

Rules of the Unauthorized Practice of Law Subcommittee of the Board on Professional Responsibility

Revised, effective Sept. 12, 2017.

I. Structure and Scope

Rule 1. The Unauthorized Practice of Law Subcommittee of the Board on Professional Responsibility.

(a) *Composition, powers and duties.* The composition of the Unauthorized Practice of Law Subcommittee of the Board on Professional Responsibility shall be set forth in Supreme Court Rule 62. Subject to the approval of the Court, the Subcommittee shall

(1) have the power to take testimony under oath, and to compel the attendance of witnesses and the production of documents by the filing of a praecipe for a subpoena with the Clerk of the Supreme Court, service of such subpoena to be made by the Sheriff of Kent County;

(2) conduct such investigations and hearings as may be necessary respecting any questions of the unauthorized practice of law, to make findings of fact and conclusions of law regarding the same, to make recommendations to the Court as to the disposition of individual matters, and to file its report of such findings with the Court in a timely manner; and

(3) assess and require the payment of the Subcommittee's reasonable costs and expenses by any person or organization found by the Court to be engaging in the unauthorized practice of law, or attendant to any investigation or hearing which results in a cessation of the unauthorized practice of law or an Order of this Court directing the same.

(b) *Advisory opinions.* The Subcommittee shall not render advisory opinions on the unauthorized practice of law.

Rule 2. Abstention of Subcommittee members.

Members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain and shall for the purposes of such proceeding only, be considered "disqualified."

Rule 3. Meetings, administration and reports.

(a) *Meetings.* From time to time the Subcommittee may meet upon call of its Chair, or upon call of the Supreme Court, at such place and time as may be specified in the call. Except in respect of a hearing in any formal proceeding, the Subcommittee, or any of the members thereof, may participate in any meeting of the Subcommittee, by telephone or electronic means, participation in a meeting pursuant to this subsection shall constitute presence in person at the meeting.

(b) *Administration of system.* The Subcommittee Administrator shall assist the Subcommittee with assignment of Hearing Panels, the scheduling of hearings, and the filing, docketing, and maintenance of pleadings and other papers constituting the official record in individual unauthorized practice cases. The Supreme Court may designate a person on its staff to serve as Subcommittee Administrator.

(c) *Reports.* On or before January 31st, the Subcommittee shall file a report with the Supreme Court advising the Court of the following:

- (1) The number of petitions filed with the Subcommittee during the previous year.
- (2) The number of hearings conducted by panels during the previous year.
- (3) The number of recommendations filed with the Court during the previous year.
- (4) The number of matters resolved through the Rule 14 Affidavit of Voluntary Compliance procedure during the previous year.
- (5) The number and status of matters pending as of the date of the Subcommittee Chair's report.

II. Procedure

Rule 4. Intake of complaints.

(a) *Complaints.* All information, whether received by complaint or otherwise, regarding a possible occurrence of the unauthorized practice of law in the State of Delaware shall initially be processed by the Office of Disciplinary Counsel, which shall act as the intake agency for the receipt of all such information. Complaints should be in writing. Upon receipt of any such information, Disciplinary Counsel shall open an appropriate file and assign the matter a docket number. Neither unwillingness nor neglect of the complainant to press a complaint once made, nor settlement, nor compromise between the complainant and any respondent, nor restitution by the respondent shall, in itself, justify abatement of the processing of any complaint.

(b) *Evaluation and summary dismissal.* Upon the receipt and docketing of a complaint or other information regarding a possible occurrence of the unauthorized practice of law in the State of Delaware, Disciplinary Counsel shall conduct an evaluation of the matter. If the complaint or information on its face does not indicate an occurrence of the unauthorized practice of law in the State of Delaware, Disciplinary Counsel shall summarily dismiss the matter without prejudice and close the file with written notice to the complainant.

