

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Misc. No. 10-01

IN RE: RULES OF ADMISSION AND PRACTICE

Before KRAMER, *Chief Judge*, and FARLEY, HOLDAWAY,
IVERS, STEINBERG, and GREENE, *Judges*.

ORDER

Pursuant to the authority of 38 U.S.C. §§ 7263(b) and 7264(a) and consistent with 28 U.S.C. § 2071(b), the Court has adopted a revision of its Rules of Admission and Practice. The consideration of this revision has occurred over an extended period during which the Court has benefitted from public comment and twice from the views of its Committee on Admission and Practice.

The Court will again entertain comments concerning these Rules from interested members of its bar if received within 45 days after the date of this order. To assist members of the bar in understanding the revision, attached to this order is a commentary, which is not part of the Rules, explaining the changes made by this revision from the proposed revision published in October 1998 in Miscellaneous Order No. 8-98. Accordingly, it is

ORDERED that the attached revised Rules of Admission and Practice are published. These Rules shall become effective on December 26, 2001, and shall apply to proceedings brought thereafter and also shall apply to pending proceedings unless the Court determines that such application would not be feasible or the individual concerned contends, and the Court determines, that such application would be unjust.

DATED: December 14, 2001

BY THE COURT:

KENNETH B. KRAMER
Chief Judge

Attachments

Attachment 1 to Miscellaneous Order 10-01

RULES OF ADMISSION AND PRACTICE

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RULE 1. DEFINITIONS AND MISCELLANEOUS

When used in these rules the following terms shall have the following meaning:

- (a) **Applicant.** The term "applicant" means a person applying for admission or a former practitioner applying for reinstatement after having been suspended or disbarred.
- (b) **Committee.** The term "Committee" means the Court's Committee on Admission and Practice as provided for in Rule 2.
- (c) **The Panel.** Generally, the term "the Panel" means a panel of three judges of the Court. The judges on a panel will be (1) those chosen at random by the Clerk, or (2) a standing panel if the Court decides to establish such a panel on a rotating or permanent basis. When a judge on such a panel is not available to continue to serve as a judge in a particular matter, the Clerk will replace that judge with another judge, selected at random from the Court.
- (d) **Mail.** The terms "mail", "mailed", and "mailing" mean to send by certified mail (return-receipt- requested) via the U.S. Postal Service to the address most recently provided to the Court by a practitioner.
- (e) **Practitioner.** The term "practitioner" means an attorney or non-attorney who has been admitted to practice under Rule 46(a) or (b) or permitted to appear under Rule 46(c) of the Court's Rules of Practice and Procedure.
- (f) **Practitioner Concerned.** The term "practitioner concerned" means a practitioner who is being considered for admission or discipline under these rules. In Court orders regarding disciplinary proceedings under these rules, the practitioner concerned is referred to as "the respondent".

RULE 2. COMMITTEE ON ADMISSION AND PRACTICE

- (a) **Appointment.**
 - (1) The Chief Judge, with the concurrence of the Court, will appoint three members of the Court's bar to serve as a Committee on Admission and Practice, and designate one member as the Chair. The membership of the Committee under the predecessor version of these rules shall continue under these rules.
 - (2) Each member is appointed for a term of three years, except that the term of a member continued under subsection (a)(1) shall expire on the date previously established for that member, and that member may be reappointed to one additional consecutive term without regard to prior service on the Committee or under the predecessor version of these rules. A member (other than a holdover member as provided for in the preceding sentence) may be reappointed to an additional consecutive term in connection with an appointment that has not already been preceded by an additional consecutive term. There is no limit on the number of nonconsecutive terms to which any member may be appointed.
 - (3) A member may serve until a successor has been appointed. If a member holds over after his or her term expires, the holdover period shall be part of the successor's term.
 - (4) A member of the Committee may resign from the Committee, or the Chief Judge, with the concurrence of the Court, may, due to disability or other good cause, revoke an appointment at any time; the successor appointed will serve the unexpired term of his or her predecessor.
 - (5) Time served as a successor to a member of the Committee whose position became available due to death, disability, or resignation, will not be considered a "term" for the purposes of this Rule.
 - (6) If, in any case referred to the Committee, the Chair recuses him or herself, the next senior unrecused member (by longevity) will assume the responsibilities of Chair for that case only. If both members have equal service, the Chair, when announcing his or her recusal, will designate, at his or her sole discretion, one unrecused member to act as Chair.
 - (7) If, in any case referred to the Committee, a member of the Committee recuses himself or herself, the Chief Judge, with the concurrence of the Court, will appoint a member of the Court's bar to serve on the Committee for that case only. In the event that all three members of the Committee recuse themselves, the Chief Judge, with the concurrence of the Court, will appoint three members of the Court's bar, and designate one of those members as Chair, to serve on the Committee for that case only.
- (b) **Referral.** Except when, in connection with a subsequent provision of these rules, the Chief Judge or the Panel determines that a matter will be closed and no action taken or when the practitioner concerned concedes the charges and agrees that the matter need not be referred to the Committee, the Panel will refer matters arising under these rules to the Committee for appropriate investigation, possible hearing, and a report when:
 - (1) Essential facts are in dispute; or

- (2) there is a question whether the evidence initially submitted is sufficient to support a decision; or
- (3) another matter concerning the same person is pending before the Committee; or
- (4) the Panel concludes that the views of the Committee would materially assist the Court in deciding the matter.

The Panel may refer any other matter arising under these rules to the Committee for any other purpose relating to these rules that the Panel considers appropriate.

(c) Action by the Committee.

- (1) After receiving a matter referred by the Panel, the Committee will mail notice to the practitioner concerned regarding the adverse matter(s) and of the rights specified in subsection (d) below.
- (2) The Committee may hold a hearing even though the practitioner concerned has not requested one. At any hearing before the Committee, the Committee may call witnesses to testify.
- (3) The Committee will investigate the matter and submit its report to the Court as soon as practicable. Its investigation will include the gathering of such additional evidence as it considers appropriate to fulfill its responsibilities. The report of the Committee will include findings of fact, conclusions of law (if appropriate), and a recommendation (with supporting reasons) as to what action the Court should take. In the investigation of applicants or of practitioner misconduct, the Committee must consider and discuss in its report, but is not bound by, the American Bar Association Standards for Imposing Lawyer Sanctions. Any evidence gathered by the Committee will be attached as an appendix or appendices to its report.

