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Report to the Board of Governors of the District of Columbia Bar on Changes in the Disciplinary System

Executive Summary

Recommendations

- Authorize the Office of Bar Counsel (“OBC”) to enter into a consent to discipline agreement in any matter in which OBC and a Respondent agree as to facts, violations and the appropriate discipline in matters that do not present an issue of first impression. The consent to discipline agreement would not represent a plea bargain. The consent to discipline agreement would be presented to a Board on Professional Responsibility (“BPR”) Contact Member and then to a BPR Hearing Committee at which Respondent and OBC would be present. The Complainant would have the opportunity to attend the hearing. Final approval of the consent to discipline agreement would be by the BPR, except in cases where the sanction is disbarment or a suspension with proof of fitness in which case the final approval remains with the District of Columbia Court of Appeals (“Court”).
- Reciprocal discipline cases should be disposed of by a Show Cause process issued by the Court rather than by referral to the BPR.
- Permit the Court to suspend a Respondent for failure to answer a pre-petition order of the BPR about an OBC investigation of alleged serious misconduct. The suspension would be vacated automatically upon the Respondent fulfilling his/her obligation pursuant to the BPR order.
- Permit a finding of violation to be made by a default judgment if a Respondent fails to answer an OBC Petition after notice, provided that OBC presents properly sworn testimony or evidence in support of the allegations of misconduct charged in the petition. The order of default would be set aside on a motion filed by the Respondent which sets forth good cause within 90 days of the Report and Recommendation by the Hearing Committee.
- Eliminate the role of the Hearing Committee and the BPR in uncontested reinstatement cases which would be considered directly by the Court. Contested reinstatement cases would still be heard by a Hearing Committee but then submitted directly to the Court for decision. The BPR is eliminated from the process.
- Empower the BPR to impose final discipline in disciplinary cases that do not involve disbarment or suspensions requiring a Respondent to demonstrate proof of fitness to practice law before reinstatement. All final discipline imposed by the BPR would be subject to discretionary review by the Court.
- Change the investigative confidentiality rules to permit OBC, with the permission of the Chairperson of the BPR, to cooperate with other disciplinary agencies, law enforcement officials, and other attorney disciplinary bodies and related organizations.
- Provide immunity for practice monitors except in cases in which the monitor engages in intentional misconduct or criminal activity.
- Broaden the category of cases eligible for diversion.

Proposed Changes in the Disciplinary System of the District of Columbia: Final Report and Recommendations

This is a 172–page, 1.81 MB PDF file that includes the recommendations on changes to the lawyer disciplinary system to the District of Columbia Court of Appeals for the court’s consideration. It is not intended to be read online, but downloaded and saved to your computer.

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Rule XI. Disciplinary Proceedings

Section 1. Jurisdiction

(a) *Persons subject to disciplinary jurisdiction.* All members of the District of Columbia Bar, all persons appearing or participating pro hac vice in any proceeding in accordance with Rule 49(c)(1) of the General Rules of this Court, all persons licensed by this Court Special Legal Consultants under Rule 46(c)(4), all new and visiting clinical professors providing services pursuant to Rule 48(c)(4), and all persons who have been suspended or disbarred by this Court are subject to the disciplinary jurisdiction of this Court and its Board on Professional Responsibility (hereinafter referred to as "the Board").

(b) *Jurisdiction of other courts and voluntary bar associations.* Nothing in this rule shall be construed to deny to any court in the District of Columbia such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt or to prohibit a voluntary bar association from censuring, suspending, or expelling its members.

(c) *No statute of limitations.* Disciplinary proceedings against an attorney shall not be subject to any period of limitation.

Section 2. Grounds for Discipline

(a) *Duty of attorneys.* The license to practice law in the District of Columbia is a continuing proclamation by this Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and an officer of the Court. It is the duty of every recipient of that privilege at all times and in all conduct, both professional and personal, to conform to the standards imposed upon members of the Bar as conditions for the privilege to practice law.

(b) *Misconduct.* Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's oath of office or the rules or code of professional conduct currently in effect in the District of Columbia shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. Any of the following shall also be grounds for discipline:

- (1) Conviction of a crime (see section 10);
- (2) Discipline imposed in another jurisdiction (see section 11);
- (3) Failure to comply with any order of the Court or the Board issued pursuant to this rule; or
- (4) Failure to respond to a written inquiry from the Court or the Board in the course of a disciplinary proceeding without asserting, in writing, the grounds for refusing to do so.

(c) *Review of board orders and inquiries.* If an attorney objects in writing to an order or written inquiry of the Board, the objection shall be noted, but review of the order or inquiry by the Court shall not be available (except as provided in section 18 (c) with respect to subpoenas) until all proceedings before the Board have been concluded. If the Board imposes or recommends the imposition of a disciplinary sanction, the attorney may then seek review of the previously challenged order or inquiry by filing an appropriate motion or pleading with the Court. If the order or inquiry is reversed, vacated, or set aside by the Court, a previous failure to comply with the order or to respond to the inquiry shall not be a ground for discipline. If the order or inquiry is modified by the Court, failure to comply with the order or to respond to the inquiry may be a ground for discipline only to the extent that the order or inquiry is not modified.

Section 3. Disciplinary sanctions.

(a) *Types of discipline.* Any of the following sanctions may be imposed on an attorney for a disciplinary violation:

- (1) Disbarment;
- (2) Suspension for an appropriate fixed period of time not to exceed three years. Any order of suspension may include a requirement that the attorney furnish proof of rehabilitation as a condition of reinstatement. In the absence of such a requirement, the attorney may resume practice at the end of the period of suspension;
- (3) Censure;
- (4) Reprimand;
- (5) Informal admonition;
- (6) Revocation or suspension of a license to practice as a Special Legal Consultant; or
- (7) Probation for not more than three years. Probation may be imposed in lieu of or in addition to any other disciplinary sanction. Any conditions of probation shall be stated in writing in the order imposing probation. The order shall also state whether, and to what extent, the attorney shall be required to notify clients of the probation. The Board by rule shall establish procedures for the supervision of probation. Violation of any condition of probation shall make the attorney subject to revocation of probation and the imposition of any other disciplinary sanction listed in this subsection, but only to the extent stated in the order imposing probation.

(b) *Conditions imposed with discipline.* When imposing discipline, the Court or the Board may require an attorney to make restitution either to persons financially injured by the attorney's conduct or to the Clients' Security Trust Fund (see Rule XII), or both, as a condition of probation or of reinstatement. The Court or the Board may also impose any other reasonable condition, including a requirement that the attorney take and pass a professional responsibility examination as a condition of probation or of reinstatement.

