M E M O RA N D U M

TO: **Board on Professional Responsibility**

FROM: **Hamilton P. Fox, III, Disciplinary Counsel**

RE: **Revisions to the Docketing and Notification Rules (Board Rules 2.3-2.8 and 6.1)**

The Office of Disciplinary Counsel opposes the revisions of the Board Rules that require the notification to all complainants that we are docketing an investigation against a lawyer. (BPR Proposed Rules 2.4 and 2.6).This requirement is inconsistent with the rule of the Court of Appeals that require that investigations of lawyers be kept confidential until formal charges are brought (or an informal admonition has been issued). D.C. Bar Rule XI, § 17(a). In recent years, we have received hundreds of complaints against public figures from complainants, on all sides of the political spectrum, who lack any personal knowledge of the matters about which they are complaining ("public complainants"). We have consistently declined to disclose to public complainants whether we are docketing a complaint. We do so because (a) since they lack any personal knowledge there is no reason to contact them further while conducting an investigation and (b) many public complainants will publicize our docketing a complaint in order to score political points. The proposed revisions will weaponize public complainants to disparage the

reputations of lawyers under investigation, a result which the Court's confidentiality rule is intended to prevent.

Rule XI § 17(a) provides, "Except as otherwise provided in this rule or as the Court may otherwise order, all proceedings involving allegations of misconduct by an attorney shall be kept confidential until either a petition has been filed . . . or an informal admonition has been issued." Importantly, the rule does not authorize the Board on Professional Responsibility to make exceptions to the requirement of confidentiality; only the Court "in this rule" or by "order" can make an exception. Disciplinary Counsel's process is to make an initial decision, on a standard similar to that applied for a motion to dismiss, as to whether a complaint makes out a possible violation of the Rules of Professional Conduct. If it does, we docket the complaint for investigation. Once we have investigated the facts, the vast majority of cases do not result in formal charges or informal admonitions. Thus, the matters remain confidential, and the lawyers under investigation suffer no reputational damage.

Although the Court has delegated no authority to the Board to adopt rules making exceptions to its requirement of confidentiality, the Board has nevertheless done so. Current Board Rule 2.6 provides, "Complainants shall be promptly advised by Disciplinary Counsel of the docketing of the complaint." In most cases, where the complainant has personal knowledge of the matter about which he or she has

complained, this requirement does not violate the spirit of the Court's requirement of confidentiality. The Court explicitly authorizes—in fact requires--Disciplinary Counsel "to investigate all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of the Court . . . ." Rule XI, § 6(a)(2). When he or she has personal knowledge, further contact with the complainant is almost inevitable. Thus, the complainants in these cases will know we have docketed the case for investigation. For example, when the lawyer responds to our inquiry, we generally send the explanation to the complainant and provide him or her the opportunity to respond. But in contacting the complainant, or other witnesses, Disciplinary Counsel informs them that the investigation is confidential and asks them to keep the fact of the investigation confidential. Our form subpoenas for documents contain similar admonitions. While there is no mechanism to enforce confidentiality, most complainants comply. Furthermore, since most lawyers whom we investigate are not public figures, there is little interest from the news media or by the public in these cases.

We have for many years taken a different approach when someone complains based not on his or her personal knowledge but on something that has appeared in the news. We tell public complainants that we will not docket an investigation in their name but that does not mean we will ignore the information or fail to docket complaints based on public information. These public complainants are not

witnesses, and we have no reason to interview or contact them further. There is no investigative reason to inform them that we have docketed a matter, and to do so violates the Court's rule requiring confidentiality of investigations. Furthermore, we know that if we do inform public complainants that we have docketed a matter for investigation, they will likely use that fact to damage the reputation of the lawyer under investigation. In many instances, the public complainants post their letters of complaint and our response on social media. Confirmation that we have docketed and are investigating the matter will undoubtedly also be disclosed. The fact that we are investigating a lawyer causes substantially more reputational damage than the fact that a political opponent has filed a complaint against the lawyer. This is precisely the result that the Court's confidentiality rule is designed to prevent.

We know that this will be the result because our colleagues in other jurisdictions that have rules analogous to the proposed amendments have told us this is exactly what they experience. The degree of magnitude in the District of Columbia, however, will be greater. As the seat of the federal government, there are undoubtedly more members of the D.C. Bar who are public figures than in any other jurisdiction. The proposed amendments weaponize their political opponents to damage these lawyers' reputations if the opponents are intelligent enough to file a complaint that gets past the low bar of a motion-to-dismiss standard. Nor will this damage be ameliorated by caveats that a determination to investigate is not a

determination that there has been a violation or an explanation of the disciplinary procedures. If the media even mentions those matters, it will be buried in the story, the headline of which is that we are investigating a public figure for ethical misconduct.

The asserted justification for these amendments is merely optics: some people believe this Office will not investigate public figures because, in compliance with the Court's rule, we will not acknowledge when we are doing so. An acknowledgment that we are investigating is thought to bolster confidence in the disciplinary system and provide greater transparency. But even in the absence of the Court's specific rule to the contrary, investigations are not supposed to be transparent. The Department of Justice does not make public announcements when it investigates public figures, not only because of the damage to the reputation of uncharged persons, but also because investigations are more effective if they are conducted in secret. That is why grand jury proceedings are confidential. As to public confidence, that is or should turn on the cases that we bring, not the cases that we investigate. Any objective assessment of this Office's public charges over the last six months ought to allay concerns that we are giving public figures a pass. The Board has established a page on its website (https://www.dcbar.org/attorneydiscipline) for the public to access "Cases of Public Interest." Furthermore, is public confidence going to be enhanced or diminished if

we publish the fact that we are investigating a public figure and then do not bring charges? Since we can only bring charges when a specific, written Rule of Professional Conduct has been violated, and since our burden of proof is clear and convincing evidence, we will inevitably dismiss a number, probably most of these investigations. It is difficult to imagine that a string of dismissals will preserve public confidence in the disciplinary system.

Both Maryland and Virginia, our closest neighbors who also have a number of attorney members who are national public figures, do not docket cases based on complaints from persons with no personal knowledge. Maryland Rule 19-711(b)(2) provides in part, "Bar Counsel may decline a complaint submitted by a person who provides information about an attorney derived from news reports or third-party sources where the complainant appears to have no personal knowledge of the information being submitted." When Virginia was overwhelmed in 2020-2021 with complaints against a public figure, it put a notice on its website saying that it was sensitive to complaints being motivated by opposition to the policies that public figures advocate and that it would not acknowledge cumulative complaints from members of the public with no direct, personal involvement. The District of Columbia should continue to follow a similar policy. The proposed Board rules will stigmatize public figures in cases where we ultimately determine that no charges are warranted.