(c) *Criteria for evaluation.* In evaluating any information involving the possible unauthorized practice of law in the State of Delaware, Disciplinary Counsel shall initially determine whether the person which is the subject of such information is otherwise authorized to practice law in the State of Delaware. If not, Disciplinary Counsel shall then determine whether such person has possibly engaged in any of the following types of conduct: (i) giving legal advice on matters relating to Delaware law, (ii) drafting legal documents or pleadings for a person or entity (other than one's self) reflecting upon Delaware law, for use in a Delaware legal tribunal or governmental agency, unless the drafting of such documents or pleadings has been supervised by a person authorized to practice law in the State of Delaware, (iii) appearing as legal counsel for, or otherwise representing, a person or entity (other than one's self) in a Delaware legal tribunal or governmental agency, (iv) holding one's self out as being authorized to practice law in the State of Delaware, (v) engaging in an activity which has traditionally been performed exclusively by persons authorized to practice law, and (vi) engaging in any other act which may indicate an occurrence of the unauthorized practice of law in the State of Delaware as established by case law, statute, ruling, or other authority. The foregoing description of types of conduct are to be used as general guidelines for evaluation by Disciplinary Counsel, and not as definitions of the unauthorized practice of law.

Rule 5. Investigations.

(a) *Investigation by Disciplinary Counsel.* If the evaluation of a matter by Disciplinary Counsel does not result in summary dismissal under Rule 4(b), Disciplinary Counsel shall proceed to initiate an investigation of the matter, with written notice to the Subcommittee and the complainant.

(b) *Subpoenas.* Following the designation of a matter as an investigation under Rule 5(a), Disciplinary Counsel may administer oaths and affirmations and may compel by subpoena the attendance of witnesses and the production of relevant books, papers, and documents. Subpoenas shall be issued under the signature of Disciplinary Counsel and served by any means deemed appropriate.

(c) *Dismissal after investigation.* Following an investigation, Disciplinary Counsel may dismiss the matter without prejudice and close the file with written notice to the complainant. When an investigation has revealed that there is insufficient evidence of conduct involving an occurrence of the unauthorized practice of law in the State of Delaware to prosecute the matter further, the matter shall be dismissed.

Rule 6. Formal proceedings.

(a) *Approval of petition by Subcommittee Chair or Vice Chair.* Following an investigation, if Disciplinary Counsel determines there is sufficient evidence of conduct involving an occurrence of the unauthorized practice of law in the State of Delaware to warrant further prosecution, Disciplinary Counsel shall draft a petition seeking appropriate relief directed to the Subcommittee. The petition shall be sufficiently clear and specific to inform the respondent of the alleged unauthorized practice of law, and shall contain a notice that the respondent's failure to file a response with the Subcommittee in a timely manner will result in the allegations and charges contained therein being deemed as conclusively established. Disciplinary Counsel shall submit the draft petition to the Subcommittee Chair or Vice Chair for review, and no petition may be filed by Disciplinary Counsel without prior approval of the Subcommittee Chair or Vice Chair. The Subcommittee Chair or Vice Chair shall not thereafter participate on a panel that decides the matter on the merits.

(b) *Commencement of formal proceedings.* Following approval of a petition by the Subcommittee Chair or Vice Chair, Disciplinary Counsel shall sign and file the petition with the Subcommittee Administrator, and shall serve the petition upon the respondent pursuant to these Rules. The respondent shall file an answer with the Subcommittee Administrator within 20 days of service of the petition, with service of same upon Disciplinary Counsel. In the event the respondent fails to answer in a timely manner, all factual allegations contained therein shall be deemed as conclusively established.

(c) *Hearing Panels.* Following the commencement of formal proceedings pursuant to Rule 6(b), the Subcommittee Administrator shall appoint a Hearing Panel, which shall consist of three members, two shall be lawyers and one shall be a non-lawyer. The chair of the Hearing Panel shall be a lawyer. The Subcommittee Chair shall not serve as a member of a Hearing Panel unless no other member of the Subcommittee is available. Prior to the appointment of a Hearing Panel in a formal proceeding, the Subcommittee Chair shall consider and determine all procedural, evidentiary, and administrative issues relating to the proceeding; after such appointment but prior to a hearing, the chair of the Hearing Panel shall consider and determine all such issues, except as otherwise stated in these Rules. Upon the commencement of a hearing in a formal proceeding, the making of any subsequent ruling, disposition, order, or final report by the Hearing Panel shall require a majority vote of its panelists.

