

Disciplinary Year in Review: Virginia Ethics and Professional Responsibility

VIRGINIA STATE BAR MATERIALS

May 6, 2016



The Honorable Paul M. Black

Judge, United States Bankruptcy Court for the Western District of Virginia

Richard C. Maxwell, Esquire

Woods Rogers PLC

Melissa W. Robinson, Esquire

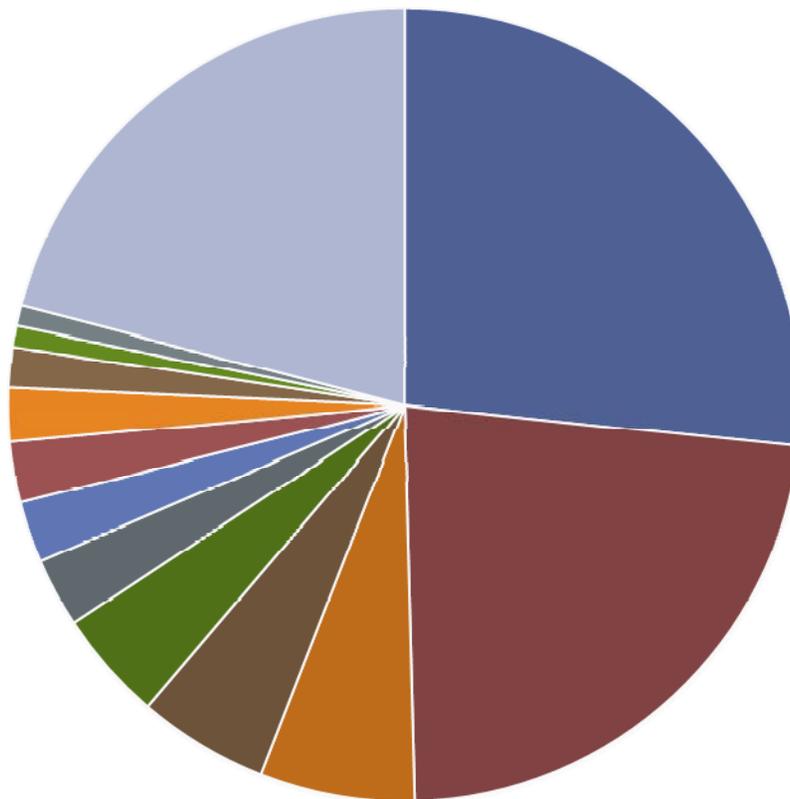
Glenn Robinson & Cathey PLC

VA Disciplinary Statistics

- 3,346 total inquiries received in FY 2015
- 3,546 received in FY2014
- 3,713 received in FY 2013
- 3,867 received in FY 2012
- 3,762 received in FY 2011
- 3,759 received in FY 2010
- 1,511 (45%) of the total inquiries pertained to criminal practice.
- 2,053 – 61% were resolved summarily at the initial Intake level with no action taken.
- 635– 19% were resolved through proactive investigations by Intake
- 645 – a little over 19% were formally opened and assigned to bar counsel for investigation.

VA - Areas of Law

Investigations



- Criminal
- Family Law
- Civil Litigation
- Estate planning
- Trust Account Overdrafts
- Real Estate
- Immigration
- Collections
- Foreclosures
- Traffic
- Landlord/Tenant
- Taxation
- Miscellaneous

Total VA Investigations - 645

- 160 Criminal Practice
- 138 Family Law
- 38 Civil Litigation
- 36 Personal Injury Practice
- 35 Bankruptcy
- 32 Estate Planning and Administration
- 27 Trust Account Overdrafts
- 17 Real Estate Practice
- 15 Immigration
- 15 Collections
- 13 Foreclosures
- 10 Traffic Offenses
- 5 Landlord/Tenant
- 5 Taxation
- 99 Miscellaneous matters in 21 other areas of law

Total Open Disciplinary Cases

- December-2015 -- 366
- December-2014 -- 419
- December-2013 -- 583
- December 2012 -- 811
- December-2011 -- 822
- December-2010 -- 919

As of December 10, 2015, the total volume of open cases was approximately 40% of the total five years ago.

