DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

May 18, 2020

ADMINISTRATIVE ORDER 2020-4

PLEASE TAKE NOTICE THAT the Board is considering amendments to the Board's Rules. The proposed amendments (shown in redline), and a brief statement of the reasons therefor, are attached hereto.

Interested parties may submit written comments concerning the proposed amendments. Comments must be submitted electronically, to DCBoard@dcbpr.org, by June 8, 2020. All comments submitted pursuant to this notice will be available to the public.

It is so ORDERED.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Matthew G. Kaiser, Chair

Board Rule 1.2 (Definitions)

". . .

Affidavit means either a declaration made under oath or a declaration conforming to 28 U.S.C. § 1746.

. . .

Parties means the Respondent and Disciplinary Counsel, unless otherwise indicated.

. . ."

Reason for proposed Rule change: The terms "affidavit," "parties," and "non-parties" are used throughout the Rules without ever being defined. This amendment adopts the definition of "affidavit" contained in D.C. Court of Appeals Rule 1(b), which encompasses both sworn declarations and unsworn declarations made under penalty of perjury. It also clarifies that the term "parties" refers only to the respondent and Disciplinary Counsel, and does not include complainants or other individuals or entities that may be involved in the case.

Board Rule 2.19 (Confidentiality of Investigations)

"Pursuant to Section 17(a) of Rule XI, except as otherwise provided in Rule XI or as the Court may otherwise order, all proceedings involving allegations of misconduct by an attorney shall be kept confidential until either a petition instituting formal disciplinary proceedings has been filed under Section 8(c) of Rule XI, a petition for negotiated discipline has been submitted pursuant to Section 12.1(c) of Rule XI, or an informal admonition has been issued. Nothing in this Rule prohibits a respondent from disclosing the existence of the respondent's disciplinary investigation."

Reason for proposed Rule change: This amendment clarifies that the confidentiality provision of Rule XI, § 17(a) does not prevent respondents from disclosing information that may be helpful to marshal a defense.

Board Rule 3.2 (Discovery from Non-Parties)

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

Reason for proposed Rule change: This amendment corrects a typographical error.

Board Rule 4.1 (Requests for Deferral Before a Petition Has Been Filed)

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

Reason for proposed Rule change: The Board recognizes that the existence of a pending disciplinary investigation in another jurisdiction presents an additional valid basis for deferral. The Board understands that Disciplinary Counsel typically allows foreign disciplinary proceedings to conclude before bringing its own charges, so this amendment would formalize that arrangement.

Board Rule 4.2 (Requests for ~~a~~ Deferral After a Petition Has Been Filed)

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

Reason for proposed Rule change: The current Rule lacks an affirmative statement of what the Board Chair will consider when ruling on a motion. This amendment clarifies that the Chair will not consider additional briefing or other pleadings submitted by either party.

Board Rule 6.2 (Notification of Diversion Agreement)

"If a diversion agreement is approved by the Board Contact Member, Disciplinary Counsel shall promptly notify the complainant in writing that the complaint was resolved through diversion, without disclosing the terms, and send a copy of the diversion agreement and complainant's written notification to respondent. ~~The notification shall contain a statement of the reasons underlying the diversion agreement.~~ If a diversion agreement requires participation by the PMAS, the diversion agreement shall contain a statement of respondent's consent to release of the diversion agreement to the PMAS. Provided that the PMAS has agreed in writing to maintain the confidentiality of the diversion agreement, a copy of the diversion agreement shall be sent to the PMAS."

Reason for proposed Rule change: The current Rule does not specify the level of detail Disciplinary Counsel is required or allowed to provide to complainants in a case resolved through diversion. Because diversions are not "public discipline," the Board believes that disclosure should not include the agreement or other details on findings. The notification should be limited to the fact of the diversion only.

Board Rule 7.6 (Notice of Intent to Raise Disability in Mitigation)

". . .

(b) Confidentiality of Notice. The Hearing Committee before which the disciplinary matter is pending shall not be informed of the notice by the Office of the Executive Attorney or Disciplinary Counsel until the conclusion of the first phase of the hearing, and the Hearing Committee has determined preliminarily pursuant to Rule 11.11 that Disciplinary Counsel proved some or all of the charges alleged in the petition. Respondent may notify the Hearing Committee of the notice at any time. Upon the filing of such a notice, the parties shall prepare their exhibits and witness lists and exchange them at least one week in advance of the hearing such that they may be filed with the Hearing Committee upon the conclusion of the first phase. If the respondent notifies the Hearing Committee in advance of the pre-hearing conference, the Chair shall set deadlines for disability-related filings to enable the disability mitigation phase of the hearing to proceed without delay following the conclusion of the violations phase of the hearing.

