District of Columbia Court of Appeals
Board on Professional Responsibility

Board Rules

Adopted June 23, 1983
Effective July 1, 1983

This edition represents a complete revision of the Board Rules.
All previous editions are obsolete.

Amended August 11, 2011~~24, 2008~~
Effective August 11, 2011~~August 1, 2008~~

TABLE OF CONTENTS

PAGE

Chapter 1 **Citation and Definitions** 1

1.1 Citation 1

1.2 Definitions 1

Chapter 2 **Investigations** 6

2.1 Initiation of Investigations 6

2.2 Complaints 6

2.3 Preliminary Screening of Complaints 6

2.4 Decision Not to Docket and Notice to Complainant 6

2.5 Complaints Against Members of the Board, Hearing Committees, or Bar Counsel 7

2.6 Docketing of Complaints and Notification to Complainants 7

2.7 Notification to Respondent 7

2.8 Respondent's Response 7

2.9 Request for Information by Bar Counsel 7

2.10 Failure to Respond to Bar Counsel ..... 9~~8~~

2.11 Records of Docketed and Undocketed Matters ..... 12~~1~~

2.12 Contact Member Review ..... 12~~1~~

2.13 Disagreements Between Bar Counsel and Contact Member 12

2.14 Non-Participation by Respondent ..... 13~~2~~

2.15 Recusal of Contact Members ..... 13~~2~~

2.16 Procedures for Diversion ..... 13~~2~~

2.17 No Appeal by Respondent 143

2.18 Recusal of Board Contact Member 143

2.19 Confidentiality of Investigations 143

Chapter 3 Discovery and Preservation of Testimony 154

3.1 Discovery Entitlement and Access 154

3.2 Discovery from Non-Parties 154

3.3 Preservation of Testimony 165

3.4 Motions Requesting Depositions 165

3.5 Time Limitations for Discovery 165

3.6 Notice of Deposition and Protective Orders 165

3.7 Conditions on Discovery 176

3.8 Persons Before Whom Deposition May Be Taken 176

3.9 Conduct, Scope and Reduction to Writing of Depositions 176

3.10 Signing and Waiver of Signatures 187

3.11 Transmission of Deposition Transcripts 187

3.12 Deposition as Part of Record 187

3.13 Costs of Depositions and Fees 198

3.14 Subpoenas Issued During Investigations 198

3.15 Quashing Subpoenas 198

3.16 Enforcement of Subpoenas 2019

Chapter 4 Requests for Deferral Based Upon Related Pending Criminal or Civil Litigation 210

4.1 Requests for Deferral Before a Petition Has Been Filed 210

4.2 Requests for Deferral After a Petition Has Been Filed 210

Chapter 5 Complaints of Misconduct Against Counsel in Criminal Proceeding 221

5.1 Preliminary Inquiry into Complaints of Misconduct Against Counsel in Criminal Proceedings..... 221

5.2 Notice to Court of Investigation of Counsel in Criminal Proceedings 221

5.3 Notice of Appeal in Matters Involving Misconduct by Counsel in Court-Appointed Criminal Proceedings 232

Chapter 6 Dismissals, Diversion Agreements, and Informal Admonitions 243

6.1 Notification of Dismissal 243

6.2 Notification of Diversion Agreement 243

6.3 Notification of Informal Admonition 243

6.4 Action Following Rejection of an Informal Admonition..... 254

6.5 Sanctions in Hearings Following Rejected Informal Admonitions..... 254

6.6 Disclosure of Informal Admonitions 254

Chapter 7 Initiation of Formal Proceedings Before a Hearing Committee in Contested Matters 265

7.1 Petitions..... 265

7.2 Service of a Petition Upon Respondent..... 265

7.3 Scheduling Hearings 276

7.4 Respondent's Address for Service of Subsequent Documents 276

7.5 Respondent's Answer..... 287

7.6 Notice of Intent to Raise Disability in Mitigation 298

7.7 Proceedings When Respondent Fails to Answer 321

7.8 Default Upon Respondent's Failure to Answer 321

7.9 Proceedings Where Respondent Answers but Fails to Appear at Hearing 343

7.10 Hearing Continuances 343

7.11 Rescheduling Continued Hearings 354

7.12 Quorums for Hearings and Pro Hac Vice Service 354

7.13 Motions 354

7.14 Submission of Motions in Proceedings Before a Hearing Committee 365

7.15 Argument on Motions 365

7.16 Disposition of Motions 365

7.17 Presentation of Documentary Evidence 376

7.18 Objections to Documentary Evidence 387

7.19 Failure to Comply with Time Limits Concerning Documentary Evidence 387

7.20 Prehearing Conference 387

7.21 Amendment of Pleadings 387

7.22 Challenges to Hearing Committee Members 398

7.23 Contacts Between Hearing Committee Members and Participants in Disciplinary Proceedings. 398

7.24 Confidentiality of Disciplinary Proceedings 4039

Chapter 8 Reciprocal Discipline 410

8.1 Notification 410

8.2 Proceedings Before the Board 421

8.3 Required Affidavit of Suspended Attorney..... 443

8.4 Reinstatement Following Vacatur of Foreign Fitness Requirement 443

Chapter 9 Reinstatement..... 454

9.1 Petitions..... 454

9.2 Service of a Petition Upon Bar Counsel 465

9.3 Motions..... 465

9.4 Dismissal of Insufficient Petition 465

9.5 Bar Counsel's Investigation 476

9.6 Uncontested Petitions for Reinstatement 476

9.7 Contested Petitions for Reinstatement 487

9.8 Evidence of Unadjudicated Acts of Misconduct 498

9.9 Required Affidavit of Disbarred or Suspended Attorneys 510

Chapter 10 Criminal Conviction/Moral Turpitude..... 532

10.1 Initial Board Review of Criminal Convictions 532

10.2 Referral of Matters Involving Serious Crimes to a Hearing Committee..... 532

Chapter 11 Conduct of Hearings in Contested Matters..... 554

11.1 Hearing Committee Proceedings..... 554

11.2 Actions by Hearing Committee 554

11.3 Admission and Exclusion of Evidence 565

11.4 Remote Testimony 56

11.54 Objections to Documentary Evidence 595

11.65 Standard of Proof 595

11.76 Effect of a Criminal Conviction 595

11.87 Recording Hearings..... 596

11.98 Transcript Corrections 6056

11.109 Rescheduling Continued Hearings 6056

11.110 Bifurcated Hearings..... 6056

11.121 Waiver of Right to Present Evidence 6157

11.132 Mitigation of Sanction for Disability or Addiction..... 6157

Chapter 12 Post-Evidentiary Proceedings in Contested Matters 640

12.1 Briefs, Proposed Findings and Recommendations, and Additional Evidence Before the Hearing Committee..... 640

12.2 Submission of the Report and Recommendation of the Hearing Committee..... 640

Chapter 13 Formal Proceedings Before the Board on Professional Responsibility 662

13.1 Submission of Motions 662

13.2 Notification of Parties 662

13.3 Notice of Exceptions to the Hearing Committee Report and Recommendation..... 662

13.4 Proceedings Where Exceptions to Hearing Committee Report Filed..... 662

13.5 Proceedings Where No Exceptions to Hearing Committee Report Filed..... 673

13.6 Participation by Board Members Not Present at Oral Argument 673

13.7 Final Board Action and Review Standards 673

13.8 Informal Admonitions and Reprimands Following Board Proceedings 684

13.9 Review of Board Orders and Inquiries 684

13.10 Censure, Suspension, or Disbarment Recommendations by the Board 684

13.11 Extensions of Time in Proceedings Before the Board 695

Chapter 14 Temporary Suspension or Probation Proceedings Where an Attorney Poses a Substantial Threat of Serious Harm 7066

14.1 Motion to Petition the Court 7066

14.2 Confidential Material 7066

14.3 Dissolution or Amendment of Orders of Temporary Suspension or Probation 7066

Chapter 15 Disability Proceedings 7369

15.1 Definitions and Scope of Disability Proceedings 7369

15.2 Appointment of Counsel 751

15.3 Motions and Responses Related to Disability Matters 751

15.4 Attorneys Judicially Declared Mentally Incompetent or Committed to a Mental Hospital as an Inpatient 762

15.5 Application to Court for Order Requiring a Medical Examination 773

15.6 Bar Counsel's Motion for Authority to Seek Suspension or Probationary Conditions Due to Disability or Addiction 784

15.7 Respondent's Motion to Hold in Abeyance Formal Disciplinary Proceedings Because of Disability or Addiction 795

15.8 Determination of Respondent's Recovery and Removal of Prior Disability or Addiction 8076

Chapter 16 **Disbarment by Consent** 840

16.1 Respondent's Motion to Consent to Disbarment 840

16.2 Disposition of Respondent's Motion 840

16.3 Confidentiality of Proceeding 851

Chapter 17 **Negotiated Discipline Other Than Disbarment by Consent** 862

17.1 Time Limitations for Negotiating Discipline 862

17.2 Negotiated Discipline Is in Bar Counsel's Sole Discretion 862

17.3 Documentation Required for Negotiated Discipline 862

17.4 Procedures for Hearing Committee Review of Petition for Negotiated Discipline 884

17.5 Considerations Underlying the Hearing Committee's Recommendation to the Court 9187

17.6 Submission of the Recommendation for Approval to the Court 9389

17.7 Rejection of the Petition for Negotiated Discipline 9389

17.8 Withdrawal from Negotiated Discipline 940

17.9 Limitation on Reference to Negotiated Discipline in Contested Disciplinary Proceedings 940

17.10 Admissions by Respondent in Negotiated Discipline Proceedings 940

17.11 Recording Hearings 951

17.12 Recusal of Hearing Committee Member 951

17.13 Recusal of Board Member 951

Chapter 18 Procedures With Respect to Probation 96

18.1 Probation 96

18.2 Supervision of Probation 97

18.3 Probation Revocation Procedures 99

18.4 Appeals 101

18.5 Additional Charges 101

Chapter 19~~8~~ Miscellaneous Matters ..... 102~~92~~

19~~8~~.1 Limitations ..... 102~~92~~

19~~8~~.2 Filing ..... 102~~92~~

19~~8~~.3 Service ..... 102~~92~~

19~~8~~.4 Computation of Time ..... 102~~92~~

19~~8~~.5 Representation of Respondent by Counsel ..... 103~~93~~

19~~8~~.6 Restrictions on Employment of Certain Attorneys as Counsel ..... 104~~94~~

19~~8~~.7 Representation of Complainant ..... 104~~94~~

19~~8~~.8 Format of Submissions to Board, Committees and Bar Counsel ..... 104~~94~~

19~~8~~.9 Respondent's Violation of Court Order ..... 106~~96~~

19~~8~~.10 Confidentiality — Cooperation with Law Enforcement and Other Disciplinary Authorities ..... 106~~96~~

Chapter 1

Citation

1.1 **Citation**

The rules and procedures set forth below shall be known and cited as the "Board Rules." They have been promulgated pursuant to Section 4(e)(10) of Rule XI of the Rules Governing the Bar. Rule XI of the Rules Governing the Bar shall be known and cited as “Rule XI.”

1.2 **Definitions**

Subject to additional definitions contained elsewhere herein, unless the context clearly indicates otherwise, the following terms shall have the meaning given to them below:

Assistant Bar Counsel means an attorney appointed by the Board pursuant to Section 4(e)(2) of Rule XI.

Bar Counsel means the attorney appointed by the Board pursuant to Section 4(e)(2) of Rule XI. Where appropriate, Bar Counsel also means the Professional Staff in the Office of Bar Counsel.

Board means the Board on Professional Responsibility of the Bar of the District of Columbia established under Section 4(a) of Rule XI.

Board Contact Member means an attorney member of the Board under Section 8.1(c) of Rule XI, designated by the Board Chair to review and approve or modify a diversion agreement.

Chair means, depending on the context in which the term is being used, the attorney member of the Board designated by the Court as Chair of the

Board pursuant to Section 4(b) of Rule XI; or the attorney member of a regular Hearing Committee senior in service (or in the case of a regular Hearing Committee with two new attorney members, senior in membership at the Bar); or in the case of an ad hoc Hearing Committee, the attorney member designated by the Executive Attorney.

Complaint means a grievance concerning an attorney communicated to or initiated by Bar Counsel.

Contact Member means an attorney member of a Hearing Committee designated, under Section 4(e)(5) of Rule XI, to review and approve or modify recommendations by Bar Counsel for dismissals, deferrals, informal admonitions, or the institution of formal charges against a respondent.

Court means the District of Columbia Court of Appeals.

Deputy Bar Counsel means the attorney designated by Bar Counsel with the approval of the Board to assume Bar Counsel's duties and responsibilities when Bar Counsel is absent or unable to act.

Diversion Agreement means a written agreement entered into between Bar Counsel and respondent, subject to approval of the Board contact member pursuant to Section 8.1 of Rule XI, which if successfully completed, shall result in no record of misconduct for respondent and the closing of Bar Counsel’s investigation.

Executive Attorney means the attorney appointed by the Board pursuant to Section 4(e)(3) of Rule XI to act as attorney to the Board and to supervise the operations of the Office of the Executive Attorney. Where

appropriate, Executive Attorney also means the Professional Staff in the Office of the Executive Attorney.

Exception means an objection to one or more findings and/or recommendations of the Hearing Committee or the Board stating that the party excepting does not acquiesce in the findings or recommendations and will seek their modification or reversal.

Hearing Committee means a committee appointed by the Board pursuant to Section 4(e)(4) of Rule XI.

Investigation means a factual inquiry by the Board pursuant to Section 4(e)(1) of Rule XI with respect to any alleged ground for discipline or alleged incapacity of any attorney, or by Bar Counsel pursuant to Section 6(a)(2) of Rule XI, brought to Bar Counsel's or the Board's attention by complaint or otherwise, with respect to all matters involving alleged misconduct by a member of the District of Columbia Bar or with respect to petitions for formal proceedings or for reinstatement by suspended or disbarred attorneys.

Investigator means a person assisting Bar Counsel in a disciplinary investigation.

Office of Bar Counsel means the Office operating under the supervision of Bar Counsel.

Office of the Executive Attorney means the Executive Office of the Board on Professional Responsibility established to provide legal and administrative support to the Board and the Hearing Committees.

Participant means respondent, respondent's counsel, a Hearing Committee member or Chair, Bar Counsel, Bar Counsel's staff, or any other person permitted by the Hearing Committee or by the Board, including witnesses, to participate in a disciplinary investigation or proceeding.

Petition Instituting Formal Disciplinary Proceedings means a petition filed with the Board (with a copy to the Clerk of the Court) pursuant to Section 8(c) of Rule XI.

Practice Management Advisory Service or PMAS means the D.C. Bar Practice Management Advisory Service established by the D.C. Bar Board of Governors, the members of which are appointed by the D.C. Bar President with the approval of the Board of Governors, to establish educational and remedial programs to assist lawyers with the business and management aspects of their law practices. As used in these Rules, PMAS includes a staff assistant, mentor, monitor, or other consultant for the PMAS.

Professional Staff means the Deputy Bar Counsel, Assistant Bar Counsel, and Special Bar Counsel, and Staff Attorneys in the Office of Bar Counsel, and the Assistant Executive Attorneys and Staff Attorney in the Office of the Executive Attorney.

Respondent means an attorney subject to the disciplinary jurisdiction in the District of Columbia pursuant to Section 1 of Rule XI, whose conduct has become subject to inquiry or disciplinary proceedings.

Rules Governing the Bar means the rules governing the activities of the Bar of the District of Columbia promulgated by the District of Columbia Court of Appeals on July 10, 1989, and any amendments thereto.

Rules of Professional Conduct means the rules of professional conduct in effect in this jurisdiction.

Special Bar Counsel means an attorney appointed by the Board who may be less than a full-time employee and who may also engage in private practice.

Staff means the investigative, research, management, clerical, and secretarial personnel in the Office of Bar Counsel and the Office of the Executive Attorney.

Vice-Chair means the attorney member of the Board designated by the Court as Vice-Chair pursuant to Section 4(b) of Rule XI to act in the absence or disability of the Chair.

Chapter 2

Investigations

2.1 Initiation of Investigations

An investigation may be initiated on the basis of a complaint or on the basis of any alleged ground for discipline coming to the attention of Bar Counsel or the Board from any source whatsoever.

2.2 Complaints

Each complaint alleging misconduct by an attorney shall be in writing and shall contain a brief statement of the facts upon which the complaint is based. The complaint need not be sworn to. The Office of Bar Counsel may assist a complainant in reducing a complaint to writing.

2.3 Preliminary Screening of Complaints

All complaints shall be examined by Bar Counsel who, after such preliminary inquiry as appears appropriate, shall determine whether the complaint is to be docketed. Except as provided in Chapter 5, a complaint shall be docketed if it: (1) is not unfounded on its face; (2) contains allegations which, if true, would constitute a violation of the Attorney's Oath of Office or the rules of professional conduct that would merit discipline; and (3) is within the jurisdiction of the Board.

2.4 Decision Not to Docket and Notice to Complainant

If Bar Counsel determines, pursuant to Section 6(a)(2) of Rule XI, that a matter is not to be docketed, Bar Counsel shall notify the complainant, giving a brief statement of reasons therefor. Bar Counsel's decision in this respect is not subject to review.