(c) *Temporary suspension or probation.*

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

Any order of temporary suspension or probation which restricts the attorney's maintenance or use of a trust account shall, when served on any bank maintaining an account against which the attorney may make withdrawals, serve as an injunction barring the bank from making further payment from the account on any obligation except in accordance with restrictions imposed by the Court. An order of temporary suspension issued under this subsection shall preclude the attorney from accepting any new cases or other legal matters, but shall not preclude the attorney from continuing to represent existing clients during the thirty-day period after issuance of the order; however, any fees tendered to the attorney during that thirty-day period or at any time thereafter while the temporary suspension is in effect shall be deposited in a trust account, from which withdrawals may be made only as directed by the Court. The order of temporary suspension or probation for failure to respond to a Board order shall not disclose information about the substance of the complaint against the attorney.

(2) Where issues of fact appear to be presented by a petition of the Board under this section, or by any response of the attorney thereto, the Court may appoint a special master to preside at a hearing at which evidence will be presented concerning the petition. The master shall prepare a report summarizing the evidence presented and make recommended findings of fact which,

together with the record, shall be filed with the Court within fifteen days of the Court's order of appointment.

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

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

Section 4. The Board on Professional Responsibility

(a) *Composition of the Board.* The Court shall appoint a board to be known as the Board on Professional Responsibility, which shall consist of seven members of the Bar and two persons who are not lawyers.

(b) *Appointment of Board members.* The lawyer members of the Board shall be appointed by the Court from a list submitted by the Board of Governors containing the names of not fewer than three active members of the Bar for each vacancy to be filled. The non-lawyer members shall be chosen by the Court. In appointing non-lawyer members, the Court shall consider, but not be limited to, any nominees whose names may be submitted to the Court in writing by the Board of Governors or by any other organization or individual. The Court shall designate one of the lawyer members as Chairperson of the Board and another as Vice Chairperson, who shall act in the absence or disability of the Chairperson.

(c) *Terms of Board members.* The term of each Board member shall be three years. Upon completion of a member's term, that member shall continue to serve until a successor is appointed. No member shall serve more than two consecutive terms, except that a member appointed to fill an unexpired term of two years or less shall be eligible to serve two additional three-year terms.

(d) *Action by the Board.* Six members of the Board shall constitute a quorum for deciding cases, and five members shall constitute a quorum for administrative matters. In deciding cases in which the Board's action is final, the Board shall act only with the concurrence of a majority of its entire membership. In deciding cases involving a recommendation to the Court, the Board shall act only with the concurrence of a majority of its members present and voting. In all other matters the Board shall act only with the concurrence of a majority of its members present and voting, except that the Board may delegate its authority to act in such matters to a single member of the Board.

(e) *Powers and duties of the Board.* The Board shall have the power and duty:

(1) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effect the purposes of this rule.

(2) To appoint Disciplinary Counsel, Special Disciplinary Counsel, and such assistant disciplinary counsel and staff as may be required to perform the duties and functions of that office (see section 6), and to fix their compensation. Disciplinary Counsel shall serve at the

pleasure of the Board, subject to the Court's oversight authority over all disciplinary matters. Any Special Disciplinary Counsel and all assistant disciplinary counsel shall serve at the pleasure of the Board. As used hereafter in this rule, the term "Disciplinary Counsel" shall refer collectively to Disciplinary Counsel, any Special Disciplinary Counsel, and all assistant disciplinary counsel unless the context requires otherwise.

(3) To appoint an Executive Attorney, who shall serve at the pleasure of the Board, and such staff as may be required to perform the duties and functions of that office (see section 7), and to fix their compensation.

(4) To appoint two or more Hearing Committees, each consisting of two members of the Bar and one person who is not a lawyer, and such alternate Hearing Committee members as may be required, who shall conduct hearings under this rule and such other hearings as the Court or the Board may direct, and shall submit their findings and recommendations, together with the record, to the Board or, if required under this rule, to the Court.

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

(6) To assign, through the Executive Attorney, formal charges and a petition for negotiated disposition to a Hearing Committee, and to refer a petition for reinstatement to Disciplinary Counsel to determine whether Disciplinary Counsel opposes reinstatement and, if so, to assign, through the Executive Attorney, the petition for reinstatement to a Hearing Committee.

(7) To review the findings and recommendations of Hearing Committees submitted to the Board, and to prepare and forward its own findings and recommendations, together with the record of proceedings before the Hearing Committee and the Board, to the Court.

(8) To reprimand attorneys subject to the disciplinary jurisdiction of the Court and the Board.

(9) To prepare the Board's proposed budget for submission to the Board of Governors.

(10) To adopt rules, procedures, and policies not inconsistent with this rule or any other rules of this Court

(f) *Review of the Board's proposed budget.* The Board of Governors may adopt or reject a proposed budget of the Board on Professional Responsibility, but in the event of a dispute between the Board of Governors and the Board on Professional Responsibility as to the amount of the latter's proposed budget, or any of its budget items, the Court shall resolve such dispute upon application by either Board.

(g) *Providing information to the Court.* Upon request from the Court, in the exercise of its duty to oversee the disciplinary system, the Board shall provide to the Court for its review the file in any case or cases, including those which have been concluded by dismissal, informal admonition, or reprimand.

(h) *Consultation with the Bar.* The Board shall, to the extent it deems feasible, consult with officers of the Bar and of voluntary bar associations in the District of Columbia concerning any appointments which it is authorized to make.

Section 5. Hearing Committees

(a) *Composition and term.* Each Hearing Committee appointed by the Board shall consist of two members of the Bar and one person who is not a lawyer. The Board shall designate one of the lawyer members of each Hearing Committee as Chairperson of the Committee. The term of each Hearing Committee member shall be three years. Upon completion of a member's term, that member shall continue to serve until a successor is appointed. No person shall serve more than two consecutive terms as a Hearing Committee member, but a person who has served two consecutive terms may be reappointed after the expiration of one year.

(b) *Quorum and Acting Chairperson.* Two members of a Hearing Committee shall constitute a quorum for the conduct of hearings. If a member cannot be present for a hearing, alternate Hearing Committee members previously selected by the Board may serve upon designation by

the Executive Attorney. If the absent member is the Chairperson of the Hearing Committee, the other attorney member shall serve as Acting Chairperson. Each Hearing Committee shall act only with the concurrence of a majority of its members.