. . ."

Reason for proposed Rule change: This amendment seeks to reduce the delay between the merits and mitigation phases of the hearing that often arises when a respondent files a disability mitigation notice under Rule 7.6. The first new sentence requires the parties to exchange exhibits and witness lists in advance of the hearing and should prevent the current practice of parties seeking additional time to compile exhibits and secure witnesses at the end of the first phase. The following sentence recognizes that some respondents choose to disclose their Rule 7.6 notices to the hearing committee and would permit the hearing committees to eliminate any delay between the two phases of the hearing by setting deadlines for disability mitigation filings in advance of the hearing. (See the counterpart amendment to Rule 11.13, *infra*.)

Board Rule 7. 17 (Presentation of Documentary Evidence)

"Should either party wish to present documentary evidence at a hearing, such evidence shall conform to Rule 19.8 and be filed with the Office of the Executive Attorney and served upon the opposing party at least ten days in advance of the hearing date, unless otherwise ordered by the Chair of the Hearing Committee. Five total copies of documentary evidence shall be filed with the Office of the Executive Attorney, unless the Chair of the Hearing Committee directs otherwise. Non-parties may not present documentary evidence."

Reason for proposed Rule change: The amendment seeks to clarify that the original set of exhibits is not one of the four copies that must be filed with the Office of the Executive Attorney. The original set becomes part of the official case record, while each hearing committee member receives one copy and the fourth copy is made available to the witnesses.

Board Rule 7.20 (Prehearing Conference)

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

Reason for proposed Rule change: Individual hearing committee chairs often ask the parties to provide opening statements and closing arguments and to identify pertinent legal authorities, and this practice has been helpful in providing a useful roadmap for hearing committee members during hearings. Adding this language to the Rule should further encourage those practices without necessarily requiring them.

Board Rule 7.22 (Challenges to Hearing Committee Members)

"The identity of the Hearing Committee members shall be included in the notice of the hearing provided to respondent and Disciplinary Counsel. Any challenges to the members of the Hearing Committee must be made by affidavit alleging a personal bias or prejudice on the part of the Hearing Committee member against the party submitting the affidavit. The affidavit must be accompanied by a motion for disqualification made to the Board, which will be decided by the Board Chair. The affidavit must state facts and reasons upon which the allegations of bias or prejudice are based and must be accompanied by a certificate executed by the party submitting the affidavit, or counsel for such party, stating that the challenge is made in good faith. The affidavit must be submitted to the Office of the Executive Attorney at least seven days prior to the date set for the hearing or the challenge shall be deemed waived. A Hearing Committee member appointed pro hac vice within seven days of the hearing to replace a previously named member may be challenged without regard to the seven-day notice ordinarily required. Emergency motions filed less than seven days before the beginning of the hearing will be considered only if the factual basis for the motion could not have reasonably been known before the deadline."

Reason for proposed Rule change: The current Rule does not specify who rules on motions to disqualify hearing committee members. The Board believes that having the Board Chair rule would be efficient and would result in consistent decisions. The final sentence seeks to avoid having disqualification motions delay or disrupt hearings whenever possible.

Board Rule 9.4 (Dismissal of Insufficient Petition)

"On a motion filed by Disciplinary Counsel within the time permitted for its answer to the petition, or sua sponte, the Board may dismiss any petition for reinstatement if the disbarred or suspended attorney is not eligible for reinstatement or the petition on its face is insufficient as a matter of law to support reinstatement, after assuming the attorney would be able to establish by clear and convincing evidence all of the material facts set forth in the petition. The motion must include a certification that Disciplinary Counsel has in good faith conferred or attempted to confer with the petitioner in an effort to narrow any disputes about the sufficiency of the petition on its face.

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

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

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

Reason for proposed Rule change: The Board believes that a meet-and-confer requirement will avoid time-consuming consideration of motions to dismiss that become moot when reinstatement petitions are amended in response.

