether by complaint or otherwise;
- (ii) to prosecute all disciplinary proceedings before the Board and this Court;
- (iii) to assist the Commonwealth's Attorney in all disciplinary matters before courts of record;
- (iv) to appear at hearings held by District Committees where practicable and at hearings with respect to motions for reinstatement by suspended or disbarred attorneys, to cross examine witnesses testifying in support of the motion and to marshal available evidence, if any, in opposition thereto;
- (v) to represent the Virginia State Bar upon request on all matters relating to the unauthorized practice of law; and
- (vi) to perform such other functions as may be designated by the Board which are not inconsistent with these rules.

Amendment § (c).

⁷³*Id.* § (q).

⁷⁴*Id.* § (f)(ii).

⁷⁵Perhaps the Board will apply the same standards as the three-judge panel: "clear proof." See text accompanying notes 42-44 *supra*.

actually imposes the penalty may be issued by the Disciplinary Board. The Board makes a "written order which shall be final and binding unless the respondent-attorney files a notice of intent to request a review by the Supreme Court" ⁷⁶ Thus, Virginia would have two bodies which would have the power of disbarment, the bar and the courts. ⁷⁷

This sharing of the disciplinary power is contrary to the commands of at least one statute. Section 54-51 of the Virginia Code provides:

[t]he Supreme Court of Appeals shall not adopt . . . any rule or regulation or method of procedure . . . which will provide for any additional method for the trial of attorneys in disbarment or suspension proceedings except those now provided for by statute ⁷⁸

The preamble of the Amendment notes that the court has "inherent power to supervise the conduct of attorneys who are its officers" ⁷⁹ But rather than assert this inherent power, it is more likely that the court and the bar will attempt to persuade the legislature to alter the conflicting statute before adoption of the proposed Amendment. ⁸⁰ To make such a change more appealing to the legislature, the draftsmen of the Amendment have included a provision which would give the accused attorney a choice when the district committee filed a petition with the Disciplinary Board. ⁸¹ He could go on with the proceedings before the Board or he could demand that the charges be brought against him in accord with the provisions of section 54-74 of the Virginia Code. ⁸²

An attorney could gain certain advantages by electing the procedure before the Board rather than the procedure before the three-judge panel. His most important advantage would be that all proceedings are kept confidential until the effective date of any order imposing a penalty. ⁸³ By taking this option, the attorney who felt that he was innocent could

⁷⁶Amendment § (f)(ii). The process of review by the supreme court is described in Amendment § (f)(iii).

⁷⁷By comparison, in California, which has a roughly similar structure for dealing with disciplinary actions, CAL. BUS. & PROF. CODE §§ 6075 et seq., 6100 et seq. (West 1962), the power to make the final order remains with the court whether or not the attorney exercises his statutory right of appeal. CAL. BUS. & PROF. CODE §§ 6083-84 (West 1962).

⁷⁸VA. CODE ANN. § 54-51 (Repl. Vol. 1972).

⁷⁹Amendment Preamble. See also note 37 *supra*.

⁸⁰Smith Interview, *supra* note 13; Wrenn Interview, *supra* note 21.

⁸¹*Id.*

⁸²Amendment § (f)(ii). In the event this option is elected, the procedure would be almost the same as the existing procedures. The only difference would be that the Board, not the district committee, would file the verified complaint and the Bar Counsel would assist in the prosecution.

⁸³*Id.* § (b).

avoid unfavorable publicity to which he would be subjected in the court proceedings even if he were exonerated. There also might be a tactical advantage in choosing the bar proceedings. The case might be heard by a committee of as few as five Board members, three of whom could convict.⁸⁴ This would be no advantage over the three-judge panel, but if a larger committee or the full Board heard the case, the prosecutor, who must bear the burden of proof,⁸⁵ would have to convince a larger number of persons of the attorney's guilt in order to obtain a conviction.

Under certain circumstances, there might be an advantage in electing the court procedures. The Board might be known to find against an attorney consistently on a given set of facts or might be known to impose a strict penalty. Further, the judge in the jurisdiction where the verified complaint would be filed might be known to be more sympathetic to the attorneys. If charges were brought against an attorney in such a situation, he would clearly prefer to elect to go before the three-judge court rather than face the Board.