Rule 7. Service of petition and other papers; filing.

(a) *Service.* Service of the petition upon the respondent shall be made either in the manner provided for service of a civil complaint under the Rules of Civil Procedure for the Superior Court or be made by any person authorized by the Subcommittee to make such service.

All papers subsequent to the petition which are filed with the Subcommittee shall be served upon each party to the proceeding. Service upon a party represented by an attorney shall be made by serving the attorney unless service upon the party personally is ordered by the Subcommittee. Service upon the

attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the Subcommittee Administrator.

Delivery of a copy within this Rule means: Handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(b) *Filing requirement and manner of filing.* A petition and all other pleadings relating to a matter before the Subcommittee shall be filed with and maintained by the Subcommittee Administrator. The filing of any such paper with the Subcommittee shall be made by delivering one original and three copies of such document to the Subcommittee Administrator. All such documents shall thereupon be date-stamped by the Subcommittee Administrator as "filed" with the Subcommittee. The original copy of all such filings shall be retained by the Subcommittee Administrator as the official record of the Subcommittee in the matter.

Rule 8. Subpoenas and discovery.

(a) *Oaths and affirmations.* Any Hearing Panel member who is authorized by law to do so may administer oaths and affirmations in matters before the Hearing Panel.

(b) *Subpoenas.*

(1) For the hearing, Disciplinary Counsel may compel by subpoena the attendance of such witnesses (including the respondent) and the production of such books, papers and documents as are relevant to the issues that are the subject matter of the hearing.

(2) After formal proceedings are instituted and at the written request of the respondent, the Subcommittee Chair or Vice Chair shall compel by subpoena the attendance of such witnesses and the production of such books, papers and documents at the hearing as are relevant to the issues that are the subject matter of the hearing.

(c) *Challenges to subpoenas.* Any attack on the validity of a subpoena so issued shall be heard and determined by the Hearing Panel, or by a court in the jurisdiction wherein enforcement of the subpoena is being sought.

(d) *Enforcement of subpoenas.* The Supreme Court may, upon proper application, enforce the attendance and testimony of any witnesses and the production of any documents subpoenaed.

(e) *Depositions.* With the approval of the Hearing Panel, testimony may be taken by deposition or by commission if the witness is not subject to service of subpoena or is unable to attend or testify at the hearing because of age, illness, absence from the State or other compelling reason. A complete record of the testimony so taken shall be made and preserved.

(f) *Witness fees.* Subpoena and witness fees and mileage shall be the same as those provided for proceedings in the Delaware Superior Court.

(g) *Discovery disputes.* Prior to the appointment of a Hearing Panel in a formal proceeding, the Subcommittee Chair shall consider and determine disputes concerning the scope and other aspects of discovery; after such appointment but prior to a hearing, the chair of the Hearing Panel shall consider and determine all such issues, except as otherwise stated in these Rules. All discovery orders are interlocutory and may not be appealed.

Rule 9. Hearings.

(a) *Notice of hearing.* If a Hearing Panel determines there are material issues of fact raised by the pleadings or if any party requests the opportunity to be heard, the Subcommittee Administrator shall serve notice of a hearing upon Disciplinary Counsel and the respondent, stating the date and place of the hearing at least 20 days in advance thereof. The notice of hearing shall advise the respondent that the respondent is entitled to be represented by a lawyer, to cross-examine witnesses and to present evidence in the respondent's own behalf. Briefs, argument or other submissions may be permitted in the discretion of the Hearing Panel.

(b) *Pre-hearing conference.* Upon the application of any party or on its own motion the Hearing Panel chair may order a conference to be held for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. The conference shall be held before the chair of the hearing panel assigned to the matter, or before the chair's designee.

(c) *Stenographic record.* A stenographic record shall be made of the hearing. The record of the hearing shall be made available to the respondent at the respondent's expense upon the respondent's request.

