

::: REPORT OF THE OFFICE OF BAR COUNSEL :::

This annual report pertains to the 2007 fiscal year, from July 1, 2006, to June 30, 2007.

Overview

The Office of Bar Counsel is composed of the following component parts: intake, ethics, and discipline. The intake department initially receives and screens all inquiries to the bar about attorney conduct and proactively handles inquiries that involve minor misconduct. The ethics department provides ethics advice to Virginia lawyers via the bar's ethics hotline; it supports the Standing Committee on Lawyer Advertising with respect to the issuance of advertising opinions and the review of lawyer advertising; it supports the Standing Committee on Legal Ethics in the issuance of legal ethics opinions; and it supports the Standing Committee on the Unauthorized Practice of Law in issuance of UPL opinions, as well as the investigation of allegations of UPL. The discipline department receives complaints which have been forwarded from the intake department and conducts the investigation and prosecution of complaints before district committees, the Disciplinary Board, and three-judge circuit courts.

Personnel

Fiscal 2007 produced its share of personnel issues. One investigator resigned in late October 2006 and was replaced in January 2007. Contemporaneously, with the hiring of the new investigator, another investigator went on short-term disability. In addition, the ethics department legal research assistant resigned in July 2006. Her position was filled in September 2006. Unfortunately, the replacement recently resigned, which required a search for a successor who will fill the position in mid-September. Finally, the senior assistant bar counsel in charge of the Northern Virginia office resigned in December 2007. That vacancy was filled by promoting an attorney from within the office. This required a search to find a replacement for the promoted assistant. That office was fully staffed as of March 2007.

The move

In March 2007, the Office of Bar Counsel completed its long-awaited move to its new offices. This move permitted the department to expand from tight quarters to a more workable and comfortable physical environment. The move also permitted the hiring of the fourth secretary for discipline, whose position had been previously frozen pending availability of space.

IBIS

In April 2007, the Office of Bar Counsel finally went online with the bar's Integrated Bar Information System (IBIS). That system has been in use by other departments for some time. The module that will permit this office to work more effectively was not fully functional at its start date, however. Extensive work by the bar's information system personnel in conjunction with the deputy bar counsel has improved it significantly. Some work remains to be completed before the full capabilities are available. When fully operational, the system will permit among other things, the tracking of disciplinary cases for the life of the case; the automation of certain routine writing and filing functions; and the ability to chronologically date and monitor the time it takes to dispose of an average disciplinary case.

Statistics

The number of active members of the bar in good standing continued its annual increase. At the end of fiscal 2006, there were 26,348 active members of the bar in good standing. As of the end of fiscal year 2007, there were 26,937.

There were 987 cases in the disciplinary system at the end of fiscal 2007. This compares to 833 cases in the system at the end of the prior fiscal year. The number of cases in the system at the district committee level that were over 180 days old at the end of fiscal 2007 was 284, compared to 247 at the end of fiscal 2006. The number of cases to be tried at the end of fiscal 2007 was 106, compared to 155 at the end of fiscal 2006. Cases tried by the end of fiscal 2007 totaled 50, of which 40 were post-district committee cases. This compares to 98 cases tried by the end of fiscal 2006, of which 82 were post-district committee cases. Agreed dispositions for the latest fiscal year totaled 86, compared to 177 in fiscal 2006.

The year-end case numbers are higher than in the last several fiscal years. Whatever cause or combination of causes might be at the heart of this increase, the Office of Bar Counsel remains attentive to, and concerned about, the increase in the statistics and is constantly looking at and implementing solutions to reduce it. Significantly, and as noted above, implementation of IBIS will give the office the opportunity to manage these cases more effectively from inception.

In addition, the introduction this year of a vetting process for disciplinary cases being heard by the Disciplinary Board and circuit court panels should have a positive effect on the quality of the cases prosecuted by this office over time.

In addition to the above case resolution data during fiscal 2007, the ethics staff attorneys handled an average of 378 calls per month from Virginia lawyers seeking legal ethics advice. This compared to 349 calls per month for fiscal year 2006.

Procedural rule changes

The bar's disciplinary system operates pursuant to Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13 (Paragraph 13) as well as other statutes and case law.

Paragraphs 13(B)(6) and 13(F)(3) were amended effective January 1, 2007, to clarify the issue of disqualification of a district committee or Disciplinary Board member from disciplinary proceedings. The rules now state that a member of a district committee or the Disciplinary Board shall be disqualified from service in a disciplinary proceeding if that member previously represented the respondent.

Paragraphs 13.H(2), 13(I)(3)(a) and 13(N)(3) were amended, effective March 1, 2007, to substitute the phrase "Charge of Misconduct" for the term "Notice of Hearing." These amendments were designed to change remaining inappropriate references to "Notice of Hearing" in Paragraph 13.

Finally, Paragraph 13(I)(4) was also amended effective March 1, 2007, changing the term "Notice of Hearing" to "notice of hearing," with the lower-case version referring to the notice for a hearing before the Disciplinary Board upon a Certification for Sanction Determination, following a prior determination of misconduct by a district committee.

Changes to the Virginia Rules of Professional Conduct

An amendment to the Rules of Professional Conduct Rule 4.2 was adopted by the Supreme Court of Virginia on April 13, 2007. The amendment included the language of comment [3] of the American Bar Association rule regarding the prohibition against communicating with a represented party even when the represented person or the lawyer initiates the contact. That comment reads:

The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a "second opinion" or replacement counsel.

The Supreme Court of Virginia adopted a proposed amendment to Rule 5.6 on July 20, 2006, effective September 1, 2006. The amendment to Rule 5.6 (b) deleted "broad" preceding "restriction" and in comment [2] struck the word "broadly" preceding "restricted" in the first sentence of the first paragraph, and added the second paragraph to that comment, stating:

Originally, Rule 5.6(b) prohibited only *broad* restrictions on an attorney's right to practice in settlement agreements. However, in line with the recommendations of the Boyd-Graves Conference Report of August 2004, the prohibition in Rule 5.6(b) is now expanded to reach *all* restrictions on the right to practice in settlement agreements, other than those within the exception afforded for settlement agreements approved by a tribunal or governmental entity. The current more expansive prohibition is in line with both the ABA's Model Rule 5.6 and with provisions in other jurisdictions.

Pending amendments

The Standing Committee on Legal Ethics approved new comments to Rule 8.4 that represent an important change in the committee's position on the ethical propriety of a lawyer, or his or her agent, using an undisclosed recording device to capture a communication or event in which the lawyer or agent is a participant. Under the new comments, the undisclosed recording of a communication or event is not unethical per se if the recording is lawful; is consented to by one of the parties to the transaction; is in furtherance of an investigation on behalf of a client; is not effectuated by means of any misrepresentations; and if the means by which the communication or event was recorded and the use of the recording do not violate the legal rights of another.

The committee and council have adopted these amendments, and they are currently pending with the Supreme Court of Virginia.

Conclusion

With the start-up of a new computer system for the Office of Bar Counsel, its staff will be better positioned to track and assess the progress of disciplinary cases through the system. Vetting of cases should improve the quality of the office's prosecutions. With these two improvements as a backdrop, the Office of Bar Counsel is well-positioned to face the challenges ahead and to meet its responsibilities to the lawyers and citizens of the Commonwealth of Virginia.