2.5 **Complaints Against Members of the Board, Hearing Committees, or Bar Counsel**

Complaints received by the Office of Bar Counsel against a member of the Board involving activities other than those performed within the scope of the duties of the Board member shall be submitted directly to the Court. Complaints against Hearing Committee members or against Bar Counsel involving activities other than those performed within the scope of their duties shall be submitted directly to the Board.

2.6 **Docketing of Complaint and Notification to Complainants**

Complaints that are docketed shall be assigned a docket number with the last two digits showing the calendar year in which the complaint is docketed. Complainants shall be promptly advised by Bar Counsel of the docketing of the complaint.

2.7 **Notification to Respondent**

Bar Counsel shall promptly notify respondent in writing when a formal investigation into respondent's conduct has been docketed. This notice shall include a copy of the complaint or other documents upon which the investigation is based and a request for a written response from respondent.

2.8 **Respondent's Response**

Respondent's response shall set forth respondent's position with respect to the allegations contained in the complaint and shall be submitted to Bar Counsel within ten days from the date of the mailing of the notice described in Rule 2.7.

2.9 **Request for Information by Bar Counsel**

(a) In the course of the investigation, Bar Counsel may request complainant, respondent, or any other person who may have knowledge of pertinent facts to provide information concerning the matters under investigation. Where a respondent receives

an information request that respondent believes is, in whole or in part, vexatious or unduly burdensome, requests information that is not reasonably calculated to lead to the discovery of information relevant to the investigation, seeks privileged information, seeks information that exceeds constitutional limitations or is otherwise improper, respondent and Bar Counsel shall confer to seek a resolution of the matter. If respondent and Bar Counsel are unable to resolve the matter, respondent may file a written motion objecting to the request for information pursuant to Rule 13.1. Respondent's response to Bar Counsel's information request, or written motion objecting to the request, shall be filed within thirty days from the date Bar Counsel mails the request for information, unless the time is extended by the Chair for good cause shown. A motion objecting to the request for information shall set forth with particularity the basis for the objection and certify that respondent and Bar Counsel have attempted to resolve the matter. The Chair is authorized to decide the motion. Any order directing compliance with Bar Counsel's written requests for information shall be treated as a Board order under Rule 2.10(a). Unless Bar Counsel provides respondent notice of respondent's rights under this Rule, the failure to object to Bar Counsel's request for information under this Rule shall not be deemed a waiver of respondent's right to raise the objection in a formal disciplinary proceeding based on the failure to respond.

(b) Bar Counsel~~, however,~~ shall not contact a client of respondent when that client is not the complainant without first obtaining the consent of respondent or, failing that, the consent upon a written showing of good cause of a member of the Board designated by the Chair for that purpose. The preceding requirement for consent prior to contacting a respondent's client who is not a complainant shall not apply when Bar Counsel believes the client has knowledge of a matter under investigation in a docketed

case. Disclosures necessary to Bar Counsel's investigation shall not constitute a violation of the confidentiality rules.

2.10 **Failure to Respond to Bar Counsel**

(a) Motion to Compel a Response. If a respondent fails to respond to Bar Counsel's written inquiries in the course of an investigation, Bar Counsel may file a written motion, with a copy to the respondent, that the Board enter an order compelling a response and for such other relief as may be appropriate. The Chair is authorized to decide the issues presented by Bar Counsel's motion and to enter an appropriate order. The Office of the Executive Attorney shall send a copy to the respondent of a Board order issued pursuant to this subsection.

(b) Petition for Temporary Suspension or Probation for Failure to Respond to Board Order.

(i) Bar Counsel's Motion to Petition the Court. If a respondent does not comply with a Board order issued under subparagraph (a) of this Rule in connection with an investigation that involves allegations of serious misconduct, Bar Counsel may file a motion requesting that the Board petition the Court to impose on respondent a temporary suspension, and/or seek temporary conditions of probation pursuant to Section 3(c)(1) of Rule XI. "Serious misconduct" for purposes of this subsection 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." See Section 3(c)(1) of Rule XI. In addition to the requirements of any other applicable Board Rule, each such motion shall include or have attached thereto:

(a) A statement of all material facts and a supporting affidavit demonstrating that respondent has failed to comply with an order of the Board in connection with an investigation that involves allegations of serious misconduct;

(b) A proposed petition for filing with the Court, in the event that Bar Counsel's motion is granted by the Chair or Vice Chair of the Board;

(c) A proposed order to be submitted to the Court; and

(d) Proof that respondent has received notice of the Board order, in accordance with the procedures set forth in Section 19(e) of Rule XI. In seeking leave for notice by publication, Bar Counsel shall inform the Court that the matter involves a confidential investigation and a confidential order of the Board.

(ii) Response. Any response by respondent shall include:

(a) Any objections to the action requested by Bar Counsel;

(b) An admission, denial or lack of knowledge with respect to each of the material facts in Bar Counsel's motion and affidavit; and

(c) An affidavit or other document setting forth the facts on which respondent intends to rely for purposes of disputing or denying any material fact set forth in Bar Counsel's motion.

The response shall be filed and served within seven days after the service of the motion, unless such time is shortened or enlarged by the Chair or the Vice Chair for good cause shown.

(iii) Reply. Bar Counsel's reply, if any, shall be filed and served five days after the filing of respondent's response.

(iv) Disposition of Bar Counsel's Motion. The Chair or Vice Chair is authorized to decide the matter presented by Bar Counsel's motion under Section 3(c)(1) of Rule XI and subparagraphs (b)(i) through (iii) of this Rule.

(a) If the motion is granted, the Chair or Vice Chair shall cause the Board to petition the Court for an order, with such notice as the Court may prescribe, temporarily suspending respondent and/or imposing temporary conditions of probation, or to direct Bar Counsel to do so; and

(b) If the motion and/or response thereto raises a genuine issue as to any material fact regarding respondent's failure to respond to an order of the Board or whether the investigation involves allegations of serious misconduct, the Chair or the Vice Chair may refer such issue(s) to a Hearing Committee for an evidentiary hearing and report thereon, which the Board will forward to the Chair or Vice Chair for action.

(v) Confidentiality. Materials that disclose the substance of the allegations under investigation that are not subject to a petition shall be filed as confidential documents and captioned "Under Seal."

(vi) Dissolution. To permit prompt dissolution of a Court order of temporary suspension or probation for failure to respond to a Board order, Bar Counsel shall promptly notify the Court when respondent has complied with the Board's order that formed the basis for the temporary suspension and/or temporary conditions of probation. If Bar Counsel fails to do so, a respondent who believes that s/he has complied with the Board's order may request that the Board petition the Court for dissolution of the order of temporary suspension and/or temporary conditions of probation, following the applicable procedures set forth in subparagraph (b) of this Rule.

2.11 **Records of Docketed and Undocketed Matters**

Bar Counsel shall maintain records of all complaints docketed and undocketed for a period of ten years. Records of all petitioned cases and cases in which Bar Counsel issued an informal admonition shall be retained permanently.

2.12 **Contact Member Review**

All dispositions, except for diversion recommendations and petitions for negotiated discipline, recommended by Bar Counsel following docketing and completion of investigation shall be reviewed by a Contact Member who may approve or disapprove the recommendation of Bar Counsel or suggest that it be modified. In approving, rejecting, or suggesting modification of the recommendation of Bar Counsel, the Contact Member shall give due deference to the expertise of Bar Counsel in disciplinary matters and to the responsibility of Bar Counsel to allocate the investigative and prosecutorial resources of Bar Counsel's office. The Contact Member may condition approval upon further investigation by Bar Counsel or modification of the disposition. The Contact Member is permitted to consult informally with Bar Counsel in order to ascertain Bar Counsel's reasons for the recommendation and to express more fully to Bar Counsel the reasons for the Contact Member's approval, rejection, or suggested modification.

2.13 **Disagreements Between Bar Counsel and Contact Member**

If Bar Counsel and the Contact Member disagree as to the disposition of a case, the case shall be submitted to the Chair of a Hearing Committee other than that of the Contact Member for decision. The decision of the Hearing Committee Chair to whom the matter is referred shall be final.

2.14 **Non-Participation by Respondent**

Respondent shall not have the right to appeal a determination made by a Hearing Committee Chair under Rule 2.13.

2.15 **Recusal of Contact Members**

A Hearing Committee member shall be recused from participating in any formal disciplinary proceeding regarding a matter which that member reviewed as a Contact Member.

2.16 **Procedures for Diversion**

All diversion agreements between Bar Counsel and respondents entered into following docketing and completion of investigation shall be reviewed and approved by the Board Contact Member, who may approve or disapprove the agreement or suggest that it be modified. In approving, rejecting, or modifying the diversion agreement, the Board Contact Member shall consider such proposed diversion agreement in light of the purposes and limitations of diversion stated in Section 8.1 of Rule XI, giving due deference to the expertise of Bar Counsel in disciplinary matters and to the responsibility of Bar Counsel to allocate the investigative and prosecutorial resources of Bar Counsel's office. The Board Contact Member may condition approval upon further investigation by Bar Counsel or modification of the agreement. The Board Contact Member is permitted to consult informally with Bar Counsel in order to ascertain Bar Counsel's reasons for entering into a diversion agreement and to express more fully to Bar Counsel the reasons for the Board Contact Member's refusal to approve the agreement, if appropriate. A diversion agreement may include a PMAS monitor as a condition of diversion, in which event the PMAS Guidelines, adopted by the Board of Governors, may be applicable.

2.17 **No Appeal by Respondent**

A respondent shall not have the right to appeal a determination by a Board Contact Member rejecting or modifying a diversion agreement.

2.18 **Recusal of Board Contact Member**

A Board Contact Member shall be recused from participating in any formal disciplinary proceeding regarding a matter in which that member reviewed a diversion agreement.

2.19 **Confidentiality of Investigations**

Pursuant to Section 17(a) of Rule XI, except as otherwise provided in Rule XI or as the Court may otherwise order, all proceedings involving allegations of misconduct by an attorney shall be kept confidential until either a petition instituting formal disciplinary proceedings has been filed under Section 8(c) of Rule XI, a petition for negotiated discipline has been submitted pursuant to Section 12.1(c) of Rule XI, or an informal admonition has been issued.

Chapter 3

Discovery and Preservation of Testimony

3.1 Discovery Entitlement and Access

During the course of an investigation of a complaint and following the filing of a petition, respondent shall have access to all material in the files of Bar Counsel pertaining to the pending charges that are neither privileged nor the work product of the Office of Bar Counsel. Respondent may, upon two days' notice, orally request access to such files. Any dispute arising under this chapter shall be resolved, after the filing of a petition, by the Hearing Committee Chair upon written application by respondent.

3.2 Discovery from Non-Parties

The Chair of the Hearing Committee before which a case is pending (or the Chair of the Board on Professional Responsibility), if the matter is not before a Hearing Committee) may, upon request of respondent, authorize discovery from non-parties by deposition or by production and inspection of documents. Such requests must be made by written motion. Such motions shall be granted only if respondent demonstrates that respondent has a compelling need for the additional discovery in the preparation of respondent's defense and that such discovery will not be an undue burden on the complainant or other persons. Bar Counsel shall make available to respondent subpoenas to compel attendance of such witnesses and the production of such books, papers, and documents as may be necessary to implement discovery authorized under this Rule. Service of such subpoenas shall be arranged by respondent.

3.3 **Preservation of Testimony**

During the investigative stage, the Chair of the Board may authorize a deposition based upon a motion that meets the conditions established for obtaining additional discovery in Rule 3.2, above, and the further showing that the deposition is necessary to preserve testimony for a possible hearing in the event of formal disciplinary proceedings.

3.4 **Motions Requesting Depositions**

A motion requesting a deposition shall state the name and address of the witness, the subject matter concerning which the witness is expected to testify, the time and place intended for taking the deposition, and the reason why such deposition should be taken. Opposition to the motion may be filed within five days of the filing of the motion.

3.5 **Time Limitations for Discovery**

Time limitations otherwise established by the Court and the Board for the conduct of disciplinary proceedings shall not be extended solely for the purpose of conducting discovery, except in extraordinary circumstances.

3.6 **Notice of Deposition and Protective Orders**

Unless notice is waived, no deposition shall be taken except after at least ten days' written notice to the parties (i.e., Bar Counsel, respondent or potential respondent, and the deponent) if the deposition is to be taken within the District of Columbia, and fifteen days' notice when a deposition is to be taken elsewhere. Any time up to five days prior to the noticed deposition, the deponent may apply to the Chair who authorized the deposition for a protective order.

3.7 **Conditions on Discovery**

In the case of any discovery authorized under this chapter, the Chair authorizing the discovery may condition the authorization upon such terms as the Chair deems appropriate.

3.8 **Persons Before Whom Deposition May Be Taken**

Depositions shall be taken before a person empowered to administer oaths in the jurisdiction in which the deposition is to be taken. In addition, either party may request that a person be designated by the Hearing Committee Chair or the Chair of the Board, as the case may be, to preside at a deposition and to rule on disputes that may arise. All depositions shall be reported by a reporter secured by the party at whose instance the deposition is taken.

3.9 **Conduct, Scope and Reduction to Writing of Depositions**

Every person whose testimony is taken by deposition shall be sworn, or shall affirm, concerning the matter about which the deponent shall testify, before any questions are put or testimony given. The deponent may be examined regarding any matter not privileged that is relevant to the subject matter of the proceeding. Respondent or Bar Counsel, as the case may be, shall have the right of cross-examination and objection. In making objections to questions or answers, the grounds relied upon shall be stated briefly. Objections to questions or answers shall be noted in the record by the reporter who took the deposition. Objections are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one that was known to the objecting party and that might have been obviated or removed if made at that time.

3.10 **Signing and Waiver of Signatures**

When the testimony has been fully transcribed, the transcript shall be submitted to the deponent for inspection and for signing and shall be read to or by the deponent and shall be signed, unless the inspection, reading, and signing are waived by the deponent, or the deponent is ill, or the deponent cannot be found, or the deponent refuses to sign. Any changes in form or substance that the deponent desires to make shall be entered upon the transcript, which shall be signed by the deponent. If the transcript is not signed by the deponent within ten days from the date of its submission to the deponent, the reporter who took the deposition shall certify the transcript in the usual form and state on the record the fact of the waiver, of the illness or absence of the deponent, or the refusal to sign together with the reason, if any, given therefor. The transcript may then be used as fully as though signed, unless the Hearing Committee to which the deposition is tendered holds that the reasons given for the refusal to sign require rejection of the deposition testimony in whole or in part.

3.11 **Transmission of Deposition Transcripts**

After the original deposition transcript has been signed or certified, it shall, together with two copies, be forwarded by the reporter who took the deposition to the Executive Attorney. Following receipt thereof, the Executive Attorney shall file the original and forward a copy to each appropriate party.

3.12 **Deposition as Part of Record**

No part of a deposition shall constitute a part of the record in the proceeding unless it is offered in evidence before the Hearing Committee concerned. At the hearing, any part or all of a deposition, so far as admissible under the Board Rules, may be used against any party who was present or represented at the taking of the

deposition or who had notice thereof. If only part of a deposition is offered in evidence by a party, the adverse party may introduce any other part that ought in fairness to be considered with the part introduced.

3.13 **Costs of Depositions and Fees**

The party seeking additional discovery under Rules 3.2 and 3.3 of this chapter shall bear the expenses thereof, including the costs of transcripts, with copies for the opposing party. If respondent is indigent, the Chair of the Board may direct that discovery expenses incurred by respondent be paid in whole or in part by the Board. Deponents whose depositions are taken shall be entitled to the same fees as are paid to witnesses pursuant to Section 18(a) of Rule XI. Such fees and all other costs of the deposition shall be paid by the participant at whose instance the deposition is taken.

3.14 **Subpoenas Issued During Investigations**

A subpoena issued during the course of an investigation shall clearly state on its face that it is issued in connection with a confidential matter. Bar Counsel may apply directly to the Court for enforcement of a subpoena issued during the course of an investigation.

3.15 **Quashing Subpoenas**

A motion to quash a subpoena issued by either party shall be in writing and filed with the Office of the Executive Attorney. Opposition to the motion may be filed within five days of the filing of the motion.

The Executive Attorney shall assign the motion to quash to a Hearing Committee to decide. The Hearing Committee may decide the motion based on the written pleadings or also hear argument if the Chair or his designee determines that argument will substantially assist in the resolution of the motion. The decision of the Hearing

Committee shall not be subject to an interlocutory appeal but may be reviewed by the Board and subsequently by the Court as part of their review of the case in which the subpoena is issued.

3.16 **Enforcement of Subpoenas**

The party seeking enforcement of a subpoena for the attendance and testimony of any witness and the production of any documents or tangible objects shall apply to the Court for enforcement.

Chapter 4

Requests for Deferral Based Upon Related Pending Criminal or Civil Litigation

4.1 Requests for Deferral Before A Petition Has Been Filed

Before a petition has been filed, a Contact Member may approve a request by Bar Counsel for deferral based upon the pendency of a related ongoing criminal investigation or upon related pending criminal or civil litigation when there is a substantial likelihood that the resolution of the related investigation or litigation will help to resolve material issues involved in the pending disciplinary matter.

