THE VIRGINIA STATE BAR'S DISCIPLINARY SYSTEM AND ETHICAL RULES

Proposed diversionary program for first-time offenders

The Standing Committee on Lawyer Discipline was asked to consider a system whereby first-time offenders with minor violations of the ethics rules could be diverted from the disciplinary system and required to attend an "ethics school." The program would address situations in which a lack of knowledge causes lawyers' disciplinary problems. It also would deflect criticism that the bar unfairly singles out solo and small-firm lawyers for prosecution. I hope that an ethics school, if established, will be as successful as it is in other jurisdictions in identifying lawyers who do not understand the Rules of Professional Conduct and educating them without establishing a disciplinary record.

Reformatting of Paragraph 13 to make it more user-friendly

Consideration has been given to the possibility of recompilation of disciplinary rules in Part 6, Section IV, Paragraph 13 of the Rules of Court to a more user-friendly format. The Virginia State Bar set up an internal work group to address this issue and work with the Virginia Division of Legislative Services to improve the format. Any reorganization or compilation of the disciplinary rules would be brought to the council and the Court for approval.

Status of proposed changes to the comments of Rule 8.4 clarifying when undisclosed lawful recording may be made

The Standing Committee on Legal Ethics proposed additional comments to Rule of Professional Conduct 8.4 (Misconduct) that outlines when undisclosed lawful recordings of communications on behalf of an attorney's clients could take place. The council added an additional comment 10 to clarify that, except in exceptional circumstances, lawyers could not record communications with other lawyers or their own current clients unless consent was obtained, and that lawyers could record communications in personal matters when they were not functioning as attorneys. Proposed comments 6 through 10 were passed unanimously by the council and submitted to the Court for its consideration.

Rule 4.2 comment change clarifying when a lawyer may communicate with a represented person

The Standing Committee on Legal Ethics proposed an additional comment 3 to Rule 4.2 (Communication with Persons Represented by Counsel) to clarify that a lawyer would be permitted to communicate with a represented person without obtaining the consent of the lawyer currently representing that person if the person were seeking a second opinion or replacement counsel. The council declined to approve the American Bar Association version of comment 3. Instead, the council passed an amended version of comment 3, which was approved by the Court on April 13, 2007, and became effective immediately.

Proposed LEO 1829

The Standing Committee on Legal Ethics of the Virginia State Bar withdrew Legal Ethics Opinion 1829, which would have eliminated the bright-line guidance that generally bars members of a law firm from appearing before a public body on which another member of the law firm sits. The bar heard many comments from attorneys, members of the General Assembly, and newspaper editorials that opposed adoption of the opinion.

Status of the foreign legal consultant rule (proposed Rule 1A:7 and revisions to Rule 5:5)

The Supreme Court, in a discussion in March 2007 of the language of proposed Rule 1A:7 and revisions to Rule 5:5, asked questions that indicated further study of these rule changes were needed. Therefore, the VSB withdrew the proposals and asked the Multi-Jurisdictional Practice Task Force to work on resolving the questions.

PUBLIC PROTECTION ISSUES

Clients' Protection Fund assessment

The council approved a proposed amendment to Virginia Code § 54.1-3913.1 (Clients' Protection Fund) to permit the Supreme Court to adopt rules and regulations providing for a special assessment up to $25 for the Clients' Protection Fund. The General Assembly passed the proposed change to the statute and the Court adopted the new rule with only a minor change. The change to Paragraph 16, Section IV of the Rules for integration of the Virginia State Bar reads as follows:

> Effective, July 1, 2007, each active member of the Virginia State Bar shall be assessed a required fee of $25 for the Clients' Protection Fund on the bar's annual dues statement. The fee shall be in addition to each member's annual dues as presented in Part 6, Section IV, Paragraph 11 of these rules, and it shall be paid on or before the 31st day of July each fiscal year.

> All monies collected under this Paragraph 16 shall be accounted for and paid into the State Treasury of Virginia and transferred by the bar from the Treasury to the Clients' Protection Fund. The bar shall report annually on or about January 15 to the Supreme Court of Virginia on the financial condition of the Clients' Protection Fund, *and the assessment will be reduced or discontinued whenever directed by the Court.* [The italicized language was added by the Court.]