(c) Powers and duties of Hearing Committees. Hearing Committees shall have the power and duty:

- (1) Upon assignment by the Executive Attorney, to conduct hearings on formal charges of misconduct, a proposed negotiated disposition, or a contested petition for reinstatement and on such other matters as the Court or Board may direct.
- (2) To submit their findings and recommendations on formal charges of misconduct to the Board, together with the record of the hearing.
- (3) To submit their findings and recommendations to approve a negotiated disposition and their findings and recommendations in a contested reinstatement to the Court, together with the record of the hearing.

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

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

Section 6. Disciplinary Counsel

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

- (1) To employ and supervise such staff as may be necessary for the performance of Disciplinary Counsel's duties, subject to budget limitations established by the Board.
- (2) To investigate all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of this Court which may come to the attention of Disciplinary Counsel or the Board from any source whatsoever, where the apparent facts, if true, may warrant discipline. Except in matters requiring dismissal because the complaint is clearly unfounded on its face or falls outside the disciplinary jurisdiction of the Court, no disposition shall be recommended or undertaken by Disciplinary Counsel until the accused attorney shall have been afforded an opportunity to respond to the allegations.
- (3) Upon prior approval of a Contact Member, to dispose of all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of the Court, by dismissal or informal admonition or by referral of charges; or upon prior approval of a member of the Board on Professional Responsibility, by diversion; or by negotiated disposition.
- (4) To prosecute all disciplinary proceedings before Hearing Committees, the Board, and the Court. When appearing before the Court, Disciplinary Counsel may, after notice to the Board, argue for a disposition other than that contained in the report and recommendation of the Board.
- (5) To appear at hearings on petitions for reinstatement of suspended or disbarred attorneys, to examine witnesses testifying in support of such petitions, and to present available evidence, if any, in opposition thereto.
- (6) To maintain permanent records of all matters processed and the disposition thereof, except that files of cases which have been dismissed may be destroyed after ten years.
- (7) To file with the Court and the Board certificates of convictions of attorneys convicted of crimes, and certified copies of disciplinary orders concerning attorneys issued in other jurisdictions.

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

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

Section 7. The Executive Attorney

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

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

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

(3) To assign formal charges, a petition for negotiated disposition, and a contested petition for reinstatement to a Hearing Committee.

(4) To maintain records of proceedings before Hearing Committees, the Board, and the Court.

(5) To forward to the Court the findings and recommendations of the Board on formal charges of misconduct together with the record of proceedings before the Hearing Committee and the Board.

(6) To forward to the Court the Hearing Committee's recommendation to approve a negotiated disposition and its recommendation in a contested reinstatement, together with the record of proceedings before the Hearing Committee.

(7) To assist the Board in the performance of its duties as the Board from time to time may direct.

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

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

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

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

(b) *Review by the Board.* Because the Executive Attorney is exercising the delegated authority of the Board, any decision or action by the Executive Attorney shall be subject to review by the Board in its discretion.

(c) *Prohibition of private practice.* The Executive Attorney shall not engage in the private practice of law, except that the Board may authorize a reasonable period of transition after appointment.

Section 8. Investigations and Hearings

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

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

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

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

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

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

(f) *Failure to answer and default.* Notwithstanding any action taken pursuant to section 3 (c), if the attorney fails to answer a petition as provided by section 8 (e) of this rule, Disciplinary Counsel may file a motion for default with the Hearing Committee to which the matter has been assigned; the motion must be supported by sworn proof of the charges in the specification and by proof of actual notice of the petition or proper publication as approved by the Court. The Hearing Committee Chairperson may enter an order of default and the petition shall be deemed admitted subject to ex parte proof by Disciplinary Counsel sufficient to prove the allegations, by clear and convincing evidence, based upon documentary evidence, sworn affidavits, and/or testimony. Disciplinary Counsel shall notify the attorney of the entry of a default order. An order of default is limited to the allegations set forth in Disciplinary Counsel's petition and shall be included in the Hearing Committee's report and recommendation filed with the Board. The Hearing Committee shall issue its report and recommendation based upon the documentary evidence, sworn affidavits, or testimony presented by Disciplinary Counsel, and the report shall set forth proposed findings of fact and conclusions of law.

An order of default shall be vacated if, within thirty days of issuance of the Hearing Committee's report, the attorney files a motion with the Hearing Committee showing good cause why the order should be set aside. Thereafter, the Board may vacate the order only upon a showing that failure to do so would result in a manifest injustice.

(g) *Discovery.* The attorney shall have the right to reasonable discovery in accordance with rules promulgated by the Board. Rulings with respect to such discovery proceedings shall be made by the Chairperson of the Hearing Committee to which the matter has been assigned for hearing or by the Chairperson of the Board. Objections to such rulings shall be preserved and may be raised upon appeal to the Board from the final action of the Hearing Committee. No interlocutory appeals shall be permitted.

(h) *Prehearing conference.* In the discretion of the Hearing Committee Chairperson, a prehearing conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. The conference may be held before the Hearing Committee Chairperson or any member of the Committee designated by its Chairperson.

(i) *Conduct of hearings.* A Hearing Committee shall conduct its hearings in accordance with rules promulgated by the Board.

Section 8.1. Diversion

(a) *Availability of diversion.* Subject to the limitations herein, diversion may be offered by

Disciplinary Counsel to an attorney under investigation for a disciplinary violation.

(b) *Limitations on diversion.* Diversion shall be available in cases of alleged minor misconduct, but shall not be available where:

(1) the alleged misconduct resulted in prejudice to a client or another person;

(2) discipline previously has been imposed or diversion previously has been offered and accepted, unless Disciplinary Counsel finds the presence of exceptional circumstances justifying a waiver of this limitation;

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

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

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

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

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

Section 9. Post-hearing Proceedings

(a) *Hearing Committee report.* Within 120 days after the conclusion of its hearing, the Hearing Committee shall in every case submit to the Board a report containing its findings and recommendation, together with a record of its proceedings and the briefs of the parties, if any were submitted. The record shall include a transcript of the hearing.

(b) *Proceedings before the Board.* Exceptions to the report of a Hearing Committee may be filed in accordance with rules promulgated by the Board. If no exceptions are filed, the Board shall decide the matter on the basis of the Hearing Committee record. If exceptions are filed, the Executive Attorney shall schedule the matter for submission of briefs and oral argument to the Board.

