



An Overview of the Virginia State Bar Disciplinary Process: Allegations of Misconduct in Criminal Cases

DURING THE FISCAL YEAR ended June 30, 2009, the Virginia State Bar received 4,097 inquiries about attorney misconduct. As in years past, inquiries relating to criminal practice continued to lead the way, accounting for more than one-third of the total, with 1,416 inquiries. Five percent of those inquiries alleged misconduct by prosecutors, 4 percent were either inquiries about judges or requests for information, while the remaining 91 percent alleged misconduct by criminal defense attorneys.

Recent news reports have quoted some sources as questioning whether the VSB is lenient on prosecutorial misconduct while it disciplines defense lawyers merely for missing an appellate deadline. The purpose of this column is to clarify the VSB's position on this issue and explain how the public may not always know what has occurred in attorney disciplinary actions, including investigations of prosecutors.

The procedures for investigating and prosecuting attorney misconduct are set forth in the Rules of the Supreme Court of Virginia.¹ Under these rules, the VSB cannot explain publicly what it is doing in connection with a case during the investigation phase. While a complaint is being investigated, the proceeding is confidential. If no evidence of misconduct is found during the investigation phase, the matter is closed. It remains confidential, and the VSB cannot disclose the results of the investigation to anyone except the complainant and respondent attorney.

The VSB prosecutes allegations of misconduct against prosecutors and defense attorneys alike when there is clear and convincing evidence of mis-

conduct. The VSB evaluates all complaints of attorney misconduct objectively, regardless of the status or position of the respondent. It does not notify the public or the members of the bar once it decides to investigate or prosecute a matter, because the complaint may result in private discipline. It is only after the matter has been referred to a district committee, the VSB Disciplinary Board, or a panel of three circuit judges for adjudication that a disciplinary complaint appears on the public docket, posted at <http://www.vsb.org/site/regulation/public-disciplinary-hearings/>.

The VSB staff does not adjudicate allegations of attorney misconduct. Because the legal profession is self-regulated in Virginia, teams of attorney and non-attorney volunteers review allegations against their peers and decide whether charges of misconduct should be brought. These volunteers also sit on the panels that decide whether misconduct has occurred and, if so, the level of discipline to be imposed. The only exception is if a respondent attorney chooses to have his or her case heard by a three-judge circuit court instead. If there is an adjudication of misconduct, the level of public or private discipline imposed will depend on the nature and severity of the misconduct, the harm to the public or to the profession, and the existence of a prior disciplinary record.

In some instances, a disciplinary committee may decide to impose private² discipline upon an attorney. In that case, no one except for the respondent attorney and the complainant will be told of the result — hence the term “private” discipline. In some instances

when a commonwealth's attorney's actions were publicized in a newspaper account but no resulting news story reported on associated disciplinary action, an implication may be inaccurately drawn that there was no disciplinary action.

Usually, when public³ discipline is given, the bar will issue a press release identifying an attorney as having been disciplined. The VSB always posts the results of public discipline on its website, at <http://www.vsb.org/site/regulation/disciplinary-system-actions/>.

Ethical charges against prosecutors may involve failure to disclose exculpatory evidence, dishonest conduct, lack of diligence, or improper contact with represented defendants. One's status as a prosecutor does not exempt or mitigate the misconduct. For example, an assistant commonwealth's attorney's law license was suspended for withholding and destroying exculpatory evidence in a securities fraud prosecution.⁴ A three-judge court suspended a commonwealth's attorney's license for failing to disclose to the court and victim in a rape case a payment of \$25,000 pursuant to an accord and satisfaction.⁵ Another three-judge court publicly reprimanded a commonwealth's attorney for lack of diligence.⁶ Other prosecutors have been disciplined for improperly contacting defendants represented by counsel in the matter.⁷ The VSB has initiated many other disciplinary proceedings against prosecutors that the hearing panels dismissed at trial or on appeal. Cases dismissed at trial or on appeal are also reported in the bar's public disciplinary reports.

