

Inside the Office of Bar Counsel

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In almost every community, certain lawyers are notorious for engaging in unprofessional conduct. Chronic procrastination, perpetual tardiness, outrageous courtroom antics, and diatribes against opposing counsel, parties, witnesses and even judges, are common hallmarks of these lawyers. When such conduct undermines the administration of justice, or reflects adversely upon the lawyer's fitness to practice law, the attorney disciplinary rules come into play.

For example, Rule 1.3(a) of the Virginia Rules of Professional Conduct states that a lawyer shall act with reasonable diligence and promptness in representing a client. Rule 3.5(f) provides that a lawyer shall not engage in conduct intended to disrupt a tribunal. Rule 3.3(a) indicates that a lawyer shall not knowingly make a false statement of fact or law to a tribunal. Rule 8.4(c) affirms that a deliberately wrongful act reflecting adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer constitutes professional misconduct.

Although lawyers, judges and lay persons privately denounce attorneys who routinely act as if they were not subject to the disciplinary rules, relatively few eyewitnesses to attorney transgressions file bar complaints. Lawyer insubordination can be a spectator sport, with onlookers either rooting for their favorite legal gladiators, bemoaning lawyers' lack of civility or blaming "the bar" for not doing anything to curb the fray.

All talk and no action will never constrain attorneys whose refusal to abide by the rules undermines public confidence in the legal system, lawyers and judges. Unless specific instances of lawyer misconduct are reported, the attorney disciplinary process has no predicate upon which to act. And until lawyers get tough with their own, behavioral recidivists will go unchecked.

Under Rule 8.3(a) of the Virginia Rules of Professional Conduct, the duty to report misconduct has two prongs: 1) reliable information that a fellow lawyer has committed a violation of the Rules of Professional Conduct, and 2) the purported violation must raise a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer. While a lawyer's duty to report misconduct covers behavior in and out of the courtroom, Canon 3.A.(2) of Canons of Judicial Conduct directs judges to maintain order and decorum in court proceedings. When an attorney's behavior is disruptive, depending upon the nature and degree of the disruption, a judge may counsel or warn the attorney, hold the lawyer in contempt of court and/or make a bar complaint.

An isolated instance of an attorney losing his or her self-control may not rise to the level of ethical misconduct warranting disciplinary action. A pattern of behavior that interferes with the administration of justice is a different matter. When efforts by the bench, friends and colleagues to counsel a truculent attorney fail, disciplinary action may be indicated. To make a case against the offending attorney, the bar must prove by clear and convincing evidence one or more acts of behavioral misconduct that violates the disciplinary rules. Multiple complaints are oftentimes essential to the successful prosecution of habitual offenders who flaunt the rules.

Contrary to what many assume, a finding of contempt punished by a monetary fine or jail time, or even "purging" oneself of contempt by leave of court, does not forestall bar discipline. The judicial disposition of an incident of lawyer insubordination addresses the lawyer's offense against the court. A bar proceeding adjudicates whether the lawyer's conduct, whether it be one act or a pattern of behavior, violated the disciplinary rules.

In contempt cases, the presiding judge is many times the best, and occasionally the only, witness to the alleged unethical conduct. A transcript oftentimes does not capture the totality of circumstances, like tone of voice, body language or prior admonitions, that bear directly upon the ethical tenor of an attorney's remarks or nonverbal conduct. Testimony from the presiding judge can put meat on the bones of a transcript offered as evidence of lawyer misconduct.

Virginia Code § 19.2-271 bars judges from testifying in a criminal or civil proceeding about any matter that came before them in the performance of their official duties, but the statutory bar does not prevent judges from testifying in attorney disciplinary hearings. See Advisory Opinion, 82-83 Va. AG 744. Furthermore, a judge who makes a bar complaint against an attorney is not required to recuse herself or himself from all cases involving the attorney. *Terrell v. Commonwealth*, 12 Va. App. 285 (1991).

Lawyers must work hand-in-hand with the judiciary and the public to police the legal profession. Attorney discipline is not limited to instances of lying, cheating or stealing. A lawyer whose conduct disrupts the integrity and decorum of legal proceedings can do as much damage to public confidence in the administration of justice as the lawyer who is a compulsive liar, rogue or thief. Behavior that reflects adversely on a lawyer's fitness to practice law insidiously undermines the legal system and those who serve it, including lawyers and judges. Such pernicious conduct merits close attention and, if unabated, disciplinary action. 