(d) General Rights of the Practitioner Concerned. The practitioner concerned is entitled to the following as applicable:

- (1) To submit, not later than 30 days after the date of the notice provided pursuant to subsection (c)(1) above, unless that time is extended by the Chair for good cause, a response to any matter(s) referred to the Committee; and
- (2) on request, to receive from the Court copies of Court docket sheets; any grievance filed by a member of the public with the Clerk against the practitioner concerned; all evidence presented to the Court or the Committee; and any documents submitted to the Court, as well as any public documents issued by the Court, during litigation of a matter that is related to the matter(s) referred to the Committee; and
- (3) to a hearing if, not later than 30 days after the date of the notice referred to in subsection (c)(1) above, a written request is received by the Clerk, who will promptly forward such request to the Chair of the Committee; and
- (4) to be represented by counsel retained by him or her; and
- (5) to present evidence or submit any relevant information, including the testimony of witnesses; and
- (6) to receive from the Clerk, for a fee established by the Court's schedule of fees, a copy of the audiotape and transcript of any hearing that is held; and
- (7) to receive from the Committee a copy of any report prepared by the Committee and of any evidence gathered by the Committee; and
- (8) to file with the Clerk (in an envelope marked "CONFIDENTIAL") a rebuttal to the Committee's report ["report rebuttal"] not later than 30 days after the date that the report is received by him or her.

(e) Hearings.

- (1) On its own initiative, the Committee may conduct a hearing into any matter referred to it, and, at the request of the practitioner concerned or by order of the Court, the Committee will conduct a hearing at an appropriate stage in the proceeding before it. In a case where the practitioner concerned has requested a hearing, a hearing must be conducted before the submission by the Committee of a report to the Court.
- (2) All hearings are conducted in private, either in person at the Court's location (or some other location designated by the Chair with the approval of the Chief Judge) or by telephone, at the option of the practitioner concerned. Testimony must be under oath or affirmation and is subject to cross-examination by the applicant or practitioner concerned or the Committee, as appropriate. The Clerk will make arrangements for an audiotape and transcript of the hearing to be made at the expense of the Court. The Chair of the Committee is empowered on behalf of the Court to administer oaths at hearings held pursuant to this Rule.
- (3) In the event that the Committee believes that it is necessary to compel the testimony of a witness, the Committee will apply to the Chief Judge for the issuance of a subpoena pursuant to 38 U.S.C. § 7265(b).

- (4) Any hearing will be kept confidential and will not be attended by Court personnel except where necessary for the purposes of security. Any audiotope or transcript made pursuant to this Rule will not be prepared by Court personnel. Any audiotope or transcript of such hearing will be maintained by the Clerk as the Court's liaison with the Committee, and will not be available to any other Court personnel prior to the submission of the Committee's report.
- (f) **Cooperation with Committee.** It is the duty of the applicant or the practitioner concerned or his or her counsel to cooperate with the Committee. In the event of a failure of such cooperation, the Committee may include in its report to the Court any recommendation that it considers appropriate for the imposition of discipline for such failure.
- (g) **Report and Rebuttal.** The Committee will mail to the practitioner concerned a copy of its report, with a notification that the practitioner concerned may submit, in accordance with subsection (d)(8) above and not later than 30 days after the date that the report is received by the practitioner concerned, a report rebuttal.
- (h) **Confidentiality.** Except to the extent reasonably necessary to carry out its responsibilities and unless otherwise ordered by the Court, the Committee will treat in confidence all information relating to the referral of any matter to it.
- (i) **Expenses of Committee.** The Court will make available to the Committee appropriate funds to cover the expenses of its operation in accordance with these rules. *See* 38 U.S.C. § 7285(b).

RULE 3. ADMISSION

- (a) **Admission.** Admission to practice before the Court is governed by Rule 46 of the Court's Rules of Practice and Procedure, as supplemented by these rules.
- (b) **Contested Admissions.** The Clerk will refer to the Chief Judge any application for admission to practice when it appears that the applicant may not be qualified under Rule 46(a) or (b) of the Court's Rules of Practice and Procedure.
 - (1) If the Chief Judge determines that the matter raised is not disqualifying, the Chief Judge will direct the Clerk to grant admission; otherwise, the Clerk will be directed to docket the matter and refer it to a Panel.
 - (2) The Panel will:
 - (A) Direct the Clerk to grant admission; or
 - (B) issue an order directing the applicant to show cause why the application should not be denied; or
 - (C) refer the matter to the Committee for action in accordance with the procedures established in Rule 2, and, after receiving the Committee's report, grant or deny the application or re-refer the matter to the Committee for action in accordance with the procedures established in Rule 2.
- (c) **Burden of Proof and Applicant Cooperation.** The applicant shall have the burden of establishing, by a preponderance of the evidence, that he or she has the character and qualifications necessary for admission and must cooperate with the Court and the Committee in their consideration of the application.

RULE 4. STANDARDS FOR PROFESSIONAL CONDUCT AND DUTIES OF PRACTITIONERS

- (a) **Discipline.** Unless otherwise provided by specific rule of the Court, the disciplinary standard for practice is the Model Rules of Professional Conduct adopted by the American Bar Association on August 2, 1983, as amended.
- (b) **Professional Misconduct.** A practitioner is subject to the Court's disciplinary authority for professional misconduct.
 - (1) Professional misconduct means:
 - (A) an act or omission that violates the Court's disciplinary standard or any other disciplinary rules applicable to the practitioner; or
 - (B) an act or omission that resulted in discipline by another jurisdiction at any time after the practitioner's admission to practice before the Court.
 - (2) Professional misconduct may also mean a failure to comply with any rule of the Court.
- (c) **Duties of Practitioners.**

- (1) A practitioner must, not later than ten days after the occurrence, provide written notification to the Clerk, to all clients presently represented before the Court, and to all adverse parties in those cases of any of the following actions regarding that practitioner:
 - (A) Public discipline for professional misconduct; or
 - (B) indictment of or other equivalent formal charge with a serious crime (as defined in Rule 7(b)(3)); or
 - (C) conviction of a serious crime (as defined in Rule 7(b)(3)); or
 - (D) disbarment on consent; or
 - (E) resignation from the bar of any court while an investigation into an allegation of misconduct is pending; or
 - (F) in the case of a non-attorney practitioner, loss of sponsorship, *see* Rule 1(e), above.
- (2) A practitioner before the Court must promptly provide written notification to the Clerk of any change of address. *See* Rule 1(d) above.

