

BEFORE THE
DISTRICT OF COLUMBIA COURT OF APPEALS

COMMENTS OF THE SECTION ON COURTS,
LAWYERS, AND THE ADMINISTRATION OF JUSTICE
OF THE DISTRICT OF COLUMBIA BAR
REGARDING PROPOSED AMENDMENTS TO BAR RULE XI

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on Court Rules who
Participated in the
Preparation of this Report

March 1989

* Took no part in the preparation of these comments.

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STANDARD DISCLAIMER

"The views expressed herein represent only those of the
Section on Courts, Lawyers, and the Administration of Justice
of the District of Columbia Bar and not those of the District
of Columbia Bar or of its Board of Governors."

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Manager for Sections shall help with the distribution, if requested, and shall forward a copy of the one-page summary to each member of the Board of Governors. In addition, the Manager for Sections shall draw up a list of all persons receiving the comment or statement, and he/she shall ascertain that appropriate distribution has been made and will assist in collecting the views of the distributees. If no request is made to the Manager for Sections within the seven-day period by at least three (3) members of the Board of Governors, or by majority vote of any steering committee or committee of the Bar, that the proposed amendment be placed on the agenda of the Board of Governors, the Section may submit its comments to the appropriate federal or state legislative or governmental body at the end of the seven-day period.

c(ii): "The Board of Governors may request, pursuant to sub-section (a)(iv), that the Section comments on proposed court rules change be placed on the Board agenda only if (a) the proposed court rule is so closely and directly related to the administration of justice that a special meeting of the Bar's membership pursuant to Rule VI, Section 2, or a special referendum pursuant to Rule VI, Section 1, should be called or (b) the proposed rule affects the practice of law--generally, the admission of attorneys, their discipline, or the nature of the profession,"

a(v): "Another Section or committee of the Bar may request that the proposed set of comments by a Section be placed on the Board's agenda only if such Section or committee believes that it has greater or coextensive expertise in or jurisdiction over the subject matter, and only if (a) a short explanation of the basis for this belief and (b) an outline filed with both the Manager for Sections and the commenting Section's chairperson. The short explanation and outline or proposed alternate comments will be forwarded by the Manager for Sections to the Board members."

a(vi): Notice of the request that the statement be placed on the board's agenda lodged with the Manager for Sections by any Board member may initially be telephoned to the Manager for Sections (who will then inform the commenting Section), but must be supplemented by a written objection lodged within seven days of the oral objection."

c(iii): "If the comments of the Section on a proposed court rules change is placed on the agenda of the Board of Governors, the Board may adopt the comments and the Board's own views, in which case no mandatory disclaimer (see Guideline No. 14) need be placed on the comments. If the Board and the Sections differ on the proposal, each may submit its own views.

Please call me by 5pm, Tuesday, April 18, 1989
if you wish to have this matter placed on the Board of
Governors' agenda for Tuesday, May 9, 1989.

SUMMARY

The D.C. Court of Appeals has published for comment a proposed revision of Bar Rule XI, governing Bar disciplinary proceedings. The proposed revision is comprehensive. The Section on Courts, Lawyers, and the Administration of Justice of the D.C. Bar largely supports the proposal, and notes that it has in the main met with the approval of Bar Counsel as well. In a few instances, however, the Section believes that it would be desirable to clarify the proposed Rule, or to make changes in the interest of consistency or fairness.

The comments which follow identify these instances and provide suggestions for clarification or change.

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The D.C. Court of Appeals has published for comment a proposed revision of Bar Rule XI, governing Bar disciplinary proceedings. The Section on Courts, Lawyers, and the Administration of Justice of the D.C. Bar largely supports the proposal, and notes that it has in the main met with the approval of Bar Counsel as well. The Section does, however, wish to comment on a few aspects of the proposal, in the hope of clarifying some points which are not now clear.

Section 2(a) - Duty of Attorneys. This rule requires an attorney "at all times and in all conduct, both professional and personal," to adhere to disciplinary standards (emphasis added). While this provision is generally unobjectionable, the Section is concerned that circumstances may arise in which an attorney might, under this requirement, be subject to discipline for personal conduct having nothing to do with his or her fitness to practice law. We suggest that the language of this rule be modified to reflect that concern.

Section 2(b) - Misconduct. This rule does not state that failure to do or decline to do something, as required by the rule, is ground for discipline. For example, Section 11(a) requires an attorney to give notice to Bar Counsel when he or she has been subject to discipline in another jurisdiction. Under the rule as drafted, failure to do so is not itself ground for discipline. The Section proposes to add a new Section 2(b)(5):

(5) Failure to comply with the requirements set forth in this Rule.