4.2 Requests for a Deferral After A Petition Has Been Filed

After a petition has been filed, either Bar Counsel or respondent may request deferral of a disciplinary case based upon the pendency of either a related ongoing criminal investigation or related pending criminal or civil litigation. Such a request shall be filed with the Office of the Executive Attorney and shall be served on the opposing party by the party making the request. A party may file an opposition to such a request within five days of the filing of the request with the Office of the Executive Attorney. The Executive Attorney shall submit the request and any opposition thereto to the Chair of the Hearing Committee to which the case is assigned. The Chair of the Hearing Committee shall transmit the request for deferral, with any opposition thereto, to the Chair of the Board with a recommendation as to the action the Chair of the Hearing Committee considers appropriate within five days of receipt of any opposition to an application for deferral or five days after the date such opposition was due. Applications shall be decided under the standards in Rule 4.1.

Chapter 5

Complaints of Misconduct Against Counsel in Criminal Proceedings

5.1 Preliminary Inquiry Into Complaints of Misconduct Against Counsel in Criminal Proceedings

Before docketing a complaint against an attorney filed by the attorney's client in a criminal proceeding, or filed by someone representing such client, Bar Counsel shall conduct a preliminary inquiry into the allegations of disciplinary violations. If a preliminary inquiry indicates a reasonable basis for opening an investigation based on misconduct by the attorney, Bar Counsel shall docket the matter, and shall thereafter follow the procedures of Chapter 2 of these Rules. After docketing the matter, Bar Counsel shall inform the attorney that the attorney is in an adversary posture with the client, and shall advise the attorney to move to withdraw from representation of the client.

5.2 Notice to Court of Investigation of Counsel in Criminal Proceedings

Should the attorney under investigation not move to withdraw, or be unsuccessful in seeking to withdraw, Bar Counsel shall inform the court before which the criminal proceeding is pending of the nature of the alleged misconduct and that the attorney is the subject of a disciplinary investigation. Bar Counsel shall further inform the court that the attorney has been advised to withdraw because of the adversary relationship with the client.

5.3 **Notice of Appeal in Matters Involving Misconduct by Counsel in Court-Appointed Criminal Proceedings**

If a Notice of Appeal is filed in the underlying criminal case by a court-appointed attorney against whom the client has complained, Bar Counsel shall request the appellate court not to appoint the attorney as appellate counsel.

Chapter 6

Dismissals, Diversion Agreements, and Informal Admonitions

6.1 Notification of Dismissal

If a proceeding is disposed of by dismissal, Bar Counsel shall promptly notify the complainant in writing and send a copy of the notification to respondent. If Bar Counsel is the complainant, respondent shall be notified in like fashion. The notification shall contain a statement of the reasons underlying the dismissal.

6.2 Notification of Diversion Agreement

If a diversion agreement is approved by the Board Contact Member, Bar Counsel shall promptly notify the complainant in writing, and send a copy of the diversion agreement and complainant's written notification to respondent. The notification shall contain a statement of the reasons underlying the diversion agreement. If a diversion agreement requires participation by the PMAS, the diversion agreement shall contain a statement of respondent's consent to release of the diversion agreement to the PMAS. Provided that the PMAS has agreed in writing to maintain the confidentiality of the diversion agreement, a copy of the diversion agreement shall be sent to the PMAS.

6.3 Notification of Informal Admonition

If a complaint is disposed of by an informal admonition, Bar Counsel shall promptly issue a letter of informal admonition. The letter shall recite the misconduct in summary form and specify the disciplinary rule or rules that respondent violated. Bar Counsel shall promptly send a copy of the letter of admonition to the complainant.

6.4 **Action Following Rejection of an Informal Admonition**

In the event that respondent rejects an informal admonition, respondent shall request in writing a formal hearing. This hearing shall be conducted in accordance with Section 8(c) of Rule XI except that Bar Counsel and the Hearing Committee may not add any charge to the petition arising out of the same circumstances that Bar Counsel was aware of at the time of the investigation, which charge was not included in the original informal admonition.

6.5 **Sanctions in Hearings Following Rejected Informal Admonitions**

In the event of a hearing under the provisions of Rule 6.4, the Hearing Committee may recommend to the Board a dismissal, an informal admonition, or a greater sanction.

6.6 **Disclosure of Informal Admonitions**

(a) Informal admonitions issued after January 1, 1995 are public.

(b) Informal admonitions issued prior to January 1, 1995 are confidential except that Bar Counsel is authorized to disclose information pertaining to proceedings disposed of by informal admonition prior to January 1, 1995, pursuant to the procedures of Sections 17(e) and (f) of Rule XI.

Chapter 7

Initiation of Formal Proceedings Before a Hearing Committee in Contested Matters

7.1 Petitions

Formal contested disciplinary proceedings shall be instituted by Bar Counsel by the filing of a petition instituting formal disciplinary charges under oath with the Office of the Executive Attorney (with a copy to the Clerk of the Court) which shall be sufficiently clear and specific to inform respondent of the alleged misconduct and the disciplinary rule or rules alleged to have been violated. Petitions shall be based on probable cause to believe that respondent has committed a crime, breached the Attorney's Oath of Office, or violated the rules of professional conduct.

7.2 Service of a Petition Upon Respondent

Promptly after the Contact Member approves a petition, Bar Counsel shall file the petition with the Office of the Executive Attorney (with a copy to the Clerk of the Court) and serve a copy thereof upon the respondent named therein. Service shall be made as follows:

(a) by delivering a copy of the petition to respondent personally; or

(b) by mailing a copy of the petition by registered or certified mail, return receipt requested, to the respondent.

The person serving the petition shall file proof of service thereof with the Office of the Executive Attorney showing receipt of the petition by the respondent. If service of the petition is made by certified or registered mail, such proof shall include a return receipt or other acknowledgment received by Bar Counsel and reflecting delivery to

respondent. The Office of the Executive Attorney shall include such proof of service as part of the official record of proceedings.

In the event Bar Counsel is unable to effect service of the petition on respondent in the manner provided for in this Rule within thirty days after filing the petition, Bar Counsel shall then promptly provide written notice to the D.C. Court of Appeals which shall: (i) state that personal service of the petition cannot be had; (ii) specify how such service has been attempted; and (iii) seek the Court's direction pursuant to D.C. Code Section 11-2503(b) regarding how to proceed. Upon receipt of direction from the Court, Bar Counsel shall promptly comply with such direction. Until Bar Counsel receives direction from the Court, Bar Counsel shall continue to attempt to effect service on respondent in the manner provided in this Rule.

7.3 **Scheduling Hearings**

Once Bar Counsel has filed proof of service of the petition with the Office of the Executive Attorney, the Executive Attorney shall set a date and place for the hearing on the petition and assign the matter to a hearing committee as soon as practicable; the Executive Attorney shall send written notice of same to respondent and Bar Counsel. The notice shall also inform respondent of his right at the hearing to be represented by counsel, to cross-examine witnesses, and to present evidence in defense or mitigation of the charges.

7.4 **Respondent's Address for Service of Subsequent Documents**

Bar Counsel shall include in the package containing the petition served on respondent in accordance with Rule 7.2 a letter (the "service letter") which shall notify respondent of the terms of this Rule and specifically identify an address at which

respondent shall be deemed to have consented to service by mail of all subsequent documents, unless respondent notifies Bar Counsel in writing, a copy of which must be filed with the Board, of a different address at which subsequent documents may be served upon him. In the absence of receipt by Bar Counsel of such written notice, subsequent documents may be served upon respondent by regular mail addressed to him at the address identified in the service letter.

In the event counsel for respondent enters his appearance of record in the proceeding, subsequent documents may be served upon respondent by regular mail addressed to respondent's counsel at his office address noted in his appearance. Subsequent documents may also be served on respondent in any other manner permitted by Rule 5(b) of the Superior Court Rules of Civil Procedure.

The person serving any subsequent documents shall file with the Office of the Executive Attorney proof of service thereof in accordance with Rule 5-I of the Superior Court Rules of Civil Procedure. The Office of the Executive Attorney shall include such proof of service as part of the official record of proceedings.

7.5 **Respondent's Answer**

Respondent shall serve a copy of an answer upon Bar Counsel and file the original with the Office of the Executive Attorney within twenty days after service of the petition, unless the time is extended by the Hearing Committee Chair. A respondent who fails to answer within the time provided may request, in writing, permission to file an answer from the Chair of the Hearing Committee to which the matter is assigned if the failure to file an answer was attributable to mistake, inadvertence, surprise or excusable neglect.

7.6 **Notice of Intent to Raise Disability in Mitigation**

(a) Respondent's Notice. If respondent intends to raise an alleged disability in mitigation pursuant to Rule 11.13~~12~~, respondent shall file a notice with the Office of the Executive Attorney on a form provided by the Office of the Executive Attorney. Respondent shall serve a copy on Bar Counsel. The notice is due on the date that the answer to the petition is due. Failure to file a notice of intent to raise an alleged disability in mitigation shall operate as a waiver of the right to raise an alleged disability in mitigation, subject to the provisions of subparagraph (d).

(b) Confidentiality of Notice. The Hearing Committee before which the disciplinary matter is pending shall not be informed of the notice by the Office of the Executive Attorney or Bar Counsel until the conclusion of the first phase of the hearing, and the Hearing Committee has determined preliminarily pursuant to Rule 11.11~~10~~ that Bar Counsel proved some or all of the charges alleged in the petition. Respondent may notify the Hearing Committee of the notice at any time.

(c) Conditions of Practice. If a respondent files a notice pursuant to subparagraph (a) hereof, the Board shall issue an order forthwith providing for appropriate conditions under which respondent shall practice law. Said order may include the appointment of monitor(s) depending upon the particular circumstances of the case. The Board hereby delegates authority to the Chair of the Board to enter an order pursuant to this subparagraph.

(i) Monitors. Should the Board appoint monitor(s), the monitor(s) shall report to the Office of the Executive Attorney on a periodic basis to be determined by the Board. The monitoring shall remain in effect during the pendency of the disciplinary proceeding or until order of the Board or the Court. The monitor(s) shall respond to Bar

Counsel's inquiries concerning such monitoring and may be called by Bar Counsel or respondent to testify in the sanction phase of a disciplinary proceeding involving respondent, or in a proceeding initiated under Section 13 of Rule XI.

(ii) Waiver. The filing of a notice pursuant to subparagraph (a) hereof is deemed to constitute a waiver by respondent of any claim of the right to withhold from the Board or Bar Counsel information coming to the attention of a monitor, subject to respondent's right to seek protective treatment pursuant to Section 17(d) of Rule XI.

(d) Late-Filed Notice.

(i) 30 Days Before Scheduled Hearing. If respondent wishes to raise an alleged disability in mitigation after the date prescribed in subparagraph (a) but no later than thirty days before the date scheduled by the Office of the Executive Attorney for the hearing on the petition, respondent shall file a motion with the Board, on notice to Bar Counsel, setting forth good cause why respondent should be allowed to raise the plea in mitigation out of time. Bar Counsel may consent in writing to the grant of the motion. The Board may grant or deny the motion, or may refer the matter to a Hearing Committee (other than the Hearing Committee before which the disciplinary matter is pending) for an evidentiary hearing. Leave to assert the plea in mitigation shall be freely granted when justice so requires, and in the absence of a showing of prejudice by Bar Counsel. An order of the Board granting such a motion may include the provisions prescribed in subparagraphs (c), (c)(i) and (c)(ii), and, in circumstances where the Board determines it to be just and appropriate, may further be conditioned upon respondent's consent to an interim suspension pending the disposition of the disciplinary proceeding.

(ii) Within 30 Days of Scheduled Hearing. If a respondent wishes to raise an alleged disability in mitigation after the date prescribed in subparagraph (d)(i), respondent shall file a motion with the Board, as prescribed in that subparagraph. Such a motion will be granted only on the condition that respondent consent to an interim suspension pending the disposition of the disciplinary proceeding.

(iii) Disposition of Respondent's Motion. The Board hereby delegates authority to the Chair of the Board to enter an appropriate order disposing of Respondent's motion pursuant to subparagraph (d).

(e) Violations of Conditions of Practice. Should a monitor report that respondent has violated a term or condition under which respondent is continuing to practice, Bar Counsel may ask the Executive Attorney to schedule the matter before a Hearing Committee for a hearing and recommendation to the Board on the issue of whether the monitoring shall be lifted, and respondent suspended, pending final disposition of the disciplinary proceedings. The Hearing Committee shall file its report with the Board on an expedited basis. The Board shall consider whether to order the suspension of respondent until final disposition of the disciplinary proceeding.

(f) Motion to Vacate or Modify Suspension. A respondent suspended pursuant to this Rule 7.6 may file a motion at any time with the Board to vacate or modify the suspension. If respondent's motion presents a prima facie case that respondent is significantly rehabilitated from the alleged disability, the matter will be referred promptly by the Board to a Hearing Committee for an evidentiary hearing on the issue of rehabilitation. Reinstatement pursuant to this subparagraph (f) shall be subject to the monitoring and waiver provisions of subparagraphs (c), (c)(i) and (c)(ii). Respondent shall have the burden of proving, by clear and convincing evidence,

significant rehabilitation from the alleged disability. The Hearing Committee shall file a report with the Board on an expedited basis.

7.7 **Proceedings When Respondent Fails to Answer**

Where respondent does not file an answer, the procedures of this paragraph shall apply. If the petition is based upon an oath made upon personal knowledge, the facts shall be deemed established as alleged in the petition. If the petition is based upon an oath made upon other than personal knowledge, Bar Counsel shall present competent proof of the factual allegations in the petition. A respondent who has not filed an answer may, if present at the hearing, cross-examine Bar Counsel's witnesses, testify in his own behalf (but not present either the testimony of others or present non-testimonial evidence), file post-hearing briefs on all issues (if called for by the Hearing Committee), and present a plea or testimony in mitigation of sanction.

7.8 **Default upon Respondent's Failure to Answer**

(a) Motion for Default. Notwithstanding any action taken by the Court pursuant to Section 3 (c) of Rule XI, if respondent fails to answer a petition as required by Rule 7.5, Bar 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 petition instituting formal disciplinary proceedings and by proof of actual notice of the petition or proper publication as approved by the Court. The motion shall state whether Bar Counsel requests an evidentiary hearing in which to present testimony and shall describe the nature of the testimony to be presented.

(b) Order of Default. The Hearing Committee Chair shall enter an order of default, limited to the allegations set forth in the petition instituting formal disciplinary proceedings, which shall be deemed admitted, if: respondent has failed to answer the

petition as required by Rule 7.5; respondent has received actual notice or has been notified by publication pursuant to Court order; and the motion is supported by sworn proof of the charges in the petition. The order shall state that the allegations in the petition will be deemed admitted subject to ex parte proof by Bar Counsel sufficient to prove the allegations, by clear and convincing evidence, based upon documentary evidence, sworn affidavits, and/or testimony. Bar Counsel shall notify respondent of the entry of a default order.

(c) Motion for Leave to Answer Out of Time. At any time until the hearing prescribed in subsection (d) of this Rule, a respondent subject to a motion for default or an order of default may seek leave to file an answer out of time, pursuant to Rule 7.5.

(d) Hearing. As soon as practicable after the entry of an order of default, the Executive Attorney shall schedule a hearing regarding the sufficiency of the ex parte proof submitted by Bar Counsel and the appropriate sanction. Respondent shall be notified of the date of the hearing. If Bar Counsel has requested an opportunity to present testimony, or if the Hearing Committee orders that testimony be presented, that testimony shall be heard at this hearing. If no testimony is to be presented, then the Hearing Committee shall proceed in executive session.

(e) Participation by Respondent. A respondent who has not filed an answer may be present at the hearing, but may not testify, present evidence or argument or cross-examine witnesses with respect to the petition. Respondent may present documentary and testimonial evidence and argument with respect to sanction.

(f) Report and Recommendation. The Hearing Committee shall issue its report and recommendation based upon the documentary evidence, sworn affidavits and testimony presented by Bar Counsel, in accordance with subsection (a) of this

Rule. The order of default shall be included in the Hearing Committee's report and recommendation.

(g) Motion to Vacate an Order of Default. An order of default shall be vacated if, within thirty days of issuance of the Hearing Committee's report, respondent files a motion with the Hearing Committee showing good cause why the order should be set aside. Thereafter and until the Board files its report with the Court or issues an order of discipline, any motion to vacate the order of default must be filed with the Board. The Board may vacate the order only upon a showing that failure to do so would result in a manifest injustice.

7.9 **Proceedings Where Respondent Answers but Fails to Appear at Hearing**

Where respondent files an answer but fails to appear at the hearing, the procedures of this paragraph shall apply. If the petition is based upon an oath made upon personal knowledge, the facts shall be deemed established as alleged in the petition. If the petition is based upon an oath made upon other than personal knowledge, Bar Counsel shall present competent proof of the factual allegations in the petition. A respondent who has received notice of the hearing and filed an answer may not subsequently file a motion to vacate pursuant to Rule 7.8(g).