(d) *Findings.* Following a hearing, the Hearing Panel shall express its findings of fact, conclusions of law, and recommended disposition in a final report which is sufficiently specific for the purposes of review by the Supreme Court. A copy of the report shall be served upon the parties.

(e) *Supreme Court review.* The Hearing Panel's final report shall be filed with the Supreme Court together with the record of its proceedings, including transcripts, briefs, and other pleadings, within 90 days of the date upon which the matter was finally submitted to the Hearing Panel. The Hearing Panel shall promptly serve notice of such filing to the parties. Within 20 days of the receipt of such notice, any party may file objections to the Hearing Panel's report with the Supreme Court. Such objections may not exceed five (5) pages in length. If objections are filed, the Court may then treat the matter pursuant to its rules governing civil appeals, designating the appropriate party as the appellant, and scheduling the matter for briefing and argument. If no objections are timely filed, the report of the Hearing Panel shall be approved by order of the Court as the final disposition of the matter unless the Court orders otherwise within 30 days of the last date for filing objections. The final disposition of a matter by the Court shall be enforceable in the Court through contempt proceedings.

Rule 10. Witnesses and evidence.

All witnesses shall be sworn or shall give proper affirmation in all proceedings hereunder. The Delaware Uniform Rules of Evidence shall be followed as far as practicable, provided that evidence may be admitted and considered which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. Where the respondent is or has been a party to a proceeding, whether criminal, civil, administrative or otherwise, the relevant portions of the transcript of the proceedings, exhibits, findings of fact, conclusions of law, opinions, decisions and judgments, shall be admitted in evidence and shall be accorded such weight as the Hearing Panel shall deem appropriate; provided, however, that proof of a conviction of the respondent for any crime shall be conclusive evidence of the commission of that crime.

Rule 11. Burden of proof.

The burden of proving action constituting the unauthorized practice of law shall be upon Disciplinary Counsel and shall be by clear and convincing evidence.

Rule 12. Related litigation.

Whenever in the course of an investigation or formal proceeding the Subcommittee or Hearing Panel, if one has been appointed, ascertains that there is in process civil litigation to which the person under investigation or the respondent is a party, or a criminal action in which such person or respondent is, or becomes, a defendant, either of which involves the subject matter of the investigation or formal

proceeding, the Subcommittee or Hearing Panel may upon application or on its own motion direct that the investigation or formal proceeding be stayed for a period not to exceed 90 days, and upon such terms as the Subcommittee or Hearing Panel may deem desirable because of the pending litigation. Upon application or on the Subcommittee's or Hearing Panel's own motion, any stay so granted which has expired or is about to expire may be renewed from time to time for periods not to exceed 90 days. The Subcommittee or Hearing Panel may, upon application or on its own motion, at any time, revoke or modify such stay. In determining whether and upon what terms a stay should be granted, denied, revoked or extended the Subcommittee or Hearing Panel shall consider all relevant factors, including the following: (1) the need for disposing of the matter at the earliest practicable time, (2) the extent to which the issues in the pending litigation are the same or substantially the same as those before it, (3) the extent to which the matter under investigation or subject to the formal proceedings would probably be delayed by awaiting the disposition of the pending civil litigation or criminal action, (4) the extent to which the matter under investigation or subject to the formal proceedings would probably be expedited by awaiting the plea or judgment in the criminal action, (5) the extent to which the matter under investigation or subject to the formal proceedings would be aided, as to the determination of a material issue, by awaiting evidence to be adduced in the pending litigation, (6) the extent to which evidence may be unavailable to the investigation or formal proceeding because of any delay occasioned by withholding further action, (7) the extent to which witnesses or documents may be unavailable to the investigation or formal proceedings because of concurrent discovery or trial proceedings in the pending litigation, and (8) the extent to which the person under investigation or the respondent or any party to the pending litigation may be prejudiced in the pending litigation by withholding or failing to withhold further action. The acquittal of the person under investigation or the respondent on criminal charges or a verdict or judgment in favor of the person under investigation or the respondent in civil litigation involving substantially similar material allegations shall not, in and of itself, abate the investigation or formal proceedings even though predicated upon the same material allegations.