Section 3(a) - Types of Discipline. Section 3(a)(6) of the proposed rule provides for imposition of probation for a period of not more than three years. It is the understanding of the Section that the Court has in the past imposed probation for periods of up to five years. The Section considers it advisable to state, either in the rule or an accompanying comment, that the amendment does not have retroactive effect and is not intended to reduce the term of probation previously given to any attorney.

Section 3(b) - Conditions Imposed with Discipline.

This rule allows the Court or the Board on Professional Responsibility ("Board") to impose reasonable conditions in conjunction with other discipline. It does not require that such conditions be in writing. Section 3(a)(6), on the other hand, does require that conditions of probation be stated in writing in the order imposing probation. In the interest of consistency and to avoid the possibility that conditions may be imposed in a manner that leaves no written record, the Section recommends that that this rule be amended to require that conditions imposed with discipline be in writing.

This rule also authorizes the Court or the Board to require an attorney to make restitution. It is the understanding of the Section that there has been at least one case in recent years in which a claim for restitution was denied on the ground that it more closely resembled a claim for damages. The Section considers that it would be desirable for the rule to state in broad outline what are the acceptable components of a claim for restitution (e.g., fees paid for services not rendered, money had and received), and how an award of restitution may be enforced (e.g., via the power of contempt).

Section 3(c)-(d) - Temporary Suspension or Probation.

These rules provide for the imposition and dissolution of temporary orders of suspension or probation. Such orders are issued ex parte and continue in force unless successfully challenged by the respondent. In the absence of provisions requiring notice to the respondent of the charges against him or her and limiting the duration of "temporary" orders, it is possible that a "temporary" order could issue and be effective indefinitely without the respondent ever having a good idea of the nature of the charges. The Section urges that Section 3(d) be amended to provide that within 30 days after issuance of an order temporarily suspending or placing on probation an attorney, Bar Counsel must initiate proceedings against the respondent by filing a petition pursuant to Section 8(c); otherwise, the temporary order terminates.

Section 4(e) - Powers and Duties of the Board.

Section 4(e)(2) provides that the appointment or removal of Bar counsel shall be subject to the approval of the Court. The Section strongly approves this provision, believing that it enhances the independence of Bar Counsel by insulating the incumbent from institutional pressures and conflicts in the hearing and review system. For the same reason, the Section urges that the rule be amended to provide that Special Bar Counsel and all assistant bar counsel shall serve at the pleasure of Bar Counsel, rather than the Board. Special and Assistant Bar

Counsel are appointed to assist Bar Counsel carry out the functions of his or her office; it would be inappropriate to permit the Board to exercise significant control over the personnel of that presumptively independent office.

Section 4(e)(5) provides for the appointment of a "Contact Member." While the duties of a Contact Member are set forth in Sections 5(d)-(e), it was strongly felt that the existing rule is unclear on what a Contact Member is, how many there are, how they are appointed, and how they fit into the Bar disciplinary structure. Accordingly, the Section recommends that the Rule be expanded and clarified, so as to be more accessible to members of the Bar who are not intimately familiar with the disciplinary process.

Section 5(c) - Powers & Duties of Hearing Committees. The Section notes that the proposal adds to the powers of Hearing Committees the power to hold hearings "on such other matters as the Board may direct." We approve and encourage this development.

Section 6(a) - Powers & Duties of Bar Counsel. Section 6(a)(2) authorizes Bar Counsel to investigate matters involving misconduct "where the apparent facts, if true, may warrant discipline." The Section is concerned by the use of the words, "apparent facts." The use of this phrase suggests that Bar Counsel has a duty to make some sort of preliminary inquiry before commencing an investigation, in order to determine, for example, whether the "allegations" of a disciplinary complaint have some "apparent fact[ual]" basis. We suggest instead that authority be granted to investigate "where the indicated grounds, if true, may warrant discipline." This would allow for all circumstances in which disciplinary matters come to Bar Counsel, whether on referral from the courts after dismissal for want of prosecution (where there are no allegations), in the context of reciprocal discipline where another court has already made a finding (and, therefore, something more than mere allegations), or upon a complaint from an aggrieved client or other injured party; but would not require a preliminary determination before an investigation could commence.

Section 8(d) - Notice of Hearing. This rule appears to provide that a hearing may be set 15 days after service of a notice of hearing. Section 8(e) provides that an attorney's answer to a petition filed by Bar Counsel may be filed within 20 days after service of the petition. Taken together, it is at least theoretically possible that a hearing could be held before a respondent has an opportunity to file an answer, and that the Hearing Committee could be deprived of a meaningful opportunity to consider a respondent's answer. While the Section recognizes that this is unlikely to occur in practice, we

consider it prudent to avoid even the possibility. Accordingly, we urge that Section 8(d) be amended to require that a hearing be set at least 25 days after the date of service of the notice.

