REPORT OF THE
JOINT LEGISLATIVE AUDIT
AND REVIEW COMMISSION

REVIEW OF THE VIRGINIA STATE BAR

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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Preface

Senate Joint Resolutions 262 and 263 (1995) directed the Joint Legislative Audit and Review Commission (JLARC) to review and evaluate the area of administration of justice. Senate Joint Resolution 263 further directed JLARC to review the Virginia State Bar (VSB).

The Virginia State Bar was created in 1938 by the General Assembly as an administrative agency of the Supreme Court of Virginia. The VSB's mission includes regulating attorneys, providing services to Bar members, and promoting the quality of legal services provided to Virginians. The study found that the Bar is effectively fulfilling its primary mission to regulate the legal profession. The review also found that the Bar's non-regulatory activities are consistent with its mission but that the Bar may need to better prioritize its activities and reexamine its mission.

This report identifies several concerns regarding funding of the Bar. The VSB's growing cash balances indicate that two mandatory dues increases may have been unnecessary and that current dues are too high. In addition, certain expenditures from the Bar's administration and finance fund may not be consistent with the purpose of the fund as established by the Supreme Court. The report contains several recommendations to address these concerns.

Although the review found that the disciplinary system works relatively well, the Bar could make several changes to the system to improve public protection, public trust and accountability, fairness, and efficiency. The report contains recommendations to strengthen all four areas. Recommendations include further opening the disciplinary process to the public and providing immunity to complainants. The Chairman of the Commission has appointed a subcommittee to monitor the progress of the Virginia State Bar in implementing the funding and disciplinary recommendations in the report over the next year.

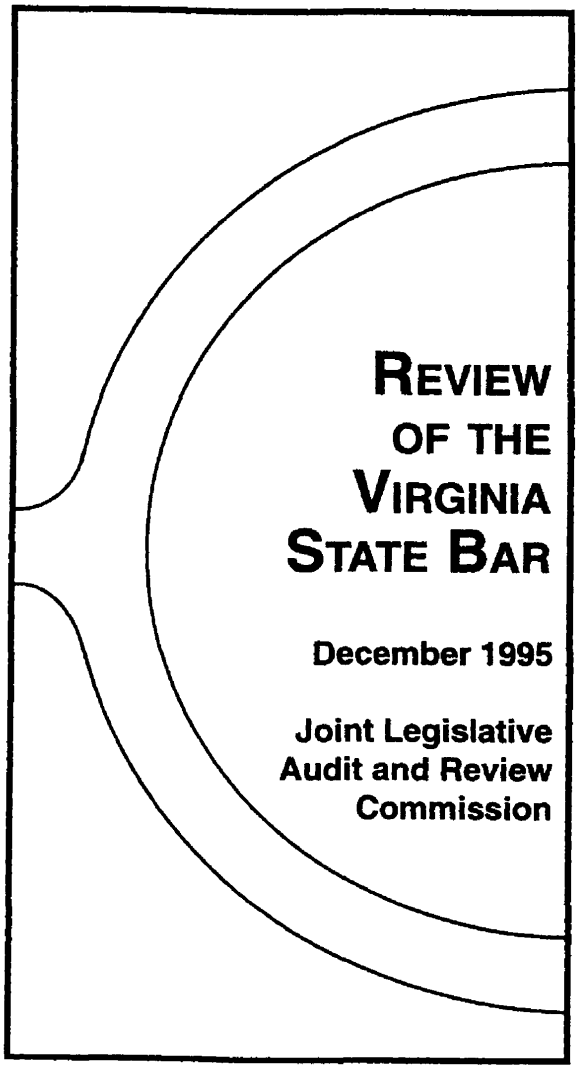
While the study found that most of the Bar's activities are generally within its mission, the Bar may need to further examine its future role. The Bar's involvement in both regulatory and non-regulatory activities is typical of mandatory Bars in other states, but this mix of activities is unusual for regulatory agencies in Virginia. The association-like nature of some of the activities of the Bar raises questions about whether the Bar is properly focused on its regulatory mission.

On behalf of the Commission staff, I would like to express our appreciation for the cooperation and assistance provided during this review by the Virginia State Bar, participants in the disciplinary process, and the voluntary statewide bar associations.

Philip A. Leone
Director

December 22, 1995

JLARC Report Summary



The Virginia State Bar (VSB) was created in 1938 by the General Assembly as an administrative agency of the Supreme Court of Virginia. The creation of the agency unified Virginia's lawyers in a mandatory State Bar to provide for the regulation of lawyers practicing in the Commonwealth. Since that time, Virginia State Bar activities have grown to support a broad mission which includes efforts to regulate, improve, and educate members of the legal profession; and to promote the administration of justice and quality of legal services provided to Virginians.

Virginia is one of 32 states and the District of Columbia that have unified, mandatory bar organizations. Currently, the VSB has 20,408 active members who each pay $185 in annual fees for the privilege of practicing law in Virginia. Annual attorney fees are used to fund most of the Bar's operations and totaled $4.3 million in FY 1995. Total Bar operating expenditures in FY 1995 were almost $5.3 million.

This review of the Virginia State Bar is one in a series of studies on the administration of justice in Virginia. Senate Joint Resolution (SJR) 263 specifically directed JLARC to conduct an analysis of the VSB and evaluate the efficiency, economy, and effectiveness of the VSB in carrying out its mission.

This review found that while the VSB shares a number of characteristics with other unified state bars, the agency is unique when compared to agencies that regulate other professions and occupations in Virginia. The VSB is different because it combines activities to regulate the legal profession with non-regulatory activities that are similar to those usually conducted by professional associations. This unusual mix of activities raises questions about how to best allocate resources and prioritize activities to carry out the Bar's mission.

Analysis of State Bar operations indicates that:

- lawyers may be paying more in annual fees than is necessary to fund the Bar's operations, as evidenced by the growing cash balances maintained in VSB special funds,

- the system to discipline lawyers in Virginia works relatively well, although, some steps need to be taken to better ensure public protection and build public confidence, and

- most activities of the VSB are consistent with the mission established for the Bar by statute and the *Rules of Virginia Supreme Court*, but the association-like nature of the Bar's non-regulatory activities exposes the Bar to potential conflicts, diverts resources from the Bar's most important activity — lawyer discipline — and raises concerns about public accountability.

Three Special Funds Are Maintained to Pay for VSB Activities

The VSB is authorized to maintain three distinct special funds to pay for its regulatory and non-regulatory activities. The State Bar fund is authorized by the *Code of Virginia* and is composed primarily of the mandatory annual fees paid by lawyers to be members of the VSB. The administration and finance (A&F) fund is authorized by the *Rules of Virginia Supreme Court (Court Rules)* and was created to pay for conference, meeting, and related VSB expenses for which State funds cannot be used. The clients' protection fund is also authorized by the *Court Rules* and is used to compensate persons who have experienced financial losses due to the dishonest conduct of lawyers. Member dues also finance this fund.

The State Bar fund is one of many special funds within the State Treasury, and as such, is monitored through the Commonwealth's Cost Accounting and Reporting System (CARS). The A&F fund and the clients' protection fund are maintained and administered solely by the VSB and are not tracked by CARS. The VSB is responsible for investing the revenue of these funds and paying their associated expenses. While not monitored through CARS, the Auditor of Public Accounts does conduct periodic audits to ensure that expenditures are properly documented and that these expenses are not charged to the State Bar fund.

While A Majority of VSB Expenditures Pay for Lawyer Regulation, Lawyers May Be Charged Excessive Fees

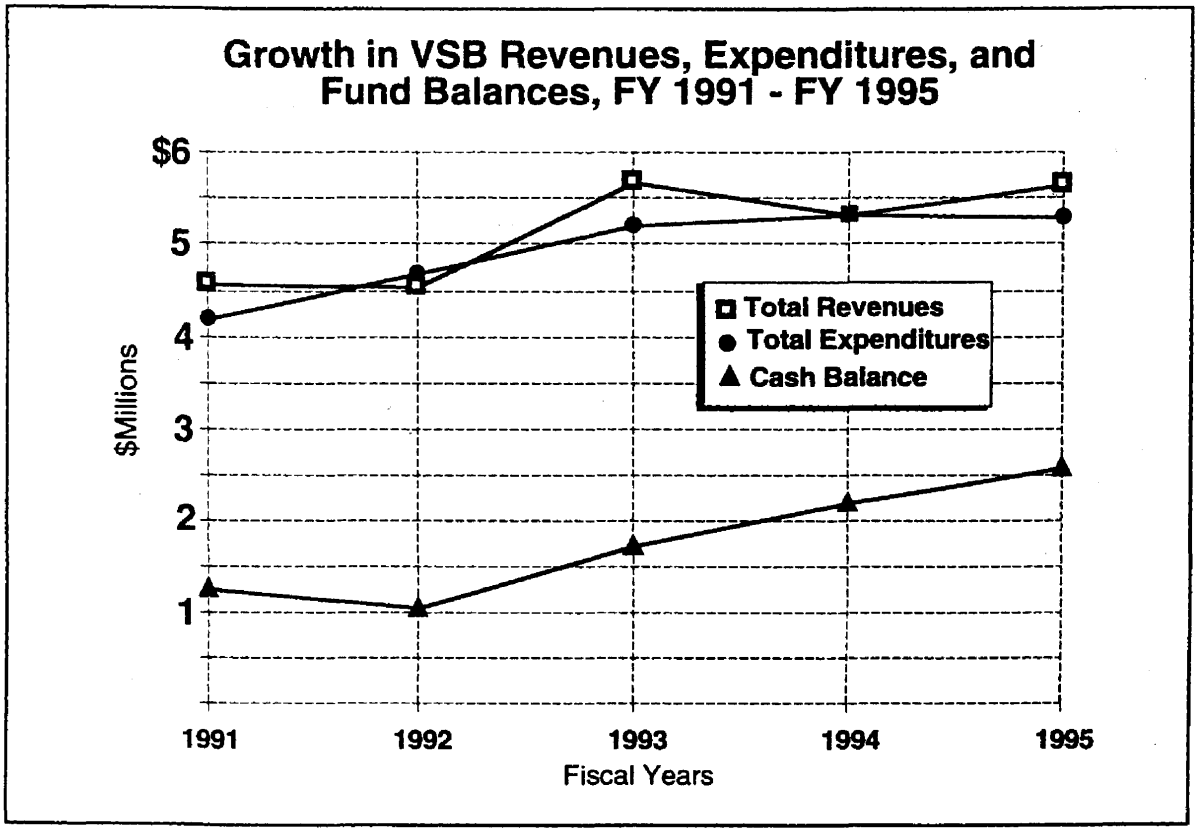
Analysis of VSB funding indicates that about 54 percent of total State Bar expenditures are used to regulate lawyers through the disciplinary system and other regulatory activities carried out by the Virginia State Bar. Nevertheless, Virginia lawyers may be paying more than is necessary to fund the activities of the VSB. Growing cash balances in two of the VSB's special funds form a large cash reserve that could have paid for about one-half of the agency's operating expenditures in FY 1995.

In three of the past five fiscal years, VSB revenue exceeded expenditures (see figure on next page). Excess revenues, combined with growing cash balances in the Bar's special funds have provided the Bar with a large cash reserve. Currently, the VSB has more than $2.5 million in combined reserve amounts from the State Bar fund and the A&F fund. Some of this reserve can be attributed to the VSB implementation of two increases in member dues over the past five years.

Recommendations are made in this report to:

- amend the *Code of Virginia* to ensure that mandatory member dues are not increased if the reserve levels in VSB special funds exceed ten percent of total operating expenditures, and

- reduce the amount of VSB member dues.



Transfers of Funds from the State Bar Fund to the Clients' Protection Fund Raise Questions about Fund Integrity

The clients' protection fund was established in 1976 to further the administration of justice by reimbursing clients for financial losses caused by the dishonest conduct of Virginia lawyers. Since its inception, the fund has been capitalized by lawyers' annual fees to the VSB. To date, the fund has received more than $1.5 million in transfers from the State Bar fund and has paid out more than $1.3 million to petitioners. The Bar's council has provided revenues to the fund in two ways: (1) approval of fund transfers from the State Bar fund, and (2) loans from the State Bar fund for the express purpose of accruing interest income to capitalize the fund. These loans were later forgiven.

The practice of routinely transferring revenue from the State Bar fund to capitalize the clients' protection fund raises concerns about the integrity of the State Bar fund. This fund was established to pay for the cost of lawyer regulation, primarily lawyer discipline. Further, the current method of funding the clients' protection fund is inconsistent with the methods used for budgeting other VSB expenditures, even though these expenses accounted for eight percent of the VSB's expenditures in FY 1995.

While the Bar has made contributions to the clients' protection fund since 1976 from the State Bar fund, this contribution was not formally budgeted until recently in FY 1995. The Bar's 1994 long range plan included a goal of contributing $200,000 annually to the clients' protection fund for a period of at least five years beginning in FY 1995. Nevertheless, the Bar's budget for FY 1995 included only $130,000 as a line item for the clients' protection fund, which represented a portion of that recommended by

the long range plan and a portion of the $400,000 which the Bar actually contributed to the fund. Consequently, capitalizing the fund appears to continue to be a discretionary expenditure depending on the financial position of the State Bar fund at the year's end.

Continued growth in demand for payments from the clients' protection fund to persons who have experienced financial losses due to the dishonest conduct of lawyers may necessitate a more straightforward funding mechanism to ensure fund integrity and protect the public. Because it is unclear whether the General Assembly intended for the fund to be capitalized by Bar member dues, the report recommends that the VSB:

- discontinue the current practice of making State Bar fund transfers to the clients' protection fund without specific statutory authority, and

- request General Assembly authorization to maintain and finance the clients' protection fund through a specific funding mechanism.

Certain Revenues Received by the Bar May Have Been Erroneously Retained

Since at least FY 1987 and possibly earlier, the VSB has received revenues from its sponsored insurance plans. From FY 1988 to FY 1995, the Bar received approximately $727,000 in insurance proceeds for various reasons. The majority of these funds appear to be from refunds for favorable claims experience on the part of VSB policyholders. These funds were eventually deposited in the VSB's administration and finance fund and have collected more than $88,000 in interest income. It appears that some of these insurance refund amounts should have been treated as unclaimed intangible property and returned to the State Treasury. Recommendations are made to:

- identify and determine if portions of the VSB's insurance revenue should be designated and treated as unclaimed property, and

- ensure that all future refunds involving intangible property are treated as unclaimed property by the VSB when the owner cannot be identified.

Some Bar A&F Fund Expenditures Do Not Appear Consistent with the Purpose of the Fund

The Bar's administration and finance fund was created in 1987 by the Supreme Court of Virginia to pay for:

> expenses related to meetings of the Council, meetings of the Executive Committee, the Annual and Midyear Meetings, and other official functions of the State Bar .... *(Court Rules)*

Analysis of the A&F fund indicates that certain expenditures may not be consistent with the purpose of the fund as established by the Supreme Court. Further, the cash balance in the A&F fund has accumulated to a level more than three times the amount expended from the fund in FY 1995. The Supreme Court may not have intended that the Bar maintain such a large cash balance when it originally set up the fund.

The three primary events that are funded through the A&F fund are the VSB annual meeting, the annual Cambridge seminar, and the midyear legal seminar. Receipts from these events are deposited with the State Treasurer in the State Bar fund. The money is then transferred to the A&F fund to pay for associated expenses. However, in FY 1995 the fund is also used to pay for:

- alcoholic beverage expenses for social meetings of the council, execu-

tive committee, specialty law sections, and committees;

- travel expenses for spouses of Bar officers; and

- staff activities and expenses such as coffee, soda, a staff holiday party, and other items.

These types of expenses are not normally approved by the Commonwealth for reimbursement. In addition, they do not appear to relate directly to "official" business of the Bar.

Reimbursement of the above types of expenses appears inconsistent with what the Supreme Court intended in setting up the fund. Further, these expenditures raise questions about the focus and priorities of the VSB in carrying out its mission. The expenditures resemble those more typical of a professional or trade association. The VSB was not set up primarily as a professional association, but rather as a regulatory agency with a mission that includes upholding and elevating the standards of honor and integrity in the legal profession. As such, all of its discretionary expenditures should be made prudently and should be able to withstand public scrutiny.

Recommendations are made to:

- lower the A&F fund balance to a reasonable level, and

- discontinue payment of certain expenses from the A&F fund.

The Disciplinary System Works Well Although Some Changes Are Needed to Improve Public Protection and Build Public Confidence

The primary mission of the VSB is to regulate the legal profession to protect the public from lawyer misconduct. In doing so, the VSB has developed a complex disciplinary system that strives to balance the need to protect the public with the need to ensure that the limited resources of the Bar are used efficiently. The Bar is also faced with the challenge of maintaining public trust, being accountable, and protecting the public while ensuring the system protects the rights of those accused and treats them fairly.

This review found that the disciplinary system works relatively well in achieving balance between the competing demands on the system. Nevertheless, some problems were identified which need to be addressed to improve public protection, build public trust in the system, and increase accountability to the public. Moreover, some minimal steps could be taken to improve fairness in the system.

Process for Dismissing Complaints Needs Strengthening. Protection of the public is the most important goal of Virginia's disciplinary system. The disciplinary process begins with the filing of complaints by members of the public regarding the conduct of members of the Virginia State Bar. However, the majority of complaints against members of the Bar are dismissed before a hearing ever takes place on the complaint. Bar counsel appear to have sufficient basis to screen out most of these complaints. However, review of VSB disciplinary files indicated some weaknesses in: (1) the documentation of case dismissal decisions, (2) the provision of an opportunity for complainants to comment on the accused attorney's response to allegations, and (3) the scope of bar counsel's authority to dismiss cases. Recommendations are made to:

- improve documentation of dismissed cases and limit bar counsel's authority to dismiss cases after a preliminary investigation, and

- provide complainants with an opportunity to rebut the accused attorney's response prior to dismissal.

Additional Improvements Could Be Made to Protect the Public. This review also identified several changes to the disciplinary system that could be made to enhance the VSB's ability to protect the public. Currently, complainants do not have the right to appeal dismissals by bar counsel. In addition, bar counsel cannot appeal decisions to dismiss cases after adjudication by Bar committees or the disciplinary board. However, attorneys accused of violating ethical standards (respondents) have the right to appeal case decisions in most instances. In addition, citizen complainants do not have the same rights to immunity from civil suits in filing complaints against lawyers, as lawyers currently have.

While the system has changed to involve lay persons in the adjudication of complaints against lawyers, lay member participation is not mandatory in all parts of the process. Further, it is not clear that the VSB has taken steps to ensure that adjudicatory decisions are consistent across the Commonwealth. This report includes recommendations to:

- provide complainants with the right to appeal dismissals,
- provide complainants with absolute immunity from civil suits for all disciplinary complaints made to the VSB,
- require lay member participation in district committee and disciplinary board actions, and
- have the VSB take steps to assess consistency in outcomes of committee decisions.

Steps Could Be Taken to Improve Public Confidence in the System. This review found that the VSB has taken a number of important steps to improve public trust in the system to discipline lawyers in recent years. However, several aspects of the current system continue to reduce confidence in the system and perhaps raise suspicions that the system is designed to protect lawyers instead of the public. These include maintaining a committee system that is closed to public access and allowing certain practices which create appearances of impropriety. Further, lack of understanding about the system and its purposes could be improved to facilitate a higher degree of public trust. Review of disciplinary files indicated that the Bar could more clearly explain reasons for case dismissals to complainants.

Recommendations are made to:

- further open the disciplinary process to the public;
- prevent members of the Bar's council from representing respondents in disciplinary proceedings and clarify participation by other Bar officers, committee members, and board members;
- prohibit Bar members from having access to confidential disciplinary information, other than Bar staff and members of the standing committee on lawyer discipline;
- require disclosure of potential conflicts of interest in disciplinary cases; and
- provide more detailed explanations for dismissals to complainants.

Minor Changes Could Be Made to Further Improve System Fairness. Analysis of the VSB disciplinary system found that, on the whole, attorneys accused of violating ethical standards are treated fairly. However, some minor changes could be made to improve the fairness of the system.

Currently, respondents are only entitled to receive very limited information from bar counsel about their case in order to prepare for a hearing. Further, respondents and their counsel are not allowed to be present for subcommittee meetings in which decisions are made to impose discipline and approve or disapprove proposed agreed dispositions. And, subcommittee members who consider whether to set a case for hearing may also sit on the committee panel that hears the case.

Recommendations are made to improve system fairness by:

- providing respondents with limited discovery in disciplinary cases and the right to appeal dismissals which create a disciplinary record, and
- excluding certain subcommittee members from the adjudicatory process, and allowing respondents and their counsel to be present for subcommittee meetings.

Changes Could Be Made to Improve the Efficiency of the Disciplinary System. Currently, the VSB assesses the efficiency of the disciplinary system by monitoring time guidelines it has established for the various steps in the disciplinary process. Analysis of VSB performance in reaching its guidelines indicates that most complaints are not processed within the goals established for the system. Several changes could be made to assist the Bar in achieving its goals and strengthening the efficiency of the system. Recommendations are made to improve efficiency by:

- improving the monitoring of performance in meeting time guidelines,
- reclassifying at least one position as an additional bar counsel position,
- better monitoring of staff productivity and assessing the need for paralegal support, and
- developing a training program for investigative staff.

The VSB's Current Mission and Role Raises Concerns about Its Regulatory Focus

This review found that, with one minor exception, most VSB activities appear consistent with the mission established for it by the General Assembly and the Supreme Court of Virginia. Nevertheless, there appears to be a need for better prioritization of activities to ensure that the Bar's regulatory activities remain its primary focus. Findings in this report indicate that the Bar may need to reallocate existing resources to address resource needs in this area.

The association-like nature of some programs and activities conducted by the Bar raises questions about whether the Bar is properly focused on its regulatory mission. In addition, the expansion of the Bar into commercial activities is unusual for a State agency and exposes the Bar to potential conflicts, especially with its regulatory function. Further, these types of activities divert resources from the Bar's most important activity — lawyer discipline — and raise concerns about public accountability.

Implications for the Future Role of the Virginia State Bar

Concerns about the unusual mission and role that the unified bar has as a state governmental agency are not new. One legal scholar who studied unified bars in the 1980s has argued that the unified bar as an institution has three contradictory images which affect its governance and accountability — that of a public agency, a compulsory membership organization, and a private voluntary association. Clearly, these images are reflective of the role of the unified

bar in Virginia and as such, raise concerns about how these contradictory roles can be appropriately balanced to ensure continued protection of the public and enhance public confidence in Virginia's legal system.

Without a more thorough examination and delineation of the role of the Virginia State Bar in the future, striking the proper balance between the Bar's regulatory and non-regulatory activities will continue to be problematic. The Bar will most likely continue to experience pressure to change the scope of its activities from its members, other statewide voluntary bar associations, complainants, and members of the General Assembly.

The Supreme Court of Virginia and the General Assembly may wish to consider several options for the future to refocus the Bar's activities and improve its public accountability. These could include structural changes to the Bar's governance, transfer of certain activities to other entities, or implementing a more structured system of oversight.

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I. Overview of the Virginia State Bar

Senate Joint Resolution (SJR) 262, passed by the 1995 General Assembly, directed the Joint Legislative Audit and Review Commission to review the area of administration of justice as part of the Commission's responsibility for examining functional areas of government under the Legislative Program Review and Evaluation Act (Appendix A). The 1995 General Assembly also passed SJR 263, which directed JLARC to conduct an analysis of the Virginia State Bar (VSB) and include an evaluation of its revenues, staffing, and activities in relation to its authority under statute and the *Rules of Virginia Supreme Court* (Appendix B). Of particular concern was that the review be conducted with a view toward ensuring the maximum effectiveness of the VSB in carrying out its mission with the minimum amount of necessary resources.

This review is the second in a series on the administration of justice in Virginia. It focuses on the VSB's overall performance in carrying out its mission. This report assesses the funding of VSB's activities through mandatory member dues, the disciplinary process for Virginia lawyers, and the relationship between the Bar's mission and its functions.

The VSB was statutorily created in 1938 by the General Assembly as an administrative agency of the Supreme Court of Virginia. Originally established to regulate the legal profession, Virginia State Bar activities have grown to support a broad mission. The VSB's primary functions currently include regulating and disciplining lawyers, providing member services, educating attorneys, and improving legal services and the administration of justice.

EVOLUTION OF THE VIRGINIA STATE BAR AND ITS FUNCTIONS

The mission and responsibilities of the VSB have grown and expanded since its creation. Originally set up to regulate the admission, discipline, and disbarment of all attorneys in Virginia, the Bar now undertakes a number of regulatory and non-regulatory activities. These expanded activities can be classified into four broad categories: (1) improving and elevating the profession, (2) improving the quality of legal services in Virginia, (3) improving the administration of justice, and (4) encouraging the education of its members. Most of the diverse functions undertaken by the VSB today are a direct result of the authority it receives from the Supreme Court of Virginia through the *Rules of Virginia Supreme Court (Court Rules).*

The VSB Originally Was Established to Regulate the Profession

In 1938, the General Assembly enacted Chapter 410 of the 1938 Acts of Assembly (codified in 1942 and recodified as §54.1-3909 *et seq.* of the *Code of Virginia)* creating the unified Virginia State Bar as an agency of the Virginia Supreme Court of

Appeals (now the Supreme Court of Virginia). As a unified bar, the VSB has three primary characteristics: (1) membership is required for all practicing lawyers, (2) it is self-governing, and (3) the Bar is authorized as a governmental agency. In Virginia the purpose in establishing a mandatory Bar was to:

> Provide for the Organization as an Agency of the State of the Virginia State Bar, and for its Regulation, Powers, and Government, Including the Admission of Lawyers to Practice and their Discipline and Disbarment (Report of the Special Committee on the Organization of the Bar, Virginia State Bar Association, August 4, 1926).

In addition to its main responsibilities of regulating the admission, discipline, and disbarment of lawyers, the Bar's governing body, the council, was empowered to formulate and adopt rules of professional ethics and conduct, which were subject to approval by the Virginia Supreme Court of Appeals.

Authority of the Virginia State Bar

The Virginia State Bar receives its powers and duties from the authority granted to it through the *Code of Virginia* and *Court Rules*. The *Code of Virginia (Code)* provides that "the Virginia State Bar shall act as an administrative agency of the [Supreme] Court for the purpose of investigating and reporting violations of rules and regulations adopted by the Court under this article" (*Code of Virginia* §54.1-3910). While the *Code* sets forth the general framework for the organization and government of the Virginia State Bar, it defers to and grants legislative authority to the Supreme Court of Virginia to promulgate rules and regulations which: (1) define the practice of law, (2) prescribe a code of ethics governing lawyers' professional conduct, and (3) set out procedures for disciplining, suspending, and disbarring attorneys.

Scope of VSB Activities Has Grown

Virginia State Bar activities as promulgated through the *Code* and *Court Rules* have expanded since the Bar's creation in 1938. As a result, the VSB is unusual in that it is a State agency which has responsibility for regulatory activities as well as non-regulatory activities which are more typically conducted by professional associations. Other State agencies which regulate professions and occupations do not combine regulatory and association-like activities.

In 1938, the *Code of Virginia* established the VSB's organization and government, and a fee schedule for members. At the same time, Part 6, § IV of the *Court Rules* was adopted to more specifically set out the Virginia State Bar's powers and responsibilities. While a number of changes to the *Code* have expanded the authority for activities in which the Bar engages, most new activities and related authority have come through amendments to the *Court Rules* promulgated by the Supreme Court of Virginia (Table 1).

Table 1

Authorized Virginia State Bar Activities

Activities	*Year Added*	*Current Authority*	
		Code of Virginia	*Court Rules*
Creation of the State Bar fund as a special fund in the State Treasury for member fees	1940	§54.1-3913	
Regulation of legal aid societies	1956	§54.1-3916	
Master retirement program for members	1968	§54.1-3917	
Registration of legal corporations	1973	§54.1-3902	Pt. 6, § IV, Para. 14
Creation of the VSB disciplinary board	1976		Pt. 6, § IV, Para. 13(C)
Legal ethics and unauthorized practice of law opinions	1978		Pt. 6, § IV, Para. 10
Membership list available to not-for-profit organizations conducting continuing legal education	1981	§54.1-3918	
Legal ethics course (precursor to professionalism course)	1984		Pt. 6, § IV, Para. 13.1
Clients' protection fund	1985		Pt. 6, § IV, Para. 16
Expanded disciplinary responsibilities of the council, the committee on lawyer discipline, and bar counsel	1986		Pt. 6, § IV, Para. 13(B)
Mandatory continuing legal education requirements	1986		Pt. 6, § IV, Para. 17
Creation of the administration and finance fund	1987		Pt. 6, § IV, Para. 9(i)
Member certification of liability insurance	1989		Pt. 6, § IV, Para. 18
Procedure for administrative suspension of members	1991		Pt. 6, § IV, Para. 19
Council authority to improve the quality of legal services	1991		Pt. 6, § IV, Para. 9(j)
Council authority to evaluate judicial candidates	1991		Pt. 6, § IV, Para. 9(j)
Approval of trust account depositories	1993		Pt. 6, § IV, Para. 20
Endorse or hold group or individual insurance policies for the benefit of members	1995	§54.1-3917.1	

Source: Section 54.1-3902 *et seq.* of the *Code of Virginia* and the *Rules of Virginia Supreme Court* Pt. 6, § IV, Para. 1-20.

From 1940 through 1973, amendments to the *Code* created authority for the VSB to operate a State Bar fund, regulate legal aid societies, create a retirement program for members, and register legal corporations. In 1981, the VSB acquired the authority through the Virginia General Assembly to make the Bar membership list available to not-for-profit organizations conducting continuing legal education programs. Finally, retroactive authority to endorse or hold group or individual insurance policies for the benefit of Bar members was authorized by the 1995 Session of the General Assembly. Group life, health, and disability insurance policies have been sponsored by the VSB since the mid-1950s.

The Bar experienced two additional periods in which significant growth occurred in its operations as a result of amendments to the *Court Rules*. First, from 1973 through 1978, Bar authority was expanded to include responsibility for registering legal corporations, operating the disciplinary board, and issuing legal ethics and the unauthorized practice of law opinions. Secondly, from 1984 through 1989, the VSB was given authority and responsibility for conducting a mandatory professionalism course for new Bar members, and operating the clients' protection fund and the administration and finance fund. The VSB staff was also given additional investigative and prosecutorial authority in the disciplinary area.

Amendments to the *Court Rules* in 1991 provided explicit authority for two areas in which the council had already been undertaking activities. Additional areas of authority included: (1) improving the quality of legal services made available to the people of Virginia, and (2) evaluating judicial candidates on a nonpartisan, merit basis. These amendments were based on a 1990 United States Supreme Court decision *(Keller v. State Bar of California)* in which the Court held that certain Bar activities funded by member dues were not permissable.

STRUCTURE, FUNDING, AND ORGANIZATION OF THE VIRGINIA STATE BAR

As mentioned above, the *Code of Virginia* and the *Court Rules* establish the authority of the Virginia State Bar. The *Code* expressly gives the VSB authority to regulate the legal profession and to regulate the operation of legal aid societies. The *Court Rules* further enumerate the powers and responsibilities of the VSB and set out the Bar structure and organizational framework.

The VSB is governed by its council. The *Court Rules* designate the officers of the VSB to be a president, president-elect, and a secretary-treasurer. The secretary-treasurer also serves as the Bar's executive director and chief operating officer. Virginia State Bar standing and special committees, specialty law sections, and special boards guide Bar activities through the use of its volunteer members.

The VSB is funded primarily through mandatory annual fees assessed on 20,408 active and 6,759 associate member lawyers. Growth in the VSB's spending and

revenue patterns reflect the growth in the Bar's mission and activities over time. The Bar's total expenditures were almost $5.3 million in FY 1995.

The VSB executive director oversees 68 full-time staff, who carry out the Bar's daily operations. The operation of the Bar's disciplinary system is carried out by staff of the department of professional regulation and the office of the clerk, who account for 41 percent of the Bar's total full-time staff. Other agency staff with regulatory and non-regulatory responsibilities work in the departments of: (1) communications and public service, (2) bar services, and (3) administration.

Governing Structure of the Virginia State Bar

The *Rules of Virginia Supreme Court (Court Rules)* delineate the structure of the VSB's governance and its organization. A 71-member council governs Bar operations with the assistance of its officers and an executive committee. The *Court Rules* delegate broad authority to the council for the purpose of operating the Bar (Exhibit 1). The *Bylaws of the Virginia State Bar and Council* authorize an executive committee of the

Exhibit 1

Authority of Council Delegated by the Supreme Court of Virginia

- Regulate the legal profession
- Improve the quality of legal services made available to the people of Virginia
- Investigate, evaluate or endorse judicial candidates on a nonpartisan, merit basis
- Uphold and elevate the standards of honor, integrity, and courtesy in the legal profession
- Encourage higher and better education for membership in the profession
- Promote reforms in judicial procedure and the judicial system that are intended to improve the quality and fairness of the system
- Recommend procedures for disciplining, suspending, and disbarring attorneys
- Recommend to the Supreme Court the adoption, modification, amendment, or repeal of any rule of the Supreme Court of Virginia

Source: Part 6, § IV, Para. 9 of the *Rules of Virginia Supreme Court.*

council to act on its behalf between meetings of the full council and delegates authority to the executive committee to act on fiscal matters. A significant amount of the Bar's work in developing and assessing policies is performed by its standing and special committees, specialty law sections, and special boards.

