

SUMMARY OF AMENDMENTS TO GOV. BAR R. V [DISCIPLINARY PROCEDURE] AND PROCEDURAL REGULATIONS OF THE BOARD OF PROFESSIONAL CONDUCT Effective January 1, 2015

Overview

Effective January 1, 2015, the Supreme Court adopted a series of amendments to the procedures applicable in disciplinary matters. The Supreme Court adopted these amendments following a two-year review process initiated by the Board of Professional Conduct in late 2012 and two public comment periods in 2013 and 2014.

The final version of Gov. Bar R. V and the Board's Procedural Regulations, and related material are available for download on the [Board's web page](#). After January 1, 2015, the Rules for the Government of the Bar will be updated on the Supreme Court's web site to include the new version of Gov. Bar R. V and the Board's Procedural Regulations.

This memorandum contains a summary of the substantive amendments to Gov. Bar R. V and the Board's procedural regulations. Please note that the summary is **not** a complete explanation of the amendments, and not every amendment is reflected in the summary. Accordingly, interested parties should closely review the corresponding portions of Gov. Bar R. V and the procedural regulations. Interested parties also may review the published correlation tables to see the manner in which Gov. Bar R. V and the Board's regulations have been reorganized and to locate existing provisions in the newly adopted rules.

Items of Specific Note for Counsel

Counsel representing relators and respondents should pay particular attention to the following items with regard to documents filed with the Board on or after January 1, 2015 and disciplinary proceedings occurring on or after that date:

- All documents prepared and presented in connection with a disciplinary proceeding should reference the Board of Professional Conduct of the Supreme Court of Ohio.
- The secretary is now the director of the Board.
- Consult the new version of Gov. Bar R. V and the procedural regulations to determine the appropriate reference to specific provisions and update rule and regulation references accordingly. For example, the aggravating and mitigating factors previously contained in Proc. Reg. 10 are now set forth in Gov. Bar R. V, Section 13, and consent to discipline provisions formerly in Proc. Reg. 11 are not found in Gov. Bar R. V, Section 16.

- Familiarize yourself with new procedures and terminology contained in the rules and regulations. Some terms used throughout Gov. Bar R. V are defined in Section 35.

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

Board of Professional Conduct [Sections 1-3]

Of specific note in Sections 1-3 are the changes to the name of the Board and title of the Board secretary. The Board is now known as the Board of Professional Conduct of the Supreme Court, or Board of Professional Conduct as a short reference, and the Board secretary now carries the title of director. Board members continue to be referred to as commissioners.

Note the following additional revisions:

- *Fees and mileage* paid to witnesses in disciplinary proceedings will be in the amounts established in R.C. 2335.06. [Section 2(C).] The current witness fees are established at \$12 for a full day and \$6 for a half day, and mileage will be paid at 50.5 cents/mile. When requesting reimbursement for witness fees or mileage in connection with a specific case before the Board, relators should include the case name and number and name of the witness so that the amounts reimbursed may be charged as costs in connection with the case.
- The Board has authority to adopt *procedural regulations*, following a notice and comment period similar to that employed by the Supreme Court in connection with rule amendments. [Section 2(E).]

Office of Disciplinary Counsel [Section 4]

There are no substantive changes to this section.

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

Sections 5 and 6 contain several notable changes regarding the jurisdiction and operation of certified grievance committees.

A certified grievance committee has *jurisdiction* to investigate any grievance involving (1) an attorney who resides or maintains an office within the geographic area served by the committee or (2) misconduct that allegedly occurred within the geographic area served by the committee. [Section 5(B).] Except with regard to conflict referrals, a certified grievance committee may not investigate allegations of misconduct involving the following:

- An officer of the bar association that established the certified grievance committee;

- A member of the certified grievance committee;
- Any judicial officer (except for the OSBA's certified grievance committee).

The number of lawyers from the *same law firm or government office* who serve on a certified grievance committee may not exceed 20 percent of the committee or five lawyers, whichever is less. [Section 5(D)(1)(a).] Any changes in membership resulting from this amendment must be made on or before January 1, 2015.

Volunteer attorneys who serve as trial counsel for a certified grievance committee are now required to attend and complete a training program offered or approved by disciplinary counsel. The training requirement must be satisfied once every biennium, beginning January 1, 2016. A certified grievance committee must reference compliance with this training requirement in its annual report that is filed with the Board. [Section 5(D)(1)(e).]

A certified grievance committee is no longer required to publish an *annual newspaper notice or announcement*.

Funding and CGC Reimbursements [Section 7]

The only change of significance to this section is the outside deadline for submitting *annual, indirect expense reimbursements* to the Board. Those reimbursement requests are due prior to February 1 of each year, and the Board is required to deny any such requests that are received on or after March 1.

