

# **The Ethical Bankruptcy Attorney**

**The Honorable Paul M. Black, Judge  
United States Bankruptcy Court for the Western District of Virginia**

**Richard C. Maxwell, Esquire, Principal, Woods Rogers PLC**

**Kathryn R. Montgomery, Deputy Bar Counsel  
Virginia State Bar**



## Do's and Don't's (Mostly Don't's)



## Disciplinary Rules of Note

- Rule 1.1 Competence  
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, and thoroughness and preparation reasonably necessary for the representation.
- Rule 3.3 Candor Toward The Tribunal  
(a) A lawyer shall not knowingly: (1) make a false representation of fact or law to a tribunal.
- Rule 8.4 Misconduct  
It is professional misconduct for a lawyer to:  
(b) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which adversely on the lawyer's fitness to practice law.



## Attorney Regulation by the Bankruptcy Courts

- Bankruptcy Court has inherent authority to regulate the practice of attorneys permitted to practice before them
- Voluntary withdrawal of an offending pleading can be a defense to a sanctions motion filed by an opposing party, but not to a show cause initiated by the Court



## Failure to Obtain Client Consent

- Attorney filed Chapter 7 petition for client that was never reviewed or signed by client.
- Attorney was previously terminated by client, who had retained separate counsel and filed a separate Ch. 7 petition hours before the second petition.
- Attorney then sued client for reimbursement of filing fees incurred on unauthorized filing.
- Matter brought to light by U.S. Trustee.
- Attorney received public reprimand.



## Falsification of Documents

- Credit counseling certificates altered and back dated to reflect a pre-petition date
- Third party completed credit counseling, not the debtor who had certificate filed on her behalf
- Chapter 7 petition not signed by the debtor, signature not authentic
- Another client had petition filed on his behalf without permission
- Disgorged fees, monetary sanctions, one year surrender of privilege to practice in Bankruptcy Court



## ECF Login Authorization Form

“Pursuant to Federal Rule of Bankruptcy Procedure 9011 and LBR 5005-1, every pleading, motion and other paper shall be signed by the attorney of record and the signature shall be indicated by /s/ and the typed name of the person signing in the following format: /s/ John Doe on the signature line. The use of my password constitutes my signature for all purposes under the Federal Rules of Bankruptcy Procedure and the Local Rules of this Court.”



## Local Rule 5005-4

- An ECF User is responsible for any document filed by anyone authorized by such User to effect electronic filings by means of such User's designated password
- The electronic filing of a document by or on behalf of a User of the ECF System shall constitute the signature of such User for all purposes under the Bankruptcy Code and Rules, including specifically FRBP 9011



## Mind that ECF Login

- Case One:
- Attorney suspended by his state's bar for three months
- Chapter 7 filed using his ECF Login during suspension period
- Allowed inactive member of Bar to use ECH login to "cover" for him during suspension
- Barred from practice in Bankruptcy Court for 24 months



## Mind that ECF Login, cont'd

- Case 2:
- Attorney suspended by Bar
- Failed to advise clients or Bankruptcy Court of suspension
- Continued filing cases during period of bar suspension
- Allowed pro se debtor to use his ECF Login to file documents in pro se debtor's case
- Bankruptcy Court held attorney in contempt and revoked his privilege to practice in that court
- Bar subsequently revoked license under reciprocal discipline provision



## Don't Make the Client's Problems Your Own Problems

- Attorney allowed client to deposit \$1.3MM in funds to his trust account
- Money was disbursed at client's direction
- Attorney filed Chapter 7 petition for client
- Did not disclose funds in trust account
- Failed to disclose client's ownership in profitable entity that generated funds on deposit
- Attorney convicted of bankruptcy fraud, conspiracy to commit bankruptcy fraud, and money laundering



