

# **A Primer On Virginia's Attorney Disciplinary System**

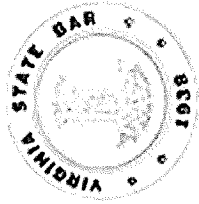
October 25, 2016

Virginia Beach Bar Association

*Christine M. Corey*

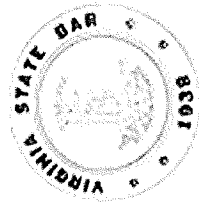
*Assistant Bar Counsel*

*Virginia State Bar*

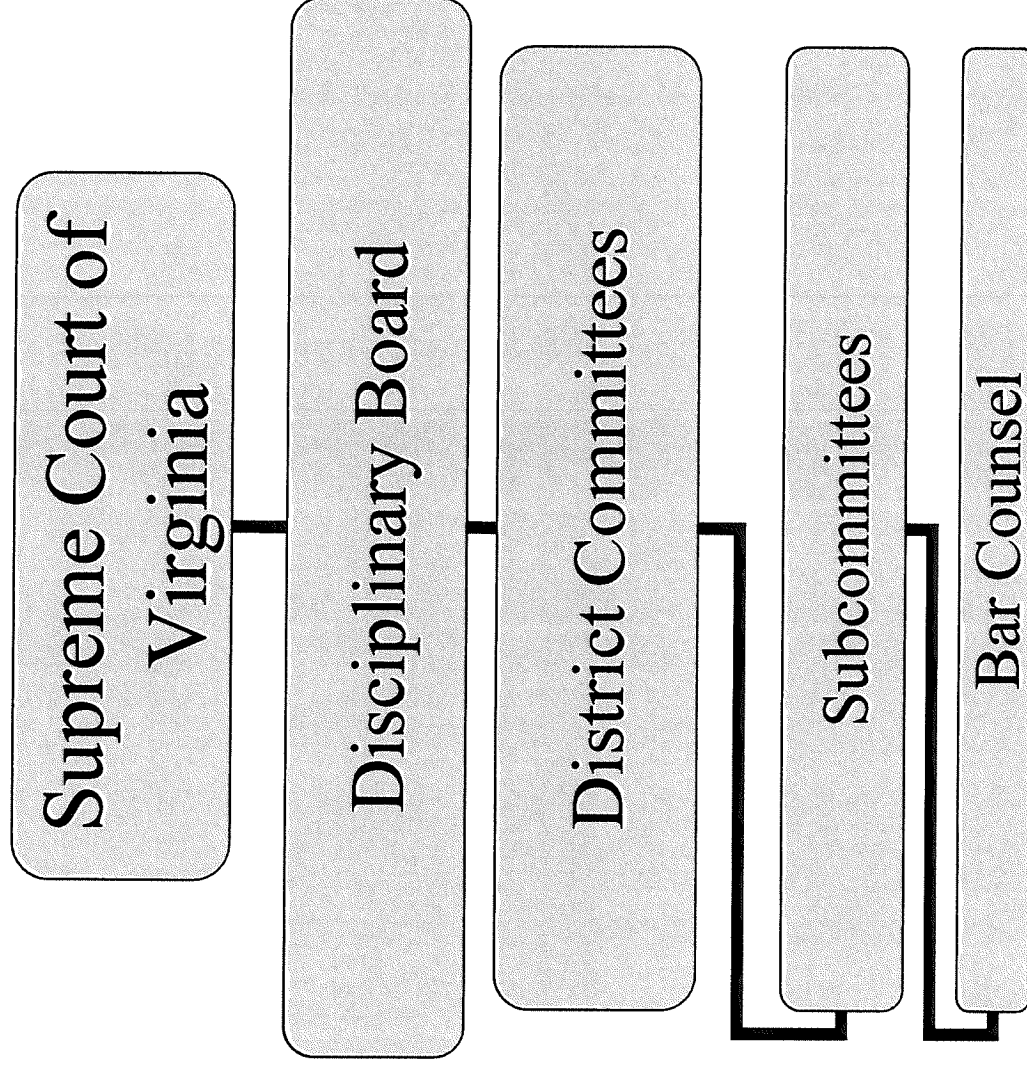


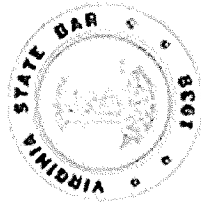
## Statistics

- Approximately 3500-4000 complaints a year
- 20-25% go to full investigation
- Other cases: dismissed and referred to as NATs (No Action Taken), or handled through Proactive process in Intake.



# Adjudication of Disciplinary Cases





# Disciplinary Staff

## ❖ Office of Bar Counsel

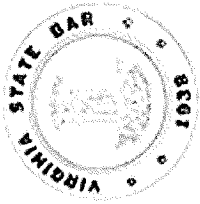
Intake Attorneys

Trial Attorneys

Clerk's Office

Investigators

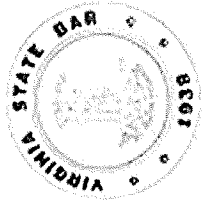
Administrative staff



# What is Misconduct?

The Supreme Court of Virginia includes in its definition of Misconduct:

1. Violation of Disciplinary Rules (current Rules of Professional Conduct or the older Code of Professional Responsibility);
2. Conviction of a Crime (generally, a felony or other offense involving theft, fraud, forgery, extortion, bribery, or perjury).



# Intake

**3,346 new inquiries last year**

**Immediate Dismissal**

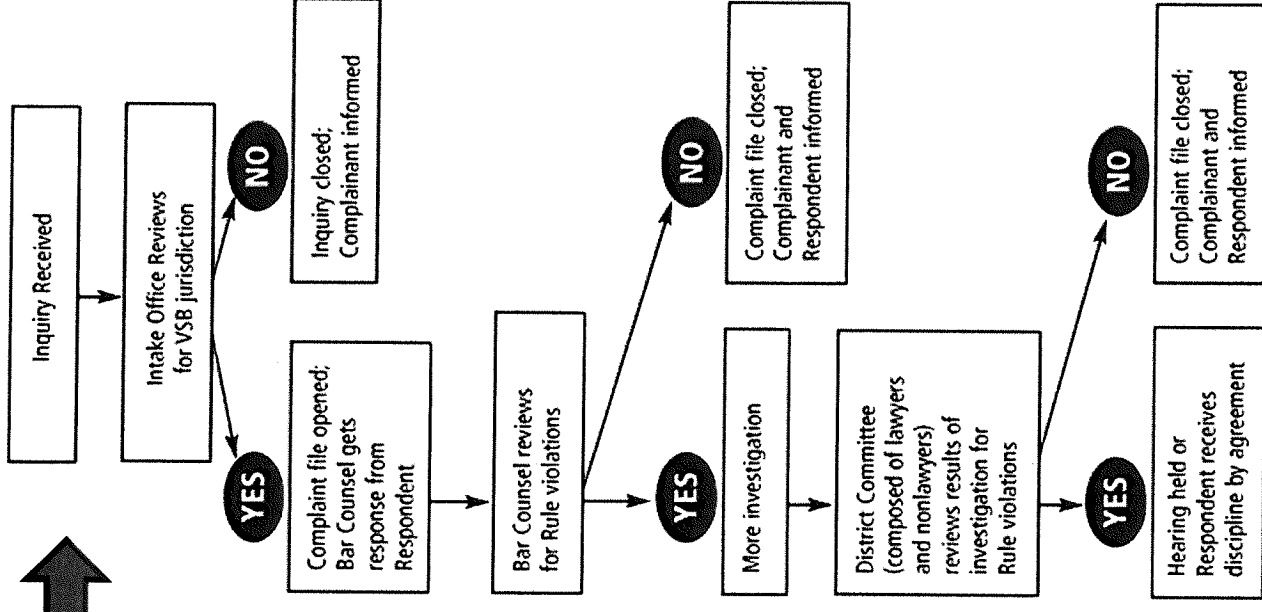
- **No disciplinary record; Respondent NOT informed**

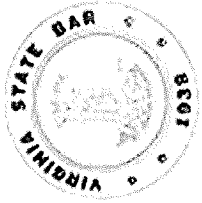
**Proactive**

- **Respondent informed, must take corrective action**
- **Includes Trust Account Overdraft Notices from banks**

**Assign full investigation (21%)**

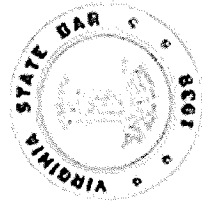
## How Complaints About Lawyers Are Handled





## Practice Areas With Higher Volume of Complaints

- Criminal Law
- Divorce & Family
- Real Estate
- Personal Injury
- Collections
- Estate Planning & Administration
- Bankruptcy



## Problem behaviors that generate complaints

- **NEGLECT/MISHANDLING • COMMUNICATION**

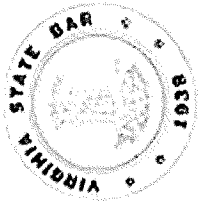
- Failure to file
  - Failure to attend hearing
  - Failing to return file after case is over
- Fee (up front or during case)
  - Outcome/status of case
  - Problems with case
  - Time to quit case

- **MISHANDLING MONEY**

- **OVERLY AGGRESSIVE LITIGATION**

- **CONFLICTS OF INTEREST**





# Intake Dismissals

Bad advice

Aggressive  
litigation tactics

Civil dispute  
with lawyer

Review my  
court case

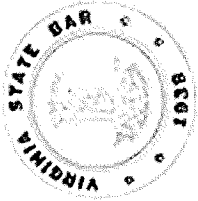
Judge made  
wrong decision

Prosecutor got  
wrong man

Guilty plea was  
coerced

Disagree with  
GAL

Fee dispute



## **Inquiries related to criminal practice:**

- Failure to communicate outcome or status of case;**
- Failure of court-appointed lawyer to explain option of appeal;**
- Failure to release file so client can pursue non-appeal remedies;**
- Failure to return unearned fee or explain why no refund.**



# Preliminary Investigation

## PROCESS:

- ❖ Assigned by Intake to Bar Counsel
- ❖ Respondent **required** to respond

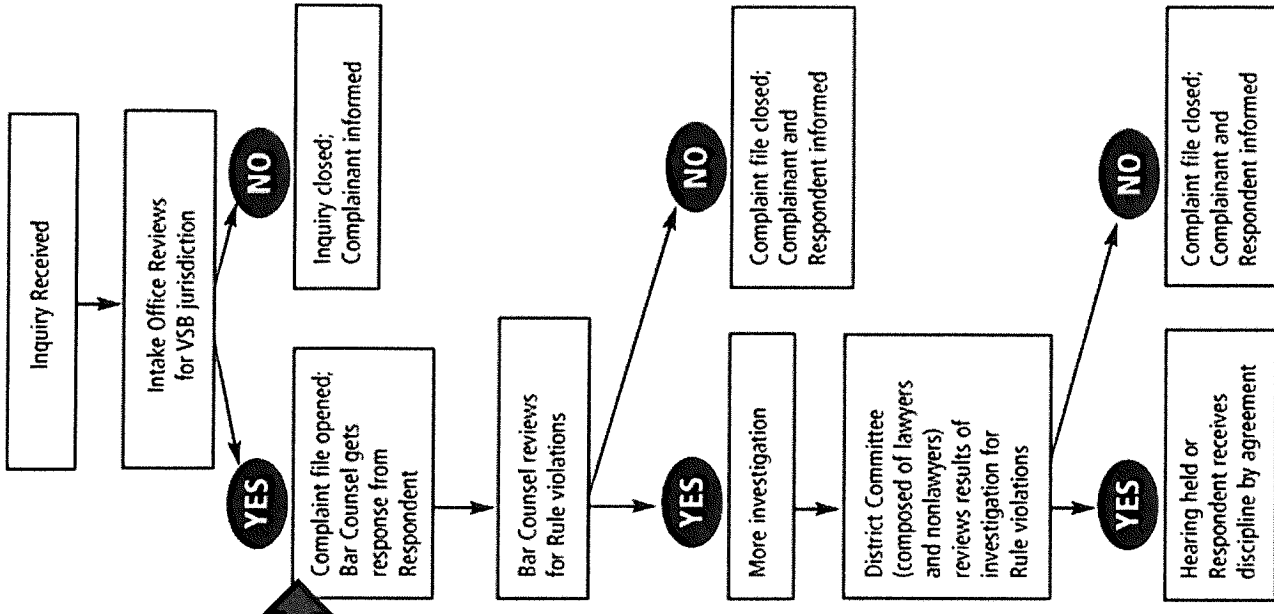
## OPTIONS:

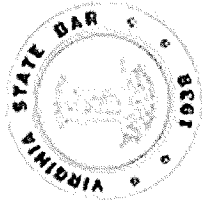
Bar Counsel can:

- ❖ DISMISS OR
- ❖ REFER to District

Committee for Full Investigation

## How Complaints About Lawyers Are Handled





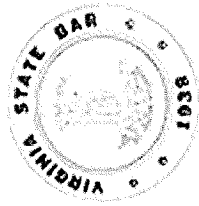
## Preliminary Investigation by bar counsel

- Complaint is sent to the respondent attorney
- 21 days to respond



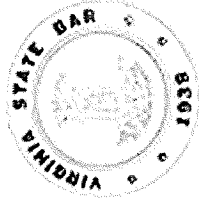
## **Preliminary Investigation by bar counsel**

- **Response is sent to the complainant**
- **10 days to file a rebuttal**



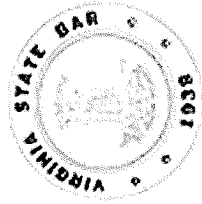
# Responding to a bar complaint

- Silence is not golden



# Responding to a bar complaint

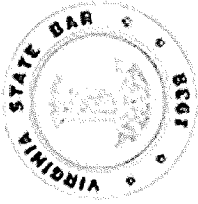
- Consider talking to counsel or a colleague



# Responding to a bar complaint

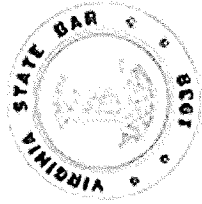
- Attach supporting documents





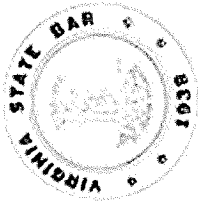
## Preliminary Investigation by bar counsel

- Dismissal
  - Clear and convincing evidence of misconduct is required to refer to full investigation



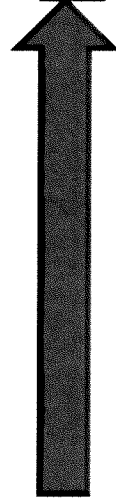
# Preliminary Investigation by bar counsel

- Refer to a District Committee for a full investigation

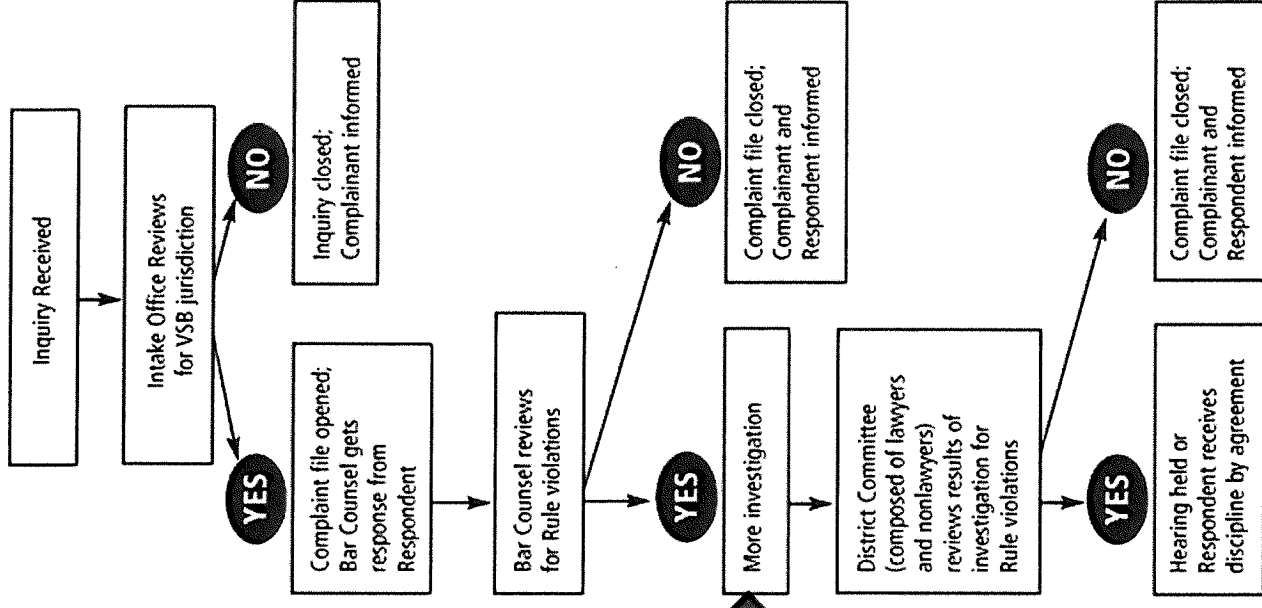


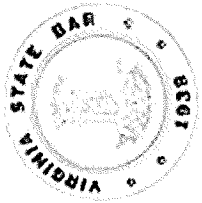
# Investigation

- Staff Investigators
- Face time
- Subpoena Power  
(but not search warrants)
- Office documents, accounting records
- Computer forensics



## How Complaints About Lawyers Are Handled

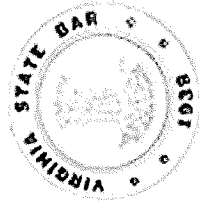




## Must Respondent Cooperate?

### Rule of Professional Conduct 8.1

A lawyer shall not fail to respond to a lawful demand for information from a disciplinary authority or obstruct an investigation by a disciplinary authority.



## What if Respondent doesn't cooperate?

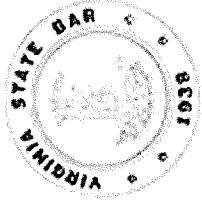
If Respondent fails to respond to VSB subpoena for documents, Bar Counsel can seek **INTERIM SUSPENSION** of Respondent's license by Disciplinary Board.

License stays suspended until Respondent complies.



## Trust Account Violations

- If **ANY** complaint filed, Bar can examine all books.
- If **NO COMPLAINT** filed but Bar has **REASONABLE BELIEF** that accounts may not be in compliance, Bar can examine all books.
- **BUT** no **RANDOM** trust account audits!



## District Committees

- 17 District Committees in Virginia
- Comprised by region
- Each Committee has 10 members
  - 7 members are lawyers
  - 3 members are lay people
- Must have a quorum of five
- Harshest sanction is a Public Reprimand



## Subcommittees

- Comprised of three members of a district committee
- Two lawyers and a lay person
- Meet to consider and vote on disposition of cases
- Usually meet once a month
- Majority vote
- Need unanimous vote to approve Agreed Disposition



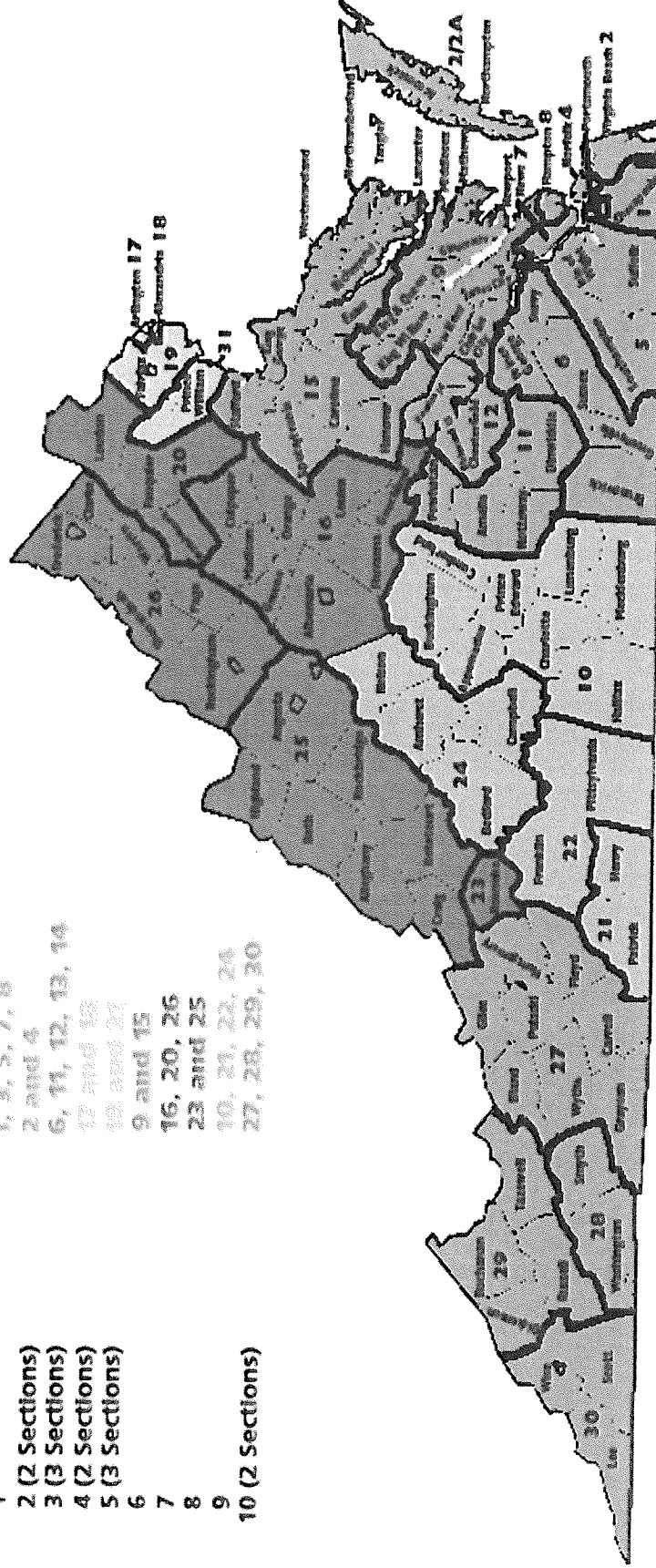
# Map of Judicial Circuits and Districts of Virginia

## District Committees

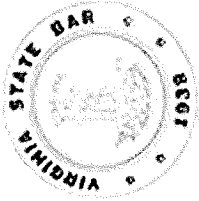
as of January 1, 2003

District Committee consists of Judicial Circuits

- |                 |                   |
|-----------------|-------------------|
| 1               | 1, 3, 5, 7, 8     |
| 2 (2 Sections)  | 2 and 4           |
| 3 (3 Sections)  | 6, 11, 12, 13, 14 |
| 4 (2 Sections)  | 12 and 13         |
| 5 (3 Sections)  | 10 and 27         |
| 6               | 9 and 15          |
| 7               | 16, 20, 26        |
| 8               | 23 and 25         |
| 9               | 10, 21, 22, 24    |
| 10 (2 Sections) | 27, 28, 29, 30    |



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# District Committee Subcommittee Meetings