Public Protection Task Force

The Public Protection Task Force agreed that VSB Counsel George W. Chabalewski and Executive Director Thomas A. Edmonds would draft a proposed statute that would require insurance companies to report directly to the intended beneficiary of the payment the fact that they have disbursed settlement proceeds to the person's lawyer. Ten states have similar statutes, and the task force seemed disposed to recommend one for Virginia if the VSB can agree on the language. The Virginia Trial Lawyers Association has noted its opposition, but the task force thought the VSB's public protection mission required that the proposal be considered by the council.

Bar staff is checking with market sources to see if there is a chance of getting an insurance policy to provide excess coverage for defalcations beyond the maximum payment available under the Clients' Protection Fund, with that amount functioning as the policy deductible. The fund had such a policy in the early 1990s, but heavy losses from the David Murray case resulted in its cancellation. Executive Director Edmonds expressed doubt as to whether any company will issue such a policy again.

The task force voted unanimously to recommend that the employee dishonesty bond and surety bond required under the Consumer Real Estate Settlement Protection Act be increased from $100,000 to $200,000. Bar staff is drafting the necessary bill to present to the VSB Executive Committee and the council in October 2007. The task force anticipates opposition from lawyers who conduct only an occasional closing and will not want to pay more for coverage, but task force members felt strongly that, with the increase in property values in the twelve years since CRESPA was enacted, the VSB's public protection responsibilities require that it move in this direction.

The Lawyer Malpractice Insurance Committee and the question of mandatory malpractice insurance

The Lawyer Malpractice Insurance Committee debated during the past year whether it should recommend that all Virginia lawyers in private practice carry malpractice insurance. Ultimately, it decided not to make such a recommendation. The committee developed an alternative proposal to require production of a declarations page or certificate of insurance by those who are insured, but withdrew the proposal before it was submitted to the council for a vote at the June 2007 meeting. Instead, it was agreed that the committee would bring the issue of mandatory malpractice insurance to the council at its October 2007 meeting for a vote on whether to proceed with such a proposal.

THE BUDGET AND DUES-INCREASE ISSUES

Increase in late and reinstatement fees

The council unanimously voted to recommend to the Court that the VSB increase late fees and reinstatement fees, to place more of the cost of administering the Membership and Mandatory Continuing Legal Education departments on those who fail to meet their membership obligations under the Rules of Court, and to try to discourage such procrastination. This rule change was adopted by the Court and became effective on July 1, 2007.

Effective July 1, 2007, the MCLE late-completion and late-reporting fees, previously set at $50 each, increased to $100 each. Late fees for the membership obligations, dues, completion of insurance certification, and completion of professionalism course increased from $25 to $50. The reinstatement fee for administrative suspensions was increased from $75 to $150 for each member obligation for which they were suspended.

Dues increase

In the budget submitted to the council to be considered at the June 2007 meeting, the projected revenue for 2008 is $11,664,165. This projected revenue is a substantial increase from the projected revenue for fiscal 2007 of $10,278,270. There are two primary reasons for this increase: (1) past and penalty dues are projected to increase from $220,000 to $420,000 and MCLE late fees from $400,000 to $610,000, and (2) the revenue figures also reflect $700,000 attributable to the Clients' Protection Fund assessment pass-through. The CPF assessment is not included in the long-range projections, since it is a pass-through item.

The long-range projections indicate that by July 2010 the reserve will stand at $520,187 — 4.2 percent of the bar's operating expenses. This figure includes the $300,000 reserve from the Administration and Finance Account, which cannot be used to defray

bar expenses. As of spring 2007, the long-range projections of the bar's operating expenses clearly indicate that the bar will need to plan for the next dues increase to go into effect no later than July 2009. This is one year beyond the last projection. The bar last increased its dues in July 2000, and had planned then for a dues cycle of about eight years. The Supreme Court has been asked for its direction on when to seek approval from the General Assembly for a change in the dues-cap statute.

ACCESS TO JUSTICE ISSUES

The General Assembly and the indigent defense fee waivers and increased funding

Final legislation from the 2007 General Assembly accomplished a great deal by amending *Virginia Code* § 19.2-163 to establish indigent defense fee-cap waivers and by increasing funding. The code change brought statutory authority to the process of waiver of caps for all felonies and misdemeanors in district and circuit courts. A compromise agreement resulted in the removal (for now) of the fee-cap increase for juvenile felonies. An additional $8.2 million was put into the budget to fund waiver of the fee caps, which was estimated to cover 20 percent to 25 percent of the cases.

Amendment to Part 6, Section 4 of the rules re pro bono services by emeritus members.