7.10 **Hearing Continuances**

All applications for hearing continuances shall be made in writing and filed with the Office of the Executive Attorney for transmission to the Hearing Committee Chair at least seven days before the hearing date. A Hearing Committee Chair shall not consider any oral request for a continuance absent the most unusual emergency circumstances. The failure of a party to apprise a Hearing Committee Chair of a fact

that has been in existence for some time, such as a pre-existing conflicting obligation, does not constitute an emergency and is not grounds for a continuance. A continuance of the hearing date may be granted only for good cause shown. A Hearing Committee shall not delay proceedings or submission of its report on the ground that respondent may not have personally received the petition, a notice or papers, if service was made as specified in Rule 7.2.

7. 11 **Rescheduling Continued Hearings**

No hearing date shall be continued without a new date being set by the Hearing Committee Chair. Whenever possible, the new date will be set within two weeks of the original date.

7.12 **Quorums for Hearings and Pro Hac Vice Service**

A Hearing Committee may conduct a formal hearing in the presence of a quorum of two members. However, if a Hearing Committee member cannot be present, and that fact is known in advance of the hearing, an alternate member shall ordinarily be appointed pro hac vice by the Board to complete the Hearing Committee for the originally scheduled date. If during a formal hearing before a three-member Hearing Committee a committee member is unable to attend the entire hearing, the Hearing Committee may proceed with a quorum of two members or, upon the consent of the parties, the Hearing Committee member who is unable to attend the entire hearing may participate in the decision.

7.13 **Motions**

Except in the case of motions dealing with evidentiary matters that arise during the hearing, all motions must be made in writing in the form of a pleading and in

compliance with Rule 19~~8~~.8. Motions must be filed with the Office of the Executive Attorney and served in accordance with Rules 19~~8~~.2 and 19~~8~~.3.

7.14 **Submission of Motions in Proceedings Before a Hearing Committee**

(a) Time Limits. Except as otherwise provided in these rules, all motions, requests, applications, challenges, and the like permitted or required to be filed by these rules shall be filed no later than seven days after the time prescribed for filing an answer to a petition unless the Chair of the Board or, if the matter is assigned to a Hearing Committee, the Chair of the Hearing Committee provides otherwise. Oppositions thereto shall be filed within seven days of the service of the motion unless the Chair of the Board or, where appropriate, of a Hearing Committee provides otherwise.

(b) Number of Copies. Four copies of all papers relating to motions shall be filed with the Office of the Executive Attorney, unless otherwise ordered by the Chair of the Hearing Committee. A copy shall be served on each party separately represented.

7.15 **Argument on Motions**

All motions shall be heard either at the time of a prehearing conference pursuant to Rule 7.20 or at the time of the formal hearing. The Hearing Committee Chair or the Chair's designee may dispense with or limit argument on any motion when the Chair or the designee finds that argument on such motion will not substantially assist in the resolution of the motion.

7.16 **Disposition of Motions**

(a) All motions directed to the manner in which the hearing is to be conducted shall be ruled upon by the Hearing Committee Chair or the Chair's designee either at a prehearing conference as provided in Rule 7.20 or at the time of the hearing. In the

case of a motion directed to the admissibility of evidence, the evidence, if oral, shall be heard by the Hearing Committee and, if documentary, shall be included in the record, and the Hearing Committee shall include in its report to the Board a recommendation for disposing of the motion, except that if the Hearing Committee Chair determines that the evidence is privileged, irrelevant, or merely cumulative, the Chair may exclude the evidence after allowing the proponent to make a proffer on the record. As to all other motions, except motions to dismiss described in subparagraph (b) of this Rule, the Hearing Committee shall include in its report to the Board a proposed disposition and the reasons therefor. The Board will rule on all such motions in its disposition in the case.

(b) In the case of a motion to dismiss the petition made by Bar Counsel before the time of the hearing, based on its intention to seek a complete dismissal of the matter, to propose a diversion agreement, or the issuance of an informal admonition, the Hearing Committee Chair shall refer the matter back to the Executive Attorney for review by a Contact Member, preferably the Contact Member who originally approved the petition. Subsequent proceedings in the matter shall be governed by Rules 2.12 – 2.17 and 6.3 – 6.5.

7.17 **Presentation of Documentary Evidence**

Should either party wish to present documentary evidence at a hearing, such evidence shall conform to Rule 1~~8~~9.8 and be filed with the Office of the Executive Attorney and served upon the opposing party at least ten days in advance of the hearing date, unless otherwise ordered by the Chair of the Hearing Committee. Four copies of documentary evidence shall be filed with the Office of the Executive Attorney, unless the Chair of the Hearing Committee directs otherwise.

7.18 **Objections to Documentary Evidence**

All objections to the authenticity of documentary evidence shall be filed with the Office of the Executive Attorney and served upon the opposing party at least five days in advance of the hearing date or at the prehearing conference, which ever is earlier.

7.19 **Failure to Comply with Time Limits Concerning Documentary Evidence**

Failure to comply with the time limits concerning submission of documentary evidence and objections thereto (Rules 7.17 and 7.18) may, at the discretion of the Hearing Committee Chair, preclude introduction of the documents or objections.

7.20 **Prehearing Conference**

The Chair of the Hearing Committee to which a matter is assigned, or the other attorney member if designated by the Chair, may conduct a prehearing conference with Bar Counsel and respondent in order to clarify the issues, encourage stipulations or admissions, and dispense with formal proof of facts not in dispute. The Chair or the Chair's designee may, but is not required to, consult with other members of the Hearing Committee concerning any rulings made in connection with prehearing conferences. The Chair or the Chair's designee shall memorialize all actions taken as a result of a prehearing conference, and a copy of such memorial shall be served on the parties at least five days before the hearing.

7.21 **Amendment of Pleadings**

No amendment of any petition or of any answer may be made except on leave granted by the appropriate Hearing Committee Chair. Whenever, in the course of a formal hearing, evidence shall be presented upon which another charge or charges against respondent might be made, it shall not be necessary to prepare or serve an

additional petition with respect thereto, but upon motion by respondent or by Bar Counsel, the Hearing Committee Chair may continue the hearing. After providing respondent reasonable notice and an opportunity to answer, the Hearing Committee may proceed to the consideration of such additional charge or charges as if they had been made and served at the time of service of the original petition.

7.22 **Challenges to Hearing Committee Members**

The identity of the Hearing Committee members shall be included in the notice of the hearing provided to respondent and Bar Counsel. Any challenges to the members of the Hearing Committee must be made by affidavit alleging a personal bias or prejudice on the part of the Hearing Committee member against the party submitting the affidavit. The affidavit must state facts and reasons upon which the allegations of bias or prejudice are based and must be accompanied by a certificate executed by the party submitting the affidavit, or counsel for such party, stating that the challenge is made in good faith. The affidavit must be submitted to the Office of the Executive Attorney at least seven days prior to the date set for the hearing or the challenge shall be deemed waived. A Hearing Committee member appointed pro hac vice within seven days of the hearing to replace a previously named member may be challenged without regard to the seven-day notice ordinarily required.

7.23 **Contacts between Hearing Committee Members and Participants in Disciplinary Proceedings**

Ex parte contacts between members of Hearing Committees and any of the participants in disciplinary proceedings are prohibited except as to procedural matters.

7.24 **Confidentiality of Disciplinary Proceedings**

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. Bar 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.

Chapter 8

Reciprocal Discipline

8.1 **Notification**

(a) Notification to the Court. Upon learning that an attorney subject to the disciplinary jurisdiction of the Court has been disciplined by another disciplining court, Bar Counsel shall obtain a certified copy of the order of discipline and file it with the Court and serve a copy on the Board and respondent. The notice of discipline should include a proposed order suspending respondent pending final disposition of any reciprocal discipline proceeding and directing respondent to show cause within thirty days why identical reciprocal discipline should not be imposed pursuant to Section 11(d) of Rule XI.

(b) Notification to Respondent. In addition to providing a copy of the notice to the Court under subparagraph (a) of this Rule, Bar Counsel shall forward to respondent copies of Section 11 of Rule XI and the Board Rules. Where respondent has been suspended or disbarred by another disciplining court, Bar Counsel shall: (i) notify respondent of the obligation to file an affidavit pursuant to Section 14(g) of Rule XI and provide a form affidavit to respondent; and (ii) notify respondent of the requirement to file an affidavit pursuant to In re Goldberg, 460 A.2d 982 (D.C. 1983) (per curiam), if respondent wishes to seek nunc pro tunc treatment of a period of suspension or disbarment. Bar Counsel shall file copies of its notice to respondent, including a list of attachments, with the Court and the Board.

(c) Notification to the Board. The parties shall serve the Board with copies of all pleadings filed pursuant to Section 11 (d) of Rule XI.

(d) Sanctions That Do Not Include Suspension or Probation. Notwithstanding the notification requirements of subsections (a) - (c) of this Rule, where the foreign sanction does not include suspension or probation, Bar Counsel shall arrange for publication of the foreign order of discipline pursuant to the procedures established by the Court.

8.2 **Proceedings Before the Board**

In cases that the Court refers to the Board for its consideration and recommendation under Section 11(e) of Rule XI, the following procedures shall apply:

(a) Submissions of Bar Counsel and Respondent.

(i) Submission of Bar Counsel. Bar Counsel shall file a statement with the Board setting forth its position with regard to whether reciprocal discipline is appropriate within thirty days of the Court's order of referral. Bar Counsel's statement shall include the relevant portions of the record of the proceeding in the other disciplining court, the statute and rules that governed it, and any affidavits filed pursuant to Section 14(g) of Rule XI and In re Goldberg, 460 A.2d 982 (D.C. 1983) (per curiam). Bar Counsel's statement shall apprise the Board of its position as to whether reciprocal discipline should be imposed under Section 11(c) of Rule XI and the effective date of the discipline, and/or address any matters that are the subject of the Court's order of referral, as appropriate.

(ii) Response by Respondent. Respondent may file a response to Bar Counsel's statement concerning reciprocal discipline and/or its response to the Court's order of referral within ten days of the filing of the statement.

(iii) Bar Counsel's Reply. Bar Counsel may file a reply to respondent's response to its statement concerning reciprocal discipline and/or its response to the Court's order of referral within ten days of the filing of the response.

(b) Oral Argument Before the Board. The Chair of the Board may enter an order, either sua sponte or for good cause shown upon motion of Bar Counsel or respondent, setting the matter for oral argument before the Board. Such order shall specify the date and hour of oral argument as well as the time allotted to each party.

(c) Conclusive Effect of Adjudication in Other Jurisdiction. In all proceedings under this Rule, including any supplemental proceedings ordered by the Board thereunder, a final adjudication in another jurisdiction or by another court in this jurisdiction that an attorney has been guilty of professional misconduct shall conclusively establish the misconduct for the purpose of a reciprocal disciplinary proceeding in this jurisdiction. In the event the Board finds that nonidentical discipline is warranted, it shall accept the facts found by the disciplining court unless it has made a finding under Sections 11(c) (1), (2), or (5) of Rule XI. Nothing herein shall preclude Bar Counsel and/or respondent from demonstrating by clear and convincing evidence, or the Board to find on the face of the record, that one or more of the grounds set forth in Section 11 (c) of Rule XI exists as a basis for not imposing the identical discipline.

(d) The Board's Recommendation to Court.

(i) After completion of all proceedings pursuant to this Rule, the Board shall submit its recommendation to the Court with respect to reciprocal discipline and any other matter in response to the Court's order of referral.

(ii) If respondent has promptly notified Bar Counsel of his discipline in a foreign jurisdiction, and otherwise establishes to the satisfaction of the Board, by

affidavit or otherwise, that respondent has voluntarily ceased the practice of law in the District of Columbia, the Board will favorably consider recommending to the Court that the effective date of any suspension or disbarment be imposed nunc pro tunc to the date on which respondent voluntarily ceased the practice of law in the District of Columbia. The Board will not recommend retroactive effectiveness of a suspension or disbarment if respondent has not also complied with the provisions of Section 14 of Rule XI.

8.3 **Required Affidavit of Suspended Attorney**

Within ten days after the effective date of a temporary suspension pursuant to Section 11(d) of Rule XI, a suspended attorney shall file with the Court and the Office of the Executive Attorney, and shall serve a copy upon Bar Counsel, an "Affidavit of Compliance with Section 14 of Rule XI."

8.4 **Reinstatement Following Vacatur of Foreign Fitness Requirement**

Where proof of fitness has been imposed on a respondent as reciprocal discipline and that respondent has been summarily reinstated in the original disciplining jurisdiction without objection from that jurisdiction's Bar Counsel or equivalent, or without a hearing as contemplated by In re Berger, 737 A.2d 1033 (D.C. 1999), the reinstatement procedures of Chapter 9 of these Rules shall apply.

Chapter 9

Reinstatement

9.1 **Petitions**

(a) Filing and Service. Petitions for reinstatement by a disbarred attorney or an attorney suspended for misconduct rather than disability and required by Rule XI to prove rehabilitation prior to reinstatement shall be filed with the Office of the Executive Attorney and served on Bar Counsel by delivery in person or alternatively by registered or certified mail. The petition may be filed no earlier than sixty days prior to the date upon which the suspension expires.

(b) Reinstatement Questionnaire. The petition shall be accompanied by a full and complete response to the Reinstatement Questionnaire available from the Office of the Executive Attorney. No petition will be accepted by the Office of the Executive Attorney unless accompanied by such a response.

(c) Reinstatement After Misconduct. The petition for reinstatement of an attorney who has been disbarred or suspended for misconduct shall include a simple narrative statement of the alleged material facts to be established by clear and convincing evidence concerning the attorney's moral qualifications, competency, and learning in law required for readmission, as well as the material facts showing that the attorney's resumption of the practice of law will not be detrimental to the integrity of the Bar, or to the administration of justice, or subversive of the public interest. Such material facts shall specifically address: (i) the nature and circumstances of the misconduct for which the attorney was disciplined; (ii) the attorney's recognition of the seriousness of such misconduct; (iii) the attorney's post-discipline conduct, including

steps taken to remedy past wrongs and prevent future ones; (iv) the attorney's present character; and (v) the attorney's present qualifications and competence to practice law.

(d) Reinstatement After Disability Suspension. The petition for reinstatement of an attorney who has been suspended for disability due to mental infirmity or illness, or because of addiction to drugs or intoxicants, shall conform to the applicable provisions of Rule 9.1 above and Rule 15.8.

9.2 **Service of a Petition Upon Bar Counsel**

Service of a petition and Reinstatement Questionnaire upon Bar Counsel shall constitute referral of the petition to Bar Counsel pursuant to Section 16(d)(1) of Rule XI.

9.3 **Motions**

Motions practice in reinstatement proceedings shall be governed by Rule 7.14 or Rule 13.1, as appropriate.

9.4 **Dismissal of Insufficient Petition**

On a motion filed by Bar Counsel within the time permitted for its answer to the petition, or sua sponte, the Board may dismiss any petition for reinstatement if the disbarred or suspended attorney is not eligible for reinstatement or the petition on its face is insufficient as a matter of law to support reinstatement, after assuming the attorney would be able to establish by clear and convincing evidence all of the material facts set forth in the petition.

The Executive Attorney shall refer the motion to the Board for decision. The proceeding before the Hearing Committee shall be held in abeyance pending decision by the Board on Bar Counsel's motion.

Bar Counsel's answer to the petition shall be due twenty days from the issuance of a Board order denying a motion to dismiss.

For purposes of reinstatement, a period of suspension or disbarment is not deemed to begin until the disbarred or suspended attorney has complied with the requirements of Section 14 of Rule XI, including with respect to notice, the delivery of client property, and the filing of an affidavit in compliance with supporting proof, except for good cause shown. A disbarred or suspended attorney shall not be eligible for reinstatement until the completion of the period of suspension or five years, in the case of disbarment.

9.5 **Bar Counsel's Investigation**

Bar Counsel shall conduct an appropriate investigation of the material facts alleged in the petition for reinstatement. This investigation shall be completed within sixty days after service of the petition for reinstatement, unless the time is extended by the Chair of the Board for good cause shown. At the conclusion of its investigation, Bar Counsel shall notify the Board, in writing, whether it intends to contest the petition for reinstatement.

9.6 **Uncontested Petitions for Reinstatement**

(a) Submission to the Court. If Bar Counsel elects not to contest the petition for reinstatement, Bar Counsel shall file with the Court as soon as practicable, but in no case more than sixty days after referral from the Board under Rule 9.2, unless the time is extended by the Chair of the Board for good cause shown: (i) the petition for reinstatement, including any supporting materials submitted by the disbarred or suspended attorney; (ii) a report stating why Bar Counsel is satisfied that the attorney meets the criteria for reinstatement; and (iii) the opinion of the Court that resulted in the suspension or disbarment of the attorney who is the subject of the petition for reinstatement.

(b) Proceedings Before the Board. In any matter referred to the Board pursuant to Section 16(e) of Rule XI, the Board may request briefing, refer the matter to a Hearing Committee or take other appropriate action pursuant to the Court's order of referral.

9.7 **Contested Petitions for Reinstatement**

(a) Answer. If Bar Counsel elects to contest the petition for reinstatement, Bar Counsel shall, within sixty days after service of the petition, unless the time is extended by the Chair of the Board for good cause shown, file in the Office of the Executive Attorney and serve on the attorney an Answer setting forth the following: (i) Bar Counsel's position (denial, admission, or lack of knowledge) with respect to each of the material facts set forth in the petition for reinstatement; and (ii) a statement as to whether Bar Counsel opposes or takes no position on reinstatement of the disbarred or suspended attorney. Bar Counsel's Answer shall also include any additional allegations and material facts in support thereof that Bar Counsel intends to present at the evidentiary hearing on the petition for reinstatement, including, but not limited to, evidence of unadjudicated acts of misconduct that Bar Counsel seeks to introduce into evidence pursuant to Rule 9.8. Any additional allegations and material facts in support thereof that come to Bar Counsel's attention after the filing of the Answer shall be promptly disclosed, and leave to amend the Answer shall be liberally granted.

