by Edward L. Davis

Acts of Inadvertence or Neglect — Should Attorneys Be Concerned about Disciplinary Action?

Every year the Virginia State Bar publishes summaries of more than 100 public disciplinary actions against attorneys. These actions, imposed by three-judge circuit courts or the volunteers serving on the Virginia State Bar Disciplinary Board and seventeen district committees throughout the commonwealth, are in addition to dozens of other private disciplinary actions issued for relatively minor acts of misconduct.[1] Should practitioners be concerned about disciplinary action for simple failures to communicate or to timely handle matters that they have agreed to undertake? The answer depends upon a number of factors, such as the existence of a pattern of inattention or neglect by an attorney, or a prior disciplinary record. The grand majority of such complaints, however, are closed with no action taken as the Virginia State Bar strives to resolve acts of minor misconduct through remedial measures without creating formal disciplinary records.

During the fiscal year that ended on June 30, 2016, the bar received 3,162 inquiries alleging attorney misconduct. Does the bar assume that someone is guilty when it receives allegations of misconduct? No. The first tier of review for all complaints is the bar's intake department, staffed by three attorneys. Their role is to review all complaints and determine within three days whether to open formal disciplinary case files or to take no action. Last year, these attorneys closed 1,977, or 62.5 percent of all of the inquiries it received upon determining that the allegations, even if true, did not implicate the Rules of Professional Conduct.

The remaining complaints set forth allegations that, if true, would constitute violations of the Rules of Professional Conduct. Nonetheless, rather than open formal disciplinary case files, in some cases the bar reached out to the attorneys and encouraged them to resolve the matters with their clients.[2] The bar does this in some cases where relatively minor misconduct is alleged and there is no pattern of inattention or neglect by the attorney, and little or no history of misconduct. Examples are clients who allege that they are unable to reach their attorneys,[3] or clients who allege that they have discharged their attorneys but cannot obtain their case files for themselves or successor counsel.[4] If there are no other allegations of misconduct, typically the bar will forward the complaint to the attorney and ask them to address the issue with the client and to inform the bar when they have done so, thereby avoiding the opening of a formal disciplinary case file. Last year 668 complaints, or 21 percent of all complaints received, were resolved in this fashion. The 493 remaining complaints, 15.6 percent of all complaints received, were assigned to the bar counsel's staff for preliminary investigation.

Does the opening of a formal disciplinary case file mean that the bar concluded that the attorney committed professional misconduct? No. At this stage the bar asks the attorney to submit a response that is then furnished to the complaining party for comment. The Rules of Court provide for the bar to take no further action if, upon review of the materials, the bar counsel determines that the evidence available shows that the attorney did not commit the misconduct alleged, that the conduct alleged was not unethical, that there is no credible evidence of misconduct, or that the allegations cannot be proven by clear and convincing evidence.[5]

"What if I just missed a deadline or failed to return one telephone call? Is the bar going to sanction me for something like that?" Earlier statutes provided for the imposition of discipline on lawyers who were found guilty of "any malpractice,"[6] and Disciplinary Rule (DR) 6-101(A)(3) of the former Code of Professional Responsibility provided that "a lawyer shall not neglect a legal matter entrusted to him." Noting that these rules and statutes, if applied with full force, would permit, if not require, the disciplining of attorneys even for trivial and insignificant issues, the Disciplinary Board chose to consider the issue in a 1980 disciplinary case. In the matter of *Fifth District Committee v. Williamson,* VSB Docket Number 79-27, the Disciplinary Board determined that the literal language of the rule and statute, which is appropriately aspirational, must be tempered by a narrower application in a disciplinary proceeding.

Accordingly, the Board determined that, "…isolated acts of inadvertence or errors of judgment on the part of a lawyer, although perhaps sufficient to subject him to civil liability to his client, standing alone will not ordinarily be of sufficient magnitude to be considered a violation of the

Bar Counsel *continued on page 21*

Bar Counsel *continued from page 14*

Code of Professional Responsibility, or of Sections 54-73 and 54-74 of the Code." The Board set forth more specific criteria, holding that, "The circumstances of each case must be considered in light of the experience, or lack of experience, on the part of the lawyer; the degree or culpability of the neglect; the harm, if any, to the client; the existence of any pattern of neglect or inattention by the lawyer; the lawyer's candor with his client in accepting responsibility for his neglect; and the extent to which the lawyer has been able to rectify or compensate his client for harm caused by the lawyer's neglect."

The Supreme Court of Virginia followed with a similar standard in a 1986 case, holding that, "Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith."[7]

These principals have withstood the test of time, and are the standards by which the bar's staff and disciplinary authorities evaluate complaints today. The Board in the *Williamson* case stated that the previous disciplinary rules and related statutes were aspirational. The current Rules of Professional Conduct are in fact designed to provide guidance to lawyers and a structure for regulating conduct as opposed to a basis for civil liability.[8] Isolated acts of inattention, neglect or malpractice should not evoke fear of disciplinary action as long as attorneys adhere to the principals set forth in the case authorities above.

Endnotes:

1 The Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13-1, define Private Discipline as an Admonition without Terms issued by a subcommittee *sua sponte,* a Private Reprimand or any form of discipline that is not public. A Private Reprimand means any form of non-public discipline that declares privately the conduct of the Respondent improper but does not limit the Respondent's right to practice law. A Private Admonition is defined as a private sanction issued by a subcommittee *sua sponte* or by agreed disposition 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.

2 The Rules of Court, Part 6, Section IV, Paragraph 13-10.C, authorize the summary resolution of complaints through informal or abbreviated investigations.

3 Rule of Professional Conduct (RPC) 1.4(a) provides that an attorney shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

4 RPC 1.16(e) provides that certain file materials are the property of the client and that an attorney, upon termination of the representation, must furnish those materials to the client or successor counsel regardless of whether the client has paid the fees and costs owed to the attorney.

5 Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 13-10.E.

6 Virginia Code Sections 54-73 and 54-74, Code of Virginia (1950) (Repealed).

7 *Pickus v. Virginia State Bar*, 232 VA 5, 11, 348 SE2d 202 (1986), citing *ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1273 (1973).*

8 Rules of the Supreme Court of Virginia, Part 6, Section II, *Preamble: A Lawyer's Responsibilities.*