Board Rule 9.8 (Evidence of Unadjudicated Acts of Misconduct)

"(a) Notice to attorney. Evidence of unadjudicated acts of misconduct occurring prior to the Court's order of disbarment or suspension with fitness ("unadjudicated acts") may be introduced by Disciplinary Counsel at a hearing on reinstatement only if: (i) Disciplinary Counsel demonstrates that the attorney seeking reinstatement received notice, in Disciplinary Counsel's letter dismissing the complaint alleging the unadjudicated acts or its motion to accept respondent's consent to disbarment, that Disciplinary Counsel reserved the right to present the facts and circumstances of the unadjudicated acts at a reinstatement hearing; and (ii) Disciplinary Counsel gives notice in the Answer to the petition for reinstatement that he intends to raise the unadjudicated acts at reinstatement. If respondent demonstrates that notice was not given in the dismissal letter or motion to accept consent to disbarment, the evidence of unadjudicated acts may be admissible if Disciplinary Counsel demonstrates by a preponderance of the evidence that respondent would not be prejudiced and it would be in the interest of the discipline system to permit consideration of such evidence.

. . .

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

. . ."

Reason for proposed Rule change: The Board recognizes that while there is value in maintaining the requirement to notify the respondent that unadjudicated acts might be raised on reinstatement, the strict wording of Rule 9.8 sometimes results in relevant evidence being excluded from consideration in reinstatement cases based on a technicality. The Board therefore supports allowing Disciplinary Counsel to respond to the petitioner's claim of lack of notice by showing, on a preponderance standard, that the petitioner would not be prejudiced and the discipline system would benefit from considering the evidence.

The Board further recognizes that limiting Rule 9.8(a) to letters of dismissal, and not including consent to disbarment, permits respondents to make a tactical decision to consent to disbarment on narrow grounds in order to avoid having to confront more

serious misconduct on reinstatement. This amendment therefore expands the scope of the Rule to cover consent to disbarment. (See the counterpart amendment to Rule 16.1, *infra*.)

These changes would be applied prospectively and thus would apply only to dismissals and motions to accept consents to disbarment following the effective date of the amendment.

The amendment to subsection (c) conforms the rule to the 2008 amendments to Rule XI that eliminated routine Board review of reinstatement hearing committee reports.

Board Rule 10.2 (Summary Adjudication)

"If respondent's conviction follows a guilty plea, along with its brief on the issue of moral turpitude per se, Disciplinary Counsel may file with the Board a motion seeking summary adjudication that the conduct underlying respondent's offense involves moral turpitude within the meaning of D.C. Code Section 11-2503(a). The Board will not consider Disciplinary Counsel's motion if it concludes that the offense involves moral turpitude per se. Disciplinary Counsel's motion must be supported by a statement of material facts that it contends are not genuinely disputed. If respondent opposes summary adjudication, respondent must file an opposition to Disciplinary Counsel's motion that identifies the material facts that respondent contends are genuinely disputed, along with a proffer of any additional facts respondent intends to present in a contested hearing; however, respondent may not contest any of the material facts alleged by the government in any plea agreement in the underlying criminal case.

If, after viewing the record in the light most favorable to respondent, the Board determines that there is no genuine issue as to any material fact, and Disciplinary Counsel has proven by clear and convincing evidence that the conduct underlying respondent's offense involves moral turpitude, the Board shall grant Disciplinary Counsel's motion and recommend to the Court that respondent be disbarred pursuant to D.C. Code Section 11-2503(a). If the Board determines that the question of moral turpitude cannot be decided based on summary adjudication, the Board shall refer the matter to a Hearing Committee pursuant to Board Rule 10.3."

Reason for proposed Rule change: In a significant number of cases referred to the Board under Rule XI, Section 10, the question of moral turpitude *per se*, *i.e.*, whether a hypothetical "least culpable offender" committed a crime of moral turpitude, is a difficult one, while the undisputed record clearly shows a crime of moral turpitude on the undisputed facts. In those cases, the Board, and a hearing committee if the matter must be referred to a committee for resolution, will expend significant time and resources when the undisputed facts—the facts admitted as part of the plea agreement—will resolve the matter.

Nothing in Rule XI prevents the Board from making determinations of moral turpitude on the undisputed facts without a hearing. This summary adjudication procedure would enable the Board to make such a determination based on the undisputed record, only after concluding that the crime is not one of moral turpitude *per se*, and only while viewing the facts in the light most favorable to the respondent.