## PROCESS

Reviews investigator's report, Bar Counsel's  
Recommendation

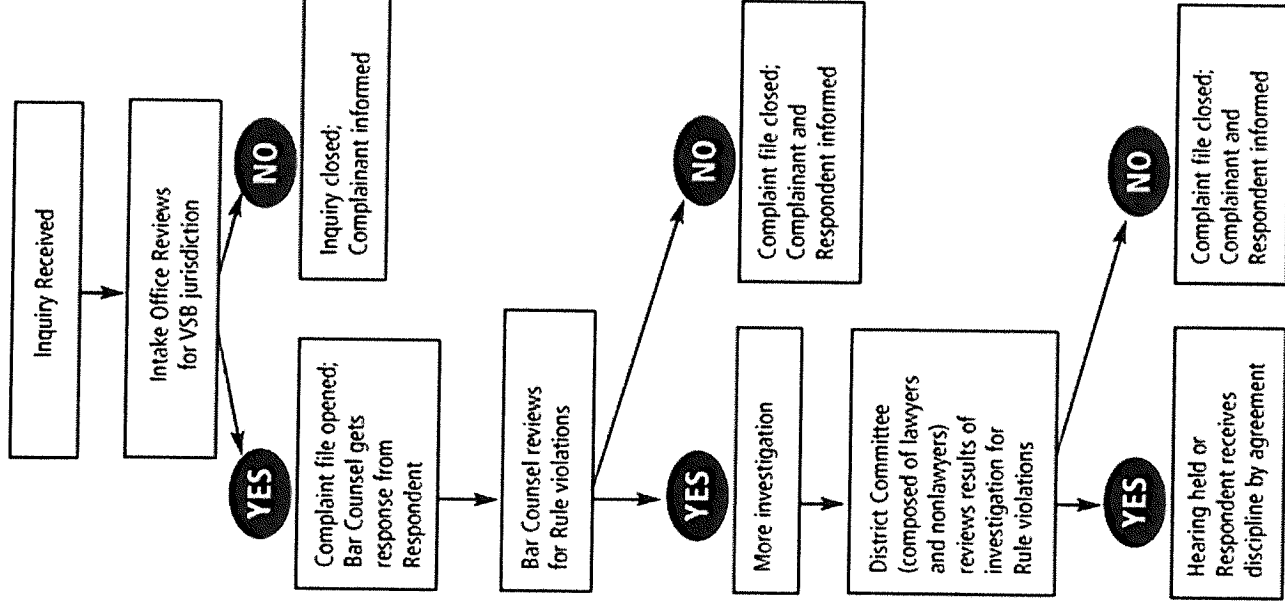
## Confidential

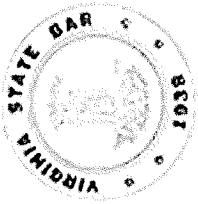
## OPTIONS

- Dismiss for lack of clear and convincing evidence
- Authorize an Agreed Disposition for a Public or  
Private Reprimand or Admonition
- Private Admonition *without* terms
- Dismiss, *de minimus* misconduct
- Dismiss, exceptional circumstances
- Set for District Committee Hearing
- Certify to Disciplinary Board

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## How Complaints About Lawyers Are Handled

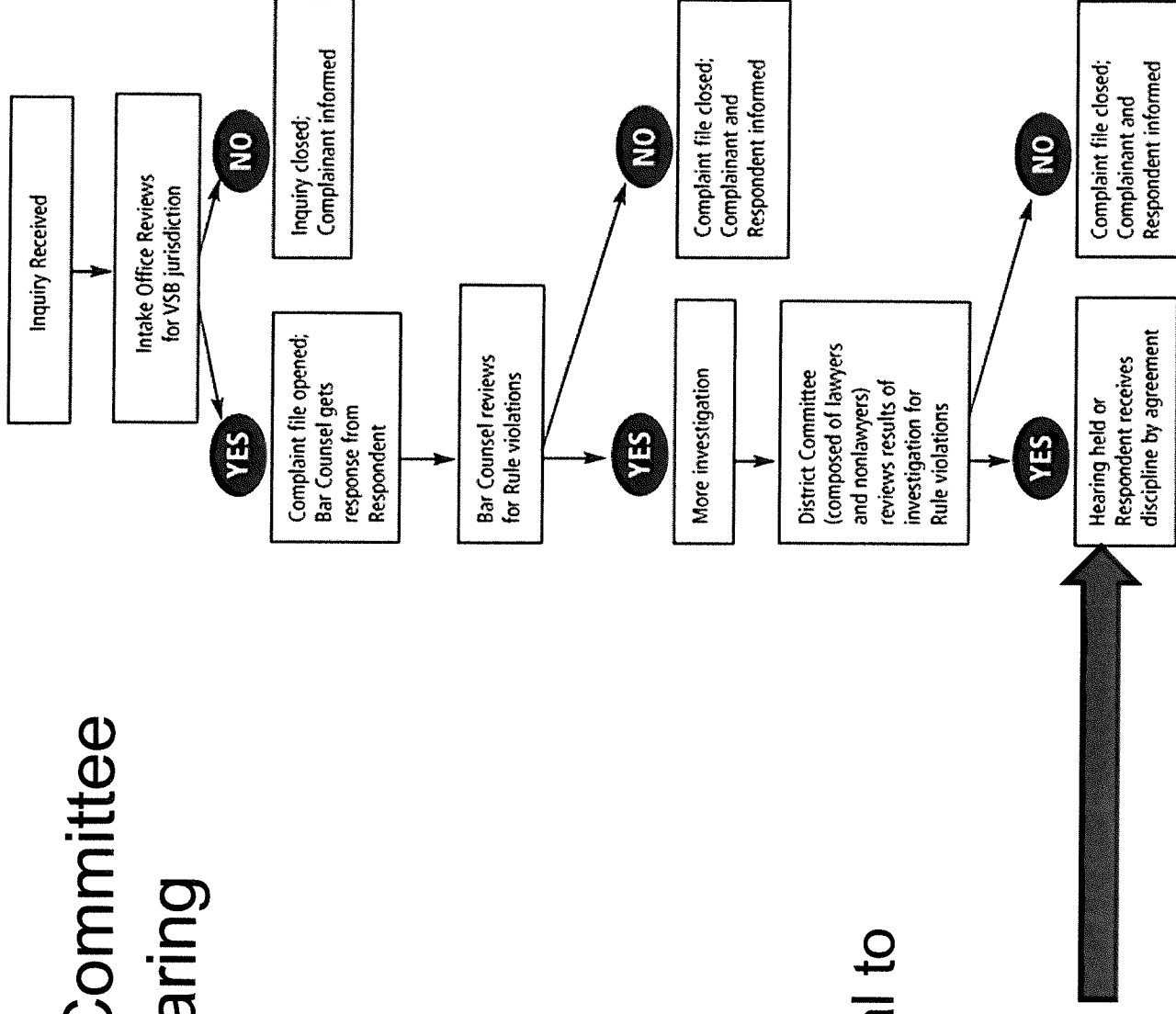




# District Committee Hearing

- Public
- Administrative  
(not civil or criminal )
- Options
  - Dismiss;
  - Admonition;
  - Reprimand;
  - Certify
- Respondent can appeal to  
Disciplinary Board

## How Complaints About Lawyers Are Handled

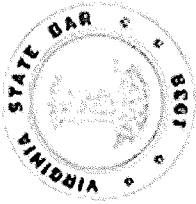


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# Procedures in Disciplinary Proceedings

- Part Six, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia
- Section 54.1-3935 of the Code of Virginia (Three-Judge Panel cases)



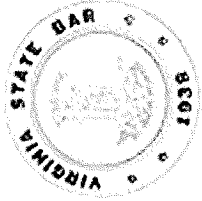
# Disciplinary Sanctions

- **Admonition (public or private)**-finding of misconduct but no substantial harm to the complainant or the public has occurred.
  - With or without “terms”
- **Reprimand (public or private)**-finding of misconduct that does not limit the attorney’s right to practice law.
  - With or without “terms”
- **Suspension**
  - Of one year or less with Terms
- **Revocation** (no permanent disbarment in Virginia)



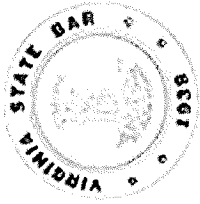
**When a case is  
set for hearing**

- **Consider hiring counsel**



**When a case is  
set for hearing**

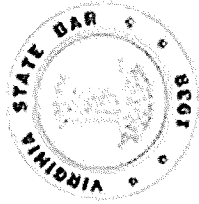
- **Respondent receives the Investigative Report and any other documents considered by the Subcommittee**



## When a case is set for hearing

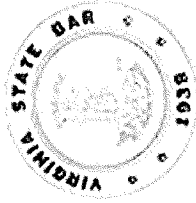
- No discovery
  - “The lawyer respondent has no procedural right to discovery in a disciplinary proceeding.” *Gunter v. Virginia State Bar*, 241 Va. 186 (1991).
- But, bar counsel is required to provide the investigative report and any exculpatory evidence





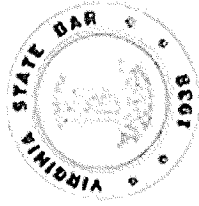
## Disciplinary Board

- Comprised of twenty members
- Sit in panels of five: one lay member and four attorneys
- May suspend or revoke a law license
- Appeal of right to the Supreme Court of Virginia



## Disciplinary Board Hearing

- Similar to Committee Hearings
- Discipline Options:
  - Same as those of Committee
  - Suspension of law license
  - Revocation of law license
- Some original jurisdiction  
(conviction of crime, reciprocal discipline, impairment)
- Respondent can appeal to Supreme Court



## Three Judge Circuit Court Panel

- Alternative to Disciplinary Board at Respondent's option;
- Active or retired Circuit Court Judges
- Discipline options same as Disciplinary Board
- Respondent can appeal to Supreme Court



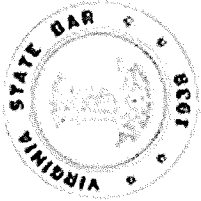
## When a bar complaint goes public

- 21 days after charges of misconduct are issued in a District Committee case



# When a bar complaint goes public

- In a Board case, the case is public when the Clerk of the Disciplinary System receives the certification



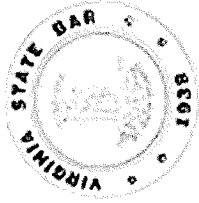
## When a bar complaint goes public

- All hearings are public
- District Committee
- Disciplinary Board
- Three-Judge Circuit Courts



## Private Discipline

- Admonition without terms issued by the subcommittee
- Agreed Disposition for a Private Reprimand



## Agreed dispositions

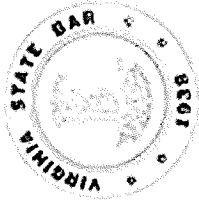
- Respondents can enter into agreed dispositions at any time charges are pending
- Respondents must admit to Rule violation(s)





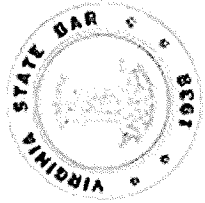
## Agreed dispositions

- Agreement must be approved by the Subcommittee or Board, depending on where the case is pending and the sanction contemplated

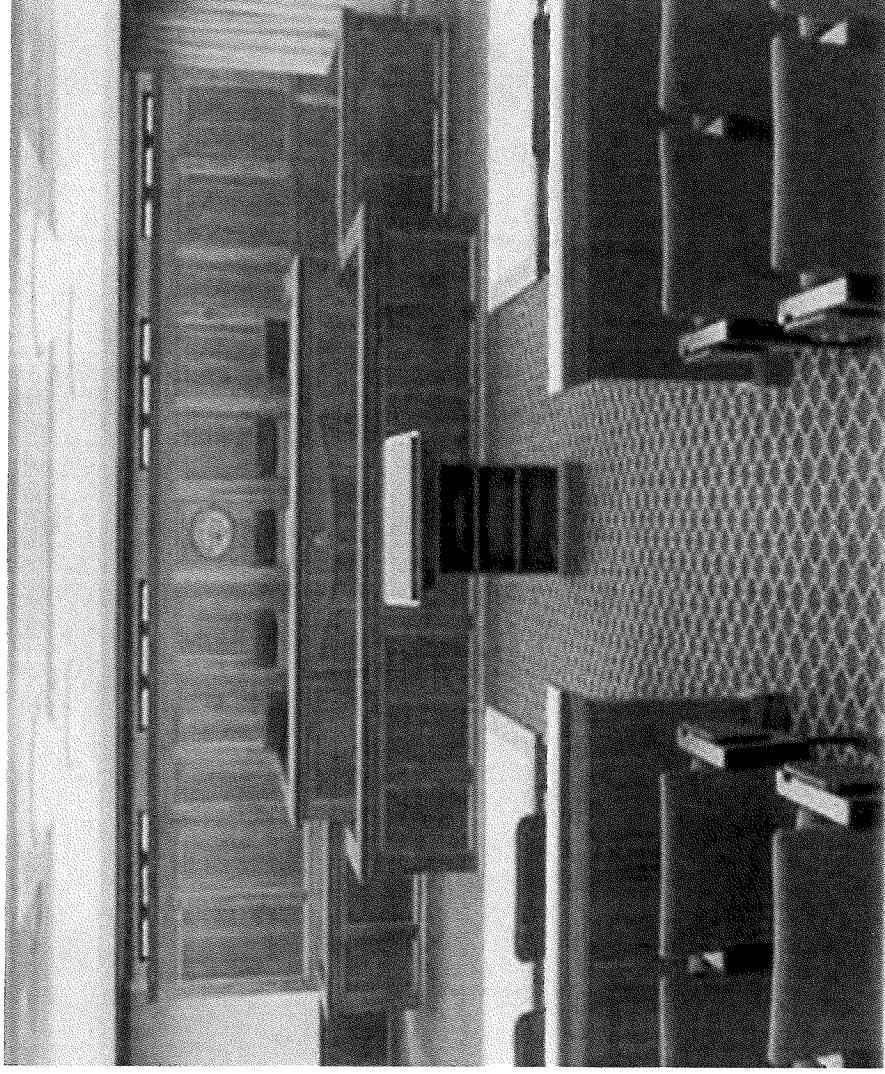


## Agreed dispositions

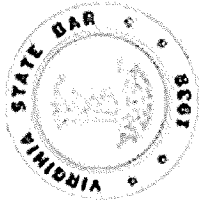
- Private discipline is only available before the case is put on the public docket.