Client Protection Fund

- Client Protection Fund (CPF) established in 1976 to make monetary awards to persons who suffer financial losses due to dishonest conduct of Virginia lawyers.
- Managed by 14-member board appointed by VSB Council.
- Board members investigate all petitions from clients.
- Board hears each petition and determines amount of loss.
- VSB received 101 new CPF petitions in FY 2014.
- Board reviewed and investigated 78 claims, some from prior years.
- CPF paid 57 claims totaling \$353,540 in FY 2014.
- CPF funded in part by \$25 assessment from all active VSB attorneys.
- General Assembly extended assessment to June 30, 2020.

Disciplinary Cases



Opinions on Reciprocal Discipline

Part Six, Section IV, 13-24 of the Rules of the Supreme Court:

Board Proceedings upon Disbarment, Revocation or Suspension in Another Jurisdiction

These Rules give Respondents who have had their privilege to practice before "another jurisdiction" the burden of showing-by clear and convincing evidence-one of three reasons why the Board should not impose the same discipline imposed in the other jurisdiction. The Respondent must, within 14 days of the Show Cause Order, file a written response confined to allegations that:

1. The record of the proceeding in the other jurisdiction would clearly show that such proceeding was so lacking in the notice or opportunity to be heard as to constitute a denial of due process;
2. The imposition by the Board of the same discipline upon the same proof would result in a grave injustice; or
3. The same conduct would not be grounds for disciplinary action or for the same discipline in Virginia.

¶ 13-24(G) of the Rules provides that if the Respondent does not file a timely written response, does not appear at the hearing or if the Board, at the hearing, determines that the Respondent has failed to establish the contentions of the written response "the Board shall impose the same discipline as was imposed in the other jurisdiction."

Reciprocal Proceeding, Cont'd:

In the Matter of Denny Pat Dobbins

The basis of the Show Cause Order was that the U.S. Bankruptcy Court for the Eastern District of Virginia had entered an order several months earlier revoking the Respondent's privilege to practice in that Court.

The Respondent failed to file a written response although he did appear for the hearing.

The Board questioned Bar Counsel on whether the Court in question constituted "another jurisdiction" and the matter was briefed and extensively analyzed by the Board.

Due to the Respondent's failure to file a response, the Board ultimately revoked his license to practice and he was disbarred.

Reciprocal Proceedings, Cont'd:

In the Matter of Sandy Yeh Chang (April 2014)

Respondent's privilege to practice law was suspended in the U.S. District Court for the District of Maryland, resulting in the issuance of a Show Cause Order by the Board.

Respondent timely filed a written response to the Board's Order and also filed a Motion to Dismiss, contending that the district court was not "another jurisdiction."

Although initially dismissing the Show Cause, the Board decided to reconsider and another hearing was convened on Respondent's Motion to Dismiss. Respondent argued that only an entity which licenses persons to practice law is a jurisdiction. The Bar contended that a case-by-case assessment was appropriate focusing on whether the other disciplinary entity had provided sufficient due process to the disciplined attorney.

After extensive briefing by the parties and further deliberation, the Board concluded that the district court in question was not another jurisdiction because, if it were, then the discipline to be imposed would actually be greater than that imposed by the district court, since the Respondent could still practice in other courts in Maryland. Such a result would be at odds with the scheme of the Rules at issue. However, the Board stressed that the issue did need to be decided on a case by case basis.

Reciprocal Proceedings, Cont'd:

In the Matter of Allenbaugh (April 2015)

Show Cause issued after the Respondent's license to practice before the 4th Circuit Court of Appeals was suspended for 2 years.