Bar Council. The VSB is governed by a 71-member council, which is comprised of:

- representatives elected by members of the Bar from each of the 31 judicial districts (some districts elect more than one council member);
- six members appointed by the Virginia Supreme Court from members of the Bar in the State at large;
- a president, president-elect, and immediate past president who have been elected by the members of the Bar (ex officio members of the council unless already regular members of the council);
- the president of the young lawyers conference (ex officio member of the council); and
- the chair of the conference of local bar associations (ex officio member of the council).

The council appoints an executive committee consisting of ten members to act on its behalf between meetings of the full council. Six executive committee members are elected annually by the council, with the VSB president, president-elect, immediate past-president, and president of the young lawyers conference serving as ex officio members.

Officers of the Virginia State Bar. The officers of the Virginia State Bar include a president, a president-elect, and a secretary-treasurer. The president presides over the meetings of the council and is elected for a one-year term. The president takes office upon adjournment of the VSB annual meeting after serving as the president-elect for one year. The president-elect is also elected for a one-year term commencing upon adjournment of the VSB annual meeting.

The secretary-treasurer of the Bar also acts as its executive director and chief operating officer, and is annually elected by the council. The secretary-treasurer is responsible for retaining all the records of the council and the VSB, and overseeing the daily operations of the Bar and its staff. In addition, this officer also serves as secretary-treasurer to the executive committee of the VSB.

Committees, Sections, and Special Boards. In addition to the council and the executive committee, the Bar operates standing and special committees, specialty law sections, and special boards. Much of the work of the Virginia State Bar is performed by its volunteer members who serve on these committees, sections, and special boards. Members of the standing and special committees are appointed by the VSB president and a nominating committee, and are later ratified by the council. Exhibit 2 details the six standing and 16 special committees of the Bar.

Exhibit 2

Virginia State Bar Committees

Standing

- Lawyer advertising and solicitation
- Lawyer discipline
- Lawyer ethics
- Professionalism
- Resolutions
- Unauthorized practice of law

Special

- Access to legal services
- Bench-bar relations
- Joint committee on alternative dispute resolution
- Lawyer malpractice insurance
- Legal network in Virginia
- Military law
- Publications/public information
- Seminars
- Bar-news media relations
- Cooperation with affiliated professions
- Judicial nominations
- Lawyer referral
- Long-range planning
- Personal insurance for members
- Resolution of fee disputes
- Special committee to study the *Code of Professional Responsibility*

Source: Virginia State Bar Leadership Directory, 1995-1996.

In addition to these committees, the VSB has 20 specialty law sections. Any attorney who wishes to participate in a specialty law section of the Bar may do so after paying a voluntary fee to belong. The purpose of these sections is to provide a forum for attorneys to further develop their specialty areas of practice and network with others who have similar specialty interests. The specialty law sections of the Bar include sections devoted to administrative law, bankruptcy law, business law, family law, criminal law, and others. Each of the sections has a board of governors.

The VSB also operates three special boards which are: (1) the clients' protection fund board, (2) the disciplinary board, and (3) the mandatory continuing legal education board. Members of the clients' protection fund board are appointed by the council, while members of the disciplinary board and the mandatory continuing legal education board

are appointed by the Chief Justice of the Supreme Court after consultation with the council. The clients' protection fund board oversees the administration of the clients' protection fund. The disciplinary board adjudicates the most serious complaints in the VSB disciplinary system. The mandatory continuing legal education board oversees and enforces Bar rules concerning the mandatory continuing legal education requirements.

VSB Funding Has Risen Over the Years

As the Bar's mission and activities expanded over time, its spending and revenue patterns have reflected this growth. Overall, funding for the Virginia State Bar has increased over the years (Table 2). In FY 1995, appropriation authority granted by the General Assembly reached $5,488,016, an increase of 27 percent since FY 1991. Expenditures and revenues also grew during this period. From FY 1991 to FY 1995, expenditures increased overall by almost 26 percent while revenues rose by almost 24 percent.

Table 2

Virginia State Bar Appropriations, Expenditures, and Revenues FY 1991 to FY 1995

Fiscal Year	Total Appropriation	Total Expenditures	Total Revenues
1991	$4,320,800	$4,206,357	$4,574,321
1992	$4,682,432	$4,678,881	$4,546,559
1993	$5,216,468	$5,216,014	$5,681,634
1994	$5,366,338	$5,350,054	$5,335,795
1995	$5,488,016	$5,299,277	$5,652,809

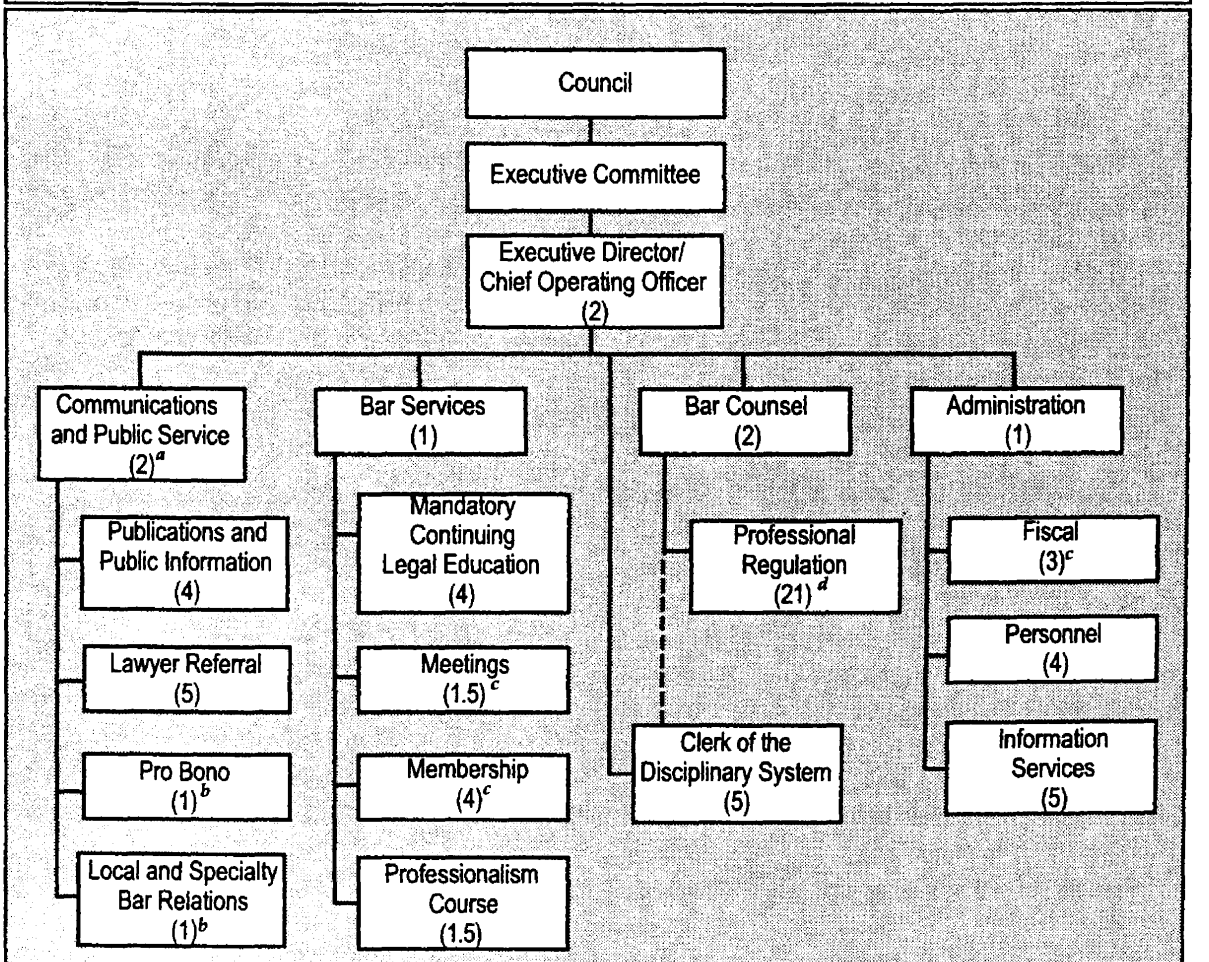
Source: Appropriations Acts, Chapter 733 approved on May 3, 1991, Chapter 994 approved on April 7, 1993, and Chapter 853 approved on May 5, 1995; and Virginia State Bar Subsidiary Revenue and Expenditure reports for FY 1991 to FY 1995.

Agency Organization and Staffing

The Virginia State Bar operations are carried out on a daily basis by its full-time staff. The staff is headed by the Bar's executive director, who oversees an organization with 73 authorized full-time positions. Currently, the Bar employs 68 full-time staff. About 41 percent of the full-time staff, or 28 positions, work in two areas primarily responsible for lawyer discipline: (1) the department of professional regulation, and (2) the office of the clerk of the disciplinary system. The remaining full-time staff work in three other departments: (1) communications and public service, (2) bar services, and (3) administration (Figure 1).

Figure 1

Virginia State Bar Organizational Chart



Notes:
[a] Does not include one temporary part-time wage employee.
[b] Does not include one long-term part-time wage employee.
[c] Does not include three college students used full-time during the summer to assist membership, fiscal, and meetings department staff.
[d] Does not include one long-term part-time wage employee and one temporary part-time wage employee.

Source: JLARC staff analysis of Virginia State Bar employee roster and November 8, 1995 memorandum received from the director of personnel regarding staffing.

The position of Bar Counsel oversees the operations of the department of professional regulation. The office of the clerk of the disciplinary system provides administrative support to the disciplinary system and is responsible for maintaining all disciplinary files. The communications and public service department of the Bar oversees four areas: publications and public information, the Virginia Lawyer Referral Service, pro bono coordination, and local and specialty bar relations. The VSB bar services department also oversees four areas: mandatory continuing legal education,

meetings, membership, and the professionalism course. The administration department oversees fiscal, personnel, and information services and provides support to the entire Bar.

OPERATIONS OF THE VIRGINIA STATE BAR

The primary responsibility of the Virginia State Bar is to regulate the legal profession in Virginia. The regulation of the legal profession is primarily conducted by professional staff in the department of professional regulation and volunteers who investigate, prosecute, and adjudicate complaints alleging violations of the Virginia *Code of Professional Responsibility* and complaints alleging the unauthorized practice of law. In this role, the VSB also issues advisory opinions and conducts other regulatory activities. The agency also conducts a number of non-regulatory activities. These primarily involve activities that: (1) support the improvement of the legal profession, (2) improve the quality of legal services in Virginia, (3) improve the administration of justice, and (4) encourage the education of its members.

Regulatory Activities of the Virginia State Bar

The VSB regulates the practice of law through its disciplinary system. The disciplinary system was established to investigate, prosecute, and adjudicate violations of the Virginia *Code of Professional Responsibility (CPR).* The *CPR* is a code of conduct establishing ethical standards for the practice of law in Virginia. In addition to the administration of the disciplinary system, the Virginia State Bar has responsibility for:

- investigating complaints alleging the unauthorized practice of law;
- issuing advisory opinions regarding legal ethics, the unauthorized practice of law, and lawyer advertising and solicitation; and
- responding to legal ethics questions through a legal ethics hotline.

The Virginia State Bar also conducts several other mandatory regulatory activities, which include:

- the registration of legal corporations,
- the regulation of legal aid societies,
- the approval of trust account depositories,
- the verification of member certification of liability insurance,
- the approval of continuing legal education providers and course content, and

- the tracking and enforcement of mandatory continuing legal education requirements.

Non-Regulatory Activities of the Virginia State Bar

The VSB conducts a number of activities which are non-regulatory in nature. These activities are related to the non-regulatory aspects of the agency's mission to: (1) support the improvement of the legal profession, (2) improve the quality of legal services made available to the people of Virginia, (3) improve the administration of justice, and (4) encourage the education of its members.

Activities to Support the Improvement of the Legal Profession. The Virginia State Bar conducts a number of activities which are directed at supporting the improvement of the legal profession. These activities include:

- coordinating local and specialty bar relations,
- developing and supporting speciality law sections,
- endorsing a professional liability insurance plan,
- providing subscription services to an on-line legal research retrieval system,
- publishing a monthly magazine,
- sponsoring an annual meeting for members,
- sponsoring personal insurance plans (life, health, disability), and
- sponsoring the lawyers expo at the VSB annual meeting.

Activities to Improve the Quality of Legal Services in Virginia. The Virginia State Bar engages in a number of activities which are designed to improve the quality of legal services available in Virginia. These include: (1) operating the Virginia Lawyer Referral Service, (2) providing pro bono services to the public, and (3) developing consumer information brochures. The Virginia Lawyer Referral Service was created in 1977 and currently operates through the VSB with five full-time staff members.

The VSB promotes and coordinates pro bono initiatives throughout the State using one full-time pro bono coordinator. This position was established in 1991. The VSB also sponsors an annual pro bono conference and a legal aid luncheon.

As a service to Virginia consumers, the VSB prepares a number of brochures and handbooks designed to educate the public on law-related issues. Examples of the brochures and handbooks prepared by the VSB include: *How Do Lawyers Charge, Legal Aids for the Wise Consumer, Marriage in Virginia,* and the *Senior Citizens Handbook.* The staff of the publications and public information department draft and edit many of these publications. Other publications are initially drafted by various specialty law sections of the VSB, with the VSB staff providing only editorial assistance.

Activities to Improve the Administration of Justice. In order to improve the administration of justice in Virginia, the Bar evaluates and makes recommendations on judicial candidates on a nonpartisan, merit basis. It also promotes reforms to improve

the judicial system largely through the work of its specialty law sections. In addition, the Bar operates and funds the clients' protection fund as a mechanism for reimbursing those clients who suffer financial losses due to the dishonest conduct of lawyers licensed in Virginia.

Educational Activities. In addition to its regulatory activities regarding continuing legal education (CLE) courses, the Bar serves in the capacity of a CLE provider. The Bar sponsors a mandatory professionalism course, a midyear legal seminar, an annual Cambridge seminar, and various seminars provided by its specialty law sections. In addition, the Bar maintains a close working relationship with the education section of the Virginia Law Foundation. The Foundation's continuing legal education section provides the majority of CLE courses in the Commonwealth and cosponsors a number of legal seminars with VSB speciality law sections.

JLARC REVIEW AND REPORT ORGANIZATION

This JLARC staff review of the Virginia State Bar provides an assessment of its revenues, staffing, and activities in relation to its mission as defined by statute and the *Rules of Virginia Supreme Court.* A number of research activities were undertaken as part of this review in order to obtain a comprehensive understanding of the Bar's operations. The remainder of this chapter details the research activities undertaken by the JLARC staff and provides a description of the three additional chapters of this report.

JLARC Staff Review

This review assesses the overall performance of the Virginia State Bar in carrying out its mission with the minimum amount of necessary resources. Research activities were designed to provide an in-depth examination of the funding of VSB activities, the disciplinary system, and the Bar's mission in relation to its regulatory and non-regulatory activities. Some of these research activities included: (1) document reviews, (2) structured interviews, (3) an analysis of financial data, (4) a mail survey of Bar members, (5) a review of disciplinary complaint files, (6) a comparison of other unified Bar organizations, including governing structures, activities, and disciplinary systems, and (7) observation of Bar meetings.

Document Reviews. A number of documents were examined which address the Bar's authority and responsibilities, its organization and operating procedures, and the services it provides to both Virginia lawyers and the public. The primary sources of the VSB's statutory and legal authority reviewed were the *Code of Virginia* and the *Rules of Virginia Supreme Court.* Documents relating to the creation of the VSB in 1938 were also reviewed.

Review of the VSB's organization and operating procedures involved the collection and analysis of a number of VSB-prepared documents. These documents included annual reports, annual financial reports, VSB budget documents, policy and

procedure manuals, staff position descriptions, monthly timesheet summaries of disciplinary staff, and annual disciplinary complaint summaries. The review of the disciplinary process included the use of studies conducted by other states, the American Bar Association, and the National Organization of Bar Counsel.

Structured Interviews. Numerous structured interviews were conducted during the course of this review. Interviews were conducted with: (1) 26 VSB staff across all agency departments; (2) eight members of the VSB executive committee and council, including past and present officers of the Bar; (3) 13 past and present volunteers participating in the disciplinary process, including members of the district committees, disciplinary board, and the committee on lawyer discipline; and (4) presidents and/or executive directors of five statewide voluntary bar associations in Virginia.

Analysis of VSB Financial Data. This review included an analysis of VSB financial data for the past five fiscal years. To conduct the analysis, JLARC staff collected financial information on the Bar's operations from: (1) the Commonwealth's Cost Accounting and Reporting System, (2) annual VSB financial reports, including agency budgets from FY 1991 to FY 1995, (3) VSB audit reports conducted by the Auditor of Public Accounts, and (4) VSB appropriations from FY 1991 to FY 1995.

Mail Survey. A mail survey of attorneys who were licensed in the Commonwealth of Virginia and had active membership status in the VSB as of March 1995 was conducted. The JLARC staff sent the mail survey to 1,000 randomly-selected attorneys. This survey was used to examine perceptions regarding the appropriateness of members' dues, the scope of the Bar's activities, and the adequacy of the Bar's disciplinary process. JLARC staff received 337 responses to this mail survey, for a response rate of 33.7 percent.

Disciplinary Complaint File Reviews. Four separate disciplinary complaint file reviews were conducted as part of the JLARC staff review of the disciplinary system. These file reviews were performed to examine: (1) complaints dismissed by intake unit staff, (2) complaints dismissed after a preliminary investigation by bar counsel, (3) complaints dismissed after a review by subcommittees of the district committees, and (4) the timeliness of disciplinary complaint processing.

Comparison of Unified Bar Organizations. This review also included a comparison of the Virginia State Bar with 32 unified bar organizations. The purpose of this assessment was to compare unified bar organizational structures, staffing, activities, and disciplinary systems with that of the Virginia State Bar. This comparison was made through examination of: (1) comparative data compiled by the American Bar Association (ABA) on state bar organizations in various ABA documents, and (2) statutes and disciplinary rules of other unified bars. JLARC staff also conducted a telephone survey of the 32 unified bars to obtain additional information on their governing structures and disciplinary systems.

Observation of Bar Meetings. To gain a thorough understanding of Bar operations, JLARC staff observed more than 30 official meetings of the Bar. Meetings

observed included those of the VSB standing and special committees, the executive committee, district committees, and the disciplinary board.

Report Organization

This chapter has provided an overview of the Virginia State Bar consisting of a discussion of the evolution of its functions, governing structure, funding, organization, and operations. This chapter also included a brief introduction to the JLARC staff review of the Virginia State Bar. Chapter II provides an analysis of Bar funding. The regulation of the legal profession and the operation of the VSB disciplinary system are discussed in Chapter III. This chapter specifically addresses concerns related to public protection, public confidence in the disciplinary system, methods to improve fairness of the system for respondents, and system efficiency. Finally, Chapter IV examines the mission and role of the Virginia State Bar.

II. Funding the Operations of the Virginia State Bar

As a non-general fund agency, the Virginia State Bar (VSB) finances its operations with dedicated special revenues, the majority of which are mandatory attorney fees. Because the VSB is a compulsory membership organization established for the regulation of Virginia lawyers, the General Assembly has been concerned whether the mandatory fees paid by lawyers fully support the mission of the Bar. Senate Joint Resolution 263 directed JLARC

> to conduct an analysis of the Virginia State Bar, which shall include .... a thorough evaluation of the revenues and staffing and each of the activities and programs .... with a view toward ensuring the maximum effectiveness of the Virginia State Bar in carrying out its assigned mission with the minimum resources necessary.

This analysis found that the Bar expended approximately 54 percent of its total FY 1995 expenditures on its regulatory functions. However, the Bar may be charging Virginia attorneys more than is necessary to support its regulatory and non-regulatory functions. The Bar's annual revenues exceeded total expenditures in three of the past five years. Excess revenues combined with excessive cash balances in its special funds have resulted in a large cash reserve. This cash reserve could have paid for about 50 percent of the Bar's FY 1995 operating expenditures. Despite the growing reserve over the past five years, the Bar increased mandatory member dues twice.

The VSB operations are financed through three special funds: (1) the State Bar fund, (2) the administration and finance (A&F) fund, and (3) the clients' protection fund. All mandatory attorney fees are deposited in the State Bar fund. The State Bar fund and the A&F fund are both used to pay for VSB activities, although most operating expenditures are funded through the State Bar fund. The A&F fund was created by the Supreme Court of Virginia when it provided the Bar with the authority to maintain a fund to pay necessary expenses related to official meetings and functions of the State Bar for which State funds cannot be used.

Given the growing magnitude of the cash balances in the VSB's special funds, this review found that the Bar's administration of these funds can be improved to ensure that Virginia attorneys do not pay more in mandatory dues than is necessary for the Bar to carry out its mission. Improvements can also be made to ensure that certain Virginia State Bar fund management policies are consistent with fund management policies used by other State agencies. Further, all VSB expenditures should meet the financial accountability standards expected by the public of a State regulatory agency.

ADMINISTRATION OF THE STATE BAR FUND CAN BE IMPROVED

One of the requirements to practice law in Virginia is to pay an annual fee (currently $185 for active members) to establish and maintain membership in the Virginia State Bar. According to a JLARC survey of VSB members (Appendix C), 48 percent of respondents thought their VSB membership dues are at about the right level. These funds are used to pay for the costs associated with regulating the legal profession and operating the VSB. Annual attorney fees are deposited with the State Treasurer in the State Bar fund. Expenditures and deposits to the fund are monitored through the Commonwealth's Cost Accounting and Reporting System (CARS). All State-approved Bar expenditures are paid for out of this fund, which is the basis for the VSB operating budget.

Analysis of the State Bar fund indicates that the majority of this fund's expenditures (57 percent) are used to regulate the legal profession. However, when total agency expenditures are considered, approximately 54 percent of total Bar resources are spent on regulatory activities. In addition, revenues have outpaced expenditures resulting in a fund balance that has grown consistently over the past five years. This large and growing balance indicates that the Bar may be charging annual fees (known as "member dues") that are in excess of what is actually needed to fund the activities of the Bar. The current State Bar fund balance could have paid for 30 percent of the fund's FY 1995 operating expenditures.

Several additional concerns were identified with the management of the State Bar fund. First, the State Bar may have erroneously retained unclaimed insurance refunds belonging to VSB members who had participated in Bar-sponsored insurance plans. These funds were not used to offset member dues or to pay for VSB operations. They were, however, transferred from the State-monitored Bar fund into the VSB's A&F fund in order to earn interest income which has been retained by the VSB. Secondly, until recently the budgeting process for making grants from the State Bar fund to capitalize the client's protection fund has been largely informal. While the Bar did budget $130,000 for the fund in FY 1995, it remains unclear as to whether the General Assembly intended for member dues to be used for this purpose.

Regulatory Functions Make Up the Majority of State Bar Fund Expenditures

In the course of this evaluation, JLARC staff found that the majority of State Bar fund expenditures are used to finance the regulatory functions of the Bar. A JLARC staff estimate of FY 1995 State Bar fund expenditures indicates that approximately 57 percent ($2.9 million) was used to fund regulatory activities. It should be noted that there may be some additional incidental regulatory expenses that are not captured by this estimate. Because the Virginia State Bar does not distinguish costs based on regulatory and non-regulatory functions, it was difficult to precisely estimate these additional expenses.

Four Departments Represent the Bulk of Regulatory Expenditures. Most of the State Bar fund expenditures for regulation can be attributed to expenditures in four VSB departments. These are:

- professional regulation,
- clerk of the disciplinary system,
- membership, and
- mandatory continuing legal education (MCLE).

These four departments, along with their administrative overhead costs, made up 54 percent of the State Bar Fund expenditures in FY 1995. When additional regulatory costs for the production of the *Virginia Register* and the Bar's regulatory standing and special committees are added, the total cost of the Bar's regulatory activities represents 57 percent of VSB operating expenditures (Table 3). As Figure 2 illustrates, the disciplinary system consumes the greatest amount of State Bar expenditures. Two departments of the VSB have primary responsibility for the disciplinary system: (1) the professional regulation department, and (2) the clerk's office. These two departments account for 43 percent of State Bar fund expenditures.

Table 3

FY 1995 Expenditures on VSB Regulatory Activities

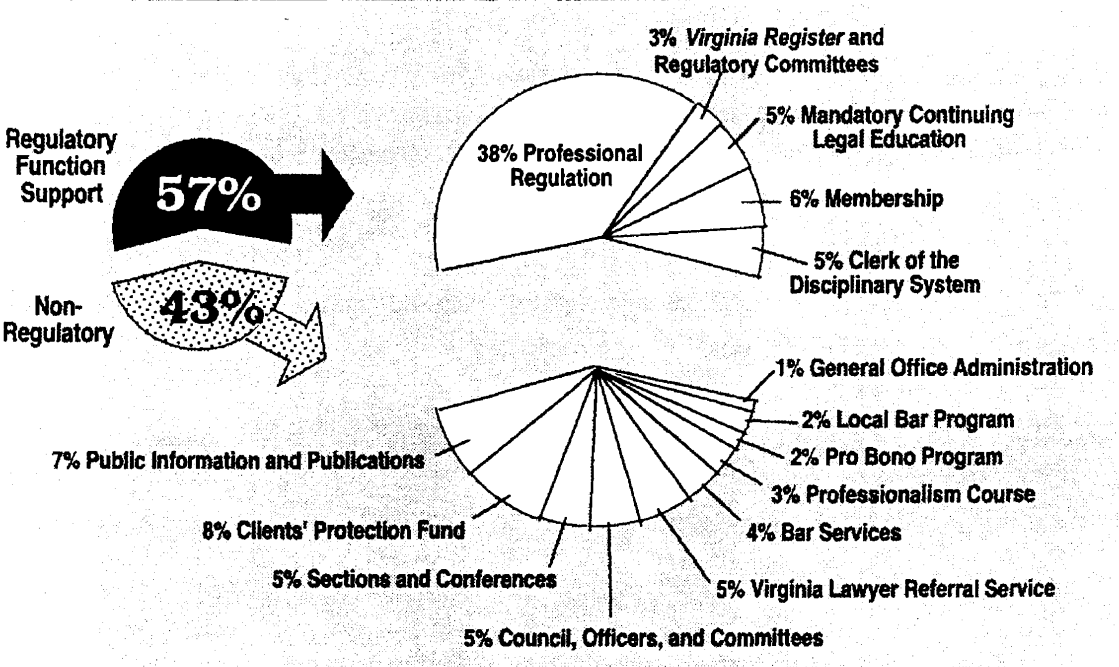
Activity / Department	*Expenditures*	*Percentage of State Bar Fund Expenditures*
Professional Regulation	$1,925,166	38%
Clerk of the Disciplinary System	$252,435	5%
Membership	$318,372	6%
Mandatory Continuing Legal Education	$248,171	5%
Virginia Register and Regulatory Standing and Special Committees	$179,744	3%
Total Regulatory Expenditures	$2,923,888	57%

Note: Regulatory standing and special committees include: advertising and solicitation, lawyer discipline, lawyers serving as fiduciaries, legal ethics, unauthorized practice of law, and the committee to study the *Code of Professional Responsibility*.

Source: JLARC staff analysis of the Virginia State Bar's financial summary report for FY 1995 and allocation of administrative staff costs by regulatory department, and the Commonwealth's Cost Accounting and Reporting System 1414 reports of expenditures details by program fund for FY 1995.

Figure 2

Virginia State Bar Expenditure Percentages, FY 1995



Note: Percentages may not add to 100% due to rounding.

Source: JLARC staff analysis of Virginia State Bar financial report summary for FY 1995, and allocation of General Administration Department expenditures for FY 1995, received on September 20, 1995.

The professional regulation department houses the investigators and VSB staff attorneys who investigate and prosecute the disciplinary cases. Total expenditures for this department in FY 1995 were about $1.9 million. The clerk's office provides substantial administrative support for the disciplinary system, including administrative support for the disciplinary board, and maintenance of Bar disciplinary files. This department's expenditures were much smaller, at about $252,000 for FY 1995.

The membership department of the VSB expends much less for its operations than the departments responsible for the disciplinary system. Nevertheless, this department plays an important role in the regulation of attorneys. It is responsible for the collection of dues, the certification of liability insurance status, and the registration of legal corporations in Virginia. The membership department has a staff of four, which often interacts with other VSB departments regarding issues such as financial statements and mandatory continuing legal education (MCLE) fees. The majority of the department's expenditures go toward staff salaries, fringe benefits, and administrative costs. The department's expenditures were about $318,372 in FY 1995.

The MCLE department is also involved in the regulation of attorneys. It keeps track of attorney compliance with continuing legal education requirements on a regular basis and also provides administrative support to the MCLE board. The board promulgates decisions regarding the appropriate structure and content of continuing legal

education courses, requirement waivers, and extension grants. The MCLE staff apply these policies and maintain member compliance records and other relevant information. This department has the smallest amount of State Bar fund expenditures of all the regulatory departments of the Bar. The department's expenditures totaled approximately $248,171 in FY 1995.

Several other activities of the Bar also contribute to the regulation of the profession. The *Virginia Register*, which is published five times per year, supports the Bar's disciplinary system by publishing legal ethics advisory opinions, changes in the *Code of Professional Responsibility*, and other disciplinary and regulatory information. In addition, the Bar operates six standing and special committees that are comprised of voluntary members who oversee aspects of lawyer regulation. These committees are:

- advertising and solicitation,
- lawyer discipline (COLD),
- lawyers serving as fiduciaries,
- legal ethics,
- unauthorized practice of law, and
- the committee to study the *Code of Professional Responsibility*.

Expenditures for the *Virginia Register* and committee operations totaled approximately $179,744 in FY 1995.

The Bar Does Not Distinguish Costs Between Regulatory and Non-Regulatory Functions. The Bar does not designate its costs between its regulatory and non-regulatory functions. The lack of staff timesheets in non-regulatory departments to break out discrete categories of staff activities made it difficult for JLARC staff to ascertain if there were any additional VSB staff costs associated with the regulatory activities. Given the mandatory nature of the fees charged annually to attorneys and the need for accountability to its members and the public, the VSB should track the amount of resources expended on regulatory versus non-regulatory activities.

Recommendation (1). **The Virginia State Bar should begin to track resources expended on regulatory and non-regulatory activities as a management tool for increasing accountability for State Bar fund expenditures.**

Virginia Attorneys May Be Charged Excessive Annual Fees

Over the last five years, State Bar fund revenues have exceeded operating expenditures consistently. This situation has contributed to a growing cash balance which totaled more than $2.5 million in FY 1995. During this time, the VSB increased dues twice, 13 percent in FY 1991 and nine percent in FY 1993. Moreover, the Bar's 1994 long range plan projected a need to increase dues by another 35 percent by FY 2000 to address projected growth in complaints against attorneys. Given the magnitude of the State Bar fund balance and the fact that the Bar's budgeting process historically ensures a year-end balance in the State Bar fund, it appears that Virginia attorneys may be

charged annual fees (member dues) that exceed the cost to regulate Virginia lawyers and provide non-regulatory services to its members.

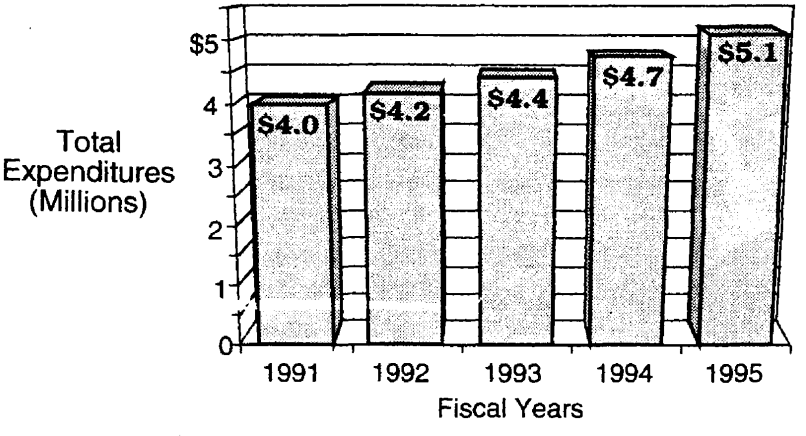
Composition of the State Bar Fund. The State Bar fund is composed of mandatory attorney fees (member dues) and other revenue sources which are collected annually. The mandatory dues paid by lawyers to practice law in Virginia finance the majority of the operations of the Virginia State Bar. Dues collected by the VSB are deposited with the Treasurer of Virginia into the State Bar fund. Labeled as dedicated special revenues, this money is not part of the Commonwealth's general fund. Rather, its sole purpose is to fund the operations of the State Bar.

In addition to dues money, the State Bar fund also contains revenues earned from fees which the Bar receives from MCLE sponsors, the professionalism course, corporate registration, specialty law sections, and commercial activities, among others. In FY 1995 total revenues amounted to about $5.4 million. In addition, more than half of the unexpended cash balance from past years remains in the operating fund. At the end of FY 1995, this balance had accrued to more than $1.5 million. The Bar budgets its annual operating expenditures by taking into account the projected revenues for that specific fiscal year only. Consequently, the majority of the unexpended cash balance continues to accumulate.

Expenditure Increases Are Related to Staff Growth. As Figure 3 illustrates, State Bar fund expenditures also have increased over the past five years. In FY 1995, expenditures reached more than $5.1 million, an increase of almost 29 percent from the FY 1991 level of almost $4 million. The primary cause of the expenditure increases was the growth in the number of VSB staff and the associated costs of staff salaries and fringe benefits. The number of VSB staff increased 46 percent from FY 1991 to FY 1995.