RULE 5. TYPES AND IMPOSITION OF DISCIPLINE

- (a) **Discipline for Misconduct.** Discipline imposed under these rules for practitioner misconduct may consist of disbarment (or revocation of admission to practice in the case of a non-attorney practitioner), suspension from practice before the Court, monetary sanction (including fines), public reprimand, private admonition (in the form of an unpublished (and nonpublic) order), or any other discipline that the Court considers appropriate. The Court may condition the termination of a period of suspension, a reinstatement, or the forbearance of the imposition of any or a greater disciplinary action on the commission or omission of a particular act or acts by the practitioner concerned, including:
 - (1) Participation in continuing legal education, personal, drug or alcohol counseling, or any other appropriate program; or
 - (2) the payment of all or part of the costs of the proceedings that led to the imposition of discipline; or
 - (3) partial or complete restitution to parties harmed by the misconduct that led to the disciplinary action.
- (b) **Presumption of Disbarment.** Disbarment is presumed appropriate for a practitioner convicted of a serious crime who has been afforded the benefit of the procedures set forth in Rule 7.
- (c) **Reciprocal Discipline.** When the Court orders that discipline be imposed in accordance with Rule 7, such discipline will generally run concurrently with the discipline on which the reciprocal action is based.
- (d) **Reconsideration or Review.** If the Court decides to impose discipline, it will first advise the practitioner concerned of that determination in an unpublished (and nonpublic) order. The practitioner may, not later than 21 days after the date of the order, file a motion for reconsideration or a single motion for reconsideration and, if reconsideration is denied, for en banc review. Any such motion must identify, with reasonable specificity, the alleged error(s) requiring reconsideration or review. The unpublished order provided for in this subsection shall specify the rights to reconsideration or review provided in this subsection. Action on the motion shall precede the imposition of any discipline.
- (e) **Effectuation of Discipline.** All discipline ordered by the Court will be accomplished by a panel or en banc order effective on the date prescribed in the order and final as of the date of the order. *See* also Rule 13(d).
- (f) **Nondisciplinary Suspension.** A temporary nondisciplinary suspension imposed under these rules is not considered to be a disciplinary action.

RULE 6. ACCUSATIONS OF PROFESSIONAL MISCONDUCT

- (a) **Role of the Chief Judge and the Clerk.** Any person, including the Clerk, or any judge, panel of judges, or entity may file with the office of the Clerk an accusation of professional misconduct (called a grievance). After receiving such a grievance, the Clerk will assign a nonpublic docket number to the matter. The Clerk will refer the matter to the Chief Judge, except that if the grievance is filed by a judge or judges of the Court, the Clerk will issue an order referring the grievance to the Panel for consideration. If the Chief Judge determines that the grievance does not have prima facie validity, the matter will be closed and the Chief Judge will direct the Clerk to return the grievance to the filing party with notice of that finding. If the Chief Judge determines that the grievance has prima facie validity, the Chief Judge will instruct the Clerk to refer the matter to a Panel and the Clerk will issue an order doing so. If the grievance

is filed by a judge or judges of the Court, that judge or those judges will not be included in the panel to which the matter is referred. The Clerk will mail a copy of any referral order to the practitioner concerned (along with copies of these rules and of any grievance filed by a member of the public).

(b) Action by the Panel.

- (1) The Panel will:
 - (A) Determine that the actions described would not constitute misconduct if true, or that the matter is not within the Court's disciplinary authority, and direct the Clerk to return the grievance to the filing party with notice of that finding; or
 - (B) issue an order to show cause why the grievance should not be referred to the Committee for action under Rule 2.
- (2) If the Panel has issued an order to show cause under paragraph (1)(B) and a response thereto ["show-cause response"] has been received or the time for filing a show-cause response has expired, the Panel will:
 - (A) Dismiss the grievance as unfounded or unsupported by sufficient evidence; or
 - (B) if the grievance is not contested, issue an order to show cause why a specific discipline should not be imposed by the Court; or
 - (C) refer the grievance to the Committee for action under Rule 2.
- (3) If a show-cause order is issued under paragraph (2)(B) above or subparagraph (D) below, or if a Committee report is received, and after a show-cause response or a report rebuttal has been received or after the time for receiving such a response or rebuttal has expired, the Panel will:
 - (A) Dismiss the grievance as unfounded or unsupported by sufficient evidence; or
 - (B) in a case where a show-cause order has been issued under paragraph (2)(B) above or under subparagraph (D) below, impose the discipline identified in the show-cause order or impose a lesser discipline; or
 - (C) in a case where a show-cause order has not been issued under paragraph (2)(B) above or under subparagraph (D) below, impose the discipline recommended by the Committee or impose a lesser discipline; or
 - (D) in a case where the Panel believes that it may be appropriate to impose a discipline greater than that recommended by the Committee or identified in a previous show-cause order, or in a case where the Panel has not yet issued any show-cause order as to the imposition of a specific discipline, issue an order to show cause why a specific discipline should not be imposed by the Court and, after a show-cause response has been received or after the time for receiving a show-cause response has expired –
 - (i) dismiss the grievance under paragraph (A) above; or
 - (ii) determine that such specific discipline or a lesser discipline is appropriate and issue an order setting forth the essential facts of the misconduct, the rationale for imposing the discipline, and the discipline imposed, to include any conditions attached thereto.
- (4) A hearing before the Court will not generally be held; however, the Court may, sua sponte or at the request of the practitioner concerned, hold a hearing in the exercise of its discretion.

- (c) Proof.** In a grievance proceeding, discipline will be imposed only upon a finding of clear and convincing evidence that the practitioner engaged in professional misconduct.