(b) Scheduling Hearing. The Executive Attorney shall fix a hearing date as soon as practicable.

(c) Prehearing Conference. The Chair of the Hearing Committee to which a reinstatement case is assigned, or the other attorney member, if designated by the Chair, shall conduct a prehearing conference in accordance with Rule 7.20.

(d) Conduct of Hearings; Post-Evidentiary Proceedings. Hearings shall conform to Rules 11.1 through 11.10~~9~~ and Rule 11.12~~1~~, and post-hearing procedures shall conform to Rule 12.1. Proceedings under this chapter shall be open to the public, except that the Board may, upon application and good cause shown and upon notice to the respondent and Bar Counsel and an opportunity to be heard, issue a protective order prohibiting the disclosure of confidential or privileged information concerning the complainant or any other person.

(e) Submission of the Report and Recommendation of the Hearing Committee. The Hearing Committee's report shall be filed with the Court within sixty days of the latter of either the conclusion of the hearing on reinstatement or the receipt of the final briefs by the parties. The report shall contain the Hearing Committee's findings and recommendation, together with a record of the proceedings, including a transcript of the hearing and any briefs of the parties. The Hearing Committee Chair may delegate the responsibility for the preparation of the Hearing Committee's report to another member of the Hearing Committee.

9.8 **Evidence of Unadjudicated Acts of Misconduct**

(a) Notice to attorney. Evidence of unadjudicated acts of misconduct occurring prior to the Court's order of disbarment or suspension with fitness ("unadjudicated acts") may be introduced by Bar Counsel at a hearing on reinstatement only if: (i) Bar Counsel demonstrates that the attorney seeking reinstatement received notice, in Bar Counsel's letter dismissing the complaint alleging the unadjudicated acts, that Bar Counsel reserved the right to present the facts and circumstances of the unadjudicated acts at a reinstatement hearing; and (ii) Bar Counsel gives notice in the

Answer to the petition for reinstatement that he intends to raise the unadjudicated acts at reinstatement.

(b) Admissibility of Unadjudicated Acts. Unadjudicated acts are admissible if supported by a preponderance of the evidence. Bar Counsel shall be required to make a written proffer of the evidence to support admissibility of unadjudicated acts to the Chair of the Hearing Committee considering the petition for reinstatement, and to serve a copy of the proffer upon the petitioner. Except for good cause shown, this proffer shall be filed no later than ten days before the date of the prehearing conference, conducted pursuant to Rule 9.7(c). The attorney seeking reinstatement may file a response within five days of the filing of Bar Counsel's proffer. Unless the attorney indicates in writing that he or she does not contest Bar Counsel's proffer, the Chair shall determine whether Bar Counsel has met his burden of establishing the misconduct or may require the submission of proofs. The Chair, in his or her discretion, may also refer the matter to the full Hearing Committee for a determination.

(c) Review of Ruling Concerning Admissibility of Evidence of Unadjudicated Acts. The Hearing Committee shall include in its report to the Board the basis for the ruling concerning the admissibility of evidence of unadjudicated acts. The ruling is not subject to an interlocutory appeal but will be considered as part of the Board's review of the Hearing Committee's Report and Recommendation.

(d) Conduct Since Discipline was Imposed. The procedure for admissibility of unadjudicated acts set forth in this section shall not apply to evidence of conduct occurring after the Court's entry of an order of disbarment or suspension with fitness, which would be admissible under In re Roundtree, 503 A.2d 1215 (D.C. 1985).

9.9 **Required Affidavit of Disbarred or Suspended Attorneys**

(a) Scope and Form of Affidavit. Within ten days after the effective date of disbarment or suspension, a disbarred or suspended attorney shall file with the Court and the Office of the Executive Attorney, and shall serve a copy upon Bar Counsel, an "Affidavit of Compliance with Section 14 of Rule XI." Such affidavit shall include, to Bar Counsel's reasonable satisfaction, the following: (i) all steps taken by the attorney to comply with the disbarment or suspension order; (ii) all other steps taken to comply with Section 14 of Rule XI, including without limitation: (1) photocopies of all notices (including return receipts), motions to withdraw, and letters of transmittal (or offers to return) involving papers and other property to which clients of the attorney are entitled; (2) the attorney's current residence or other address where communications may be directed to him; (3) the attorney's understanding of the continuing obligation during disbarment or suspension for a period of up to five years to file both annual and supplemental registration statements in accordance with D.C. Bar R. II, § 2 (with copies thereof served on Bar Counsel) listing such attorney's residence or other address where communications may be directed to him; (4) the attorney's understanding of the continuing obligation to keep and maintain records (including copies of all pertinent documents) showing the steps taken by such attorney to comply with Section 14 of Rule XI; and (5) the attorney's understanding that if the affidavit required by this Rule is rejected by Bar Counsel in a Notice of Non-Compliance as provided below in subparagraph (b) of this Rule, the period of disbarment or suspension may be extended by the Court.

(b) Notice of Non-Compliance. Bar Counsel may file with the Court and in the Office of the Executive Attorney a Notice of Non-Compliance, and Bar Counsel shall

serve a copy thereof on the disbarred or suspended attorney, if the following steps and events have previously occurred: (i) Bar Counsel served on the attorney not less than thirty days prior to the filing of the Notice of Non-Compliance a blank form of "Affidavit of Compliance With Section 14 of Rule XI" together with copies of Chapter 9 of these Rules plus a warning that failure to submit such Affidavit in proper form may result in suspending the running of time during the attorney's disbarment or suspension ordered by the Court; and (ii) Bar Counsel determined by the time of filing the Notice of Non-Compliance either that the required Affidavit had not been filed with the Court and served on Bar Counsel within ten days after the effective date of disbarment or suspension order, or that the Affidavit as filed and served was inadequate due to incompleteness or other valid reason.

(c) Review of Notice of Non-Compliance. The attorney may file with the Office of the Executive Attorney, and shall serve on Bar Counsel, a request for the Board to review specified objections to a Notice of Non-Compliance issued under subparagraph (b) of this Rule. Such request shall be submitted within ten days after the Notice of Non-Compliance is served. The matter will be decided by the Board on the papers of the parties unless the Board determines that there are disputed issues of fact and therefore enters an order referring such issues to a Hearing Committee for an evidentiary hearing and report to the Board. If the Board decides that the attorney has failed to comply with Section 14 of Rule XI, the Board shall file a report with the Court asking the Court to enter an appropriate order.

Chapter 10

Criminal Conviction/Moral Turpitude

10.1 Initial Board Review of Criminal Convictions

In any proceeding under Section 10 of Rule XI based upon an attorney's conviction of a serious crime, the Board shall institute formal proceedings to determine if the offense involves moral turpitude within the meaning of Section 11-2503(a) of the District of Columbia Code (1981). The Board shall initially review the matter to determine if the offense involves moral turpitude per se. Bar Counsel and respondent shall be requested to submit briefs on the moral turpitude issue, and the Board may, in its discretion, hear oral argument. If the Board determines that the crime of which respondent was convicted involves moral turpitude per se, it shall recommend to the Court that respondent be disbarred pursuant to D.C. Code Section 11-2503(a).

10.2 Referral of Matters Involving Serious Crimes to a Hearing Committee

If the Board determines that the crime of which respondent was convicted is not one involving moral turpitude per se, the matter shall be referred to a Hearing Committee to determine if the conduct underlying respondent's offense involves moral turpitude within the meaning of D.C. Code Section 11-2503(a). Bar Counsel may file a petition instituting a proceeding pursuant to Section 8 of Rule XI based on the conduct underlying respondent's crime. If Bar Counsel files a petition, it shall be filed within fifteen days of the Board's order referring the matter to a Hearing Committee. The Executive Attorney shall consolidate the matters before the Hearing Committee. Whether or not the Hearing Committee concludes that the offense involves moral turpitude, the Hearing Committee shall determine if respondent's conduct violated the

disciplinary rules charged in the petition, if Bar Counsel filed a petition and, if so, shall recommend an appropriate sanction so that the Board may have the benefit of the Hearing Committee's views on violation and sanction in the event that the Board finds no moral turpitude is involved.

Chapter 11

Conduct of Hearings in Contested Matters

11.1 Hearing Committee Proceedings

Proceedings under this chapter shall be open to the public except that the Board may, upon application and good cause shown and upon notice to the respondent and Bar Counsel and an opportunity to be heard, issue a protective order prohibiting the disclosure of confidential or privileged information concerning the complainant or any other person and directing that any proceedings be so conducted as to implement the order.

11.2 Actions by Hearing Committee

At the outset of a hearing, the Chair shall administer the oath or affirmation to the reporter and rule on any challenges to any member of the Hearing Committee made in accordance with Rule 7.22. Should challenges result in the departure of the Chair, the remaining attorney member shall act as Chair. If a quorum no longer exists, the hearing shall be recessed until a quorum is present.

The Chair shall administer the oath or affirmation, as the case may be, to the witnesses called by Bar Counsel and respondent. Following a witness' testimony, the Chair may permit the witnesses to remain present at the hearing. If the witness is a possible rebuttal witness, then the witness shall be excused from the hearing room during the subsequent testimony. The Chair and the other Hearing Committee members may question the participants for the purpose of clarifying matters raised at the hearing.

After consultation with the other members of the Hearing Committee, the Chair shall rule on all evidentiary and procedural objections in accordance with Rule 7.16. Formal exceptions are unnecessary.

11.3 **Admission and Exclusion of Evidence**

Evidence that is relevant, not privileged, and not merely cumulative shall be received, and the Hearing Committee shall determine the weight and significance to be accorded all items of evidence upon which it relies. The Hearing Committee may be guided by, but shall not be bound by the provisions or rules of court practice, procedure, pleading, or evidence, except as outlined in these rules or the Rules Governing the Bar.

11.4 **Remote Testimony**

(a) Submission of Motions

(i) In every hearing, the testimony of witnesses shall be taken in person in open court unless otherwise provided by these Rules. The Hearing Committee Chair may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of witness testimony in open court by contemporaneous transmission from a different location. The Hearing Committee Chair shall administer the oath to any witness testifying remotely.

(ii) A written motion requesting permission to present testimony by contemporaneous transmission from another location must be filed at least twenty-one days prior to the first day of the hearing, unless otherwise approved or ordered by the Hearing Committee Chair. The motion shall include a proffer of the expected testimony. The provisions of Board Rule 7.14 shall apply.

(iii) In determining whether the moving party has established good cause in compelling circumstances and appropriate safeguards under subsection (a)(i)

of this Rule, the Hearing Committee Chair may consider any or all of the following factors:

(a) whether the motion is unopposed;

(b) the seriousness of the alleged violation about which the witness will testify;

(c) the materiality of that witness' testimony to the merits (compelling circumstances are more easily established if the testimony is expected to be routine or ministerial);

(d) the quality of the proposed transmission technology (e.g., whether audio-only, video and audio (video-conferencing is strongly preferred), and the clarity of sound and picture);

(e) the ability to transmit documents to the witness during the testimony;

(f) the location from which the witness will testify (e.g., the Office of Bar Counsel in the jurisdiction where the witness is located, commercial conference facilities, or the witness' home or work location);

(g) the reason that the witness is not available to testify in person (e.g., age, infirmity, illness, undue hardship, incarceration);

(h) whether the moving party has been unable to secure the witness' attendance by process or other reasonable means;

(i) whether in-person observation of the witness is likely to be critical to evaluate that witness' credibility and demeanor;

(j) whether the issue about which the witness will testify is likely to be so determinative of the outcome that face-to-face cross-examination is necessary;

(k) whether the volume of exhibits or documents about which the witness will testify makes remote testimony impractical;

(l) whether an accurate record can be made of the testimony by the court reporter present at the hearing;

(m) whether the failure of the witness to appear in person will result in substantial prejudice to a party to the proceeding;

(n) whether the witness is subject to the perjury laws of the United States; or

(o) any other relevant circumstance.

(iv) If the Hearing Committee Chair grants a motion for remote witness testimony, the moving party shall be responsible for any expenses incurred as a result of such testimony being taken remotely. The moving party shall also be responsible for coordinating all technical and logistical aspects of the remote witness testimony, including, but not limited to, ensuring that the witness has a copy of all relevant exhibits.

(v) During or after the witness' testimony, the Hearing Committee Chair, after consultation with the other members of the Hearing Committee, may exclude remote testimony as inadmissible if the transmission lacks sufficient clarity or adequate safeguards to make it reliable, does not permit the Hearing Committee to make necessary credibility findings, does not permit adequate cross-examination or for any compelling reason. Otherwise, the Hearing Committee shall receive the evidence and shall determine the weight and significance it should be accorded, pursuant to

Board Rule 11.3. If remote testimony is excluded pursuant to this subsection 11.4 (a)(v), there shall be a presumption that the excluded testimony will not be retaken, but in extraordinary circumstances the Hearing Committee Chair, after consultation with the other members of the Hearing Committee, may fashion an appropriate remedy, including permitting the witness to re-testify in person or remotely by more reliable means.

(b) Testimony by Respondent. The testimony of respondent shall not be taken by contemporaneous transmission absent the most compelling of extenuating circumstances.

11.5~~4~~ **Objections to Documentary Evidence**

Where a party objects in the manner provided in Rule 7.18 to the introduction of a document on the ground that it has been altered or is not a duplicate of the original document, the Hearing Committee Chair shall include the disputed document in the record. The Chair may subsequently require production of the original or take additional testimony or evidence as is warranted in the situation.

11.6~~5~~ **Standard of Proof**

Bar Counsel shall have the burden of proving violations of disciplinary rules by clear and convincing evidence. In reinstatement proceedings, the petitioning attorney shall be required to establish petitioner's fitness to resume the practice of law by clear and convincing evidence.

11.7~~6~~ **Effect of a Criminal Conviction**

A certified copy of the court record of a guilty finding against an attorney of any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding based thereon.

11.8~~7~~ **Recording Hearings**

A hearing before a Hearing Committee shall be reported by a reporter designated by the Executive Attorney, or a hearing may be recorded electronically and the record transcribed by a transcriber designated by the Executive Attorney. A transcript of such report or recording shall be a part of the record and the sole official transcript of the proceeding. A transcript shall include a verbatim report of the entire hearing except as directed on the record by the Hearing Committee.

11.9~~8~~ **Transcript Corrections**

Corrections in the official transcript may be made only to make it conform to the evidence presented at the hearing. No corrections or physical changes shall be made in or upon the official transcript of the hearing, except as provided herein. Transcript corrections agreed to by all parties may be incorporated into the record by the Hearing Committee. The Hearing Committee Chair shall resolve all disputes concerning the correctness of the transcript.

11.10~~9~~ **Rescheduling Continued Hearings**

If the formal hearing cannot be completed in one day, the Hearing Committee shall continue the hearing to a date certain. The date certain shall be within two weeks of the original hearing except in extraordinary circumstances.

11.11~~10~~ **Bifurcated Hearings**

At the conclusion of the evidentiary portion of the hearing and after hearing such final argument as the Hearing Committee Chair shall permit, the Hearing Committee shall go into executive session and decide preliminarily whether it finds a violation of any disciplinary rule has been proven by Bar Counsel. In all cases in which the Hearing Committee is able to reach such a preliminary, non-binding determination, the Hearing

Committee shall immediately resume the hearing and permit Bar Counsel to present evidence of prior discipline, if any. Respondent shall be permitted to present any additional evidence in mitigation. In those extraordinary cases where the Hearing Committee is unable to reach such a preliminary determination, the Hearing Committee Chair may defer the presentation of matters in aggravation (including prior discipline) and in mitigation until such later time as the Hearing Committee Chair shall designate for the presentation of such evidence in documentary form or at a subsequent hearing which the Hearing Committee Chair may authorize on a showing of good cause.

11.12~~11~~ **Waiver of Right to Present Evidence**

All relevant evidence shall be presented in the appropriate evidentiary hearing before a Hearing Committee. Failure of Bar Counsel or respondent to proffer certain evidence or type of evidence at the evidentiary hearing (including the second part of the bifurcated hearing on aggravation or mitigation of sanctions, for alleged disability due to mental or physical infirmity or illness, or for alleged addiction to drugs or alcohol, or for any other alleged reasons), shall operate as a waiver of the right to present such evidence or type of evidence unless otherwise ordered by the Board for good cause shown pursuant to a motion filed on or before five days prior to the date of oral argument in the formal proceedings before the Board or filed on or before the effective date of any waiver of such oral argument, whichever date is later. (See Rules 13.4, 13.5 and 13.6).