Figure 3

State Bar Expenditures, FY 1991 to FY 1995



Source: Virginia State Bar fiscal department.

In terms of actual full-time equivalent (FTE) positions, the VSB grew from 50 FTE positions in FY 1991 to 73 FTE positions in FY 1995.

VSB Appropriation Authority. For the past several years, the General Assembly has been concerned that VSB expenditures have been used increasingly to pay for non-regulatory activities that are unrelated to its statutory mission. Consequently, in 1994, the General Assembly included language in the Appropriation Act to direct the Bar to "strictly direct its activities toward the purposes of regulating the legal profession and improving the quality of legal services available to the people of the Commonwealth" (1994 Virginia Acts of Assembly, Chapter 966, Item 35(c)).

Although appropriations for the State Bar continued to grow in FY 1995, they were used primarily to offset inflationary budget increases and salary adjustments. In addition, appropriation authority was utilized so that revenues from the Bar's three main voluntary seminars - the annual meeting, Cambridge seminar, and midyear legal seminar - which were deposited in the State Bar fund, could be vouchered out and deposited in the A&F fund. These seminar moneys are not considered to be part of the State Bar fund operating expenditures because they are considered pass-through funds.

Because its budget exceeded its initial appropriation authority, it was necessary for the Bar to obtain additional appropriation authority from the Department of Planning and Budget (DPB), which has the authority to approve additional State Bar expenditures from the VSB operating fund. This additional appropriation authority resulted in total appropriations that surpassed the VSB operating budget in FY 1994 and FY 1995 (Table 4). In FY 1992 and FY 1993, the VSB requested additional authority despite initial appropriations which exceeded the budget figures.

These additional appropriation requests were necessary because the VSB did not routinely budget its A&F pass-through funds. According to VSB staff, budgeting for the A&F pass-through funds was initiated for the FY 1996 budget. As Table 5 illustrates, the VSB has utilized the majority of its additional appropriation authority over the years. In FY 1995, the Bar used its additional authority so that it could transfer its A&F pass-through funds and allocate funding for salary increases, postal costs, consultant fees, the clients' protection fund, and a substance abuse program for attorneys. Moreover, the increased authority enabled the Bar to spend grants from the American Bar Association and the Virginia Law Foundation.

State Bar Fund Revenues Consistently Exceed Expenditures. Although operating expenditures have increased over the past five years, revenues have continued to outpace expenditures. Figure 4 shows that State Bar fund revenues have exceeded operating expenditures by several hundred thousand dollars in this time period. In FY 1993, revenues exceeded expenditures by 11 percent, the largest amount in the past five years. Bar staff reported that excess revenues are the result of fiscally conservative methods of accounting. According to the executive director, the VSB forecasts its revenues and plans its expenditures very conservatively to ensure a positive financial picture. The existence of a consistently large fund balance condition coupled with

Table 4

Comparison of Annual Appropriation Authority With the VSB Operating Budget FY 1991 to FY 1995

Fiscal Year	Agency Appropriation	DPB-Approved Additional Appropriation	Total Appropriation	VSB Operating Budget
1991	$4,320,800	$0	$4,320,800	$4,159,911
1992	$4,510,000	$172,432	$4,682,432	$4,495,027
1993	$4,745,763	$470,705	$5,216,468	$4,738,302
1994	$4,878,763	$487,575	$5,366,338	$4,999,075
1995	$5,178,250	$309,766	$5,488,016	$5,381,635

Note: The Virginia State Bar operating budget figures do not include budgeted amounts for pass-through funds which are transferred to the administration and finance fund.

Source: Appropriation Acts, Chapter 723 approved on May 3, 1991, Chapter 994 approved on April 7, 1993, and Chapter 853 approved on May 5, 1995; and Virginia Department of Planning and Budget, Program Budget System - FATS, Appropriation Allotment Status Report, FY 1993, FY 1994, and FY 1995; and VSB financial report summaries for FY 1991 to FY 1995.

Table 5

Differences Between VSB Total Appropriations and Expenditures, FY 1991 to FY 1995

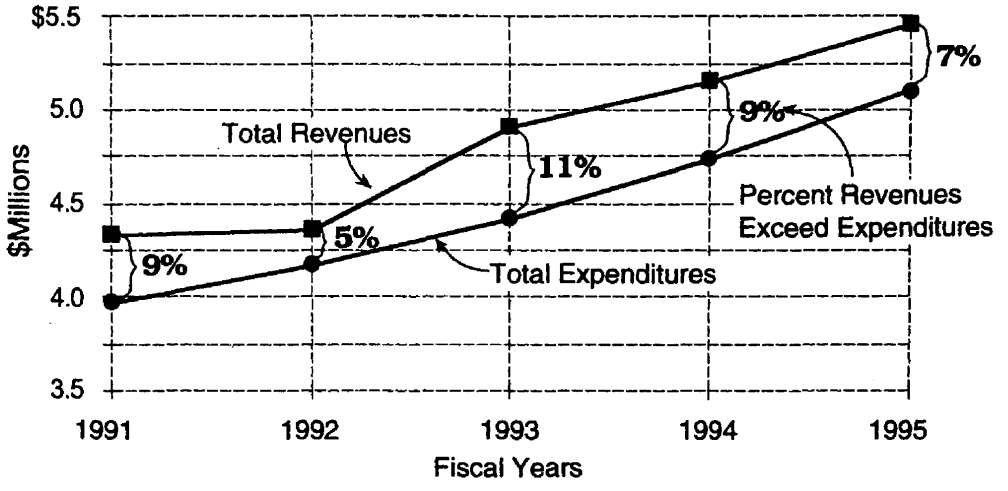
Fiscal Year	Total Appropriation	Total Expenditures	Difference	Percentage of Total Appropriation Unexpended
1991	$4,320,800	$4,206,357	$114,443	2.6%
1992	$4,682,432	$4,678,881	$3,551	.1%
1993	$5,216,468	$5,216,014	$454	0%
1994	$5,366,338	$5,390,054	$16,284	.4%
1995	$5,488,016	$5,299,277	$188,739	3.4%

Note: Total expenditures include State Bar fund operating expenses as well as funds passed through the State Bar fund to the A&F fund for events paid through the administration and finance fund.

Source: Appropriation Acts, Chapter 723 approved on May 3, 1991, Chapter 994 approved on April 7, 1993 and Chapter 853 approved on May 5, 1995; and Virginia State Bar subsidiary expenditure reports for FY 1991 to FY 1995.

Figure 4

State Bar Revenue Excess for FY 1991 to FY 1995



Note: Figures do not include pass-through funds which are credited and debited to the State Bar fund and transferred to the administration and finance fund.

Source: Virginia State Bar fiscal department financial summary reports, FY 1991 and FY 1995.

conservative budgeting practices calls into question the necessity of raising member dues twice in this time period (Table 6).

Given that the majority of the revenues are comprised of dues money, it appears that lawyers in Virginia are charged dues that may be higher than necessary to operate the Virginia State Bar. As Table 7 shows, almost 80 percent of Bar revenues are derived from mandatory dues and penalty fees paid by Virginia attorneys. The remaining

Table 6

VSB Member Dues, FY 1991 to FY 1995

Fiscal Year	Active Dues	Increase from Previous Year
FY 1990	$150	0%
FY 1991	$170	13%
FY 1992	$170	0%
FY 1993	$185	9%
FY 1994	$185	0%
FY 1995	$185	0%

Source: Membership and dues statistics provided by the VSB fiscal department, April 14, 1995.

Table 7

State Bar Fund Revenues in FY 1995

Revenues Source	Amount	Percentage of Revenues
Current dues	$4,159,043	76.0%
Virginia Lawyer Referral Service fees	$248,694	4.6%
Legal practice section dues	$247,320	4.5%
Past and penalty dues	$160,752	2.9%
Professionalism course fees	$144,750	2.7%
Seminars and miscellaneous	$122,179	2.2%
Advertising revenues for VSB publications	$106,812	2.0%
MCLE fees	$85,464	1.6%
LEXIS® fees and receipts	$71,823	1.3%
Professional corporation registration fees	$59,600	1.1%
Professional regulation cost taxing	$31,510	0.6%
Reimbursements from receivers	$19,010	0.3%
Pamphlet sales	$11,085	0.2%
Total	$5,468,042	100%

Note: Revenues do not reflect those received for events which are paid through the administration and finance fund. Those revenues are initially deposited in the State Bar fund and then transferred to the A&F fund. These revenues totaled $176,860 in FY 1995. State Bar fund revenues also do not include revenue refunds, miscellaneous sales, and private grants which totaled $26,917 in FY 1995.

Source: Virginia State Bar, financial report summary, as of June 30, 1995, and subsidiary revenue report for FY 1995.

revenues are derived from lawyer referral service fees, voluntary legal practice section dues, professionalism course fees, and other revenues.

The VSB Maintains a Large Fund Balance in the State Bar Fund. The State Bar fund's unexpended cash balance consists of the excess revenues which have accrued over the years. The VSB designates this fund balance, along with a portion of the A&F fund, as its reserve. The State Bar fund balance has grown by more than 80 percent from $856,692 in FY 1991 to over $1.5 million in FY 1995 (Table 8). It equals about 30 percent of the State Bar fund operating expenditures in FY 1995. This fund balance is much higher than generally accepted levels for most professional and occupational regulatory State agencies which keep their reserves between five to ten percent of expenditures. Therefore, the fund reserve maintained by the VSB appears excessive.

As mentioned above, the VSB calculates its reserve amount by adding the State Bar fund cash balance and a portion of the cash balance in the A&F fund. The total reserve amount for FY 1995 as calculated by the VSB was about $2.4 million, which is

Table 8

State Bar Fund Cash Balance FY 1991 to FY 1995

Fiscal Year	Cash Balance	Percentage of Operating Expenditures
1991	$856,692	22%
1992	$707,564	17%
1993	$1,209,519	27%
1994	$1,228,428	26%
1995	$1,552,432	30%

Source: JLARC staff analysis of VSB financial reports, FY 1991 to FY 1995.

equivalent to 45 percent of the VSB's operating budget and 47 percent of VSB operating expenditures. According to JLARC staff calculations, the amount of the reserve is understated because it does not fully account for the entire cash balance in the A&F fund. Currently, the VSB only counts that portion of the A&F fund cash balance which is made up of insurance refunds. However, if the total A&F fund cash balance is added to the calculation, the VSB reserve amount is equivalent to approximately 50 percent of the operating expenditures in FY 1995 (Table 9).

This level of reserve violates the State Bar's policy to maintain a reserve amount between ten and 25 percent of operating expenditures. In addition, it exceeds typical reserve levels for specially-funded professional and occupational regulatory agencies.

Table 9

VSB Reserve Amount Based on Cash Balances in the State Bar Fund and Administration and Finance Fund FY 1991 to FY 1995

Fiscal Year	Reserve Amount	Reserve Amount as a Percentage of Annual Budget	Reserve Amount as a Percentage of State Bar Fund Operating Expenditures
1991	$1,263,820	30%	32%
1992	$1,039,260	23%	25%
1993	$1,740,351	37%	39%
1994	$2,198,021	44%	46%
1995	$2,568,303	48%	50%

Source: JLARC staff analysis of VSB financial summary reports, FY 1991 to FY 1995.

The legislature's intent in this area is for specifically-funded agencies to have reasonable but low balances. Other professional regulatory agencies in Virginia maintain reserve balances of five to ten percent of operating expenditures.

Recommendation (2). **The General Assembly may wish to consider amending the *Code of Virginia* to ensure that mandatory dues of the Virginia State Bar are not increased if the reserve levels of the Bar, including total cash balances of the State Bar fund and the administration and finance fund, exceed ten percent of total operating expenditures.**

Recommendation (3). **The General Assembly may wish to consider directing the Virginia State Bar to reduce dues of active and associate members in order to bring current reserves to a level which does not exceed ten percent of operating expenditures.**

State Bar Fund Transfers to Other Special Funds Raise Concerns

JLARC staff identified several transfers of State Bar fund money which raise concerns about fund integrity, and in one instance, compliance with State policies and procedures. Since FY 1988, the Bar has been accruing money from State Bar-sponsored insurance plans which appear to be primarily composed of refunds of policyholder premiums based on positive claims experience and possibly negotiated sponsor fees. The majority of these funds belong to VSB-sponsored insurance policyholders which the Bar was unable to identify or locate. However, instead of transferring this unclaimed property over to the State's Unclaimed Property Division to locate the owners, the Bar deposited this money into its A&F fund and designated it as this fund's reserves. JLARC staff estimate that the VSB may have retained more than $654,000 of unclaimed property erroneously and proceeded to earn interest on this money. This practice undermines the integrity of the State Bar fund since it was established to offset the cost of regulating the legal profession.

In addition, the VSB periodically transfers large sums of money to the clients' protection fund from the State Bar fund. Although the clients' protection fund is authorized by *Court Rules*, the VSB's practice of financing the fund with money from the State Bar fund, which has the primary purpose of funding lawyer regulation costs, raises concerns about the integrity of the State Bar fund. Moreover, the current method of funding the clients' protection fund is inconsistent with the VSB's budgeting mechanism for its other departments.

Erroneous Transfers of Insurance Refunds. Since its inception, the records for the A&F fund include amounts received from various insurance companies with which the Bar had sponsored insurance plans for members. These funds represent insurance refunds received from at least FY 1988 to FY 1995, and possibly earlier. They amounted to about $727,222 over this period (Table 10).

Table 10

Insurance Money Received by the VSB FY 1988 to FY 1995

Fiscal Year	*Insurance Company*	*Amount Received*	*Reason for Refund*
1988	Monumental General	$15,697	Unknown
1988	Durham Life	$12,161	Association Fee
1988	Kirke - Van Orsdel (insurance plan administrator)	$18	Dividend Refund to Policy-holders
1989	Durham Life	$11,763	Association Fee
1989	Northeastern Life	$13,688	Interest on Policyholders Claims Against Carrier
1989	Cigna	$139,988	Termination of Policy Refund
1992	Durham Medical	$109,165	Experience Rating Refund
1993	Life Insurance Company of North America	$33,428	Unknown
1993	Durham Life	$140,000	Experience Rating Refund
1994	Durham Life	$243,119	Experience Rating Refund and Association Fee
1994	Fortis Benefits	$8,194	Experience Rating Refund
Total		$727,222	

Source: JLARC review of insurance data and documents provided by the fiscal department of the Virginia State Bar.

Most of the refunds appear to be based on favorable claims experiences by policyholders of VSB-sponsored insurance plans. Other refunds may have been for association fees negotiated between the VSB and the insurance carrier. Some refunds received from insurance companies were not clearly documented. The favorable claims experience rating refunds received by the VSB from one former life insurance carrier totaled about $500,000 between 1992 and 1994. According to Bar staff, the insurance

carrier could not identify the policyholders who could have been entitled to a refund for their favorable claims experience. Evidently, the records of the life insurance company did not allow for easy identification of policyholders.

Because the insurance carrier could not identify the VSB policyholders affected by this large refund, the VSB's governing body decided to deposit the funds with the State Bar fund and use the funds to offset a loan which had been made from the State Bar fund to the clients' protection fund. However, the refund was not held in the State Bar fund to benefit the entire Bar by offsetting operating costs or reducing member dues. The insurance refunds were later transferred into the A&F fund so these funds could collect interest which would be retained by the VSB. This type of transfer appears to weaken the fund integrity of the State Bar fund and may violate State policies regarding unclaimed property.

According to the *Code of Virginia*, it would appear that some of these refunds should have been treated as unclaimed property, particularly refunds due to favorable claims experience. The insurance refunds appear to meet the definition of intangible property under *Code of Virginia* provisions for unclaimed property. "Intangible property" is defined as including:

> moneys, checks, drafts, deposits, interest, dividend income, credit balances, customer overpayments, security deposits, refunds .... and amounts due and payable under the terms of insurance policies. (*Code of Virginia* §55-210.2)

"Unclaimed property" is defined as:

> property for which the owner, as shown by the records of the holder of his property, has ceased, failed or neglected, within times (specified), to make presentment and demand for payment and satisfaction or to do any other act in relation to or concerning such property. (*Code of Virginia* §55-210.2)

Under §55-210.9 of the *Code of Virginia,* intangible property that is held by any State agency, and remains unclaimed by the owner for more than a year after it became payable or distributable, is presumed to be abandoned. Therefore, it is subject to the custody of the Commonwealth. The Virginia State Bar is defined as a State agency in §54.1-3910 of the *Code of Virginia*. Based on the above definitions, it seems clear that the unclaimed insurance funds constituted intangible, unclaimed property under the Unclaimed Property Act.

It appears that the VSB may be unaware that these amounts could be subject to the State's Unclaimed Property Act, since the VSB executive committee and council minutes do not reflect discussions about this. Instead, the minutes reflect that these refunds were unexpected amounts which were to be held in the Bar's A&F fund where they could collect interest income. Currently, there is potentially more than $730,000 of unclaimed property in the form of insurance refunds plus accrued interest held by the

VSB in its A&F fund which should be identified as unclaimed property and treated accordingly. To date, the VSB has not voluntarily reported the intangible property amounts to the Division of Unclaimed Property within the Department of the Treasury.

Recommendation (4). **The Virginia State Bar, in consultation with the Department of Accounts and the Treasurer of Virginia, should identify all insurance revenues received and determine which portions of it should be designated as unclaimed property.**

Recommendation (5). **The Virginia State Bar should ensure that all future refunds involving intangible property for which the owner cannot be identified are treated as unclaimed property.**

Need for Clarification of Transfers to Clients' Protection Fund. The other concern about fund transfers involves the clients' protection fund. The clients' protection fund was authorized by the *Court Rules* in 1976. Since that time, it has been capitalized by member dues. The fund has received more than $1.5 million in transfers from the State Bar fund and has generated almost $800,000 in interest from investments. There are two primary concerns regarding these transfers to the fund. First, the budgeting process which the Bar employs for the fund lacks consistent structure and obscures the impact of the transfers on member dues. Second, the Bar routinely transfers revenues from the State Bar fund to capitalize the clients' protection fund although the State Bar fund was established primarily to pay for the cost of lawyer regulation. These methods raise questions about the fund integrity of the State Bar fund and the ambiguous nature of the clients' protection fund's current financing mechanism.

Funding the clients' protection fund lacks consistent structure which is generally found in the process for budgeting other VSB expenditures, even though the fund's expenses accounted for eight percent of VSB expenditures in FY 1995. Prior to FY 1995, instead of being presented as a budget item, the clients' protection fund was capitalized through an ad-hoc budgeting process when the Bar's council decided the Bar was in a financial position to either lend or grant money to the fund. There was no formal budgeting process used for determining how much should be contributed to the fund or when the contributions should be made until FY 1994 when the Bar's long range plan was completed.

The Bar's 1994 long range plan included a goal of contributing $200,000 annually to the clients' protection fund for a period of at least five years beginning in FY 1995. However, the Bar's budget for FY 1995 included only $130,000 as a line item for the clients' protection fund although the VSB actually contributed $400,000 to the fund.

JLARC's survey of VSB members found that 44 percent were in favor of the use of dues for the clients' protection fund, while 42 percent were opposed. Given these mixed responses, VSB's current process used in budgeting for this fund may need to be reassessed. The current budgeting process still does not accurately portray proposed contributions, thereby obscuring the impact of these State Bar fund transfers on mandatory member dues.

Moreover, the transfer of State Bar fund money to finance this fund raises concerns that the State Bar fund integrity is being jeopardized since it is being used for purposes other than attorney regulation and discipline. While the fund serves a worthwhile purpose, these types of transfers may not be consistent with the purpose for which the State Bar fund was created. Therefore, a more explicit funding policy to maintain and finance the fund may be needed.

Because the clients' protection fund is used to further the administration of justice by protecting clients from some financial losses caused by dishonest attorneys, there is a legitimate public interest in maintaining the fund. Consequently, the VSB should obtain statutory authority to maintain and finance the fund, and adopt a more straightforward budgeting mechanism for the fund. These actions would provide greater clarification to members regarding the use of mandatory dues or some other special assessment to finance this fund.

Recommendation (6). **The Virginia State Bar should discontinue the transfer of mandatory member dues to the clients' protection fund without specific statutory authority to operate the fund and make such transfers.**

Recommendation (7). **The General Assembly may wish to consider amending the *Code of Virginia* to authorize the Virginia State Bar to operate the clients' protection fund and to establish a formal funding mechanism to capitalize the fund.**

MANAGEMENT OF THE ADMINISTRATION AND FINANCE FUND APPEARS INCONSISTENT WITH SUPREME COURT INTENT

The administration and finance (A&F) fund was created in 1987 to accommodate conference and meeting expenses which are not under the Comptroller's purview and therefore cannot be financed with State funds. Specifically, Part 6, § IV, ¶ 9 of the *Court Rules* provides the Bar's council with the power to:

> establish an Administration and Finance Fund from which expenses related to meetings of the Council, meetings of the Executive Committee, the Annual and Midyear Meetings, and other official functions of the State Bar may be paid.

The Bar's management of the A&F fund raises two concerns. First, in recent years, the A&F fund's unexpended cash balance has grown quite large, totaling more than $1 million in FY 1995. In contrast, the fund's expenditures totaled less than one-third of its overall cash balance. None of these excess A&F funds are used to offset the cost of attorney regulation or other operating costs of the Bar.

The second concern relates to A&F fund expenditures. Although not a part of the Commonwealth's general fund, the A&F fund is collected and expended in the official

conduct of Virginia State Bar business. The *Court Rules* establish that "disbursements from the fund shall be made as authorized by council to pay necessary expenses related to official functions of the Virginia State Bar" (Part 6, § IV, ¶ 9). Some of the A&F fund expenses do not appear consistent with the purpose established by the Virginia Supreme Court.

Unexpended A&F Fund Cash Balance May Be Excessive

The majority of the A&F fund is made up of receipts from the Bar's three main voluntary seminars held annually: the VSB annual meeting, the Cambridge seminar, and the midyear legal seminar. In FY 1995, the fund's revenues were almost twice its expenditures. These revenues were added to the already growing cash balance of the A&F fund which the Bar invests to obtain interest income. This unexpended cash is maintained and invested by the Bar, in accordance with the Bar's authority as specified in the *Court Rules*:

> the Fund shall be composed of funds appropriated to it by Council, or otherwise received. Such funds may be held, managed, and invested as authorized or directed by Council. (Part 6, § IV, ¶ 9)

Nevertheless, the current unexpended A&F fund cash balance may be excessive.

A&F Fund Revenues Exceed Expenditures. The three main sources of revenues for the A&F fund are the registration receipts for the Cambridge seminar, the midyear legal seminar, and the VSB annual meeting. These receipts are deposited with the State Treasury in the State Bar fund. The money is then transferred to the A&F fund to pay for attendant expenses. Table 11 illustrates the types of events for which revenues were received and expenditures disbursed from the A&F fund in FY 1995.

As Table 11 shows, A&F fund revenues received in FY 1995 exceeded expenditures by $293,188 (91 percent). Rather than using the excess A&F cash balances to offset the level of member dues or costs of other Bar regulatory and non-regulatory activities, this unexpended cash remains within the A&F fund to collect interest income. *Court Rules* allow the Bar to maintain, invest, and accrue interest on these moneys. Unlike the State Bar fund, the VSB does not transfer any cash from the A&F fund to capitalize the clients' protection fund.

Excessive Cash Balance in A&F Fund. As mentioned above, the cash balance for the A&F fund far exceeds the actual expenditures for FY 1995. In fact, the fund's cash balance has been growing over the years. At the end of FY 1995, the fund balance exceeded the actual expenditures by 316 percent. As Table 12 shows, even in FY 1991, the cash balance in the fund could have almost paid for the expenditures again. It appears that the Virginia Supreme Court intended the Bar to retain A&F fund cash balances and interest income for future expenditures. It is not clear whether the Supreme Court anticipated that the A&F fund would accrue to such a high level.

Table 11

A&F Fund Revenues and Expenditures (FY 1995)

*Revenues**		*Expenditures*	
Annual Meeting	$105,919	Annual Meeting	$86,928
Cambridge Seminar	$46,416	Cambridge Seminar	$31,957
Midyear Seminar	$20,481	Midyear Seminar	$8,063
President's Art Collection Project	$1,500	Council/Executive Committee	$17,713
Additional Insurance Refunds (Added to Designated Reserves)	$245,025	Officers/Spouses	$8,702
		General Committees	$3,979
Reimbursements Received	$162,409	Professionalism Course	$958
		Sections	$3,104
Checking Account Interest	$6,425	Young Lawyers Conference	$1,653
Interest Income: Treasury Note	$17,188	Reimbursements	$152,733
Interest Income: Certificates of Deposit	$8,913	Staff	$4,566
		Bank Service Charges	$454
		Local Bar Program	$277
TOTAL	**$614,276**	**TOTAL**	**$321,088**

*Revenues reflect those accounted for on a cash basis for FY 1995.

Note: Expenditures may not add up to total due to rounding. Reimbursements consist of risk management, section, and young lawyers conference expenses.

Source: Virginia State Bar fiscal department, FY 1995 financial report summary.

As with the State Bar fund, the A&F fund cash balance has remained high, despite the Bar's implementation of two mandatory dues increases in the same time period. It is not clear why these cash balances were not used to offset State Bar operating costs in order to avoid dues increases.

Recommendation (8). **The Supreme Court of Virginia may wish to consider modifying the *Rules of Virginia Supreme Court* to clearly articulate its intention regarding the accumulation of cash balances in the administration and finance fund. Consideration should also be given to limiting the fund balance to no more than ten percent above its current budget for the fund. Excess funds could be transferred to the State Bar fund to offset the costs of the Bar's operating expenditures or the clients' protection fund.**

Table 12

A&F Fund Cash Balance

Fiscal Year	A&F Fund Cash Balance	A&F Fund Expenditures	A&F Fund Cash Balance as a Percentage of A&F Fund Expenditures
1991	$407,128	$431,349	94%
1992	$331,696	$417,895	79%
1993	$530,832	$214,510	247%
1994	$969,593	$346,095	280%
1995	$1,015,871	$321,088	316%

Source: JLARC staff analysis of financial summary reports for FY 1991 to FY 1995 which were provided by the Virginia State Bar fiscal department.

Some Expenditures from the A&F Fund Appear Inconsistent with the Purposes Established by the Supreme Court

The A&F fund was created by the Supreme Court to process revenues and expenses for official State Bar functions, particularly the annual meeting and educational seminars. Part 6, § IV, ¶ 9 of the *Court Rules* state that "expenses related to meetings of the council, meetings of the Executive Committee, the Annual and Midyear Meetings, and other official functions of the State Bar may be paid [by the A&F fund]." Creation of the fund was necessary because the expenditures associated with the annual meetings and seminars would not normally be approved for payment by the State. The Supreme Court worked with the Department of Accounts and the Department of Planning and Budget in establishing the A&F fund.

Most of the expenditures from the A&F fund are for the purposes the Supreme Court enumerated in establishing the fund. However, the fund has also been used for expenses which may not have been anticipated by the Supreme Court, and do not appear consistent with the VSB's mission. In addition to the Bar's three main voluntary events, the fund is used by the Bar for social, travel, and other association-like items not normally allowed for State agencies in general. In FY 1995 these expenses included:

- alcoholic beverage expenses for social meetings of the council, executive committee, sections, and committees;
- travel expenses for spouses of Bar officers; and
- staff activities and expenses such as coffee, sodas, a staff holiday party, and other items.

Few other State regulatory agencies have as much discretion in their expenditures. It does not appear that such expenditures relate directly to the official business of the Virginia State Bar. Currently, the A&F fund revenues for the three main State Bar events for which the A&F fund was established appear to subsidize other activities which benefit a minority of Bar members for purposes which do not seem supported.

The A&F fund is not a private fund. It was created by action of the Supreme Court under its authority to establish rules for the administration of justice. The *Court Rules* mandate that "disbursements from the fund shall be made as authorized by council to pay necessary expenses related to official functions of the Virginia State Bar" (Part 6, § IV, ¶ 9). The fund's expenditures are used in the conduct of the VSB's official responsibilities. As such, the fund should be judiciously used to ensure its expenditures conform to the purposes of the fund as intended by the Supreme Court of Virginia. Moreover, these funds should be able to withstand public scrutiny and expectations that these funds are judiciously expended.

Recommendation (9). **The Virginia State Bar should discontinue the practice of paying for expenses from its administration and finance fund which are inconsistent with the intent of the Supreme Court of Virginia in establishing and authorizing the fund.**

III. Regulation of the Legal Profession

Since the establishment of the Virginia State Bar in 1938, its primary responsibility has been to regulate the legal profession to protect the public from lawyer misconduct. Pursuant to this mission, the Bar has developed a complex disciplinary system that involves several sets of rules, numerous participants, and a multi-stage disciplinary process.

In striving to effectively regulate the legal profession, the Bar has several difficult challenges. One of the major challenges of the Bar is to balance the need to protect the public through full and thorough investigations of complaints and prosecution of violations with the need to ensure that the limited resources of the Bar are used efficiently. The Bar is also faced with the challenge of maintaining public trust and accountability in a system in which lawyers are policing their own members while also ensuring that the system operates smoothly and protects the rights of those accused. Finally, the Bar must strive to achieve a balance between protecting the public and ensuring that respondents are treated fairly.

JLARC's review of the disciplinary system found a system that works relatively well in achieving balance between the competing demands on the system. However, some problems with the current system need to be addressed. JLARC staff identified several areas in which the balance between protection and efficiency needs to be altered in favor of ensuring public protection. JLARC staff also found that the Bar needs to take additional measures to build public trust in the disciplinary system and to increase the accountability of the system to the public. Finally, several minor modifications could be made to improve the fairness of the system to respondents while having only a minimal impact on the system overall.

The review of the Bar also included an analysis of the efficiency of the disciplinary system. JLARC staff found that the Bar was not meeting some of the time guidelines established for processing cases. Consequently, there is a need for the Bar to take additional steps to improve the efficiency of the system.

STATE BAR DISCIPLINARY SYSTEM

The lawyer disciplinary system in Virginia is complex. It involves four separate sets of rules, a structure that includes volunteer and professional participants, and a multi-stage disciplinary process. The rules governing the process include one set of rules specifying what conduct is unethical and three sets of procedural rules. The system includes professional staff to screen, investigate and prosecute cases, district committees and a disciplinary board to adjudicate cases, and a Bar committee to oversee the process. The disciplinary process includes two screening phases, an investigation phase, and four adjudicatory levels.

Four Sets of Rules Govern the Disciplinary Process

Four sets of rules govern the disciplinary process. The basis for the disciplinary system is the *Code of Professional Responsibility* (*CPR*) which specifies what conduct is unethical. The *CPR*, which was adopted by the Supreme Court, includes canons, disciplinary rules, and ethical considerations. The disciplinary rules are mandatory in character and set forth what attorney conduct is considered unethical. These are the rules that are enforced through Virginia's disciplinary system.

In addition to the *CPR*, there are three sets of rules that establish the procedural requirements for the disciplinary process. The most important of these three sets of rules is Part 6, § IV, paragraph 13, of the *Rules of Virginia Supreme Court*. This paragraph establishes detailed procedural requirements for the disciplinary process. In addition to these rules, the council has developed the *State Bar Council Rules of Disciplinary Procedure (Council Rules)* which establish further procedural requirements. The disciplinary board has also adopted the *Virginia State Bar Disciplinary Board Rules of Procedure (Board Rules)* which establish additional procedural requirements for cases before the disciplinary board.

Structure of the Disciplinary Process

Under the current disciplinary structure, the Bar's professional staff receive and review disciplinary complaints, investigate complaints, and prosecute cases. Cases are adjudicated primarily by local district committees throughout the State which are composed of members of the Bar and lay persons who volunteer their services. More serious cases are adjudicated by the State disciplinary board which is also composed of members of the Bar and lay persons. Another entity that has an important role in the disciplinary process is the disciplinary clerk's office, which is responsible for administering the disciplinary system. Finally, the Bar's standing committee on lawyer discipline oversees the disciplinary process on behalf of the council.

Bar's Professional Staff. The Bar's professional staff are responsible for screening, investigating, and prosecuting disciplinary cases. These staff are located in the Bar's department of professional regulation. The department is composed primarily of attorneys who review and prosecute disciplinary cases and investigators who conduct investigations of cases. The department is managed and directed by the Bar Counsel. The Bar Counsel is assisted by the Deputy Bar Counsel who is responsible for managing investigators. In addition to their administrative responsibilities, both positions screen and prosecute disciplinary cases.

In addition to the positions of Bar Counsel and Deputy Bar Counsel, there are six attorneys on staff who handle disciplinary complaints. These six attorneys are also referred to as bar counsel. One of these attorneys oversees the Bar's intake unit and is responsible for conducting the initial review of cases to determine whether a case file should be opened. The remaining five bar counsel handle the screening and prosecution of disciplinary cases full time.

Along with the attorneys on staff, the Bar also has eight full-time investigators. These investigators conduct investigations of disciplinary complaints. The investigators all report to the Deputy Bar Counsel.

District Committees. Most disciplinary cases are adjudicated through the Bar's local district committee system. The committees are appointed by the Bar's council and are comprised of both members of the Bar and lay persons. They screen all of the disciplinary cases that are referred to a committee for investigation, and they also adjudicate the less serious cases.