## **Be Mindful of Conflicts and Duty of Loyalty**

- Counsel filed Chapter 11 without authorization of true owners of debtor
- Counsel continued to represent adverse party, alleged recipient of preferential transfer
- Counsel also represented a creditor of the estate
- Counsel sanctioned, barred from representing any party in interest in a Chapter 11 for one year
- Counsel required to take bankruptcy CLE, including ethics, and forfeit compensation



## **Bankruptcy Rule 9011**

- Factual contentions in pleadings must “have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery.”
- An attorney is under a duty to objectively verify the facts underlying a petition
- This duty is non-delegable
- Exception to 21 day safe harbor ordinarily required for a sanctions motion under Rule 11 is the filing of a bankruptcy petition



## OPM – “Other People’s Money”

- Attorney deposited fees from 9 clients directly into his operating account
- In each case, he drafted but never filed the bankruptcy petition
- Voluntarily placed his license on inactive status, while continuing to take and file new cases
- Bankruptcy Court enjoined attorney from practicing in that court, ordered attorney to disgorge fees and show cause why he should not be held in contempt
- Attorney’s bar license revoked



## Bankruptcy Petition Preparers

- Cannot provide “any legal advice,” including counseling debtors whether to file. 11 U.S.C. 110(e)(2)(B)

Without limitation:

- Cannot counsel debtors on what chapter to file, how to select exemptions, etc.
- Cannot give advice on whether they can keep property or whether a discharge will be granted
- Cannot advise on tax consequences, dischargeability, reaffirmation, characterization of debts or interests in property, or bankruptcy procedures and rights

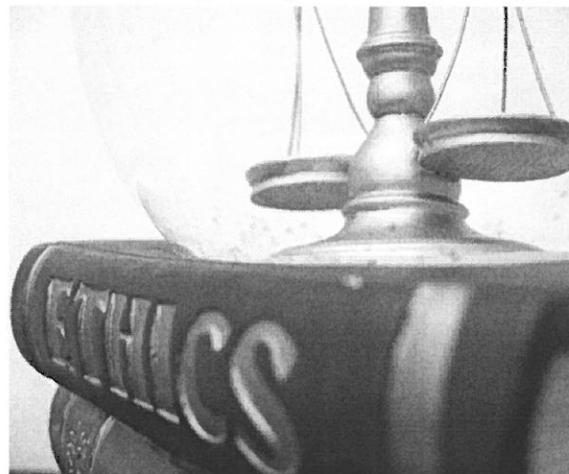


## BPP -- Sanctions

- Forfeiture of fees
- If fraudulent, unfair or deceptive, the debtors actual damages, plus greater of \$2,000.00 or twice the amount paid to the BPP by the debtor for services, and reasonable attorney's fees and expenses
- Fines of \$500.00 per violation
- Injunctive relief
- Trebled fines for certain violations, such as failure to disclose identity of preparer or instruction not to disclose assets or income



## Disciplinary Cases Involving Bankruptcy Attorneys





## Case #1

### Reciprocal Discipline

**Background:** Bar may suspend/revoke a lawyer's license based on a suspension/revocation in "another jurisdiction."

Bankruptcy court revokes Respondent's privilege to practice in bankruptcy court. Bar then files a show cause reciprocal action to revoke Respondent's license based on the bankruptcy court's order.