Board Rule 10.~~2~~3 (Referral of Matters Involving Serious Crimes to a Hearing Committee)

"If the Board determines that the crime of which respondent was convicted is not one involving moral turpitude per se and determines that the question of moral turpitude cannot be decided based on summary adjudication, the matter shall be referred to a Hearing Committee to determine if the conduct underlying respondent's offense involves moral turpitude within the meaning of D.C. Code Section 11-2503(a). Disciplinary Counsel may file a petition instituting a proceeding pursuant to Section 8 of Rule XI based on the conduct underlying respondent's crime. If Disciplinary Counsel files a petition, it shall be filed within fifteen days of the Board's order referring the matter to a Hearing Committee. The Executive Attorney shall consolidate the matters before the Hearing Committee. Whether or not the Hearing Committee concludes that the offense involves moral turpitude, the Hearing Committee shall determine if respondent's conduct violated the disciplinary rules charged in the petition, if Disciplinary Counsel filed a petition and, if so, shall recommend an appropriate sanction so that the Board may have the benefit of the Hearing Committee's views on violation and sanction in the event that the Board finds no moral turpitude is involved."

Reason for proposed Rule change: The amendment accounts for the new summary adjudication procedure in Rule 10.2.

Board Rule 11.4 (Remote Testimony)

"(a) Notice of Remote Testimony. In every hearing, the testimony of witnesses shall be taken in person in open court unless otherwise provided by these Rules. If a witness resides outside of subpoena range and thus cannot be compelled to testify in person, either party may present that witness's testimony via remote video transmission, subject to the safeguards set forth in subsection (d), only if the party gives notice at least twenty-one days before the hearing and certifies that the party has contacted the Office of the Executive Attorney to schedule a time to test the means of remote transmission. The Hearing Committee Chair shall administer the oath to any witness testifying remotely. A party that fails to meet the twenty-one-day deadline must file a motion for permission to present remote testimony pursuant to subsection (b)(ii).

~~(a)~~(b) Submission of Motions

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

~~(ii)~~ A written motion requesting permission to present remote testimony (1) by any means other than contemporaneous video transmission ~~from another location~~; or (2) from a witness who can be compelled to testify but is unable to do so for other reasons, such as disability, must be filed at least twenty-one days prior to the first day of the hearing, unless otherwise approved or ordered by the Hearing Committee Chair, and will be granted for good cause in compelling circumstances, subject to the safeguards set forth in subsection (d). The motion shall include a proffer of the expected testimony and shall certify that the party has contacted the Office of the Executive Attorney to schedule a time to test the means of remote transmission. The provisions of Board Rule 7.14 shall apply.

(ii~~i~~) A motion requesting permission to present remote testimony by any means other than contemporaneous video transmission or for permission to present video testimony less than twenty-one days before the hearing will be granted for good cause shown in compelling circumstances. In determining whether the moving party has established good cause in compelling circumstances ~~and appropriate safeguards~~ under subsection (a)(i) of this Rule, the Hearing Committee Chair may consider any or all of the following factors:

(a) whether the motion is unopposed;

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

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

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

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

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

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

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

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

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

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

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

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

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

(o) any other relevant circumstance.

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

~~(v) During or after the witness' testimony, the Hearing Committee Chair, after consultation with the other members of the Hearing Committee, may exclude remote testimony as inadmissible if the transmission lacks sufficient clarity or adequate safeguards to make it reliable, does not permit the Hearing Committee to make necessary credibility findings, does not permit adequate cross-examination or for any compelling reason. Otherwise, the Hearing Committee shall receive the evidence and shall determine the weight and significance it should be accorded, pursuant to Board Rule 11.3. If remote testimony is excluded pursuant to this subsection 11.4(a)(v), there shall be a presumption that the excluded testimony will not be retaken, but in extraordinary circumstances the Hearing Committee Chair, after consultation with the other members of the Hearing Committee, may fashion an appropriate remedy, including permitting the witness to re-testify in person or remotely by more reliable means.~~