**RULE 7. PRACTITIONERS CONVICTED OF CRIMES OR DISCIPLINED BY OTHER COURTS
OR GOVERNMENTAL ENTITIES**

(a) Evidence.

- (1) A certified court judgment showing that a practitioner has been convicted of a crime is conclusive proof of that fact for purposes of a disciplinary proceeding in the Court.
- (2) Credible evidence of a final determination in another court or government entity that a practitioner has committed and been disciplined for professional misconduct is conclusive proof of that fact for purposes of a disciplinary proceeding in the Court unless the Court determines, by clear and convincing evidence, that:

- (A) The prior procedure was so lacking in notice or opportunity to be heard that it constituted a deprivation of due process; or
- (B) there was such an infirmity of proof as to the misconduct that the Court could not, consistent with its duty, accept as final the conclusion on that subject; or
- (C) the imposition of discipline by the Court would result in a grave injustice.

(b) Conviction of a Serious Crime.

(1) After receiving evidence (as described in subsection (a) above) that a practitioner has been convicted of a serious crime, as defined in paragraph (3) below in any court of the United States, of the District of Columbia, or of any state, territory, commonwealth, or possession of the United States, the Clerk will (except as provided in the last sentence of this paragraph):

- (A) Issue an order imposing on the practitioner concerned an immediate temporary nondisciplinary suspension from practice until proceedings under this Rule are concluded, regardless of the pendency of any case in the Court, and refer the matter to a Panel; and
- (B) mail to the practitioner concerned a copy of the order and (unless the practitioner was the source of the evidence received by the Court) a copy of the evidence received, along with a copy of these rules; and
- (C) send a copy of the order to any appellants represented by the practitioner concerned in the Court, and to any sponsoring attorney or organization (including an organization that arranged for pro bono representation by the practitioner concerned before the Court), as appropriate.

Notwithstanding the foregoing sentence, if the Clerk believes that immediate suspension is not appropriate under the particular circumstances of the conviction, the Clerk may refer the matter to the Chief Judge for disposition in accordance with the same process provided for in the second and third sentences of subsection (c) below.

(2) The Panel will issue an order directing the practitioner concerned to show cause why a specific discipline should not be imposed. After receipt of a show-cause response or the expiration of the time for filing such a response, the Panel will:

- (A) Revoke the suspension in the interest of justice, and take no further action and close the matter; or
- (B) impose discipline if the practitioner concerned has not contested the discipline proposed in the show-cause order; or
- (C) refer the matter to the Committee for action under Rule 2 and then take action pursuant to subparagraph (A) or (B) above, after considering the Committee's report, any report rebuttal, and issuing any further show-cause order that the Court considers appropriate.

In any case, discipline will not be imposed, and (unless the Court orders to the contrary) any temporary nondisciplinary suspension order issued pursuant to paragraph (1)(A) above will remain in effect, until all appeals from the conviction that served as a basis for the disciplinary proceeding are concluded.

(3) As used in this Rule, the term "serious crime" includes:

- (A) A felony in the jurisdiction where the judgment was entered; or
- (B) a lesser crime that involves moral turpitude, including interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, or theft; or
- (C) an attempt, or a conspiracy or solicitation of another, to commit a "serious crime."

(4) A practitioner suspended under paragraph (1) above will be reinstated by the Chief Judge immediately upon a showing that the underlying conviction has been reversed. However, such reinstatement will not preclude initiation or continuance of a disciplinary proceeding under another of these rules based on the conduct that resulted in the conviction or otherwise. In such a proceeding, evidence of that conduct may be considered despite the reversal of the conviction.

(c) Conviction of Any Other Crime. After receiving evidence (as described in subsection (a) above) that a practitioner has been convicted of a misdemeanor, the Clerk will refer the matter to the Chief Judge. If the Chief Judge determines that the misconduct may potentially affect the professional character of the practitioner concerned, the Chief Judge will direct the Clerk to refer the matter to a Panel for consideration as in the case of a "serious crime." Otherwise, the Chief Judge will direct the Clerk to close the matter and notify the practitioner concerned.

(d) Reciprocal Discipline.

(1) After receiving evidence that a practitioner has been disciplined for misconduct (including disbarment on consent), or resigned

while under investigation for professional misconduct, by another court or governmental entity, the Clerk will:

- (A) Mail to the practitioner concerned a copy of these rules and a copy of the evidence received (unless the practitioner was the source of the evidence received by the Court); and
 - (B) where disbarment or suspension was imposed or the practitioner concerned resigned while under investigation for professional misconduct, issue an order imposing on the practitioner concerned an immediate temporary nondisciplinary suspension from practice until proceedings under this Rule are concluded, regardless of the pendency of any case in the Court, and refer the matter to a Panel; and
 - (C) send a copy of the order issued under subparagraph (B) to any appellants represented by the practitioner concerned in the Court, and to any sponsoring attorney or organization (including an organization that arranged for pro bono representation by the practitioner concerned before the Court), as appropriate.
- (2) The Panel will:
- (A) Take no further action and close the case; or
 - (B) issue an order to show cause why an identical discipline, or a similar discipline (including a difference in the duration of the discipline) specified by the Court in the show-cause order, should not be imposed by the Court, and enclose a copy of the judgment or order from the other court or entity; or
 - (C) refer the matter to the Committee for action under Rule 2.
- (3) If a show-cause order is issued under paragraph (2)(B) above, or if a Committee report is received, and after a show-cause response or a report rebuttal has been received or after the time for receiving such a response or rebuttal has expired, the Panel will:
- (A) Take no further action and close the case; or
 - (B) if the practitioner concerned has not contested the discipline proposed in the show-cause order or by the Committee in its report, impose the proposed discipline or a lesser discipline; or
 - (C) in a case where the Panel believes that it may be appropriate to impose a discipline greater than that recommended by the Committee or identified in a previous show-cause order, or in a case where the Panel determines that there is evidence of additional misconduct before the Court, or in a case where the practitioner concerned has contested the discipline proposed in the show-cause order, the Panel will close the case, refer the matter to the Committee for action under Rule 2 or impose the discipline that the Panel determines is appropriate discipline after considering the Committee's report and any report rebuttal and issuing any further show-cause order that the Panel considers appropriate.
- (4) If the discipline imposed in the other jurisdiction has been stayed, the Panel may, in its discretion, defer any action or imposition of reciprocal discipline until that stay expires.