The Access to Legal Services Committee proposed an amendment to Part 6, § 4 of the Rules of Court to broaden opportunities for emeritus members to provide pro bono legal services by expanding the definition of approved legal assistance organizations. The VSB Council passed the proposed amendment by unanimous vote and the proposal is under consideration by the Supreme Court.

Legal aid society increased reporting obligations.

The VSB Special Committee on Access to Legal Services proposed an amendment to the legal aid society regulations to clarify the heightened reporting obligations of legal services providers that hold themselves out to the public as "legal aid societies." The proposed regulatory changes passed by unanimous vote at the March 2007 council meeting and became effective immediately.

JUDICIAL CANDIDATE EVALUATIONS

Revision of the VSB judicial evaluation policy

The VSB judicial-evaluation policy was revised in fall 2006 in response to criticism from state legislators that the bar was attempting to select judges rather than providing evaluations of the candidates. The revised policy was approved by the council at the October 2006 meeting. Instead of selecting two candidates to recommend to the appointing authority, the Judicial Nomination Committee (JNC) now interviews all candidates and ranks them as either "highly qualified" or "qualified" and writes a summary of the candidate's credentials, attributes, etc.

JNC policy re confidentiality

The VSB's policy on the evaluation process of the Judicial Nominations Committee was amended at the March 2007 council meeting to address the confidentiality of information obtained during investigations and to require that the evaluation summary stand without further explication or explanation. The revised policy became effective immediately.

JNC evaluations for FY 2006-07

The JNC evaluated many candidates for two federal judgeships in the Eastern District of Virginia and two Virginia vacancies on the Fourth Circuit Court of Appeals and rated them with written summaries.

Interviews with Senators Warner and Webb

Joseph A. Condo, Mary Yancey Spencer, and VSB President Karen A. Gould met with Senators John W. Warner and James H. Webb Jr. and their staffs on April 18, 2007, to discuss the VSB's new judicial evaluation process. The senators and their staffs were very complimentary of the VSB's new system and said how thankful they were that the JNC was performing this service, which they found invaluable, particularly in preparing questions for the candidates during their limited thirty-minute interviews. It was also very helpful for Mr. Condo to describe the process so the senators could understand what went into the background check, the interview, and the resulting written summary of each candidate's credentials and the committee's evaluation.

MEMBER SERVICES

Improved communication with members: the e-mail newsletter and online member directory

The first e-mail newsletter was sent out on May 1, 2007, to the 26,542 VSB members for whom the VSB has e-mail addresses. Since then, 504 members have opted out of receiving the *Virginia State Bar E-News*.

The online member directory became available for registration on May 1, 2007, and as of May 29, 2007, 1,201 members had signed up for the online member directory.

Status of Fastcase online legal research member benefit

In April 2007, Fastcase had 8,319 logins with 64,481 total transactions. Total number of users to date amounts to 8,197. Unique logins for April 2007 came to 2,078. Edward J. Walters, chief executive officer of Fastcase, spoke to the Solo and Small-Firm Practitioner Forum in Roanoke on May 23, 2007. The many questions asked indicated that the product has been well-accepted by the Roanoke community.

Search for new executive director.

The Executive Director Search Committee re-advertised the position with the hope that it will be able to bring a candidate to the October 2007 council meeting for approval.

ABA HOUSE OF DELEGATES

Substitution Policy

The council passed a policy permitting the VSB president to appoint an alternate for any VSB-appointed ABA delegate who is unable to attend an ABA meeting. Joseph Condo notified Karen A. Gould, VSB president, in April 2007 that he would be unable to attend the August 2007 ABA House of Delegates meeting. Pursuant to this new policy, a substitute was sought — preferably someone who was already planning on attending the ABA meeting, since the VSB does not reimburse expenses for non-officers who attend as its delegates. Savalle C. Sims agreed to serve as a substitute.

Resolution regarding bar members serving in the armed forces

The VSB Executive Committee agreed to cosponsor at the August ABA House of Delegates meeting a recommendation to all bar associations to permit waiver or suspension of the dues, CLE requirements and other membership obligations for members who are serving in the United States armed forces in a combat zone. The VSB is joined in this recommendation by the bars of Florida, Maryland, Mississippi, Nevada, North Carolina, South Carolina, and West Virginia, as well as the ABA Section of Public Contract Law and The Virginia Bar Association.

Thank you

Thank you for the opportunity to serve as bar president. It has been a unique and rewarding experience. I have thoroughly enjoyed the opportunity to be of service to the bar and the citizens of Virginia.

Respectfully submitted,

Karen A. Gould