11.13~~12~~ **Mitigation of Sanction for Disability or Addiction**

(a) Respondent's Motion. If respondent desires to present evidence on mitigation of sanctions based on an alleged disability or addiction (hereinafter "disability-related mitigation evidence"), respondent shall file a motion not later than at the

beginning of the second part of the bifurcated hearing pursuant to Rule 11.11~~10~~, and such motion shall set forth a simple narrative statement of the material facts including but not limited to: (i) the alleged facts showing that respondent had a disability or addiction, all of which facts respondent shall have the burden of establishing by clear and convincing evidence; (ii) the alleged facts showing that respondent's misconduct would not have occurred but for respondent's disability or addiction, all of which facts respondent shall have the burden of establishing by a preponderance of the evidence; (iii) other alleged facts, written statements and consents required by Rule 15.8(c) to establish significant evidence of rehabilitation or recovery; and (iv) a signed form (available at the Office of the Executive Attorney) wherein respondent acknowledges the alleged disability or addiction and stipulates that such acknowledgment may be used by the Board (if relevant and if respondent fails to establish significant evidence of rehabilitation or recovery) in seeking from the Court an order imposing probationary conditions or suspension pursuant to Section 13(c) of Rule XI.

(b) Bar Counsel's Response and Scheduling of Hearing. The Chair of the Hearing Committee may require Bar Counsel to submit a written response to respondent's motion and may reschedule the second part of the bifurcated hearing in order to allow Bar Counsel a reasonable period to investigate and respond to the disability-related mitigation evidence alleged in respondent's motion.

(c) Hearing Committee Report. The Hearing Committee's report to the Board shall include separate findings and conclusions on all material facts related to mitigation of sanctions.

(d) Evidence of Rehabilitation. In determining whether respondent has submitted significant evidence of rehabilitation or recovery that is sufficient for mitigation

of sanctions due to disability or addiction, the Board will generally require substantially the same evidence (including satisfactory completion of an adequate period of rehabilitation or recovery) as would apply, under Section 13(g) of Rule XI, to an application for reinstatement had respondent been suspended by an order of the Court based on the same disability or addiction for which mitigation of sanctions is requested.

(e) Inadequate Evidence of Rehabilitation. If the Board concludes that respondent's evidence submitted at the initial bifurcated hearing satisfies all requirements for mitigation of sanctions due to disability or addiction except that the duration or other aspects of respondent's rehabilitation or recovery were not then sufficient to constitute significant evidence of rehabilitation, the disciplinary matter shall go forward in the usual manner. Unless otherwise provided in any suspension order or other directive of the Court, respondent shall be entitled, by motion filed at any time within one year of the initial bifurcated hearing, to supplement the record in the disciplinary proceeding by submitting evidence showing that respondent's rehabilitation or recovery is then sufficient to constitute significant evidence of rehabilitation, and if appropriate the Board will thereafter submit a supplement report to the Court with the Board's recommendation concerning mitigation of sanction in light of respondent's supplemental evidence.

Chapter 12

Post-Evidentiary Proceedings in Contested Matters

12.1 Briefs, Proposed Findings and Recommendations and Additional Evidence Before the Hearing Committee

(a) Time Limits. The Hearing Committee may request briefs and proposed findings of fact and recommendations by the parties. Bar Counsel's submission shall be filed and served not more than ten days following service of the hearing transcript. Respondent's submission shall be filed and served not more than ten days following service of Bar Counsel's submission. Any reply thereto shall be filed and served not more than five days following service of respondent's submission. The time limits specified in this subsection shall apply unless otherwise ordered by the Chair of the Hearing Committee. At its discretion, the Hearing Committee may dispense with the submission of proposed findings of fact and recommendations.

(b) Number of Copies. Four copies of each submission shall be filed with the Office of the Executive Attorney, unless otherwise ordered by the Chair of the Hearing Committee. A copy shall be served on each party separately represented.

(c) Additional evidence. The record may be held open for not more than seven days following the conclusion of the hearing for the submission of additional documentary evidence. No additional evidence may be submitted after the record is closed, unless otherwise ordered by the Chair of the Hearing Committee.

12.2 Submission of the Report and Recommendation of the Hearing Committee

The Hearing Committee's report shall be filed with the Board not later than 120 days following the conclusion of the hearing. The 120 days provided for by the Court's

rules for the preparation of the Hearing Committee's report shall start to run at the conclusion of the hearing. The Hearing Committee Chair may delegate the responsibility for the preparation of the Hearing Committee's report to another member of the Hearing Committee.

Chapter 13

Formal Proceedings Before the Board on Professional Responsibility

13.1 Submission of Motions

(a) Time Limits. Except as otherwise provided in these rules, (i) an application for an order or other relief shall be made by filing a motion with the Office of the Executive Attorney, and (ii) a response or opposition thereto shall be filed within seven days of the service of the motion, unless the Chair of the Board directs otherwise.

(b) Number of Copies. Two copies of all papers relating to motions shall be filed with the Office of the Executive Attorney, unless otherwise ordered by the Chair of the Board. A copy shall be served on each party separately represented.

13.2 Notification of Parties

Following receipt of the Hearing Committee Report and Recommendation, the Executive Attorney shall send copies of the Report to respondent and Bar Counsel.

13.3 Notice of Exceptions to the Hearing Committee Report and Recommendation

Respondent and Bar Counsel may file, within ten days of receipt of the Hearing Committee Report, notice of exceptions to the findings and/or recommendation of the Hearing Committee.

13.4 Proceedings Where Exceptions to Hearing Committee Report Filed

(a) Scheduling. If a notice of exceptions to the report is filed, the Executive Attorney shall promptly schedule the matter for the submission of briefs and oral argument. Oral argument may be waived by stipulation between the parties. A party

failing to file a brief with the Board waives the right to oral argument, and the Board will decide the matter based on the available record.

(b) Time Limits. The brief of the party directed to submit the first brief shall be served and filed within twenty days following the date of the Board's letter scheduling the place and date for oral argument. The responsive party shall serve and file a brief within fifteen days after service of the first party's brief. Any reply thereto shall be served and filed within seven days after service of the second party's brief. No reply brief shall be filed later than seven days before oral argument. The time periods specified in this Rule shall apply unless otherwise ordered by the Board.

(c) Number of Copies. Ten copies of each brief shall be filed with the Board, unless otherwise ordered by the Board. A copy shall be served on each party separately represented.

13.5 Proceedings Where No Exceptions to Hearing Committee Report Filed

If no notice of exceptions is filed within the time allotted, the rights of the parties to brief and argue before the Board shall be waived, and the Board shall take action based on the record.

13.6 Participation by Board Members Not Present at Oral Argument

Absent any objection from respondent made at or before the oral argument, any member of the Board not present at the oral argument may participate in the decision of the Board if the absent member listens to the recording of the argument.

13.7 Final Board Action and Review Standards

Upon conclusion of the oral argument or its waiver, the Board may affirm, modify, or expand the findings and recommendation of the Hearing Committee. Alternatively,

the Board may remand the matter to the Hearing Committee for further proceedings, or the Board may dismiss the petition. Review by the Board shall be limited to the evidence presented to the Hearing Committee, except in extraordinary circumstances determined by the Board. When reviewing the findings of a Hearing Committee, the Board shall employ "substantial evidence on the record as a whole" test. When making its own findings of fact, the Board shall employ a "clear and convincing evidence" standard.

13.8 **Informal Admonitions and Reprimands Following Board Proceedings**

When the Board determines that the proceeding should be concluded by an informal admonition, or by a reprimand, the Board shall direct Bar Counsel to informally admonish respondent in writing including a brief statement of the reasons therefor or the Board shall issue an order reprimanding respondent.

13.9 **Review of Board Orders and Inquiries**

If a respondent objects in writing to an order or written inquiry of the Board, review of the order or inquiry by the Court is available after all the proceedings before the Board are concluded and the Board has recommended or imposed a sanction.

13.10 **Censure, Suspension, or Disbarment Recommendations by the Board**

If the Board determines that the proceeding should be concluded by a public censure, suspension, or disbarment, the Board shall promptly submit a report containing its findings and recommendation, together with the entire record, to the Court.

13.11 **Extensions of Time in Proceedings Before the Board**

A request for an extension of time in a proceeding before the Board shall be filed with the Office of the Executive Attorney at least seven days prior to the pertinent date, stating the reasons for the request.

Chapter 14

Temporary Suspension or Probation Proceedings Where an Attorney Poses a Substantial Threat of Serious Harm

14.1 Motion to Petition the Court

If a respondent appears to pose a substantial threat of serious harm to the public, Bar Counsel may file a motion requesting that the Board petition the Court to impose on that respondent a temporary suspension and/or seek temporary conditions of probation. The procedures set forth in Rule 2.10(b)(i) through (iii) shall apply to that motion, any response thereto, and any reply. Rule 2.10(b)(iv)(a) through (b) shall apply to the decision of that motion.

14.2 Confidential Material

Materials that disclose the substance of the allegations under investigation that are not subject to a Specification of Charges shall be captioned "Under Seal."

14.3 Dissolution or Amendment of Orders of Temporary Suspension or Probation

A respondent temporarily suspended or placed on probation for appearing to pose a substantial threat of serious harm to the public may, for good cause shown, request dissolution or amendment of the temporary order by petition filed with the Court, with a copy served on the Board and Bar Counsel.

(a) Petition for Dissolution or Amendment. The petition for dissolution or amendment of the temporary order of suspension or probation shall include the following:

(i) A statement of all material facts demonstrating that respondent no longer appears to pose a substantial threat of serious harm to the public and that

respondent's resumption of practice, with or without conditions, is consistent with the public interest; and

(ii) Any supporting documentation, including reports from practice monitors, financial monitors, and any other documentation relating to respondent's present ability to practice law.

(b) Bar Counsel's Response. Bar Counsel may reply to the petition for dissolution or amendment of the temporary order of suspension or probation within seven days of the filing of the petition. Bar Counsel shall file its response with the Board, with a copy to the Court. Bar Counsel's response shall specifically state its view regarding whether respondent still appears to pose a substantial threat of serious harm to the public and shall provide supporting evidence.

(c) Reply. Respondent's reply, if any, shall be filed and served five days after the filing of the Bar Counsel's response.

(d) Disposition of the Petition for Dissolution or Amendment. A petition for dissolution or amendment shall be set for immediate hearing before the Board or a panel of at least three of its members designated by the Chair or, in the Chair's absence, by the Vice Chair. The hearing shall be set not less than fifteen days after the filing of the petition.

(i) The Board or its designated panel shall hear the petition and may receive evidence and hear testimony from respondent, Bar Counsel and any witnesses who can testify to the material facts presented in the petition or in Bar Counsel's response to the petition.

(ii) The Board or its designated panel shall submit its report and recommendation to the Court approving or denying the petition with the utmost speed consistent with fairness.

Chapter 15

Disability Proceedings

15.1 **Definitions and Scope of Disability Proceedings**

(a) Definitions: The following terms shall have the meaning indicated:

(i) "Mentally incompetent" or "involuntarily committed to a mental hospital" means a judicial determination in a final order that declares respondent to be mentally incompetent or that commits respondent involuntarily to a mental hospital or similar institution as an inpatient;

(ii) "Disability" means any mental or physical infirmity or illness;

(iii) "Addiction" means any chemical or psychological dependency upon drugs or intoxicants;

(iv) "Incapacitated" means the state of suffering from a disability or addiction of such nature as to cause respondent to be unfit to be entrusted with professional or judicial matters, or to aid in the administration of justice as an attorney and as an officer of the court;

(v) "Significant evidence of rehabilitation" means clear and convincing evidence that it is significantly more probable than not that there will be no re-occurrence in the foreseeable future of respondent's prior disability or addiction;

(vi) "Disability matter" means any issue, question, proceeding or determination within the scope of Section 13 of Rule XI.

(b) Scope of Bar Rules for Disability Matters. The Rules of Chapter 15 shall apply to all disability matters, specifically including those to determine:

(i) whether respondent has been judicially declared to be mentally incompetent or involuntarily committed to a mental hospital as an inpatient;

(ii) whether the Board should apply to the Court for an order requiring respondent to submit to an examination by qualified medical experts regarding an alleged disability or addiction;

(iii) whether respondent is incapacitated from continuing the practice of law by reason of any disability or addiction;

(iv) whether the Board should hold in abeyance a disciplinary investigation or other proceeding because of respondent's alleged disability or addiction;

(v) whether respondent, having previously been suspended solely on the basis of a judicial order declaring respondent to be mentally incompetent, has subsequently been judicially declared to be competent and is therefore entitled to have the prior order of suspension terminated;

(vi) whether respondent, having previously been suspended solely on the basis of an involuntary commitment to a mental hospital as an inpatient, has subsequently been discharged from inpatient status in the mental hospital and is therefore entitled to have the prior order of suspension terminated; and

(vii) whether respondent, having previously acknowledged or having been found by the Board and/or the Court to have suffered from a prior disability or addiction sufficient to warrant suspension (whether or not any suspension has yet occurred), has recovered to the extent, and for the period of time, sufficient to justify the conclusion that respondent is fit to resume or continue the practice of law and/or is fit to defend the alleged charges against respondent in a disciplinary investigation or other proceeding that has been held in abeyance pending such recovery.

15.2 **Appointment of Counsel**

In any disability matter wherein Bar Counsel contends that respondent should be suspended from the practice of law, subjected to probationary conditions, or required to submit to a medical examination, the Board shall appoint counsel to represent respondent whose alleged disability or addiction is under consideration if it appears to the Board's satisfaction, based on respondent's motion or notice from Bar Counsel or the Executive Attorney, that otherwise such respondent will appear pro se and may therefore be without adequate representation.

15.3 **Motions and Responses Related to Disability Matters**

(a) Motions. All proceedings to address disability matters shall be initiated by way of motion filed by Bar Counsel or respondent. In addition to the requirements of any other applicable Rule, each such motion shall include or have attached thereto:

(i) a brief statement of all material facts;

(ii) a proposed petition and/or recommendation to be filed with the Court on behalf of the Board if the movant's request is granted by the Board; and

(iii) affidavits, medical reports, official records, or other documents setting forth or establishing any of the material facts on which the movant is relying.

(b) Response. The non-moving party shall file a response to any motion hereunder setting forth the following:

(i) all objections, if any, to the actions requested in the motion;

(ii) an admission, denial or lack of knowledge with respect to each of the material facts in the movant's papers; and

(iii) affidavits, medical reports, official records, or other documents setting forth facts on which the non-moving party intends to rely for purposes of disputing or denying any material fact set forth in the movant's papers.

Except as otherwise provided in any order of the Court or the Board, the response shall be served and filed within fourteen days after service of the motion unless such time is shortened or enlarged by the Chair of the Board for good cause shown.

15.4 **Attorneys Judicially Declared Mentally Incompetent or Committed to a Mental Hospital as an Inpatient**

(a) Bar Counsel's Motion. Bar Counsel shall be responsible for monitoring proceedings within the District of Columbia, and in other jurisdictions where practicable, wherein respondent has been judicially declared to be mentally incompetent or has been involuntarily committed to a mental hospital as an inpatient, and upon obtaining proof of that fact, Bar Counsel shall either (i) promptly serve and file a motion requesting authority to submit on behalf of the Board a petition (with appropriate affidavits and/or other documentary proof) seeking, pursuant to Section 13(a) of Rule XI, an order from the Court suspending respondent from the practice of law effective immediately and for an indefinite period of time until further order of the Court; or (ii) notify the Board of Bar Counsel's intention not to file a motion under (i) above and the reasons therefore.

(b) Disposition of Bar Counsel's Motion. The Board hereby delegates authority to the Chair of the Board to enter an order granting or denying Bar Counsel's motion based on the affidavits and other documentary proof of the parties unless the Chair of the Board determines there is a genuine issue concerning one or more of the

material facts and refers such factual issues to a Hearing Committee for an evidentiary hearing and report thereon to the Board.

15.5 **Application to Court for Order Requiring a Medical Examination**

(a) Bar Counsel's Motion. Whenever Bar Counsel concludes there is cause to believe: (i) that respondent (whether or not the subject of any pending disciplinary matters) should be subjected to a compulsory medical examination because respondent appears to be incapacitated from continuing the practice of law by reason of a disability or addiction and likely to offer legal services while so incapacitated, or (ii) the additional information (not otherwise available) concerning respondent's alleged past or current disability or addiction is relevant to the subject matter of a pending disciplinary matter (including respondent's request for mitigation of sanctions), Bar Counsel thereafter shall submit a motion requesting authority to file on behalf of the Board, pursuant to the applicable provision of Section 13 of Rule XI, a petition seeking from the Court an order requiring respondent to submit to an examination by qualified medical experts to be designated by the Court. Bar Counsel's motion shall include allegations in the form of a narrative statement of material facts setting forth in detail the reasons for the requested examination and its relevance to any pending disciplinary matter or protection of the public.

(b) Disposition of Bar Counsel's Motion. The Board hereby delegates to the Chair of the Board authority to decide the issues presented by Bar Counsel's motion and any response thereto and to enter an appropriate order disposing of such motion.

15.6 **Bar Counsel's Motion for Authority to Seek Suspension or Probationary Conditions Due to Disability or Addiction**

(a) Bar Counsel's Motion. Whenever Bar Counsel has probable cause to believe that respondent is incapacitated from continuing the practice of law by reason of disability or addiction and that respondent is nonetheless likely to offer or attempt to perform legal services while so incapacitated, Bar Counsel is hereby authorized to file a motion requesting authority to submit on behalf of the Board a petition (with appropriate affidavits and/or other documentary proof) seeking pursuant to Section 13(c) of Rule XI an order from the Court suspending respondent from the practice of law effective immediately for an indefinite period until further order of the Court, or possibly imposing probationary conditions with or without a period of suspension.