**ISSUE:** Is the bankruptcy court "another jurisdiction" for reciprocal purposes?



## Case #1

### Reciprocal Discipline

- **Answer:** Bar has historically imposed reciprocal discipline based upon suspensions/revocations from other states, bankruptcy courts, federal courts, military tribunals, USPTO, etc.
- See, *In the Matter of Volzer* (VSB 08-000-074268) (2008) (U.S. Army Judiciary is another jurisdiction); *In the Matter of Buffington, Jr.* (VSB 06-000-3411) (2006) (United States District Court in Eastern District of Pennsylvania is another jurisdiction for the purposes of reciprocal discipline); *In the Matter of Johnson, Jr.* (VSB 04-000-3403) (2004) (United States District Court for the Eastern District of Virginia is another jurisdiction for reciprocal discipline purposes); *In the Matter of Lickstein* (VSB 05-000-0543) (2004) (Federal bankruptcy court is another jurisdiction for reciprocal discipline purposes); *In the Matter of Mullen* (VSB 02-000-1877) (2002) (United States Patent and Trademark Office is another jurisdiction for reciprocal discipline purposes); *In the Matter of Harris* (VSB 02-000-1316) (2002) (Federal bankruptcy court is another jurisdiction for reciprocal discipline purposes); *In the Matter of Kilgore* (VSB 02-000-2781) (2002) (Federal bankruptcy court is another jurisdiction for reciprocal discipline purposes); *In the Matter of Hardenbergh* (VSB 06-000-0155) (2005) (U.S. Army Judiciary is another jurisdiction for reciprocal discipline purposes).



## Case #1

### Reciprocal Discipline

Answer: Virginia State Bar Disciplinary Board recently decided that reciprocal discipline can be based only upon a suspension/revocation from another state licensing authority. Suspension by a federal court cannot form the basis for reciprocal discipline. See, *In the Matter of Sandy Yeh Chang*, VSB 13-000-094679 (Summary Order issued December 19, 2013, awaiting Memorandum Order).

Note: Although reciprocal discipline may not lie from a suspension/revocation in federal court, the bar may file charges of misconduct based upon the same conduct that garnered the federal sanction.



## Case #2

### Repeat Offender

Respondent has a bankruptcy practice representing debtors. Respondent filed a Chapter 7 petition for Client A. The petition was so deficient that the Court ordered Respondent's fee disgorged. Respondent did not disgorge the fee until a bar complaint was filed.

Respondent filed a Chapter 7 petition for Client B. The petition was so deficient that the Court ordered Respondent's fee disgorged.

Respondent filed a Chapter 7 petition for Client C. Respondent failed to file the certificate of credit counseling. When the Trustee moved to dismiss the case on this basis, Respondent did not respond to the motion or appear at the hearing.

Respondent filed a Chapter 7 petition for Client D that included schedules with information Respondent knew was false. In an attempt to prevent the Trustee from issuing a subpoena to the debtor, Respondent falsely represented the Trustee that the debtor had moved away and had just lost a baby.



## Case #2 Relevant Authorities

- Rule 1.1 (competence)
- Rule 1.2 (c) (cannot counsel client to commit fraud)
- Rule 1.3 (a) (diligence)
- Rule 1.5 (a) (reasonable fee)
- Rule 1.15 (b)(5) (convert funds)
- Rule 3.3 (false statement to tribunal/offer false evidence)
- Rule 8.4 (deliberately wrongful act/dishonesty)



## Sanction for Case #2

- Disciplinary Board found all rule violations charged.
- Disciplinary Board considered Respondent's prior record.
- Sanction imposed: Revocation



## Case #3 Undercut the Competition

Respondent widely advertised as a bankruptcy attorney and undercut the fees customarily charged by other bankruptcy lawyers in the area. Respondent accumulated hundreds of clients. Respondent became overwhelmed with the volume of work; nevertheless, Respondent continued to accept new clients. Respondent neglected and abandoned clients.

Respondent maintained scant trust account records. Respondent transferred client money from the trust account to the operating account before work was completed. Respondent spent client money and was unable to refund unearned fees upon demand by frustrated clients.

Respondent exhibited a lack of competence that raised concerns in the Trustee's office.



