

Howard W. Martin, Jr., President
Crenshaw, Ware & Martin, P.L.C.
1200 Bank of America Center
Norfolk, VA 23510-2111
Telephone: (757) 623-3000

Manuel A. Capsalis, President-elect
Capsalis, Bruce & Reaser, P.L.C.
2200 Wilson Boulevard, Suite 800
Arlington, VA 22201
Telephone: (703) 358-9620



Virginia State Bar

Eighth and Main Building
707 East Main Street, Suite 1500
Richmond, Virginia 23219-2800
Telephone: (804) 775-0500

Facsimile: (804) 775-0501 TDD (804) 775-0502

Karen A. Gould
Executive Director and
Chief Operating Officer

Mary Yancey Spencer
Deputy Executive Director

Elizabeth L. Keller
Assistant Executive Director
for Bar Services

Susan C. Busch
Assistant Executive Director
for Administration

George W. Chabalewski
Bar Counsel

April 11, 2008

The Honorable Leroy Rountree Hassell, Sr.
Chief Justice, Supreme Court of Virginia
100 North Ninth Street, 5th Floor
P.O. Box 1315
Richmond, VA 23218-1315

RE: Web Posting of Results of Disciplinary Proceedings

Dear Chief Justice Hassell:

Thank you for your letter of March 18, 2008, which I received in my office on March 21, 2008, and then forwarded to the bar offices. The bar received your letter on March 24, 2008, and immediately discontinued the practice of posting any adverse disciplinary results on the website "about disciplinary complaints....until the date that the Supreme Court issues a mandate or order" or until the appeal time has expired.

This direction from the Court has prompted a number of questions from bar staff regarding their procedures and their responsibilities under Court rules. I wanted to bring these questions to your attention.

The Virginia State Bar ("VSB") website provides information about disciplinary cases in four places: (1) the public disciplinary hearing docket, (2) the disciplinary action summaries, (3) the electronic version of the *Virginia Lawyer Register*, and (4) the attorney records search. In addition, the clerk of the disciplinary system issues press releases summarizing every admonition, public reprimand, suspension, and revocation.

(1) Public Disciplinary Hearing Docket

Pursuant to Rules of the Supreme Court of Virginia, Part 6, ¶ 13 (H)(2)(b) and ¶ 13 (N)(3), a complaint as stated in the charge of misconduct or certification becomes public once it is placed on the district committee or board docket. The clerk is required to maintain a public docket of all matters set for hearing. The requirement for a public docket was implemented in 2001 when hearings at the district committee level were opened to the public. Since that time the public docket has been a part of the bar's

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website at <http://www.vsb.org/site/regulation/public-disciplinary-hearings/>. A copy of a recent docket is attached. Please let me know whether your direction of March 18th covers the public docket and whether we should stop publishing this on the website. Until we hear from you, we will not add new matters to the public docket.

The staff of the clerk's office responds to inquiries from the public and the press by providing copies of public records and information regarding the nature of the charges brought against an individual as well as the date of the public hearing. If a communication to the VSB asks for public information regarding a lawyer's disciplinary record, including a case in which an appeal has been filed, that information will continue to be provided to the requestor, unless the Court directs otherwise.

(2) Disciplinary Action Summaries

A. Press Releases

Paragraph 13 (B)(8)(d)(1) provides that the clerk of the disciplinary system shall "issue a statement to the communications media summarizing each public Admonition, Public Reprimand, Suspension or Revocation." While your letter of March 18, 2008, only mentions website summary postings, we are unsure as to whether your letter is meant to include press releases also. Please let me know the Court's wishes regarding press releases. Extending the Court's directive to this function by the clerk would constitute a sea change as to how the bar performs its obligations under the aforesaid rule.

In the case of admonitions and public reprimands, the required press releases have historically been issued after the appeal time has run if no appeal is filed. If an appeal is filed, the press releases are issued only after the sanction is upheld. It appears that this procedure comports with the Court's desired policy, and no change is necessary.

Because there is no provision for an automatic stay from a suspension and no stay is granted from a revocation, it has been the practice of the clerk's office to issue the press release when the order and the sanction were entered in the bar's records. We have not changed this procedure because the issuance of press releases was not mentioned in the Court's directive in its March 18, 2008 letter. Please let me know if the Court's instruction was intended to cover press releases.

We do respectfully suggest, for the reasons more fully set forth below, that the bar be allowed to continue to issue press releases and post web summaries in cases in which suspensions or revocations have been imposed.

In addition to the communication to the media required by Paragraph 13(B)(8)(d)(1), the clerk is also required to notify the clerk of the Supreme Court, the clerks of the circuit and district courts in each judicial circuit in the Commonwealth where the attorney resides or maintains an office, and disciplinary authorities for other jurisdictions, federal or state (where it is reasonable to expect that the attorney may be

licensed) of each public admonition, public reprimand, suspension or revocation. Rules of the Supreme Court of Virginia, Paragraph 13(B)(8)(d)(2). Does the Court also wish these notifications to be delayed until after the appeal time has run? We respectfully ask the Court to allow these notifications to continue.

Because no stay can be granted from a revocation decision, those lawyers who have been revoked cannot practice. However, a new policy providing that the VSB cannot notify the courts and the public of those revocations could result in some of those (former) lawyers continuing to practice law pending the running of their appeal without anyone outside the bar having any knowledge of their status. In addition, those lawyers whose sanction involves a suspension, and whose suspension has not been stayed, could also continue to practice under similar circumstances. In the case of a suspension, moreover, the failure to publicize such information could lead to the anomalous result of an attorney being suspended for a year, appealing his sanction, and by the time the appeal is resolved and the sanction affirmed, the time of the suspension would have been served. The fact that the public would have been unaware of the attorney's status during this time frame would be problematic. In addition to cases proceeding through the normal misconduct process, however, some lawyers are also summarily suspended because of a criminal conviction, losing their licenses in other jurisdictions, or because a receiver has been appointed by a circuit court pursuant to Va. Code Section 54.1-3935. If a lawyer has been suspended or revoked under these circumstances, we believe the public as well as the courts in which the lawyer practices should be notified of that fact, regardless of whether an appeal is pending.

