Inside the Bar Counsel's Office

Barbara Ann Williams, VSB Bar Counsel

Unfortunately, every attorney admitted to the practice of law in the Commonwealth of Virginia, either on a regular or limited basis, is potentially a respondent in an attorney disciplinary action. What follows are five facts that every potential respondent, and thus every lawyer practicing law in Virginia, should keep in mind.

1. It is each attorney's responsibility to keep the Virginia State Bar apprised of his or her current address.

When an attorney moves or changes membership status, it is his or her responsibility to notify the bar if the attorney's official address of record should be changed. This includes attorneys who elect to take retired/disabled status.

The disciplinary rules require that bar complaints and notice of bar proceedings be mailed to an attorney's official address of record. As long as there is proof, usually in the form of a certified mail receipt, that a complaint or notice was mailed to an attorney's official address of record, service is deemed effective even if the mail never reached its intended recipient. Accordingly, an attorney who neglects to inform the bar of a change in his or her official address of record may not know that he or she is the subject of a bar proceeding until the process is well underway, or be able to assert lack of notice as a defense.

Official address of record changes must be in writing and should be directed to the Membership Department. Telefaxes are acceptable.

2. Failure to respond in writing to a bar complaint will almost invariably result in the complaint being referred for a full investigation.

During the preliminary investigation phase of a bar complaint, the complaint is mailed to the respondent with a request for a written response. With few exceptions, if the respondent fails to respond to the complaint, or simply submits a general denial, bar counsel lacks the evidentiary predicate necessary to consider dismissing the complaint on one or more of the following grounds: the evidence available shows that the respondent did not engage in the misconduct questioned or alleged; there is no credible evidence to support the allegations of misconduct; or the evidence available could not reasonably be expected to support any allegation of misconduct under a clear and convincing evidentiary standard. Instead, the complaint must be filed with a district committee and a full investigation undertaken.

Full investigations are time consuming for the parties to the complaint, witnesses and the bar. Even if a response to a bar complaint is not dispositive, the response may narrow the issues in such a way as to expedite resolution of the complaint. Otherwise, all possible issues must be explored, which can result in the scope of the complaint expanding rather than contracting, thereby extending the duration of the investigation. For all these reasons, if there is a defense to a bar complaint, it is to the respondent's advantage to present that defense as early in the disciplinary process as possible.

Moreover, as of January 1, 2000, when the new Virginia Rules of Professional Conduct become effective, in certain instances, failure to respond to a lawful demand for information in connection with a disciplinary proceeding may trigger another disciplinary charge.

3. The Virginia State Bar can only discipline attorneys; the bar cannot discipline law firms.

New York is the only state in the union that has extended disciplinary rules applicable to lawyers, particularly rules involving dishonesty, fraud, deceit and misrepresentation, to law firms. New York's rules have been in effect since 1996. Although there has been discussion in bar circles as to whether other states should follow New York's lead, the *ABA Journal* recently reported that no other states have reported pending proposals providing for law firm discipline, although California at one time apparently considered adopting a set of rules similar to New York's.

Because the Virginia State Bar's authority is limited to regulating attorneys, even where complaints involve

allegedly systemic billing fraud, conflicts of interest or discovery abuse, the bar can only discipline the lawyer(s) proved by clear and convincing evidence to have engaged in the misconduct in question. Therefore, while individual lawyers can and will be held accountable for law firm practices that run afoul of disciplinary rules, the firm that countenanced, if not actively encouraged the misconduct, will get off scott-free — at least in terms of bar discipline.

4. Standing to bring a bar complaint is not an issue in bar proceedings.

From time to time, a respondent will argue vehemently that a bar complaint should be dismissed because the complainant lacks standing to bring a complaint. Such arguments are doomed to failure. Paragraph 13 of the Rules of the Virginia Supreme Court defines "complainant" as "the initiator of a Complaint." The bar receives complaints from many sources — not only clients, but relatives of clients, judges, colleagues, other professional service providers, parties and non-parties, and opposing counsel. While the bar considers the source of a complaint in evaluating its merits, the fact that a complaint was made by someone other than the respondent's client is not outcome determinative.

In fact, concomitant with the privilege of self-regulation is each lawyer's duty to report ethical misconduct. Rule 8.3 of the Virginia Rules of Professional Conduct mandates that a lawyer having reliable information that another lawyer has committed a violation of the rules that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall inform the appropriate professional authority.

5. The Code of Professional Responsibility and the Virginia Rules of Professional Conduct prescribe the minimum acceptable level of ethical conduct.

The disciplinary rules establish the minimum level of professional conduct expected of all lawyers. On many occasions, clients, their lawyers, and ultimately the public, would benefit from counsel adopting a course of professional conduct that exceeds the minimum ethical requirements. For example, where a potential conflict of interest presents a close call, even if a lawyer thinks that a favorable outcome could be achieved if the conflict issue were litigated, given the time and expense involved in litigating a peripheral issue, the best advice the lawyer could give the prospective client might be to look for other counsel.

In other words, while the disciplinary rules provide a safe harbor for attorneys, the rules are the floor, not the ceiling, for ethically permissible conduct. It is up to each attorney to decide whether to go beyond what the rules require in a given situation. The Virginia State Bar does not regulate that decision, but the legal profession certainly has an interest in the choices that every attorney makes. The public image of lawyers has taken a beating in the last couple of decades, arguably because many members of the public believe that all lawyers are self-serving. Every lawyer practicing in Virginia can help dispel our negative image by taking the high road, even when that path involves more time, effort and self-sacrifice than the minimum level of ethical conduct required by the disciplinary rules. ▩