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

(d) *Report of the Board.* Unless the Board dismisses the petition or remands the case, or

unless the matter is concluded by a reprimand or a direction for an informal admonition, the Board shall promptly prepare a report containing its findings and recommendation. The Executive Attorney shall submit the report of the Board, together with the entire record, to the Court and shall serve a copy thereof on the attorney.

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

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

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

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

(2) If the attorney does not make the showing required by subsection (g)(1) of this section, or if the attorney has not responded to the show cause order in the time required, the Court shall impose interim discipline as follows pending final action on the Board's recommendation:

(a) If the Board has recommended disbarment or suspension requiring proof of fitness to practice law as a condition of reinstatement, the Court shall enter an order suspending the attorney from the practice of law in the District of Columbia. (b) If the Board has recommended suspension of one year or more without requiring proof of fitness as a condition of reinstatement, the Court shall enter an order imposing the discipline recommended by the Board.

(3) Any suspension imposed under this subsection will not limit the authority of the Court to impose greater or lesser discipline than that recommended by the Board.

(4) Suspension under this subsection shall take effect as provided in subsection 14 (f), and an attorney suspended under this subsection shall comply with the requirements of section 14 of this rule.

(h) *Proceedings before the Court.*

(1) Upon the filing of exceptions under subsection (e) or subsection (f) of this section, and in all cases arising under section 8 in which the Board's recommended sanction includes a requirement that the attorney make a showing of fitness before reinstatement, the Court shall schedule the matter for consideration in accordance with applicable court procedures. If the matter has come before the Court under subsection (f) of this section, the Court may order the Board to file a report setting forth its findings of fact and the reasons for its decision. Upon conclusion of the proceedings, or upon consideration of the report if no exceptions are filed, the Court shall enter an appropriate order as soon as the business of the Court permits. In determining the appropriate order, the Court shall accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record, and shall adopt the

recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted.

Unpublished opinions in disciplinary cases decided on or after April 1, 1991, shall not be deemed binding precedent by the Court except as to appropriateness of sanctions.

(2) Other than as provided in subsection (g) of this section, if no exceptions are filed to the Board's report, the Court will enter an order imposing the discipline recommended by the Board upon the expiration of the time permitted for filing exceptions.

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

(j) *Court review of final actions by the Board.* In any disciplinary proceeding in which a dismissal, an informal admonition, or a reprimand is contemplated or effected, the Court shall have the right to review the matter on its own motion and to enter an appropriate order, including an order directing further proceedings.

Section 10. Disciplinary Proceedings Based Upon Conviction of Crime

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

(b) *Serious crimes.* The term "serious crime" shall include (1) any felony, and (2) any other crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

(c) *Action by the Court—Serious crimes.* Upon the filing with this Court of a certified copy of the record or docket entry demonstrating that an attorney has been found guilty of a serious crime or has pleaded guilty or *nolo contendere* to a charge of serious crime, the Court shall enter an order immediately suspending the attorney, notwithstanding the pendency of an appeal, if any, pending final disposition of a disciplinary proceeding to be commenced promptly by the Board. Upon good cause shown, the Court may set aside such order of suspension when it appears in the interest of justice to do so.

(d) *Action by the Board—Serious crimes.* Upon receipt of a certified copy of a court record demonstrating that an attorney has been found guilty of a serious crime or has pleaded guilty or *nolo contendere* to a charge of serious crime, or any crime that appears to be a serious crime as defined in subsection (b) of this section, Disciplinary Counsel shall initiate a formal proceeding in which the sole issue to be determined shall be the nature of the final discipline to be imposed. However, if the Court determines under subsection (c) of this section that the crime is not a serious crime, the proceeding shall go forward on any charges under the Rules of Professional Conduct that Disciplinary Counsel may institute. A disciplinary proceeding under

this subsection may proceed through the Hearing Committee to the Board, and the Board may hold such hearings and receive such briefs and other documents as it deems appropriate, but the proceeding shall not be concluded until all direct appeals from conviction of the crime have been completed.

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

(f) *Proof of criminal convictions.* A certified copy of the court record or docket entry of a finding that an attorney is guilty of any crime, or of a plea of guilty or *nolo contendere* by an attorney to a charge of any crime, shall be conclusive evidence of the commission of that crime in any disciplinary proceeding based thereon.

(g) *Reinstatement.* An attorney suspended under subsection (c) of this section may file with the Court and the Board, at any time, a certificate demonstrating that the underlying finding or plea or the judgment of conviction based thereon has been reversed, vacated, or set aside. Upon the filing of the certificate, the Court shall promptly enter an order reinstating the attorney, but the reinstatement shall not terminate any formal disciplinary proceeding then pending against the attorney, the disposition of which shall be determined by the Board on the basis of all available evidence.

Section 11. Reciprocal Discipline

(a) *Definition.* As used in this section,

(1) "state" shall mean any state, territory, or possession of the United States.

(2) "disciplining court" shall mean (a) any court of the United States as defined in Title 28, Section 451 of the United States Code; (b) the highest court of any state; and (c) any other agency, commission, or tribunal, however denominated, that is authorized to impose discipline effective throughout a state.

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

(c) *Standards for reciprocal discipline.* Reciprocal discipline may be imposed whenever an attorney has been disbarred, suspended, or placed on probation by another disciplining court. It shall not be imposed for sanctions by a disciplining court such as public censure or reprimand that do not include suspension or probation. For sanctions by another disciplining court that do not include suspension or probation, the Court shall order publication of the fact of that discipline by appropriate means in this jurisdiction. Reciprocal discipline shall be imposed unless the attorney demonstrates to the Court, by clear and convincing evidence, that:

(1) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistently with its duty, accept as final the conclusion on that subject; or

(3) The imposition of the same discipline by the Court would result in grave injustice; or

(4) The misconduct established warrants substantially different discipline in the District of Columbia; or

(5) The misconduct elsewhere does not constitute misconduct in the District of Columbia.

Unless there is a finding by the Court under (1), (2), or (5) of this subsection, a final

determination by another disciplining court that an attorney has been guilty of professional misconduct shall conclusively establish the misconduct for the purpose of a reciprocal disciplinary proceeding in this Court.

(d) Temporary suspension and show cause order.

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

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

(e) Action by the Court.

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

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

(f) Effect of stay of discipline by disciplining court. If the discipline imposed by another disciplining court is stayed, any reciprocal discipline imposed by this Court shall be deferred until the stay expires.