The Amendment would raise no insoluble legal problems if the conflicting statute⁸⁶ were removed. The procedure would meet due process requirements since the attorney would have both notice and an opportunity to defend before the district committee and the Disciplinary Board.⁸⁷ Even the fact that the Board rather than the court may issue the final order in some instances would not pose any serious problems since the accused may elect the judicial procedures or he may have judicial review of the bar proceedings.⁸⁸ Further, since the procedure would be contained in the Rules of Court, the Board or the committee would be acting as an arm of the court and under its authority.⁸⁹

While any legal problems raised by the Amendment may be readily solved, some practical defects remain and these may prove more challenging. Despite the grant of minor disciplinary authority, the continued use of the district committees may be viewed as a weakness by some critics. The ABA Special Committee recommends greater centralization to achieve uniformity and to avoid the influence of personalities and position which may impair the effectiveness of the diversified local bodies.⁹⁰ How-

⁸⁴*Id.* § (a).

⁸⁵*Id.* § (q).

⁸⁶See text accompanying note 78 *supra*.

⁸⁷See Amendment §§ (f)(i)-(ii).

⁸⁸Apparently review may be had only at the election of the attorney. There is no provision for review on request of the district committee of the Bar Counsel. Amendment-§ (f)(iii).

⁸⁹This would be true under the court's inherent authority to discipline its officers, note 37 *supra*, or the statutory grant of authority, VA. CODE ANN. § 54-48(c) (Repl. Vol. 1972).

⁹⁰The ABA Special Committee cites New York as an example of the effectiveness of a small number of full-time, active disciplinary agencies compared to the more common

ever, the Virginia draftsmen, in retaining the existing system, reflected the opinions of the administrators of that system.⁹¹

While nothing can alleviate the "dragging of feet"⁹² at the local level when a complaint of a socially or politically sensitive nature is received, there are ways to shorten the long delays which often attend disbarment proceedings.⁹³ The ABA Special Committee suggests that time is wasted by needlessly repetitive adversary proceedings.⁹⁴ The district committees could act as screening bodies, holding only informal proceedings or investigations. The formal adversary proceedings could be left to the Board if the investigation showed a strong probability that there had been some misconduct. Such a practice would injure neither the complainant nor the attorney since the former could take his complaint directly to the courts or to the Board if the committee rejected his position,⁹⁵ and the attorney would still have his privacy protected at this point⁹⁶ and his rights guaranteed by due process.⁹⁷ From a tactical standpoint however, an attorney might prefer to have as many full proceedings as possible.

The most important benefit of the Amendment would be the standardization resulting from centralizing the power to disbar in the Disciplinary Board. The diversity in the existing system would remain in the alternative procedures permitted under section 54-74 of the Virginia Code, but the Board could be internally consistent on matters of proof and penalties, thus creating much needed predictability.⁹⁸

Additional benefits would be derived from the Board's power to deal

district committee system. New York has the largest attorney population in the country, yet all discipline is handled through four regional departments. ABA SPECIAL COMM. 28-29. See also Clark, *Disciplinary Procedures for the Bar*, 39 PA. B. ASS'N Q. 484, 487 (1968).

⁹¹At present, some committee members favor the retention of the district committees with power to administer minor discipline, and some suggest that even smaller units may be desirable. They cite the example of the local bar at Charlottesville which handles many complaints before they ever get to the district committee. *Hess Interview*, *supra* note 9; *Groseclose Letter*, *supra* note 20.

⁹²Clark, *Disciplinary Procedures for the Bar*, 39 PA. B. ASS'N Q. 484, 485 (1968).

⁹³In *Nolan v. Forste*, 252 Ind. 199, 247 N.E.2d 60 (1969), four years elapsed between the filing of the original action and the final order. See also ABA SPECIAL COMM. 30-33. This occurs in Virginia too. Many cases are carried over from one year to the next. See Appendix *infra*. *Groseclose Letter*, *supra* note 20.

⁹⁴ABA SPECIAL COMM. 30-33. The only provision in the Amendment which contributes to accelerating the proceedings is a provision that any appeal which shall be taken from the final order of the Board shall have priority over other items on the supreme court's schedule. Amendment § (f)(iii).

⁹⁵See VA. CODE ANN. § 54-74(1) (Repl. Vol. 1972); Amendment § (a)(i).

⁹⁶See Amendment § (p).

⁹⁷See note 52 and accompanying text *supra*.