The disciplinary system has ten district committees in the State which are based on geography and include one or more judicial circuits. Several of the districts have multiple sections which essentially act as separate committees. For example, the third district committee, which covers most of the Richmond metropolitan area and portions of central Virginia, has three sections.

Disciplinary Board. In addition to the district committees, there is also a State disciplinary board which is appointed by the Virginia Supreme Court. The board's function is to adjudicate the more serious disciplinary cases as well as to serve as the appellate body to review district committee decisions that are appealed by respondents. The board also hears several special categories of cases. These categories include cases in which a member of the Bar: (1) has been convicted of a crime, (2) has been disciplined for lawyer misconduct in another jurisdiction, (3) is believed to have a disability, or (4) is seeking reinstatement of his or her license.

Disciplinary Clerk's Office. The clerk's office has several important roles in the disciplinary process. It provides the administrative support for the disciplinary board. This includes making all of the arrangements for board hearings and assisting the board with the preparation and issuance of the board's orders and notices. In addition, it is responsible for tracking all of the cases in the disciplinary system which it does through various dockets. The clerk's office is also responsible for initiating distribution of public disciplinary orders and maintaining the disciplinary files.

Committee on Lawyer Discipline. The other major participant in the disciplinary process is the Bar's standing committee on lawyer discipline (COLD). The COLD committee is a 12-member body appointed by the VSB President to oversee the disciplinary process. It oversees the disciplinary process through several means. The committee receives regular reports from Bar Counsel and district committee liaisons regarding how the disciplinary process is working. In addition, the committee conducts an annual review of the Bar Counsel's job performance.

The committee also oversees the disciplinary process through two subcommittees. The rules subcommittee regularly reviews the *Court Rules* and recommends to council any proposed rule changes that the committee determines are necessary. In addition, COLD has an oversight subcommittee that reviews cases in which complainants are dissatisfied with the result of their case.

The Virginia State Bar Disciplinary Process

Paragraph 13 of the *Rules of Virginia Supreme Court* establishes a multi-stage disciplinary process which includes detailed procedural rules that govern the process. A complaint is first screened in-house by the Bar staff through a two-stage process. For those cases in which there is sufficient basis to proceed, the cases are referred to the appropriate district committee for a full investigation and adjudication. At the committee level, subcommittees serve to screen cases and dispose of some cases through dismissals or agreed dispositions. (Agreed dispositions involve the imposition of discipline without a hearing when the Bar counsel and a respondent agree on the facts in a case and the discipline to be imposed.) Other cases are heard by a full committee. More serious cases are referred by the subcommittees or committees to the disciplinary board for hearing. Figure 5 provides a diagram of the disciplinary process.

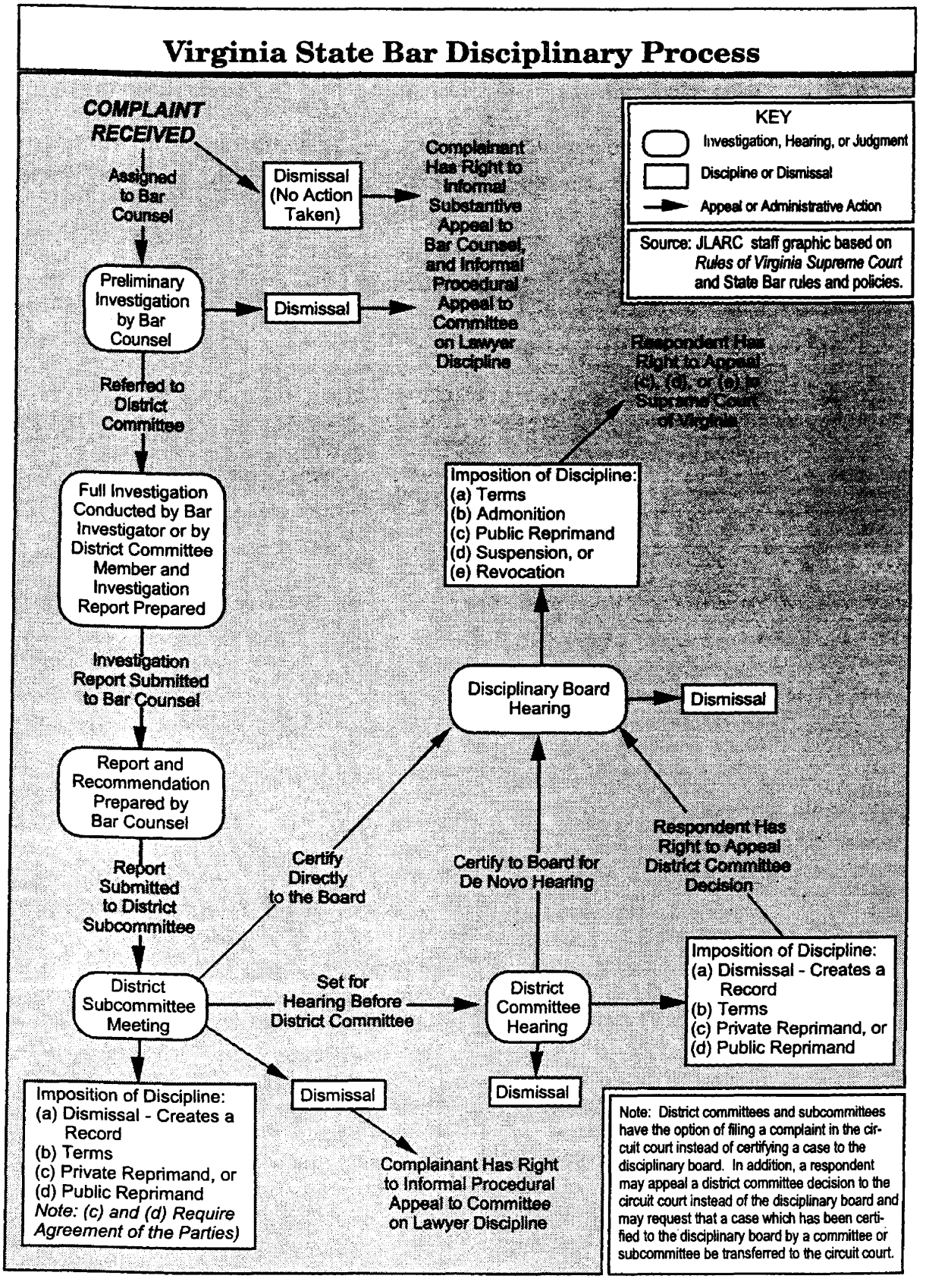
Screening Cases at Intake. Any person who believes that a member of the Virginia State Bar has violated the *CPR* may file a complaint against that lawyer with the Virginia State Bar. The Bar requires that the complainant submit a signed written complaint. The complaint can be submitted on the complaint form established by the Bar or in a letter if signed by the complainant. The intake unit receives all complaints and reviews them to determine whether the conduct alleged in the complaint would constitute a violation of the *CPR* if the facts alleged in the complaint were true. If the intake unit determines that the complaint alleges a violation of the *CPR*, then it assigns the complaint to one of the bar counsel for further investigation. When the intake unit determines that the complaint does not allege a violation of the *CPR*, it dismisses the complaint and notifies the complainant by letter that the complaint has been dismissed. In the last two years, the intake unit has also become involved in trying to resolve less serious cases through proactive intervention at the intake level.

Screening Cases after a Preliminary Investigation. When the intake unit determines that a violation of the *CPR* has been alleged, a complaint is assigned to a bar counsel for a preliminary investigation. The preliminary investigation consists of forwarding the complaint to the lawyer accused of misconduct (the respondent) and requesting that the respondent provide a written response to the complaint within 21 days. Upon receipt of the response from the respondent attorney, the bar counsel has the discretion to forward the response to the complainant to give the complainant the opportunity to rebut the accused attorney's response. The bar counsel is not required to forward the response to the complainant and may evaluate the case based solely on the initial complaint and the accused attorney's response.

After receiving the accused attorney's response and the complainant's rebuttal (in those cases in which the complainant is given the opportunity to rebut the response), the bar counsel then determines whether to file charges or dismiss the case. The bar counsel may dismiss a case if:

- the conduct alleged does not constitute misconduct as a matter of law,
- the evidence shows that the respondent did not engage in misconduct,

Virginia State Bar Disciplinary Process



- there is no credible evidence to support an allegation of misconduct, or

- the evidence available could not reasonably be expected to support an allegation of misconduct under a "clear and convincing" evidentiary standard.

Bar counsel is required to notify the respondent and the complainant by letter of a dismissal. If bar counsel determines that the evidence available could reasonably be expected to support an allegation of misconduct, bar counsel files charges with the appropriate committee and refers the case to the committee for a full investigation.

Complaint Referral and Investigation. Cases that are referred to a committee are usually referred to the district committee where the alleged misconduct occurred, where the respondent resides, or where the respondent maintains an office, in that order of preference. After a case is referred to a district committee, the Bar typically assigns the case to a VSB investigator to conduct a full investigation of the complaint. The committee or bar counsel may request that the investigation be conducted by a member of the committee instead of a Bar investigator. However, committees and bar counsel rarely make such a request, and most cases are investigated by one of the Bar's investigators.

After conducting an investigation, an investigator is required to prepare a written report of the investigation and submit it to the bar counsel responsible for the case. The bar counsel then typically reviews the investigative report and develops his own report of the investigation referred to as the report of investigation. Bar counsel's written recommendation is submitted to the committee for action. In some cases, bar counsel does not present a written report and, instead, makes only an oral report even though the *Court Rules* require bar counsel to prepare a written report.

Subcommittee Review after Investigation. Subcommittees of the district committees meet to review cases when investigations have been completed and bar counsel have submitted reports of investigations or submitted the investigators' reports directly to the subcommittee. The *Court Rules* require each subcommittee that reviews a case be composed of three members of the district committee. One member of the subcommittee must be an officer of the committee and one member must be a non-lawyer.

A subcommittee has several options regarding how to handle a case. If it believes that the case involves a serious violation of the *CPR* which may warrant revocation or suspension of a respondent's license, the subcommittee must certify the case directly to the disciplinary board or file a complaint in circuit court. It may also set a case for hearing before the committee if it believes that there may have been a violation of the *CPR* but that the violation will not warrant the imposition of a suspension or revocation. When a subcommittee determines that there is not sufficient evidence to establish a violation of the CPR, the subcommittee may dismiss the case.

A subcommittee also has the option of imposing one of four forms of discipline (Exhibit 3). A subcommittee may impose two types of sanctions, a public or private reprimand. A private reprimand is a form of non-public discipline which declares a

Exhibit 3

Discipline Options Available to the Disciplinary Board and District Committees and Subcommittees

District Subcommittees	District Committees	Disciplinary Board
Dismissal - Creates a Record	Dismissal - Creates a Record	Dismissal with Terms
Dismissal with Terms	Dismissal with Terms	Admonition
Private Reprimand (requires agreement of the parties)	Private Reprimand Public Reprimand	Public Reprimand Suspension (up to 5 years)
Public Reprimand (requires agreement of the parties)		Revocation

Note: Private reprimands, public reprimands, and admonitions may be imposed with or without terms.

Source: *Rules of Virginia Supreme Court*, Part 6, § IV, ¶ 13.

lawyer's conduct improper but does not limit his ability to practice law. A public reprimand is a similar sanction except that it is made public. A subcommittee may also incorporate terms with a sanction. A subcommittee must obtain the approval of both the bar counsel and the respondent to impose a sanction.

Another option for a subcommittee is to impose one of two forms of discipline unilaterally that are not considered sanctions but do create a disciplinary record. A dismissal of a complaint with terms imposed is a dismissal contingent upon the respondent fulfilling some term or terms. Fulfillment of the terms does not result in an outright dismissal because the imposition of the terms creates a disciplinary record for the respondent even if they complete the terms. The other type of dismissal that a subcommittee can order is a dismissal that creates a record. This type of dismissal is reserved for situations where a subcommittee determines that there was a violation of the *CPR*, but there were exceptional circumstances or the violation was a minor, technical violation. These cases are dismissed, but they create a disciplinary record.

District Committee Hearings. When a case is set for hearing before a district committee, a panel of the committee then conducts an adversarial hearing. The bar counsel presents the charges. The respondent may be represented by counsel or may represent himself. Both sides may call witnesses to testify and introduce exhibits into evidence.

A district committee has several options regarding the disposition of a case. A committee may dismiss the case if the evidence fails to show misconduct. A committee

may certify the case to the disciplinary board for a hearing or file a complaint in circuit court if it determines the evidence indicates that the respondent may be guilty of misconduct which warrants license suspension or revocation.

A district committee also has the option of imposing the same types of discipline as a subcommittee. The only difference is that a district committee does not have to obtain the approval of the bar counsel and respondent in order to impose a sanction. A respondent has the right to appeal to the disciplinary board or circuit court a decision of the district committee to issue a private or public reprimand, or to dismiss a case with terms.

Disciplinary Board Hearings. The disciplinary board hears all cases that are certified to it by a subcommittee or committee. After a case is certified, the bar counsel is required to serve the respondent with a statement of the charges certified to the board. The respondent is then required to file an answer. At this point in the process, the respondent has a right to request that the disciplinary board proceeding be terminated and that the case be heard by a three-judge panel comprised of circuit court judges.

In those cases where the respondent elects to have his hearing before the disciplinary board, an adversarial hearing is conducted by a panel of the board similar to the hearings conducted by the district committees. Bar counsel prosecutes the cases before the board, and the respondent may represent himself or choose to be represented by counsel.

The disciplinary board may then either dismiss one or more of the charges or impose one of several forms of discipline. The board has more sanction options than are available to the district committees or subcommittees. The board may impose a: (1) dismissal with terms, (2) admonition, (3) public reprimand, (3) suspension, or (4) revocation. An admonition is comparable to a private reprimand at the committee level and may be used when there has been no substantial harm to the complainant or the public. However, an admonition is a matter of public record. A license suspension is for a set term up to five years and precludes an attorney from practicing law during the period of suspension. License revocation involves the disbarment of an attorney from the practice of law in the State indefinitely, although an attorney who has had his license revoked is eligible to apply for reinstatement. A respondent has a right to appeal a decision of the disciplinary board imposing a revocation, suspension, or public reprimand to the Supreme Court.

The disiplinary board has the discretion to approve the imposition of discipline without a hearing when Bar counsel and a respondent agree as to the facts in a case and the discipline that should be imposed. Cases resolved in this manner are referred to as agreed dispositions.

Criminal Convictions, Sanctions Imposed in Other Jurisdictions, Disability Cases, and Reinstatement Cases. The disciplinary board also has jurisdiction to impose discipline in several other circumstances. In cases in which a member of the Virginia State Bar has been convicted of a crime or had their law license suspended in

another jurisdiction, the disciplinary board is required to summarily suspend the license of the respondent and then hold a hearing to determine whether the license of the attorney should be revoked or further suspended. In addition, when bar counsel determines after an investigation that there is probable cause to believe that an attorney has a disability which potentially impacts his or her ability to practice law, the disciplinary board is required to hold a hearing to determine whether a disability exists. Finally, the disciplinary board has responsibility for considering petitions for reinstatement presented by attorneys who have had their licenses revoked.

Bar Has Acted to Improve the Process

Through the COLD committee, the Bar has demonstrated a willingness and capacity over time to change the system in order to improve the efficiency and effectiveness of the system and to make it more accountable to the public. One of the ways that the Bar has done this in recent years is by greatly increasing the number of professional staff in the disciplinary area. In 1986, the *Court Rules* were amended to give bar counsel the authority to both investigate and prosecute disciplinary cases. Since then, the Bar's professional staff have investigated and prosecuted most of the disciplinary cases.

The Bar has improved the efficiency of the system through several other changes. The adoption of the subcommittee system has helped to screen out cases without merit and more quickly certify more serious cases to the disciplinary board for prosecution. In addition, the Bar has established the use of agreed dispositions which have helped the Bar resolve more cases through negotiated settlements and reduced significantly the number of cases that have had to be tried. Finally, the Bar recently increased the size of the disciplinary board from 14 to 20 members in an effort to handle the backlog of cases at the board level.

The Bar has also recognized the need to be more accountable to the public and has made changes that respond to this recognition. In 1990, the *Court Rules* were modified to make hearings before the disciplinary board open to the public. In addition, the *Court Rules* were amended to require that lay members be appointed to the disciplinary board and the district committees. Finally, the council by-laws were amended to require that two of the 12 members of the COLD committee be non-lawyers.

As a result of the Bar's efforts, JLARC's review of the Bar's disciplinary system found a system that works relatively well. The primary focus of the system appears to be protecting the public from attorney misconduct by disciplining and educating attorneys who have acted unethically. Those persons working in the system seem committed to that goal. For the most part, cases without merit are being screened out early in the process, and the cases that appear to have some merit are being prosecuted and adjudicated effectively through district committees and the disciplinary board. Bar counsel appear to effectively present the charges, and the committees and disciplinary board are effective in adjudicating cases. The district committee members and disciplinary board members that JLARC staff observed appear to take their role seriously and

seem committed to imposing discipline in cases in which they determine that discipline is necessary.

The JLARC survey of VSB members found that a majority of those survey respondents who have participated in the system in some capacity believe that the system works relatively well. When these persons were asked whether the disciplinary process is effective in sanctioning lawyers who have violated the ethical rules, 52 percent indicated that the system was effective, 29 percent indicated that it was not, and 19 percent had no opinion or did not respond to the question.

Although the system is working relatively well, the study identified several concerns about the current process that need to be addressed. The concerns raised about the disciplinary system relate to protection of the public, public confidence in the system, fairness of the system for attorneys, and efficiency.

PROTECTION OF THE PUBLIC COULD BE STRENGTHENED

The primary and most important purpose of the disciplinary system is to regulate the legal profession and thereby protect the public from unethical conduct by Virginia attorneys. While the JLARC staff review of the disciplinary system found that the system is working reasonably well to achieve this objective, there are several changes that could be made to the current system to further ensure that the system adequately protects the public. The changes relate to proper documentation of dismissals, appeals of dismissals by complainants and bar counsel, composition and operation of the district committees, and civil immunity for complainants. By making these changes, the Bar can address the most serious concerns about the ability of the disciplinary process to protect the public.

Bar Should Ensure Sufficient Documentation for Dismissal

The Bar's professional staff seem to be fairly effective in screening and investigating cases. The bar counsel are able to screen out most of the unfounded complaints either at the intake level or after a preliminary investigation. However, bar counsel need to ensure that there is sufficient documentation to support their decisions to dismiss cases at these early stages in the process.

Based on a random review of cases dismissed at the intake level and after a preliminary investigation, it appears that in most cases bar counsel have sufficient basis to dismiss the cases, but some cases may lack adequate documentation to support a dismissal. Several rule changes would help to ensure that meritorious cases are not dismissed without a full investigation.

Bar Counsel May Dismiss Cases at Intake Level or After a Preliminary Investigation. Decisions whether to open a case file at the intake level are made by the

intake attorney based on the complaint submitted by the complainant. Occasionally, the intake unit will make some follow-up phone calls to verify or confirm information presented in the complaint. However, the decision whether to dismiss a complaint at this point or open up a case file for further investigation is usually based solely on the written complaint.

Bar counsel also have the authority to dismiss a case after a preliminary investigation. A preliminary investigation is conducted in all cases for which the intake attorney determines that there is sufficient basis. The purpose of the investigation is to determine whether there is sufficient basis in the complaint of a violation of the *CPR* to warrant a full investigation or whether the case should be dismissed.

The preliminary investigation usually consists of forwarding the complaint to the respondent and requesting that the accused attorney provide a written response. Upon receipt of the response, bar counsel may forward the response to the complainant and give the complainant the opportunity to rebut the accused attorney's response; however, bar counsel are not required to do so. Based on a review of the files and interviews with staff attorneys, bar counsel often do not give the complainant the opportunity to rebut the accused attorney's response.

Files Revealed Insufficient Documentation for Some Dismissals. JLARC staff conducted a random review of cases dismissed in FY 1995 both at the intake level and after a preliminary investigation. JLARC reviewed 145 (10 percent) of the 1,450 cases dismissed at the intake level in FY 1995, and 38 (10 percent) of the 372 cases dismissed after a preliminary investigation. The primary objective of both reviews was to determine whether adequate documentation existed to support the decision made by bar counsel to dismiss the cases. (Appendix D describes in more detail the methodology used to conduct the review and the sampling error).

A review of the dismissals by the intake unit revealed that in most cases, there was adequate documentation in the files to support the decision of the intake unit to dismiss the cases. However, in three percent of the cases, it appeared that the file lacked sufficient documentation to support the intake attorney's dismissal decision. In those cases, it appears that the complainant had asserted sufficient allegations to warrant further investigation. Generalizing from the sample to the entire population of complaints dismissed by the intake unit in FY 1995, approximately 50 cases may have lacked sufficient documentation to support a decision to dismiss the case (Appendix D).

Likewise, the review of dismissals after a preliminary investigation revealed that in most cases, bar counsel had a reasonable basis to dismiss the cases, and there was adequate documentation in the file to support the dismissal decisions. Most of the respondents in these cases submitted strong documentation with their response that clearly exonerated them. However, in ten percent of the cases reviewed, it appeared that bar counsel did not have sufficient documentation to support the dismissals and should have conducted further investigations themselves, or referred the cases to a district committee for further investigation. In four cases, bar counsel appeared to rely on the written narrative provided by the respondent without any other documentation to

substantiate the response, while apparently discounting the allegations in the complaint. Generalizing to the entire population of cases dismissed after a preliminary investigation in FY 1995, bar counsel may have lacked sufficient documentation to dismiss approximately 40 cases after a preliminary investigation in the last fiscal year (Appendix D).

Complainants Should Be Given the Opportunity for Rebuttal. The complainant should be given the opportunity to rebut the accused attorney's response prior to dismissal of any complaint at the preliminary investigation phase of the process. Giving the complainant the opportunity to respond can be done with little additional effort and may in some cases help to evaluate the credibility of the accused attorney's response. A Virginia State Bar complainant satisfaction survey project recently conducted by the Thomas Jefferson Program in Public Policy at the College of William and Mary (the Bar's complainant satisfaction project) recommended that the Bar make greater efforts to corroborate conflicting complaint allegations and respondent replies.

Allowing an opportunity for rebuttal is especially important in those cases in which the respondent's version of the facts is inconsistent with the complaint, and the respondent has not provided any documentation to support his or her response. Bar counsel did not provide the complainant with the opportunity to rebut the accused attorney's response in any of the cases in which JLARC's review revealed questions about the dismissal decision.

Standard for Dismissal after Preliminary Investigation Needs to Be Modified. The *Court Rules* should be amended to reduce the discretion of the bar counsel to dismiss cases after a preliminary investigation. Prior to October 1993, bar counsel could only dismiss a case after a preliminary investigation if bar counsel determined that the charges of misconduct had no basis in fact or that even if proved, would not constitute misconduct. However, in 1993, the *Court Rules* were amended to give bar counsel a further basis for dismissal after a preliminary investigation. The amendment provided that bar counsel could dismiss a case if "the evidence available could not reasonably be expected to support any allegation of misconduct under a 'clear and convincing' evidentiary standard." The rationale for adopting this additional basis for dismissal was to try to improve the efficiency of the system by giving bar counsel additional authority to dismiss cases at the preliminary investigation phase of the process and therefore reduce the number of cases being referred to committees for investigation.

With so little oversight of in-house dismissals, this does not appear to be an acceptable standard to use in screening cases at the preliminary investigation phase of the process. Until a full investigation has been completed, it seems premature to authorize bar counsel to assess whether the evidence will meet the clear and convincing standard based merely on the written complaint and the written response of the accused attorney. If the preliminary investigation reveals credible evidence that an attorney has violated the *CPR*, then it seems appropriate for a case to be referred to a district committee for a full investigation before making a final determination whether there is clear and convincing evidence of a violation.

Recommendation (10). **The Virginia State Bar's counsel should ensure that there is adequate documentation to support every decision to dismiss a case at the intake level or after a preliminary investigation.**

Recommendation (11). **In every preliminary investigation, the Virginia State Bar should give the complainant the opportunity to provide a written rebuttal to the accused attorney's response prior to any determination regarding the dismissal or referral of a case to a district committee.**

Recommendation (12). **The Supreme Court of Virginia may wish to amend the *Rules of Virginia Supreme Court* to eliminate the Virginia State Bar counsel's authority to dismiss a case after a preliminary investigation based on the grounds that the evidence available could not reasonably be expected to support any allegation of misconduct under a "clear and convincing" evidentiary standard.**

Complainants Should Have Right to Appeal Bar Counsel Dismissals

Under the current system, bar counsel have substantial discretion whether to dismiss a case at intake or after a preliminary investigation. They are not required to obtain any additional approval in order to dismiss a case, and a complainant does not have any formal right to appeal a dismissal at any stage in the process. A right of appeal would serve to check the effectiveness of bar counsel in screening cases. In addition, it would likely reduce public dissatisfaction with the process which the Bar has acknowledged to be a problem.

Under the current *Court Rules,* a complainant has no formal right to appeal a decision of bar counsel to dismiss a case at the intake level or after a preliminary investigation. A complainant who is dissatisfied with a dismissal may obtain an informal review of the case by Bar Counsel or Deputy Bar Counsel. The purpose of this review is to determine if there is any basis for reopening the case. This review is granted only if the complainant expresses dissatisfaction with the result of a dismissal to the Bar on his or her own initiative. The Bar does not make known to the public that they have the right to such a review.

The only other review available to a complainant is a review by the committee on lawyer discipline (COLD). However, the COLD committee's review is limited to a procedural review of whether bar counsel followed the proper procedures in dismissing a case. In addition, this review is only provided if Bar Counsel determines that it should be conducted or if the complainant specifically requests a review by COLD. COLD does not encourage these reviews and, in fact, has a policy of not making this right of review known to the public.

Both the American Bar Association and the National Organization of Bar Counsel recommend that complainants be provided a right of appeal in disciplinary cases. The ABA's Commission on the Evaluation of Disciplinary Enforcement (also

referred to as the McKay Commission), which conducted a nationwide evaluation of disciplinary enforcement between 1989 and 1991, recommended in its 1992 report that all jurisdictions should afford a right of review to complainants whose complaints are dismissed prior to a full hearing on its merits. The report stated that providing such a right of appeal "provides a useful check on the effectiveness of the disciplinary counsel's initial screening of complaints."

In addition, the National Organization of Bar Counsel (NOBC), which is comprised of bar counsel around the country, recommended in its 1990 report to the McKay commission titled, *Recommendations to American Bar Association Commission on Evaluation of Disciplinary Enforcement*, that there be an appeal process for complainants who have had their complaints dismissed. In its recommendations to the McKay Commission, the NOBC stated that independent review of bar counsel decisions to dismiss cases is desirable to improve the functioning of the disciplinary system and to increase public confidence in lawyer self-regulation.

Most other states with a unified bar have a mechanism to check the discretion of bar counsel in screening out cases. A survey of other unified bars found that 25 of the 28 unified bars that use professional counsel to screen disciplinary cases have a procedure in place to ensure that bar counsel effectively exercises his or her discretion in screening cases. Eleven of the states provide the complainant with a formal right to appeal a dismissal to another body, and 14 states require bar counsel to obtain the approval of a separate body before dismissing a complaint (Exhibit 4).

Complainants should be given a formal right to appeal a decision to dismiss a complaint. The appeal should include a review to determine whether bar counsel had sufficient basis for the dismissal. An appeal limited to whether there was sufficient basis in the complaint to refer the case to the next step in the disciplinary process should not place too great a burden on the system. Establishing a right of appeal would provide a useful check on the bar counsel's screening decisions and would help to ensure that there was sufficient basis for the dismissal of cases.

While JLARC's review of cases dismissed in-house in FY 1995 revealed that the bar counsel are effectively screening out the unmeritorious claims in the vast majority of cases, the review did indicate that approximately 90 cases dismissed by bar counsel in FY 1995 may have lacked sufficient documentation to support a decision for dismissal (Appendix D). Establishing a right of appeal would provide a mechanism to address those cases. Moreover, providing an appeal to complainants would help to reduce dissatisfaction with the disciplinary process by complainants who had their cases dismissed.

The most appropriate body to review the appeals would be the disciplinary board. Members of the disciplinary board are somewhat removed from the Bar because they are appointed directly by the Supreme Court. In addition, they have considerable experience in the disciplinary system. Individual disciplinary board members or small panels of board members could be used to consider these appeals on a rotating basis to minimize the burden on board members.

Exhibit 4

Checks on Bar Counsel Discretion to Dismiss Disciplinary Complaints, Survey of Unified Bars

Complainant Has Right to Appeal Dismissal	Dismissal Requires Approval of Separate Body	Bar Counsel Has Unchecked Discretion to Dismiss Complaint
Alaska	Alabama	Florida
California	Arizona	Georgia
Idaho	Hawaii	Michigan
Louisiana	Kentucky	Virginia
Missouri	Mississippi	
Nebraska	Nevada	
Oregon	New Mexico	
Texas	North Carolina	
Utah	North Dakota	
Washington	Oklahoma	
Wyoming	Rhode Island	
	Washington D.C.	
	West Virginia	
	Wisconsin	

Note: In some states the checks on bar counsel apply only to complaints that properly allege a violation of the applicable code of professional conduct. Montana, New Hampshire, South Carolina, and South Dakota were not included in the analysis because these states do not have a professional bar counsel.

Source: JLARC survey of disciplinary rules of other jurisdictions with unified bars.

Providing a right of appeal to an independent body should improve the efficiency of the system by reducing the workload of the bar counsel. Many participants in the system complained that bar counsel have to spend too much time considering requests to reopen files or review decisions to dismiss cases. Under the current system, if a complainant is dissatisfied, the file may be reviewed by the bar counsel who is assigned to the case, then by Bar Counsel, and finally by the COLD committee. By establishing a limited right of appeal to the disciplinary board, considerable Bar staff time could be saved by clearly establishing that this is the only right of appeal and that neither bar counsel nor COLD will review their initial decision to dismiss a case.

Recommendation (13). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to provide complainants with the right to appeal to the disciplinary board dismissals either at the intake level or after a preliminary investigation.**

Mandatory Participation by Lay Members

In 1990, the *Court Rules* were amended to require that non-lawyers be appointed to the district committees, the disciplinary board, and the committee on lawyer discipline. The purpose of lay member participation is to ensure that the general public is represented in the disciplinary process and to make the process more accountable to the public. Based on interviews with bar counsel and members of the disciplinary board and the district committees, there is widespread agreement that the inclusion of lay members has been valuable to the process.

Although participants in the process agree that it is important to have lay members sit on the committee and disciplinary board panels hearing cases, the *Court Rules* do not require lay member participation except on the subcommittees. Subcommittees cannot take action without a lay member sitting on the subcommittee panel. In contrast, the *Court Rules* do not require that a lay member be present to have a quorum for committee or disciplinary board hearings. Therefore, committee or disciplinary board panels may hear cases and take action without a non-lawyer present. Some committees, however, have established a policy of not hearing cases unless a non-lawyer is on the panel.

While the disciplinary board and committees try to have a lay person present for all of the hearings, there are instances in which they do not. JLARC staff attended a district committee hearing in which there was no lay person on the hearing panel. In addition, JLARC staff attended a disciplinary board hearing at which there were no lay board members present, and a disciplinary board conference call to consider a proposed agreed disposition at which there were only lawyers on the panel.

Given the accepted importance of having non-lawyers participate in hearings at the committee and board level, the Bar should make it mandatory to have a lay person on every panel. This would ensure that the general public is represented in every proceeding and action taken by a committee or the disciplinary board.

Recommendation (14). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to require lay member participation on any district committee or disciplinary board panel that is taking action in a disciplinary case.**

Steps Should Be Taken to Ensure Reasonableness and Consistency in Committee Decisions

With the current committee structure, additional steps need to be taken to ensure that the committees are acting reasonably and consistently. The current committee system is very decentralized, with each committee having substantial discretion in the imposition of sanctions and decisions whether to certify cases to the disciplinary board. One of the potential problems with giving committees so much discretion is that, under the committee structure, local lawyers are judging local lawyers.

With this type of arrangement, there is the potential for committee members to exercise bias for or against a respondent.

Despite the decentralized nature of the system and the potential problems with the discretion that each local committee has, there are few checks in the system to ensure that the committees are acting reasonably and consistently across districts. Moreover, there are no sanction guidelines in effect, and the committees have fairly broad discretion as to what sanction or discipline to impose or whether to certify a case to the disciplinary board.

Bar Counsel Should Have Right to Appeal Committee Decisions. Based on interviews with bar counsel, there occasionally are cases in which committees may reach a result that is perceived to be unreasonable by bar counsel. According to bar counsel, some of these cases may result from inexperience or mistaken judgment on the part of the committees. Other cases may be the result of bias for or against a respondent. Like the respondent, who can appeal a committee decision that they consider too harsh, bar counsel should have the right to appeal a decision in which bar counsel believes a committee's decision is too lenient. Based on the survey of other unified bars, 20 of the 28 other unified bars with professional bar counsel give counsel a right of appeal.

Providing this right of appeal to bar counsel would further protect the public in two important ways. First, it would provide a mechanism to correct unreasonable decisions in which committees treat unethical attorneys too leniently. Second, it would likely improve the decisionmaking of committees and make them more accountable to the public if they knew that bar counsel had the right to appeal their decisions.