RULE 8. PROCEEDINGS WHEN PRACTITIONER DECLARED MENTALLY INCOMPETENT OR ALLEGED TO BE INCAPACITATED

- (a) Practitioner Declared Mentally Incompetent or Involuntarily Committed.** After receiving evidence that a practitioner has been:
- (1) Judicially declared incompetent; or
 - (2) involuntarily committed to a mental health facility,

the Clerk will issue an order imposing on the practitioner concerned an immediate temporary nondisciplinary suspension from practice until proceedings under this Rule are concluded and will mail a copy of the suspension order (along with a copy of these rules) to the practitioner concerned and the guardian, and send copies of the order to the director of the mental-health hospital, any appellants represented by the practitioner concerned, and a sponsoring attorney or organization (including an organization that arranged for pro bono representation by the practitioner concerned before the Court), as appropriate.

- (b) Practitioner Alleged to be Incapacitated.** After receiving information that:

- (1) A practitioner's physical or mental condition may adversely affect the practitioner's ability to practice law; or
- (2) a practitioner may be incapacitated for the practice of law by reason of the use of drugs or intoxicants,

the Clerk will inform the Chief Judge. If the Chief Judge determines that the evidence received under this subsection does not have prima facie validity, the matter will be closed and the Chief Judge will direct the Clerk to so notify the practitioner and, if the evidence

was received in the form of a grievance, will direct the Clerk to return the grievance to the filing party with notice of that determination. If the Chief Judge determines that the evidence has prima facie validity, the Chief Judge will instruct the Clerk to refer the matter to a Panel and the Clerk will issue an order doing so. The Panel may take or direct action to determine whether the practitioner concerned is so adversely affected or incapacitated, including examination (at the Court's expense) by qualified medical experts designated by the Court. Failure or refusal by the practitioner concerned to submit to such examination is evidence of incapacity. If the evidence is filed by a judge or judges of the Court, that judge or those judges will not be included in the Panel to which the matter is referred. The Clerk will mail to the practitioner concerned a copy of any referral order (along with a copy of these rules).

(c) Determination by the Panel.

- (1) After action is taken under subsections (a) or (b) above, the Panel will:
 - (A) Order the practitioner concerned to show cause why he or she should not be suspended for a specific or indefinite period; or
 - (B) refer the matter to the Committee for action under Rule 2 and, after receiving the Committee's recommendation, either take no further action and close the case or order the practitioner concerned to show cause why he or she should not be suspended for a specific or indefinite period and
 - (C) after consideration of any show-cause response, if the Panel determines, by a preponderance of the evidence, that the person is incapacitated and should not be permitted to continue to practice, enter an order suspending the practitioner for a specific or an indefinite period.
- (2) All suspensions under this subsection are nondisciplinary.
- (3) Copies of any order suspending a practitioner from practice will be mailed or sent, as appropriate, to the list to which an order issued under subsection (a) above is required to be mailed or sent.

(d) Application for Reinstatement.

- (1) A former practitioner indefinitely suspended under subsection (c) above may apply for reinstatement only by filing an application with the Clerk, but not until the expiration of at least six months after the date of the suspension or last rejection of reinstatement or at such shorter intervals as the Court may direct in the suspension order.
- (2) The applicant must show by clear and convincing evidence that the disability has been removed and that the applicant is fit to resume practice before the Court.
 - (A) The filing of the application waives any doctor-patient privilege with respect to pertinent treatment and examination received during the period of disability underlying the suspension. The applicant may be required to disclose the name of every medical practitioner and facility from whom or in which he or she received that treatment or examination, and to furnish the Court with written consent for those persons or facilities to divulge information or records concerning that examination or treatment.
 - (B) The Panel may take or direct appropriate actions to determine whether the disability has been remedied, including review of appropriate documents or requiring an examination, at the applicant's expense, by qualified medical experts designated by the Court.
- (3) If it appears that the applicant is no longer incapacitated, the Panel may:
 - (A) Reinstatement the applicant; or
 - (B) refer the matter to the Committee for action in accordance with the procedures in Rule 2 and, after receiving the Committee's report and any report rebuttal, either reinstate the applicant or deny the application.
- (4) When a former practitioner suspended due to either a judicial declaration of incompetence or an involuntary commitment to a mental hospital has been judicially declared to be competent, the Court will accept that declaration as conclusive evidence of the removal of the disability and the Panel will direct the reinstatement of the former practitioner upon such terms as it considers appropriate.

- (e) Claim of Disability during Disciplinary Proceedings.** Whenever a practitioner claims, during a disciplinary proceeding, that he or she is incapacitated by disability for any of the reasons listed in subsection (b) above and that this disability makes it impossible to present an adequate defense, the Panel will issue an order imposing on the practitioner an immediate temporary nondisciplinary suspension from practice. The Panel will then proceed in accordance with the evidence-gathering procedures set forth in subsection (b) above relating to Panel action in order to determine if the claim is valid. If the claim is found valid, the disciplinary proceedings will be suspended until a determination is made, in accordance with the same procedure, that the incapacitation has ended or no longer

impedes the practitioner's ability to participate in the disciplinary proceeding.

- (f) **Confidentiality.** Orders announcing suspensions under this Rule will state only that the Court finds that the practitioner concerned has a disability that precludes his or her continued practice before the Court. *See* Rule 12.

RULE 9. LOSS OF SPONSORSHIP BY NON-ATTORNEY PRACTITIONER

- (a) **Initial Action.** After receiving information that a non-attorney practitioner is no longer:
- (1) Under the direct supervision of an attorney admitted to the Court's bar; or
 - (2) employed by an organization chartered by Congress and recognized by the Secretary of Veterans Affairs for claims representation,
- the Clerk will issue an order directing the practitioner to show cause why the Court should not impose on him or her an administrative suspension from practice until the deficiency is remedied. The Clerk will mail that order (along with a copy of these rules) to the practitioner concerned.
- (b) **Suspension.** If the non-attorney practitioner fails to respond to the order or verifies the loss of sponsorship, or if the Clerk determines, by a preponderance of the evidence, that the sponsorship has been terminated, the Clerk will issue an order imposing on him or her an immediate administrative suspension from practice. All administrative suspensions under this subsection are nondisciplinary.
- (c) **Recertification.** A non-attorney practitioner who is under a new sponsorship arrangement or who has been suspended under subsection (b) above may apply for recertification under Rule 46 of the Court's Rules of Practice and Procedure by filing a new sponsorship certificate, identical to that required for admission. Such application may be filed at any time after the non-attorney practitioner concerned has been suspended.
- (d) **Appeal.** A non-attorney practitioner who has been suspended under subsection (b) above may appeal that suspension to the Court by filing a notice of appeal with the Clerk not later than 30 days after such suspension is effected. The Clerk will then refer the matter to a Panel for decision.