⁹⁸It would seem necessary to have a written record of the proceedings, not only to insure the desired consistency with regard to subsequent cases, but also to aid in appellate review in any given case. There is no specific requirement of such a record in the Amendment.

with several matters which are not presently covered by any statute or rule. For example, section 54-73 of the Virginia Code states that the court shall disbar an attorney "on proof being made that he has been convicted of a felony" ⁹⁹ The statute is not specific as to how or when this is to be done. The Amendment provides for immediate suspension pending appeals from the conviction of a felony and a hearing before the Board after all appeals have been exhausted to determine the extent of the final discipline. ¹⁰⁰

Another problem has been the practice of surrendering a license after the attorney is under disciplinary investigation. This privilege was widely abused by attorneys in some jurisdictions since the conditions under which the license was surrendered and the consequences of that action were not clearly defined. ¹⁰¹ Such confusion would be avoided by the Amendment which provides that the attorney would be required to sign an affidavit providing, among other things, that he is aware there is a complaint against him; that the charges are true; and that he could not successfully defend against the charge. ¹⁰² The Board would then issue a public order disbaring the attorney "on consent" though the affidavit would not be made public. ¹⁰³

⁹⁹VA. CODE ANN. § 54-73 (Repl. Vol. 1972).

¹⁰⁰Amendment § (g)(i). This is in accord with the ABA Special Committee recommendation which was highly critical of procedures which would allow a convicted attorney to practice up to several years while appeals were pending. ABA SPECIAL COMM. 122.

The Special Committee also recommended that no disciplinary proceedings be initiated until a conviction was obtained or until a verdict was had in a civil case where the disciplinary action was based on the same facts. ABA SPECIAL COMM. 82. Present Virginia procedure apparently follows this course though there does not appear to be any statute or rule which demands this result. *Smith Interview, supra* note 13. VA. CODE ANN. § 54-73 (Repl. Vol. 1972) provides in part that disbarment or suspension results "on proof being made that [an attorney] has been convicted of a felony . . . or of any corrupt unprofessional conduct" But a felony, whether or not committed in a professional capacity, *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 172 S.E. 282 (1934), would certainly qualify as corrupt conduct. *See Ex parte Wall*, 107 U.S. 265, 304 (1883) (Field, J., Dissenting). Thus an attorney could theoretically be disbarred even absent a conviction. California codified such a rule. CAL. BUS. & PROF. CODE § 6106 (West 1962).

The Amendment is slightly clearer than the existing void. It provides that disbarment would result upon the "filing with the Board of a certificate demonstrating that an attorney has been convicted" Amendment § (g)(i). Similar wording in an Arizona statute was held in *In re Methcany*, 104 Ariz. 144, 449 P.2d 609 (1969) to prevent disbarment proceedings based on a criminal offense in the absence of a final conviction. ARIZ. REV. STAT. ANN. § 32-267 (1956).

¹⁰¹ABA SPECIAL COMM. 101. *See also Clark, Disciplinary Procedures for the Bar*, 39 PA. B. ASS'N Q. 484 (1968); Note, *Legal Profession—Resignation from the Bar Under Charges*, 26 MO. L. REV. 90 (1961). This practice is apparently not prevalent in Virginia though it does exist. There was one such surrender in 1971. *See Appendix*.

¹⁰²Amendment § (h).

¹⁰³*Id.*

The Board would also be given specific authority to deal with attorneys admitted to practice in Virginia who have been disciplined in another state,¹⁰⁴ who have been declared to be incompetent,¹⁰⁵ or who have been alleged to be incapacitated.¹⁰⁶ Here again, the power to suspend is given to the Board. Presumably the right to have the Board's order reviewed by the supreme court would be the same for these procedures as for regular discipline,¹⁰⁷ but this is not specified in the text of the Amendment.

CONCLUSION

Of the many flaws which exist in the disciplinary procedures presently in effect in Virginia, three are particularly important. There are too many barriers to complaints reaching the disciplinary body.¹⁰⁸ There is a lack

¹⁰⁴The attorney would be given a hearing where he may attempt to show:

- (a) that the procedure [in the foreign jurisdiction] was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;
- (b) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Board should not accept as final the conclusion on that subject; or
- (c) that the imposition of the same discipline by this Board would result in grave injustice; or
- (d) that the misconduct established has been held by this Board to warrant substantially different discipline. The attorney's response shall be limited to the above enumerated criteria

Amendment § (g)(v).

¹⁰⁵The attorney would be suspended for an indefinite period. *Id.* § (g)(ii).

¹⁰⁶The Board would determine the attorney's fitness in a hearing of which he *may* be given notice if the Board deems it "proper and advisable." If he is found unfit he is indefinitely suspended. *See* Amendment (g) (iii). If he is not given notice, there would seem to be a due process violation. *See* text accompanying note 52 *supra*. *See also* ABA SPECIAL COMM. 110.

Amendment § (g)(iv) provides:

If, during the course of any proceedings . . . the respondent contends that he is suffering a disability by reason of mental or physical infirmity . . . or . . . addiction to drugs or intoxicants, which make it impossible for the respondent to adequately defend himself . . . the Board shall enter an order immediately suspending the respondent . . . until a determination is made of the respondent's capacity to continue to practice law

When the attorney who is suspended under this paragraph applies for reinstatement, he must prove his fitness by "clear and convincing evidence," and he waives any doctor-patient privilege by his application. Amendment § (g)(iv).

