

Inside the Office of Bar Counsel:

Who Does Attorney Self-Regulation Serve?

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Critics of the bar often grumble that attorney self-regulation is akin to the fox guarding the hen house. Comparing the number and resolution of complaints against attorneys with the number and resolution of complaints against professionals who are not self-regulated dispels the notion that attorney self-regulation serves lawyers at the expense of the public. The fact is that Virginia lawyers are disciplined more often than health professionals and are the subject of more disciplinary investigations than accountants, contractors and real estate professionals.

The Virginia Department of Health Professions (DHP) and 12 health regulatory boards, along with the Board of Health Professions, are charged by statute with ensuring that more than 250,000 health professionals and facilities deliver safe and competent services to the public. DHP investigates alleged violations of regulations it promulgates as well as laws governing health professions and facilities. Substandard care, diversion of prescription drugs for illegal purposes, improper prescribing, sexual misconduct, improper advertising, inadequate record keeping and unsanitary conditions are the most common complaints.

The disciplinary process for health professionals is similar, although not identical, to the attorney disciplinary process. Whereas the Rules of Court govern attorney disciplinary proceedings, the Administrative Process Act applies to disciplinary proceedings conducted by all the occupational regulatory boards in Virginia, including the 12 health regulatory boards.

At the intake stage, complaints against health professionals are either closed or docketed for investigation. After the complaints are investigated, the appropriate board reviews each complaint and investigative report. The board decides whether there is sufficient evidence of a violation for a case to proceed to an informal conference. If not, the case is dismissed.

Senior legal assistants prepare cases for informal conferences, which involve two or three board members. If there is an appeal from an informal conference decision, or if it appears that a case may result in suspension or revocation of a health license, a panel of board members holds a formal hearing. Attorneys from the Office of the Attorney General serve as counsel to the various boards and prosecute cases that proceed to formal hearing.

The governor appoints the DHP director, who serves at the governor's pleasure. The governor also appoints all DHP board members, most of whom are health professionals licensed by the boards on which they serve. By statute, every

board except the Board of Medicine and the Board of Funeral Home Directors and Embalmers must have one to three citizen members. Like the Virginia State Bar (VSB), DHP is a special fund agency whose operating costs are covered by a legislative appropriation of fees charged to licensees and paid into the Treasury of the Commonwealth.

The VSB's and DHP's fiscal year runs from July 1 through June 30. An annual report detailing attorney disciplinary statistics and trends is posted on the VSB Web site. DHP publishes a biennial report. According to the bar's disciplinary statistics and DHP's biennial report for fiscal years 1999 and 2000, the numbers of licensees, complaints, investigations and rule violations involving lawyers, dentists, doctors and nurses were as follows:

Fiscal Year 1999

PROFESSION	LICENSEES	COMPLAINTS	INVESTIGATIONS	VIOLATIONS	VIOLATION RATE
Lawyers	22,135	3,147	1,059	263	11.28
Dentists	5,299	181	190	28	5.28
Doctors & Surgeons	28,616	688	739	105	3.67
Nurses (RNs)	84,639	216	196	58	0.69

Fiscal Year 2000

PROFESSION	LICENSEES	COMPLAINTS	INVESTIGATIONS	VIOLATIONS	VIOLATION RATE
Lawyers	22,720	3,377	1,076	231	10.17
Dentists	5,339	311	243	27	5.06
Doctors & Surgeons	29,395	1,065	884	99	3.37
Nurses (RNs)	86,600	369	288	98	1.13

These statistics demonstrate in dramatic fashion that the bar receives more complaints, conducts more investigations and establishes more rule violations than the three principal health regulatory boards. Lawyers are two to three times more likely to be disciplined than dentists or doctors, and nearly ten times more likely than nurses. Does this mean that lawyers are less ethical than health professionals? No. Do the numbers show that members of the public are more likely to complain

about lawyers than health professionals? Yes. Attorneys are easy targets when litigants are unhappy with the outcome of legal proceedings. Does the violation rate prove that the bar holds its members strictly accountable for their conduct? Absolutely.

The 1998 General Assembly directed the Joint Legislative Audit and Review Commission (JLARC) to study the effectiveness of DHP and the 12 health regulatory boards. JLARC's second report, issued in August 1999, analyzes disciplinary cases involving health professionals that were resolved in fiscal years 1997 and 1998. Although JLARC concluded that the disciplinary process generally worked well, JLARC determined that the Board of Medicine took more than 2.6 years on average to resolve cases. Most, although not all, bar complaints are resolved in considerably less time.

In its response to the JLARC report, DHP identified several factors that contribute to the slow resolution of cases, including the rising number of complaints, insufficient staff to handle the large case influx, difficulty obtaining records, attorney requests for continuances and inability to schedule enough hearing dates due to limited board member availability. With the exception of limited hearing dates, attorney disciplinary proceedings are subject to the same delays.