RULE 10. DISBARMENT ON CONSENT WHILE UNDER DISCIPLINARY INVESTIGATION

The Chief Judge will issue an order disbaring a practitioner who is the subject of an investigation or proceeding under Rule 6 when the practitioner concerned files an affidavit stating that he or she:

- (a) Is aware of the pending investigation or proceeding, the nature and allegations of which must be specifically set forth in the affidavit; and
- (b) acknowledges that the material facts so alleged are true or that he or she has no defense to the allegations; and
- (c) consents freely and voluntarily to disbarment, with full awareness of its implications.

The Clerk will mail a copy of the disbarment order (along with a copy of these rules) to the practitioner concerned.

RULE 11. REINSTATEMENT FOLLOWING DISCIPLINARY ACTION

- (a) **After Suspension for a Definite Period.**
- (1) Except as provided in paragraph (2) below, a practitioner upon whom a disciplinary suspension has been imposed for a definite period may resume practice at the end of the suspension period. If any conditions were imposed in the suspension order, the practitioner may resume practice only after filing with the Clerk an affidavit of compliance or other evidence of compliance as required by the Panel, with those conditions.
 - (2) A practitioner whose suspension was directed to run concurrently with a suspension mandated by another court may resume practice only after filing with the Clerk an affidavit that he or she has been reinstated by the other court and after completion of the procedures set forth in paragraph (3) below.
 - (3) Any affidavit filed under paragraph (1) or (2) above will be referred by the Clerk to the Court (specifically, to the panel that imposed the suspension) and, unless otherwise ordered by the Panel, the Clerk will issue an order reinstating the practitioner 14 days after referral of the affidavit to the Panel.
 - (4) After referral by the Clerk of an affidavit in accordance with paragraph (3) above, the Panel may take action as prescribed in subsection (c)(2)(A) and (B) below or may take no action.

(b) After Disbarment or Suspension for an Indefinite Period.

- (1) A practitioner upon whom a disciplinary suspension has been imposed for an indefinite period or who has been disbarred may not resume practice before the Court until reinstated by order of the Court.
- (2) Such a practitioner may apply for reinstatement only by filing an application with the Clerk, but not until the expiration of at least one year after the date of the disbarment or suspension order or last rejection of reinstatement.
- (3) The practitioner shall have the burden of demonstrating by clear and convincing evidence that he or she possesses the moral and professional qualifications required for admission to practice before the Court and that the practitioner's resumption of practice before the Court will not be detrimental to the integrity and standing of the bar or to the administration of justice.

(c) Application.

- (1) An application for reinstatement shall consist of a letter from the practitioner concerned that is filed with the Clerk.
- (2) The Clerk will promptly refer an application for reinstatement that meets the criteria of subsection (b) above, when applicable, to the panel of the Court that imposed the suspension or disbarment. The Panel will:
 - (A) Issue an order reinstating the practitioner concerned; or
 - (B) issue a non-public order referring the matter to the Committee for a report and recommendation as to whether the practitioner concerned should be reinstated and, after receiving such report and any report rebuttal:
 - (i) Issue an order reinstating the practitioner concerned; or
 - (ii) issue an order to show cause why the Court should not deny the application for reinstatement; or
 - (iii) hold in abeyance the application for reinstatement and issue an order stating what action or forbearance of action is required as a prior or subsequent condition for the reinstatement of the practitioner concerned.
- (3) After receiving a show-cause response to an order issued in accordance with subsection (c)(2)(B) above, or after the time for receiving a show-cause response has expired, the Panel will take whatever action prescribed in subsection (c)(2)(B) above that it considers appropriate, or deny the application.

(d) Orders.

- (1) An order reinstating an applicant, issued by the Clerk pursuant to this Rule, will state only that the Court reinstates the applicant. Such order will be a public order.
- (2) An order reinstating an applicant, issued by a Panel pursuant to this Rule, may discuss the details of the application and the Court's rationale for granting the application for reinstatement. Such order will be a public order.

(e) Substitution of Judges. The Clerk will substitute a randomly selected judge of the Court for any judge who was part of the Panel of the Court that imposed the suspension or disbarment but who is no longer eligible or able to serve on the Panel.

(f) Nonapplicability. This Rule shall not apply to reinstatement in connection with a proceeding under Rules 8 or 9 above.

RULE 12. ACCESS TO DISCIPLINARY INFORMATION

(a) Confidentiality.

- (1) Except as otherwise provided in these rules, the charges, investigations, hearings, and other proceedings under these rules are confidential; in no case will the affidavit required under Rule 10 be released.
- (2) For purposes of this Rule:
 - (A) The term "nonpublic information" includes, but is not limited to, all documents in a proceeding under these rules other than public orders issued by the Court pursuant to these rules; and
 - (B) the term "predecisional or advisory documents" includes, but is not limited to, the report of the Committee, if any; communications within the Court; and any records of disclosures described in subsection (f) below.

(b) Public Nature of Sanctions and Orders. Except where specifically provided otherwise by these rules, all public discipline will be announced in public orders that will set forth the rationale for imposing the sanction. See also Rule 5(e).