Rule 13. Rulings, orders, and reports.

The Subcommittee shall have power to make such rulings, dispositions, orders, recommendations, and reports as may be permitted under Supreme Court Rule 62 and these Rules. Any such action which is reduced to writing shall be signed by an appropriate member of the Subcommittee.

Rule 14. Voluntary compliance.

At any time after a matter is initially docketed by the Office of Disciplinary Counsel, the respondent may voluntarily offer an assurance that the respondent shall not engage in the unauthorized practice of law in the State of Delaware. Any such voluntary assurance must be in writing and duly sworn, and must be approved in writing by the Disciplinary Counsel and either (a) the Subcommittee Chair, if no panel has yet been assigned to the matter, or (b) the Hearing Panel, if a panel thereof has been assigned to the matter. Upon such approval, the voluntary assurance shall be filed by Disciplinary Counsel in the Supreme Court with a petition for the Court's approval briefly describing the facts of the matter and a form of order. The Supreme Court's entry of an order approving the voluntary assurance shall be enforceable in the Court through contempt proceedings.

Rule 15. Notice to complainant.

Disciplinary Counsel shall promptly notify the complainant, if any, as to the final disposition of each complaint after the matter is concluded.

Rule 16. Costs.

Unless otherwise ordered by the Supreme Court or the Hearing Panel, costs of all proceedings, including the costs of investigation, service of process, witness fees and court reporting services, shall be assessed

against the respondent in any case where the Court makes a final determination that the respondent has engaged in the unauthorized practice of law.

III. Enforcement Proceedings

Rule 17. Rulings of the Hearing Panel.

Except for the findings and other dispositions contained in the Hearing Panel's final report pursuant to rule 9(d), all rulings of the Hearing Panel shall be considered interlocutory and shall not be subject to interlocutory review by the Supreme Court.

Rule 18. Objections.

Objections to the findings of the Hearing Panel following a hearing may be filed with the Supreme Court in the manner described in Rule 9(e). The pendency of the Supreme Court's review of the Hearing Panel's findings pursuant to Rule 9(e) shall operate as a stay of such findings until final disposition by the Court.

Rule 19. Enforcement proceedings.

Whenever it shall come to the attention of the Disciplinary Counsel that a respondent is or may be in violation of an order of the Court, Disciplinary Counsel shall initiate an investigation of the matter. If after investigation Disciplinary Counsel determines that the respondent is not in violation, Disciplinary Counsel shall dismiss the matter without prejudice subject to the approval of the Subcommittee Chair, and close the file with written notice to the appropriate parties. If after investigation Disciplinary Counsel concludes that the matter should not be dismissed, Disciplinary Counsel shall draft a petition to the Court for a rule to show cause why the respondent should not be found in contempt. Disciplinary Counsel shall submit the draft petition to the Subcommittee Chair for review, and no such petition may be filed by Disciplinary Counsel without the prior approval of the Subcommittee Chair.

Following approval of such petition by the Subcommittee Chair, Disciplinary Counsel shall file the petition with the Court, and shall serve the petition upon the respondent in the same manner as a petition which is initially filed with the Subcommittee. The respondent shall file an answer with the Court within 20 days of service of the petition, with service of same upon Disciplinary Counsel. In the event that the respondent fails to answer the petition in a timely manner, or otherwise does not dispute the petition, all allegations and charges contained therein shall be deemed as conclusively established, and the Court may thereupon enter an appropriate order of enforcement. If the respondent answers the petition in a timely manner and disputes the allegations and charges contained therein, the Court may thereupon treat the matter as it would any contempt proceeding. The Court may direct that the Subcommittee conduct an evidentiary hearing with respect to the petition and submit a report with its findings and recommendations to the Court on the issue of contempt.

IV. Miscellaneous Provisions

Rule 20. Immunity.