# Disciplinary Hearings

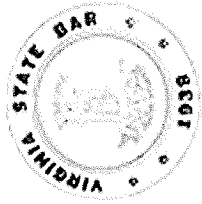


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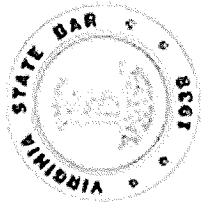
# Disciplinary Board

- Board sits in Richmond once a month



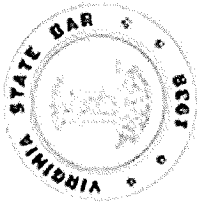
## Disciplinary Board

- Board sits in panels of five
  - Four attorneys
  - One lay person



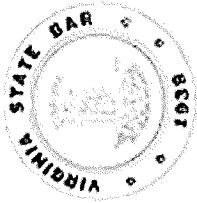
# Disciplinary Board

- All sanctions available, from admonition to revocation



## Three-Judge Circuit Court

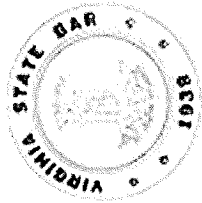
- Respondents may elect to be tried by a three judge panel rather than the District Committee or the Board



## Three-Judge Circuit Court

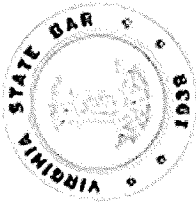
- The panel sits in the judicial district where the respondent works or resides
  - Judges are from outside that district





## Three-Judge Circuit Court

- Composition
  - One active Circuit Court Judge
  - Two retired Circuit Court Judges



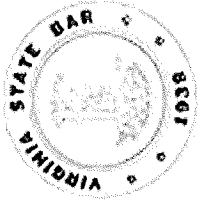
# ABA Standards for Imposing Lawyer Discipline

- **Aggravating Factors:**
  - Prior disciplinary offenses
  - Dishonest or selfish motive
  - Pattern of misconduct
  - Multiple offenses
  - Bad faith obstruction of disciplinary process
  - Submission of false evidence in disciplinary process
  - Refusal to acknowledge wrongful nature of misconduct
  - Vulnerability of victim
  - Substantial experience in the practice of law
  - Indifference to making restitution
  - Illegal conduct, including conduct involving controlled substances



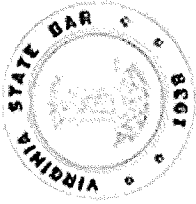
# ABA Standards for Imposing Lawyer Discipline

- Mitigating Factors:
  - Absence of prior disciplinary offenses
  - Absence of dishonest or selfish motive
  - Personal or emotional problems
  - Timely good faith effort to make restitution/rectify misconduct
  - Full disclosure and cooperation with the disciplinary process
  - Inexperience with the practice of law
  - Character or reputation
  - Mental or physical disability (including addiction) where there is 1) medical evidence, 2) causation, 3) meaningful recovery, 4) recovery arrested misconduct
  - Delay in disciplinary proceedings
  - Imposition of other penalties or sanctions
  - Remorse
  - Remoteness of prior offenses



## Appeals

- Respondents have a right of direct appeal to the Supreme Court from decisions of the Board or Three-Judge Circuit Court
- The bar has no right of appeal

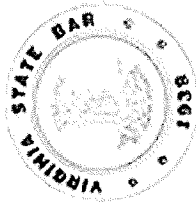


## Avoiding Bar Complaints:

- Recognize the problem
- Review Legal Ethics Opinions
- Take proactive steps to correct the situation

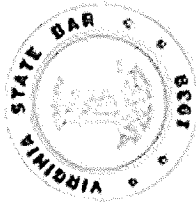
### Call or email Ethics Hotline

- confidential
- 804-775-0564
- [www.vsb.org/site/regulation/ethics](http://www.vsb.org/site/regulation/ethics)



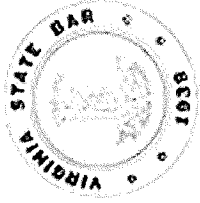
## A word about impairment

- Board has jurisdiction over impairment matters
- “Impairment” means any physical or mental condition that materially impairs the fitness of an attorney to practice law.
- Board may suspend a lawyer for impairment to protect the public



## A word about impairment

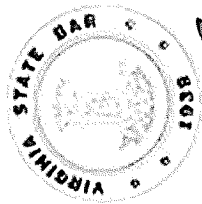
- Lawyers Helping Lawyers
- Confidential
- Helps with substance abuse, mental health, including depression, resource for issues involving dementia
- 804-644-3212
- [www.VALHL.org](http://www.VALHL.org)



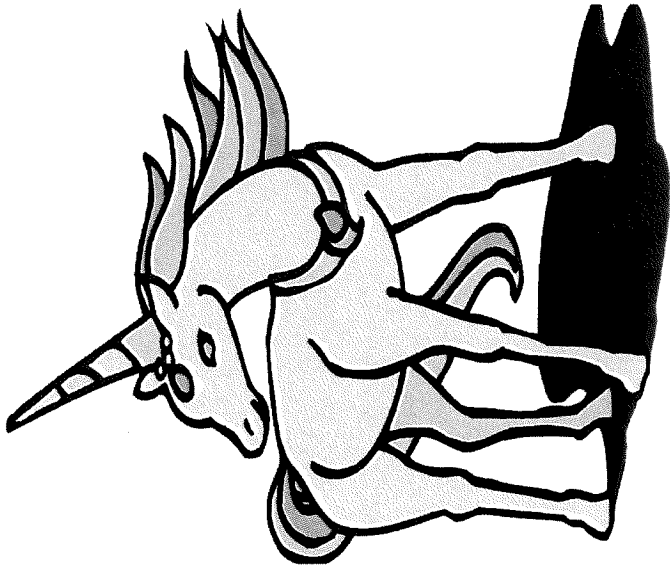
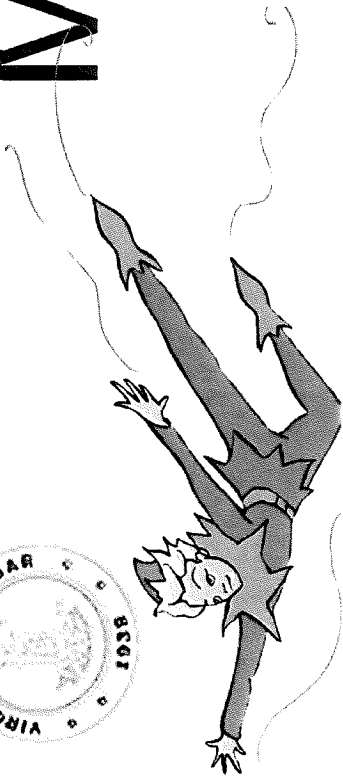
# Signs of Impairment

- Regularly late or absent from office or court
- Misses scheduled appointments
- Has frequent illnesses or days off
- Procrastination causing harm to clients
- Decline in productivity
- Overreacts to criticism
- Withdrawal
- Smells of alcohol
- Gradual deterioration of appearance or hygiene
- Poor financial management
- Loses control at social gatherings
- Arrests for DUI, drunk in public, possession





# Myths



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## MYTH

There is a statute of limitations for filing a bar complaint.

## REALITY

No limit exists. A complainant may file a complaint regarding conduct far in the past.

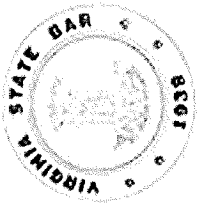


## MYTH

Only *clients* can file complaints.

## REALITY

- *Anyone* can file a complaint regarding *any* attorney's conduct
- Attorneys have duty to report misconduct if they have reliable information
- Judges send information
- VSB can initiate without complaint



## MYTH

If a complainant withdraws a complaint, the matter is closed.

## REALITY

Once a complaint is filed, the Bar investigates and pursues the allegations based on the merits, not on the complainant's preferences.

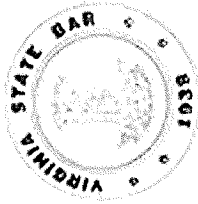


## MYTH

If the complainant is a criminal, his complaint is unreliable.

## REALITY

The Bar evaluates the merits of each allegation regardless of the complainant's situation. Each year, the Bar prosecutes cases to the highest tribunals based upon complaints by inmates.



## MYTH

The Bar can only investigate the specific allegations made by the complainant.

## REALITY

- The Bar investigates all issues present in the information obtained.
- A complaint can lead to audit of accounts.
- Investigation can reveal facts, issues not known to complainant.



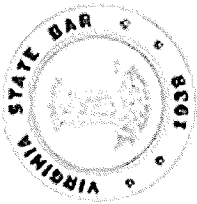
## MYTH

If there is no showing of harm, the complaint will be dismissed.

## REALITY

The complaint system determines misconduct, not money damages.

The client protection fund may be available but is separate from the disciplinary process.



The End



# Virginia State Bar

## Virginia Beach Bar Association CLE

### SCOPE

This presentation provides an overview of the Virginia State Bar's disciplinary system for processing, investigating and prosecuting complaints against attorneys who practice law in Virginia.

#### **I. SOURCE OF THE BAR'S AUTHORITY**

The Virginia State Bar gets its authority to regulate lawyer conduct from:

- A. Rules of Professional Conduct ( RPCs), found in Vol. 11 of the Virginia Code and at the VSB website, [www.vsb.org](http://www.vsb.org).
- B. Procedure for Disciplining, Suspending and Disbarring Attorneys (Paragraph 13), found in the Rules of Supreme Court of Virginia (Volume 11 of the Virginia Code) and at the VSB website, [www.vsb.org](http://www.vsb.org).
- C. Trust Account Regulations, found in *Virginia State Bar Professional Guidelines* and the VSB website, [www.vsb.org](http://www.vsb.org).
- D. Virginia Code, Section 54.1-3900, *et seq.* (statutes dealing with Professions Regulated by the Supreme Court of Virginia)
- E. American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005).

#### **II. OVERVIEW OF THE DISCIPLINARY SYSTEM**

##### **A. Disciplinary Staff/Departments**

##### **B. Rules of Disciplinary Procedure**

The procedural rules governing lawyer discipline are found in the Rules of Virginia Supreme Court, Part 6, Section IV, Paragraph 13 (Volume 11 of the Virginia Code).

Revised May 2016

Disciplinary Process Page 1

### C. What is Misconduct?

The Supreme Court of Virginia includes in its definition of **Misconduct**:

1. Violation of Disciplinary Rules (current Rules of Professional Conduct or the older Code of Professional Responsibility);
2. Conviction of a Crime (generally, a felony or other offense involving theft, fraud, forgery, extortion, bribery or perjury).

### D. Intake Process

Lawyers in the Intake section of the Office of Bar Counsel review all inquiries to decide whether they state misconduct. This first level of review is intended to eliminate those complaints that are frivolous or state situations that are outside the scope of the ethics rules. About 75% of complaints are dismissed and referred to as NATs, No Action Taken.

The Intake staff may use its **proactive** process, or informal investigation, to resolve the situation. This involves contacts by the staff with the respondent and complainant in an effort to reach resolution.

