

REPORT OF THE OFFICE OF BAR COUNSEL

The Virginia State Bar's fiscal year runs from July 1 to June 30. Each month, and at the end of every fiscal year, the clerk of the disciplinary system compiles attorney discipline statistics. These statistics help the Office of Bar Counsel and the Standing Committee on Lawyer Discipline (COLD) assess the efficiency of the attorney disciplinary process, discern trends and identify future needs. Reviewing the numbers on a monthly and annual basis is an integral part of the ongoing effort to maintain and enhance the fairness of the attorney disciplinary process by improving efficiency. What follows is an overview of the year-end statistics for the fiscal year ending 2004, with comparative information from prior years.

On June 30, 2004, there were 24,526 attorneys active and in good standing to practice law in the Commonwealth of Virginia. On June 30, 1995, there were only 20,032 attorneys active and in good standing to practice law in Virginia. In fiscal year 1995, the bar received 2,514 complaints, compared with 3,782 complaints in fiscal year 2004. These numbers demonstrate that over a ten-year period the number of complaints received has outstripped the increase in the number of bar members active and in good standing to practice law.

The number of complaints the VSB received dropped from an all-time high of 3,990 in fiscal year 2003 to 3,782 in fiscal year 2004, perhaps in part because some attorneys who generated a disproportionate number of complaints are no longer practicing law in Virginia.

For the last three years, COLD and the Office of Bar Counsel have focused on resolving complaints more than a year old. Although significant progress has been made in this area, the VSB has not reached its aspirational goal of investigating and either dismissing or referring for hearing complaints on which disciplinary files are opened within six months of the bar's first receipt of the complaints. The software program currently in use does not permit the bar to calculate the average time it takes to resolve a bar complaint, but the length of time varies greatly and depends largely upon the complexity of the complaint in question and how easy it is to obtain the evidence necessary to evaluate the complaint's merits and, in matters referred for hearing, try charges of misconduct.

The available statistics show that the ongoing effort to resolve complaints more expeditiously is paying off. The number of complaints the bar carried over from fiscal year 2003 to the new fiscal year decreased dramatically from 1,018 last year and 1,017 the preceding year to 779 in fiscal year 2004. The carryover figure is the lowest it has been in at least ten years.

As the size of the bar and the annual tally of bar complaints have grown, the number of attorney disciplinary sanctions imposed has of course increased as well. In fiscal year 2004, 385 sanctions were imposed, compared with 253 sanctions in fiscal year 1995. On the other hand, last fiscal year 20 lawyers consented to the revocation of their Virginia law licenses with disciplinary charges pending, whereas in fiscal year 1995 there were 13 surrenders. The marginal increase in the number of surrenders is consistent with lawyers' growing propensity to contest disciplinary charges to the bitter end. The number of Virginia attorneys whose licenses were suspended or revoked increased from 27 in fiscal year 1995 to 43 in fiscal year 2004.

Along with the rising numbers of complaints, there has been a steady increase in the number of complaints on which the bar took no action. Inquiries might be a more appropriate term for this category of complaints, since they involve matters over which the bar has no jurisdiction. Inquiries closed with no action taken range from complaints against judges or other court-appointed officials acting in their official capacity, allegations that a guilty plea in a criminal matter was not voluntary (unless a court set the plea aside) and fee disputes. In most instances, inquiries alleging that lawyers were rude, employed the wrong strategy in handling a legal matter and/or committed legal malpractice are also closed with no action taken. In the last fiscal year, 2,637 inquiries were closed with no action taken, down from 2,746 such closing in fiscal year 2003. In fiscal year 1994, 1,450 inquiries were closed with no action taken.

The VSB sends every person whose complaint is closed with no action taken a letter explaining why no action could be taken on their matter. Last fiscal year, at complainants' request, 435 complaints were reviewed a second time, and many a third or fourth time, to ensure that the proper procedures were followed and that closing an inquiry with no action taken was the appropriate disposition under the Rules of Court. In cases where new evidence is discovered, or it is determined that important facts were overlooked, the matters are reopened. In fiscal year 2004, 63 inquiries were reopened for review or investigation.

As the number of bar complaints has escalated, the bar has implemented procedures to resolve certain types of complaints outside the formal disciplinary process. Resolution of complaints via proactive intervention has been the

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most successful of these procedures. In a proactive situation, intake counsel asks the lawyer against whom a complaint has been made to address, usually directly with the client, the situation that led to the complaint. The lawyer is requested to provide the bar written confirmation of client contact within ten days. If the lawyer's response demonstrates that he or she has made an acceptable effort to address the client's concerns, intake closes the file and notifies both the complainant and the respondent of the disposition of the complaint.

Over the last five years, intake has closed about 80 percent of proactive matters without opening a disciplinary file and with no additional investigation. Proactive cases account for between 15 and 19 percent of total complaints the bar receives. Resolving complaints proactively means that the VSB investigates between 12 and 15 percent fewer complaints each year.

In fiscal year 2004, as has been the case for at least ten years, the practice of criminal law generated the most bar complaints. Complaints generated by the practice of family law ranked second, and for the first time in several years, real estate matters led to more complaints than personal injury matters. The most common type of complaint remains failure to communicate, followed by failure to file and failure to pay amounts due from trust account funds.

One of the most interesting developments in fiscal year 2004 was the continued increase in the election of three-judge panels. Pursuant to Virginia Code § 54.1-3915, respondents can elect a three-judge panel to hear disciplinary matters in lieu of a district committee or the Disciplinary Board. Over the last three years, the number of respondents electing three-judge panels has dramatically increased from four respondents involved in ten cases in fiscal year 2002, to seven respondents involved in seven cases in fiscal year 2003, to sixteen respondents involved in thirty-seven cases in fiscal year 2004.

The growth in three-judge panel hearings may be due to the fact that recent three-judge panel determinations appear to have favored respondents. For example, in fiscal year 2004, three-judge panels dismissed three attorney disciplinary matters with no discipline imposed, including reversing a district committee determination on appeal. Between fiscal year 1993 and 2003, three-judge panels dismissed only four attorney disciplinary matters. Unlike district committee or Disciplinary Board proceedings, three-judge panels do not include a non-lawyer as a decision maker.

It also usually takes longer to schedule a three-judge panel proceeding than district committee or Disciplinary Board hearing because three-judge panels do not have regular hearing dates, and the Court cannot appoint panel members until respondent, respondent's counsel and bar counsel agree upon a hearing date. Sometimes circuit courts are unable to provide a courtroom on the dates the respondent, counsel and judges are available. Continuances cause additional delays. Delay benefits respondents whose licenses may be suspended or revoked, not the public or the bar.

COLD has proposed several rule amendments and other initiatives, including educational presentations and development of a bench book for three-judge panels, to help expedite the three-judge panel process and promote more consistent case dispositions.

Fairness and efficiency are the twin goals of the attorney disciplinary process. The Office of Bar Counsel realizes that efficiency without fairness would be meaningless but also recognizes that efficiency is a fundamental component of fairness. For the benefit of the public and members of the bar, the Office of Bar Counsel will continue to strive for both fairness and efficiency, reallocating available resources where possible and seeking rule changes that will further enhance fairness and efficiency of the attorney disciplinary process.