(a) *From civil suit.* Communications to any member of the Subcommittee or Disciplinary Counsel relating to the alleged unauthorized practice of law and testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit may be instituted against any complainant or witness based on such communications or testimony. All persons performing official duties under these Rules, including but not limited to members of the Subcommittee, the agents, employees or other persons working on behalf of the Subcommittee, Disciplinary Counsel and staff, and the Subcommittee Administrator, shall be immune from civil suit for any conduct in the course of their official duties.

(b) *From criminal prosecution.* Upon application by Disciplinary Counsel or the respondent and notice to the Attorney General, the Supreme Court may grant immunity from criminal prosecution to a witness in any proceedings under these rules.

Rule 21. Confidentiality.

(a) *Complaints, investigations, and hearings.* In connection with a particular matter being considered by the Court, the Subcommittee, or Disciplinary Counsel, all information and proceedings are confidential, except that the following shall be considered as public:

- (1) the fact that a matter is being evaluated or investigated by Disciplinary Counsel,
- (2) the identity of a person being evaluated or investigated by Disciplinary Counsel,
- (3) the general subject matter, pendency, and status of a matter being evaluated or investigated by Disciplinary Counsel,
- (4) the official record in a matter as filed with the Subcommittee pursuant to Rule 7(b),
- (5) hearings in particular matters before the Hearing Panel,
- (6) the rulings, orders, dispositions, and reports of the Hearing Panel in particular matters, and
- (7) the record and proceedings in particular matters which are reviewed by the Supreme Court.

(b) *Protective orders.* In order to protect the interests of complainants, witnesses, third parties or respondents, the Hearing Panel may, upon application and for good cause shown, issue a protective order prohibiting the disclosure of specific information and direct that the proceedings be conducted so as to implement the order.

(c) *Duty of participants.* All participants in a proceeding under these rules shall conduct themselves so as to maintain the confidentiality mandated by any protective order.

(d) *Cooperation with criminal justice authorities.* Any evidence or information obtained pursuant to these Rules indicating criminal conduct, including documents, transcripts, and work product, or any selected portions thereof, may be disclosed or turned over to the appropriate criminal justice authorities for their independent review and investigation.

Rule 22. Nature of proceedings.

Proceedings concerning the unauthorized practice of law are neither civil nor criminal but are sui generis.

Rule 23. Time.

(a) *Computation of time.* In computing any period of time prescribed or allowed by these Rules, the provisions of Supreme Court Rule 11(a), as amended from time to time, shall control.

(b) *Effect of time limitations.* Except as is otherwise provided in these Rules, time provisions stated in these Rules are directory and not jurisdictional. Failure to observe prescribed time intervals may result in sanctions against the violator but does not justify abatement of any investigation or proceeding.

Rule 24. Limitations on actions.

An occurrence or course of conduct involving the possible unauthorized practice of law which concluded prior to three years of the receipt of information of such activity by the Office of Disciplinary Counsel may be evaluated or investigated by Disciplinary Counsel for the purposes of verification, but shall not otherwise become the subject of formal proceedings before the Subcommittee pursuant to Rule 6(b).

Rule 25. Complaints against non-lawyer members or associate members.

Complaints against non-lawyer members or non-lawyer associate members of the Subcommittee alleging the unauthorized practice of law shall be submitted directly to the Supreme Court.

Rule 26. Permanent file of opinions.

All written opinions issued by the Hearing Panel shall be public unless otherwise provided in accordance with Rule 21 and shall be maintained by the Subcommittee Administrator in a permanent file of opinions.

Rule 27. Disciplinary Counsel.

As used in these rules, "Disciplinary Counsel" shall mean disciplinary counsel as defined by Supreme Court Rule 64, or as the case may be, the Office of Disciplinary Counsel.

Rule 28. Effective date.

These rules shall become effective on May 1, 1997, and any investigation or other proceeding relative to the unauthorized practice of law pending on that date shall be processed pursuant to these rules from that point on unless the Supreme Court shall otherwise order to avoid substantial injustice.

Index follows Rules.

INDEX TO RULES OF THE BOARD ON THE UNAUTHORIZED PRACTICE OF LAW