### E. Preliminary Investigation

1. If the Intake staff identifies possible disciplinary rule violations, the matter is assigned to Bar Counsel to conduct a **preliminary investigation**.
2. The Preliminary Investigation usually includes sending the complaint to the Respondent so he can file a written response and allowing the Complainant to respond to the Respondent's response.
3. The bar strives to complete preliminary investigations within 60 days of receipt of the complaint.

### F. Preliminary Investigation Dispositions

Within the 60-day time limit, Bar Counsel should decide the disposition of the complaint using the following authority and alternatives:

1. **Dismiss** the complaint if any of the following apply:
  - As a matter of law, the conduct does not constitute Misconduct; or

- The evidence shows that the Respondent did not engage in the Misconduct alleged; or
- There is no credible evidence that the Respondent committed Misconduct; or
- There is not “clear and convincing” evidence of Misconduct.

Para. 13-10 E.

2. If none of the above bases for dismissal exists, Bar Counsel will **refer** the matter to a **District Committee** for a more detailed investigation.

## G. Investigative Authority of Bar Counsel

1. Bar Counsel has the authority to issue *subpoenae duces tecum* (for documents) and summonses (for witnesses) during its investigation. Para. 13-8A.5.
2. Bar Counsel has the authority to examine the financial books and records maintained by an attorney in her law practice. Para. 13-8A.3-4 <sup>1</sup>
3. Rule 8.1(c) of the Rules of Professional Conduct requires cooperation with a “lawful request” of a discipline investigation.
4. Para. 13-6G.3. empowers the Disciplinary Board to impose an interim Suspension if an Attorney fails to comply with a summons or subpoena issued by any member of the Board, the Clerk, Bar Counsel, or any lawyer member of a District Committee.<sup>2</sup>

## H. District Committee Investigations

1. A District Committee investigation can be performed by either the Office of Bar Counsel or an attorney member of the District Committee. Most cases are investigated by one of the staff investigators of the Office of Bar Counsel. Summonses and subpoenae duces tecum may be issued by Bar Counsel as a part of the investigation. Para. 13-8A.5.
2. The investigation will result in the submission of a report to the Subcommittee of the District Committee. Para 13-10F.

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<sup>1</sup>As a result of a study by the Virginia State Bar Random Trust Account Review Committee, the VSB has a policy to promptly review attorney escrow account records upon receipt of information that may call into question an attorney’s management of his or her escrow account. An example may be a second escrow account check returned for insufficient funds, regardless of the explanation.

<sup>2</sup>A related power is the Board’s broad sanction power under Para. 13-6G1., including interim suspension, for failure to comply with a Board order. This has arisen in the context of disability hearings where a Respondent has been ordered to disclose health care providers, provide releases, and submit to a mental or physical examination and evaluation.

## I. Action by the Subcommittee

1. The Subcommittee consists of three District Committee members: a lay person and two attorney members. One attorney member shall be appointed by the District Committee or Section Chair to act as Chair of that Subcommittee.
2. The Subcommittee will consider the report of Investigation and the recommendation submitted by the Office of Bar Counsel in order to make a disposition of each of the complaints presented.
3. The Subcommittee acts by majority vote. Para. 13-15C. However it must have a unanimous vote to approve an Agreed Disposition. Para. 13-7A.9.
4. The Subcommittee can:
  - a. Dismiss the complaint; or
  - b. Impose limited discipline; or
  - c. Accept an Agreed Disposition of discipline; or
  - d. Set a hearing in the matter; or
  - e. Certify the matter to the VSB Disciplinary Board.
5. The Subcommittee can **dismiss** a complaint if:
  - As a matter of law the conduct does not constitute Misconduct. Para. 13-15B.1.a.
  - The evidence shows that the Respondent did not engage in the Misconduct alleged. Para. 13-15B.1.b.
  - There is no credible evidence to show Misconduct by the Respondent. Para. 13-15B.1.b.
  - There is no “clear and convincing” evidence of Misconduct. Para. 13-15B.1.b.
  - The alleged Misconduct is protected by superseding law. Para. 13-15B1.e.

### 6. Limited Discipline by the Subcommittee without a hearing

- a. The Subcommittee can impose the limited discipline of a private **Admonition without Terms** without a hearing if it believes the bar’s investigation shows that the Respondent has engaged in Misconduct. The Respondent may reject this disposition and request a full evidentiary hearing before the District Committee. Para. 13-15B.2.
- b. The Subcommittee can impose a private **Dismissal De Minimis** without a hearing if it finds that the Respondent has engaged in Misconduct that is not of sufficient magnitude to warrant disciplinary action, and the Respondent has

taken reasonable precautions against a recurrence of the Misconduct.  
Para. 13-15B1.c

- c. The Subcommittee can impose a private **Dismissal for Exceptional Circumstances** without a hearing if it finds that the Respondent has engaged in Misconduct but there exist exceptional circumstances mitigating against further proceedings. Para. 13-15B1.d.

## 7. **Agreed Dispositions before the Subcommittee**

- a. The Subcommittee can accept an **Agreed Disposition** between the bar and the Respondent. Para 13-15B.4.
- b. All members of the Subcommittee must accept the Agreed Disposition. If any one member rejects the agreement, a hearing will be scheduled before the full District Committee. Paras. 13-7A.9., 13-15C.
- c. If the Subcommittee accepts the Agreed Disposition, it will issue a document called the “**Subcommittee Determination**” that outlines the relevant facts, rule violations and discipline to be imposed upon the Respondent.

## 8. **Subcommittee Decision to Set for Hearing Before the Full District Committee**

If the Subcommittee does not dismiss the complaint, it must set the matter for a hearing before the District Committee or certify it to the Disciplinary Board.

### a. **Information available to Respondent**

When a matter is set for a District Committee hearing by the issuance of a Charge of Misconduct, the Respondent is provided with a copy of the Investigative Report and any exculpatory materials in the possession of Bar Counsel. Paragraph 13-16A. However, there is no requirement of reciprocity on the part of the Respondent. But RPC 8.1 states that “a lawyer ... in connection with a disciplinary matter, shall not: ... (a) knowingly made a false statement of material fact; (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter; (c) fail to respond to a lawful demand for information from ... disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or (d) obstruct a lawful investigation by ... disciplinary authority.”

### b. **District Committee Hearings are Public**

Private discipline is available only up through the first 21 days of the issuance of the Charge of Misconduct. Any discipline agreed to during the second 21 day period is public, as is the district committee hearing. However, the hearing will not be posted on the public hearing docket until 21 days after the date of the Charge of Misconduct. Para. 13-16H. After the matter is posted on the

public docket, it will not be possible to work out an agreed disposition imposing private discipline, and any discipline imposed will become a matter of public record.

## 9. Certification to Disciplinary Board

The Subcommittee may bypass a District Committee hearing and **certify** the matter directly to the Disciplinary Board if there is a reasonable belief that the Respondent has engaged in Misconduct that, if proved, would justify a suspension or revocation of the Respondent's license to practice law. Paragraph 13-15B.3.

## 10. Terms

- a. The Subcommittee is authorized to approve an Agreed Disposition that can include imposing certain conditions or **terms**, which the Respondent is required to perform as a condition predicate for the imposition of an admonition with terms, a private reprimand with terms, or a public reprimand with terms. With the imposition of terms, there must also be provided an alternative sanction in case of non-compliance with the term within the deadline for compliance.
- b. The Terms must be performed within the deadline set by the Subcommittee. If the Terms are not met, the alternative sanction will be imposed against the Respondent through a show cause hearing. Para. 13-15.F.

In the event of non-compliance, Bar Counsel will initiate a **show cause hearing** before the District Committee.

- (i) The hearing is simply to allow the Respondent an opportunity to show that he or she has complied with the Terms; it is not for the purpose of extending the time for compliance.
- (ii) The burden of proof is on the Respondent to show by clear and convincing evidence that he has complied with the Terms within the time specified by the Terms. A finding of failure to comply with the terms within the specified time period requires the alternative disposition or sanction to be imposed. Para 13-15.F.

## J. Action by the District Committee

### 1. Hearings

#### a. Charge of Misconduct

- The initial pleading or charging document is a notice pleading, not a fact pleading. The hearing “is an informal proceeding and it is only necessary that the defendant be informed of the nature of the charge and be given an opportunity to answer.” *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833,838, 172 S.E. 282 (1933).
- At least 42 days before the hearing date, Bar Counsel must serve upon the Respondent by certified mail the Charge of Misconduct, a copy of the Investigative Report considered by the Subcommittee, and any exculpatory materials. Para. 13-16A.
- Within 21 days after service of the Charge of Misconduct, Respondent must file an **answer** or a **demand** that the District Committee proceedings be terminated and the matter transferred to a three judge circuit court panel pursuant to Virginia Code Section 54.1-3935. Para. 13-16B.

**b. Summons and Subpoenae**

- The District Committee can issue summonses and subpoenae *duces tecum* either through a lawyer committee member or the Office of Bar Counsel. Should a Respondent wish to have such process effected on his or her behalf in preparation for the hearing, the Office of Bar Counsel will issue the process on behalf of the District Committee. Para 13-16E.
- A subpoena compelling the Respondent to produce documents may be served upon the Respondent by certified mail at the Respondent’s last address of record with the bar in the same manner as other notices served upon Respondents.
- The Chair may quash any summons or subpoena issued on behalf of the Committee for good cause. The Chair may also refuse to issue summons or subpoena requested by the Respondent. Paragraph 13-16E.
- Summons and subpoenae issued by the Committee can be enforced by a Circuit Court. Paragraph 13-2.

**c. Participants in District Committee Hearing**

- Bar Counsel presents the case against the Respondent on behalf of the bar.

- The Respondent or, if represented by counsel, the Respondent's counsel, presents the Respondent's case.
- District Committee Members on the hearing panel may ask questions of the witnesses. Para. 13-16L-M

**d. Order of the District Committee Hearing**

The District Committee Hearing proceeds in the following order:

- (i) Opening statements;
- (ii) Presentation of the bar's case;
- (iii) Presentation of the Respondent's case;
- (iv) Motion to Strike--argument on the question of whether ethics rule violations have been proved by clear and convincing evidence and whether the bar has failed to introduce sufficient evidence that would under any set of circumstances support the conclusion that Respondent has engaged in the alleged Misconduct. The ruling is made by the Chair, subject to being over-ruled by the majority of the remaining members of the panel. Para 13-16R;
- (v) Private Committee deliberation on the question of ethics rule violations. Para. 13-16T;
- (vi) Committee announcement of its decision on ethics rule violations;
- (vii) Evidence and argument on the sanction to be imposed for any misconduct found;
- (viii) Committee announcement of its decision from the bench on discipline imposed;
- (ix) Formal written decision issued by District Committee Determination setting forth findings of facts, nature of the Misconduct—including Rule violations, and sanctions imposed. Para 13-16Y.



- e. Rules of evidence are not strictly enforced<sup>3</sup>. Para.13-12D.
- f. Objections may be made and are ruled upon by the presiding chair, subject to being overruled by a majority of the remaining hearing panel. Para 13-16Q.
- g. A quorum of five District Committee members is required for a hearing. Each District Committee consists of seven attorneys and three lay people. Any five members of the Committee may constitute a quorum, although an effort is made to include a lay member in the quorum whenever possible. Para. 13-4B. The members of the Subcommittee who set the matter for hearing may participate in the hearing.
- h. District Committee Hearings, except for deliberations of the panel, are open to the public. Para 13-16G.
- i. Neither counsel for the complainant or any witness may examine or cross-examine any witness, introduce evidence, or present an argument. Para. 13-16N.

2. **District Committee Decisions after a hearing include:**

- a. Dismissal;
- b. Public Dismissal *De Minimis*;
- c. Public Dismissal Exceptional Circumstances;
- d. Public Admonition, with or without terms;
- e. Public Reprimand, with or without terms;
- f. Certification to the Disciplinary Board or file a complaint in a circuit court pursuant to Va. Code Section 54.1-3935.

Para. 13-16X.

3. **Appeals of District Committee Determinations**

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<sup>3</sup> In any Disciplinary Proceeding, evidentiary rulings shall be made favoring receipt into evidence of all reasonably probative evidence to satisfy the ends of justice. The weight given such evidence received shall be commensurate with its evidentiary foundation and likely reliability. Para. 13-12D.