Respondent filed an untimely written response as well as a Motion to Dismiss, contending that Chang was dispositive.

Board concluded that the untimely written response did not waive Respondent's separate challenge to the Board's jurisdiction.

Because there was insufficient evidence regarding that disciplinary scheme employed by the Court of Appeals for purposes of assessing due process issues, the Board concluded that, based on the facts before it, the 4th Circuit Court of Appeals was not another jurisdiction for purposes of a reciprocal action under the Rules of the Supreme Court of Virginia.

Reciprocal Proceedings, Cont'd:

In the Matter of Darryl Arthur Parker (May 2015)

Show Cause Order issued after the U.S. Bankruptcy Court for the Eastern District of Virginia suspended Respondent's license to practice before it for specified term.

Respondent failed to file a timely response to the Show Cause but appeared pro se at the hearing.

The Bar presented facts in the record pertaining to the Bankruptcy Court's disciplinary system in light of the Allenbaugh decision.

The Board deliberated and concluded that the Bankruptcy Court for the Eastern District was not "another jurisdiction" for purposes of reciprocal discipline under the relevant Virginia Rules governing such proceedings.

Post-Parker: The Bar has discontinued automatic issuance of Show Cause Orders for reciprocal discipline until the Rule is amended to define or otherwise address the jurisdiction of the Board in these circumstances.

Other Recent Cases
Bernice Stafford Turner,
VS B Docket No. 14-032-098575, 14-032-099212

- **RPC 1.3(a), 1.4(a), 1.15(a-c).**
- Client hired respondent for a Chapter 7 bankruptcy in January 2014 and paid \$1,300 in advance for Respondent's attorney's fee and the filing fee.
- Client furnished all requested financial records to Respondent and completed required financial counseling.
- Thereafter client could not reach Respondent by telephone or email and could not furnish her with financial counseling certificates.
- Respondent had closed office temporarily for a seasonal flower business she operated.
- Client's bank accounts became frozen pending filing of the bankruptcy petition.
- Respondent did not place the advanced fees and costs into a trust account, and placed cash for the filing fees in a desk drawer pending obtaining a debit card to pay the filing fees.

Bernice Stafford Turner (Cont'd)

- Client complained to VSB and Respondent filed the petition in February 2014 but requested continuances twice to obtain records already furnished.
- Bankruptcy finalized May 27, 2014.
- Another client hired Respondent for an uncontested divorce in April 2013.
- Client and her spouse had been separated for years and shared no children or property.
- Client paid partial advance fee after which she could not reach Respondent for two months.
- Client completed payments of the advanced fee by check in July 2013 and still could not reach Respondent.
- Client determined on her own that Respondent had not initiated the divorce action.
- Respondent negotiated client's check in August 2013 and kept no records of her disposition of the funds.

Bernice Stafford Turner (Cont'd)

- Respondent did not furnish trust account records to bar in response to subpoena.
- In the fall of 2013 Respondent moved for the appointment of a GAL stating client was indigent when client was willing and able to pay for GAL.
- Respondent filed divorce action and prayed for appointment of a person to serve as GAL who had previously declined to do so.
- In April 2014, client complained to bar. Final decree of divorce entered September 2014.
- In determining a sanction, the Disciplinary Board considered Respondent's 24 years of practice and a prior disciplinary record that included two private reprimands and eight public reprimands.
- Board imposed a one-year suspension.
- Respondent exercised appeal of right that was dismissed on several procedural grounds discussed *infra*.

Elizabeth Margaret Fischer

- **RULE 3.1; 3.3(a)(1), (4); 3:4(c),(j); 8.1(a),(c), (d); and 8.4(b),(c)**
- Respondent blamed a pattern of missed bankruptcy payments on what the press dubbed a “phantom assistant.”
- Respondent was admitted to practice in 2010 and filed for bankruptcy in 2012.
- In 2013, the bankruptcy trustee suspected she was falsely reporting that she was making payments under her plan.
- VSB investigator received a similar pattern of explanations from Respondent regarding lapses in payments to her condominium association and mortgage holder.
- Respondent repeatedly claimed she was the victim of embezzlement by an assistant named Sylvia Jacques.

