

**SUMMARY OF PROPOSED AMENDMENTS TO GOV. BAR R. V [DISCIPLINARY
PROCEDURE] AND PROCEDURAL REGULATIONS OF THE BOARD OF
COMMISSIONERS ON GRIEVANCES AND DISCIPLINE
May 2013**

Background

The Rules Committee of the Board of Commissioners on Grievances and Discipline has undertaken a comprehensive review of Gov. Bar R. V and the Board's Procedural Regulations. The Rules Committee believes this is the first comprehensive, Board-initiated review of Gov. Bar R. V in more than 25 years. The purpose of this review is to update the rule and regulations to (1) address gaps in the rule and regulations, (2) update the rule and regulations to reflect current practices, procedures, and terminology, and (3) place the provisions of the rule and regulations in a more logical and user-friendly format.

Before the Rules Committee submits recommendations to the full Board and before the Board submits recommendations to the Supreme Court, the Rules Committee is circulating amendments under consideration to interested parties for review and comment. **The Rules Committee emphasizes that this is an informal solicitation of comments and that no decisions have been made by the Rules Committee or the Board as to the content of any amendments that may eventually be recommended to the Supreme Court for adoption.** By circulating the proposed amendments at this time, the Rules Committee hopes to receive input on the proposed revisions and suggestions for additional revisions that may be included in subsequent drafts.

At the close of the comment process, the Rules Committee will consider the written comments received and consider revisions to the proposed amendments. Revised, proposed amendments will then be prepared and submitted to the Board for possible recommendation to the Supreme Court. After receiving the Board's recommendations, the Board anticipates the Supreme Court will publish proposed amendments for public comment prior to adoption.

Comment Process

Any interested party who wishes to comment on the proposed amendments may submit a written comment **via email only** to the Board secretary at rick.dove@sc.ohio.gov. **Please do not submit a duplicate comment via regular mail or fax.** The deadline for comments is July 1, 2013.

When commenting on a specific proposed amendment, please refer to the line numbers contained in the left-hand margin of the rule amendment document.

Accessing and Understanding the Proposed Amendments

The proposed amendments are available to review or download at <http://www.supremecourtofohio.gov/Boards/BOC/default.asp> under the heading “Proposed Rule Amendments—May 2013.”

As you review the proposed amendments, please note that the revisions fall into three general categories:

- **Substantive revisions** appear as either ~~stricken-through~~ or underlined text and are **highlighted**. These revisions are explained in detail below.
- **Nonsubstantive revisions** also appear as either ~~stricken-through~~ or underlined text but are not highlighted. Nonsubstantive revisions are changes in the wording or terminology used in Gov. Bar R. V or the Board’s regulations that the Rules Committee believes have a negligible effect on the application of the rule or regulations or are purely internal to the operation of the Board. Examples are the renaming of the Board or references to “commissioners” rather than “members of the Board.”
- **Reorganization changes** also appear as either ~~stricken-through~~ or underlined text but are not highlighted. In most instances, these changes represent the relocation of existing provisions from one location in Gov. Bar R. V to another location or the movement of a regulation into Gov. Bar R. V. An example is the move of aggravating and mitigating factors from BCGD Proc. Reg. 10 to new Gov. Bar R. V, Section 13. Reorganization changes that have a substantive effect or require additional explanation are detailed below. Included on the web site referenced above is a reorganization table that includes a table of contents for revised Gov. Bar R. V and the revised regulations and the corresponding provisions of the current rule and regulations.

Summary of the Proposed Amendments to Gov. Bar R. V

Board on Professional Conduct (Sections 1-3)

Lines 68-69 make explicit what is implicit in the January 1, 2012 amendments to Gov. Bar R. V—that the Board has jurisdiction to certify, recertify, or decertify grievance committees. No substantive change is intended.

Lines 101-105 alter the authority and process for the adoption of procedural regulations by the Board. These amendments are intended to (1) draw a more clear distinction between the substantive provisions of Gov. Bar R. V and the procedural/operational provisions of the regulations, and (2) provide the Board with greater flexibility to address purely procedural and operational matters through the adoption of regulations. Presently, the Board has authority to adopt regulations, subject to the prior approval of the Supreme Court. Since amendments to both Gov. Bar R. V and the regulations now require Court approval, there is no practical difference

between the types of matters addressed in Gov. Bar R. V and those addressed in the Board's regulations. In addition, many existing regulations address what are arguably substantive matters, such as aggravating and mitigating factors and authorizing the use of consent to discipline, that the Board is proposing for inclusion in Gov. Bar R. V. The Board intends to ask the Court for authority to adopt its own procedural and operational regulations, without requiring prior Court approval. In amending or adopting regulations, the Board would employ a notice, comment, and publication process comparable to the process used by the Supreme Court for the adoption of rules.