An appeal from a Determination by a District Committee upon trial is heard by either the Disciplinary Board or a three judge circuit court panel, if so chosen by the Respondent. Para. 13-17A.<sup>4</sup> Such appeals are based solely upon the record from the District Committee. The standard for the appeal is whether there was substantial evidence to support the findings of the District Committee. Para. 13-19.

4. **Terms**

The District Committee has the same authority as the Subcommittee regarding the issuance and enforcement of Terms.

**J. Action by the Disciplinary Board**

1. **Composition**

The Disciplinary Board is composed of 20 persons, including 16 attorneys and 4 lay persons. Para.13-6A. It generally holds its hearings in Richmond. A quorum of any 5 Disciplinary Board members is required for a hearing. At least one lay person should be included in each quorum. Para. 13-6D.

2. **Notice**

Upon certification, the Clerk of the Disciplinary System will serve upon the Respondent a notice of the hearing date before the Disciplinary Board and the Certification from the District Committee of at least 21 days prior to the hearing date. Para. 13-18C.

3. **Election by Respondent**

Respondent will have 21 days from service of the Certification (or "charge of misconduct") in which time the Respondent may:

- a. File a signed answer, or
- b. File a signed answer with a demand that proceedings before the Disciplinary Board be terminated and further proceedings be conducted before a three-judge circuit court. Para. 13-18A.1.; Va. Code §54.1-

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<sup>4</sup>The bar has no right to appeal. Its sole recourse is a motion to reconsider, which is also available to the Respondent, based upon the discovery of material evidence not known or available when first heard and to prevent an injustice or warranted by specific exceptional circumstances. Para 13-16DD

3935.

- c. If an answer is filed, or if no answer or demand is filed within 21 days of service of the Certification, the complaint will be heard by the Disciplinary Board. Para. 13-18B.

#### 4. **Disciplinary Board Hearings**

- a. Board hearings consist of the same basic steps as those in a District Committee proceeding. However, Board proceedings are generally more formal in nature and generally include a pre-hearing order or scheduling order requiring pre-hearing designation of exhibits and witnesses, objections thereto, and stipulations. Para. 13-18E.
- b. Summonses and subpoenae *duces tecum* are issued by the Clerk of the Disciplinary System upon request of Bar Counsel, the Respondent, or the Board itself. Para. 13-6G.2.
- c. Members of the Board panel may ask questions of the witnesses. Para. 13-18I.2,3.

#### 5. **Disciplinary Board Dispositions:**

The Disciplinary Board can hand down any of the following decisions:

- a. Dismissal;
- b. Admonition, with or without terms;
- c. Public Reprimand, with or without terms;
- d. Suspension of license for up to five years;
- e. Suspension of license for one year or less, with or without Terms;
- f. Revocation of license.

Para. 13-18M.

- ➔ **NOTE:** There is no Board sanction that incorporates the word "private" in its nomenclature. Misconduct cases before the Disciplinary Board, except Impairment cases, are public proceedings.

#### 6. **Cases of Original Jurisdiction**

The Board also hears cases of original jurisdiction regarding impairment, Para.13-23; criminal convictions of a specific nature in Para.13-21, First

Offender Statute, and Para. 13-22, Guilty Plea or Adjudication of Crime; and reciprocal discipline of disbarment or suspension by another jurisdiction, Para.13-24. The Board also may hear matters related to the failure of a Respondent, who has elected to appeal a district committee decision to a three judge court, to file a transcript.

**7. Appeal of a Disciplinary Board Decision**

- a. The Respondent has an appeal as a matter of right to the Supreme Court of Virginia from an order of Admonition, Public Reprimand, Suspension, or Disbarment imposed by the Disciplinary Board. Para. 13-26A.
- b. A notice of appeal and assignments of error must be filed with the Clerk of the Disciplinary System within 30 days after the Memorandum Order of the Disciplinary Board is served on the Respondent. This action within the time prescribed is jurisdictional. Rule 5:21 (b).
- c. A stay is automatically imposed on a Board order of Admonition or Public Reprimand during the pendency of the appeal. A Board order of suspension or revocation may be stayed by the Supreme Court during an appeal upon appropriate petition. Rule 5:21(b)(5).

**IV. MISCELLANEOUS ITEMS OF INTEREST**

**A. Request by Complainant to Withdraw Complaint**

The fact that a Complainant wishes to withdraw his/her complaint will not be the sole basis upon which to dismiss the matter. The investigation and prosecution of the complaint will proceed to its appropriate conclusion despite the request to withdraw the complaint by the Complainant. Para. 13-10B.

**B. Existence of Pending Criminal/Civil Litigation**

The pendency of civil or criminal litigation similar to the charges of misconduct may result in the deferment of proceedings, based on the prosecutorial discretion of Bar Counsel.

**C. Service**

Service is effective in the disciplinary system when mailed by certified mail to the Respondent at the Respondent's last address on record for licensing purposes with the Bar. Thus, it is important that the Respondent maintain a current address with the Bar membership department.

Para. 13-12C.

#### **D. Costs**

Costs are assessed upon the Respondent in every case in which there has been a final determination of misconduct by a District Committee (and its subcommittee), Circuit Court, the Disciplinary Board, or the Supreme Court, following a hearing or entry of an agreed disposition when a Dismissal *de minimis*, Dismissal for Exceptional Circumstances, an Admonition, Reprimand, Suspension, or Revocation is imposed; cases against a Respondent who surrenders his license to practice law when charges are pending against him; cases in which a Respondent has been found guilty of a Crime by the Disciplinary Board; reciprocal discipline cases; and reinstatement cases. Para. 13-9E.

The costs are assessed by the Clerk of the Disciplinary System and include reasonable costs paid by the bar to outside experts or consultants, reasonable travel and out-of-pocket expenses for witnesses, court reporter and transcript fees, copying, mailing, required publication costs and an administrative charge as determined by the Virginia State Bar Council. Costs are now \$500.00 at the Subcommittee level, \$750.00 at the district committee level, and \$1000.00 at the Board or Circuit Court level. Costs unpaid by a specified date will result in the suspension of the Respondent's license to practice law by the Disciplinary Board until payment is made. Para. 13-9F.

#### **E. Disciplinary Trials/Civil Litigation**

1. A disciplinary proceeding is a civil proceeding, in the nature of an inquest into the conduct of the attorney. *Moseley v. Virginia State Bar ex rel. Seventh District Committee*, 694 S.E.2d 586, 589 (Va. 2010). See also, *Maddy v. District Committee*, 205 Va. 652, 658, 139 S.E.2d 56, 58 (1964); cf. *Seventh District Committee v. Gunter*, 212 Va. 278, 183 S.E.2d 713, 717 (1971), cited with approval in *Gunter v. Virginia State Bar*, 241 Va. 186, 399 S.E.2d 820 (1991).
2. Since the proceeding is in the nature of an inquest, it is conducted much like an administrative proceeding.
3. The Respondent has no procedural due process right to discovery in a disciplinary proceeding. *Gunter v. Virginia State Bar*, id.; Para.13-11.
4. Hearings are bifurcated. The District Committee and Board will first determine if the bar has proved Misconduct; if so, the District Committee or Board will then hear evidence in mitigation or aggravation before

determining the appropriate sanction.

5. Motions to Strike are permitted in hearings at the conclusion of the Bar's evidence and at the conclusion of all of the evidence. Para. 13-16R, District Committee hearings, and Paragraph 13-18J., Disciplinary Board hearings.

**F. Procedure for Conducting Three Judge Court Proceedings**

Matters which are taken to a three judge court pursuant to Va. Code Section 54.1-3935 are conducted in accordance with the rules and procedures of Paragraph 13. Va. Code Section 54.1-3935(B).

### **III. NON-DISCIPLINARY RESOURCES TO HELP LAWYERS**

In addition to processing complaints about lawyers, the Virginia State Bar coordinates the following processes to assist lawyers in avoiding misconduct:

#### **A. Ethics Counsel**

- Ethics Counsel, a non-disciplinary, advisory arm of the Virginia State Bar, gives Lawyers “real time” assistance via telephone and e-mail about ethical dilemmas.
- All inquiries are held in strict confidence and are not shared with the disciplinary side of the Office of Bar Counsel.
- Contact information:
  - Telephone Hotline: 804-775-0564;
  - E-mail directly from VSB website [www.vsb.org/site/regulation/ethics/](http://www.vsb.org/site/regulation/ethics/).

#### **B. Legal Ethics Opinions from Standing Committee on Lawyer Discipline**

*This part of VSB work is governed by the Supreme Court of Virginia through its rules found in Volume 11 of the Virginia Code.<sup>5</sup>*

**Legal Ethics Opinions (LEOs)** are **advisory opinions** promulgated by the Standing Committee on Legal Ethics (the Committee). Lawyers may request an LEO concerning actual or contemplated conduct.

##### **1. Requesting an LEO**

The request for an LEO must:

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<sup>5</sup> Rules of Court, Pt 6, §IV, ¶ 10.

- Be in writing on a form mandated by the Committee;
- Be in the hypothetical, with no identifying information about the parties; and
- State that the requesting lawyer has researched ethics rules, statutory law and case law on the question at hand and the results of that research.

Para. 10-2A.

## **2. Anatomy of an LEO**

- ❖ The Committee issues an LEO after it reaches a decision by a majority vote. No dissenting opinions are issued. All LEOs must be reviewed by the Supreme Court of Virginia prior to issuance.
- ❖ An LEO states the operative facts, the question presented, the applicable ethics rules, relevant prior opinions and case law, the Committee’s opinion on the facts presented, and the rationale for that opinion.
- ❖ The requesting member or any other VSB member may ask the Committee to reconsider its conclusion. The requesting member may appeal the Committee’s conclusion to the Bar Council, the governing body of the VSB. Para. 10-2D.
- ❖ If the request presents a previously resolved issue, the requesting attorney is notified through a “Legal Ethics Inquiry” response citing prior Opinions instead of through a new LEO.
- ❖ The Committee may decline to issue an LEO regarding any matter that is subject of a pending disciplinary proceeding or litigation.

## **3. Publication and Comment Period for LEOs**

- ❖ In the Committee’s discretion, LEOs may be published as informal advisory opinions or transmitted to Bar Council for approval, modification, or disapproval as a formal advisory opinion.
- ❖ Prior to consideration of the Opinion by Council, the VSB issues a press release inviting public comment. Para 10-2C.



- ❖ If approved by Bar Council, the VSB may petition the Supreme Court of Virginia for review of the Opinion.
- ❖ Prior to consideration of the Opinion by the Court, the VSB issues a press release inviting public comment.

➔ **Note this important distinction about the legal effect of LEOs, depending upon the issuing body:**

- ❖ Opinions issued by the **Legal Ethics Committee** or the **Council** are **advisory** only, have no legal effect and are not binding on any judicial or administrative tribunal. Para. 10-2C., Para. 10-3A.
  - Prior to issuance, however, the Supreme Court of Virginia now reviews all LEOs. Review of an LEO is not the equivalent of approval of an LEO, which gives the opinion the full force of law.
- ❖ Opinions approved by the **Supreme Court of Virginia** become a decision of the court and have the full force of law. See, e.g., LEO 1765: Whether an Attorney Working for a Federal Intelligence Agency can Perform Undercover Work Without Violating Rule 8.4

#### 4. Finding and Researching LEOs

The LEOs or summaries of LEOs can be found at:

- Separate unnumbered volume of the Virginia Code entitled *Legal Ethics and Unauthorized Practice Opinions*;
- By number, at the Bar's website: [www.vsb.org/site/regulation/leos](http://www.vsb.org/site/regulation/leos);
- The *Virginia Lawyer Register*; and

Virginia CLE's website, [www.vacle.org](http://www.vacle.org)

## V. MYTHS AND MISCONCEPTIONS ABOUT BAR COMPLAINTS

A. **Myth:** There is a statute of limitations for filing a bar complaint.

- **Reality:** No limit exists. A complainant may file a complaint regarding conduct far in the past. *Moseley v. Virginia State Bar ex rel. Seventh*

- B. **Myth:** Only clients can file complaints.
- **Reality:** Anyone can file a complaint regarding any attorney's conduct.
- C. **Myth:** If a complainant withdraws a complaint, the matter is closed.
- **Reality:** Once a complainant files a complaint, the Bar investigates and pursues the allegations based on the merit of each claim, not on the preferences of the complainant.
- D. **Myth:** If a complainant is a criminal, his complaint is unreliable and will surely be dismissed.
- **Reality:** The Bar evaluates the merits of each allegation regardless of the identity of the complainant. Each year, the bar prosecutes cases to the highest tribunals based upon complaints initiated by inmates.
- E. **Myth:** The Bar can only investigate the specific allegations of the complainant.
- **Reality:** The Bar investigates all issues present in the information obtained.
- F. **Myth:** If there is no showing of harm, the complaint will be dismissed.
- **Reality:** The complaint system determines misconduct, not damages.