Bar Should Assess Consistency of Sanctions Imposed Across Committees and Consider Measures to Ensure Consistency. One of the potential problems with a decentralized disciplinary system is the lack of consistency or uniformity in the imposition of sanctions and the decisions regarding which cases to certify directly to the disciplinary board. Several of those participants in the system interviewed by JLARC indicated that there are sometimes inconsistencies in the sanctions imposed across district committees. Under the current system, neither committees nor the disciplinary board are required to follow any standards in imposing sanctions or deciding which cases to certify. Some committees appear to consider the *ABA Standards for Imposing Lawyer Sanctions* as guidance in deciding what sanction to impose. However, other committees are resistant to using them.

Despite the decentralized nature of the system, the Bar does not appear to have analyzed the decision outcomes across districts in order to assess whether there is sufficient consistency in the imposition of sanctions and the decisions to certify. A formal assessment with the collection and analysis of decision outcomes could be valuable to determine whether further checks are needed in the system to ensure that committees are acting consistently and are imposing sanctions that adequately protect the public in each area of the State.

If an analysis of committee outcomes revealed significant inconsistencies across jurisdictions, then the Bar might want to consider the adoption of uniform sanction guidelines for Virginia. Guidelines would serve to promote more consistency in the imposition of sanctions across committees. The ABA's Commission on Evaluation of Disciplinary Enforcement recommends that each jurisdiction adopt guidelines for imposing disciplinary sanctions. The Commission's 1992 report states that the adoption of guidelines would promote equity and consistency in the disciplinary process.

The Bar might also want to consider the adoption of guidelines to be used by the committees in assessing which cases to certify to the disciplinary board. This would help to ensure that all of the serious cases are certified up to the board. In addition, certification guidelines might help to ensure that cases remain with committees that do not need to be heard by the board.

Recommendation (15). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to give bar counsel the right to appeal decisions of the district committees to the disciplinary board.**

Recommendation (16). **The Virginia State Bar should conduct a formal assessment of the consistency in outcomes of the various district committees. Based on this review, the Virginia State Bar should consider whether it would be beneficial to adopt sanction guidelines or certification guidelines.**

Complainants Should Be Given Absolute Immunity from Civil Action

Under the current system complainants do not have adequate protection from civil suits that might arise out of communications with the Bar. Non-lawyers making complaints appear to have qualified immunity from defamation actions under Virginia's common law, and attorneys have qualified immunity from any civil action pursuant to statute. However, with a system that relies primarily on the public to report lawyer misconduct, it is important that prospective complainants be given further protection to encourage reporting of misconduct. This can be ensured by giving complainants in the disciplinary system absolute immunity from civil action for information shared with the Virginia State Bar.

Lawyers Currently Have Statutory Immunity and Non-Lawyer Complainants Have Limited Immunity under Common Law. Under Virginia law, the only immunity expressly provided to complainants by statute is qualified immunity extended to attorneys, law corporations, and limited liability companies. Section 54.1-3908 of the *Code of Virginia* states:

> No attorney, law corporation or limited liability company shall be held liable in any civil action for words written or spoken in any proceeding concerning, or investigation of, the professional conduct of any member of the bar of Virginia before any bar association or committee

> thereof, unless it is proved by the plaintiff that the words were false, used with actual malice and used without any reasonable or probable cause.

The statute does not refer to other complainants. However, non-lawyers who submit complaints appear to have qualified immunity from defamation actions under Virginia common law. The Virginia Supreme Court has held in several decisions that a communication is privileged from a defamation action if it is made in good faith on a subject in which the communicating party has an interest or owes a duty and if the communication is made to a party who has a corresponding interest or duty. Although the Supreme Court has never specifically applied this privilege in a situation involving a disciplinary complaint to the Bar, the qualified privilege established by the Court would appear to apply to complaints made to the Bar if a complaint is made in good faith.

Despite the existence of this protection and the importance of encouraging the public to report lawyer misconduct, the Bar does not publicize the availability of this protection. The Bar's brochure on the disciplinary process does not mention that complainants have qualified immunity from defamation actions under common law or that lawyers have qualified immunity from all civil actions by statute. In contrast, the only statement in the brochure on this subject is a warning to prospective complainants that communications by a complainant are not privileged from a civil law suit if the complainant wrongfully accuses a lawyer. While this warning was likely placed in the brochure to discourage frivolous complaints, the need to encourage the public to report lawyer misconduct outweighs any concerns that the Bar may have with discouraging claims that lack merit.

All Members of the Public Should Be Given Statutory Immunity from Civil Actions. With a disciplinary system that depends almost entirely on citizen complaints, complainants should be given express statutory immunity from civil action, and the Bar should take steps to publicize the availability of this protection to complainants. The protection needs to be expressly provided to all complainants in statute, as it currently is for lawyers. Non-lawyers who are considering whether to make a complaint should not be expected to know that they have qualified immunity from civil action under common law when the existence of this protection is not mentioned in the Bar's brochure on the disciplinary process. Moreover, the immunity extended to non-lawyers should include protection from all types of potential civil actions that might arise out of a disciplinary complaint like it currently is for lawyers and should not be limited to defamation actions. The Bar should also make the availability of this protection known to complainants both through the Bar's brochure on the disciplinary process and through other means.

National experts and participants in Virginia's disciplinary system assert that complainants should be given immunity from civil action. Both the American Bar Association and the National Organization of Bar Counsel recommend that complainants be given immunity from civil actions. The 1992 report of the ABA Commission on Evaluation of Disciplinary Enforcement recommended that complainants be given immunity from civil suit for all communications with a disciplinary agency and all

communications made within a disciplinary proceeding. The National Organization of Bar Counsel strongly recommended in its report that all complainants be given immunity from civil actions. Based on interviews with participants in the disciplinary system, there appears to be fairly widespread agreement that complainants and attorneys should be given immunity from civil action.

Immunity Provided Should Be Absolute. Both the ABA and the NOBC recommend that complainants be given absolute immunity from all civil actions. The 1990 NOBC report of *Recommendations to American Bar Association Commission on Evaluation of Disciplinary Enforcement* states that:

> In order to be fully accessible, [disciplinary] agencies must provide complainants absolute immunity from liability for complaints filed or evidence provided in the course of the proceeding. Qualified immunity is insufficient because of the high cost and risk of having to defend a frivolous suit alleging bad faith.

The ABA report noted that it is important that the immunity given to complainants be absolute to prevent intimidation of persons with valid complaints. The report stated that if immunity is limited to good faith complaints, an attorney can still use the prospect of a civil suit to intimidate a prospective complainant even if the complainant is making a complaint in good faith.

Most states provide immunity to persons making disciplinary complaints. A 1995 ABA survey found that 31 states and the District of Columbia give complainants absolute immunity from civil actions.

Recommendation (17). **The General Assembly may wish to consider amending the *Code of Virginia* to give all complainants absolute immunity from civil suit for all communications made to the Virginia State Bar regarding a disciplinary complaint or statements made in a disciplinary proceeding.**

Recommendation (18). **The Virginia State Bar should publicize the fact that complainants have immunity from civil suit in its brochure on the disciplinary process and through other reasonable means.**

PUBLIC CONFIDENCE COULD BE IMPROVED

With a self-policing disciplinary system in which lawyers are given responsibility for disciplining their own members, it is essential that all reasonable steps be taken to build and promote public confidence and trust in the system. Despite the need to build trust and confidence, there are several aspects of the current system that may instead reduce confidence in the system and even raise suspicions that the system is designed to protect lawyers instead of the public. One of the factors that lowers public confidence in the system is the closed nature of most parts of the disciplinary process. Another factor

that may lessen public confidence in the system are disciplinary rules which allow certain practices that create the appearance of impropriety. A final factor that may lessen public trust is the lack of understanding of the system and the purpose of the disciplinary process.

While some steps have been taken to improve public trust in the system in recent years, the Supreme Court and the VSB could take additional steps to further strengthen public confidence in the system. One step the Bar can take is to further open the disciplinary process. The Bar can also improve public confidence by amending the rules governing the process to remove any appearance of impropriety or conflict of interest that exists under the current system. Finally, the Bar should do a better job of informing complainants who have had their complaints dismissed at the intake stage why their complaint was dismissed.

Further Opening the System to the Public Would Improve Public Trust

One aspect of the current system that increases suspicion on the part of some members of the public is the closed nature of the system. Closed records and proceedings are likely to engender public suspicion regardless of how fair the system actually is. In order to demonstrate the fairness of the system to the public and increase public confidence in the system, the disciplinary system needs to be further opened to the public.

Most Aspects of the Current System Are Confidential. Under the current system, most aspects of the disciplinary process are closed to the public. Cases are confidential through the intake and investigative stages. In addition, subcommittee meetings and committee hearings are confidential. The only proceedings that are open to the public are disciplinary board hearings. Furthermore, the only records that are public are the final orders issued in disciplinary board cases and written determinations by a committee in cases in which a committee imposes a public reprimand.

Disciplinary Process Should Be Opened After a Probable Cause Determination Is Made. As long as lawyers continue to have responsibility for policing themselves, it is important to further open the process in order to demonstrate the fairness of the system and reduce public suspicion of it. Subcommittee meetings and district committee hearings should be open to the public after a threshold determination has been made that that there is some degree of reasonable basis or probable cause to believe that the respondent has violated the *CPR*.

Both the American Bar Association and the National Organization of Bar Counsel support opening the disciplinary process. The ABA Commission on Evaluation of Disciplinary Enforcement recommends that all records of the disciplinary process be made available to the public from the time of a complainant's initial communication with a disciplinary agency unless the complainant or respondent obtains a protective order for specific testimony, documents, or records. The Commission also recommends that all proceedings except adjudicative deliberations be public. The Commission report states that an open disciplinary system demonstrates its fairness to the public, and secret

records and proceedings create public suspicion regardless of how fair a disciplinary system actually is.

The National Organization of Bar Counsel also recommends that the system be further opened, although it does not recommend that the entire process be opened. The NOBC states that the process should be opened from the point at which formal charges are filed (after a probable cause determination is made) and that all hearings arising out of the prosecution of formal charges should be open to the public. The NOBC's report further states that the good will and trust of the public can only be gained by providing them with thorough and credible knowledge of the activities of disciplinary agencies.

Under the current system, there is no formal determination of probable cause. Therefore, the system would need to be modified to establish this probable cause determination. The logical point in the current process at which to make this threshold determination would be during the subcommittee review. The subcommittees currently assess the strength of the cases in deciding whether to certify cases, set them for hearing, dismiss them, or approve an agreed disposition.

A two phase subcommittee procedure would need to be developed. During the first phase, the subcommittee could meet in closed session to assess which cases met the probable cause or other threshold standard so that those cases that did not could be screened out in closed session and kept confidential. The subcommittee could then meet in open session to consider how to dispose of those cases in which there was reasonable basis or probable cause to believe that a violation of the *CPR* had occurred.

Opening up the disciplinary process after a probable cause determination would alleviate the primary concern raised by persons interviewed who are opposed to further opening the system. The main concern expressed by those whom JLARC staff interviewed was that it would unfairly harm the reputation of those attorneys who have had frivolous or unfounded complaints made about them. With a system that remains confidential until a complaint passes a probable cause threshold, unfair harm from frivolous complaints should not occur.

Recommendation (19). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to make the disciplinary process open to the public after a determination is made that there is reasonable basis or probable cause to believe that an attorney has violated the *Code of Professional Responsibility*.**

Bar Needs to Avoid the Appearance of Impropriety

With a system in place in which lawyers are given responsibility for regulating themselves, it is imperative that all reasonable steps be taken to avoid any appearances of impropriety or potential conflicts of interest. Under the current rules, several practices are allowed which create at the least the appearance of potential improper influence. The

Court Rules currently allow members of the council, other than executive committee members, to represent respondents in the disciplinary system. In addition, the *Court Rules* were recently amended to allow officers of the Bar access to the disciplinary files. Moreover, the *Court Rules* do not establish a formal procedure for disciplinary board members or district committee members to disclose conflicts that they may have in a case. The current *Court Rules* also appear to allow any member of the Bar, regardless of their position in the Bar, to represent respondents in the disciplinary system prior to a disciplinary case being referred to a committee. Finally, the *Court Rules* allow members of the disciplinary board to serve on the Bar's governing council simultaneously.

Bar Council Members Should Be Disqualified from Representing Respondents in the Disciplinary System. Paragraph 13 of the *Court Rules* provides that employees, officers or members of the executive committee, any member of a district committee, the disciplinary board, or the committee on lawyer discipline may not act as counsel for a respondent in any proceeding before a district committee or the disciplinary board. However, this language does not exclude council members who are not on the executive committee from representing respondents in disciplinary proceedings. Therefore, under the current rules, a member of the council, who is not a member of the executive committee, could represent a respondent in the disciplinary system.

This clearly creates the appearance of impropriety because of the council's powers related to the disciplinary system. The council is the body that approves the salary and appointment of the Bar Counsel. In addition, the council is the body that appoints the members of the district committees. The council also has the authority to recommend rules changes to the disciplinary system and has oversight of the disciplinary system through its appointment of the COLD committee. Based on the council's powers, none of its members should be allowed to represent respondents in disciplinary cases.

Certain Members Should Be Expressly Excluded from Representing Respondents at the Preliminary Investigation Stage. The current *Court Rules* do not appear to expressly disqualify council members, COLD members, disciplinary board members, or district committee members from representing a respondent in the disciplinary system prior to the referral of a case to a district committee. Clearly, none of these participants in the system should be allowed to represent a respondent at the preliminary investigation phase. This phase of the process is closed to the public and is a point in the process at which bar counsel have the discretion to dismiss a case. Having a Bar council member, COLD member, disciplinary board member, or district committee member representing a respondent at this stage of the disciplinary process clearly would have the appearance of impropriety.

Officers of the Bar Should Not Have Access to the Disciplinary Files. Another example in which the VSB and the Supreme Court have created the appearance of impropriety is a recently adopted amendment to the *Court Rules*, which gives officers of the Bar access to disciplinary records in the exercise of their official duties. Prior to this rule change, the only persons who had access to disciplinary files were members of COLD and bar counsel. This rule change apparently was based on the concern raised by past presidents of the Bar that they have not been able to respond knowledgeably to

inquiries by members of the public about high profile disciplinary cases because of their lack of access to the files. They argued that as the spokesperson for the Bar, it was important for the president to have access and be able to respond to inquiries.

While this rule change may have been well intended, it clearly creates an appearance of impropriety. Allowing the officers access creates the perception that the disciplinary system is not necessarily protected from outside influence. The disciplinary system should be entirely separate from those functions of the Bar not directly related to discipline to the extent possible. The president does not have any direct role in the disciplinary process and does not need access to the disciplinary files to perform his or her duties. While access to the records might make the president or other officers more knowledgeable in responding to inquiries from the public, the appearance of impropriety created by giving the president of the Bar such access far outweighs the president's need for access.

Committee and Board Members Should Be Required to Formally Disclose Conflicts. Under the current *Court Rules*, members of district committees and the disciplinary board are prohibited from adjudicating any matter with respect to which the member has any personal or financial interest that might affect or reasonably be perceived to affect the member's ability to be impartial. However, there do not appear to be any formal procedures in place to require board members and committee members to disclose potential conflicts. The system relies on members to come forward on their own initiative and reveal any potential conflicts that they may have.

The Bar should establish a formal procedure for disclosure of potential conflicts. Based on interviews with participants in the system and observation of board and committee proceedings, the disciplinary board and district committee members appear to disclose potential conflicts that they may have. However, with the closed nature of the system and the fact that local lawyers are judging local lawyers through the committee system, the Bar should establish a formal procedure for the disclosure of conflicts. This would help to avoid any appearance of impropriety and serve to reduce the perception of some that lawyers use the disciplinary system to protect their own members.

Members of the Disciplinary Board Should Not Serve on the Bar Council Simultaneously. Under the current *Court Rules* a member of the Bar may sit on the disciplinary board and the council simultaneously. Permitting members to serve on both bodies simultaneously unnecessarily blurs the distinction between the Bar's regulatory purpose and its non-regulatory purposes. Members of the disciplinary board should be completely independent of the other functions of the Bar.

Recommendation (20). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to prohibit any member of the Virginia State Bar Council, the committee on lawyer discipline, the disciplinary board, and the district committees from representing a respondent at any point in the disciplinary system.**

Recommendation (21). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to prohibit any person other than members of the committee on lawyer discipline, Virginia State Bar staff working in the area of discipline, and the Supreme Court of Virginia from having access to confidential disciplinary information.**

Recommendation (22). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to establish a formal procedure for disciplinary board and district committee members to disclose potential conflicts in disciplinary cases that they are assigned to adjudicate.**

Recommendation (23). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to prohibit members of the disciplinary board from serving on the Virginia State Bar Council simultaneously.**

Bar Should Provide Detailed Explanation of Dismissals

One group that appears to be particularly dissatisfied with the disciplinary system is those persons who have filed complaints and have had them dismissed. In many of the cases, their frustration appears to result largely from their lack of understanding of the purpose and limitations of the disciplinary system. Based on JLARC's review of cases, the intake unit does not always provide a detailed explanation of the reason for dismissal of cases that it decides to dismiss at intake. The Bar should try to reduce this lack of understanding by providing to complainants a detailed explanation of the basis for dismissal of their cases in every case that is dismissed.

Based on interviews with participants in the disciplinary process, one of the primary reasons that complainants are frustrated with the process is that they misunderstand the purpose and the limitations of the system. Some complainants have had an unsatisfactory legal result and are seeking a remedy through the disciplinary system. They may not understand that the disciplinary system is not intended to provide such remedies to complainants. Other complainants appear to be dissatisfied with the system because the *CPR* does not prohibit all bad or unprofessional behavior. Therefore, a lawyer may have acted badly or unprofessionally but not have violated the *CPR*. The complainant may not understand this distinction, and why the disciplinary system does not have jurisdiction to address the lawyer's conduct.

The Bar's complainant satisfaction project supports the conclusion that many of those complainants who are dissatisfied are confused about the system. The project found that one of the primary reasons for complainant dissatisfaction was confusion and misconceptions about what constitutes unethical attorney conduct.

With this potential for frustration and misunderstanding on the part of complainants, it is important for the Bar to take the time to provide complainants with a detailed explanation as to the reason for the dismissal of those cases that are dismissed

at intake. During the review of cases dismissed in 1995, JLARC staff assessed whether the dismissal letters submitted to complainants provided sufficient explanation regarding the grounds for dismissal. Based on the JLARC staff review of 145 cases dismissed at intake, the intake unit provided an adequate explanation to complainants in most of the cases but failed to provide an adequate explanation regarding the basis for dismissal in slightly more than ten percent of the cases reviewed. Generalizing to the entire population, this means that, out of 1,450 cases dismissed at the intake level in FY 1995, approximately 150 complainants would not have been given an adequate explanation of the basis for dismissal (Appendix D).

Recommendation (24). **The disciplinary system's intake unit should establish procedures to ensure that the correspondence submitted to complainants advising them that their complaint has been dismissed provide a detailed explanation of the basis for dismissal.**

IMPROVING FAIRNESS OF THE SYSTEM FOR RESPONDENTS

In addition to protecting the public, it is also important that the disciplinary system treat attorneys who are faced with charges of misconduct fairly. While JLARC's review found that the system generally treats respondents fairly, the study team's review revealed that the Bar could make some minor modifications to the system to improve its fairness. First, the system should provide limited discovery to respondents. Second, committee members who sit on the subcommittee that first reviews a case should be prohibited from sitting on the committee panel that hears that same case if it goes to a hearing. Third, respondents or their counsel should be allowed to be present for the subcommittee's consideration of their case if bar counsel are permitted to be present. Fourth, respondents who have a dismissal that creates a record imposed on them should have the right to appeal the decision to impose this discipline.

Limited Discovery Should Be Provided

The respondents in disciplinary cases should have the right to some limited discovery. Under the current rules, the only information that the respondent is entitled to receive from bar counsel is the complaint and any other exculpatory information that bar counsel has in its possession. Some additional information is currently being exchanged. For example, the disciplinary board recently instituted the policy of developing a pre-trial order under which certain information is exchanged. Moreover, bar counsel have indicated that they often share the facts of their case with the respondent or respondent's counsel in trying to reach an agreed disposition.

Although some exchange of information does appear to currently take place, the *Court Rules* should be amended to require some limited discovery in cases that have been set for hearing before a committee or before the disciplinary board. For example, the discovery could be limited to witness lists, summaries of witness statements, and exhibits

to be introduced at hearing. JLARC staff's survey of other states found that 26 of 32 jurisdictions with unified bars give respondents the right to conduct some discovery. Providing some limited discovery would ensure that the respondent was entitled to sufficient information to prepare for the hearing while not placing too great a burden on the system.

Recommendation (25). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to provide respondents with limited discovery in disciplinary cases that have been scheduled for hearing before the disciplinary board or a district committee.**

Subcommittee Participants Should Be Excluded from Committee Hearings

Under the current system, members of a committee who review a case at the subcommittee level may also sit on the committee panel that hears the full case. This raises two major concerns from a fairness standpoint. First, the committee members who reviewed a case at the subcommittee level may have additional information that is not available to other members of the committee on the panel. Second, a subcommittee member who has recommended that a case be set for hearing is, in the respondent's view, likely predisposed to believe that the respondent has violated the *Code of Professional Responsibility* prior to the hearing.

In interviews with committee members and disciplinary board members, most persons interviewed agreed that this practice seemed unfair. Allowing this practice at the committee level also seems somewhat inconsistent with the *Disciplinary Board Rules of Procedure* which prohibit any disciplinary board member who reviews a proposed agreed disposition from sitting on the panel that hears the case if the agreed disposition is ultimately rejected by the board. To address this fairness concern, the *Court Rules* should be amended to prohibit members who reviewed a case at the subcommittee level from sitting on the committee panel that ultimately hears a case.

Recommendation (26). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to prohibit committee members who participate in the subcommittee's review of a case from sitting on the committee panel that ultimately hears the case.**

Respondents Should Be Allowed to Be Present for Subcommittee Meetings

Under the current disciplinary system, it generally is the practice for bar counsel to attend most subcommittee meetings and present the cases on the docket to the subcommittee. Bar counsel also remains present while the subcommittee deliberates regarding each case. In contrast, neither the respondent nor his counsel is permitted to be present at the subcommittee meetings.

The current practice raises a fairness concern for respondents because of the decision authority that subcommittees have. A subcommittee has the authority to impose a dismissal with terms or a dismissal that creates a record at a subcommittee meeting without the consent of the respondent. Although neither type of dismissal is viewed by the Bar as a sanction, both do create a disciplinary record and may have substantial negative consequences for an attorney. Therefore, the respondent has a reasonable interest in being present for the consideration of his or her case if bar counsel is going to be present.

The subcommittees also have the authority to approve or reject proposed agreed dispositions. In cases in which the bar counsel and the respondent have reached a proposed agreed disposition of a case, the respondent has a reasonable interest in being present for the presentation of the agreed disposition to the subcommittee. At the disciplinary board level, respondents and their counsel are given the opportunity to be present for the presentation of proposed agreed dispositions to the disciplinary board.

Recommendation (27). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to allow respondents and their counsel to be present for the consideration of their case by a subcommittee to at least rebut any statements made by bar counsel or to answer any questions of the subcommittee.**

Respondents Should Have Right to Appeal Dismissals that Create a Record

Under the current system, a subcommittee has the authority to dismiss a case with the designation that the case creates a disciplinary record. This type of dismissal is used in cases where the subcommittee determines that there is a technical violation of the *CPR* but that the violation is so minor that the case should be dismissed, or there are exceptional circumstances that contributed to the violation. A subcommittee may impose such a dismissal without a hearing and without the consent of the respondent. Moreover, the respondent does not have the authority to appeal such a dismissal.

Although this type of dismissal is not viewed by the Bar as the imposition of a sanction, such a dismissal does create a disciplinary record for the respondent. The creation of a disciplinary record may adversely impact a lawyer's access to malpractice insurance or insurance rates, and could also be considered against the respondent as an aggravating factor in the sentencing phase of a subsequent disciplinary proceeding. Therefore, the Bar should provide some process by which a respondent can appeal a decision to impose a dismissal that creates a record.

Recommendation (28). **The Supreme Court of Virginia may wish to consider amending the *Rules of Virginia Supreme Court* to establish the right of a respondent to request a hearing before a committee panel for any dismissal that creates a disciplinary record.**

EFFICIENCY OF DISCIPLINARY PROCESS COULD BE IMPROVED

Over the past several years, there has been concern expressed by members of the public and Virginia attorneys that the Bar's disciplinary process is not as efficient as it should be. Concerns with the timeliness of complaint processing have been raised by complainants, respondents, and other participants in the process. Based on these concerns, the Bar has recently developed time guidelines for completing various phases of the disciplinary process in an effort to monitor and improve the efficiency of the system. The development of these time guidelines is a significant positive step by the Bar to improve its processing of complaints. Nevertheless, this review revealed many instances in which the majority of cases did not meet the time guidelines established by the Virginia State Bar for completing various phases of the disciplinary process.

The Bar needs to take several steps to improve the efficiency of the disciplinary system. A process that is not efficient is unfair both to the public and the respondents in the system. The many instances of missing the time guidelines for processing complaints at the intake and preliminary investigation phases of the process indicate that the Bar may need one additional full-time bar counsel to reduce delays at these points in the process. To assess future staff needs, Bar Counsel needs to more actively monitor hours worked and productivity of bar counsel and investigators. In addition, the Bar should formally consider whether the use of paralegals would improve the efficiency of the system. Finally, the Bar should establish a formal training program for investigators to provide additional instruction regarding the *Code of Professional Responsibility* as well as other relevant legal issues.

Most Disciplinary Complaints Do Not Meet VSB Processing Standards

In April 1994, the VSB committee on lawyer discipline adopted goals for disciplinary complaint processing as a mechanism to measure the efficiency of the disciplinary process. The Bar's disciplinary staff developed these time guidelines based on a survey of 29 other states in order to set out measurable goals for reviewing, investigating, and adjudicating disciplinary complaints. Analysis of disciplinary complaints received by the Bar in FY 1994 found that most timeline goals are being met less than 50 percent of the time (Table 13).

The lowest levels of performance in meeting the timeline goals are in the areas of: (1) intake review, (2) preliminary investigation of complaints, and (3) district committee hearings. This analysis further indicated that the Bar's current process for monitoring compliance with the time guidelines may be of limited use because of data problems which include missing information, inaccurate information, and inconsistencies in data used.

Intake Unit Not Meeting Bar's Processing Goals in Dismissing Cases and Opening Case Files. The single greatest source of not meeting the timeline goals involves intake review. The time guideline established for the intake unit (Action/

Table 13

Comparison of Complaint Processing With Timeline Goals FY 1994 Complaints

Action/Timeline	VSB Goal (Days)	Average Number of Days	Number and Percentage Meeting Criteria	
			Yes	*No*
1. Initial review and either: - assign for preliminary investigation, or - advise complainant that matter will not be investigated[a] (3 days from receipt of complaint)	3	6 26	455 (35%) 97 (8%)	849 (65%) 1195 (92%)
2. Preliminary investigation concluded by bar counsel and either: investigation closed or complaint assigned to staff investigator and referred to district committee[a] (60 days from receipt of complaint)	60	70	442 (34%)	862 (66%)
3. Staff investigative report received by bar counsel[b] (180 days from Bar's receipt of complaint)	180	182	42 (61%)	27 (39%)
4. Bar counsel prepares report and recommendation for district committee[b] (30 days from bar counsel's receipt of staff investigative report)	30	51	36 (58%)	26 (42%)
5. Subcommittee acts either to dismiss complaint, set for district committee hearing, or certify to disciplinary board[b] (30 days from date of bar counsel's report and recommendation)	30	59	32 (54%)	27 (46%)
6. District committee hearing held[c] (90 days from district committee or subcommittee decision to set for hearing)	90	134	11 (35%)	20 (65%)
7. Transfer date - clerk's office receives disciplinary board certification[c] (30 days from certification by district committee or subcommittee)	30	57	25 (49%)	26 (51%)
8. Post committee hearing - either disciplinary board or circuit court[c] (120 days from certification by district committee or subcommittee)	120	178	22 (47%)	25 (53%)

Notes:
(a) Data taken from entire population of complaints as reported in the VSB disciplinary database.
(b) JLARC staff analysis of randomly-drawn sample of ten percent of the entire population of complaints.
(c) JLARC staff analysis of entire population of complaints.

Note: Sampling errors and confidence intervals are reported in Appendix D.

Source: Virginia State Bar analysis for Action/Timelines #1 through #2; JLARC staff analysis for Action/Timelines #3 through #8.

Timeline #1) provides that the intake unit should either assign a case for preliminary investigation or advise the complainant that the case will not be investigated within three days of receipt of the complaint. Intake staff did not advise the complainant that the matter was being dismissed within the three-day time guideline in 92 percent of the complaints received and dismissed by intake staff in FY 1994. Furthermore, the Bar did not assign the complaint for preliminary investigation within the three-day timeline in 65 percent of the cases in which the intake staff determined that a case file should be opened.

Preliminary Investigations Are Not Meeting Processing Goals. Bar counsel are not conducting a preliminary investigation within the time guideline established by the Bar in most cases. Bar counsel met the 60-day timeline (Action/Timeline #2) only 34 percent of the time for complaints received in FY 1994 that were assigned to bar counsel for preliminary investigation.

Majority of Investigative Staff, Bar Counsel, and Subcommittee Actions to Complete Investigations and Set Cases for Hearings Meet Processing Goals. The highest level of performance in meeting goals is with the investigation time guideline. The guideline (Action/Timeline #3) states that full investigations should be completed within 180 days of receipt of a Bar complaint. Investigators met this time guideline in 61 percent of the cases that were initially received in FY 1994.

Bar counsel and the subcommittees are also meeting the time guidelines for processing cases after an investigation more than half of the time. Bar counsel met the goal of submitting a report of investigation to the appropriate subcommittee within 30 days of receiving the staff investigative report in 58 percent of cases (Action/Timeline #4). Moreover, the subcommittees acted within 30 days of receiving the report of investigation in 54 percent of the cases (Action/Timeline #5).

Majority of District Committee and Disciplinary Board Hearings Are Not Completed within the State Bar's Timeline Goals. The Bar has not been meeting the timeline goal for holding district committee hearings in a majority of cases. The guideline (Action/Timeline #6) states that the district committees should hold a hearing within 90 days of a decision by a subcommittee to set a case for hearing. This goal was met only 35 percent of the time for district committee hearings held involving FY 1994 complaints. District committee hearings are held an average 134 days from the subcommittee decision to set the case for hearing.

It is not clear why the district committees are having difficulty meeting this 90-day time guideline. Many of the participants in the process whom JLARC staff interviewed indicated that district committees do not have enough work with the establishment of the subcommittee system. The Bar needs to assess why the district committees are not meeting this guideline and take steps necessary to reduce delays in holding district committee hearings and improve performance in meeting this timeline goal.

The disciplinary board is also not meeting the guideline for holding hearings in a majority of cases. According to Bar timeline goals, disciplinary board hearings should

be held within 120 days of a decision to certify a case to the board (Action/Timeline #8). Only 47 percent of the hearings involving FY 1994 complaints tracked through August 1995 met this goal. However, COLD has already identified delays at the board level as a problem, and the VSB has taken the step of adding six new members to the disciplinary board to address it. This should enable the board to reduce delays in holding hearings and increase performance in meeting the 120-day goal.

The VSB Needs to Improve Its Timeline Monitoring Process. JLARC staff analysis of the Bar's monitoring of timelines found some problems with the current system that need to be addressed if the Bar is going to continue to rely on the current system to assess the efficiency of the disciplinary process. The VSB adopted timeline goals in April 1994 and is currently in the process of rectifying implementation problems. The primary problem appears to be with the data used by the VSB to analyze its success in meeting the timelines.

One of the problems with analyzing past performance is the lack of complete data. The Bar did not begin entering data on action/timelines four through eight until October 1994. Therefore, performance reports regarding cases in the system prior to October 1994 may not be reliable because of the incomplete data.

This analysis also found two problems with the accuracy of the data entered into the computer database used to analyze actual performance compared to time guidelines. First, the analysis found problems with the accuracy of the data for action/timeline #3 (staff investigation is concluded and a report is submitted to bar counsel), as a number of computer entries did not accurately state the day that the report was submitted to bar counsel. Secondly, the analysis found problems with the accuracy of the data for action/ timelines #4 (bar counsel prepares report) and #5 (subcommittee acts) for some cases. In these instances, the cases were still open as of October 1994, but had already passed these stages in the process. When the date of bar counsel's report or the subcommittee meeting date were not documented in the file, the clerk's office had to rely on complaint tracking form data which was not maintained consistently by staff within the professional regulation department.

Finally, the JLARC staff analysis found that there are some inconsistencies in the dates used to measure the VSB's performance in meeting the various timeline goals. (See Appendix D for a discussion of the inconsistencies.) The Virginia State Bar needs to standardize the dates used to measure performance in order to effectively monitor the agency's ability to meet the various timeline goals.

Recommendation (29). **The Virginia State Bar should assess why the district committees are not meeting the time guideline for conducting district committee hearings and take the necessary steps to improve performance in meeting the 90-day timeline.**

Recommendation (30). **The Virginia State Bar should establish procedures to ensure the accuracy and consistency of the data used to analyze its**

performance in meeting the timeline goals. This information is necessary to accurately monitor the efficiency of Virginia's disciplinary process.