Public Access to Proceedings and Documents [Section 8]

Some of the most significant changes in Gov. Bar R. V pertain to the confidentiality provisions governing the disciplinary process. Eliminated from the rule are the former distinctions between “private” and “confidential.” Gov. Bar R. V, Section 8 contains revised provisions that more clearly address confidentiality of proceedings and the public nature of most post-probable cause proceedings. In addition, there are new provisions that authorize the Board to restrict public access to case documents and require parties to omit personal identifiers from case documents.

Proceedings prior to probable cause [Section 8(A)]

Proceedings, documents, and deliberations relating to the review and investigation of grievances are confidential, unless one of the three existing exceptions applies. This includes investigatory materials prepared or submitted by the relator for consideration by a Board probable cause panel.

Proceedings subsequent to probable cause [Section 8(B)]

After a Board panel finds probable cause and certifies a complaint to the Board, all proceedings and documents are public except as follows:

- Deliberations by the Board or a Board hearing panel;
- Panel reports and Board reports, until the matter is dismissed or the Board report is filed with the Supreme Court;
- The relator’s summary of investigation is designated as confidential work product, but any other investigatory materials are subject discovery in accordance with the Civil Rules;
- ADR procedures are confidential.

Restricted access to case documents [Section 8(C)]

A new provision permits a party to a pending Board case to file a motion to restrict public access to all or a portion of a case-related document filed with the Board. To ensure consistency in ruling on motions to restrict public access, all such motions will be reviewed and ruled on by the Board chair.

Motions to restrict public access will be determined based on the standards set forth in Superintendence Rule 45(E) that are applicable to court documents. Before filing a motion to restrict public access, counsel should familiarize themselves with the standards in the Rules of Superintendence and any case law that interprets and applies those standards.

Personal identifiers [Section 8(D)]

Parties in Board cases are now responsible for removing any personal identifiers from case documents before those documents are filed with the Board. Counsel and parties should familiarize themselves with the definitions of “personal identifiers” and “case document” in Superintendence Rule 44 and the requirements of Superintendence Rule 45.

The Board will be prescribing a personal identifier form for use by parties in Board cases. The form will be available on the Board’s web page.

Investigations and Grievances [Section 9]

Many of the new provisions in this section are clarifications or codification of current practices. The standards for requesting *extensions of time* to complete investigation are modified to require extension requests (1) to be in writing and, (2) for an extension beyond 150 days, to include the reason for the request. All extension requests should be submitted via email to BOCfilings@sc.ohio.gov.

Another codification of existing practice relates to the *appointment of an expert* to assist in a disciplinary investigation. Section 9(E) requires a written request and approval by the Board director, before an expert is hired. The rule sets forth specific content of the request letter, including an estimate of the expert’s fees and costs.

Formal Complaints [Section 10]

Section 10 addresses the obligations of relators with regard to the dismissal of a grievance and the filing of a formal complaint with the Board.

With regard to dismissals, Section 10(D) codifies the practice of referring appeals of dismissals to a certified grievance committee if disciplinary counsel cannot review the appeal because of a conflict. For all appeals, the rule prescribes that the standard of review is abuse of discretion or error of law.

The relator is now required to provide the respondent with a minimum of 14 days to respond to a *notice of intent to file* a formal complaint. The former rule required an opportunity to respond but did not specify a uniform time period. [Section 10(A).]

A complaint filed with the Board must be filed in the name of either disciplinary counsel or the bar association that sponsors the certified grievance committee that will prosecute the complaint. [Section 10(E)(1).]

Each formal complaint must contain two additional items, if applicable to the case. [Section 10(E)(1)(b) and (c).] First, the complaint must include an *allegation regarding restitution* that may be owed by the respondent or a statement that the relator cannot make a good faith allegation without engaging in discovery. Second, the complaint must include a list of any *prior discipline or suspensions* imposed against the respondent and the nature of the prior discipline or suspension. As noted below, both attorney registration and CLE suspensions are now considered prior discipline for purposes of aggravation, so the relator should reference in the complaint either type of suspension as well any sanction imposed in a prior disciplinary proceeding.

Section 10(E)(2) precludes the relator from *attaching exhibits, documents, or other material* to a formal complaint, unless the attachment is specifically required by Civ. R. 10.

Probable Cause [Section 11]

Many of the changes in Section 11 are codifications of existing practices, including the establishment of an *annual probable cause schedule* and the publication of a list of newly certified cases. Also codified are procedures for addressing *partial dismissals* of complaints and waiver of probable cause by the respondent. [Sections 11(A), (B), and C).]

With regard to appeals of *probable cause dismissals*, Section 11 provides that such an appeal is available only when the complaint is dismissed in its entirety and that, in reviewing such an appeal, the Board is limited to reviewing the documents reviewed by the probable cause panel. [Section 11(D).]