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

(d) Safeguards for All Remote Testimony. The party presenting remote testimony pursuant to subsections (a) or (b) shall (1) bear all expenses associated with the remote testimony and shall be responsible for coordinating all technical and logistical aspects of it, (2) ensure that the transmission allows for uninterrupted contemporaneous transmission of high-quality audio and video, (3) make such accommodations as may be necessary to permit relevant exhibits other than those submitted in advance of the testimony to be available to the witness so that either party can provide the witness with such exhibits as needed, and (4) instruct the witness that the testimony may not be recorded or broadcast outside of the hearing. If the transmission lacks sufficient clarity or adequate safeguards to make it reliable, to permit adequate cross-examination, or to allow the Hearing Committee to make necessary credibility findings, the Hearing Committee has the discretion to exclude the testimony. Otherwise, the Hearing Committee shall receive the evidence and shall determine the weight and significance it should be accorded, pursuant to Board Rule 11.3. If remote testimony is excluded pursuant to this subsection, there shall be

a presumption that the excluded testimony will not be retaken, but in extraordinary circumstances the Hearing Committee Chair, after consultation with the other members of the Hearing Committee, may fashion an appropriate remedy, including permitting the witness to re-testify in person or remotely by more reliable means.

(e) Objections to Remote Testimony. Any objections to the subject or means of remote testimony must be made within five (5) days of the presenting party's notice or motion. Objections based on quality of the transmission must be made during the testimony in question. Post-hearing objections will not be considered.

(f) Remote Hearings. In extraordinary circumstances, including but not limited to a public health emergency, the Hearing Committee or Board Chair may issue an order requiring that all witnesses testify remotely, subject to the safeguards set forth in subsection (d).

Reason for proposed Rule change: When the remote testimony rule was first enacted, the technology was relatively new and untested. Consequently, the rule was written narrowly, requiring a motion showing good cause and exceptional circumstances in every case. Nearly ten years later, remote testimony has become a routine aspect of hearings, usually to accommodate witnesses who cannot travel to appear in person, and objections and technical difficulties are rare. Given this success, the Board believes that additional "compelling circumstances" should not be required for witnesses who reside outside of subpoena range. In such cases, a timely "notice" of remote testimony, rather than a motion, will suffice. The Board believes that a motion should still be required for untimely requests or those made for reasons other than geographic limitations. The "safeguards" were reorganized into a separate subsection to make clear that they apply to all forms of remote testimony, whether by notice or by motion.

Subsection (f) was added in response to the COVID-19 pandemic and is intended to make clear that the motion and notice requirements of Rule 11.4 do not prevent hearings from being held entirely by videoconference when in-person hearings are impossible due to a public health emergency or similar circumstance.

Board Rule 11.13 (Mitigation of Sanction for Disability or Addiction)

"(a) Respondent's Motion. If respondent desires to present evidence on mitigation of sanctions based on an alleged disability or addiction (hereinafter "disability-related mitigation evidence"), respondent shall file a motion not later than at the beginning of the second part of the bifurcated hearing pursuant to Rule 11.11, and such motion shall set forth a simple narrative statement of the material facts including but not limited to: (i) the alleged facts showing that respondent had a disability or addiction, all of which facts respondent shall have the burden of establishing by clear and convincing evidence; (ii) the alleged facts showing that respondent's misconduct would not have occurred but for respondent's disability or addiction, all of which facts respondent shall have the burden of establishing by a preponderance of the evidence; (iii) other alleged facts, written statements and consents required by Rule 15.8(c) to establish significant evidence of rehabilitation or recovery; and (iv) a signed form (available at the Office of the Executive Attorney) wherein respondent acknowledges the alleged disability or addiction and stipulates that such acknowledgment may be used by the Board (if relevant and if respondent fails to establish significant evidence of rehabilitation or recovery) in seeking from the Court an order imposing probationary conditions or suspension pursuant to Section 13(c) of Rule XI. With the motion, the parties shall file their exhibits and witness lists and any objections thereto and state their witnesses' availability to appear on any remaining hearing dates and for the next month thereafter; however, the Chair may set a later deadline for Disciplinary Counsel's exhibits and witness lists if further investigation is necessary under Rule 11.13(b). If the respondent disclosed the Rule 7.6 notice to the Hearing Committee in advance of the hearing, the parties shall be prepared to present their disability evidence immediately after the conclusion of the first phase or as directed by the Hearing Committee.

. . .

(f) Inadvertent Disclosure of Notice. If, before respondent files the motion under subsection (a), the fact that respondent filed a Rule 7.6(a) notice is inadvertently disclosed to the Hearing Committee by anyone other than respondent or respondent's counsel, and if respondent believes that the Hearing Committee's consideration of the case will be influenced by such disclosure, respondent may file a motion with the Board requesting that the proceedings to date be vacated and that a new Hearing Committee be assigned. Such motions will be decided by the Board Chair.