The JLARC report prompted DHP to review its disciplinary process and propose some changes in the way health regulatory boards operate. For example, in accordance with JLARC's recommendation, the Board of Medicine is developing what it describes as "a vertically integrated quality assurance process to identify external and internal benchmarks for case resolution and to analyze compliance with the resulting guidelines at regular intervals."

Like the Board of Medicine, the VSB is in the process of devising sound timelines for resolution of complaints and more reliable means of tracking compliance with those timelines. When JLARC reviewed the VSB's operations in 1995, lack of consistent and complete data needed to assess compliance with internal timelines was one of the problems noted. New computer software, currently under development, will enable the VSB to identify benchmarks in the attorney disciplinary process and establish practicable timelines for the resolution of bar complaints—the same exercise the Board of Medicine has undertaken. The new software will also yield accurate data for analyzing actual performance versus timeline requirements, including the average time it takes the VSB to resolve bar complaints.

The counterpart to DHP for non-health professionals is the Department of Professional and Occupational Regulation (DPOR). Through 18 boards and programs, DPOR licenses and oversees more than 250,000 individuals and entities engaged in a wide variety of professions and occupations. DPOR's regulants range from auctioneers, barbers and polygraph examiners to accountants, contractors and real estate professionals. The boards can discipline regulants who do not follow accepted ethical or professional standards.

The governor appoints the DPOR director, subject to confirmation by the General Assembly. The DPOR director serves at the governor's pleasure for a term coincident with that of the governor. The governor also appoints the nine member DPOR board, subject to confirmation by the General Assembly, and, when openings arise, members of all the boards under DPOR's regulatory umbrella for terms fixed by law.

DPOR publishes a biennial report. The most recent DPOR report was issued on November 1, 2000, and covers fiscal years 1999 and 2000. The report states that the Enforcement Division received more complaints during the last biennium than any other period in the department's history. Not surprisingly, the Enforcement Division and the regulatory boards are looking for new ways to increase the efficiency of the disciplinary process.

7,170 cases were docketed against non-health professionals in fiscal years 1999 and 2000. The Enforcement Division, working with the Regulatory Programs Division, closed or adjudicated 6,907 cases. The DPOR report enumerates the cases each board docketed but not the violations found.

Based upon the DPOR biennial report and VSB annual statistics, here is how regulatory investigations of accountants, contractors and real estate professionals compared to bar investigations in fiscal years 1999 and 2000:

Fiscal Years 1999 and 2000

PROFESSION	LICENSEES	DOCKETED CASES	CASES CLOSED OR ADJUDICATED	PER 1000 LICENSEES CASES DOCKETED
Lawyers	23,000 + in good standing	2,135	1,868	92.8
Accountants	14,169 individuals 1,014 firms	80	80	5.6
Contractors	77,455 contractors and tradesmen	4,398	4,239	56.8
Real Estate Appraisers & Brokers	46,342 individuals and 5,785 entities	1,831	1,692	39.5

The numbers demonstrate that during the last biennium the rate of cases docketed and investigated was higher for attorneys than the rates for accountants, contractors and real estate professionals. Although many bar investigations do not result in attorney discipline, whenever a complaint is dismissed following a preliminary or full investigation, the complainant is apprised in writing of the investigative findings and the basis for dismissal under the Rules of Court. Thus, the claim that self-regulation allows the bar to ignore or sweep disciplinary matters under the proverbial rug is unfounded.

Attorney self-regulation compares quite favorably to regulation of other professionals in Virginia. Indeed, the numbers

prove that the bar is much tougher on its members than other regulatory boards. But disciplining lawyers who break the rules is only one part of the VSB's mission. Serving the public and the bar by resolving grievances before complaint files are opened and helping attorneys avoid bar complaints through the Professionalism Course, continuing legal education programs and the Ethics Line are equally important undertakings. For the VSB, fewer, not more, bar complaints would signal victory.

Even though relatively few Virginia lawyers flout the disciplinary rules, in instances where attorneys are the subject of bar proceedings, the bar has significantly expanded public access to the proceedings. A docket of public proceedings is published on the bar's Web site. Press releases are dissemi-

nated when public discipline is imposed, and disciplinary information is promptly posted on the bar's Web site. A citizen seeking to engage a lawyer can ascertain by telephone or from the bar's Web site whether an attorney has been publically disciplined and whether the attorney has certified that he or she has malpractice insurance. Members of the public can attend district committee and Disciplinary Board hearings.

So the next time someone asserts that attorney self-regulation is a cockamamie scheme, designed by lawyers to serve lawyers, assure them that while no regulatory system is perfect, the attorney disciplinary process in Virginia serves the public and the bar in commendable fashion at no cost to taxpayers.