Fischer (Cont'd)

- VSB investigator could not locate a Sylvia Jacques in the DC metro area except for one who did not fit the description.
- A physical address Respondent previously furnished to police was nonexistent and an email address led to no response.
- Respondent appeared before the Disciplinary Board where she stipulated to underlying allegations of misconduct.
- The bankruptcy court previously noted on the record that Respondent “acted in bad faith throughout the course of her Chapter 13 case, [and] that her conduct and testimony during the course of this case were reckless and abusive...”
- The Disciplinary Board revoked her law license, taking into consideration her prior disciplinary record, which included a public reprimand for dishonesty and other misconduct in 2012 for which she was required to take four extra hours of ethics CLE.

Nnika E. White, VSB Docket No. 15-031-102065

- Respondent, a general practitioner, set up her attorney trust account in 2004 to provide overdraft protection to her operating account.
- Since 2004 Respondent routinely commingled earned fees and personal funds in the trust account and failed to maintain client subsidiary ledgers.
- Over a 3-year period Respondent's trust account paid overdraft protection to her operating account 142 times for a total of nearly \$150,000.
- Because she commingled personal funds and failed to maintain client subsidiary ledgers, Respondent could not determine whether client funds were applied to the overdrafts.
- Meanwhile Respondent paid client refunds, client bankruptcy trustee fees, and client support arrearages with funds drawn on her operating account.
- Respondent represented a debtor in a Chapter 13 bankruptcy matter.
- Respondent disclosed to the court that she was a creditor for fees relating to the bankruptcy but did not disclose she was a general creditor of client for tens of thousands of dollars.

Nnika E. White (Cont'd)

- Client inherited \$50,000 that Respondent deposited in her trust account without disclosing it to the court.
- Client failed to pay on the Chapter 13 plan despite her inheritance and the court dismissed the bankruptcy case.
- Respondent then disbursed \$33,490 of the inherited funds to herself as payment for outstanding attorney's fees.
- Respondent filed new Chapter 13 bankruptcy for client without disclosing the inheritance, the payments to Respondent, that Respondent was a general creditor, or that Respondent continued to hold funds belonging to the debtor.
- Disciplinary Board found that Respondent violated Rules 1.7(a)(2), 1.15(a)&(c), 3.3(a), 4.1(b), and 8.4(b) & (c), and suspended her license to practice law for 3 years.

Trust Account, Property and Fee Issues

Darryl Arthur Parker, VSB Docket No. 15-032-102633

- VSB pursued a petition for an expedited hearing against this Respondent whose law license was already suspended.
- Respondent represented a minor, disabled child in a civil action against the state for injuries sustained at a school playground.
- Respondent settled the matter for \$60,000 and informed the child's mother. The child was to receive \$34,996 under this proposal.
- Respondent never paid any of the proceeds to the child's mother or to a special needs trust established for the child.
- On May 1, 2015, Respondent's law license was suspended for four months as a result of other misconduct.
- Respondent did not inform the child's mother, the court or opposing counsel of his law license suspension.
- Respondent advised the child's mother to come to his office to collect her funds, but failed to keep the appointment.

Darryl Arthur Parker (Cont'd)

- The child's mother complained to the VSB on April 28, 2015 and Respondent submitted an answer.
- Investigation revealed Respondent's trust account was overdrawn on several occasions after he deposited the check and the overdrafts were not reported to the VSB.
- Further audits revealed that that he spent the money on personal and other expenses.
- On July 16, 2015, Respondent failed to appear for a court hearing to enter a final order to approve the settlement.
- The bar investigated the matter and filed a petition for an expedited hearing that was heard on August 28, 2015.
- Respondent failed to appear.
- The Disciplinary Board found violations of Rules 1.3, 1.4, 1.15, 1.16. 4.1, 8.1 and 8.4 and revoked Respondent's law license.