Reason for proposed Rule change: The above amendment to Rule 7.6(b) requires the parties to prepare and exchange witness lists in advance, while the new language in Rule 11.13(a) will require them to file those pleadings as soon as the hearing committee is notified of the *Kersey* defense through the respondent's motion. Together, these amendments will help reduce or eliminate gaps in time between the merits and mitigation phases of hearings. Subsection (f) specifies for the first time what happens in the event that the *Kersey* defense is disclosed through no fault of the respondent. In such a case, the Board believes that the respondent should be entitled to request a new hearing. The Board believes that the Board Chair should be designated to decide the motion in order to minimize any delay of the hearing.

Board Rule 12.1 (Briefs, Proposed Findings and Recommendations and Additional Evidence Before the Hearing Committee)

"(a) Time Limits. The Hearing Committee may request briefs and proposed findings of fact and recommendations by the parties. Disciplinary Counsel's submission shall be filed and served not more than ten days following service of the hearing transcript. Respondent's submission shall be filed and served not more than ten days following service of Disciplinary Counsel's submission. Any reply thereto shall be filed and served not more than five days following service of respondent's submission. The time limits specified in this subsection shall apply unless otherwise ordered by the Chair of the Hearing Committee. Motions to extend briefing deadlines will be granted for good cause shown. Motions for leave to file a brief after time has expired will only be considered if accompanied by the proffered brief. At its discretion, the Hearing Committee may dispense with the submission of proposed findings of fact and recommendations.

. . ."

Reason for proposed Rule change: This amendment is designed to avoid excessive delay caused by failure to adhere to briefing deadlines. The amendment specifically targets post-due-date motions for extension of time, which can be sources of bad-faith delay, as opposed to motions to late-file, which may be granted for good cause.

Board Rule 13.3 (Notice of Exceptions to the Hearing Committee Report and Recommendation)

"Respondent and Disciplinary Counsel may file, within ten days of receipt of the Hearing Committee Report, notice of exceptions to the findings and/or recommendation of the Hearing Committee. Alternatively, either party may file a notice taking no exception to the Hearing Committee's recommended sanction, and thus waiving the right to file a brief and present argument, while expressly taking no position as to the underlying findings of fact and conclusions of law. The filing of such a notice does not waive a party's right to argue in opposition to any findings of fact and conclusions of law in the event that the opposing party files an exception to the Hearing Committee Report or briefing is otherwise ordered."

Reason for proposed Rule change: This amendment seeks to avoid spending time and resources on minor issues and charges that would not affect the sanction, without forcing the parties to waive their right to make those arguments should the other party file an exception. Disciplinary Counsel already uses this approach in some of its notices to the Board and the Court, and formally making it part of the Rule will inform respondents that they are able to do the same.

Board Rule 15.6 (Disciplinary Counsel's Motion for Authority to Seek Suspension or Probationary Conditions Due to Disability or Addiction)

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

. . ."

Reason for proposed Rule change: The Board understands that the narrow applicability of the current Rule might compel Disciplinary Counsel to prosecute a disabled attorney who is not practicing and might incentivize a disabled attorney from seeking his or her own disability suspension. Enabling Disciplinary Counsel to petition the Court for those attorneys' suspensions will save time and resources.

Board Rule 16.1 (Respondent's Motion to Consent to Disbarment)

". . .

(c) If Disciplinary Counsel files a motion to accept respondent's consent to disbarment, such motion shall include a statement as to whether Disciplinary Counsel reserves the right to bring evidence of unadjudicated acts at a hearing on reinstatement under Rule 9.8(a)."

Reason for proposed Rule change: Like the amendment to Rule 9.8(a), this new subsection provides for notice of the right to present evidence of unadjudicated acts in reinstatement cases where the respondent had consented to disbarment.

Board Rule 19.8 (Format of Submission to Board, Committees and Disciplinary Counsel)

". . .

(d) Citation to Record. The parties shall cite to the exhibits and hearing transcript as follows:

Disciplinary Counsel's Exhibits: "DX [#] at __"

Respondent's Exhibits: "RX [#] at __"

Hearing transcript: "Tr. __"

. . ."

[Current subsections (d), (e), and (f) will be renumbered (e), (f), and (g).]

Reason for proposed Rule change: Using a uniform citation style will permit the Office of the Executive Attorney to insert automatic hyperlinks to the record for the benefit of Board and hearing committee members.