Section 12. Disbarment by Consent

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

- (1) That the consent is freely and voluntarily rendered, that the attorney is not being subjected to coercion or duress, and that the attorney is fully aware of the implication of consenting to disbarment;
- (2) That the attorney 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;
- (3) That the attorney acknowledges that the material facts upon which the allegations of

misconduct are predicated are true; and

(4) That the attorney submits the consent because the attorney knows that if disciplinary proceedings based on the alleged misconduct were brought, the attorney could not successfully defend against them.

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

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

Section 12.1. Negotiated discipline other than disbarment by consent.

(a) Availability of negotiated discipline.

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

(b) *Documentation of a negotiated disposition.*

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

- (i) A statement of the nature of the matter that was brought to Disciplinary Counsel's attention;
- (ii) A stipulation of facts and charges, including citation to the Rules of Professional Conduct that the attorney has violated;
- (iii) A statement of any promises that have been made by Disciplinary Counsel to the attorney; and
- (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.

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

- (i) The disposition is freely and voluntarily entered into, the attorney is not being subjected to coercion or duress and is fully aware of the implications of the disposition, and Disciplinary Counsel has made no promises to the attorney other than what is contained in the petition for negotiated disposition;
- (ii) The attorney is aware that there is currently pending an investigation into, or a proceeding involving, allegations of misconduct;
- (iii) The attorney acknowledges the truth of the material facts upon which the misconduct described in the accompanying petition for negotiated disposition is predicated; and
- (iv) The attorney agrees to the disposition because the attorney believes that he or she could not successfully defend against disciplinary proceedings based on that misconduct. The affidavit may recite any other facts the attorney chooses to present in mitigation that support the agreed upon sanction.

(c) *Hearing Committee review.*

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

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

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

- (1) The attorney has knowingly and voluntarily acknowledged the facts and misconduct reflected in the petition and agreed to the sanction set forth therein;
- (2) The facts set forth in the petition or as shown at the hearing support the admission of misconduct and the agreed upon sanction; and
- (3) The sanction agreed upon is justified. If the Hearing Committee rejects a petition for negotiated disposition, it may not modify the proposed disposition on its own initiative, but instead shall afford Disciplinary Counsel and the attorney an opportunity to revise the petition, and shall review any revised petition they submit.

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

Upon receipt from a Hearing Committee of a recommendation to approve a negotiated disposition, the Court shall review the recommendation in accordance with its procedures for the imposition of uncontested discipline. The Court in exceptional cases may request the views of the Board concerning the appropriateness of a negotiated disposition. If the Court accepts the recommendation, it shall impose the recommended discipline in a *per curiam* opinion briefly describing the misconduct, the specific Rule(s) of Professional Conduct violated, and the sanction imposed. Unless the opinion provides otherwise, an opinion imposing negotiated discipline may not be cited as precedent in contested disciplinary proceedings except as provided in the second sentence of D.C. App. R. 28 (g).

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

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

Section 13. Incompetent and Incapacitated Attorneys

(a) *Mentally disabled attorneys.* When an attorney has been judicially declared to be mentally incompetent or has been involuntarily committed to a mental hospital as an inpatient, the Court, upon proper proof of that fact, shall enter an order suspending that attorney from the practice of law for an indefinite period until further order of the Court. The suspension shall be effective immediately. A copy of the order shall be served upon the attorney, the attorney's guardian, and the director of the mental hospital, if any, in such manner as the Court may direct. If at any time thereafter the attorney is judicially declared to be competent or discharged from inpatient status in the mental hospital, the Court may dispense with further evidence that the disability has ended and may direct the attorney's reinstatement to the practice of law upon such terms as it

deems appropriate.

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

(c) *Attorneys who may be incapacitated.* If the Board has reason to believe that an attorney is incapacitated from continuing to practice law because of mental infirmity or illness or because of addiction to drugs or intoxicants, the Board may petition the Court to determine whether the attorney is so incapacitated. Upon the filing of the Board's petition, the Court may take or direct such action as it deems appropriate, including the examination of the attorney by such qualified medical expert or experts as it shall designate. If the Court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order suspending the attorney on the ground of such disability for an indefinite period, effective immediately and until further order of the Court, and any pending disciplinary proceeding against the attorney shall be held in abeyance. In a case of addiction to drugs or intoxicants, the Court alternatively may consider the possibility of probationary conditions. The Court may provide for such notice to the attorney of proceedings in the matter as it deems appropriate and may appoint counsel to represent the attorney if it determines that the attorney is without adequate representation.

(d) *Burden of proof.* In a proceeding under this section seeking an order of suspension, the burden of proof shall be upon the Board. In a proceeding under this section seeking an order terminating a suspension, the burden of proof shall be upon the suspended attorney.

(e) *Claim of disability by attorney.* If, in the course of a disciplinary proceeding, the attorney claims to be suffering from a disability because of mental or physical illness or infirmity, or because of addiction to drugs or intoxicants, which makes it impossible for the attorney to present an adequate defense, the Court shall enter an order immediately suspending the attorney from the practice of law until a determination is made of the attorney's capacity to practice law in a proceeding under subsection (c) of this section.

(f) *Action by the Court when attorney is not incapacitated.* If, in the course of a proceeding under this section or a disciplinary proceeding, the Court determines that the attorney is not incapacitated from practicing law, it shall take such action as it deems appropriate, including the entry of an order directing the resumption of the disciplinary proceeding against the attorney.

(g) *Reinstatement of incapacitated attorney.* An attorney suspended under this section may apply for reinstatement once a year, or at such shorter intervals as the Court may direct in its order of suspension or any modification thereof. Upon the filing of such application, the Court may take or direct such action as it deems appropriate, including the examination of the attorney by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the attorney, and that evidence be presented establishing proof of the attorney's competence and learning in the law, which may include certification by the bar examiners of the attorney's successful completion of an examination for admission to practice. An application for reinstatement under this subsection shall be granted by the Court upon a showing by the attorney, by clear and convincing evidence, that the disability has ended and that the attorney is fit to resume the practice of law.

(h) *Waiver of doctor-patient privilege.* The filing of an application for reinstatement under subsection (g) of this section shall constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of disability. The attorney shall disclose the name and address of every physician by whom, and every hospital in which, the attorney has been examined or treated since the suspension and shall furnish to the Court

written consent to each to divulge such information and records as may be required by Court-appointed medical experts.

Section 14. Disbarred and Suspended Attorneys

(a) *Notice to clients in non-litigated matters.* An attorney ordered to be disbarred or suspended shall promptly notify by registered or certified mail, return receipt requested, all clients on retainer and all clients being represented in pending matters other than litigated or administrative matters or proceedings pending in any court or agency, of the order of disbarment or suspension and of the attorney's consequent inability to act as an attorney after the effective date of the order, and shall advise such clients to seek legal advice elsewhere.