Disciplinary Counsel (Section 4)

Line 210 clarifies that the specific process for removing Disciplinary Counsel applies only to an in-term removal for just cause. The Board would retain the authority to recommend appointment or reappointment of Disciplinary Counsel for a new or continued four-year term, subject to the approval of the Supreme Court.

Lines 239-243 are modified to remove references to specific categories of grievances filed that must be reported quarterly by the Office of Disciplinary Counsel (ODC) and the certified grievance committees (CGC). This amendment would give the Board, in consultation with ODC and CGCs, to alter the reporting categories without seeking an amendment to Gov. Bar R. V.

Certified Grievance Committees and Bar Counsel (Sections 5-6)

Lines 402-409 would remove the requirement that each CGC publish an annual newspaper notice or announcement. The Rules Committee recommends eliminating this requirement for three reasons: (1) a one-time newspaper publication can easily be missed; (2) as of January 1, 2012, each CGC is required to establish and maintain a web site that can be found at anytime through Internet search engines; and (3) the cost associated with the newspaper publication.

Funding and CGC Reimbursements (Section 7)

At line 540, the cut-off date for paying annual reimbursement requests is moved from May 1 to March 1. Under the current rule, annual reimbursement requests are due on or before February 1 although the rule essentially has a built-in three-month grace period. Annual reimbursement requests represent a significant portion (approximately 40%) of the expenditures from the Board's reimbursement budget, and ensuring the timely submission of reimbursement requests will allow the Board to ascertain the cost of these reimbursements in preparing a budget for submission to the Supreme Court.

Public Access to Proceedings and Documents (Section 8)

The Rules Committee is seeking specific input on the content of Section 8. This section would replace and alter the privacy and confidentiality provisions now found in Gov. Bar R. V, Section 11(E). In developing these revisions, the Rules Committee had two goals in mind: (1)

provide more clarity and certainty to relators, respondents, and the public regarding what disciplinary documents and procedures are public or confidential; and (2) mirror, to the extent possible, rule and procedures that are applicable to court proceedings. The Rules Committee proposes to eliminate the existing distinctions between “private” and “confidential” and the corresponding definitions of those terms. Instead, the term “confidential” would be used throughout Section 8.

Section 8(A) [lines 612-639] applies to grievance and investigatory proceedings prior to a probable cause determination by the Board and essentially protects the confidentiality of documents and proceedings during that stage of the disciplinary process. Specifically, the deliberations of a grievance committee and any investigatory materials prepared by the relator or filed in connection with a formal complaint would be designated as confidential.

Section 8(B) [lines 641-662] addresses access to documents after a complaint has been certified. Generally, all documents and proceedings subsequent to probable cause would be public, except as set forth in the rule. The one substantive change being proposed by the Rules Committee is in lines 655-657. This language would specifically provide that investigatory materials are discoverable, post-probable cause, as provided in the Rules of Civil Procedure. When such materials have been sought as part of a discovery request, the Civil Rule standard has been used by some panel chairs in ruling on motions to compel or for protective orders. *Dayton Bar Association v. Weisbrod*, BCGD Case No. 12-025. This proposed change is intended to provide clear guidance to the parties and panel chairs regarding the potential discoverability of these reports and provide a uniform standard that can be applied in all cases.

Section 8(C) [lines 664-672] are intended to adopt the standard contained in Rule 45(E) of the Rules of Superintendence regarding the restriction of access to documents filed in Board cases. Pleadings, stipulations, exhibits, and other documents filed in Board cases often contain medical information, such as diagnoses or treatment, regarding the respondent or sometimes a member of the respondent’s family. Although this information is germane to disposition of the disciplinary matter before the Board and ultimately the Court, there are differing views about whether this information should be readily accessible by the public. On one hand, the protection of the public standard suggests that the public have access to the details of a lawyer’s discipline especially if that lawyer is continuing to practice as part of probation or a stayed suspension or is reinstated following a suspension. On the other hand, some would contend that disciplinary violations should not trigger full disclosure of a lawyer’s medical conditions to the public and that the potential for making such information public may deter full disclosure of mitigating factors. The Rules Committee has drafted a provision that provides a process for limiting public access, using the same standards that are applicable to court proceedings. In addition, the determinations to restrict access would be made by the Board chair so as to provide consistency in the determinations.