***Virginia State Bar***  
***Office of Bar Counsel***

***Presents***

**Mock Subcommittee**  
**Meeting**

**October 25, 2016**

**Virginia Beach Bar Association**

## Materials

- Introduction and Instructions
- Narration of Facts and Evidence
- Exhibit A: Attorney-Client Fee Agreement
- Exhibit B: Assignment and Authorization
- Exhibit C: Settlement Statement
- Exhibit D: Excerpt of Deposition of Stuart Winthrop
- Exhibit E: Cash Richie's Disciplinary Record (not to be viewed until after an assessment has been made as to whether charges of misconduct should be brought)
- Selected Rules of Professional Conduct

### Mock Subcommittee Meeting

In this session, we will present a mock subcommittee meeting. Subcommittees consist of three members of a District Committee and are comprised of two lawyers and a non-lawyer (called lay member). There are 17 District Committees in Virginia, arranged geographically by judicial districts. District Committees have 10 members each, included 3 lay members. Most District Committee work is done in subcommittee. In Virginia's attorney disciplinary system, subcommittees, not staff attorneys, bring charges of misconduct.<sup>1</sup> Here, you will be given evidence and must decide what, if any, charges of misconduct to bring against a respondent lawyer.

Subcommittees have the power to dismiss a case, set it for hearing before a District Committee (where the harshest sanction available is a public reprimand), certify it for hearing before the Disciplinary Board (where the harshest sanction is revocation), approve an agreed disposition for private discipline or public discipline that is a reprimand or less, or impose minor private discipline, such as a private admonition without terms or a private dismissal *di minimis*.<sup>2</sup>

These materials were previously presented at the 2014 Disciplinary Conference of the Virginia State Bar. That session was somewhat different than today's mock subcommittee meeting. There, the session was entitled "The Adjudicator's Perspective," and was a live adjudication of a mock case before a District Committee. Below are the instructions for that program, which contain useful information for today's program.

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<sup>1</sup> Staff attorneys may only bring charges of misconduct in expedited proceedings involving imminent danger to the public. Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-18.D.

<sup>2</sup> Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-15.B.

### Adjudicating a Disciplinary Case

All panelists are volunteers in the disciplinary system; there are four lawyers and a lay member, for a quorum of five.<sup>3</sup>

Disciplinary hearings are bifurcated, with the Committee first hearing evidence of misconduct.<sup>4</sup> The Committee will decide whether the bar has proven each alleged rule violation by clear and convincing evidence.<sup>5</sup> The Committee may find clear and convincing evidence that the respondent violated some rules, but not all rules charged by the bar.

If the Committee finds one or more rule violations, the hearing is reconvened for the sanctions phase. At this time, the bar may present the respondent's prior disciplinary record, if any.<sup>6</sup> The bar may also present other evidence bearing on the appropriate sanction to be imposed. The respondent may also present evidence, including character witnesses. The respondent is generally limited to five character witnesses without leave of the Committee. If the Committee finds rule violations, it must impose a sanction.

All District Committee hearings are open to the public.<sup>7</sup> As such, private discipline is not available at a District Committee hearing. The Committee may impose the following sanctions<sup>8</sup>:

- Public Dismissal *Di Minimis* (Defined by Paragraph 13-1 as a finding that the respondent has engaged in misconduct that is clearly not of sufficient magnitude to warrant disciplinary action, and the respondent has taken reasonable precautions against a recurrence of same. Despite its name, a Dismissal *Di Minimis* creates a disciplinary record.)
- Public Dismissal for Exceptional Circumstances (Defined by Paragraph 13-1 as a finding that the respondent has engaged in misconduct, but there exist exceptional circumstances mitigating against further proceedings, which circumstances shall

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<sup>3</sup> District Committee hearings must have a quorum of five, including at least one lay member. Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13-4.B.

<sup>4</sup> Paragraph 13-16.T and X.

<sup>5</sup> Paragraph 13-16.Y.

<sup>6</sup> Paragraph 13-16.X.

<sup>7</sup> Paragraph 13-16.G.

<sup>8</sup> Paragraph 13-16.X.

be set forth in writing. Despite its name, a Dismissal for Exceptional Circumstances creates a disciplinary record.)

- Public Admonition, With or Without Terms (Defined by Paragraph 13-1 as a public sanction imposed by a District Committee upon a finding that misconduct has been established, but that no substantial harm to the complainant or the public has occurred, and that no further disciplinary action is necessary.)
- Public Reprimand, With or Without Terms (Defined by Paragraph 13-1 as a form of public discipline that declares publicly the conduct of the respondent improper, but does not limit the respondent's right to practice law.)

A District Committee does not have the power to suspend or revoke a lawyer's license to practice law. If the Committee believes a sanction of suspension or greater is warranted, it may certify the charge of misconduct to the Board or file a complaint in the Circuit Court, pursuant to Virginia Code Section 54.1-3935. The case is then tried *de novo* at the Board level or before a Three-Judge Circuit Court.

"Terms" is defined by Paragraph 13-1 as those conditions imposed on the respondent by a District Committee that require the respondent to perform certain remedial action as a necessary condition for the imposition of an Admonition or Reprimand. Examples of terms include:

- Requiring the respondent to take a certain number of CLE hours in a certain subject not for MCLE credit
- Requiring the respondent to hire a law office management consultant
- Requiring the respondent to read certain treatises, such as *Lawyers and Other People's Money*

Terms are meant to rehabilitate the respondent and to protect the public, but the disciplinary system is not a substitute for a court of law. For that reason, it is the rare circumstance that a term requiring monetary restitution is appropriate. If the District Committee

imposes terms, it shall state the time period in which the terms shall be met and provide the alternate sanction should the respondent fail to comply with the terms.<sup>9</sup>

In determining the appropriate sanction, a District Committee may refer to the *ABA Standards to Imposing Lawyer Sanctions*, which includes aggravating and mitigating factors as follows:

Aggravating factors:

- Prior disciplinary offenses
- Dishonest or selfish motive
- A pattern of misconduct
- Multiple offenses
- Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency
- Submission of false evidence, false statements, or other deceptive practices during the disciplinary process
- Refusal to acknowledge the wrongful nature of conduct
- Vulnerability of victim
- Substantial experience in the practice of law
- Indifference to making restitution
- Illegal conduct, including that involving the use of controlled substances

Mitigating factors:

- Absence of a prior disciplinary record
- Absence of a dishonest or selfish motive
- Personal or emotional problems
- Timely good faith effort to make restitution or to rectify consequences of misconduct
- Full and free disclosure to disciplinary board or cooperative attitude toward proceedings
- Inexperience in the practice of law
- Character or reputation
- Physical disability
- Mental disability or chemical dependency including alcoholism or drug abuse when:

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<sup>9</sup> Paragraph 13-16.BB.



- There is medical evidence that the respondent is affected by a chemical dependency or mental disability
- The chemical dependency or mental disability caused the misconduct
- The respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
- The recovery arrested the misconduct and recurrence of that misconduct is unlikely
- Delay in disciplinary proceedings
- Imposition of other penalties or sanctions
- Remorse
- Remoteness of prior offenses

## Narration of Facts and Evidence

Wednesday, February 13, 2013 was a sunny day in Henrico County, Virginia. Laura Reynolds was especially cheerful because she had just dropped her children off at school for the first time in a week and she was headed to her office at 8:30 a.m. An unexpected five snow days in a row had ruined her work schedule. As a Certified Public Accountant, this was her busiest time of year.

On the same morning, Stuart Winthrop woke up and staggered to his car, headed to his job as a barista at Starbucks. The night before Stuart had been at a bar celebrating his birthday and had stumbled home at 4:00 a.m. As he approached the intersection, Stuart made a rolling right on red and swiped the side of Laura's minivan as she proceeded through the intersection.

Laura was knocked out of her pleasant daydream about tax deductions by the impact of Stuart's car. At the scene, Laura declined an ambulance, but the next day, she saw her primary care provider for neck and shoulder pain. Her injuries were to the soft tissue only, but she missed several weeks of work recovering. She was treated by a chiropractor named Dr. Snap for her injuries. By the time she was able to return to work, tax season was nearly over and all of her clients had hired other accountants to file their taxes.

Laura was furious at the loss of income, which she estimated at twelve thousand dollars. Laura didn't consider herself a "litigious person," but after a few months, she decided to sue Stuart Winthrop. Laura visited attorney Danny Doolittle, whose office was next door to hers. Danny listened patiently while Laura told her entire story. He advised Laura that she must file suit within two years from the date of the accident, or the statute of limitations would expire. Danny ultimately declined to take her case, explaining that he was a primarily a "dirt lawyer," and that she needed a "top gun" like his law school classmate, Cash Richie. Laura was hesitant to hire Cash—she had seen him in television ads shouting, "You've been in a wreck? You deserve a check!" Danny, however, persuaded her that Cash Richie was the best. Danny personally called Cash and made the appointment for Laura.

Cash Richie was not as handsome or well-dressed as he appeared on television, but he was full of energy and eager to take her case. She signed a

contingency fee agreement providing for an attorney's fee of 33.33% of any award or settlement. Laura gave him a list of her medical providers and signed medical releases for him to obtain her records. Cash promised to "nail that guy to the wall."

True to his word, within a month Cash filed a \$5 million suit in Henrico County Circuit Court. Cash moved quickly to gather all relevant documents, investigate the case, and take depositions. After drinks with his good buddy Danny Doolittle, with whom Cash often discussed his cases hypothetically, Cash decided to explore in discovery whether the defendant was texting at the time of the accident.

During defendant Stuart Winthrop's deposition, under Cash's withering examination, Stuart admitted to drinking two beers before getting in the car the morning of the accident. Stuart further admitted to texting while driving. Days after Stuart's deposition, the case settled for \$300,000, which was much more than Laura had ever expected. Cash asked Laura if she would be satisfied with him increasing his fee a few percentage points and her receiving "about one fifty." Laura quickly agreed and signed a settlement statement to that effect. Cash distributed the settlement funds and moved on to his next lucrative case. It seemed everyone was happy, until.....

A month after the case settled, Dr. Snap called Cash Richie's office and asked about the status of the case. When Cash's secretary informed him of the settlement, Dr. Snap snapped, "But what about my bills? That deadbeat owes me \$5,000!" Cash never returned Dr. Snap's call. Dr. Snap called three more times and wrote several letters, all of which went unanswered. Flummoxed, Dr. Snap finally filed a bar complaint, attaching a copy of the assignment signed by Laura and Cash Richie.

In response to the bar complaint, Cash produced a copy of the fee agreement and settlement statement.

Meanwhile, Stuart filed a bar complaint against Cash alleging that Cash had "bullied" him during the deposition and attaching a copy of the transcript. [Note: for the training purposes of this seminar, these two bar complaints have been combined into one matter.]

### The bar's investigation

The bar investigated the case and found evidence that upon settlement, Cash Richie had increased the percentage of his contingency fee agreement to 45% and had paid Danny Doolittle a fee of \$10,000.00.

Laura was interviewed by the bar's investigator. She believes that Cash Richie is the best lawyer in town, and is appalled that the bar is taking these complaints seriously. Laura had no problem with Cash Richie receiving a 45% contingency fee, rather than 33.33% because her settlement was much more than she ever anticipated. Further, she said that she did not mind Danny Doolittle receiving a fee, although she was surprised Cash Richie was sharing his fee at all, since, in her words, "Danny didn't do anything except refer me to Mr. Richie." Laura said she is very happy with her settlement and that she did not want the bar to discipline Cash or Danny.