B. Disciplinary Action Web Summaries

Since 1999, the clerk has posted the press releases on the website at <http://www.vsb.org/site/regulation/disciplinary-system-actions/>. At the direction of the VSB Standing Committee on Lawyer Discipline, this section of the website records the results of all cases that appear on the public docket and tracks all subsequent procedural developments. For example, appeals, stays, and reversals are added to the web summaries as they occur. Dispositive orders are posted along with the summaries. In addition to press release summaries of sanctions, dismissed cases are listed. The summaries and orders, including summaries of admonitions and public reprimands, are posted as soon as practical after the orders are entered. The bar staff takes great pride in keeping this information as current as possible. This procedure has been very popular with the public and the press. It, along with the disciplinary record search, is the primary source for public information about disciplinary actions. As stated above, effective March 24, 2008, the clerk is waiting for the appeal time to run or for the Court's mandate or order before posting information to the site.

(3) *Virginia Lawyer Register*

The *Virginia Lawyer Register*, which is published five times a year, is posted on the website. The register includes copies of all public disciplinary opinions issued by district committees, the board, three-judge-courts, and the Supreme Court. If a matter is appealed to the Supreme Court before the magazine is printed, the appeal is noted in the

magazine. We wonder whether the policy you outline in your letter of March 18, 2008, would apply to the *Virginia Lawyer Register*. Please let us know if your March 18 letter is intended to change our procedures regarding publication in the *Virginia Lawyer Register*. If this is your direction, it would lead to anomalous results and be a major shift in how we perform our duties under the Rules.

(4) Attorney Records Search

The “attorney records search” provides the public internet access to every attorney’s public disciplinary record with links to the press release information, the posted opinions, and the *Virginia Lawyer Register* opinions. The information returned in a search will indicate if a sanction has been appealed and also if it is stayed. The search program has been off-line while we switch to the new IBIS software. The IBIS version of the search is complete and ready to go live. After receiving your letter, we decided not to reinstate the search feature on the website. However, we believe that the search procedure is of great benefit to the public and to the bar generally. We hope the Court will authorize us to activate this search function on the website.

Conclusion

In conclusion, the bar is cognizant of the Court’s concerns over the impact that publication of a sanction against a respondent may have on that attorney if the sanction is thereafter vacated or reversed by the Court. However, it is respectfully submitted that the extent of the openness in the current disciplinary system is consistent with that which is characteristic of the court system generally. It is also consistent with the idea of increased transparency in government and in the disciplinary process. There are safeguards built into the disclosure process, of course, since confidentiality applies to any complaint during investigation and subcommittee proceedings. This covers the vast majority of bar complaints that are dismissed or resolved confidentially. The basic premise set forth in the Supreme Court rules is that district committee hearings, board proceedings, three-judge circuit court cases and Supreme Court decisions (other than impairment hearings) are public. Just as with any court case, any information presented during those hearings as well as resulting orders, whether or not final, are public and are made available to the public. Likewise, any information about a stay or an appeal is also public.

Since 2001, pursuant to Court rules, the bar has made substantial efforts to operate a more transparent disciplinary system. If we withhold from any venue the fact that a lawyer has been publicly disciplined, even for the relatively short time period in which his case is on appeal, the discipline is thereby effectively rendered private for that period of time. The rules of the Court mandate a public process for the serious offenders. We believe the inability of Virginians to readily ascertain the discipline information via the bar’s website during the appeal process significantly impairs the bar’s important efforts to protect the public. Finally, such deference to the respondent lawyer is in stark contrast to the court system’s treatment of the ordinary litigant or defendant.

With all due respect, we therefore urge the Court to reconsider its directive and allow the VSB to publicize serious disciplinary cases to the fullest extent possible.

Chief Justice Leroy Rountree Hassell, Sr.

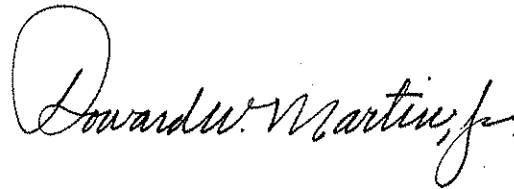
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Coincidentally, I have been advised that the VSB Standing Committee on Lawyer Discipline ("COLD") at its meeting earlier this month passed a resolution asking that their strong interest in this subject be communicated to the Court. The consensus of the members of COLD appears to be that "COLD sees the internet as an essential tool of public protection and that information should be available from the first time a lawyer is found..." to have violated disciplinary rules.

Thank you for your consideration of this letter. I look forward to receiving the Court's response, and I would be happy to provide any further information that you might deem appropriate.

Very truly yours,

A handwritten signature in cursive script that reads "Howard W. Martin, Jr." The signature is written in dark ink and is positioned to the right of the typed name below it.

Howard W. Martin, Jr.

HWMjr/lem

cc: William L. Babcock, Jr., Esq.
James L. Banks, Jr., Esq.
Manuel A. Capsalis, Esq.
Jon D. Huddleston, Esq.
Karen A. Gould, Esq.
Mary Yancey Spencer, Esq.
George W. Chabalewski, Esq.