Bar Needs to Increase and Strengthen Staff Resources in Order to Improve Efficiency

Based on the analysis of the Bar's performance in meeting its timeline goals, the Bar needs to take additional steps to improve the efficiency and reduce delays in processing disciplinary cases. The difficulty in meeting action/timelines one and two indicate that the department of professional regulation may need one additional bar counsel position to assist with intake review and preliminary investigations. JLARC staff analysis also found that the Bar needs to develop better capability to assess staff needs in the future. Further, the Bar needs to assess whether the use of paralegals could improve the efficiency of the system. Finally, the Bar should develop a formal training program for investigators.

One Additional Bar Counsel May Be Needed. The difficulty in meeting the time guidelines established for reviewing cases at intake and for conducting preliminary investigations indicates that the Bar may need another bar counsel to handle some of the workload at these levels. The additional bar counsel could divide their time between intake review and preliminary investigations.

Based on an analysis of the hours worked by the bar counsel currently on staff, it does not appear that they have the capacity to absorb much of this excess workload unless they work substantially more than their weekly requirement of 37.5 hours. JLARC staff analysis of bar counsel work hours found that full-time bar counsel worked an average of 1952 hours in FY 1995, or about 45 hours per week (Table 14).

Table 14

VSB Full-time Bar Counsel and Investigative Staff Average Hours Worked, FY 1990 to FY 1995

	Average Number of Bar Counsel	Average Hours Per Week	Average Number of Investigaors	Average Hours Per Week
FY 1990	5.17	41	7.00	42
FY 1991	6.00	44	7.75	44
FY 1992	6.92	46	7.83	45
FY 1993	7.17	44	7.50	44
FY 1994	7.58	44	7.75	48
FY 1995	7.33	45	7.50	48

Source: JLARC staff analysis of Virginia State Bar monthly timesheet summaries of bar counsel and investigative staff.

If an additional bar counsel position were established by reclassifying one of the Bar's current positions, the VSB would then need to monitor the impact on other parts of the system. One place where it might have an impact is on investigations. Currently, the investigators are meeting the 180-day time guideline in 61 percent of the cases. However, with more cases being reviewed more quickly, the total investigative workload would likely increase.

Based on JLARC staff analysis of hours worked by investigators, investigators would not be able to easily absorb the increased workload. JLARC staff analysis revealed that investigators worked 48 hours a week on average during FY 1995. Therefore, the current investigative staff would have difficulty absorbing an increased workload and still meeting the 180-day goal for completing investigations in most cases.

Bar Counsel Needs to More Effectively Monitor Hours Worked and Productivity. Although Bar Counsel requests that bar counsel and investigators submit weekly time records, Bar Counsel does not enforce this requirement diligently. Moreover, Bar Counsel does not appear to conduct much analysis of the time records after they are received. With the resource limitations of the disciplinary process and the changing workload of the department over time, the Bar Counsel should be regularly analyzing time records and productivity of bar counsel and investigators, along with performance in meeting timeline goals, to assess when additional staff are needed.

Regular analysis of the total hours worked by attorneys and investigators would help the Bar to assess whether there is any unused capacity within the department. Along with analyzing the hours worked, Bar Counsel needs to develop measures of productivity to assess whether bar counsel are being efficient in their work. Productivity measures have been developed for investigators but not for bar counsel. By conducting regular analysis of hours worked and productivity of bar counsel and investigators together with performance in meeting the timeline goals, Bar Counsel would be able to better assess when additional resources are needed and would have records to support requests for additional staff.

The Bar Should Study Whether the Use of Paralegals Would Improve Efficiency. Some of the bar counsel interviewed reported that the use of paralegals could reduce the workload of the attorneys and increase the efficiency of the disciplinary process. They stated that paralegals could assist with legal research, trial preparation, docket control, and file maintenance. Other bar counsel interviewed indicated that they did not think paralegals would be useful or were uncertain whether they would be useful.

A 1994 consultant study of the disciplinary department noted that Virginia employed only one paralegal and that other states employed 4.3 paralegals on average. The one paralegal referred to by the report worked for the ethics counsel and did not work in the disciplinary process. The report recommended that the VSB study the potential value of using more paralegals.

Despite the interest in using paralegals expressed by some bar counsel and the recommendation in the consultant report that the Bar consider the use of paralegals, the

Bar does not appear to have seriously considered the issue. With current resource limitations and the need to improve the efficiency of the disciplinary process, the VSB should examine whether the employment of additional paralegals would be beneficial.

Increased Training Could Improve Efficiency of Investigators. Investigators currently do not receive much structured training from the Bar regarding how to conduct investigations. Most of the training that the VSB provides is on-the-job training. While the Bar only hires staff with prior investigative experience in other fields, investigative staff reported that training in the *Code of Professional Responsibility* and the civil law would allow them to conduct their investigations more efficiently and effectively. The Bar should develop a structured training program for staff investigators that covers legal topics that would assist investigators in their investigations.

Recommendation (31). **The Virginia State Bar should reclassify an existing position as an additional bar counsel position. This position should be used to review cases at the intake level and to conduct preliminary investigations to help reduce processing delays.**

Recommendation (32). **The Bar Counsel should actively monitor hours worked and productivity of bar counsel and investigators, along with performance in meeting the timeline goals, to better assess the future resource needs of the department of professional regulation.**

Recommendation (33). **The Virginia State Bar should formally study whether the increased use of paralegal staff would improve efficiency.**

Recommendation (34). **The Virginia State Bar should develop a structured training program for investigative staff which covers the *Code of Professional Responsibility* and other relevant legal issues.**

IV. Role and Mission of the Virginia State Bar

The current role and mission of the Virginia State Bar (VSB) are not unique among states in the nation. Several other states have unified bars with similar roles and missions, with some variation. However, compared to the way in which other professions and occupations are regulated in Virginia, the scope of the VSB's mission and activities is distinct. This distinction is characterized by the combination of regulatory activities and non-regulatory activities which are more commonly found in professional associations.

Senate Joint Resolution (SJR) 263 directed the Joint Legislative Audit and Review Commission (JLARC) to review the VSB and to examine the activities of the VSB as they relate to the Bar's mission. The resolution specifically directed that JLARC conduct:

> ....a thorough evaluation of the revenues and staffing and each of the activities and programs of the Virginia State Bar in relation to its statutory and Rules of Court authority with a view toward ensuring the maximum effectiveness of the Virginia State Bar in carrying out its assigned mission with the minimum resources necessary.

This review found that, with one minor exception, most VSB activities appear consistent with the mission established for it by statute and the *Rules of Virginia Supreme Court* (*Court Rules*). Nevertheless, there is a need for better prioritization of activities to ensure that the Bar's regulatory activities remain its primary focus. Findings in an earlier chapter of this report indicated that the Bar is experiencing some problems affecting the efficient and effective resolution of Bar disciplinary complaints. The Bar may need to reallocate existing resources to address resource needs in this area.

This review also found that the association-like, non-regulatory activities conducted by the Bar raise questions about whether the Bar is properly focused on its regulatory mission. The Bar has expanded its non-regulatory activities over the years to include commercial activities that are unusual for a State regulatory agency. Given the lack of uniform support for some of the non-regulatory, association-like activities of the Bar, the Bar may need to re-focus its priorities on its regulatory mission.

Finally, this review found that the Supreme Court of Virginia and the General Assembly may wish to provide additional guidance to the Virginia State Bar in striking a proper balance between its regulatory and non-regulatory activities. Without this guidance, the Bar will most likely continue to experience pressure to change the scope of its activities from its members, other voluntary bar associations, complainants, and the public.

PROPER BALANCE NEEDED BETWEEN REGULATORY AND ASSOCIATION-LIKE ACTIVITIES

Virginia State Bar activities which support its mission to regulate the legal profession are clearly the most important responsibility of the Bar because they serve to protect the public from lawyer misconduct. The *Code of Virginia* states:

> The Virginia State Bar shall act as an administrative agency of the Court for the purpose of investigating and reporting violations of rules and regulations adopted by the Court under this article. (§54.1-3910)

This responsibility for regulating lawyer misconduct is the only broad responsibility given to the Bar by statute. However, the development of a number of non-regulatory, association-like activities within the Bar has served to divert the Bar's attention and some resources from this statutory mission to regulate the legal profession.

While a number of the Bar's non-regulatory activities may support aspects of the mission articulated in the *Court Rules*, there are several indications that the balance of regulatory and non-regulatory activities undertaken by the Bar may need to be reassessed. The association-like nature of some programs and activities have triggered questions by the Bar's own members about whether the Bar is appropriately focusing efforts on its regulatory mission. In addition, current resource allocations, coupled with problems identified regarding the Bar's disciplinary system, suggest that the current balance between activities may not be the most optimal.

Expansion of Non-Regulatory Activities Diverts the VSB's Focus from Its Regulatory Role

Examination of the VSB activities indicates that a number of non-regulatory, association-like activities have grown out of a desire to support aspects of the Bar's mission articulated in the *Court Rules*. These *Court Rules* give the Virginia State Bar Council broad authority for activities to: (1) protect the public through regulation of the legal profession, (2) improve the administration of justice in Virginia, (3) improve the quality of legal services to citizens in Virginia, and (4) support the improvement of the legal profession by maintaining and elevating high standards of conduct, integrity, and courtesy; and by encouraging higher and better education of members. Expansion of non-regulatory activities to support three of the four broad categories for which the Bar has authority, however, may serve to distract the Bar's attention from its regulatory mission and deflect resources from necessary regulatory functions.

Exhibit 5 illustrates a comparison of the broad scope of the Bar's powers and duties as articulated in the *Court Rules* and the activities which they appear to support. A closer examination of some of these non-regulatory activities indicates that a number of these are extensions of the Bar's original mission and activities. Some activities appear to have tenuous links to the Bar's mission, particularly as articulated by statute.

Exhibit 5

General Powers of the VSB Council by Associated Regulatory and Non-regulatory Activities

Protection of the Public by Regulation of the Profession	Improvement of the Administration of Justice	Improvement of the Quality of Legal Services	Improvement of the Profession
• Receive and investigate disciplinary complaints	• Evaluate and endorse judicial candidates on a merit basis	• Operate the Virginia Lawyers Referral Service	• Provide support to Bar's executive committee, council, and standing and special committees
• Prosecute charges of misconduct	• Administer the clients' protection fund	• Promote and coordinate pro bono activities	• Sponsor an annual meeting for members
• Adjudicate disciplinary cases		• Sponsor a pro bono conference	• Conduct professionalism course
• Receive and investigate unauthorized practice of law complaints		• Publish consumer information on the legal system	• Develop and support specialty law sections
• Provide advice on legal ethics, lawyer advertising and solicitation, and the unauthorized practice of law		• Fee dispute resolution program	• Sponsor continuing legal education through specialty law sections
• Publish the *Virginia Register*			• Young lawyers conference
• Approve trust account depositories			• Publish the *Virginia Lawyer*
• Register legal corporations			• Publish section newsletters and profession-related brochures
• Regulate legal aid societies			• Sponsor Cambridge education program held in England
• Verify member certification of liability insurance			• Sponsor midyear legal seminar

Source: JLARC staff analysis of VSB activities and *Rules of Virginia Supreme Court*, Part 6, § IV *et seq.*

Exhibit 5 (continued)

General Powers of the VSB Council by Associated Regulatory and Non-regulatory Activities

Protection of the Public by Regulation of the Profession	Improvement of the Administration of Justice	Improvement of the Quality of Legal Services	Improvement of the Profession
• Provide support to the disciplinary system through the Clerk's Office			• Coordinate local and specialty bar relations
• Approve continuing legal education providers and course content			• Sponsor annual bar leaders' institute and conference of local bar associations
• Track and enforce mandatory continuing legal education requirements			• Establish and maintain an administration and finance fund
• Conduct annual conference for members participating in disciplinary process			• Coordinate Bar-sponsored personal insurance plans
			• Coordinate Bar-endorsed professional liability coverage
			• Sponsor lawyers' expo at the Bar's annual meeting
			• Provide computerized legal research services
			• Establish and maintain presidents' art collection
			• Make grants to lawyers' substance abuse program

Source: JLARC staff analysis of VSB activities and *Rules of Virginia Supreme Court*, Part 6, § IV *et seq.*

Nevertheless, the Bar's executive director indicated that of these activities, only one, the establishment of the presidents' art collection, does not support the Bar's mission as dictated by the *Code of Virginia* and *Court Rules*.

Table 15 illustrates the non-regulatory activities undertaken by the VSB over the last 25 years. Some of these activities do not appear to directly support the VSB's mission. For example:

> *The VSB established a presidents' art collection in 1992 to honor the presidents of the Virginia State Bar. The development of this art collection required the Bar to solicit contributions from law firms, corporations, local bar associations, and individuals who wished to honor a particular Bar president. In addition, the Bar-endorsed malpractice insurance carrier underwrote the production of a catalog which commemorates the art collection.*
>
> *The use of Bar staff to solicit, procure, and set up the collection appears to be an inappropriate use of Bar member dues, particularly since the activity does not appear to support the Bar's mission. While donations for the presidents' art collection total only about $53,300, this figure does not include the staff resources used to procure the art, to arrange for the production of the art catalog, or to maintain the collection appropriately.*

While some of the Bar's non-regulatory activities are not funded by mandatory member dues, each of the non-regulatory activities require some commitment of VSB staff time and resources which generally are funded through mandatory member dues. The only activities which currently appear to be completely self-supporting are: (1) the Virginia Lawyer Referral Service, and (2) the specialty law sections. Examples of non-regulatory activities which divert resources and may distract the regulatory focus of the Bar are two continuing legal education seminars produced by the Bar each year.

The Bar currently conducts two continuing legal education seminars which are held outside the Commonwealth of Virginia, and usually outside the United States. These are the Cambridge seminar and the annual midyear legal seminar. The VSB sponsorship of these programs raises two primary concerns. First, by conducting these programs, the VSB devotes time and resources to activities which appeal to a small number of Bar members and are not widely supported by members of the Virginia State Bar. Further, by conducting these seminars at resorts in distant locations, the Bar contributes to the public perception that it is not properly focused on its regulatory mission.

Sponsorship of the Midyear Legal Seminar Requires Bar Resources and May Lack Membership Support. The midyear legal seminar is generally held in November each year in a resort location, often outside of the United States. To date, the VSB has held 23 such seminars. On average, about 200 members attend this seminar, usually with three VSB staff members. While the event is budgeted to be self-supporting,

Table 15

Recent Expansion of VSB Non-Regulatory Activities

Activity	Date Authorized	Authorizing Entity
Specialty law sections	1955, 1969, 1970s, 1980s, 1990s[1]	VSB council
Young lawyers conference	1971	VSB council
Midyear legal seminar	1973	VSB council
Virginia Lawyer Referral Service	1976	VSB council
Clients' protection fund	1985	Part 6, § IV, ¶16 *Rules of Virginia Supreme Court*
Bar leadership institute	1986	VSB Council
Professionalism course	1987	Part 6, § IV, ¶13.1 *Rules of Virginia Supreme Court*
Administration and finance fund	1987	Part 6, § IV, ¶9(i) *Rules of Virginia Supreme Court*
Virginia Lawyer	1988[2]	Part 6, § IV, ¶9(j) *Rules of Virginia Supreme Court*
Lawyers expo	1988	VSB president's initiative
Computerized legal research services	1989	VSB council
Cambridge seminar	1990	VSB executive committee
Local and specialty bar relations	1990	VSB council
Conference of local bar associations	1990	VSB council
Pro bono coordination	1990	VSB council
Pro bono conference	1991	VSB council
Evaluate and endorse judicial candidates	1991	Part 6, § IV, ¶9(j) *Rules of Virginia Supreme Court*
Presidents' art collection	1992	VSB executive committee
Resolution of fee disputes	1993	VSB council
VSB-sponsored group personal insurance	1995[3]	Section 54.1-3917.1 *Code of Virginia*
VSB-endorsed group professional liability insurance	1995[3]	Section 54.1-3917.1 *Code of Virginia*

[1]There are currently 20 specialty law sections. Four sections were established by council in 1955, one was established in 1969, seven sections were established in the 1970s, five were established in the 1980s, and two were established in the early 1990s.

[2]The *Virginia Lawyer* evolved from the Bar's prior publication, the *Virginia Bar News*. Authority for this type of a publication was reinforced by *Button v. Day* 204 Va. 547, 132 S.E.2d 292 (1963) which held that the publication was not a law magazine within the meaning of the statute at that time (§54-52 of the *Code of Virginia*, later recodified), and its publication was within the powers granted the Bar under Part 6, § IV, ¶9(j) of the *Rules of Virginia Supreme Court*.

[3]VSB sponsored group insurance plans were initiated in 1954 when it sponsored life insurance. Group health insurance was added in 1955, group disability insurance was added in 1959, and group professional liability insurance was added in the 1960s.

Source: Section 54.1 *et seq.* of the *Code of Virginia* and the *Rules of Virginia Supreme Court*, Part 6, § IV, Paragraphs 1-20.

some Bar resources do support the event. Further, VSB members do not appear to generally support this activity.

A JLARC survey of Bar members found that 86 percent reported that the sponsorship of the midyear legal seminar was not an essential activity of the Bar. When the number of individuals participating in this seminar is compared to overall Bar membership, it is apparent why most Bar members do not feel this is an essential activity. On average, only about one percent of Bar members participate in this seminar each year (Table 16).

One rationale offered by Bar leaders for maintaining the midyear legal seminar is that the event is self-supporting and is not subsidized by mandatory Bar dues. Nevertheless, VSB financial resources for staff planning, coordination, and accounting are used to conduct the annual event. An examination of the expenditures for the midyear legal seminar also indicates that the seminar lost money in three of the past seven years. In at least one of these years, the Bar had to allocate profits from its Cambridge seminar to offset the losses for the midyear legal seminar. Table 17 illustratesthe revenues and expenditures of the annual midyear legal seminar over the past seven years.

Table 16

Locations and Participants at the VSB Annual Midyear Legal Seminar

Calendar Year	Mid-year Legal Seminar Locations	Number of Participants	Participants as a Percent of Active Bar Members
1988	Acapulco, Mexico	492	3.06%
1989	Bermuda	361	1.81%
1990	Monte Carlo	289	1.64%
1991	Palm Springs	95	0.52%
1992	Acapulco, Mexico	175	0.92%
1993	Bermuda	136	0.70%
1994	Grand Cayman	177	0.89%
1995	Maui, Hawaii	150*	0.74%

*Projected schedule.

Source: Virginia State Bar, memo dated April 14, 1995, including a report on membership and dues statistics, and final accounting documentation of midyear legal seminars received on October 12, 1995.

The VSB Annual Cambridge Seminar Also Diverts Some Resources and Lacks Membership Support. The Cambridge seminar is held at Emmanuel College at Cambridge University in Cambridge, England. The current executive director established a similar program when he was Dean of the T.C. Williams School of Law at the University of Richmond. That program was discontinued when he left the law school in 1987. He became the executive director in 1989, and the executive committee authorized the establishment of the current program for VSB members in 1991.

Table 17

Revenues and Expenditures of Midyear Legal Seminars 1988 - 1995

Year	Midyear Seminar Location	Revenue	Expenditures	Profit (Loss)
1988*	Acapulco, Mexico	$6,319.45	$1,805.10	$4,514.35
1989*	Bermuda	$3,254.80	$1,353.95	$1,900.85
1990*	Monte Carlo	$1,585.00	$2,926.19	($1,341.19)
1991	Palm Springs	$7,255.00	$ 16,475.65	($9,220.65)
1992	Acapulco, Mexico	$11,875.00	$ 26,125.72	($14,250.72)
1993	Bermuda	$35,983.44	$ 20,700.81	$15,282.63
1994	Grand Cayman Island	$39,098.02	$ 27,037.61	$12,060.41
1995**	Maui, Hawaii	$37,500.00	$ 36,750.00	$750.00

*Revenues and Expenditures for these years do not reflect total revenues and expenditures associated with the seminar that are handled by the travel agent. They do reflect net revenues and expenditures of the Bar in arranging the seminar.

**Revenues, expenditures and profits for 1995 represent budgeted amounts, not actual amounts.

Source: Virginia State Bar, memo dated April 14, 1995, including a report on membership and dues statistics, and final accounting documentation of midyear legal seminars received October 12, 1995.

This seminar also appears to lack member support. A JLARC survey of Bar members found that 94 percent of members reported that the Cambridge seminar was not an essential activity of the Bar. As with the midyear legal seminar, less than one percent of the VSB members participate in this event annually. At the most recent Cambridge seminar in July 1995, 33 Bar members (not including the executive director) attended.

Questions Have Been Raised Regarding the Scope and Focus of VSB Activities

Some concerns surfaced regarding the scope and focus of VSB activities during consideration of the Bar's 1994-1996 biennial budget by the General Assembly. Additional concerns were raised during the formulation and adoption of the VSB's most recent long range plan (completed in 1994). These concerns raised a number of questions such as:

- Is the Bar appropriately focused on regulation of the profession?
- Are the activities of the VSB consistent with its mission, particularly its statutory mission?
- Should the Bar be involved in certain commercial activities?
- Are projected dues increases actually necessary?

Legislative uncertainty about growth in the Bar's non-regulatory activities led the 1994 General Assembly to insert language into the Appropriation Act to require the VSB to direct its activities to those which involved regulating the profession and improving the quality of legal services in Virginia. Further, concerns were also evident when the 1995 General Assembly amended the *Code of Virginia* to decrease the cap on lawyers' annual fees from $300 to $250 per annum. While the VSB can raise lawyers' annual fees, it does not have the authority to charge annual fees greater than the cap set by statute. (Current annual fees are $185 per year.)

The VSB completed its current long range plan in 1994. At that time, several statewide voluntary bar associations began to question: (1) the underlying assumptions guiding Bar activities outlined in the plan, and (2) the extent of projected growth to support those activities through the year 2000. While recognizing the broad mission of the Bar as set forth in statute and the *Court Rules*, the voluntary associations were concerned that the Bar had exceeded its statutory mission by implementing a wide range of non-regulatory activities. Further, they believed these non-regulatory activities to be inconsistent with the intent of the General Assembly in creating a unified Bar.

The voluntary statewide bar associations were also concerned about the anticipated growth of the Bar's staff and questioned the allocation of staff between regulatory and non-regulatory, association-like activities. This led one voluntary bar association to state:

> The VSB of the past, even the VSB of 1986/87, which operated with a staff of 30 and a clear focus on professional regulation, no longer exists. The current VSB, in the scope of its activities, already looks more like a very large and growing trade association than a state agency.
>
> The VSB has an annual meeting that strongly resembles a convention, it provides an array of member benefits, its non-dues revenues have expanded, and it is heavily involved in production and marketing of CLE programs. The VSB's publications have become quite sophisticated and expansive, as have programs in public relations, public education and public service. The VSB....has created sections or committees in virtually every area of interest to various segments of the bar.
>
> In short, the VSB has become a monolithic hybrid: a public agency with a statutorily defined duty but also a 'super bar' association with the power to mandate membership and dues to support programs not necessarily addressed to the profession as a whole.

The Bar's Statutory Mission to Regulate the Legal Profession Should Continue to Be Its Top Priority

The Bar's current mix of regulatory and non-regulatory, association-like activities is unusual for a State professional regulatory agency. This makes performance comparisons between these types of regulatory agencies difficult. Clearly, the VSB's

mission is broad and allows for this diversity of activities. Nevertheless, the General Assembly and the Supreme Court of Virginia may wish to ensure that regulation of the legal profession continues to be the top priority of the VSB in terms of its resource allocation and activities. Without this emphasis, public protection and public confidence in Virginia's legal system may be impaired.

During this review of the VSB, it did not appear that the regulation of the profession is always regarded as the Bar's top priority. Examination of resource allocations and funding patterns, observation of Bar activities, and interviews with Bar officers and staff, revealed that the Bar sometimes prioritizes activities that serve its members, rather than activities that regulate the profession.

Approximately One-Half of the VSB's Resources Are Allocated to Non-Regulatory Activities. Balancing regulatory and non-regulatory activities necessarily creates some tensions in allocating resources. As indicated in an earlier chapter, about 57 percent of State Bar fund expenditures in FY 1995 were used to finance VSB regulatory activities. If State Bar fund expenditures are added to VSB expenditures from its administration and finance fund, it appears that about 54 percent of total VSB expenditures are used to support non-regulatory activities.

Interviews with VSB staff and its officers indicated that the Bar has not increased resources to meet perceived needs in the disciplinary system, particularly the department of professional regulation. According to these interviews, this was because the 1994 General Assembly froze its appropriations for FY 1995 and FY 1996. Examination of the VSB appropriations, budgets, and expenditures over this period shows growth in overall spending by the Bar during the last two years for inflationary budget increases and salary adjustments, but no growth in new programs or positions. These increases occurred in regulatory and non-regulatory departments.

While the VSB continued to expend a significant portion of its resources on non-regulatory activities during this period, it did shift one full-time position from the communications and public service staff to the office of the clerk of the disciplinary system. The only new program initiated during this time was a fee dispute resolution program to divert such matters from the disciplinary system. The program involves no new personnel and is being carried out by the coordinator of local and specialty bar relations. The Bar also reviewed with the Office of the Attorney General all of its member benefit programs and eliminated one such program, the endorsed car rental program.

Nevertheless, during this time period, the Bar did not attempt to reallocate any existing resources from its non-regulatory association-like activities to its department of professional regulation, even though it had identified staffing needs in this area. The Bar continued to expend a major portion of its resources on non-regulatory activities. This occurred in spite of the strong message sent by the General Assembly directing the VSB to focus its activities on regulatory matters

An assessment of the VSB's yearly calendar of events also indicates that a large portion of the VSB's activities involve non-regulatory activities by its staff and volunteer

members. Of the more than 330 meetings held by the VSB in FY 1995, approximately 45 percent involved activities which are clearly non-regulatory in nature. Many of these meetings divert limited staff resources to schedule and prepare for the meetings.

Non-Regulatory Activities Divert Resources of the VSB. If resources were unlimited, then perhaps VSB support of non-regulatory activities would not be as problematic. However, as Chapter III indicated, the VSB continues to lack adequate resources within the disciplinary system to fully carry out the Bar's mission to protect the public in a timely and efficient manner. The department of professional regulation appears to need at least one additional full-time bar counsel position, and additional investigative and support staff may be needed in the future to expedite the processing of disciplinary complaints. In addition, the clerk's office appears to be functioning at peak capacity.

In the meantime, resources are being used to support other non-regulatory activities which may not be central to the Bar's primary statutory mission. For example:

> *Currently the VSB supports 20 specialty law sections and the young lawyers conference with staff and administrative support. These sections sponsor special projects and publications, produce newsletters, and conduct continuing legal education programs.*
>
> *Fourteen VSB staff members serve as liaisons to one or more sections and may have responsibilities such as coordinating and scheduling meetings, ordering lunches, assisting with the preparation of the agenda, attending the meetings, maintaining the minutes, advising sections of VSB policies and procedures, assisting in budget development, monitoring invoices and travel reimbursement, and assisting with the publication of materials and newsletters. The director of bar services coordinates the liaison responsibilities and serves as the primary contact with all sections on policies and programs.*
>
> *An analysis of the VSB's calendar for FY 1995 found that about 23 percent of the more than 330 official Bar meetings were related to specialty law section and young lawyers conference activities. While sections budget 15 percent of their revenue to cover VSB administrative support, no documentation exists to determine how much staff time and resources are actually devoted to section activities. In contrast to the specialty law sections, no special fees are assessed for membership in the young lawyers conference. These expenses are subsidized through mandatory member dues.*
>
> *When asked about resources devoted to these activities, the executive director indicated that one full-time staff position could be eliminated if they discontinued staff support of these activities.*

The existence of limited resources, coupled with the fact that the majority of the Bar's revenues are obtained by the assessment of a mandatory annual fee on Virginia

attorneys, makes it especially important that the VSB focus on the activities that directly serve its primary statutory mission — to protect the public from lawyer misconduct.

EXPANSION OF VSB COMMERCIAL ACTIVITIES RAISES CONCERNS

The Bar's growth has included the adoption of several commercial activities. These activities appear to be within the Bar's authority as specified in *Court Rules*. Nevertheless, VSB involvement in commercial activities is unusual for a State agency, particularly a professional regulatory agency. This makes it difficult to compare its performance with other professional and occupational regulatory agencies in Virginia.

This expanded focus on commercial activities by the Bar creates the potential for conflicts, especially with respect to its regulatory functions. Over time, the Supreme Court may find even greater difficulty in identifying the proper role of the Bar as an administrative agency of the Supreme Court due to its commercial relationships and the reluctance of members to relinquish the Bar's role in providing these services.

Review of the Bar's current involvement in the provision of commercial products and services raises several questions which the Supreme Court of Virginia and the General Assembly may wish to examine such as:

- What is the impact of the Virginia State Bar's involvement in the sponsorship, endorsement, and/or promotion of commercial products and services on its ability to carry out its regulatory activities?
- Should a professional regulatory State agency be involved in the sponsorship or endorsement of commercial products and services?
- Does the Virginia State Bar's involvement in certain commercial products and services place other vendors at a competitive disadvantage due to the mandatory nature of the Bar's membership?
- What potential conflicts of economic interest are present in allowing the VSB to continue to be involved in sponsoring or endorsing commercial products and services?

Interviews with Bar officers and members indicated that few saw any potential conflicts in having the Bar involved in the provision of commercial products and services. However, the JLARC survey of VSB members indicated that there was generally less support for these types of activities than Bar involvement in regulatory activities.

JLARC staff review of VSB involvement in commercial activities identified several which are unusual for State agency involvement. These include: (1) endorsing computerized legal research services for members, (2) endorsing a professional liability insurance product, (3) sponsoring personal insurance products, and (4) sponsoring

vendor displays and memento sales (the lawyers expo) at the VSB annual meeting. These activities are non-regulatory and do not clearly support the agency's regulatory mission.

Product sponsorship and endorsement by the VSB may also present a conflict of interest because the Bar has benefited monetarily from these arrangements. Given its status as a State agency with mandatory membership requirements, it may be unsuitable for the VSB to negotiate commercial contracts which contain agreements to provide access to the VSB members through its mailing list or guarantee marketing efforts which will be supported by the agency. This may disadvantage other commercial providers of these services and may be inconsistent with statutory and Supreme Court intent regarding the scope of the Bar's activities.

Sponsorship of Computerized Legal Research Services May Be Unsuitable

The VSB became involved in sponsoring computer-assisted legal research services in January 1990. Given its regulatory mission, VSB involvement in soliciting subscribers for these services does not appear suitable for a State agency for several reasons. First, it presents a potential conflict of interest for the VSB because: (1) the Virginia State Bar, as a state agency, benefits directly from soliciting these services by receiving commissions on services and products, (2) the Bar obtains free computerized legal research time for staff in its department of professional regulation, and (3) the seller of these products subsidizes a reception for Bar members at an official Bar function, its annual meeting.

In addition to potential conflicts of interest, other concerns with the Bar's involvement in this type of commercial activity exist. The provision of these services has no direct link to the Bar's central mission of regulating the legal profession. Involvement in selling products or soliciting customers for a private company by a State agency is unusual and raises potential issues regarding unfair competition. Moreover, the provision of the Bar's mailing list for commercial purposes may also violate statutory intent regarding the use of this list.

In the early 1990s, the VSB entered into an agreement with a private company to begin offering a group discount for computerized legal research activities to its members (mostly those practicing in small firms or in solo practices). In 1992, the VSB agreed to act as an authorized sales agent of this company with the right to solicit subscriptions to the company's membership group program for providing computer-assisted legal research and information retrieval services, and CD-ROM products licensed by another company. The current agreement between the VSB and this company requires the VSB to "assist....in soliciting third parties ("Subscribers") to subscribe to the Services."

Currently, the Bar receives a quarterly royalty payment of $1,200 plus an additional amount for each new subscription agreement and each CD-ROM product sold. The VSB receives $10 per each new sale, up to 120 sales per quarter. For each sale greater than 120 per quarter, the VSB receives $20. Table 18 illustrates the net program revenues received by the Bar for its program sponsorship over the past three fiscal years.

Table 18

Virginia State Bar Revenue and Expenditures for the Computerized Legal Research Subscription Endorsement

Fiscal Year	*Program Receipts Paid to Company*	*Amounts Received From Subscribers*	*Commissions*	*Net Program Revenues*
1993	$216,624	$200,669	$18,054	$2,099
1994	$313,446	$285,749	$47,113	$19,416
1995	$156,042	$193,511	$34,354	$71,823
Total				$93,337

Source: Virginia State Bar, Summary Ledger, FY 1991 to FY 1995 and data provided by the fiscal department, November 28, 1995.

Exhibit 6 summarizes the VSB's current obligations under its sponsorship agreement for these services and benefits it receives. As mentioned above, one of the Bar's obligations is to make available four full sets of mailing labels per year. In addition, the Bar must undertake a number of promotional activities to solicit customers for the service and its products.

In accepting this agreement, the VSB may have thwarted statutory intent regarding access to the Bar's mailing list. The *Code of Virginia* states:

> When requested, copies of the Virginia State Bar membership address list shall be made available to Virginia professional legal organizations which operate not for profit and which regularly conduct continuing legal education programs in the Commonwealth (§54.1-3918).

This specific language limiting the availability of the VSB mailing list suggests that the General Assembly did not intend for the VSB to make the mailing list generally available to commercial entities for marketing purposes. However, one of the VSB's current obligations under its sponsorship agreement for these services is to make available copies of the Bar's mailing list.