Failure to disclose exculpatory evidence has given rise to many complaints of prosecutorial misconduct in news accounts. Many so-called *Brady*⁸ violations, however, involve police rather than prosecutorial misconduct. The Virginia Rules of Professional Conduct require that the prosecutor have actual knowledge of exculpatory material.⁹ Depending upon the circumstances, constructive knowledge alone may not establish a rule violation by clear and convincing evidence.¹⁰

News accounts of alleged prosecutorial misconduct often prove inaccurate or lack material facts that affect the outcome of a disciplinary investigation. The bar investigates anonymous complaints, but if attorneys with information about the facts of the case refuse to report prosecutorial misconduct or do not want their names involved in the investigation, these cases are very difficult to investigate and prove. As attorneys, we have an ethical obligation to report violations of the Rules of Professional Conduct that raise substantial questions about an attorney's honesty, trustworthiness, or fitness to practice law.

Likewise, complaints against defense attorneys may lack the requisite level of misconduct to justify the imposition of discipline against them. The bar does not discipline or even investigate lawyers merely for missing a deadline—appellate or otherwise. Discipline has resulted, however, if an attorney engages in a pattern of such behavior, fails to inform the clients about it, or fails to take corrective action.¹¹

The VSB's ability to perform its mission is dependent on members of the bar and the public reporting misconduct, assisting with investigations as needed, and participating in the disciplinary process. The disciplinary system is staffed by two hundred conscientious lawyer and lay volunteers who seek to ensure that the public receives ethical legal services and that due process is provided to Virginia's lawyers.

We urge you to get involved with the disciplinary system so that you may better understand how it works and par-

ticipate in the self-regulation of our profession. Interested volunteers may give their names to their local representatives on the Virginia State Bar Council,¹² or to the Office of Bar Counsel at the VSB.¹³

Endnotes:

- 1 Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13.
- 2 Private discipline is any form of non-public discipline that declares privately the conduct of an attorney improper but does not limit the attorney's right to practice law. It includes a private reprimand or private admonition, with or without terms; a dismissal *de minimis*; or a dismissal for exceptional circumstances.
- 3 Public discipline includes the suspension or revocation of an attorney's law license, or a public declaration of the same sanctions listed in endnote 1.
- 4 See VSB Docket Number 93-031-1042, Virginia State Bar Disciplinary Board, October 20, 1994.
- 5 See VSB Docket Number 94-000-0248, Chancery MC 4160, Circuit Court, City of Richmond, Manchester Division, December 13, 1993. The commonwealth's attorney donated the \$25,000 to local charities during a year that he was up for reelection.
- 6 See VSB Docket Number 98-101-1093, Circuit Court, Giles County, July 12, 1999.
- 7 See, for example, VSB Docket Number 03-010-1051, Virginia State Bar First District Committee, November 17, 2003, http://www.vsb.org/disciplinary_orders/kelleter_opinion.html.
- 8 *Brady v. Maryland*, 373 U.S. 83 (1963).
- 9 Rule 3.8(d), Rules of Professional Conduct, provides that prosecutors shall make timely disclosure of the existence of evidence that the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.
- 10 Comment (4) to Rule 3.8 explains that the intent of the rule is to exclude situations where the prosecutor does not know the theory of the defense, so as to be able to assess the exculpatory nature of evidence, or situations where the prosecutor does not have actual knowledge or control over the *ultra vires* actions of law enforcement personnel

who may be only minimally involved in a case.

- 11 See VSB Docket Number 08-022-073014, Case No. CL08-6672, Circuit Court, City of Norfolk, April 24, 2009, http://www.vsb.org/docs/Yancey-Final_12-08-09.pdf. The respondent attorney was publicly reprimanded for having failed to file the opening brief in a criminal appeal, resulting in its dismissal. The attorney placed the blame on an appellate briefing service for not informing him of the filing deadline. Contrary to his assertions, the three-judge court found that the brief-printing service advised the attorney three times of the deadline and prompted him further to file the brief by sending him an advanced copy of the appendix several days prior to the deadline. The three-judge court considered the attorney's prior disciplinary record in imposing the sanction.
- 12 See list of VSB Council members at <http://www.vsb.org/site/about/council/>.
- 13 Interested volunteers may send their curriculum vitae to evans@vsb.org.