## Case #3 Relevant Authorities

- Rule 1.1 (competence)
- Rule 1.3 (a) (diligence)
- Rule 1.4 (communication)
- Rule 1.15 (trust account violations/convert funds)
- Rule 1.16 (failure to refund unearned fee)
- Rule 8.4 (deliberately wrongful act/dishonesty)



## Sanction for Case #3

- Consent to revocation
- Receivership imposed by the bar
- Bankruptcy lawyers in the community pitched in to assist clients for no extra charge



## Typical bar complaint involving bankruptcy lawyers

- Unreasonable/unnecessary delay in filing the petition (Rule 1.3 diligence)
- Failure to keep the client informed (Rule 1.4)
- Incompetence (Rule 1.1)



## Common Rule Violations for All Types of Bar Complaints

- Rule 1.3(a) (Diligence) "A lawyer shall act with reasonable diligence and promptness in representing a client."
- Rule 1.4(a) (Communication) "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."



## Ethical Neglect, defined

- In order to find a violation of Rule 1.3(a), there must be clear and convincing evidence of neglect. The Supreme Court of Virginia has said:
- Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.
- *Pickus v. Virginia State Bar*, 232 Va. 5, 11, 348 S.E.2d 202, 209 (1986), quoting ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1273 (1973).



## Assisting a Pro Se Debtor

- Judge Black's Opinion in *In re Oliphant*, Case no. 12-70668, U.S. Bankruptcy Court, W.D. Va. (April 2, 2014) (sanctioning nonlawyer bankruptcy petition preparer and issuing rule to show cause why preparer should not be permanently enjoined from working as bankruptcy petition preparer).



## Assisting a Pro Se Debtor

- Proposed LEO 1874, Limited Scope Representation—Reviewing Pleadings for Pro Se Litigants- Substantial Assistance and “Ghostwriting”
  - Limited representation ethical
  - Absent court rules otherwise, ghostwriting pleadings ethical
  - This is a change in position



## A Word about Impairment

- The bar may suspend a lawyer's license to practice law based on a finding of impairment by the Disciplinary Board. Part 6, Section IV, Paragraph 13-23, Rules of Court.
- "Impairment" means any physical or mental condition that materially impairs the fitness of an Attorney to practice law.

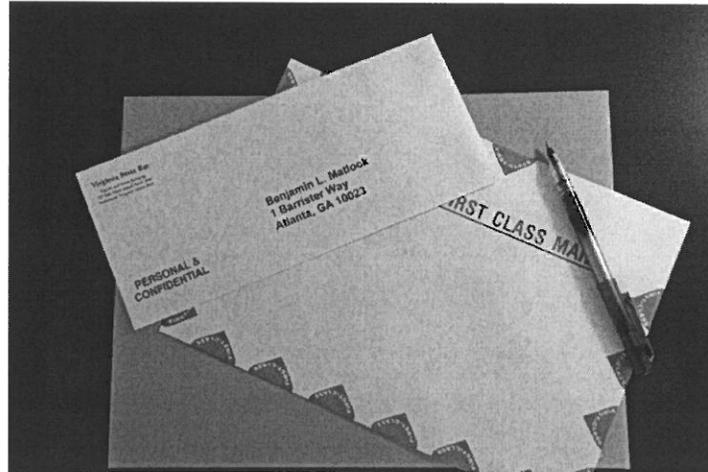


## A Word about Impairment

- Lawyer Helping Lawyers ("LHL") is a statewide organization that offers free, confidential assistance to lawyers with mental health and substance abuse issues.
- LHL DOES NOT report misconduct to the bar.
- Executive Director Jim Leffler at 804-644-3212