- (c) **Request for Release of Nonpublic Information.** Except as provided below, the Clerk will, in response to a request under this subsection, deny release of nonpublic information.
- (1) On request, the practitioner concerned will be mailed a copy of the Court's file, including the Committee report but not other predecisional or advisory documents.
 - (2) The Clerk may disclose the pendency, general subject matter, and status of an ongoing proceeding if:
 - (A) The practitioner concerned has waived confidentiality, in writing; or
 - (B) there is an immediate need to notify another person or organization as to some matter in order to protect the interests of that person or organization other than an interest at issue in a case pending before the Court.
 - (3) (A) Subject to the limitations in subparagraphs (B) and (C) below, the Clerk may provide public and nonpublic documents (but not predecisional or advisory documents) to:
 - (i) Another federal court to which the practitioner concerned is admitted or has applied for admission, or a state court or agency authorized to investigate attorney conduct for admission or discipline; or
 - (ii) to such other governmental investigative agency as the Court directs in a particular case.
 - (B) Except as provided in subparagraph (C) below, before a release of any nonpublic information under subparagraph (A) above and if the practitioner concerned has not provided a written waiver of confidentiality, the Clerk will mail a notification to the practitioner concerned, at his or her last known address, of the request, the identity of the requesting court or agency, and the nature of the documents intended to be released. The notification will advise the practitioner concerned that the information will be released unless the practitioner has filed with the Clerk an objection not later than 21 days after the date of the notice. If an objection is filed, the information will remain confidential except as provided in subparagraph (C) below.
 - (C) Without notice or waiver, the Clerk will release only the minimum nonpublic information necessary to respond to a request under subparagraph (A) above and only as a Panel directs in a particular case and only if the requesting court official or head of the agency certifies in writing that:
 - (i) The request is made as part of an ongoing investigation into the conduct of the practitioner concerned; and
 - (ii) the information is essential to that investigation; and
 - (iii) disclosure of the existence of the investigation to the practitioner concerned would seriously prejudice that investigation.
- (d) **Records of Disclosures.** All requests for information and responses thereto, with any internal advice on the propriety and extent of any release, will be maintained as a part of the disciplinary file concerned.
- (e) **Duty of Confidentiality.** All persons privy to a proceeding under these rules must, and all Court personnel with knowledge of such proceedings will, maintain the confidentiality mandated by this Rule.
- (f) **Disclosure of Redacted Material.** Nothing in this Rule or otherwise in these rules shall prevent the Court from adopting a process for making public redacted orders or summaries thereof regarding private discipline imposed or not imposed by the Court. Redaction and summarization shall attempt to protect the identity of a practitioner concerned.

RULE 13. DUTIES OF THE CLERK

- (a) **During Proceeding.** During the pendency of any proceeding under these rules concerning the actions or possible incapacity of a practitioner concerned, the Clerk will not refer the name of the practitioner concerned to unrepresented appellants before the Court.
- (b) **Notification to Other Jurisdictions.** Following the issuance of an order imposing discipline, as prescribed in Rule 5(e), and subject to subsection (d) below, the Clerk will promptly mail a certified copy of the order imposing public discipline to another court or other governmental entity if there is reason to believe that the practitioner is admitted to practice before that court or entity.
- (c) **Notification to National Discipline Data Bank.** Following the issuance of an order imposing discipline, as prescribed in Rule 5(e), and subject to subsection (d) below, the Clerk will promptly mail a certified copy of the order imposing public discipline to the American Bar Association's National Discipline Data Bank.
- (d) **Motion to Stay Notification.** Not later than 14 days after public discipline has been imposed, the practitioner concerned may file a

motion with the Court to stay notification pursuant to this Rule until after all action on an appeal by the practitioner concerned of the discipline imposed by the Court is completed. Evidence that an appeal has been filed must accompany a motion filed pursuant to this subsection.

RULE 14. OTHER COURT POWERS

Nothing in these rules shall be construed to deny the Court or otherwise limit the exercise of the powers – such as its contempt powers under 38 U.S.C. § 7265(a) – necessary to maintain control over its proceedings, or to deprive the Court of the power to exercise its inherent disciplinary powers.

Attachment 2 to Miscellaneous Order 10-01

COMMENTARY ON THE RULES OF ADMISSION AND PRACTICE

General. Herein, references to "10/98 proposed rules" or to a particular "10/98 proposed Rule" refer to the 10/98 proposed revision to the existing rules, which was published as an attachment to Misc. Order 8-98 for notice and comment, and references to "11/98 proposed rules" or to a particular "11/98 proposed Rule" refer to the 11/98 redline submitted as to the 10/98 proposed rules; the following revision is derived from those two proposals and takes into account comments submitted to the Court on them.

Rule 1. The text is new. The concept for this Rule came from Rule 1 of the U.S. Court of Appeals for the Federal Circuit's Attorney Discipline Rules (Federal Circuit Rules). As to subsection (c), Federal Circuit Rule 9 refers affidavits in cases of reciprocal discipline to a Standing Panel of judges of that court; provision is made for the Court to decide to establish a standing panel for this and/or other purposes. The definition of "Practitioner" in subsection (e) is from 10/98 proposed Rule 1(b)(2). Rule 46(c) of the Court's Rules of Practice and Procedure (P&P Rules) will be amended to include that portion of 10/98 proposed Rule 8 that conferred disciplinary authority upon the Court for any alleged misconduct by persons specially admitted to practice before the Court.

Rule 2. All but subsections (h) and (i) are derived from 11/98 proposed Rule 2, with some revision. The revisions to the appointment provisions in subsection (a) are intended to provide for the continuation of the existing Committee on Admission and Practice and its staggered terms. Provision for staggered terms generally is intended to attempt to ensure that an experienced member is always serving on the Committee. This idea stems from Local Rule 46(h) of the U.S. Court of Appeals for the Second Circuit. Other revisions have been made in response to public comments received regarding the need for clearer procedures and the lack of administrative support for the Committee. Subsection (h), regarding confidentiality, is derived from Rule II(b) of the Rules for Disciplinary Enforcement for the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit Rules). Although Rule 12 also relates to access to information in disciplinary proceedings, subsection (h) is intended to cover specifically the members of the Committee, as distinguished from other "persons privy to a proceeding," who are referred to in Rule 12(e). Subsection (i) was added in response to concerns raised in public comments regarding the need to provide for certain Committee expenses. It anticipates the enactment of legislation proposed by the Court, which has been passed by the House of Representatives and favorably reported by the Senate Committee on Veterans' Affairs.