The final codification of existing practice relates to the *retention and destruction of probable cause materials* following certification or dismissal of a complaint. [Section 11(E).]

Proceedings before the Board [Section 12]

Consistent with Civ. R. 15(A), a relator is now required to file a *motion for leave to amend* a complaint, after an answer has been filed, unless the respondent consents to the amendment. The rule further codifies the Board's holding in Advisory Op. 90-18 that amended complaints are not subject to a separate probable cause review. [Section 12(E).]

The rule modifies the Board's procedures for providing *notice of dismissals* by a unanimous hearing panel and dismissals by the Board. Notices will now be sent only to the parties and counsel in the case. [Section 12(G) and (J).]

As a condition of a stayed suspension, probation, or reinstatement, the Board may recommend and the Court may require the respondent to take and pass the *Multistate Professional Responsibility Examination*. [Section 12(I).]

Aggravation and Mitigation [Section 13]

The standards considered in *aggravation and mitigation* of sanctions are moved from the procedural regulations to Gov. Bar R. V, Section 13. The standards are identical to those in the former regulations, although there are *terminology changes* to replace "mental disability" with "mental disorder" and "chemical dependency" with "substance use disorder." The term "nonsubstance use disorder" also is added to the rule. [Section 13(C)(7).] The single term "disorder" is used to encompass all three terms. The terms are defined in Section 35 and are also relevant to impairment suspensions that are discussed below in reference to Section 15.

Relevant to aggravation and mitigation although not expressly addressed in Gov. Bar R. V, Section 13, parties should note that the Supreme Court amended Gov. Bar R. X, Section 17(C) to require CLE suspensions to be considered as prior discipline when imposing a sanction for professional misconduct. This amendment places CLE and registration suspensions on equal footing for purposes of aggravation and eliminates the dichotomy that previously existed between those types of suspensions. See, *e.g.*, *Disciplinary Counsel v. Anthony*, 2013-Ohio-5502, ¶11. This revision also becomes effective January 1, 2015.

Interim Default Suspension [Section 14]

The *interim default suspension* procedures adopted in August 2012 remain unchanged in Gov. Bar R. V, Section 14. One revision is made to clarify that a master, who is assigned to review a motion for default judgment, has the same authority as a panel chair to rule on any motions or other matters filed in the default proceeding. [Section 14(F)(2)(a).]

Impairment Suspension [Section 15]

Gov. Bar R. V, Section 15 makes significant revisions to the procedures in cases involving *impaired respondents*. The Board may recommend and the Supreme Court may impose an impairment suspension in three circumstances.

First, an impairment suspension may be imposed based on a *court adjudication of mental illness* pursuant to R.C. 5122.01, *et seq.* [Section 15(A).] This suspension is the same as a mental illness suspension imposed under former Gov. Bar R. V, Section 7(B)(1)(a).

Second, an impairment suspension may be imposed based on a *court order of treatment for alcohol and other drug abuse* pursuant to R.C. 5119.90, *et seq.* [Section 15(B).] This is a new form of suspension not found in former Gov. Bar R. V.

Third, an impairment suspension may be imposed based on an allegation by relator, presentation of evidence to the Board, and a finding that the respondent is suffering from a mental illness, alcohol and other drug abuse, or a disorder that *substantially impairs the ability of the respondent to practice law.* [Section 15(C).] Although former Gov. Bar R. V, Section 7 permitted the imposition of a mental illness suspension absent a court adjudication, an impairment suspension based on the existence of alcohol and other drug abuse or a disorder is new.

An impairment suspension may be imposed based solely on the existence of an impairment and prior to the adjudication of any alleged professional misconduct. Proceedings on the underlying misconduct allegations will be stayed until such time as the respondent applies to have the impairment suspension lifted and a hearing panel determines the application should be granted. [Section 15(C)(3) and (E).]

With regard to both impairment suspensions and factors in mitigation, relators and respondents' counsel should familiarize themselves with the new terminology used in Gov. Bar R. V and the definitions of those terms found in Section 35. The following table is a comparison of the former and new terminology employed in Gov. Bar R. V:

New Terminology:

Former Terminology:

Mental Illness

Mental Illness

“Impairment” refers to one or more of the following: mental illness; mental disorder; substance use disorder; or nonsubstance related disorder

n/a

Disorder

Mental disability, chemical dependency, gambling

New Terminology:

Mental disorder

Substance use disorder

Nonsubstance related disorder

Former Terminology:

Mental disability

Chemical dependency

Gambling

In cases where a hearing panel orders the respondent to undergo an independent impairment evaluation, the evaluation may be conducted by a physician, psychiatrist, or psychologist. [Section 15(C).] Further, the procedures of the submission of and filing objections to the report of the health care professional are now codified in the rule.