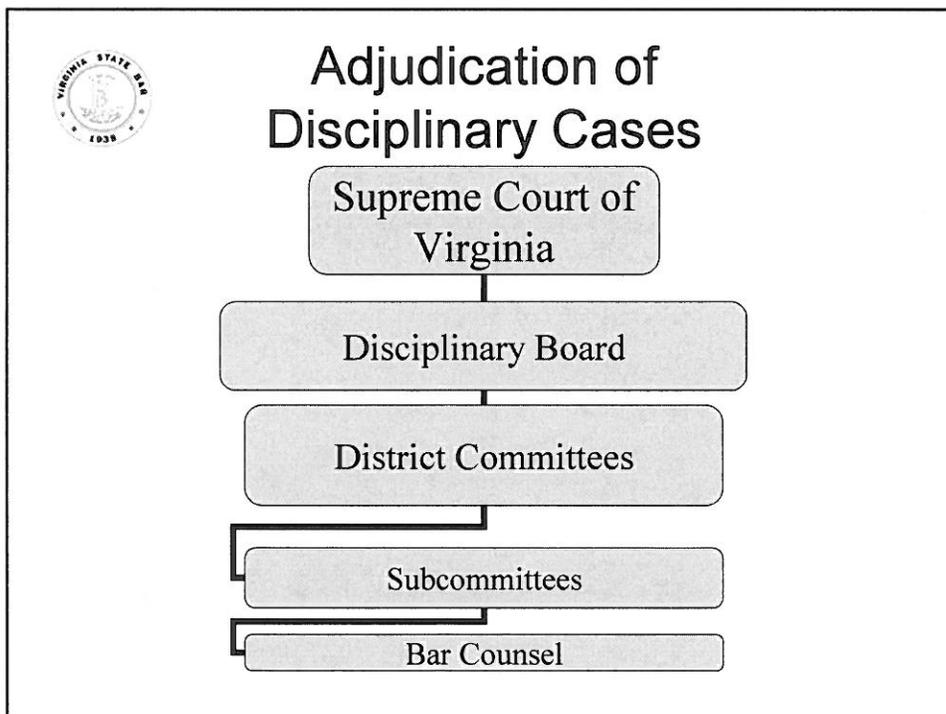
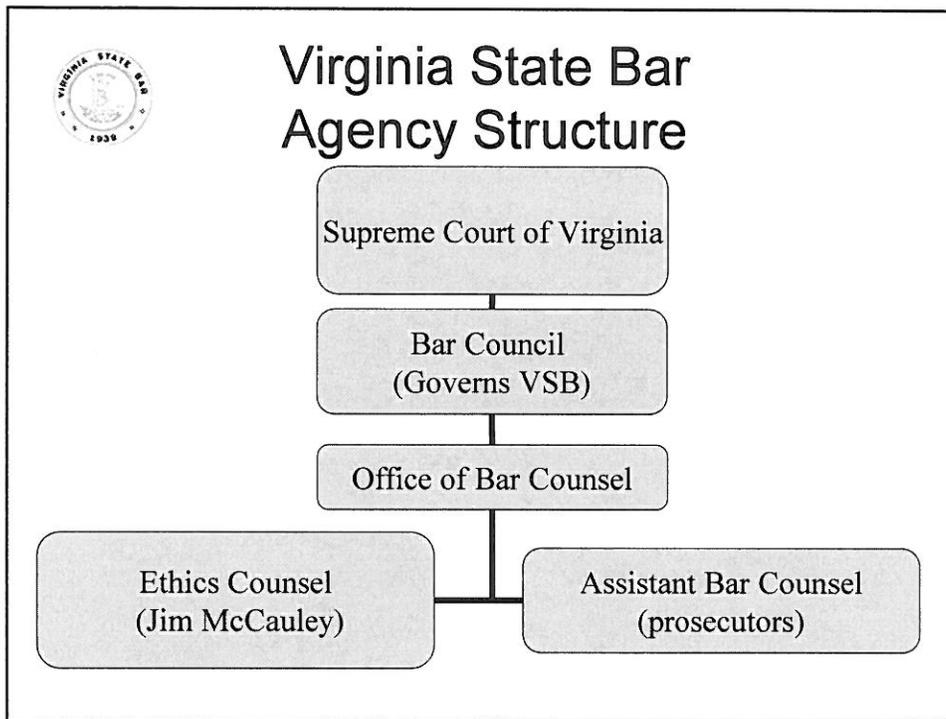