Section 8(D) [lines 674-677] also parallel provisions found in Sup. R. 45 and the Supreme Court Rules of Practice. The proposed amendment would make the parties to cases before the Board responsible for omitting personal identifiers [as defined in Sup. R. 44(H)] from case documents filed with the Board.

Section 8(F) [lines 689-693] ensure that all administrative and financial records of the Board and ODC are public, unless specifically exempted by Court rule.

Investigations and Grievances (Section 9)

Lines 739-740 and 748-751 clarify that ODC and CGCs must file written requests for extensions of time to complete investigations. A request for an extension beyond the initial 60-day time period does not require a specific explanation; however, a request for an extension beyond 150 days must include the reason a second or subsequent extension is being requested.

Lines 767-771 codify what has been the Board's practice regarding the retention of outside experts to assist in an investigation.

Formal Complaints (Section 10)

New language at lines 828-829 and 833 codify the existing practice of referring appeals of grievance dismissals to another CGC where ODC has a conflict and cannot review the appeal.

Lines 846-852 require that a formal complaint include an allegation of restitution, if applicable, and list any previous discipline or suspensions imposed against the respondent. The former requirement parallels the requirement in current Gov. Bar R. V, Section 6a (proposed Section 14) relative to default matters.

Probable Cause (Section 11)

Lines 1045-1048 codify the existing procedure that is followed where a respondent voluntarily waives an independent probable cause determination by the Board. Lines 1057-1063 codify the Board's practice regarding the retention and destruction of probable case materials following certification or dismissal of a complaint.

Proceedings before the Board (Section 12)

Lines 1143-1149 represent a modified and expanded version of BCGD Proc. Reg. 9(D) regarding amended complaints. Presently, a complaint may be amended, without leave or a showing of good cause, at anytime more than 30 days prior to a scheduled hearing. The proposed amendment would permit the filing of an amended complaint, without motion or leave, 60 or more days prior to the hearing. Inside of 60 days prior to the hearing, an amended complaint must be accompanied by a motion for leave to amend that sets forth good cause for the amendment. New language is added to specify that amended complaints are not subject to review by a Board probable cause panel. See BCGD Advisory Op. 90-18.

Lines 1159-1162 and 1171-1172 clarify the procedures to be followed when a complaint is dismissed by a unanimous hearing panel and when the Board dismisses a complaint upon recommendation of the hearing panel.

Lines 1174-1183 are updated to reflect current Board practices. For example, a hearing panel submits, rather than files, its report to the Board secretary and does not certify the report, the record made at the hearing, or the hearing transcript. These steps are taken when the Board certifies its report and the record to the Supreme Court.

Aggravation and Mitigation (Section 13)

The Rules Committee is proposing incorporation of the aggravating and mitigating factors, now set forth in BCGD Proc. Reg. 10, into Gov. Bar R. V. These factors are an integral element of determining the sanction in virtually every disciplinary case and go beyond the intended procedural scope of the Board regulations.

The substantive changes to this section relate to the standards of mental disorder and substance use disorder that qualify as mitigation. Lines 1250-1265. After consulting with a psychiatrist who is familiar with Board procedures, the Rules Committee is recommending use of the term “mental disorder” in place of the term “mental disability” now used in BCGD Proc. Reg. 10. The committee has been advised that “mental disorder” encompasses a broad range of disorders and is a more medically precise term contained in the Diagnostic and Statistics Manual (DSM) of Mental Disorders issued by the American Psychiatric Association. See the discussion of Section 15, below, for more on this terminology.

The term “substance use disorder” would replace “chemical dependency” now used in the regulation. The committee is advised that this term reflects (1) the fact that the latest edition of DSM (DSM-V) no longer distinguishes between chemical abuse and dependency, and (2) encompasses a broad range of impulse control disorders, including gambling.

The new terms are defined in Section 30 [lines 2566-2568] by referring to the corresponding terminology in the most recent edition of the DSM.

Although the Rules Committee believes these changes represent more accurate and current terminology, the committee specifically invites comment on these amendments.

Interim Default Suspension (Section 14)

This section is taken from existing Gov. Bar R. V, Section 6a that was adopted in August 2012. The only change is the addition of lines 1364-1367 to vest a master commissioner who is assigned to review a motion for default judgment, with the same authority as a panel chair to rule on any motions or other matters filed in the default proceeding.