Rule 3. Subsection (a) of this Rule is derived from 10/98 proposed Rule 1(a). Subsection (b) is derived from 10/98 proposed Rule 3(a), with technical alterations, except that subparagraph (2)(C) of subsection (b) is intended to provide a uniform procedural context for action by the Committee in admission referrals. Subsection (c) is derived from Rule II(c)(2)-(3) of the D.C. Circuit Rules. The revisions to this Rule generally are intended to make the admission process separate and distinct from the reinstatement and discipline processes, whereas the three processes were intertwined at several places throughout the current rules and the 1998 proposed rules.

Rule 4. Subsections (a) and (b) are derived from 10/98 proposed Rule 1(b)(1)-(2), with technical changes and with deletion of the definition of practitioner, which had appeared in 10/98 proposed Rule 1(b) (Rule 1(e) of these proposed Rules now contains a definition of that term). The use of the words "of the Court" in subsection (b)(2) rather than "these rules", is intended to leave open the possibility of instituting disciplinary proceedings based on a violation of any of the Court's rules, not just the Rules of Admission and Practice. Subsection (c) is derived from 10/98 proposed Rule 11, with some minor revision; that provision is more appropriate for inclusion as a subsection of this Rule rather than as a separate rule.

Rule 5. This is a new Rule precipitated in part by 10/98 proposed Rule 1(b)(3). It is designed to provide a clear list of types of discipline, which should be helpful, inter alia, to the Committee when it is asked to make a specific recommendation. Subsections (a)-(c) are derived from Federal Circuit Rule 3, except that paragraphs (2) and (3) of subsection (a) are derived from 10/98 proposed Rule 7, the content of which seems better suited to this new rule. Subsection (d) is derived from 10/98 proposed Rule 5(c) and is added to provide a period for panel reconsideration or review by the en banc Court before a proposed discipline order becomes final and to require nonpublic notice of this period to the practitioner concerned. Subsection (e) is added in response to comments as to whether private discipline is to be accomplished by letter or Court order. Subsection (f) is new and is designed to differentiate between a protective suspension and a disciplinary suspension.

Rule 6. Subsections (a) and (b) are derived from 11/98 proposed Rule 5; revisions were made, in response to public comments, to clarify the required proceedings and to ensure that no discipline will be imposed that is greater than a discipline identified to the practitioner concerned in a show-cause order. Subsection (c) is derived from 10/98 proposed Rule 1(c)(2), with technical alteration.

Rule 7. This is derived from 10/98 proposed Rule 4 and 11/98 proposed Rule 4, with some revision. In subsection (c), the scope of "other crimes" is limited to misdemeanors. The revisions to the procedures in subsection (d) were made to conform to the text of proposed new Rule

6(b), which sets forth similar procedures in the context of the consideration of accusations of misconduct, and to new Rule 8(a), regarding immediate suspension orders issued by the Clerk. The term "similar discipline" is used in subsection (d)(2)(B) because there may be no "identical" discipline provided for under the Court's rules. For example, a state court may require a disciplined attorney to attend an ethics course provided by that state's bar, but the bar of the Court may not provide such a course. Throughout this Rule, as well as Rule 8, it is made clear that a temporary suspension pending the outcome of proceedings is not disciplinary in nature.

Rule 8. This is derived from 10/98 proposed Rule 9 and 11/98 proposed Rule 9, with some revision and reorganization. The amendments are primarily to provide procedures, which were not detailed in the prior proposed Rule. In addition, the initial suspension provided for in subsection (a) is no longer for a fixed time but only until proceedings by the Court under this Rule are completed. Also, the time period after which a person who has been suspended or whose application for reinstatement has been rejected is reduced from one year to six months, in part due to public comments received on the 1998 proposed rules. An option is added, in subsection (d)(3)(B), to refer the matter of reinstatement to the Committee.

Rule 9. Subsections (a)-(c) are derived from 10/98 proposed Rule 10, with some revision, including reversing subsections (b) and (c) in sequential order and clarifying the effect of the Clerk's verification of information regarding loss of sponsorship. Subsection (b) now provides that the suspension under this Rule is administrative, not disciplinary, and is based on common practice in state bars that impose administrative suspensions for failure to pay dues, etc. Subsection (d) is new.

Rule 10. This provision is derived from 10/98 proposed Rule 6(a), with minor technical alterations and with the substantive change to give the Chief Judge, not the Clerk, the power to disbar a practitioner under this Rule.

Rule 11. Subsections (a) and (b) are derived from 10/98 proposed Rule 7(a) and (b) and 11/98 proposed Rule 7(a) and (b), but have been reorganized into categories based on the nature of the discipline that was imposed in the earlier proceeding. Paragraph (3) has been added to subsection (b) to retain the standard for reinstatement contained in existing Rule 7(b). Subsections (a)(3), (c), and (e), which are new, are intended to clarify what procedures obtain when an affidavit filed pursuant to subsection (a)(1) or (2) is received by the Clerk. Subsections (d), (e), and (f) are new. The 11/98 proposed Rule 7(c) has been moved to new proposed Rule 10.

Rule 12. This is derived from 10/98 proposed Rule 12 and 11/98 proposed Rule 12, with some minor revisions (including a requirement for approval by a panel of the Court as to the release of any nonpublic information without notice to or waiver by the practitioner concerned to another Court or governmental investigative agency), and with the addition of subsection (f), which follows a suggestion in the Commentary to Rule 1.2 of the American Bar Association Standards for Imposing Lawyer Sanctions that "[t]o deter other lawyers, the court can still issue a public report describing facts in cases where [nonpublic] admonitions are imposed, but omitting the names of the disciplines lawyers."

Rule 13. This is derived from 10/98 proposed Rule 13 and 11/98 proposed Rule 13, with some revision. Subsection (d) is new and is designed to provide a procedure to cover a matter not addressed in the current rules or the 1998 proposed rules.

Rule 14. This is derived from existing rule 12 and 11/98 proposed Rule 1(d), with text added at the end; the added text is derived from the language used in D.C. Circuit Rule XII, and is intended as a formal recognition of the Court's inherent disciplinary powers. See, e.g., *In re Bailey*, 182 F.3d 860, 864 (Fed. Cir. 1999) (recognizing that the Court "does indeed have such power").