Section 8(g) - Prehearing Conference. The Section questions whether it is appropriate to hold a prehearing conference "for the purpose of obtaining admissions." We suggest that it may be proper for the purpose of obtaining "stipulations."

Section 9(g) - Proceedings Before the Court. This rule provides, among other things, that the Court shall accept the Board's recommended disposition "unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted" (emphasis added). A majority of the Section approves this language, noting that it is in substance identical to the existing rule. A minority of the Section is concerned that the exception swallows the rule, and asks whether there is some more precise way of defining the standards according to which the Court will exercise its authority to overrule the Board.

Section 10(a) - Notification of Conviction. This provision requires that the clerk of "a District of Columbia court" give notice to the D.C. Court of Appeals and to Bar Counsel when an attorney is convicted of a crime in that court. The Section is unaware of any court to which this rule could apply, other than the D.C. Superior Court (recognizing that this Court is not in a position to compel the obedience of the Clerk of the U.S. District Court), and respectfully suggests that the rule refer to the Superior Court expressly, rather than by implication.

Section 10(f) - Proof of Criminal Convictions. This rule provides that a copy of a court record or docket entry of "a plea of guilty or nolo contendere . . . to a charge of any crime, shall be conclusive evidence of the commission of that crime." The Section is troubled by this provision. There is case law from the Supreme Court of the United States, and from several Courts of Appeals, to the effect that a plea of nolo contendere is not a general admission of guilt and does not create collateral civil estoppel. See, e.g., Hudson v. United States, 272 U.S. 451, 455 (1926); Fisher v. Wainwright, 584 F.2d 691, 693 n.3 (5th Cir. 1978); United States v. Dorman, 496 F.2d 438, 440 (4th Cir. 1974). Cf. Haring v. Prosise, 462 U.S. 306, 316 (1983) (civil rights action; guilty plea held not to create collateral estoppel because, inter alia, issue of guilt was not actually litigated). Similarly, a plea of guilty may be entered in some cases without an attendant conviction in jurisdictions that employ an accelerated rehabilitative dis-

position program for first-time, minor offenders. In such cases, if the offender successfully completes a probationary period without further offenses, he or she may have the record expunged or closed without a finding. To give collateral civil consequences to a plea entered in such circumstances would in part defeat the purposes of the program and nullify in part the laws of a coordinate jurisdiction to which the District of Columbia owes comity.

The Section believes that disciplinary action based upon conviction of crime should be predicated not upon the plea of the defendant -- which may in any case be rejected by the court for a number of reasons -- but upon a judgment of conviction entered by the court with jurisdiction over the case. Consequently, the Section strongly urges the Court to rely for proof of conviction solely upon a judgment of conviction entered by a court, and recommends that Section 10(f) be amended to read as follows:

(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~~ judgment of guilt or of conviction of any crime, shall be conclusive evidence of the commission of that crime in any disciplinary proceeding based thereon.

Section 11(c) - Recommendation for Reciprocal Discipline. Given the alternatives in the text and in footnote 1, the Section prefers the alternative set forth in the text, which gives a respondent an opportunity to show cause why he or she should not be suspended before, rather than after, being suspended. We do not think that the bare fact of suspension in another jurisdiction justifies summary discipline here, particularly since the rules themselves recognize that there may be cases in which reciprocal discipline is inappropriate, see proposed Rule 11(b).

Section 11(e) - Action When Reciprocal Discipline Is Not Recommended. The Section approves this proposal.

Section 12(c) - Access to Records of Disbarment by Consent. This provision requires that the affidavit upon which consent disbarment is predicated be kept confidential "except by order of the Court or upon written consent of the attorney." Recognizing that the order of disbarment may be disclosed, the Section is nonetheless concerned that a bare Order, without more, may provide an inadequate record for a coordinate jurisdiction to impose reciprocal discipline. Accordingly, the

Section recommends that Section 12(c) be amended to read as follows:

(c) Access to Records of Disbarment by Consent. The order disbarring 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 to another jurisdiction for purposes of imposing reciprocal discipline, or upon written consent of the attorney.

Section 19(a) - Immunity. This rule provides, among other things, that "[m]embers of the Board, its employees, members of Hearing Committees, Bar Counsel, and all assistants and employees of Bar Counsel shall be immune . . . from suit for any conduct in the course of their official duties." Assuming that the Court has the power to make so sweeping a gift of immunity, by rule or otherwise -- a proposition which the Section is not prepared to concede -- the Section strongly feels that the immunity should be limited to conduct "within the scope" of official duties, not acts committed "in the course" of official duties.