(b) Required Evidence. In the absence of unusual circumstances, probable cause sufficient to support Bar Counsel's motion under subsection (a) of this Rule shall include, inter alia, a report of an examination by one or more qualified medical experts or the written acknowledgment of respondent confirming the existence of the alleged disability or addiction and otherwise showing respondent is incapacitated as alleged.

(c) Disposition of Bar Counsel's Motion. The Chair of the Board shall place the matter on the Board's executive agenda for a decision granting or denying Bar Counsel's motion based on the affidavits and other documentary proof of the parties unless the Board's Chair determines there is a genuine issue concerning one or more material facts and refers such factual issues to a Hearing Committee for an evidentiary hearing and report thereon to the Board.

15.7 **Respondent's Motion to Hold In Abeyance Formal Disciplinary Proceedings Because of Disability or Addiction**

(a) Respondent's Motion. At any time prior to the Board's final disposition of any formal disciplinary proceeding, respondent therein may file a motion requesting the Board to enter an order holding such proceeding in abeyance based on the contention that respondent is suffering from a disability or addiction that makes it impossible for respondent adequately to defend the charges in such disciplinary proceeding. Respondent's motion should be accompanied by all pertinent medical records and in all cases must include a signed form (available from the Office of the Executive Attorney) acknowledging the alleged incapacity by reason of disability or addiction.

(b) Disposition of Respondent's Motion. The Board hereby delegates to the Chair of the Board authority to decide the matter presented by respondent's motion under subsection (a) of this Rule and any response thereto. The Board hereby directs the Chair, if respondent's motion satisfies the requirements of subsection (a): (i) to enter a temporary order holding in abeyance any formal disciplinary proceeding (but not any preliminary investigation) instituted by Bar Counsel against respondent; (ii) to submit to the Court on behalf of the Board a report that includes a petition, pursuant to the applicable provision of Section 13(e) of Rule XI, seeking from the Court an order immediately suspending respondent from the practice of law until a determination is made of respondent's capability to resume the practice of law in a proceeding instituted by respondent under Rule 15.8(b) or instituted by Bar Counsel under Rule 15.8(d); and (iii) if Bar Counsel raises a genuine issue as to any material fact concerning respondent's self-alleged disability or addiction, to enter an order referring such issue(s) to a Hearing Committee for an evidentiary hearing and report thereon to the Board

pursuant to the procedures of Rule 15.8(d). The temporary abeyance order shall remain in effect until a determination is made by the Board and/or the Court that respondent is not incapacitated and that resumption of the matters held in abeyance would be proper and advisable.

15.8 **Determination of Respondent's Recovery and Removal of Prior Disability or Addiction**

(a) Scope of Rule. Rule 15.8 shall apply to disability matters involving allegations that respondent's prior disability or addiction has been removed, including proceedings for reinstatement or for resumption of disciplinary matters being held in abeyance.

(b) Reinstatement. As provided in Section 13(g) of Rule XI, any respondent suspended for incapacity by reason of disability or addiction shall be entitled to file a motion for reinstatement once a year beginning at any time not less than one year after the initial effective date of suspension, or once during any shorter interval provided by the Court's order of suspension or any modification thereof. In addition to complying with all applicable Board Rules or Chapter 9, such motion shall conform to the requirements of subparagraph (c) of this Rule and include all alleged facts showing that respondent's disability or addiction has been removed and that respondent is fit to resume the practice of law.

(c) Contents of Motion for Reinstatement. A motion for reinstatement alleging that respondent has recovered from a prior disability or addiction shall be accompanied by all available medical reports or similar documents relating thereto and shall also include allegations specifically addressing the following matters:

(i) the nature of the prior disability or addiction, including its approximate beginning date and the most recent date (approximate) on which respondent was still afflicted with the prior disability or addiction;

(ii) the relationship between the prior disability or addiction and respondent's incapacity to continue the practice of law during the period of such prior disability or addiction;

(iii) in the case of a prior addiction, for an appropriate prior period (including the entire period following any suspension therefor), the approximate dates or periods for each and every occasion on or during which respondent used any drugs or intoxicants having the potential to impair respondent's capacity to practice law, whether or not such capacity was in fact impaired;

(iv) a brief description of the supporting medical evidence (including names of medical or other experts) that respondent expects to submit in support of the alleged recovery and rehabilitation;

(v) a written statement disclosing the name of every medical expert (psychiatrist, psychologist, physician) or other expert and hospital by whom or in which respondent has been examined or treated during the period since the date of suspension for disability or addiction;

(vi) respondent's written consent, to be provided to each medical or other expert or hospital identified in subsection (v) above, to divulge such information and records as may be required by any medical experts who are appointed by the Court or who examine respondent pursuant to his or her consent at Bar Counsel's request; and

(vii) respondent's written consent (without further order of the Court) to submit to an examination of qualified medical experts if so requested by Bar Counsel.

(d) Resumption of Proceeding Held in Abeyance. Bar Counsel may file a motion requesting the Board to terminate, or to recommend that the Court terminate, a prior order holding in abeyance any pending proceeding because of respondent's disability or addiction. The Board hereby delegates to the Chair of the Board authority to decide the matter presented by Bar Counsel's motion hereunder based on the affidavits and other admissible evidence attached to Bar Counsel's motion or respondent's response, unless the Chair determines there is a genuine issue as to one or more material facts and refers such issues to a Hearing Committee for an evidentiary hearing and a report to the Board thereon. In any such evidentiary hearing the following procedures shall apply:

(i) if the prior order of abeyance was based solely on respondent's self-alleged contention of disability or addiction, Bar Counsel's motion under subparagraph (d) of this Rule shall operate as a show cause order placing the burden on respondent to establish by a preponderance of the evidence that the prior self-alleged disability or addiction continues to make it impossible for respondent to defend himself or herself in the underlying proceeding being held in abeyance; and

(ii) if such prior order of abeyance was based on a finding supported by affirmative evidence of respondent's disability or addiction, the burden shall be on Bar Counsel to establish by a preponderance of the evidence that the prior evidence of disability or addiction was erroneous or that respondent's disability or addiction has been removed and full recovery therefrom has been achieved.

(iii) Referral to Hearing Committee. All factual issues raised in motions and related matters subject to this Rule 15.8 shall be referred to a Hearing Committee for evidentiary hearings as appropriate to resolve such issues and for the Hearing Committee's report to the Board thereon.

Chapter 16

Disbarment by Consent

16.1 **Respondent's Motion to Consent to Disbarment**

(a) At any time during the course of an investigation or a pending proceeding based on allegations of misconduct, a respondent may consent to disbarment. A motion to consent, with a copy served on Bar Counsel, shall be filed with the Office of the Executive Attorney accompanied by an affidavit stating: (i) that the consent is voluntarily rendered, that respondent is not being subjected to coercion or duress, and that respondent is fully aware of the implication of consenting to disbarment; (ii) that respondent is aware that there is currently pending an investigation into, or a proceeding involving allegations of misconduct, the nature of which shall be specifically set forth in the affidavit; (iii) that respondent acknowledges that the material facts upon which the allegations of misconduct are predicated are true; and (iv) that respondent submits the consent because respondent knows that if disciplinary proceedings based on the alleged misconduct were brought, respondent could not successfully defend against them.

(b) Bar Counsel may file a response to respondent's motion pursuant to this Rule within five days after filing of the motion.

16.2 **Disposition of Respondent's Motion**

The Board hereby delegates to the Chair authority to decide the matter presented by respondent's motion under Rule 16.1 and any response thereto. The Board hereby directs the Chair, if respondent's motion satisfies the requirements of Rule 16.1: (a) to submit to the Court on behalf of the Board a report that includes

respondent's affidavit, seeking from the Court an order disbarring respondent; or (b) if Bar Counsel raises an objection to respondent's motion, to refer the matter to the full Board for resolution.

16.3 **Confidentiality of Proceeding**

Respondent's affidavit and any substantive reference to its contents shall be confidential.

Chapter 17

Negotiated Discipline Other Than Disbarment by Consent

17.1 Time Limitations for Negotiating Discipline

A respondent who is the subject of (a) an investigation by Bar Counsel under Rule 2.1, or (b) a pending petition under Rule 7.1, may negotiate with Bar Counsel a proposed disposition of the charge(s) and sanction. The petition for negotiated discipline and supporting affidavit may be filed with the Executive Attorney at any time before the filing of the Hearing Committee's report and recommendation under Rule 12.2.

17.2 Negotiated Discipline Is in Bar Counsel's Sole Discretion

The decision whether to enter into negotiated discipline is within Bar Counsel's sole discretion. There is no review by the Board or the Court from a refusal of Bar Counsel to agree to negotiated discipline.

17.3 Documentation Required for Negotiated Discipline

(a) The Required Petition. The petition for negotiated discipline shall be prepared by Bar Counsel and signed by Bar Counsel, respondent and, if applicable, respondent's counsel. It shall contain: (i) a statement of the nature of the matter that was brought to Bar Counsel's attention; (ii) a stipulation of facts and charges, including citation to the Rules of Professional Conduct that respondent has violated; (iii) a statement of any promises or inducements that have been made by Bar Counsel to respondent, including, but not limited to, any agreement not to pursue specific charges or investigations of possible misconduct, whether in the present proceedings or in future

proceedings, including reinstatement; (iv) an agreed upon sanction, with a statement of relevant precedent and any circumstances in aggravation or mitigation of sanction that the parties agree should be considered; and (v) the justification for imposing a fitness requirement, if included in the agreed sanction.

(b) The Required Affidavit. Respondent shall submit to Bar Counsel, in support of the petition for negotiated discipline, an affidavit that includes the following averments: (i) that respondent has either conferred with counsel or is aware of his right to do so and is proceeding pro se; (ii) that respondent is entering into the negotiated discipline freely and voluntarily and is not being subjected to coercion or duress; (iii) that respondent is fully aware of the implications of the negotiated discipline; (iv) that Bar Counsel has made no promises to respondent other than those contained in the petition for negotiated discipline; (v) that respondent is aware that there is currently pending an investigation into, or a proceeding involving, allegations of misconduct by respondent, the nature of which is set forth in the petition for negotiated discipline; (vi) that respondent acknowledges the truth of the material facts upon which the misconduct stipulated to in the petition for negotiated discipline is predicated; and (vii) that respondent agrees to the negotiated discipline because respondent believes that he or she could not successfully defend against disciplinary proceedings based on the misconduct described in the petition for negotiated discipline.

Respondent may recite in his or her affidavit any other facts in mitigation that support the agreed upon sanction.

Should the negotiated discipline include a suspension from the practice of law, respondent shall acknowledge that he or she is aware of the requirement to file an affidavit pursuant to Section 14 of Rule XI and Rule 9.9 and shall further acknowledge

that the period of suspension will not be deemed to commence for purposes of respondent's eligibility to return to practice until such an affidavit is filed with the Court and Board.

17.4 **Procedures for Hearing Committee Review of Petition for Negotiated Discipline**

(a) Limited Hearing. A Hearing Committee receiving a proposed negotiated discipline shall hold a limited hearing. At the limited hearing, the Hearing Committee shall consider the petition for negotiated discipline, the accompanying affidavit, the colloquy with respondent, the presentations by Bar Counsel and respondent, and any unsworn written comment by any complainant in any matter that is the subject of the negotiated discipline. The Hearing Committee may also consider such unsworn oral statements from any complainant as the Chair may permit at the hearing. In exceptional circumstances, the Hearing Committee may also take live testimony or accept sworn affidavits to reach a final disposition on the negotiated discipline. The provisions of Rule 11.4 (Remote Testimony), Rule 11.8~~7~~ (Recording Hearings), and Rule 11.9~~8~~ (Transcript Corrections) shall apply.

(b) Review Prior to Institution of Formal Charges. Where a petition for negotiated discipline and accompanying affidavit by respondent are submitted to the Executive Attorney prior to the filing of a Petition Instituting Formal Disciplinary Proceedings and Specification of Charges under Rule 7.1, the Executive Attorney shall serve notice of the hearing date and assign the petition for negotiated discipline to a Hearing Committee solely for the purpose of reviewing that petition. If this initially assigned Hearing Committee rejects the proposed negotiated discipline and formal charges are subsequently filed pursuant to Rule 7.1, a different Hearing Committee will

be assigned by the Executive Attorney to decide the charges and file a report and recommendation with the Board.

(c) Review Subsequent to the Institution of Formal Charges. When a petition for negotiated discipline is filed after formal charges have been filed in the same matter under Rule 7.1 and assigned to a Hearing Committee for a hearing and report and recommendation under Rule 7.3, the Executive Attorney shall (i) advise the Hearing Committee hearing the charges to adjourn the proceedings; and (ii) assign the petition for negotiated discipline to a different Hearing Committee, in accord with subparagraph (b) of this Rule for the sole purpose of reviewing the petition for negotiated discipline.

(d) Matter of Public Record. The petition for negotiated discipline and accompanying affidavit shall remain confidential until filed with the Executive Attorney, at which time all proceedings before the Hearing Committee shall become open to the public. The petition and accompanying affidavit, 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. Bar Counsel's files and records shall not be available for public inspection except for such portions thereof as are introduced at the hearing regarding negotiated discipline.

(e) Challenges to Hearing Committee Members. The identity of the Hearing Committee members assigned to review the petition for negotiated discipline shall be included in the notice of the hearing provided to respondent and Bar Counsel. Challenges to members of the Hearing Committee must be made in the same manner as a challenge to a Hearing Committee member under Rule 7.22. The necessary affidavit challenging a Hearing Committee member must be submitted to the Office of the Executive Attorney at least seven days prior to the date set for the hearing or the

challenge shall be deemed waived. The Chair will promptly rule on any challenge to a Hearing Committee member. Quorums for limited hearings will be determined as provided for in Rule 7.12.

(f) Scheduling Limited Hearings. Absent extraordinary circumstances, the limited hearing shall be set as soon as practicable but not less than twenty-one days after the filing of the petition for negotiated discipline and accompanying affidavit.

(g) Notice to Complainants. Not less than ten days prior to the limited hearing, Bar Counsel shall furnish notice to any complainant in any matter that is the subject of the negotiated discipline at the last address on file with Bar Counsel: (i) the petition for negotiated discipline and accompanying affidavit of respondent; (ii) notice of the date, time, and place of the scheduled hearing; and (iii) notice of the complainant's opportunity to be present at the hearing and to submit comments in writing to Bar Counsel to be submitted to the Hearing Committee not less than three days before the hearing.

(h) Ex Parte Contact with Bar Counsel. Prior to the limited hearing on the petition for negotiated discipline, the Hearing Committee or its Chair may review Bar Counsel's investigative file in camera and meet with Bar Counsel ex parte at the Office of the Executive Attorney to discuss the basis for Bar Counsel's recommendation for negotiated discipline.

(i) Bar Counsel shall inform the Hearing Committee Chair of the existence of any written comment(s) received following the filing of the petition for negotiated discipline.

17.5 **Considerations Underlying the Hearing Committee's Recommendation to the Court**

At the limited hearing, respondent shall be placed under oath or affirmation and examined with regard to the petition for negotiated discipline and accompanying affidavit. The Hearing Committee may also hear from and question Bar Counsel.

(a) Recommendation of Approval of the Petition. The Hearing Committee shall recommend to the Court approval of the petition for negotiated discipline if it finds that:

(i) respondent has knowingly and voluntarily acknowledged the truth of the stipulated material facts and misconduct set forth in the petition and agreed to the sanction proposed therein;

(ii) the stipulated facts set forth in the petition or as shown during the limited hearing support the admission of misconduct and the agreed upon sanction; and

(iii) the agreed upon sanction is justified, taking into consideration the record as a whole, including the nature of the misconduct, any charges or investigations that Bar Counsel has agreed not to pursue, any circumstances in aggravation and mitigation, and relevant precedent.

(b) Review of Petition and Affidavit with Respondent. In reviewing the petition and accompanying affidavit with respondent, the Hearing Committee shall address respondent and determine that respondent:

(i) has either conferred with counsel or is aware of his right to do so and is prepared to proceed pro se;

(ii) has carefully reviewed both the petition for negotiated discipline and the accompanying affidavit;

(iii) is aware that there is currently pending an investigation into, or proceeding involving, allegations of misconduct by respondent;

(iv) affirms that the stipulated facts in the petition and accompanying affidavit are true and support the stipulated misconduct and the agreed upon sanction;

(v) believes that he or she could not successfully defend against disciplinary proceedings based on that misconduct;

(vi) has freely and voluntarily entered into the negotiated discipline and is not being subjected to coercion or duress;

(vii) acknowledges that any promises or inducements that have been made by Bar Counsel to respondent are set forth in writing in the petition;

(viii) understands the implications of entering into negotiated discipline including, but not limited to, giving up rights: (a) to a hearing before a Hearing Committee at which respondent may cross-examine adverse witnesses and compel attendance of witnesses favorable to the defense; (b) to require that the charges be proven by a clear and convincing evidence; (c) to seek review of an adverse determination by a Hearing Committee by filing exceptions with the Board to the Hearing Committee's report and recommendations; and (d) to appeal to the Court by filing exceptions to the Board's report and recommendations.