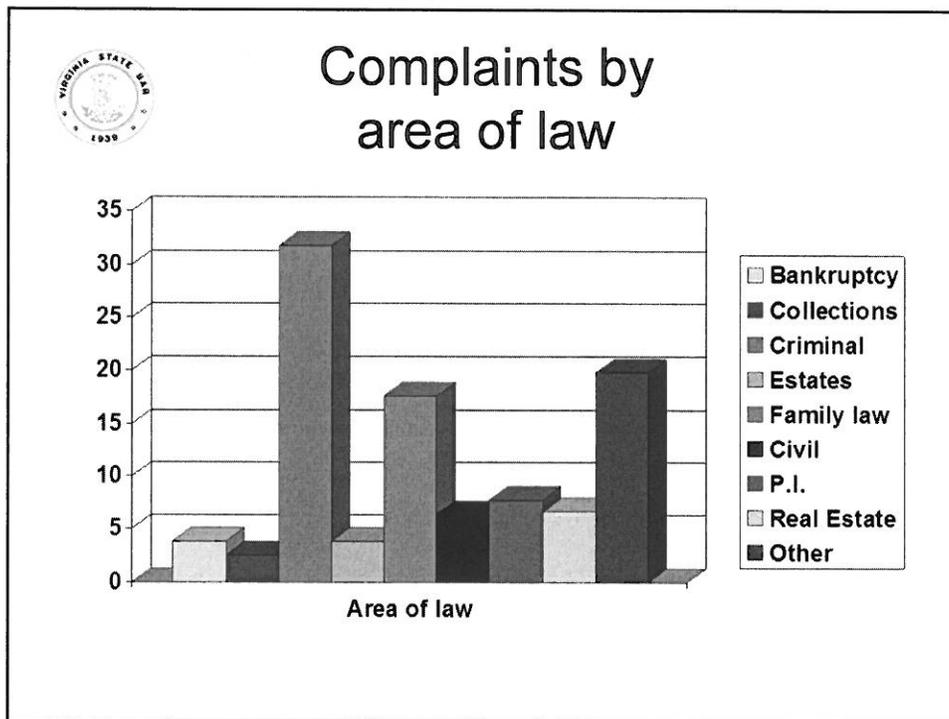
## Procedures in Disciplinary Proceedings



## Bar Statistics

- Active Membership in 2013 was 31,027, up from 29,602 in 2012
- Approximately 4000 bar complaints a year
- About half become NAT files (no action taken)





-  **Statistics**
- In 2011:
    - 103 agreed dispositions
    - 72 trials (37 respondents)
    - 42 misconduct suspensions (21 respondents)
    - 8 respondents revoked following hearing
    - 10 respondents revoked by consent



## Disciplinary Sanctions

- **Admonition (public or private)**-finding of misconduct but no substantial harm to the complainant or the public has occurred.
  - With or without “terms”
- **Reprimand (public or private)**-finding of misconduct that does not limit the attorney’s right to practice law.
  - With or without “terms”
- **Suspension**
  - Of one year or less with Terms
- **Revocation** (no permanent disbarment in Virginia)



## District Committees

- 17 District Committees in Virginia
- Comprised by region
- Each Committee has 10 members
  - 7 members are lawyers
  - 3 members are lay people
- Must have a quorum of five



## Subcommittees

- Comprised of three members of a district committee
- Two lawyers and a lay person
- Meet to consider and vote on disposition of cases
- Meetings are confidential



## Disciplinary Board

- Comprised of twenty-five members
- Sit in panels of five: one lay member and four attorneys
- May suspend or revoke a law license
- Appeal of right to the Supreme Court of Virginia



## Procedures in Disciplinary Proceedings

- Part Six, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia
- Section 54.1-3935 of the Code of Virginia (Three-Judge Circuit Court cases)



## Processing Bar Complaints

- **Standard of Review**
  - “Does the conduct questioned or alleged present an issue under the Rules of Professional Conduct?”
  - Similar to a demurrer



## Intake Department

- Proactive Process
  - Examples:
    - Return client's phone call
    - Provide client's file



## Preliminary Investigation by bar counsel

- Complaint is sent to the respondent attorney
- 21 days to respond



## Preliminary Investigation by bar counsel

- Response is sent to the complainant
- 10 days to file a rebuttal



## Responding to a bar complaint

- Silence is not golden
- Consider talking to counsel or a colleague
- Attach supporting documents (e.g., email proving communication, fee agreement, letters, trust account records, etc.)