Bar Activities Concerning the Endorsement of Professional Liability Insurance Raise Several Issues

The VSB has endorsed professional liability insurance, or malpractice insurance, since the 1960s. According to VSB staff, the Attorney General's Office has consistently advised the Bar that it had clear authority to endorse the professional liability insurance programs since their inception about 25 years ago. In 1995, statutory changes granted the Bar the authority to endorse and/or sponsor group or individual plans. While aimed at providing the Bar with authority to sponsor its personal insurance

Exhibit 6

Current VSB Obligations and Services Obtained for the Sponsorship of Computerized Legal Research Services

VSB Contractual Obligations	*Services Received by the VSB in Exchange for Sponsorship*
• Make available four full sets of mailing labels per year	• Compensation of a quarterly royalty payment of $1,200 plus additional amounts for new subscription agreements and CD-ROM products licensed
• One 750-word article in each issue of the *Virginia Lawyer* and the *Virginia Lawyer Register*	• Provision of computerized legal research services for all eligible VSB members
• Provide space for 12 500-word or less articles in appropriate section newsletters, per year	• Sponsorship of a reception at the VSB annual meeting up to $2,500
• Include a one-page flyer in new member packets	• Payment for all costs of computerized legal research program educational seminars with some exceptions
• Include promotional inserts in VSB annual meeting packets provided to Bar members	• Payment for all production and postage costs for promotional mailings for program and educational seminars
• Acknowledge the use of the services and firm's contribution in pro bono literature and pro bono events	• Use of a marketing fund of $2,500 per month to use for additional advertisements, inserts, press releases, mailing labels, and other services for promoting the subscription services
• Reproduce firm-provided literature for the purpose of distributing copies to subscribers	• Provision of the greater of $150 worth of use of the services or up to an amount equal to one hour's use to be used to demonstrate the services to potential subscribers
• Endorse program and communicate that endorsement	• Provision of instruction, invoices, and literature to subscribers; processing of all phone and mail inquiries, subscription agreements, identification numbers, software and other subscriber services

Source: "Membership Group Agreement," entered into by the Virginia State Bar and a private firm and the "Barter Amendment" to the subscription agreement dated November 10, 1994.

programs, it also provides the Bar with clear authority for its professional liability insurance program.

JLARC staff identified several potential concerns surrounding the Bar's endorsement of professional liability insurance. First, the Bar's role in developing the current endorsed product appears unusual for a State agency. This type of activity is one that is typically carried out by professional or trade associations. Secondly, the role of the Bar's committee on lawyers' malpractice insurance raises questions about oversight and potential conflicts of interest. In addition, under the current terms of the endorsement agreement, the Bar receives some indirect financial benefits in the form of funding for the Bar's risk management programs which are available to all members.

The VSB's Role in Developing the Current Endorsement Agreement Is Typically a Professional or Trade Association Activity. The Bar actively pursued the development of a lawyer-owned insurance reciprocal which has been a goal since the late 1980s when a Bar special committee studied the issue. The current malpractice insurance program endorsed by the Bar evolved from its discussions with its former malpractice insurance carrier. The Bar was concerned about the continued availability and affordability of this insurance for members. The Bar's role in developing this program appears more consistent with activities one would expect of a professional or trade association than a State agency.

The current malpractice insurance program is not subject to the full scope of regulatory oversight to which traditional insurance carriers, mutual insurance companies, and insurance reciprocals are subject in Virginia. The current malpractice insurer is not a member of the Virginia Life, Accident and Sickness Insurance Guaranty Association. Therefore, should the insurer go out of business, policyholders would not be able to recover premiums, and they could be liable to pay any outstanding or future liability claims incurred while they were covered by the defaulted insurer. Further, the public would not be protected because third party claimants would not have their malpractice claims honored.

The current endorsement agreement evolved from the Bar's relationship with its previous malpractice insurance carrier. In late 1989, the State Corporation Commission (SCC) ordered this carrier to decrease its premium rates and refund premium amounts to policyholders because the SCC believed the rates being charged were excessive. The VSB lawyer malpractice insurance committee, which also functioned in an advisory capacity to this carrier, supported a prospective rate reduction rather than a retroactive rate reduction and premium refunds to policyholders. According to meeting minutes, the committee was concerned about the stability of the program and the need to maintain the integrity of premiums earned in prior policy years until loss experience was fully accounted for in future years.

The VSB lawyer malpractice insurance committee began discussions with its malpractice insurance carrier as early as mid-1991 on the possibility of forming a lawyers' reciprocal which could be capitalized with relatively little money if it were

established as a risk retention group rather than a traditional insurance company. A risk retention group is authorized by the 1986 federal Liability Risk Retention Act to allow certain lines of liability insurance to be offered without having to comply with every state's insurance regulatory requirements. By 1993, the VSB's malpractice insurance carrier had paid about $3.5 million to capitalize the current malpractice carrier which was established as a risk retention group. This present insurance carrier is not subject to the more stringent regulatory requirements of the SCC such as rate and policy reviews.

The present malpractice insurance carrier is licensed and domiciled in the state of Tennessee and is registered, but not licensed, in Virginia and several other states to offer malpractice insurance coverage. The VSB lawyer malpractice insurance committee and the VSB executive director were apprised and consulted with as this entity was created and as policies with its former insurance program were transferred to the risk retention group.

The VSB's participation in this change raises concerns about the compatibility of this type of activity with its role as a State agency. The VSB was involved in developing an insurance product which does not allow for the full scope of State regulatory oversight and which does not ensure the full protection of policyholders in case of default by the insurer. Further, it does not appear that VSB members were fully informed that the change in the malpractice insurance endorsement agreement meant that policyholders were not protected by funds available through the Virginia Life, Accident and Sickness Insurance Guaranty Association in the event that the risk retention group defaults.

Default by a risk retention group does pose somewhat of a risk to policyholders. Between 1989 and 1995, the National Association of Insurance Commissioners reported that ten risk retention groups were placed in receivership. One of these was domiciled in Virginia, and one was domiciled in Tennessee.

The Role of the Bar's Committee on Lawyers' Malpractice Insurance Raises Accountability Concerns. The VSB has had a special committee on lawyer malpractice insurance since at least 1983. This committee serves as the Bar's oversight entity for its malpractice insurance program. Its members are appointed by the VSB president. In addition, the committee serves as an advisor to the insurance carrier on issues such as member benefits, rates, claims, and risk management. In order to function as an advisor to the carrier, committee members must be approved by the insurance carrier. This dual role of the committee has the potential for posing some conflicts, especially during times when the agreement is being renegotiated or rate increases are requested. The VSB committee is supposed to provide the Bar with an independent assessment of the merits of the Bar's malpractice insurance program, yet that independence may be compromised by its role as an advisor to the malpractice insurance carrier and the fact that membership on the committee must be agreed to by the insurance carrier.

Further, until recently, VSB insurance committee members also served as members of the malpractice insurance carrier's board of directors. And, some of these

members also served as members of the board of directors for the corporation which serves as the carrier's attorney-in-fact. As part of the current endorsement agreement, the VSB may have six representatives appointed to the malpractice insurance carrier's board of directors. Traditionally, these six members were selected from the Bar's malpractice insurance committee. Further, four of these six members also were selected to the board of directors of the corporation that serves as the malpractice insurance carrier's attorney-in-fact. The attorney-in-fact is responsible for the daily operations of the risk retention group.

This type of arrangement may also result in potential conflicts in decisionmaking by committee members who also have a fiduciary responsibility to the insurance carrier. Recently, the current president of the VSB recognized the potential problems with this arrangement as the VSB begins the process of assessing its current endorsement agreement. In making appointments to the VSB committee, the current VSB president ensured that the VSB insurance committee members were individuals that did not also serve on either the insurance carrier's board of directors or the board of directors for the attorney-in-fact.

Consideration of potential conflicts in future appointments should be an ongoing concern to the VSB. Virginia State Bar representatives to the insurance carrier's board of directors, the board of directors for the attorney-in-fact, and the lawyer malpractice insurance committee have responsibilities both to members of the Bar and to the insurance carrier. Because these interests may at times be incompatible, formal mechanisms should be in place to minimize these potential conflicts such as the filing of economic interest statements and the development of a Bar policy to prevent future overlapping memberships.

The Virginia State Bar Receives Financial Benefits from the Current Endorsement Agreement. In addition to the above concern, under the current malpractice endorsement agreement, the Bar receives some financial benefits. The receipt of these benefits is similar to what professional associations typically would negotiate in sponsorship or endorsement agreements for member insurance programs. Comparisons with other State agencies cannot be made since the Bar's involvement in this type of endorsement arrangement as a State agency is unusual.

Currently, the Bar has access to up to three percent in premium amounts for risk management programs it undertakes. These programs are available to all members of the Bar to educate them on malpractice issues, provide advice on malpractice claims repairs, and obtain confidential attorney consultations with the Bar's risk manager. The funds are also used to publish the *Malpractice Reporter,* a quarterly publication on malpractice issues, and provide some funding to a lawyers' substance abuse program. Clearly, these activities benefit bar members. Whether they serve to protect the public is not as clear.

The Bar's Sponsorship of Personal Insurance Products Is Unusual for a State Agency

As with the endorsement of a professional liability product, the Bar's sponsorship of personal insurance products is also unusual for a State agency. The VSB has sponsored personal insurance products since the 1950s when it began to offer members group life insurance. Group health and disability insurance plans were also added as member benefits in the 1950s. Nevertheless, the VSB had lacked specific authority for operating these programs until 1995 when the General Assembly approved statutory changes to allow the Bar to offer its members group insurance plans.

Like VSB endorsement of lawyers' malpractice insurance, this type of undertaking is unusual for a State regulatory agency. The provision of group personal insurance is typically offered through professional or trade associations in Virginia, not through a State agency which is responsible for regulating the profession.

Potential problems may arise when the Bar has a financial interest in providing a commercial product or service. As indicated in Chapter II of this report, the VSB has benefited financially from the sponsorship of personal insurance products. Findings indicate that some of these financial benefits may have been erroneously retained by the Bar, rather than refunded to its members who held policies, or returned to the Commonwealth as unclaimed intangible property. This type of problem would not have occurred if the mission and activities of the VSB were limited to the regulation of the profession.

Sponsoring a Lawyers Expo Is a Commercial Activity Typical of Professional Associations

The sponsorship of vendor displays and memento sales (the lawyers expo) at the VSB annual meeting represents another commercial activity which is more typical of a professional association than the activity of a State agency. The lawyers expo is provided as part of the annual meeting to: (1) offset some costs of the annual meeting with private funding, and (2) provide the members who attend the annual meeting with information about new products and services. This activity does not support the Bar's regulatory mission.

The lawyers expo was initiated in 1988. Since that time, the VSB has invited exhibitors to participate in the expo at the annual meeting to display and promote products and services in which members may be interested. The VSB charges exhibitors a fee to occupy a booth at the expo.

In the past five fiscal years, the VSB has made a profit on the expo, enabling the VSB to use the funds to offset some of the costs associated with its annual meeting. Table 19 shows the revenues, expenditures, and net profit received from this event. While it is self-supporting, the activity may not be appropriate for a State agency responsible for regulating the legal profession.

Table 19

VSB Revenues, Expenditures, and Net Profit for the Lawyers Expo, FY 1990 to FY 1995

Fiscal Year	Revenues	Expenditures	Net Profit (Loss)
1990*	$19,410	$10,020	$9,390
1991	19,975	11,976	7,999
1992	22,315	13,532	8,783
1993	22,525	12,003	10,522
1994	20,300	9,636	10,664
1995	20,725	11,073	9,652
Total			$57,010

*Financial information for FY 1990 is for budgeted amounts only.

Source: VSB financial information on the lawyers expo for FY 1990 to FY 1995.

VSB Decisionmakers Should Be Required to Declare Potential Conflicts of Interest

If the Bar's involvement in the sponsorship, endorsement, or promotion of commercial products continues, the Supreme Court of Virginia may wish to consider requiring Bar staff and members involved in key decisions regarding the products or services to file economic interest statements. While this review did not find any evidence of direct economic conflicts of interest by Bar officers or committee members, this type of disclosure would ensure that State Bar decisionmakers are held to similar standards required of decisionmakers in other professional and occupational regulatory agencies.

Filing economic interest statements is fairly common for public officials in Virginia on both the State and local government levels. Currently, the following public officials are required to complete and file a "Statement of Economic Interests" with the Secretary of the Commonwealth:

- employees of State agencies designated by the Governor or the General Assembly,
- employees of local governments designated by the *Code of Virginia* or their governing ordinance, and
- members of certain State and local government boards (including appointed board members).

Requiring such disclosures would help to reduce the potential for decisionmakers to be influenced by their own interests.

Because potential conflicts weaken public perception of the Bar's integrity and ability to protect the public, the Supreme Court or the General Assembly may wish to consider requiring the officers and certain VSB members with decisionmaking responsibilities for a particular product or service to declare conflicts of economic interests. In addition, the Supreme Court may wish to consider requiring that the executive director also declare potential conflicts of economic interests as a condition of his employment. Several unified bars require, either through their state statutes or bar rules, that their executive directors declare potential conflicts of economic interests as a condition of their employment. Requiring a declaration of potential conflicts would mirror requirements for directors of other State professional and occupational regulatory agencies in Virginia.

If decisionmakers of the Virginia State Bar were required to provide this information, it could help to improve public confidence in the regulatory system for Virginia lawyers. This requirement would also help to reinforce the idea that the Supreme Court is holding Bar decisionmakers to a high ethical standard, which is consistent with the fundamental goals of the agency in regulating the legal profession. Further, VSB decisionmakers would be explicitly made aware of their responsibility to make decisions based on the best interests of the public and the entire Bar membership. In addition, a disclosure requirement would help to avoid any appearance of impropriety due to: (1) perceived interests of Bar decisionmakers, or (2) the secrecy surrounding any economic interest a member may have in a particular outcome.

IMPLICATIONS FOR THE CURRENT AND FUTURE ROLE OF THE VSB

Concerns about the unusual mission and role that the unified bar has as a state governmental agency are not new. In the 1980s, a number of state legislatures and courts were involved in closely scrutinizing their unified bars due, in part, to concerns about public accountability. In 1983, one legal scholar argued that the unified bar as an institution had three contradictory images which affected its governance and accountability: (1) the image of the bar as public agency, (2) the image of the bar as a compulsory membership organization, and (3) the image of the bar as a private voluntary association.[1] Clearly, these images are reflective of the unified bar in Virginia and make any assessment of the Bar's overall performance in carrying out its mission a complex one.

This report on the Virginia State Bar raises potential concerns about the agency's unusual role in conducting both regulatory and non-regulatory, association-like activities. The mixture of activities exposes the Virginia State Bar to potential conflicts, diverts resources from the Bar's most important activity — disciplining lawyers — and raises concerns about public accountability. These concerns may best be addressed by reconsidering the role of the Virginia State Bar in the future.

Without a more thorough examination and delineation of the role of the Virginia State Bar in the future, striking the proper balance between the Bar's regulatory and

[1] Theodore J. Schneyer, "The Incoherence of the Unified Bar Concept: Generalizating from the Wisconsin Case," *American Bar Foundation Research Journal* 1 (1983): 6, 46-79.

non-regulatory activities will continue to be problematic. The Bar will most likely continue to experience pressure to change the scope of its activities from a number of groups such as:

- a growing and increasingly diverse membership, which will require regulation and at the same time desire additional member services;
- local and specialty bar associations, which have become more numerous and are increasingly more sophisticated in offering membership services, and which view VSB involvement in non-regulatory activities as competitive and inherently unfair given the mandatory nature of the organization;
- a public which will increasingly demand public agency accountability; and
- the General Assembly, as constituents and complainants raise concerns about the Bar's regulatory role and the scope of its activities.

These pressures may result in continued calls for oversight of the Bar's activities by both the Supreme Court of Virginia and the Virginia General Assembly.

It is possible that the Bar's activities to protect the public and provide its members with association-like services are essentially incompatible. Even if they are not incompatible, it is clear that the Bar's mission as currently articulated by statute and the *Court Rules* allows for broad interpretation by the Bar in delineating its activities. The Supreme Court of Virginia and the General Assembly may wish to consider whether more specific direction or oversight is needed to ensure that the Bar is properly focused on its regulatory mission.

The Supreme Court and the General Assembly could consider several options for refocusing the Bar's activities and improving accountability. These could include structural changes to the Bar's governance, transfer of certain activities to other entities, or implementing a more structured system of oversight. These types of options have been used in some other states in response to concerns about the role of the Bar. Concerns about the ability of unified bars to focus appropriately on their regulatory role have led the courts in several other states to make fundamental changes in the oversight structure of the disciplinary function. Several courts have transferred the disciplinary function to a separate administrative agency to improve accountability.

The Supreme Court has recognized the need for some independence from the Bar in lawyer disciplinary matters through its direct appointment of disciplinary board members. The Supreme Court may also wish to consider direct appointment of the Bar Counsel to further strengthen the oversight and accountability of the disciplinary process. Another structural change which could be considered in the future to strengthen the disciplinary process is to transfer the disciplinary function of the Bar to the Supreme Court.

In reconsidering the future mission and role of the Virginia State Bar, the Supreme Court could also examine several options for functions it no longer wants the Bar to provide. First, it could simply direct the Bar to discontinue certain activities. This would reduce services to Virginia lawyers, however, and may not be acceptable to members of the Bar. As an alternative, the Supreme Court could direct a transfer of certain activities to voluntary bar associations which are interested in providing services to members of the Bar. To ensure statewide availability of the services, the Supreme Court could stipulate, as a part of the transfer, that services be made available to non-members of the voluntary associations.

In refocusing the priorities of the VSB, it would also be useful for the agency to reevaluate and update its current long range plan. The revised plan should address the findings of this report and should reflect any changes in mission and priorities directed by the Supreme Court of Virginia or the General Assembly.

Finally, the Supreme Court of Virginia and the General Assembly could implement a more structured system of oversight of the Bar to ensure the Bar takes steps to address the findings of this report and that future Bar activities are appropriate for its role as a professional regulatory agency. Consideration could be given to having the Supreme Court review the VSB's budget submissions on a regular basis, for example. Another option would be for the Supreme Court to review and approve the VSB's long range plan. Finally, the VSB could be required to submit impact statements with all proposed changes to the *Court Rules* or statute which would articulate the impact of the changes on the VSB's ability to carry out its regulatory responsibilities, particularly those involving the discipline of lawyers.

Appendixes

Appendix A

Senate Joint Resolution No. 262

Designating functional areas of government for review by the Joint Legislative Audit and Review Commission under the provisions of the Evaluation Act.

WHEREAS, the Legislative Program Review and Evaluation Act (§ 30-65 et seq.) of the Code of Virginia provides for the evaluation of state government according to schedules and areas designated for study by the General Assembly; and

WHEREAS, § 30-66 of the Code of Virginia provides that from time to time as may be required, the Senate and House of Delegates shall establish a schedule of the functional areas of state government to be reviewed by the Joint Legislative Audit and Review Commission; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the functional areas of government for review by the Joint Legislative Audit and Review Commission under the provisions of the Evaluation Act are hereby designated. Pursuant to §§ 30-65 through 30-72 of the Code of Virginia, the Joint Legislative Audit and Review Commission shall review and evaluate the functional areas of state government according to the following schedule, the order of which may be reviewed and revised by future sessions of the General Assembly:

Administration of Justice

Resource and Economic Development

Transportation; and, be it

RESOLVED FURTHER, That the review and evaluation in each functional area shall be initiated at such time as sufficient commission resources become available and such review shall generally include, but not be limited to, programs, activities, and management of agencies within these functional areas in the sequence prescribed. Prior to the initiation of such studies, the commission may coordinate its review efforts with the Senate and House of Delegates committees with general jurisdiction in the area of study; and, be it

RESOLVED FINALLY, That the commission shall complete its work and submit its findings and recommendations to the Governor and the General Assembly in accordance with the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Appendix B

Senate Joint Resolution No. 263
1995 Session

Identifying study topics in the functional area of administration of justice to be reviewed and evaluated by the Joint Legislative Audit and Review Commission.

WHEREAS, the Legislative Program Review and Evaluation Act (§ 30-65 et seq.) of the Code of Virginia provides for the evaluation of state government according to schedules and areas designated for study by the General Assembly; and

WHEREAS, a companion resolution of this session of the General Assembly identifies administration of justice as a functional area of state government to be reviewed at such time as sufficient Commission resources become available; and

WHEREAS, § 30-67 of the Code of Virginia provides that prior to the years in which a functional area of government is designated for review, the Joint Legislative Audit and Review Commission may identify to the extent feasible the agencies, programs or activities selected for review and evaluation from the functional area; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That study topics in the functional area of administration of justice to be reviewed and evaluated by the Joint Legislative Audit and Review Commission be hereby identified. Pursuant to §§ 30-65 through 30-72 of the Code of Virginia, the agencies, programs, and activities subject to review and evaluation in the designated functional area of administration of justice shall include, but not be limited to (i) the system of juvenile justice in Virginia, including the Department of Youth and Family Services, the Department of Correctional Education, and the operation of youth learning centers and services units at the state and local level; (ii) the system of courts in Virginia, including the various courts, the magistrate system, the Virginia State Bar, the Public Defender Commission, and the funding of court-appointed counselors; and (iii) the Department of Criminal Justice Services; and, be it

RESOLVED FURTHER, That pursuant to the powers and duties specified in § 30-58.1 of the Code of Virginia, the Joint Legislative Audit and Review Commission shall plan and initiate reviews of these agencies, programs, or activities, including consideration of matters relating to any previous Joint Legislative Audit and Review Commission report of these areas; and, be it

RESOLVED FURTHER, That in carrying out this review, the agencies identified for study by this resolution or subsequently identified by the Commission, other affected agencies, and the Auditor of Public Accounts shall cooperate as requested and shall make available all records and information necessary for the completion of the work of the Commission and its staff; and, be it

RESOLVED FURTHER, That the Joint Legislative Audit and Review Commission be directed to conduct an analysis of the Virginia State Bar, which shall include, but not be limited to, a thorough evaluation of the revenues and staffing and each of the activities and programs of the Virginia State Bar in relation to its statutory and Rules of Court authority with a view toward ensuring the maximum effectiveness of the Virginia State Bar in carrying out its assigned mission with the minimum resources necessary. The Commission shall complete its analysis of the Virginia State Bar in time to submit its findings and recommendations to the Governor and the 1996 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents; and, be it

RESOLVED FINALLY, That the Commission shall complete its work and submit its findings and recommendations to the Governor and the General Assembly in accordance with the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Appendix C

Survey of Virginia State Bar Members

JLARC conducted a survey of VSB active members in order to assess how members of the Bar view VSB functions and policies. The VSB member survey was sent to a sample of attorneys who are licensed in the Commonwealth of Virginia and have active member status in the Virginia State Bar.

Sample Size and Survey Implementation

Since the main purpose of the survey was to obtain a general understanding of the practicing attorneys' views of VSB activities and policies, the team decided to focus the survey on the active members of the Bar. These attorneys made up 74 percent of the VSB's membership. In March 1995, there were 19,901 active members. JLARC staff drew a random sample of 1,000 active members of the Virginia State Bar from a database provided by the VSB which contained the names, addresses, and membership status of the members of the VSB. JLARC sent out 50 pretest surveys on June 15, 1995 in order to obtain some indicators as to whether there were any problems with survey question interpretation, the response deadline, or the actual survey design. Revisions were made accordingly. The final survey instrument was sent to 1,000 randomly chosen active members on July 5, 1995 with a return request of July 19, 1995. Late surveys which arrived up to and including August 10, 1995 were included in the survey database which contains a total of 337 completed survey responses (approximately 34 percent response rate).

Survey Analysis

The survey responses were entered into a statistical database which was validated against the original written instruments. The majority of the statistical analysis was performed in Microsoft Excel, with which pivot tables were used to run frequencies, and to sort and summarize a combination of survey responses. In addition, JLARC staff conducted analyses of the response database using the subset of the survey respondent population which had participated in the VSB disciplinary process. This enabled JLARC staff to view how those particular respondents viewed the effectiveness of the system. The following summary of the overall results of the survey shows the aggregate raw numbers for each survey response as well as the percentage of the total responses. Because several respondents did not answer some categories in questions seven and 12, percentages may not add up to 100 due to missing data.

Results of JLARC Survey of VSB Members

1. Please indicate whether you practice as:

In-house counsel (private)	**23**	**(7%)**
Government attorney	**46**	**(14%)**
Attorney with private law firm	**175**	**(52%)**
Solo practitioner	**75**	**(22%)**
Other	**15**	**(4%)**
Did not respond	**3**	**(1%)**

2. If you practice in a private law firm, please indicate the number of full-time attorneys employed by your firm.

   Number of attorneys employed: **Responses ranged from 2 to 400+**

3. Please indicate the voluntary organization(s) in which you are a member:

American Bar Association	**127**	**(40%)**
Old Dominion Bar Association	**3**	**(1%)**
Virginia Association of Defense Attorneys	**24**	**(7%)**
Virginia Bar Association	**139**	**(42%)**
Virginia Trial Lawyers Association	**66**	**(20%)**
Virginia Women Attorneys Association	**7**	**(2%)**
Local Bar Associations	**189**	**(58%)**
Other	**72**	**(23%)**
None	**43**	**(16%)**

4. Do you currently pay an annual fee to practice law in Virginia?

Yes	**299**	**(89%)**
No	**14**	**(4%)**
Don't Know/No Opinion	**16**	**(5%)**
Did not respond	**8**	**(2%)**

5. What is the amount of the annual fee you or your employer pay for you to practice law in Virginia?

$185	**157**	**(47%)**
Don't know	**53**	**(16%)**
Did not respond	**28**	**(8%)**

(The remaining 29% had responses which ranged from $120 to $1000)

6. Please place a check next to each Virginia State Bar section, if any, of which you are a member.

No Section Involvement: **146 (43%)**

Administrative Law	**9**	**(3%)**	Health Law	**5**	**(1%)**
Antitrust Law	**4**	**(1%)**	Intellectual Property Law	**11**	**(3%)**
Bankruptcy Law	**10**	**(3%)**	International Practice	**4**	**(1%)**
Business Law	**21**	**(6%)**	Litigation	**42**	**(12%)**
Construction Law	**8**	**(2%)**	Local Government Law	**9**	**(3%)**
Corporate Counsel	**8**	**(2%)**	Real Property	**23**	**(7%)**
Criminal Law	**30**	**(9%)**	Senior Lawyers	**8**	**(2%)**
Education of Lawyers	**6**	**(2%)**	Taxation	**10**	**(3%)**
Environmental Law	**11**	**(3%)**	Trusts and Estates	**26**	**(8%)**
Family Law	**31**	**(9%)**	Young Lawyers Conference	**8**	**(2%)**
General Practice	**14**	**(4%)**			

7. Please indicate below whether you believe the following activities are an essential or non-essential activity of the Virginia State Bar. For those items which you have checked as essential, please also indicate if the activity should be funded by State Bar member dues.

State Bar Activities	Essential And Fund with Member Dues		Essential But Do Not Fund with Member Dues		Non-Essential	
Receive and investigate disciplinary complaints	**276**	**(82%)**	**56**	**(17%)**	**2**	**(1%)**
Receive and investigate unauthorized practice of law complaints	**242**	**(72%)**	**57**	**(17%)**	**31**	**(9%)**
Prosecute and adjudicate charges of misconduct	**253**	**(75%)**	**62**	**(18%)**	**14**	**(4%)**
Sponsor annual disciplinary conference	**97**	**(29%)**	**31**	**(9%)**	**178**	**(53%)**
Provide advice on unauthorized practice of law, legal ethics, and lawyer advertising and solicitation	**225**	**(67%)**	**59**	**(18%)**	**47**	**(14%)**
Regulate legal aid societies	**54**	**(16%)**	**36**	**(11%)**	**233**	**(69%)**
Administer Clients' Protection Fund	**149**	**(44%)**	**62**	**(18%)**	**108**	**(32%)**
Approve trust account depositories	**106**	**(31%)**	**53**	**(16%)**	**163**	**(48%)**

7. (continued)

State Bar Activities	Essential And Fund with Member Dues		Essential But Do Not Fund with Member Dues		Non-Essential	
Collect and make available to the public member certifications of professional liability insurance	**93**	**(28%)**	**41**	**(12%)**	**186**	**(55%)**
Register legal corporations	**41**	**(12%)**	**26**	**(8%)**	**252**	**(75%)**
Approve MCLE providers and course content	**195**	**(58%)**	**85**	**(25%)**	**52**	**(15%)**
Track/enforce MCLE requirements	**217**	**(64%)**	**69**	**(20%)**	**46**	**(14%)**
Conduct mandatory professionalism course for new admittees	**131**	**(39%)**	**55**	**(16%)**	**137**	**(41%)**
Sponsor "First Day in Practice" seminar	**54**	**(16%)**	**26**	**(8%)**	**243**	**(72%)**
Sponsor midyear legal seminar	**14**	**(4%)**	**18**	**(5%)**	**290**	**(86%)**
Sponsor Cambridge education program held in England	**3**	**(1%)**	**4**	**(1%)**	**318**	**(94%)**
Publish *Virginia Lawyer/Register*	**166**	**(49%)**	**36**	**(11%)**	**123**	**(36%)**
Publish consumer information & profession-related brochures	**83**	**(25%)**	**21**	**(6%)**	**215**	**(64%)**
Publish section newsletters	**99**	**(29%)**	**45**	**(13%)**	**176**	**(52%)**
Operate Virginia Lawyer Referral Service	**100**	**(30%)**	**67**	**(20%)**	**160**	**(47%)**
Promote and coordinate pro bono activities	**96**	**(28%)**	**54**	**(16%)**	**174**	**(52%)**
Sponsor Pro Bono Conference	**38**	**(11%)**	**27**	**(8%)**	**257**	**(76%)**
Sponsor Conference of Local Bar Associations	**26**	**(8%)**	**25**	**(7%)**	**273**	**(81%)**
Sponsor annual Bar Leaders' Institute	**20**	**(6%)**	**17**	**(5%)**	**286**	**(85%)**

7. (continued)

State Bar Activities	Essential And Fund with Member Dues		Essential But Do Not Fund with Member Dues		Non-Essential	
Coordinate local and specialty bar relations	**23**	**(7%)**	**27**	**(8%)**	**271**	**(80%)**
Coordinate Bar-sponsored personal insurance plans (life, health, etc.)	**54**	**(16%)**	**52**	**(15%)**	**220**	**(65%)**
Coordinate Bar-endorsed professional liability coverage (ANLIR)	**91**	**(27%)**	**87**	**(26%)**	**150**	**(45%)**
Sponsor Virginia State Bar annual meeting	**118**	**(35%)**	**97**	**(29%)**	**112**	**(33%)**
Sponsor Lawyers' Expo at the annual meeting	**16**	**(5%)**	**20**	**(6%)**	**286**	**(85%)**
Support Bar standing committees and special committees	**115**	**(34%)**	**75**	**(22%)**	**131**	**(39%)**
Provide subscription services to LEXIS® for VSB members	**25**	**(7%)**	**48**	**(14%)**	**249**	**(74%)**
Reimburse expenses for official VSB travel	**153**	**(45%)**	**47**	**(14%)**	**124**	**(37%)**

8. In your opinion, is the current level of your membership dues for the Virginia State Bar too high, too low, or about right?

Too High	**122**	**(36%)**
Too Low	**2**	**(1%)**
About Right	**160**	**(48%)**
Don't Know/No Opinion	**48**	**(14%)**
Did not respond	**5**	**(1%)**

9. Should the Virginia State Bar regularly designate a specific portion of member dues to the Clients' Protection Fund which is used to compensate victims of dishonest attorney conduct?

Yes	**148**	**(44%)**
No	**142**	**(42%)**
Don't Know/No Opinion	**40**	**(12%)**
Did not respond	**7**	**(2%)**

10. Have you ever participated in the Bar's disciplinary process?

Yes	**105**	**(31%)**
No	**232**	**(69%)**

11. In what capacity have you participated in the Bar's disciplinary process? (Check all that apply.)

Complainant	**20**	**(19%)**
Respondent	**49**	**(47%)**
Witness	**29**	**(28%)**
Advised complainant on a lawyer disciplinary matter	**21**	**(20%)**
Represented lawyer charged in a disciplinary matter	**12**	**(11%)**
District subcommittee member	**12**	**(11%)**
District committee member	**29**	**(28%)**
State disciplinary board member	**2**	**(2%)**
Other	**8**	**(8%)**

12. Please indicate whether you agree or disagree with the following statements regarding the disciplinary process.

	Agree		Disagree		No Opinion	
The State Bar handles complaints against lawyers in a timely manner.	**108**	**(32%)**	**41**	**(12%)**	**182**	**(54%)**
The district committees and subcommittees adjudicate disciplinary cases in a timely manner.	**94**	**(28%)**	**28**	**(8%)**	**209**	**(62%)**
The district committees and subcommittees adjudicate disciplinary cases equitably.	**108**	**(32%)**	**26**	**(8%)**	**197**	**(58%)**
State Bar staff investigate disciplinary complaints in a timely manner.	**97**	**(29%)**	**37**	**(11%)**	**198**	**(59%)**
State Bar staff investigate disciplinary complaints effectively.	**109**	**(32%)**	**24**	**(7%)**	**199**	**(59%)**
State Bar staff prosecute disciplinary complaints effectively.	**102**	**(30%)**	**22**	**(7%)**	**206**	**(61%)**
The disciplinary board resolves cases in a timely manner.	**85**	**(25%)**	**32**	**(9%)**	**213**	**(63%)**

12. (continued)

	Agree		Disagree		No Opinion	
The disciplinary board resolves cases in an equitable manner.	100	(30%)	19	(6%)	206	(61)%
All State Bar disciplinary hearings should be open to the public.	99	(29%)	187	(55%)	47	(14%)
All State Bar subcommittee proceedings should be open to the public.	87	(26%)	188	(56%)	57	(17%)
All State Bar disciplinary records should be open to the public.	129	(38%)	163	(48%)	40	(12%)
The State Bar should conduct random audits of lawyer trust accounts.	134	(40%)	138	(41%)	58	(17%)
The disciplinary process is effective in sanctioning lawyers who have violated ethical rules of the profession.	154	(46%)	51	(15%)	126	(37%)
The disciplinary process provides for the fair treatment of attorneys charged with ethical violations.	136	(40%)	35	(10%)	158	(47%)
The disciplinary system adequately protects the public.	145	(43%)	54	(16%)	132	(39%)

13. Do you have any additional comments or concerns about the Virginia State Bar's disciplinary process?

Responses to Question 13 are in the JLARC files for this study.