Ivan Yacub, VSB Docket No. 14-041-097049

- **RPC 1.15(a), (b), (c) and (d).**
- Respondent's bank reported an overdraft against his trust account.
- Respondent debited \$380 to the U.S. Citizenship Service against insufficient funds and his bank assessed an overdraft fee.
- Investigation revealed Respondent frequently received flat fees from clients that he considered earned upon receipt although he had not done the work.
- For this reason he did not deposit the advanced fees into his trust account.
- Investigation also revealed that Respondent did not reconcile the account or maintain all required trust account records.
- Respondent hired a CPA during the bar's investigation who began conducting reconciliations.
- Investigation revealed no losses of client funds.
- District Subcommittee imposed a Public Reprimand with Terms requiring, *inter alia*, reports to the bar from his CPA, disciplinary probation, and extensive additional CLE that address the handling of client property.
- Alternate Sanction of a Certification for Sanction Determination.

Miscellaneous

Wayne Richard Hartke, VSB Docket No. 14-051-098765

- Respondent attended CLE program on guardians ad litem to help prepare for a case he had against a guardian ad litem.
- Respondent was removed from the program after participants complained about his loud snoring from the back of the room during the morning and his shouting at a video presentation during the afternoon program.
- Participants reported a strong odor associated with alcohol from Respondent and a near-empty bottle of gin among his belongings.
- Respondent gave inconsistent accounts concerning his consumption of alcohol during lunch.
- Respondent had prior disposition with VSB requiring him to complete a contract with Lawyers Helping Lawyers which he did.
- Respondent had prior disciplinary record that included public reprimands in five cases.
- Respondent stipulated to a violation of Rules 8.1(b) and 8.4(a) and a six-month suspension of his law license with terms requiring him to complete another contract with Lawyers Helping Lawyers.

IMPAIRMENT INVESTIGATION AND RECEIVERSHIP

VSB Docket No. 14-000-_____

- In April 2014 VSB obtained an order for an impairment investigation from the Disciplinary Board which also appointed a guardian *ad litem*.
- Later, in July 2014, a member of the Virginia State Bar Council reported to the VSB that Respondent appeared in court that day as counsel in a criminal matter where he blew a .34 blood alcohol test.
- VSB investigator diverted from another case to the courthouse where she met with the presiding judge and witnesses to gather the facts.
- VSB immediately filed a Petition for an Expedited Impairment Proceeding before the Disciplinary Board.
- Respondent, in consultation with his guardian *ad litem*, consented to indefinite impairment suspension.
- Clients then reported that they could not obtain refunds of unearned fees from Respondent.
- VSB petitioned and obtained an order for the appointment of a receiver under Virginia Code Section 54.1-3900.01 to take control of Respondent's accounts and report to the court.
- Disciplinary Board further suspended Respondent's license for failing to notify clients about the suspension and failing to refund unearned fees.
- In light of the two law license suspensions, remaining disciplinary investigations were dismissed for exceptional circumstances pursuant to rules pertaining to impairment suspensions.

IMPAIRMENT INVESTIGATION AND RECEIVERSHIP

VSB Docket No. 14-000 - _____

- Client reported to VSB that Respondent settled personal injury case for client and offered to invest the proceeds. Client agreed.
- 18 months later client alleged to VSB that Respondent would not provide an accounting or turn over the funds upon request.
- VSB investigation revealed Respondent suffered from dementia that substantially impacted his ability to practice law.
- Accordingly VSB petitioned Disciplinary Board for impairment suspension, and Board ordered indefinite impairment suspension.
- VSB also petitioned for the appointment of a receiver to take custody of client funds, wind up the practice and report to the court.
- Court ordered appointment of a receiver under Virginia Code Section 54.1-3900.01.
- Client was reimbursed for his losses through sale of Respondent's home.
- 1,800 files for receiver to inventory.
- Illustrates importance of succession planning.