(ix) understands the consequences of the negotiated discipline and the failure to comply with its terms; and

(x) if the negotiated discipline includes a fitness requirement, the Hearing Committee shall determine whether respondent understands: (a) the requirement to petition for reinstatement; (b) that any misconduct that Bar Counsel has agreed not to charge or pursue in the negotiated discipline may be considered in any

reinstatement proceeding as evidence of unadjudicated misconduct under Rule 9.8; and (c) that the requirement to prove fitness may have the effect of extending the period of suspension.

17.6 **Submission of the Recommendation for Approval to the Court**

If the Hearing Committee approves the negotiated discipline by majority vote, it shall submit its written report and recommendation to the Court within fourteen days of receipt of the transcript. The report and recommendation shall make the findings required by Rule 17.5 and shall state the basis for its conclusions. If the Hearing Committee's recommendation relies in whole or in part on confidential material disclosed during the Hearing Committee's in camera review of Bar Counsel's investigative file or ex parte meeting with Bar Counsel pursuant to Section 12.1(c) of Rule XI and Rule 17.4(h), any reference to such confidential material in the Hearing Committee's report shall be included in a confidential supplemental report filed with the Court, captioned "Under Seal" and served only on Bar Counsel.

17.7 **Rejection of the Petition for Negotiated Discipline**

If the decision of the Hearing Committee is to reject the petition for negotiated discipline, it shall issue a written order. The Hearing Committee may include in its order the reason(s) for its rejection of the proposed discipline. The Hearing Committee may not modify the proposed disposition on its own initiative. Bar Counsel and respondent shall have the opportunity to revise and re-submit the petition. The same Hearing Committee, to the extent possible, shall review any revised petition submitted by Bar Counsel and respondent. Any resubmitted petition shall be reviewed using the criteria

set forth in Rule 17.5. There is no review by the Board or the Court of a rejection of a petition for negotiated discipline by a Hearing Committee.

17.8 **Withdrawal from Negotiated Discipline**

Either Bar Counsel or respondent, for any reason or for no reason, may withdraw from a negotiated discipline at any time prior to the conclusion of the limited hearing. After the limited hearing has concluded but prior to the filing of the Hearing Committee's recommendation with the Court, respondent may withdraw from the negotiated discipline for good cause shown.

17.9 **Limitation on Reference to Negotiated Discipline in Contested Disciplinary Proceedings**

Neither a Hearing Committee nor the Board may (a) inquire of Bar Counsel or a respondent who is the subject of a contested disciplinary proceeding under Chapter 7 of these Rules whether the parties considered entering into negotiated discipline; (b) consider, in recommending discipline following formal proceedings under Chapter 7 of these Rules, whether respondent offered or declined to enter into negotiated discipline; or (c) refer to any rejected or withdrawn petition for negotiated discipline, except as permitted by Rule 17.10.

17.10 **Admissions by Respondent in Negotiated Discipline Proceedings**

Admissions made by a respondent in the petition for negotiated discipline, the accompanying affidavit, or the limited hearing may not be used as evidence against respondent in a contested disciplinary proceeding under Chapter 7 of these Rules, except for purposes of impeachment at any subsequent hearing in a contested matter.

17.11 **Recording Hearings**

The limited hearing on a petition for negotiated discipline shall be reported or recorded as provided for in Rules 11.8~~7~~ and 11.9~~8~~. At the outset of the limited hearing, the Chair shall administer the oath or affirmation to the reporter.

17.12 **Recusal of Hearing Committee Member**

A Hearing Committee member shall be recused from participating in any formal disciplinary proceeding under Chapter 7 of these rules regarding a matter in which that member participated with regard to a petition for negotiated discipline.

17.13 **Recusal of Board Member**

A Board member who participated in a negotiated discipline matter as a Hearing Committee member shall be recused from participating in (a) the review of the petition for negotiated discipline, where the Court requests the views of the Board, or (b) any matter which that member reviewed as a Hearing Committee member.

Chapter 18

Procedures with Respect to Probation

18.1 **Probation**

(a) The following rules shall apply to any member of the Bar who is placed on probation in connection with a disciplinary matter. Respondent shall accept the terms of the probation within thirty days of the date of the Court order imposing the probation either by (i) filing a statement with the Board on a form prepared by the Executive Attorney, or (ii) countersigning the Board order implementing the probation. If respondent fails to accept the terms of the probation within the thirty-day period, any underlying suspension or disbarment shall take effect.

(b) Where a term or condition of probation requires the appointment of a practice or financial monitor, the Board shall issue an order appointing the monitor. Practice or financial monitors shall not be deemed to have an attorney-client relationship with respondent and communications between respondent and the monitor shall not be subject to the attorney-client privilege; provided, however, that where the monitor is associated with the D.C. Bar Practice Management Service Committee, any communications with the monitor shall be governed by Rule 1.6(j) of the Rules of Professional Conduct.

(c) Where a term or condition of probation includes counseling, treatment, supervision or monitoring by a medical, mental health, substance abuse, or other qualified professional ("treatment monitor"), including, but not limited to, where probation is imposed based on disability mitigation pursuant to *In re Kersey*, 520 A.2d 321 (D.C. 1987), respondent shall, as a condition of probation, execute an authorization on a form

provided by the Board waiving any physician-patient or similar privilege to the extent necessary to permit the treatment monitor to release information to the Board and/or Bar Counsel and/or to testify at a hearing under Section 18.3 regarding respondent's disability and compliance with the terms and conditions of probation and fitness to practice law. Respondent may not raise a claim of privilege as a basis for an objection to the release of such information or testimony.

(d) Within thirty days of accepting probation under Section 18.1(c), respondent shall:

(i) provide a copy of the authorization required by Section 18.1(c) to any treatment monitor respondent is required to consult as a term or condition of probation,

(ii) advise the treatment monitor that he or she may be requested to consult with Bar Counsel and/or testify at a hearing concerning respondent's compliance with the terms and conditions of probation and fitness to practice law, and

(iii) file a statement with the Board, and shall serve a copy on Bar Counsel, certifying compliance with this subsection.

Failure to comply with these provisions within thirty days of accepting probation shall constitute a violation of the terms and conditions of probation, and, unless an extension of time is obtained from the Board, shall result in the automatic revocation of probation and institution of the underlying sanction.

18.2 **Supervision of Probation**

(a) Supervised Probation

(i) Where counseling, treatment, supervision or monitoring by a practice monitor, financial monitor, or treatment monitor is a condition of probation, the

monitor shall timely file any required reports with the Board, and serve a copy on Bar Counsel. If the monitor fails to file a required report, respondent shall (x) obtain and file the report with the Board, and serve a copy on Bar Counsel, or (y) file a statement explaining why the report was not filed, including respondent's efforts to obtain the report from the monitor.

(ii) Except as otherwise provided by the Court's and Board's probation orders, the monitor's reports shall briefly state (a) whether respondent has complied with the terms and conditions of probation, including, where appropriate, a brief description of the steps respondent has taken or failed to take to comply, (b) whether respondent has cooperated with the monitor, and (c) such other information as the monitor believes may be relevant to a determination of whether the probation should be revoked, extended or modified.

(iii) Where the monitor believes respondent has violated the terms and conditions of probation, the monitor's report shall briefly explain the basis for the monitor's conclusion.

(b) Unsupervised Probation

Where respondent is placed on unsupervised probation in connection with a disciplinary sanction and a monitor is not appointed, Bar Counsel shall monitor respondent's compliance *vel non* with the terms and conditions of probation.

(c) Investigation

(i) Upon receipt of (a) a monitor's report showing that respondent may be in violation of the terms and conditions of probation, or (b) other credible information from any source whatsoever that comes to the attention of Bar Counsel or the Board where the apparent facts, if true, may warrant the revocation, extension or modification

of the terms of probation, Bar Counsel shall promptly investigate the matter to determine whether to institute a probation revocation proceeding.

(ii) Bar Counsel shall have the investigatory powers granted by Section 6 of Rule XI and Chapter 2 of these Rules and conduct its investigations in accordance therewith, except as otherwise provided in this Rule.

18.3 **Probation Revocation Procedures**

(a) Where Bar Counsel has probable cause to believe that respondent has violated the terms or conditions of probation, Bar Counsel may file with the Court a verified motion to show cause why the matter should not be referred to a Hearing Committee for an evidentiary hearing to determine whether respondent has violated the terms or conditions of probation and, if so, whether the probation should be revoked, extended or modified. The motion shall set forth the specific conduct alleged to have violated the probation terms or conditions. A copy of the petition shall be served on respondent in accordance with Rule 7.2.

(b) Bar Counsel may file a motion with the Court to toll the term of the probation pending the resolution of the probation revocation proceeding.

(c) If the Court refers a probation revocation proceeding to a Hearing Committee for an evidentiary hearing, the Executive Attorney shall promptly assign the matter to a Hearing Committee, and the Hearing Committee shall conduct a hearing on an expedited basis.

(d) Except as set forth in this rule, the hearing shall be conducted in accordance with the procedures set forth in Chapter 11 of these Rules. Bar Counsel shall have the burden of establishing a violation(s) of the terms and conditions of probation by a preponderance of the evidence.

(e) The Hearing Committee may direct the filing of briefs and proposed findings of fact and recommendations. Any such submissions shall be filed simultaneously and served not more than ten days following service of the hearing transcript. Any responsive briefs shall be filed simultaneously and not more than seven days following service of the other party's submission. Extensions of time shall be granted only for good cause shown.

(f) The Hearing Committee's report shall be filed with the Board no later than sixty days following the conclusion of the hearing.

(g) Where the Hearing Committee finds a violation of the terms or conditions of probation, it may recommend (i) that no additional sanction be imposed, (ii) revocation of the probation and imposition of any sanction authorized by Section 3(a) of Rule XI, including but not limited to modification of the terms or conditions of the probation, but no greater discipline may be recommended than the underlying sanction imposed in the Court's order of probation, or (iii) such other disposition as the Hearing Committee concludes is consistent with Section 3(a)(7) of Rule XI and will serve the purposes of justice and the disciplinary system. In determining the appropriate sanction, the Hearing Committee may consider the nature or seriousness of the violation, as well as any mitigating or aggravating factors.

(h) Where the Court's order of probation so provides, the Board shall, when a Hearing Committee recommends revocation of probation and imposition of any part of the sanction, issue an order, consistent with the terms of the Court's order of probation, immediately imposing the Hearing Committee recommendation pending the outcome of the revocation proceedings. Respondent may petition the Board for a stay of the Board order pending full review of the Hearing Committee Report by the Board or Court.

18.4 **Appeals**

(a) Respondent and Bar Counsel may file, within seven days of receipt of the Hearing Committee Report, notice of exceptions to the findings and/or recommendation of the Hearing Committee. Within twenty days of receipt of any exception, the Board shall either (i) adopt the Hearing Committee Report and file it with the Court, or (ii) issue an order establishing an expedited briefing schedule for consideration of the Hearing Committee Report. In the absence of timely filed exceptions, the Board shall file the Hearing Committee Report with the Court within twenty days of the filing of the Hearing Committee Report with such recommendations, if any, as it may deem appropriate.

(b) Appeals from a decision of the Board in a revocation proceeding shall be had in the same manner as appeals from Board decisions in contested disciplinary matters pursuant to Section 9(e) of Rule XI.

18.5 **Additional Charges**

The termination, modification or extension of probation for a violation of the Rules of Professional Conduct shall not preclude Bar Counsel from instituting a formal proceeding under Section 8(c) of Rule XI based on the same violation.

Chapter 19~~8~~

Miscellaneous Matters

19~~8~~.1 **Limitations**

Investigations, petitions, and the application of sanctions are not subject to any statute of limitations.

19~~8~~.2 **Filing**

Documents required or permitted to be filed under the Rules Governing the Bar or Board Rules must be received for filing at the Office of the Executive Attorney within the time limits specified by these rules and served upon all parties. If a document does not conform to the rules or is not legible, the Office of the Executive Attorney may refuse to file it.

19~~8~~.3 **Service**

Except as otherwise provided in these rules, service shall be accomplished by the party filing the document in accordance with Rules 5 and 6 of the Civil Rules of the Superior Court of the District of Columbia. Service by mail will be considered complete upon mailing.

Except as otherwise provided in these rules, whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three days shall be added to the prescribed period.

19~~8~~.4 **Computation of Time**

Except as otherwise provided in these rules or in any order of the Court or the Board, in computing any period of time prescribed or allowed by these rules, by order of

the Board, or any applicable Court or Board Rule, or the time for filing an exception with the Board, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or when the act to be done is the filing of a paper with the Office of the Executive Attorney, a day on which weather, emergency, or other conditions have made the Office of the Executive Attorney inaccessible, in which event the period shall run until the end of the next day which is not one of the aforementioned days. When the period prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this Rule, “legal holiday” includes New Year’s Day, Birthday of Martin Luther King, Jr., Presidents’ Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or Congress of the United States, or by the District of Columbia.

1~~8~~9.5 **Representation of Respondent by Counsel**

Respondents may be represented by counsel at all stages in Board proceedings. Counsel shall file with the Office of the Executive Attorney a written notice of such appearance, which shall state counsel's name, address and telephone number, the name and address of respondent on whose behalf counsel appears, and the caption and docket number of the subject proceeding. Any notice or other written communication required to be served on or furnished to respondent may be sent to the counsel of record for respondent at the stated address of the counsel in lieu of transmission to respondent. If respondent is represented by more than one counsel, notice to one shall be sufficient. Counsel may be appointed for respondent by the Chair

of the Board upon motion by respondent accompanied by an affidavit of indigency executed by respondent.

19~~8~~.6 **Restrictions on Employment of Certain Attorneys as Counsel**

Members of the Board, its professional staff, and members of Hearing Committees shall not represent respondents, complainants, or witnesses in disciplinary proceedings during their tenure and for one year thereafter. In addition, participation as counsel for respondents by such individuals shall be governed by the provisions of Rule 1.11 of the Rules of Professional Conduct pertaining to public officers or employees.

19~~8~~.7 **Representation of Complainant**

Complainants' counsel may be present with the complainant at a hearing or other proceeding but shall not participate.

19~~8~~.8 **Format of Submissions to Board, Committees and Bar Counsel**

(a) Typewritten. Documents filed in formal proceedings, other than correspondence, if not printed, shall be typewritten on paper cut or folded to letter size, 8 to 8-1/2 inches wide by 11 inches long, with left-handed margin not less than 1-1/2 inches wide and other margins not less than 1 inch. The impression shall be on only one side of the paper and shall be double-spaced, except that quotations in excess of a few lines may be single-spaced and indented. Reproduced copies shall be accepted as typewritten, provided all copies are legible.

(b) Printed Material. Printed documents shall not be less than 12-point type on unglazed paper cut or folded so as not to exceed 8-1/2 inches wide by 11 inches long, with inside margin not less than 1 inch wide, and with double-spaced text and

single-spaced, indented quotations. Documents, other than correspondence, shall be bound by staples or otherwise appropriately assembled.

(c) Length of Briefs. Except by special order of the Chair of the Hearing Committee or the Chair of the Board, the brief for Bar Counsel or respondent shall not exceed 50 pages in length. A reply brief, if any, shall not exceed 20 pages.

(d) Documentary Evidence. All copies of documentary evidence filed with the Office of the Executive Attorney pursuant to Rule 7.17 shall be on paper cut or folded to letter size, 8 to 8-1/2 inches wide by 11 inches long. Reproduced copies shall be legible. All original documents and copies shall be filed with an index and the copies shall be tabbed.

(e) Execution. Except as may be otherwise ordered or requested by the Chair of the Hearing Committee concerned or the Board, all original pleadings shall be signed in ink by the party in interest, or by counsel, and shall show the office address and telephone number of such party or counsel. All other copies filed shall be fully conformed.

Petitions and other pleadings need not be under oath except as provided in D.C. Code Section 11-2503(b). However, the signature of the person subscribing any such document filed in a proceeding constitutes a certificate by the subscriber that the individual has read the document being subscribed and filed and knows the contents thereof; that if executed in any representative capacity, the document has been subscribed and executed in the capacity specified upon the document with full power and authority to do so; that the contents are true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things, the subscribers believes them to be true.

1~~8~~9.9 **Respondent's Violation of Court Order**

If at any time Bar Counsel has reason to believe that a respondent has violated an order of the District of Columbia Court of Appeals in a disciplinary matter, including an order of suspension or disbarment, Bar Counsel may file with the Court a motion for an order to show cause why the respondent should not be held in contempt of court.

1~~8~~9.10 **Confidentiality — Cooperation with Law Enforcement and Other Disciplinary Authorities**

Notwithstanding any other provision of Section 17 of Rule XI regarding confidentiality, Bar 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.

(a) The Board, acting through its Chair or a designated Board member may grant Bar Counsel's request upon good cause shown.

(b) The Board may grant the request subject to any limitations or conditions the Board may impose, including appropriate protections of confidentiality.

(c) Communication under this provision may be made either during the course of Bar Counsel's investigation or following such investigation.

(d) The Chair or the designated Board member shall have the discretion to solicit a response to Bar Counsel's request from respondent.