Laura did not pay Dr. Snap's bills because she thought Cash Richie had paid all her medical bills before distributing her share of the settlement. Laura admitted that she signed the settlement statement, but in all the excitement of settling the case, she did not remember agreeing to pay Dr. Snap out of her funds. She further said that after she was contacted by the bar's investigator, she paid Dr. Snap in full.

Dr. Snap was also interviewed by the bar's investigator. He said that he had heard nothing from Cash Richie or Laura Reynolds until the week before, when he received a check from Laura in the amount of \$5000. The memo line said "full and final payment of medical bills." Dr. Snap believes Cash Richie should be "suspended indefinitely" for his unethical conduct.

The bar investigator then interviewed Stuart Winthrop. Stuart confirmed the accuracy of the transcript and said that his testimony about the two beers and texting while driving was "unfortunately true." Stuart said that he was having second thoughts about applying to law school following Cash Richie's "outrageous behavior" at his deposition. Since the deposition, he has been stressed out, overly sensitive, and has lost his job and his girlfriend. He is now living in his grandmother's basement and has adopted a pet mouse. He would like to see Cash Richie disbarred.

Finally, the bar investigator interviewed Cash Richie, who said that he has been in practice for over fifteen years and that he has helped thousands of personal injury victims with his aggressive approach to litigation. He further said that he did nothing wrong in this case and that it should be dismissed. Cash Richie pointed out that the testimony he elicited from Stuart Winthrop was true, that Dr. Snap has now received full payment of his fees, and that his client Laura Reynolds is very happy with the settlement, the fees, and his services. Cash said the fee to Doolittle was justified, since Doolittle advised Laura on the statute of limitations and gave Cash the idea to ask Stuart about texting while driving.

The following exhibits are available for the subcommittee's review:

1. Fee agreement signed by Laura Reynolds
2. Dr. Snap's assignment signed by Laura Reynolds and Cash Richie
3. Excerpt from Stuart Winthrop deposition transcript
4. Settlement statement signed by Laura Reynolds

Attorney-Client Fee Agreement

Client Laura Reynolds (hereinafter "Client") hereby agrees to retain attorney Cash Richie, Esquire, for representation for the following matter: Personal injury claim arising from automobile accident of February 13, 2013.

Attorney's fee shall be contingent on a monetary recovery for client through judgment or settlement, and shall be 33.33 % of the total recovery. **Client agrees to be responsible for payment of all costs of litigation.** In the event that the representation is terminated prior to recovery, Client agrees to pay to Attorney a fee calculated on a *quantum meruit* basis at \$300.00 per hour for lawyer time and \$85.00 per hour for paralegal time. If there is no monetary recovery, Attorney shall not be paid a fee, but client remains responsible for costs. **Client specifically acknowledges that she is responsible for payment of her own medical bills.**

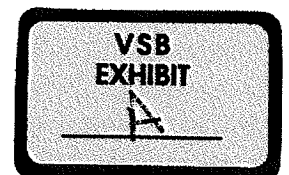
Attorney agrees to work diligently on Client's matter and keep Client reasonably informed about Client's case. Client agrees to cooperate with Attorney in pursuing this matter.

Laura Reynolds  
Client signature

July 8, 2013  
date

Cash Richie  
Cash Richie, Esquire

July 8, 2013  
date



# Snap Chiropractic Center

Vernon Snap, DC  
11800 West Broad Street  
Henrico, Virginia 23233  
(804) 360-1700

## ASSIGNMENT AND AUTHORIZATION

You are hereby authorized to disclose and/or furnish my attorney(s) with any and all medical information, bills, and/or records in your possession which they request in reference to any illnesses and injuries which I have suffered.

I further, irrevocably assign to you, and authorize and direct said attorney to pay from the proceeds of any recovery in my case all reasonable fees for services provided by you, including fees for preparation and testimony, as a result of the injury or condition heretofore mentioned. I understand that this in no way relieves me of my personal primary obligation to pay for such services and that the signing of this form does not prohibit customary billing by you. All bills shall be paid promptly in the usual manner.

Signature: Laura Reynolds  
Client Name: Laura Reynolds  
Address: 1400 North Parham Road  
Richmond, Virginia 23229  
Witness: Robert Edwards  
Date: July 22, 2013

THE UNDERSIGNED ATTORNEY FOR THE PATIENT REFERRED TO ABOVE HEREBY AGEES TO COMPLY FULLY WITH THE FOREGOING "AUTHORIZATION AND ASSIGNMENT" AND AGREES TO ADVISE THE NAMED ASSIGNEE IN WRITING THE STATUS OF THE CLAIM OF THE PATIENT WITHIN TEN (10) DAYS OF THE REQUEST, AND AGREES TO NOTIFY THE ASSIGNEE IF THE ATTORNEY CEASES TO REPRESENT THIS PATIENT AND/OR IF THE CLAIM IS DROPPED OR DENIED.

Attorney: Cash Richie  
Date: July 22, 2013



Settlement Statement

Laura Reynolds v. Stuart Winthrop  
Circuit Court for the County of Henrico  
Case No.: CL13-4344

Settlement amount:	\$300,000.00
Attorney's fee—Cash Richie (45%)	\$135,000.00
Referral fee—Danny Doolittle	\$10,000.00
Lawsuit filing fee	\$346.00
Copies and faxes	\$212.00
Court reporter costs	\$785.00
Consulting expert fee (Dr. Snow, orthopedist)	\$1500.00
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Total due to Client Laura Reynolds:	\$152,157.00

By signing this agreement, Client agrees that attorney Cash Richie shall receive a contingency fee of 45% and Danny Doolittle shall receive a referral fee of \$10,000.00. Client also agrees to be responsible for paying all medical bills and other medical costs related to her injuries.

Laura Reynolds  
Laura Reynolds, Client

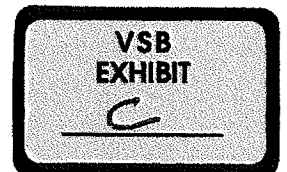
September 30, 2013  
date

Cash Richie  
Cash Richie, Esquire

September 30, 2013  
date

Robert Edwards  
Witness

September 30, 2013  
date





VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

LAURA JANE REYNOLDS,

Plaintiff

V.

Case No. CL13-4344

STUART POWELL WINTHROP, IV,

Defendant.

DEPOSITION OF STUART POWELL WINTHROP, IV

September 16, 2013

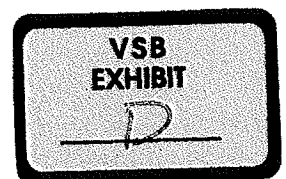
Counsel:

For the Plaintiff:

Cashion F. Richie, Esquire  
407 Fitzhugh Place  
Henrico, VA 23229

For the Defendant:

George Michael Jones, Esquire  
5506 Cutshaw Lane  
Midlothian, VA 23113



Q: So after your buddies dropped you off at four in the morning, what did you do?

A: I slept.

Q: I bet you did. Slept off all that booze. You were drunk, weren't you?

A: Not really, not by that point. I was tired.

Q: Tired of drinking or tired of smoking weed?

BY MR. JONES: Objection! There's no evidence of marijuana in this case.

BY MR. RICHIE: Whatever. I can tell he's a total pothead and so will the jury.  
Moving on.

What time did you leave for work on February 13, 2013, the day of the accident?

A: Um. I usually leave around 8:15, 8:20, something like that.

Q: I bet you were pretty hung over that morning, am I right?

A: No, not really.

Q: Not really? You testified earlier you had eight to twelve beers the night before.

A: I have a high tolerance.

Q: I understand, I used to be that way back in law school too. I'd go out, party all night and take an exam the next day. Ace it!

BY MR. JONES: Is there a question here?

BY MR. RICHIE: Cool it man. I'm getting to it. So anyway, before I was so rudely interrupted, I was saying I'd ace the exams every time. You know my

secret? A beer on the way to class. Hair of the dog that bit you. You ever try that?

A: Yeah, sometimes.

Q: Did you do that on the day of the accident?

A: Um, I don't think so.

Q: Is that what your roommate would say if I asked him?

A: Um. I don't know. Maybe.

Q: You had a beer the morning of the accident, didn't you?

Didn't you? Didn't you?

BY MR. JONES: Objection, asked and answered.

BY MR. RICHIE: Shut up Jones! You know your client was drunk. You were drunk, weren't you? I can prove it. I am going to prove it. You were D-R-U-N-K!

BY MR. JONES: That's enough now.

BY MR. RICHIE: D-R-U-N-K!

BY THE WITNESS: I was not drunk. Two beers is not drunk.

Q: So you admit you had two beers that morning?

A: Two beers is not drunk.

Q: But you drank the two beers, didn't you?

A: I don't see how that is relevant.

Q: You don't see? What kind of idiot are you?

A: Mr. Jones?

BY MR. JONES: Cash, let's get back to questions.

BY MR. RICHIE: That was a question. I want to know why your idiot client doesn't think drinking two beers before causing an accident is relevant.

BY MR. JONES: Let's just move on. You got what you wanted.

Q: Mr. Winthrop, if I subpoenaed your phone records, would I find that you were texting at the time of the accident?

A: I don't know.

Q: Were you texting at the time of the accident?

A: Um.

Q: Mr. Winthrop? Do you understand the question?

A: Um. I'm thinking. Maybe. Maybe one text?

Q: Maybe one text? Are you sure?

A: Yeah, maybe just one.

Q: Just one, you're sure?

A: Definitely. Just one quick text to my girlfriend. Wasn't more than three or four characters. That's all, I swear. I think it was "IM L8."

Q: "IM L8"?

A: Um hmm. [nodding]

Q: Jones, this kid's a full-fledged nincompoop. You better call the insurer now, because this case just got a whole lot more interesting.

BY MR. JONES: Cash, that's enough. Let's take a break.

BY MR. RICHIE: Fine with me. What a moron.

**VIRGINIA:**

**BEFORE THE THIRD DISTRICT COMMITTEE  
VIRGINIA STATE BAR**

**IN THE MATTER OF CASHION FORD RICHIE**

**VSB DOCKET NO. 14-031-099895**

**Certification**

I hereby certify that to the best of my knowledge, information and belief, the attached information accurately reflects the disciplinary record of attorney Cashion Ford Richie.

The disciplinary record consists of the following sanctions issued in attorney disciplinary proceedings:

- Private Admonition Without Terms – January, 2005

(Subcommittee imposed a Private Admonition Without Terms for violation of Rule 1.5(c), which provides that a contingency fee agreement must be in writing. Respondent's agreement for a 33.33% contingency fee with client was oral. Client also complained of a lack of communication, but this charge was dismissed by the subcommittee for lack of clear and convincing evidence of misconduct.)

- Public Reprimand Without Terms – May, 2011

(District Committee imposed a Public Reprimand Without Terms for a violation of Rule 3.3, which prohibits a false statement of facts or law to a tribunal. The Committee found that Respondent falsely advised the court that his office had not received requests for admission propounded by defendant in a personal injury case, when in fact the discovery had been timely served and received.)

Thomas Smith  
Assistant Clerk



## SELECTED RULES OF PROFESSIONAL CONDUCT

### RULE 1.5 Fees

**(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:**

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
- (3) the fee customarily charged in the locality for similar legal services;**
- (4) the amount involved and the results obtained;**
- (5) the time limitations imposed by the client or by the circumstances;**
- (6) the nature and length of the professional relationship with the client;**
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and**
- (8) whether the fee is fixed or contingent.**

**(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.**

**(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.**

**(e) A division of a fee between lawyers who are not in the same firm may be made only if:**

**(1) the client is advised of and consents to the participation of all the lawyers involved;**

**(2) the terms of the division of the fee are disclosed to the client and the client consents thereto;**

**(3) the total fee is reasonable; and**

**(4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.**

**RULE 1.15 Safekeeping Property**

**(b) Specific Duties. A lawyer shall:**

**(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive;**

**RULE 3.4 Fairness To Opposing Party And Counsel**

**(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.**

**RULE 7.3 Direct Contact With Potential Clients**

**(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:**

- (1) pay the reasonable costs of advertisements or communications permitted by this Rule and Rule 7.1;**
- (2) pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service;**
- (3) pay for a law practice in accordance with Rule 1.17; and**
- (4) give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.**

**RULE 8.4 Misconduct**

**It is professional misconduct for a lawyer to:**

**(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;**