

Inside the Office of Bar Counsel:

Public versus Private Discipline

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Currently, under the Rules of the Supreme Court of Virginia, "all information pertaining to the investigation, discipline, suspending and disbarment of an attorney . . . [is] confidential," except for Disciplinary Board hearings and orders imposing public reprimands, suspensions or revocations, all of which are public. See Part Six, Section IV, Paragraph 13.K.(5).

In July 2000, Virginia State Bar President Joseph A. Condo formed the Special Committee on Access to the Disciplinary Process to consider whether the Virginia Supreme Court Rules governing confidentiality should be modified to open the attorney disciplinary process further to the public. Bernard J. DiMuro chairs the twenty-person committee, whose members include attorneys, lay persons, legislators and media representatives.

In three spirited meetings, the special committee examined and debated the pros and cons of opening the attorney disciplinary process further to the public. The special committee ultimately voted to recommend to the Virginia State Bar Council that, at some point after a subcommittee determines there is sufficient probable cause to set a misconduct complaint for hearing by a district committee, the hearing date be disclosed to the public and that the hearing be open to the public. The special committee also recommended that a matter set for hearing before a district committee not be posted on a public docket until expiration of a fixed period of time for bar counsel and the respondent to negotiate an agreed disposition providing for private discipline, if warranted, and that Council adopt specific criteria governing the imposition of private discipline.

Disciplinary statistics from past years shed some light on the proposed recommendations. If you wish to analyze the statistics, the Office of Bar Counsel will provide a ten-year survey of complaint dispositions, titled "Historical Perspective," and a survey of sanctions imposed from fiscal year 1989 through last fiscal year, upon request. Space constraints and, equally, if not more important, reader attention span render analyzing a decade of disciplinary dispositions impractical in this column. What follows is a snapshot of how the proposed changes might have affected the attorney disciplinary matters resolved in fiscal year 2000, which ended on June 30, 2000.

In fiscal year 2000, the Virginia State Bar received 3,377 complaints. The Disciplinary Board and three-judge circuit court panels conducted 58 public hearings. The Disciplinary Board and three-judge panels also approved 17 agreed dispositions. District committees decided 51 cases in closed hearings, and three-member subcommittees of district committees approved 70 agreed dispositions.

Private discipline was imposed on 132 lawyers. Forty lawyers received public discipline. Because some lawyers were respondents in more than one case, the total number of lawyers disciplined does not correspond with the total number of trials and agreed dispositions.

In considering the disciplinary statistics from fiscal year 2000, keep in mind that the Standing Committee on Lawyer Discipline ("COLD") enacted a policy, effective March 7, 2000, limiting the number of private disciplinary sanctions that a lawyer can receive, absent extraordinary circumstances, to two. Since this policy was implemented more than half-way through fiscal year 2000, the year-end statistics do not reflect the new policy's full impact. Fewer respondents would probably have received private discipline had COLD's new policy been in effect throughout the fiscal year.

While implementation of the special committee's recommendations would open the disciplinary process further to the public, key aspects of pretrial procedure would not change. Before any complaint is set for hearing before a district committee, the complaint undergoes a multi-level review process incorporating the following checks and balances.

An intake attorney reviews every complaint to identify matters over which the bar has no jurisdiction or which can be resolved without opening a discipline file. Each year only about half the complaints that the bar receives merit opening discipline files. If a discipline file is opened, the respondent has an opportunity to respond in writing to the complaint, and the complainant has an opportunity to submit a written rebuttal. Then bar counsel reviews the file and recommends whether the matter should be dismissed or referred for a full investigation.

If the matter is referred for a full investigation, a trained investigator interviews the complainant, the respondent and other witnesses, and gathers pertinent documentary evidence. The investigator then submits a written investigative report. Bar counsel reviews the file and investigative report, and recommends whether the matter should be set for hearing. A three-person subcommittee, consisting of one lay person and two attorneys, reviews bar counsel's recommendation and the investigative report and determines whether the case should be dismissed, referred for further investigation or set for hearing.

Thus, absent exceptional circumstances, before any matter is set for hearing before a district committee, the case undergoes at least three reviews by attorneys in the Office of Bar counsel, as well as examination by the respondent, the complainant and an investigator, and finally a subcommittee composed of two attorneys and a lay person. Only the three-person subcommittee can determine whether there is probable cause to set a case for hearing before a district committee.

After a subcommittee determines that there is probable cause to set a case for hearing, how would implementation of the proposed recommendations affect current attorney disciplinary procedures? COLD will formulate revised procedures for Council's consideration. It remains to be seen what COLD will propose, but a step-by-step, possible procedural scenario follows.

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First, after a subcommittee determines that there is probable cause to set a matter for hearing, the respondent and bar counsel would have a fixed period of time to negotiate an agreed disposition—perhaps one imposing private discipline within the confines of whatever rules are adopted. If the deadline passed without the respondent and bar counsel reaching an agreement acceptable to the subcommittee, the matter would be set for hearing. The hearing date would be noted on a public docket published on the bar's Web site. The Clerk's Office would advise a member of the public checking the respondent's disciplinary record of the hearing date. Pursuant to current Disciplinary Board procedures, the particulars of the complaint and supporting evidence would not be disclosed to the public before the district committee hearing.

Second, an interested member of the public could attend the district committee hearing, just as any citizen can attend a Disciplinary Board hearing. Since Disciplinary Board hearings were opened to the public in 1990, public attendance at board hearings has been sparse.

Third, if discipline were imposed following a public district committee hearing, the discipline would perforce be public. The only public sanction available to district committees is a reprimand. A dismissal with no discipline imposed would also be a matter of public record.

Fourth, the district committee's order would be made public, just as Disciplinary Board orders are available to the public via press releases, summaries posted on the bar's Web site and in full text upon request.

Of the 51 district committee cases tried last fiscal year, 13 resulted in public discipline, 19 resulted in private discipline, and 11 resulted in dismissals with no discipline imposed. Two cases

were heard and continued, five cases were certified to the Disciplinary Board for hearing, and one case was treated as a disability matter. Five of the 19 respondents who received private discipline following a district committee hearing in fiscal year 2000 might have received public discipline had COLD's policy limiting private discipline sanctions to two per lawyer been in effect when the cases were heard.

Of the 70 agreed dispositions that subcommittees approved last fiscal year, four matters were certified to the Disciplinary Board, public discipline was imposed in two cases and private discipline was imposed in 64 cases. Fourteen of the respondents who received private discipline by agreement had received at least two prior private discipline sanctions. Again, had COLD's policy been in effect at the time the agreed dispositions were negotiated, fewer lawyers might have received private discipline.

Eighteen of the 51 cases heard by district committees in fiscal year 2000 became public either through the imposition of public discipline or certification to the Disciplinary Board. One of the 51 cases considered by a district committee was treated as a disability matter. Disability hearings are closed proceedings due to the confidential nature of the medical evidence introduced. The special committee did not recommend making disability hearings public.

Thus, in fiscal year 2000, the special committee's recommendations would have resulted in public hearings of 32 attorney misconduct complaints that would otherwise have been treated confidentially. Thirty-two cases amount to less than one percent of the 3,377 complaints that the Virginia State Bar received in fiscal year 2000. In other words, the vast majority of bar complaints would have remained confidential had the recommendations of the Special Committee on Access to Disciplinary Process been implemented in fiscal year 2000. 