IMPAIRMENT INVESTIGATION AND RECEIVERSHIP

VSB Docket No. 15-000 - _____

- Began as a Misconduct complaint alleging lack of diligence and lack of communication in a divorce matter.
- Respondent submitted an answer and issued a refund to complainant.
- Complainant submitted a rebuttal to Respondent's answer.
- Complainant's rebuttal materials showed that refund check was drawn on a personal account instead of a trust account and returned for insufficient funds.
- Bar counsel immediately referred case for investigation on an expedited basis and issued subpoenas for Respondent's bank account information.
- VSB investigator made contact with Respondent within a few days.
- Investigation revealed that Respondent suffered from cancer and extensive health issues and complications from the treatments and surgeries.
- Respondent stipulated to an Impairment, and was indefinitely suspended by the Disciplinary Board on that basis.
- Bar dismissed the Misconduct matter accordingly.
- Illustrates balance between public protection (Respondent forced to cease accepting new cases and fees, and to stop practicing law), v. fairness (health issues were the likely cause of Respondent's conduct; Impairment suspension does not carry same implications as discipline for Misconduct).

Rule Changes

- Amendments to RPCs 1.1 and 1.6 in light of Advances in Technology in the Practice of law.
- New RPC 5.8 and the Duty of Notification when a Lawyer leaves a law firm.
- New procedural rule allowing bar counsel to disclose information otherwise prohibited from disclosure as confidential if information is exculpatory or helpful to the defense.
- Rewritten reinstatement rule clarifying prerequisites for a reinstatement hearing and authorizing Clerk of the Disciplinary System to make initial determination as to whether petitioners have met all prerequisites and may have a hearing.

New Comments to RPCs 1.1 and 1.6

On March 16, 2015 came the Virginia State Bar, by Kevin E. Martingayle, its President, and Karen A. Gould, its Executive Director and Chief Operating Officer, and presented to the Court a petition, approved by the Council of the Virginia State Bar, praying that Section II, of the Rules of Integration of the Virginia State Bar, Part Six of the Rules of Court, be amended to read as follows:

Amend the Comments to Part Six, Section II, Rule 1.1 to read as follows:

Rule 1.1. Competence.

COMMENT

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. **Attention should be paid to the benefits and risks associated with relevant technology.** The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

New Comments to RPCs 1.1 and 1.6 (Cont'd)

Amend Part Six, Section II, Rule 1.6 to read as follows:

Rule 1.6. Confidentiality of Information.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. *Acting Reasonably to Preserve Confidentiality*

[19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

New Comments to RPCs 1.1 and 1.6 (Cont'd)

19[a] Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of this Rule.

[20] Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. Perfect online security and data protection is not attainable. Even large businesses and government organizations with sophisticated data security systems have suffered data breaches. Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms. Lawyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. What is "reasonable" will be determined in part by the size of the firm. See Rules 5.1 (a)-(b) and 5.3(a)-(b). The sheer amount of personal, medical and financial information of clients kept by lawyers and law firms requires reasonable care in the communication and storage of such information. A lawyer or law firm complies with paragraph (d) if they have acted reasonably to safeguard client information by employing appropriate data protection measures for any devices used to communicate or store client confidential information.

New Comments to RPCs 1.1 and 1.6 (Cont'd)

To comply with this Rule, a lawyer does not need to have all the required technology competencies. The lawyer can and more likely must turn to the expertise of staff or an outside technology professional. Because threats and technology both change, lawyers should periodically review both and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.

[21] Because of evolving technology, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information, addressing such practices as:

- (a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;
- (b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;
- (c) Procedures addressing security measures for access of third parties to stored information;
- (d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;
- (e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and
- (f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.