(b) *Notice to clients in litigated matters.* An attorney ordered to be disbarred or suspended shall promptly notify, by registered or certified mail, return receipt requested, all clients involved in litigated matters or administrative proceedings in any court of the District of Columbia, or in pending matters before any District of Columbia government agency, of the order of disbarment or suspension and of the attorney's consequent inability to act as an attorney after the effective date of the order. The notice shall advise the prompt substitution of another attorney or attorneys. If the client fails to obtain substitute counsel before the effective date of the order, the disbarred or suspended attorney shall move pro se in the court or agency in which the proceeding is pending for leave to withdraw.

(c) *Notice to adverse parties.* An attorney ordered to be disbarred or suspended shall promptly notify, by registered or certified mail, return receipt requested, the attorney or attorneys for every adverse party in litigated matters or administrative proceedings in any court of the District of Columbia, or in pending matters in any District of Columbia administrative agency, of the order of disbarment or suspension and of the attorney's consequent inability to act as an attorney after the effective date of the order. The notice shall state the mailing address of each client of the disbarred or suspended attorney who is a party in the pending matter or proceeding.

(d) *Delivery of client papers and property.* An attorney ordered to be disbarred or suspended shall promptly deliver to all clients being represented in pending matters any papers or other property to which the clients are entitled, or shall notify the clients and any co-counsel of a suitable time when and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property.

(e) *Imposition of discipline pendente lite.* The Court, sua sponte or on motion, may order that the discipline recommended by the Board shall take effect pending the Court's determination of the merits of the case.

(f) *Effective date of discipline.* Except as provided in sections 10, 11, and 13 of this rule, and in subsection (e) of this section, an order of disbarment or suspension shall be effective thirty days after entry unless the Court directs otherwise. The disbarred or suspended attorney, after entry of the order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period between the date of entry of the order and its effective date, the attorney may conclude other work on behalf of a client on any matters which were pending on the date of entry. If such work cannot be concluded, the attorney shall so advise the client so that the client may make other arrangements.

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

(1) Demonstrating with particularity, and with supporting proof, that the attorney has fully complied with the provisions of the order and with this rule;

(2) Listing all other state and federal jurisdictions and administrative agencies to which the attorney is admitted to practice; and (3) Certifying that a copy of the affidavit has been served on Disciplinary Counsel.

The affidavit shall also state the residence or other address of the attorney to which communications may thereafter be directed. The Board may require such additional proof as it

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

(h) *Required records.* An attorney ordered to be disbarred or suspended, other than an attorney suspended under section 13(a) or 13(c), shall keep and maintain records of the various steps taken under this section, so that in any subsequent proceeding proof of compliance with this section and with the disbarment or suspension order will be available. The Court may require the attorney to submit such proof as a condition precedent to the granting of any petition for reinstatement. In the case of an attorney suspended under section 13(a) or 13(c), the Court shall enter such order as may be required to compile and maintain all necessary records. See also sections 15(a) and 15(f).

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

(a) *Appointment of Counsel.* If an attorney dies, disappears, or is suspended for incapacity or disability, and there is no partner, associate, or other responsible attorney capable of conducting the attorney's affairs, the Court, on motion of the Board, shall appoint a member of the Bar to make an inventory of the attorney's cases, to make appropriate disposition of the attorney's files, to distribute as appropriate any funds in the attorney's escrow accounts, and to ensure continuity of representation for the attorney's clients. The appointed attorney shall file with the Board written acceptance of the appointment.

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

(c) *Establishment of eligibility.* When directed by the Chairperson of the Board, the Executive Attorney shall determine that an attorney's affairs require proceeding under this section and shall verify that determination to the Board.

(d) *Selection of attorneys for appointment.* The Court may appoint any member of the Bar to perform any function under subsection (a) of this section. The Executive Attorney may submit to the Court the names of three attorneys who are willing and able to accept such appointment.

(e) *Compensation for appointed attorneys.* The level of compensation to be paid under this section shall, in the absence of extraordinary circumstances as determined by the Chairperson of the Board, be the prevailing rate under the District of Columbia Criminal Justice Act. If, after reasonable efforts, the Executive Attorney cannot find three attorneys willing to accept compensation at that rate, the list of names submitted by the Executive Attorney under subsection (d) may include attorneys who will serve at a higher rate deemed appropriate by the Executive Attorney. In such a case, the Executive Attorney shall provide to the Chairperson of the Board a brief description, in writing, of the nature and extent of the search for candidates for appointment.

(f) *Duties of appointed attorney.* As promptly as possible after receiving an appointment by the Court under subsection (a), the appointed attorney shall review the files, identify open cases, and note those requiring action. The attorney shall provide to the Executive Attorney, in writing, an estimate of the number of hours necessary to complete the inventory and distribution. If the attorney is appointed in the case of an attorney suspended under section 13(a) or 13(c), the appointed attorney shall, to the fullest extent possible, compile and maintain such records as the Court may require under section 14(g).

(g) *Budget amendments.* If the Executive Attorney reasonably concludes that the estimated payment of fees for services to be performed under this section will exceed the amount

available for that purpose in the budget of the Board, the Executive Attorney shall, on approval by the Chairperson of the Board, submit a report to the Board of Governors seeking a budget amendment before authorizing the appointed attorney to proceed.

(h) *Contact with clients.* The appointed attorney shall consult with clients whose cases are open to discuss the disposition of their cases and to make arrangements to distribute client papers and assets.

(i) *Disposition of cases.* After consulting each client, the appointed attorney may refer that client's open cases to attorneys willing to handle such matters, may advise the client to consult the Bar for assistance in finding new counsel, or may elect, with the consent of the client, to assume responsibility for one or more of the client's cases. In all other matters the attorney shall return the client's files to the client.

(j) *Monthly statements of time and expenses.* The appointed attorney shall submit to the Executive Attorney each month a detailed statement of the time spent and expenses incurred in carrying out the order of appointment.

(k) *Review of statements and payment.* The Executive Attorney shall promptly review the appointed attorney's statement and submit it to the Chairperson of the Board, together with a recommendation for the Chairperson's review and, if appropriate, approval. Upon approval of the statement by the Chairperson of the Board, the Executive Attorney shall authorize payment to the appointed attorney by submitting a copy of the approved statement to the Board of Governors. The appointed attorney shall receive compensation under this section only for services rendered in carrying out the order of appointment. If the appointed attorney undertakes any substantive work on a case, payment for such work shall be made by the client in accordance with a fee agreement between the appointed attorney and the client.