¹⁰⁷*See* Amendment § (f)(iii).

¹⁰⁸These barriers include fear and lack of knowledge of the existence, function, and membership of the district committees on the part of the public; inertia and protectiveness on the part of attorneys; and lack of time, funds, and aggressiveness on the part of the district committees.

of uniformity in procedures, standards, and penalties. The courts bear too much of the responsibility for disciplining attorneys while the bar bears too little.

The proposed Amendment would correct some of these defects. The qualified immunity from civil suits, if sufficiently publicized, may encourage people to come forward with legitimate complaints, but there is apparently no provision which would increase the effectiveness of the district committees as an initiator of complaints in the disciplinary procedure. The establishment of the office of Bar Counsel may help somewhat, but this is envisioned, initially at least, as a small office.¹⁰⁹ While the Bar Counsel will be authorized to make investigations,¹¹⁰ because of limited resources, his main activity would probably be limited to prosecutorial functions.¹¹¹ Thus, the principal benefit will be derived by the commonwealth's attorneys¹¹² and the Attorney General who now perform those functions.

Though diversity would remain at the important local level, uniformity would be achieved above that by the creation of the centralized Disciplinary Board. This uniformity may be the largest single benefit which the Amendment could provide because it would greatly increase the predictability of these proceedings and it would assure that the penalty imposed on an attorney will depend solely on the nature of the misconduct.¹¹³

The grant of authority to the district committee for minor disciplining and to the Disciplinary Board for the more stringent penalties would free the judges of the state for other matters.¹¹⁴ This would be accomplished without entirely removing disciplinary procedures from the courts since the attorney would have the right to have the charges heard by the court or to have judicial review of the bar proceedings. Thus, while the proposed Amendment does not answer all objections, if the statutory barriers

¹⁰⁹*Smith Interview, supra* note 13.

¹¹⁰Amendment § (c)(i).

¹¹¹*Smith Interview, supra*, note 13.

¹¹²V.A. CODE ANN. § 54-74(3) (Repl. Vol. 1972).

¹¹³In explaining the reasons for adopting a system similar to the one in the proposed Amendment, one spokesman has said:

The thinking behind establishing this . . . board was that they wanted to get away from the local influence that you have in the common pleas court. The bar politics—whether or not the man was well liked or well disliked. We thought we could achieve more uniformity of discipline, and this was a real problem. In one part of the state, embezzlement would be grounds for disbarment, and in another part of the state, if the accused got a private reprimand, it might be considered a real accomplishment.

ABA SPECIAL COMM. 28.

¹¹⁴*See* note 61 *supra*.

to its enactment can be overcome,¹¹⁵ it will provide many important improvements for both the disciplinary system and the accused attorney.

GREGORY J. DIGEL

¹¹⁵The supreme court could choose to exercise its inherent authority (*see note 79 supra*) and adopt these procedures regardless of whether or not the legislature altered the statutes. *Smith Interview, supra note 13; Wrenn Interview, supra note 21.*

APPENDIX

The following is a statistical summary of the disciplinary actions by the Virginia State Bar for the year June 30, 1970 to June 30, 1971:

Complaints pending 6/30/70		50	
Complaints received 6/30/70 to 6/30/71		<u>190</u>	
TOTAL			240
Complaints Dismissed without formal hearing		<u>151</u>	
			89
Complaints Docketed for formal hearing as of 6/30/71	32		
Complaints under investigation as of 6/30/71	<u>13</u>		
TOTAL	45	<u>45</u>	
Formal Hearing Held			44
Dismissed after formal hearing			<u>16</u>
To be verified to one judge or three judge court			28
Not yet verified to any court			<u>5</u>
Verified to either one judge or three judge courts			23
Verified to three judge court	16		
Verified to one judge court	<u>7</u>		
TOTAL	23	<u>23</u>	0
Verified Complaints in three judge courts			
Carried over from previous year			8
Verified from 6/30/70 to 6/30/71		<u>16</u>	
TOTAL			24
Disposition:			
Reprimand			3
Revocation			1
Surrender of license			1
Suspension			1
Pending			18
Verified Complaints in one-judge courts			
Carried over from previous year			2
Verified from 6/30/70 to 6/30/71		<u>7</u>	
TOTAL			9
Disposition:			
Dismissed			0
Reprimanded			3
Pending			6

Wrenn Letter, supra note 25.