Consent to Discipline [Section 16]

The provisions relative to the filing and consideration of *consent to discipline* agreements are moved from the procedural regulations to Gov. Bar R. V. The only substantive change in these provisions is that a consent agreement must now include citations to any case law that supports the sanction recommended by the parties. [Section 16(A)(2).]

Supreme Court Procedures [Section 17]

There are three notable changes relative to the Supreme Court's consideration of disciplinary matters. First, specific provisions regarding filing requirements with the Supreme Court are deleted in Gov. Bar R. V and replaced by a reference to the requirements set forth in the Supreme Court Rules of Practice. Second, when ordering discipline, the Court will provide notice of the discipline to the disciplinary authority of any other jurisdiction in which the respondent is known to be admitted. To facilitate this notice provision, relators should provide the Board with evidence of other states in which a respondent is licensed so that the Board may include that information in its report and recommendation to the Court. Third, the Court will no longer publish disciplinary orders in the form of paid newspaper advertisement.

Interim Felony or Child Support Default Suspension (Section 18)

A new provision requires a trial judge to submit a *certified judgment entry of felony conviction* to the Board within ten days of the date of the entry. [Section 18(A)(2).] The new rule also provides that a *stay of disciplinary proceedings* based on a criminal conviction remains in place until all direct appeals from the conviction are concluded. [Section 18(C).]

Sections 19-23

There are no substantive changes to the sections addressing interim remedial suspensions, reciprocal discipline, probation, duties of a disbarred or suspended attorney, or the employment of a disqualified or suspended attorney.

Reinstatement Proceedings [Sections 24-25]

For ease of reference, the provisions regarding reinstatement proceedings are divided into two sections. Section 24 applies to an *application for reinstatement*, which is filed when a respondent seeks to return to practice after a stayed suspension. Section 25 addresses a *petition for reinstatement*, which is filed when a respondent seeks to return to practice after an indefinite suspension or other suspension in which the Court has ordered the respondent to submit to a reinstatement hearing.

There are two substantive changes, both of which apply to reinstatement petitions. First, a petition for reinstatement must include an affidavit from the petitioner that indicates whether the petitioner has *any formal disciplinary proceedings* pending. [Section 25(B)(4).] Second, the *time period for filing objections* to a Board recommendation to deny a reinstatement petition is extended to 20 days to correspond to the time for filing objections to a show cause order. [Section 24(F)(5).]

File Inventories [Section 26]

Disciplinary counsel and certified grievance committees should be aware of several changes relative to the inventory of files of a disciplined, deceased, or disabled attorney or an attorney who otherwise abandons client files.

File inventory provisions are expanded to include the files of suspended lawyers, lawyers who fail to comply with the terms of a Court-ordered suspension or disbarment, and lawyers who abandon their client files. [Section 26(A).] In the case of *abandoned files*, disciplinary counsel or a certified grievance committee no longer must wait 60 days to commence a file inventory but may do so when the standard of abandonment set forth in the rule is satisfied. [Section 26(A).]

The *costs of certain file inventories* may be recovered from a disciplined lawyer, including one who has resigned with discipline pending, or the estate of a deceased lawyer. [Section 26(C).]

Any inventoried files in possession of disciplinary counsel or a certified grievance committee may be *destroyed* seven years after the inventory is completed. Excluded from this provision are original documents such as deeds or unprobated wills. [Section 26(E).]

Applicability of Rules; Regulations; Special Service [Section 27]

There are no substantive changes to this section.

Definitions [Section 35]

All definitions applicable in disciplinary proceedings are consolidated in Section 35. The impact of new or amended definitions is addressed above.

Summary of the Proposed Amendments to Procedural Regulations¹

Pleadings and Motions [Proc. Reg. 1]

A standard *14-day time period* has been established for responding to any motion filed in a disciplinary matter. The Board or panel chair retains authority to order a longer or shorter response time to a particular motion. [Proc. Reg. 1(A).]

Counsel seeking to withdraw from a matter pending before the Board must file a *motion for leave to withdraw*, if the matter has been scheduled for hearing. The regulation prescribes the required content of the motion and permits the panel chair to conduct a hearing on the motion. [Proc. Reg. 1(C).]

Filings; Copies; Exhibits; Service [Proc. Reg. 3]

Parties should familiarize themselves with the *filing requirements* contained in this regulation. The regulation sets forth the number of copies that must be filed in Board cases and the required content of a certificate of service. Note the requirements regarding the filing or presentation of exhibits at a hearing [Proc. Reg. 3(C)] and that the panel chair may order electronic or other alternative means of serving documents on the panel members. [Proc. Reg. 3(E).]

Time Guidelines [Proc. Reg. 8]

Panel chairs will now conduct an *initial prehearing phone conference* with the parties within 40 days of the date the hearing panel is appointed. [Proc. Reg. 8(A).]

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