(l) *Confidentiality.* The appointed attorney shall not disclose any information obtained in a client file without the consent of the client to whom the file relates, except as necessary to carry out the order of appointment.

Section 16. Reinstatement

(a) *Restrictions on reinstatement.* A disbarred attorney, or a suspended attorney required to furnish proof of rehabilitation under section 3(a)(2) of this rule, shall not resume the practice of law until reinstated by order of the Court. A disbarred attorney not otherwise ineligible for reinstatement may not apply for reinstatement until the expiration of at least five years from the effective date of the disbarment. See also section 14(h).

(b) *Reinstatement of attorneys suspended for disability.* An attorney who has been suspended indefinitely because of disability under section 13 of this rule may move for reinstatement in accordance with that section, but reinstatement shall not be ordered except on a showing by clear and convincing evidence that the disability has ended and that the attorney is fit to resume the practice of law.

(c) *Reinstatement of attorneys suspended on other grounds.* An attorney suspended for more than one year before September 1, 1989, shall be subject to the reinstatement requirements in effect on the date of suspension. An attorney suspended for a specific period of time on or after September 1, 1989, without being required to furnish proof of rehabilitation under section 3(a)(2) of this rule shall be reinstated without further proceedings upon the expiration of the period specified in the order of suspension, provided that the attorney has timely filed with the Court the affidavit required by section 14(g) and such other proof as may be required under section 14(h). Notwithstanding the foregoing, a suspended attorney shall not be eligible for reinstatement until a period of time equal to the period of suspension shall have elapsed following the attorney's compliance with section 14, and a disbarred attorney shall not be eligible for reinstatement until five years shall have elapsed following the attorney's compliance with section 14. If the attorney has failed in any respect to comply with section 14, the Board shall so notify the Court, and the Court thereafter shall enter an appropriate order.

(d) *Contested petitions for reinstatement.*

(1) A petition for reinstatement by a disbarred attorney or an attorney suspended for misconduct rather than for disability and required to provide proof of rehabilitation shall be filed with the Board. If the attorney is not eligible for reinstatement, or if the Board determines that the petition is insufficient or defective on its face, the Board may dismiss the petition; otherwise it shall refer the petition to Disciplinary Counsel for a determination of whether Disciplinary Counsel opposes the petition. If Disciplinary Counsel opposes reinstatement, the Executive Attorney shall promptly schedule a hearing before a Hearing Committee at which the attorney seeking reinstatement shall have the burden of proof by clear and convincing evidence. Such proof shall establish:

(a) That the attorney has the moral qualifications, competency, and learning in law required for readmission; and

(b) That the resumption of the practice of law by the attorney will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest.

(2) Within sixty days after the conclusion of its hearing on reinstatement and receipt of the final briefs by the parties, the Hearing Committee shall submit to the Court a report containing its findings and recommendation, together with a record of the proceedings and any briefs of the parties. The record shall include a transcript of the hearing. Upon the filing of the Hearing Committee's findings and recommendation, the Court shall schedule the matter for consideration. In its discretion, the Court may request a recommendation by the Board concerning reinstatement.

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

(f) *Conditions of reinstatement.* If the attorney is found unfit to resume the practice of law, the petition shall be denied. If the attorney is found fit to resume the practice of law, the Court shall enter an order of reinstatement, which may be conditioned upon the making of partial or complete restitution to persons harmed by the misconduct which led to the suspension or disbarment, or upon the payment of all or part of the costs of the reinstatement proceedings, or both. The reinstatement may also be conditioned upon the furnishing of evidence, in a form determined by the Court, of the attorney's successful completion of an examination for reinstatement subsequent to the date of suspension or disbarment. The Court may impose such other conditions on reinstatement as it deems appropriate. Failure to comply with conditions of reinstatement may result in revocation of the reinstatement order. See also section 2 (b)(3).

(g) *Resubmission of petitions for reinstatement.* If a petition for reinstatement is denied, no further petition for reinstatement may be filed until the expiration of at least one year following the denial unless the order of denial provides otherwise.

Section 17. Confidentiality

(a) *Disciplinary proceedings.* Except as otherwise provided in this rule or as the Court may otherwise order, all proceedings involving allegations of misconduct by an attorney shall be kept confidential until either a petition has been filed under section 8 (c) or an informal admonition has been issued. All proceedings before the Hearing Committee and the Board shall be open to the public, and the petition, together with any exhibits introduced into evidence, any pleadings filed by the parties, and any transcript of the proceeding, shall be available for public inspection. If an informal admonition is issued, the letter of admonition from Disciplinary Counsel informing the attorney of the grounds for the admonition shall be available for public inspection.

Disciplinary Counsel's files and records, however, shall not be available for public inspection except to the extent that portions thereof are introduced into evidence in a proceeding before the Hearing Committee.

(b) *Disability proceedings.* All proceedings involving allegations of disability on the part of an attorney shall be kept confidential unless and until the Court enters an order suspending the attorney under section 13 of this rule.

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

(d) *Protective orders.* To protect the interests of the complainant or of any other person, the Board may, upon application and for good cause shown, and upon notice to the attorney and an opportunity to be heard, issue a protective order prohibiting the disclosure of confidential or privileged information or of any documents listed in the order, including subpoenas and depositions, and directing that any proceedings before the Board or a Hearing Committee be so conducted as to implement the order.

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

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

Section 18. Subpoenas

(a) *Issuance of subpoenas.* In carrying out this rule, any member of the Board, any member of a Hearing Committee in matters before the Committee, the Executive Attorney, or Disciplinary Counsel in matters under investigation may, subject to Superior Court Civil Rule 45, compel by subpoena the attendance of witnesses and the production of pertinent books, papers, documents, and other tangible objects at the time and place designated in the subpoena. An attorney who is a respondent in a disciplinary proceeding or is under investigation by Disciplinary Counsel may, subject to Superior Court Civil Rule 45, compel by subpoena the attendance of witnesses and the production of pertinent books, papers, documents, and other

tangible objects before a Hearing Committee after formal disciplinary proceedings are instituted. Subpoena and witness fees and mileage costs shall be the same as those in the Superior Court. (b) *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 investigation under this rule. A consultation with an attorney by a person subpoenaed shall not be regarded as a breach of confidentiality.