## Preliminary Investigation by bar counsel

- **Dismissal**
  - Clear and convincing evidence of misconduct is required to refer to full investigation



## Preliminary Investigation by bar counsel

- **Refer to a District Committee for a full investigation**



## Investigation



## Subcommittee meetings

- Three members of the District Committee
  - Two lawyers and a lay person
  - Majority vote



## Subcommittee meetings

- Usually meet once a month
- Meetings are confidential
- May dismiss complaints
- May set cases for hearing
- May impose minor discipline
- May approve agreed dispositions



## When a case is set for hearing

- Respondent receives the Investigative Report and any other documents considered by the Subcommittee



## When a bar complaint goes public

- All hearings are public
  - District Committee
  - Disciplinary Board
  - Three-Judge Panels



## Private Discipline

- Admonition without terms issued by the subcommittee
- Agreed Disposition for a Private Reprimand



## Agreed dispositions

- Respondents can enter into agreed dispositions at any time charges are pending
  - Respondents must admit to Rule violation(s)



## Agreed dispositions

- Private discipline is only available before the case is put on the public docket.



## Disciplinary Hearings



## District Committees

- Ten Committees throughout the state
  - Some are divided into sections



## District Committees

- Composition:
  - Seven attorneys
  - Three lay people



## District Committees

- Harshest sanction is a public reprimand



## Disciplinary Board

- Board sits in Richmond once a month



## Disciplinary Board

- Board sits in panels of five
  - Four attorneys
  - One lay person



## Disciplinary Board

- All sanctions available, from admonition to revocation



## Three-Judge Circuit Court

- Respondents may elect to be tried by a three judge Circuit Court rather than the District Committee or the Board



## Three-Judge Circuit Court

- Composition
  - One active Circuit Court Judge
  - Two retired Circuit Court Judges



## Three-Judge Circuit Court

- The panel sits in the judicial district where the respondent works or resides
  - Judges are from outside that district



## ABA Standards for Imposing Lawyer Discipline

- **Aggravating Factors:**
  - Prior disciplinary offenses
  - Dishonest or selfish motive
  - Pattern of misconduct
  - Multiple offenses
  - Bad faith obstruction of disciplinary process
  - Submission of false evidence in disciplinary process
  - Refusal to acknowledge wrongful nature of misconduct
  - Vulnerability of victim
  - Substantial experience in the practice of law
  - Indifference to making restitution
  - Illegal conduct, including conduct involving controlled substances



## ABA Standards for Imposing Lawyer Discipline

- **Mitigating Factors:**
  - Absence of prior disciplinary offenses
  - Absence of dishonest or selfish motive
  - Personal or emotional problems
  - Timely good faith effort to make restitution/rectify misconduct
  - Full disclosure and cooperation with the disciplinary process
  - Inexperience with the practice of law
  - Character or reputation
  - Mental or physical disability (including addiction) where there is 1) medical evidence, 2) causation, 3) meaningful recovery, 4) recovery arrested misconduct
  - Delay in disciplinary proceedings
  - Imposition of other penalties or sanctions
  - Remorse
  - Remoteness of prior offenses



## Appeals

- Respondents have a right of direct appeal to the Supreme Court from decisions of the Board or Three-Judge Circuit Court
- The bar has no right of appeal



## Avoiding Bar Complaints

- Call the Ethics Hotline
  - confidential
  - 804-775-0564