Mental Illness Suspension (Section 15)

There are two substantive changes to the current rules governing mental illness suspension. The Rules Committee is considering recommending an expansion of the current mental illness suspension procedures to allow for the suspension of a lawyer who is diagnosed with a substance use disorder that substantially impairs the ability of the lawyer to practice law. The main provisions are found in 1426-1430 in addition to other terminology changes

throughout Section 15. The committee believes such a suspension would provide an additional measure of public protection in situations where a lawyer is substantially impaired but not mentally ill.

The second substantive change is to add psychologists to the list of medical professionals who may conduct examinations and provide reports in mental illness and substance use disorder suspensions. Lines 1416 and 1432-1434.

The changes contained in line 1435-1440, 1447-1451, and 1463-1471 codify the current Board practices in relation to filing objections to a medical report, staying underlying disciplinary proceedings when a mental illness suspension is ordered, and addressing in a single proceeding, the termination of a mental illness suspension and the underlying disciplinary case that was stayed during the term of the suspension. See *Cincinnati Bar Assn. v. Komarek* (1998), 84 Ohio St.3d 9 and *Cleveland Metro. Bar Assn. v. Polke*, 135 Ohio St.3d 121, 2012-Ohio-5852.

Consent to Discipline (Section 16)

The provisions relative to consent to discipline are moved from BCGD Proc. Reg. 11 to Gov. Bar R. V. The only proposed substantive change is in line 1489, specifying that a consent agreement must include citations to any case law that supports the sanction agreed to and being recommended by the parties.

Supreme Court Procedures (Section 17)

Two revisions to this section apply to consent to discipline cases. Lines 1538-1539 codify the Court's current practice of not issuing show cause orders in consent to discipline cases. Lines 1556 and 1559 reflect the fact that the Court rejects the agreement, not just the sanction, and removes a requirement that the Board must conduct a hearing if a consent agreement is rejected and the case remanded to the Board. This latter change would allow the hearing to proceed on stipulations and a joint waiver of hearing if deemed appropriate.

Line 1575 would require notice of discipline to the disciplinary authority of any other state in which the respondent is known to be admitted.

Line 1583-1587 removes a requirement that disciplinary orders be published as a paid newspaper advertisement.

Sections 18-23

There are no substantive changes to these sections.

Reinstatement Proceedings (Sections 24-25)

The existing provisions for reinstatement are divided into two sections to reflect the different procedures that are applicable to applications for reinstatement from a term suspension and petitions for reinstatement from an indefinite suspension. The amendments at lines 2150-

2151 and 2212-2214 delete specific filing requirements and replace them with a reference to the Supreme Court Rules of Practice. Lines 2231-2232 add a requirement that a petition for reinstatement must include an affidavit from the respondent that no formal disciplinary proceeding are pending. Line 2326 provides the petitioner 20 days to file objections to the Board's recommendation that a petition for reinstatement be denied. This change corresponds to the typical 20-day objection period applicable in disciplinary cases.

Sections 26 & 27

There are no substantive changes to these sections.

Definitions (Section 30)

All definitions used in Gov. Bar R. V are moved to a single definition section. Newly defined terms are highlighted. Note the definition of "misconduct" is revised to remove the moral turpitude standard in current Gov. Bar R. V, Section 6(A)(1) in favor of the standard contained in lines 2576-2577. This change reflects the differences between former DR 1-102(A)(3) and Prof. Cond. R. 8.4(b).

Summary of the Proposed Amendments to Procedural Regulations¹

Pleadings and Motions (Reg. 1)

Lines 17-20 would specify a 14-day response time, as set forth in the Civil Rules, for responding to motions and would give the Board or panel chair the authority to order a shorter or longer response time where necessary.

Lines 33-36 would require counsel to file a motion for leave to withdraw where a hearing has been scheduled in a matter pending before the Board. See Prof. Cond. R. 1.16(c).

Filings; Copies; Exhibits; Service (Reg. 3)

This proposed regulation specifies several existing, but heretofore unwritten practices regarding the filing of documents with the Board, service of documents on the hearing panel, and presentation of exhibits at a hearing. Lines 95-97 give the panel chair the authority to order alternative means of service of documents on the panel members, but would not relieve the parties of the service requirements set forth in the regulations.

Time Guidelines (Reg. 8)

Line 219 would reduce from 60 days to 40 days the time within which a panel chair is required to conduct a pre-hearing conference.

¹ Regs. 2, 4, 5, 6, 7, 9 and 15 contain no substantive changes.