(c) *Quashing subpoenas.* Any challenge to the validity of a subpoena issued in accordance with this section shall be heard and determined by a Hearing Committee designated by the Executive Attorney. 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.

(d) *Enforcement of subpoenas.* The Court may, upon proper application, enforce the attendance and testimony of any witnesses and the production of any documents or tangible objects so subpoenaed.

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

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

Section 19. Miscellaneous Matters

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

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

(c) *Effect of settlement, compromise, restitution, or refusal to proceed.* Neither unwillingness nor neglect by the complainant to sign a disciplinary complaint or to prosecute a charge, nor settlement, compromise, or restitution, shall in itself justify abatement of an investigation into the conduct of an attorney.

(d) *Related pending litigation.* The processing of a disciplinary complaint shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal, civil, or administrative proceedings, unless authorized by the Board or a Contact Member for good cause shown.

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

(f) Deleted by Court, effective March 1, 2016.

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

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

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

Such undertakings shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of Disciplinary Counsel. The failure of an approved depository to comply with any of its undertakings hereunder shall be grounds for immediate removal of such institution from the list of BPR- approved depositories.

(b) Reports to Disciplinary Counsel by approved depositories pursuant to paragraph (a) above shall contain the following information: (1) In the case of a dishonored instrument, the report shall be identical to the over-draft notice customarily forwarded to the institution's other regular account holders.

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

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

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

(d) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia Court of Appeals, the District of Columbia Bar, the District of Columbia Board on Professional Responsibility, the Office of Disciplinary Counsel, or the District of Columbia Bar Foundation as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule means only that the institution has undertaken to meet the reporting and other requirements enumerated in paragraph (a) and (b) above.

(e) Nothing in this rule shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(f) Participation by financial institutions in the DC IOLTA program is voluntary. A financial institution that elects to offer and maintain DC IOLTA accounts shall fulfill the following requirements:

(1) The institution shall pay no less on its DC IOLTA accounts than the interest rate or dividend rate in (A) or (B):

(A) The highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers when the DC IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any. In determining the highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers, an institution may consider in addition to the balance in the DC IOLTA account, factors customarily considered by the institution when setting interest rates or dividend rates for its non-IOLTA customers, provided that such factors do not discriminate between DC IOLTA accounts and non-IOLTA accounts and that these factors do not include the fact that the account is a DC IOLTA account.

(i) An institution may offer, and the lawyer or law firm may request, an account that provides a mechanism for the overnight investment of balances in the DC IOLTA account in an interest- or dividend-bearing account that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(ii) An institution may choose to pay the higher interest rate or dividend rate on a DC IOLTA account in lieu of establishing it as a higher rate product.

(B) A "benchmark" rate set periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for accounts in the DC IOLTA program and that is net of allowable reasonable fees. When applicable, the Foundation will express the benchmark rate in relation to the Federal Funds Target Rate.

(2) Nothing in this Rule shall preclude a financial institution from paying a higher interest rate or dividend on a DC IOLTA account than described in subparagraph (f)(1) above.

(3) Allowable reasonable fees are the only fees and service charges that may be deducted by a financial institution from interest or dividends earned on a DC IOLTA account. Allowable reasonable fees may be

deducted from interest or dividends on a DC IOLTA account only at the rates and in accordance with the customary practices of the financial institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on a DC IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the lawyer or law firm maintaining the DC IOLTA account. Allowable reasonable fees in excess of the interest or dividends earned on one DC IOLTA account for any period shall not be taken from interest or dividends earned on any other DC IOLTA account or accounts or from the principal of any DC IOLTA account. Nothing in this rule shall preclude a financial institution from electing to waive any fees and service charges on a DC IOLTA account.

(g) On forms approved by the Foundation, a financial institution that maintains DC IOLTA accounts shall:

(1) Remit all interest or dividends, net of allowable reasonable fees, if any, on the average monthly balance in each DC IOLTA account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the Foundation. The institution may remit the interest or dividends on all of its DC IOLTA accounts in a lump sum; however, the institution shall provide, for each individual DC IOLTA account, to the Foundation the information described in subparagraph (g)(2), and to the lawyer or law firm the information in subparagraph (g)(3).

(2) Transmit with each remittance to the Foundation a report showing the following information for each DC IOLTA account: the name of the lawyer or law firm in whose name the account is registered, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any allowable reasonable fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the remittance period, and such other information as is reasonably required by the Foundation.

(3) Transmit to the lawyer or law firm in whose name the account is registered a periodic account statement in accordance with normal procedures for reporting to depositors.

(h) The Foundation shall maintain records of each remittance and statement received from a financial institution for a period of at least three years and shall, upon request, promptly make available to a lawyer or law firm the records or statements pertaining to that lawyer's or law firm's DC IOLTA accounts.

(i) All interest and dividends transmitted to the Foundation shall, after deduction for the necessary and reasonable administrative expenses of the Foundation for operation of the DC IOLTA program, be distributed by the Foundation for the following purposes: (1) at least eighty-five percent for the support of legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance; and (2) up to fifteen percent for those programs to improve the administration of justice in the District of Columbia as are specifically approved from time to time by this court.

(j) Definitions. As used in this rule, the terms below shall have the following meanings:

(1) "Allowable reasonable fees" for DC IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable DC IOLTA account administrative or maintenance fee.

(2) "Foundation" means the District of Columbia Bar Foundation, Inc.

(3) "Interest- or dividend-bearing account" means (i) an interest-bearing account, or (ii) an investment product which is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund. A daily (overnight) financial institution repurchase agreement must be fully collateralized by U.S. Government Securities and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined

by applicable federal statutes and regulations. An open-end money-market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least \$250,000,000.

(4) "DC IOLTA account" means an interest- or dividend-bearing account established by a lawyer or law firm for IOLTA-eligible funds at a financial institution from which funds may be withdrawn upon request by the depositor as soon as permitted by law.

(5) "IOLTA-eligible funds" means those funds from a client or third-party that are nominal in amount or are expected to be held for a short period of time, and that cannot earn income for the client or third party in excess of the costs incurred to secure such income.

(6) "Law Firm" - Includes a partnership of lawyers, a professional or non-profit corporation of lawyers, and combination thereof engaged in the practice of law.

(7) "Financial Institution" - Includes banks, savings and loan associations, credit unions, savings banks and any other business that accepts for deposit funds held in trust by lawyers or law firms which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the financial institution is situated and that maintains accounts which are insured by an agency or instrumentality of the United States.