14. Do you have any additional comments or concerns about the Virginia State Bar in general?

Responses to Question 14 are in the JLARC files for this study.

Appendix D

Virginia State Bar Disciplinary Complaint File Review and Analysis

JLARC staff conducted several disciplinary complaint file reviews as part of the review of the Virginia State Bar (VSB) disciplinary system. File reviews were performed to examine: (1) cases dismissed by intake unit staff, (2) cases dismissed after a preliminary investigation, and (3) the timeliness of disciplinary complaint processing.

Review of Cases Dismissed by Intake Unit Staff

JLARC staff conducted a review of cases dismissed by intake unit staff. The primary purpose of the review was to determine whether bar counsel had sufficient documentation to support in-house dismissals and adequate explanations to complainants. To conduct the analysis, JLARC staff reviewed a random sample of cases dismissed by intake unit staff.

Whenever a random sample is drawn to make inferences about the entire population, some random error due to sampling can be anticipated. A way to take that sampling error into account when making inferences from sample results to the entire population is to calculate confidence intervals. Where samples are used in the JLARC staff analysis, the sampling error and confidence intervals have been calculated.

For cases dismissed at intake, JLARC staff reviewed a random sample of ten percent of the cases that were received and dismissed after the intake review in FY 1995. A review of the Virginia State Bar "No Action Taken Report" dated July 10, 1995 found that 1,450 cases were received and dismissed at the intake level in FY 1995. Using a random number generator, JLARC staff randomly selected 145 files for review.

The review found that five (three percent) of the 145 cases in the sample did not have adequate documentation to support the dismissal decision. Generalizing from the sample to the entire population, approximately 50 cases may have lacked sufficient documentation to support a decision to dismiss the case. The sampling error was calculated to determine the confidence interval for this estimate. The sampling error was calculated to be .01333 and the confidence interval was determined to be 2.1 percent to 4.8 percent. Therefore, it can be stated with 95 percent confidence that between two and five percent of the 1,450 cases dismissed at intake in FY 1995 lacked adequate documentation.

The review also found that 15 (ten percent) of the 145 randomly-selected cases in the sample did not provide an adequate explanation to

complainants regarding the Bar's reason for the dismissal. Generalizing from the sample to the entire population, approximately 150 cases may have lacked an adequate explanation to complainants regarding the Bar's reason for the dismissal. The sampling error was calculated to determine the confidence interval for this estimate. The sampling error was calculated to be .0445 and the confidence interval was determined to be 5.9 percent to 14.8 percent. Therefore, it can be stated with 95 percent confidence that between six and 15 percent of the 1,450 cases received and dismissed at intake in FY 1995 lacked an adequate explanation to complainants.

Review of Cases Dismissed After Preliminary Investigation

JLARC staff conducted a review of cases dismissed by bar counsel after a preliminary investigation. The primary purpose of this review was to determine whether bar counsel had sufficient documentation to support the decision to dismiss the case. For cases dismissed after a preliminary investigation, JLARC staff reviewed a random sample of ten percent of the cases that were received in FY 1995 and dismissed after preliminary investigation. Based on a review of the "In-House Attorney Docket" summary for FY 1995, the study team determined that 372 cases were received in FY 1995 and dismissed as of July 13, 1995. Using a random number generator, JLARC staff randomly selected 38 files for review.

The review found that four (ten percent) of the 38 cases in the sample did not have adequate documentation to support the dismissal decision. Generalizing from the sample to the entire population, approximately 40 cases may have lacked sufficient documentation to support a decision to dismiss the case. The sampling error was calculated to determine the confidence interval for this estimate. The sampling error was calculated to be .095 and the confidence interval was determined to be one to 20 percent. Therefore, it can be stated with 95 percent confidence that between one and 20 percent of the 372 cases received in FY 1995 and dismissed after a preliminary investigation lacked adequate documentation.

Review of Cases For the Timeliness of Disciplinary Complaint Processing

A review of disciplinary complaints received by the Bar in FY 1994 was conducted by JLARC staff to ascertain VSB performance in meeting timeline goals. Fiscal year 1994 cases were selected for review to allow a sufficient amount of time to elapse for processing cases through the system. Prior to this review, JLARC staff requested that the VSB prepare a modified report version of the disciplinary complaint database which identified the total number of FY 1994 cases to reach each stage of the disciplinary process by July 1995. The VSB report also identified the average number of days and the number and percentage of FY 1994 cases meeting the timeline goals. Once the report was received from the VSB, it became apparent to JLARC staff that complaint data was entered completely only through action/timeline #3 (staff investigation

concluded and report submitted to bar counsel). The Bar did not begin entering complaint data for action/timelines #4 through #8 until October 1994. For assessing performance in meeting certain timeline goals, JLARC staff relied on sampling strategies to gather complaint data from randomly-drawn complaint samples.

Separate methods of case identification were used to determine the entire population of FY 1994 cases reaching each stage of the disciplinary process. Once data were collected, JLARC staff conducted the analysis using a Microsoft Excel spreadsheet to determine the average number of days and the number and percentage of cases meeting the VSB timeline goals. The entire population of FY 1994 complaints to reach action/timelines #1 through #2 and #6 through #8 were used to analyze performance in meeting timeline goals. A ten percent sample of FY 1994 cases was drawn to analyze performance in meeting action/timelines #3 through #5. While JLARC staff planned initially to rely on VSB-entered data and analysis for action/timeline #3, JLARC staff found a discrepancy of about 58 cases between the number of cases reported by the VSB and number counted by JLARC staff from the "In-House Attorney Docket." Due to this discrepancy, JLARC staff decided to draw a sample of the cases to ensure an accurate representation of cases for the timeline analysis.

Performance in Meeting Action/Timelines #1 and #2. The Bar has entered data in its database for action/timelines #1 (initial review by intake unit staff) and #2 (preliminary investigation by bar counsel) for several years. As mentioned above, the VSB produced a report which detailed the average number of days and the number and percentage of FY 1994 cases reaching these two timeline goals through July 1995. Because this information has been consistently entered into the disciplinary database for several years, the data was deemed accurate and used to determine performance in meeting these two timeline goals.

Performance in Meeting Action/Timelines #3 Through #5. A JLARC staff review of "In-House Attorney Docket" summaries found that the total population of FY 1994 complaints to reach action/timeline #3 (staff investigation is concluded and a report submitted to bar counsel) by July 1995 was 686 cases. A sample of ten percent of these cases, or 69 cases, was randomly selected for review. To conduct this review, JLARC staff reviewed each case file and used a written instrument to collect timeline data for each case for action/timelines #3 through #5. Data were then analyzed to determine VSB performance in meeting timeline goals.

The sampling error and confidence intervals of the average number of days for the entire population of FY 1994 cases to reach action/timelines #3 through #5 based on the sample population are listed in Table 1. Table 2 details the sampling error and confidence intervals of the percentage of cases meeting

action/timelines #3 through #5 for the entire population of FY 1994 cases, based on the sample population.

Performance in Meeting Action/Timeline #6. To identify the total population of FY 1994 cases to reach action/timeline #6 (district committee hearing held) by July 1995, JLARC staff reviewed VSB annual disciplinary reports and found 37 cases. While 37 cases were identified by JLARC staff, only 31 cases had made it to the district committee hearing stage. The remaining six cases had district committee hearings set for dates later than August 1995, the month in which the data were collected. Due to the small number of cases reaching this timeline goal, JLARC staff reviewed all 31 case files to collect and analyze relevant timeline data.

Performance in Meeting Action/Timeline #7. To identify the total population of FY 1994 cases to reach action/timeline #7 (transfer date) by July 1995, JLARC staff reviewed cases reported on a VSB-prepared computer printout and the VSB master post-committee docket notebook, which is compiled by the clerk of the disciplinary system. JLARC staff review found that 53 FY 1994 cases had made it to this timeline by August 1995. While 53 cases were identified by JLARC staff, timeline data could only be collected and analyzed for 51 cases. Data could not be collected in the two remaining cases because one case had not made it to the transfer stage by August 1995, and the other case file had been sealed by the Circuit Court.

Performance in Meeting Action/Timeline #8. The JLARC staff review found that 47 FY 1994 cases made it to action/timeline #8 (post committee hearing) by August 1995. Due to the small number of cases reaching this stage of the disciplinary complaint process, JLARC staff collected timeline data for each case. JLARC staff then analyzed the data for performance in meeting this timeline goal.

Inconsistency in Dates Used to Measure VSB Performance in Meeting Timeline Goals. The JLARC staff review found some specific concerns regarding the consistency of dates used to measure the VSB's performance in meeting the various timeline goals. The JLARC staff review found concerns relating to action/timelines #4 (bar counsel prepares report) and #5 (subcommittee acts) for some cases. In these instances, the cases were still open as of October 1994, but had already passed these stages in the process. While the clerk's office enters complaint data into the disciplinary database from the contents of complaint files, there were several instances where these two action/timelines were not documented in the files. In these instances, the clerk's office relied on complaint summary information contained on tracking forms which are compiled by staff within the department of professional regulation.

Table 1

Sampling Error and Confidence Intervals for Average Number of Days for Cases To Reach Specific Timeline Goals (Sample of FY 1994 Complaints)

Action/Timeline	Average Number of Days	Sampling Error*	Confidence Interval*
# 3 (bar counsel receives staff investigative report)	182	± 25.1 days	156.9 to 207.1 days
# 4 (bar counsel prepares report)	51	± 18.7 days	32.3 to 69.7 days
# 5 (subcommittee acts)	59	± 21.3 days	37.7 to 80.3 days

*Note: Level of statistical significance is .05.

Source: JLARC staff analysis of FY 1994 cases to reach action/timelines #3 through #5.

Table 2

Sampling Error and Confidence Intervals for Percentage of Cases to Meet Specific Timeline Goals (Sample of FY 1994 Complaints)

Action/Timeline	Complaints Meeting Criteria	Sampling Error*	Confidence Interval*
# 3 (bar counsel receives staff investigative report)	61%	± 11.1%	49.9 to 72.1%
# 4 (bar counsel prepares report)	58%	± 11.9%	46.1 to 69.9%
# 5 (subcommittee acts)	54%	± 12.3%	41.7 to 66.3%

*Note: Level of statistical significance is .05.

Source: JLARC staff analysis of FY 1994 cases to reach action/timelines #3 through #5.

Due to inconsistencies in how the data were summarized on the tracking forms,some of the dates used by the clerk's office for entry into the disciplinary database were not accurate. The clerk's office is aware of this inconsistency and the concern is under review by staff of the department of professional regulation.

The JLARC staff review also found an additional inconsistency in dates used to measure the VSB's performance in meeting action/timeline #5 (subcommittee acts). The disciplinary computer system entry for the subcommittee action is designed to reflect the date when the subcommittee met to decide the case. When an agreed disposition is reached prior to a district committee hearing date, the procedure in use by the clerk's office for entering this information has been inconsistent. Initially, the clerk's office deleted the district committee hearing date and left the original subcommittee decision date intact, while at other times the clerk's office deleted the original subcommittee decision date and replaced this date with the date that the agreed disposition was reached. The clerk's office recognized the inconsistency of this procedure and took steps in June 1995 to standardize the dates used to measure the VSB's performance in meeting this specific timeline goal.

Appendix E

Response of the Virginia State Bar

As part of an extensive data validation process, the major State agencies involved in a JLARC assessment effort are given an opportunity to comment on an exposure draft of the report. Appropriate technical corrections resulting from the written comments have been made in this version of the report. Page references in the agency response relate to an earlier exposure draft and may not correspond to page numbers in this version of the report.

This appendix contains the response of the Virginia State Bar.

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December 7, 1995

Mr. Philip A. Leone
Director, Joint Legislative
Audit and Review Commission
Suite 1100
General Assembly Building
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Richmond, Virginia 23219

Dear Mr. Leone:

This will acknowledge receipt of your letter of November 17, 1995, together with three copies of the exposure draft of your staff report on the Virginia State Bar. I appreciate you and other members of your staff meeting with me on November 22nd to review several factual discrepancies in the draft, and I am glad most of those have been corrected.

On the whole, we believe your report contains a comprehensive and accurate description of the bar and its activities and programs, and it was helpful for our volunteers and staff to have participated with members of your staff in the study process. The report contains many recommendations and suggestions we are certain will be helpful to us as we continue to carry out our responsibilities in the future.

As I mentioned to you at our meeting last month, there are two broad themes developed in the report with respect to which the bar's elected leadership and staff have a somewhat different point of view; and we are concerned about the appropriateness of some of the recommendations deriving from the report's approach to these themes. Accordingly, we offer the attached written comments which I understand will be sent to the Commission along with the report.

Mr. Michael W. Smith, the bar's current president, and our senior staff also expect to be present at the Commission meeting on December 11, 1995, when the report will be presented at 9:30 a.m. It is my understanding we will have about thirty minutes for an oral response, and this will be made by Mr. Smith as the elected spokesperson for the Virginia State Bar.

We appreciate this opportunity to provide comments on the exposure draft of the report, and we look forward to meeting with the Commission on December 11 to discuss the report and answer any questions members of the Commission may have.

Very truly yours,

Thomas A. Edmonds

TAE:jm
encl
cc: Executive Committee
w/encl

COMMENTS OF

THE VIRGINIA STATE BAR

TO A DRAFT REPORT

REVIEW OF THE VIRGINIA STATE BAR

BY THE

JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION [1]

The draft report contains a comprehensive description of the bar and its activities and programs. We agree with much that is written there; many of the recommendations are helpful, and they are being given careful consideration. The process has benefitted the bar and will assist us in setting goals for the future.

We are pleased that the study concluded: "This review found that, with one minor exception, most VSB activities appear consistent with the mission established for it by statute and the Rules of the Virginia Supreme Court." (p. 117)

The study found that the bar is different from other state agencies in structure and programs. This is true of unified bars across the country. The United States Supreme Court recognized this uniqueness in *Keller v. State Bar of California,* 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), the leading case about the operations of unified bars. The Court said: "The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as 'governmental agencies.'" In Virginia, our most important difference is our representative governing body.

Pursuant to the guidelines established by the Virginia Supreme Court, the bar is directed by the Virginia State Bar Council, which is made up of elected representatives. They represent every judicial circuit and all types of practices and viewpoints -- from sole practitioners to large firms to government lawyers. All of the activities identified in this report are based on decisions made by these representatives. For example, the dues are set by the Virginia Supreme Court upon recommendation of the council. If they are too high, the council can recommend that the court lower them.

All of the members of council, the executive committee, the sections, and committees are volunteers. They give freely of their time to serve their profession and the public, often at great financial and personal sacrifice. The bar's greatest strength is its volunteers. We believe that this report must be considered in the context of the bar's representative and volunteer structure.

We also ask that the bar be compared with other unified bars. Attachment A demonstrates that our bar dues, growth and expenditures are less than the national average. [2] For instance, the average dues are $201; ours are $185.

1. These comments will parallel the organizational structure of the draft report, which contains four sections, and make reference to the page numbers of the November 17, 1995, draft, pp. i through xv and pp. 1 through 153.

Our strongest difference with this report is the bright line distinction it makes between regulatory and non-regulatory activities. Many of the activities classified as non-regulatory we consider regulatory in nature; all of the others provide strong and necessary support for our regulatory activities. We, however, also believe that all of those activities stand on their own as services to the public and as a part of the bar's mission.

Finally, in reviewing this report, it should be recognized that the Administration and Finance Account contains no dues money and was specifically created by the Supreme Court for expenses that might not be appropriate for mandatory dues or for a typical state agency.

If this report and the Virginia State Bar are considered in the context of the *Keller* case and other unified bars, it must be concluded that our unique structure is a positive and efficient way to accomplish our mission to regulate the legal profession and to improve the quality of the legal services available in the Commonwealth.

I. Overview of the Virginia State Bar

The draft report begins with an informative summary of the history and organization of the bar since its creation in 1938 as an agency of the Virginia Supreme Court. The bar is governed by an elected council of 71 attorneys from all parts of Virginia. Sixty are elected directly by the lawyers in each judicial circuit, six are appointed by the Supreme Court, and five serve by virtue of office. Bar council carries out the responsibilities enumerated in Va. Code §§ 54.1-3900 *et. seq.* and Part 6, § IV of the Rules of the Supreme Court of Virginia. The powers of council, stated in Paragraph 9 of Part 6, § IV, include not only self governance powers, but also powers to regulate the legal profession; to recommend to the Supreme Court disciplinary procedures; to promote judicial reforms; to improve the quality of legal services in the Commonwealth; to encourage lawyer education; and to uphold and elevate standards of attorney conduct.

Although stated in different ways, these powers have been the foundation of the bar's operations since 1938. The original Rules for the Integration of the bar stated the last four powers delineated above this way in Rule IV, §9(k): "To cultivate and advance the science of jurisprudence; To promote reform in law and in judicial procedure; To facilitate the administration of justice; To uphold and elevate the standards of honor, of integrity and of courtesy in the legal profession; To encourage higher and better education for membership in the profession; To promote a spirit of cordiality and brotherhood among the members of the Virginia State Bar...."

The bar and the court have repeatedly reviewed and reconsidered these powers. In 1991, after the United States Supreme Court's decision in *Keller v. State Bar of California*, the Virginia rules were rewritten to conform to the Supreme Court's language in *Keller*; but no significant new powers were added as is suggested by the JLARC report. (p. 6)

2. American Bar Association, 1995 Bar Activities Inventory 2-3.

The JLARC report draws a distinction between purely "regulatory" functions of the bar and other activities that are classified as "non-regulatory." The bar questions whether such a bright line distinction makes sense in the context of its overall mission.

Many of the activities labeled "non-regulatory" are a fundamental part of our responsibility to protect the public from lawyer misconduct. For example, the professionalism course and the fee dispute resolution program are classified in the report as "non-regulatory" activities. (p. 121) As such, they are among those activities that in the opinion of the JLARC staff are within the mission of the bar, but may nevertheless present a "diversion" of resources away from the bar's proper focus on its regulatory role. (pp. 119, 131) Since 1988, the professionalism course has been *required* by the Supreme Court of every new admittee to the Virginia State Bar. The course teaches the new lawyers to apply the principles of professionalism and the Code of Professional Responsibility to practical, day-to-day situations. The fee dispute resolution program is designed to divert appropriate fee dispute matters from the disciplinary system and prevent them from turning into disciplinary complaints. We see both as important parts of the regulatory mission. Likewise, we believe that other activities classified as "non-regulatory" contribute to our core mission of regulating licensed attorneys.

Drawing this distinction between the bar's programs also may have lent some ambiguity to interpretation of the mail survey referred to on page 20 of the report. The JLARC survey asked attorneys to classify each of the bar's programs and activities as either "essential" or "non-essential." Given the language of the General Assembly study resolution, it was the bar's suggestion that members' opinions be sought as to whether each program or activity was "appropriate" or "inappropriate" in light of the bar's statutory and rule of court authority. This, in our opinion, would have produced a more accurate assessment of members' views regarding the relative importance of different bar functions. The survey results contained in Appendix C to the report show that even some of those activities classified as purely "regulatory" by JLARC staff are not considered "essential" by attorneys (e.g. regulating legal aid societies). On the other hand, some of the "non-regulatory" activities were thought by a large number of respondents to be "essential" (e.g. conducting mandatory professionalism course for new lawyers). (p. C-4)

II. Funding the Operations of the Virginia State Bar

This section of the report reasons that:

1. the bar's present reserve fund balance is too large, exceeding the bar's policy that calls for maintaining a reserve of 10 to 25% of the ensuing year's operating budget;
2. the bar should not have raised dues to the present level on July 1, 1992, and dues should be reduced and not raised again if the bar's reserve exceeds 10%; and

3. the bar's Administration and Finance Account ("A & F Account"), which contains only non-dues revenue, should not be used either for certain types of expenses now paid, or as a vehicle for maintaining a portion of the bar's reserve as is now done.

In examining and responding to these issues we emphasize the bar's commitment to both fiscal responsibility and member satisfaction. The bar agrees that the present reserve balance is too large. We further agree that the passage of time has revealed error in the 1992 analysis that then showed a need for a dues increase. Finally, we appreciate the concerns expressed about A & F Account expenditures. The bar is committed to honest appraisal of these issues, and it is hoped that the members of the commission will take the following information into account and allow the bar time to consider the suggestions contained in section II of the report.

(A) **The Bar's Reserve.** The bar's reserve as of June 30, 1995, consists of approximately $1.55 million in the State Bar Fund (a dues repository) and approximately $850,000 in the A & F Account (a non-dues repository), for a total of approximately $2.4 million. This amounts to approximately 45% of the bar's current operating budget. The total reserve thus exceeds the bar's own policy, which provides for a reserve of 10-25%.

The bar's reserve proportion policy was established in 1990 as part of a long-range planning process in which the bar consulted many other unified state bars about their reserve policies. Our policy was also constructed with the recognition that the bar has no separate equipment reserve. Accordingly, budget forecasting has in the past used very conservative methods. The bar staff and president in 1995 have been more pragmatic in preparing the appropriation request for the new biennium.

Although the bar's reserve policy was designed to achieve a reserve of 10-25% of the operating budget, there is no dispute that the reserve has grown beyond the bar's needs. The leadership of the bar has acknowledged this fact but thought that it would be inappropriate to spend into the reserve until JLARC had finished its report and the cost of any recommendations had been assessed. Now that the JLARC study is completed, it is the bar's duty to set responsible priorities for use of the reserve funds. The options have not been explored formally, but there appear to be several: (i) reduction in dues; (ii) addition of disciplinary system staff; (iii) transfer of reserve funds to the Clients' Protection Fund; and (iv) making any necessary capital expenditures. Choices among these or other options should be made only after careful deliberation. So that such deliberation can proceed within council forthwith, we respectfully request that legislative initiatives be deferred until the bar council has the opportunity to perform this duty.

(1) **The Administration & Finance Account Reserve.** With respect to the portion of the bar's reserve maintained in its A & F Account (a non-dues repository), virtually all of this $850,000 component of the bar's overall reserve was derived from extraordinary distributions made to the bar by insurance carriers that underwrote endorsed personal lines insurance products. The funds have been held in the A & F Account because it is interest-bearing, and none have been spent.

The JLARC report suggests that these insurance monies should have been remitted (either by the carriers or by the bar) to the State Treasurer because they are unclaimed property pursuant to the Uniform Disposition of Unclaimed Property Act, Va. Code § 55-210.1 *et seq.* This suggestion presents a question of law that must be analyzed. The insurance documents that are probative of this question of law are in the insurers' custody, and we have requested them. The bar has consulted with its legal counsel in the Office of the Attorney General and will resolve this question.

(2) **Reserve Maintained in State Bar Fund.** The growth in the component of the reserve that is maintained in the State Bar Fund is primarily attributable to the fact that the bar has not added staff to its disciplinary system as was anticipated two years ago. During both FY 1995 and FY 1996, our appropriation requests were reduced by the General Assembly. This action precluded implementation of the final year of the bar's 1990-95 Long Range Plan and the first year of the bar's 1995-2000 Long Range Plan.

As events unfolded, the bar experienced a reduction in disciplinary workload during 1994-95, which disproved the predictions of the Long Range Plan. We would like to think that this trend reflects work we have accomplished in the continuing legal education programs, the mandatory professionalism course, the Lawyers Helping Lawyers program, and the like. But whatever the cause, this downturn in new complaints would have caused the bar to revise its current Long Range Plan to add fewer disciplinary personnel than originally planned. Nevertheless, the bar would have added *some* disciplinary staff in order to make efficient assignments of the extremely high caseloads now carried by our attorneys and investigators. The JLARC staff recommends adding at least one disciplinary position. (p. 131) We believe that had we added staff in 1994 and 1995, the disciplinary department would have come closer to meeting the aspirational time standards that have been established by the bar for completing investigations.

In summary, in the absence of a pending study by JLARC and the appropriation reductions, the bar would have been spending more during FY 1995 and FY 1996. Funds would quite likely have been needed from the reserve to cover these additional staff expenses.

The bar continues to believe that more staff may be needed to continue to operate an excellent disciplinary system and to promote the highest standards of ethical conduct so vital to public confidence in the justice system. The JLARC report compliments the bar's Committee on Lawyer Discipline for demonstrating "a willingness and capacity over time to change the system in order to improve the efficiency and effectiveness of the system and to make it more accountable to the public." (p. 69) As the report concludes, "As a result of the bar's efforts, JLARC's review of the bar's

disciplinary system found a system that works relatively well." (p. 70) However, the report also points out that the bar has not been able to meet its aspirational time guidelines for completing various phases of the disciplinary process. (pp.110-111) The report's suggestions for improved efficiency are very helpful and are under our active consideration (for example, increased use of paralegal support). But the need for staff to handle the present caseload still confronts us (p. 131), and the excess reserve gives us flexibility to address these needs.

(B) **The July 1, 1992, Dues Increase.** With the benefit of hindsight, it is now apparent that the dues increase adopted in 1992, under the then-existing Long Range Plan, could have been deferred. The report is correct on that point. It is respectfully submitted, however, that the decision to raise dues should be judged according to the facts as they existed in 1991 and 1992.

By the beginning of 1992, disciplinary complaints seemed to be exploding. The Long Range Plan (1990-1995) had forecast, based on past experience, that complaints would increase at approximately 5% per year during 1990-95. But during the first year of that plan, complaints increased 6.4%. This growth accelerated to 13.4% during the second year of the plan. The national experience and predictions were consistent with what was occurring in Virginia. Many knowledgeable bar leaders advised states to expect an onslaught of lawyer defalcations and client complaints. On the basis of this information, the bar became apprehensive and expected that it would have to add even more disciplinary staff than the number called for in the Long Range Plan. A dues increase, which always is a controversial matter taken very seriously by bar council and never approved casually, was recommended. This increase required approval by the Supreme Court, which was granted.

Fortunately, the rate of growth in new complaints against lawyers slowed in FY 1993 and FY 1994, and actually declined in FY 1995. The bar also introduced internal efficiencies during this period that reduced the number of complaint files opened for investigation.

It is now clear that the bar could have deferred the 1992 dues increase, but this did not become clear until late 1994. In April 1995, when the bar began to focus attention on the excess reserve and the possibility of a dues reduction, the JLARC study was set to begin. It seemed imprudent to consider reducing dues until the study had been completed, especially as the study would examine the bar's staffing situation and make an objective evaluation to assist council.

(C) **The Bar's Use of Its Administration & Finance Account.** There is an important fact to keep in mind when discussing the A & F Account: it never has and does not now involve any dues money. The A & F Account contains revenues earned on the bar's Annual Meeting, its Midyear Seminar and its Cambridge Seminar. (pp. 48-49)

The A & F Account was created and approved by the Supreme Court, with the advice of the Office of the Attorney General, the Comptroller, and the Department of Planning

and Budget, expressly to give the bar flexibility to pay certain expenses which could not be defrayed from the state bar fund. These specifically included expenses for alcoholic beverages at meetings and special events such as executive committee and council meetings, the Annual Disciplinary Conference, and the Pro Bono Conference.

It is fair to question again whether, as the court has provided, bar council should have social expenses paid, and whether bar officers should receive certain travel reimbursements for working meetings. We will continue to ask that question of ourselves and raise the issue with the Supreme Court. Our immediate response is this: the work of the bar is carried out through major commitments of time contributed by its unpaid members, and one of the ways in which these volunteers are recognized and thanked is through the receptions the bar hosts in connection with some of its meetings and special events.

We hope that the leaders of our profession, in every geographic location, will continue to participate as volunteer members of council and its executive committee. The bar should always maintain the caliber of its past and present officers, who have been willing to travel away from home to perform essential bar work. In the recent past, the bar has been well served by presidents from such diverse parts of the Commonwealth as Abingdon, Norfolk, Vienna, Richmond, Roanoke, McLean, Lynchburg, and Gloucester. The current president-elect is from Tazewell.

Bar officers are called upon to represent the bar even more frequently than are other bar volunteers, and when they travel to meetings such as the National Conference of Bar Presidents where spouses of other bar leaders will be in attendance, it has long been the bar's practice that the spouses' travel expenses to those meetings should be covered from non-dues resources accumulated in the A & F Account. The JLARC draft report suggests that paying travel expenses for the spouses of bar officers may not have been intended by the Supreme Court. The bar will explore this suggestion. However, we should think about whether a change in this policy could reduce the incentive for someone to participate as an unpaid officer for two years (president-elect and president) if he or she is expected to travel long distances for working meetings, and must choose either not to bring his or her spouse, or to pay for the spouse's travel expenses.

Comments on Specific JLARC Staff Recommendations in Section II:

Recommendations 2 and 3. (Reserve and Dues Policy) We acknowledge that our current reserve is too high and that the reserve policy needs to be revisited. We also acknowledge that our dues may be too high and that a policy tying dues increases to the level of the reserve is a good suggestion. The president has appointed a committee to review these issues and make appropriate recommendations to council and the Supreme Court. We intend to reduce the reserve balance to an appropriate level and set dues at a level actually needed for operations. We hope that the General Assembly will give us time to implement these changes without legislation.

Recommendations 4 and 5. (A & F Account Reserve) The bar will consult with its legal counsel in the Office of the Attorney General to determine whether the funds we have received from insurance companies in the recent past constitute unclaimed property pursuant to Va. Code § 55-210.1 *et seq.* The bar will, of course, comply with the requirements of The Uniform Disposition of Unclaimed Property Act.

Recommendations 6 and 7. (Funding Clients' Protection Fund) The bar has committed to providing a $200,000 a year contribution for at least five years to the Clients' Protection Fund in fulfillment of the Supreme Court's authorization of the fund and its important public protection purpose. The existing reserve of over $2 million may provide an opportunity to make a greater current contribution to the Clients' Protection Fund than is presently planned. Transfer of reserve funds for this purpose also would avoid the need for a new assessment on bar members to fund the Clients' Protection Fund, as suggested in the JLARC report. The bar respectfully suggests that legislative initiatives for such an assessment be deferred until the bar can design a solution to the need for funding through regular budgeting and/or transfers from the reserve.

Recommendations 8 and 9. (A & F Account Expenses) The A & F Account was authorized by the Virginia Supreme Court for the express purpose of giving the bar the flexibility to pay certain expenses associated with our meetings and other special functions that could not be defrayed from the State Bar Fund. We believe it is being used as intended. The bar, however, will consider fully all of the JLARC staff's suggestions and will confer with the Supreme Court about this issue. Subsequently, the bar will revise its practices if necessary.

III. Regulation of the Legal Profession

Section III of the report contains a very helpful assessment of our Professional Regulation Department, and it advances a number of excellent recommendations. The bar president has already asked the bar's Standing Committee on Lawyer Discipline to give serious consideration to each item in the report.

The bar has always been active in reviewing its disciplinary system and procedures to make them more effective and efficient, and we were glad to see reflected in the draft report a recognition by JLARC staff that many improvements in the system have been made in recent years. (pp. 69-70) This does not mean, however, there is not more that can be done, and some of the recommendations made by the JLARC staff present new ideas that have not been considered previously. The Committee on Lawyer Discipline will make a written report on each one of JLARC's recommendations. This will be submitted to council at the February 1996 meeting. Any rule changes that are then recommended to the Supreme Court will be accompanied by a discussion of any JLARC recommendations that were not developed into proposed rule changes, and the reasons therefor.

We hope that the commission will give adequate consideration to our 1995-2000 Long Range Plan and the report of Altman Weil Pensa, both finalized during 1994 and made

available to JLARC staff. It was observed in both the Long Range Plan and the Altman Weil Pensa report that the bar's disciplinary department lawyers and investigators are already carrying caseloads that are among the highest in the nation. In light of this fact, as well as the observation made in the draft report that we are unable to meet the aspirational time standards we have established for processing disciplinary complaints, the conclusion expressed in Recommendation 31 that the Professional Regulation Department needs only one additional staff person in the intake office seems open to question.

The bar will continue to evaluate what additional disciplinary resources are needed to enable it to do the kind of job it would like to do in its primary area of responsibility--discipline. The bar also will examine any possible resources that could be shifted from other areas of the bar's work to the disciplinary effort.

IV. Role and Mission of the Virginia State Bar

(A) **The Regulatory Mission.** As suggested in our comments above to section I of the report, the distinction drawn in the JLARC report between the bar's "regulatory" activities and all of its other programs is not entirely helpful in analyzing what the bar can and should be doing. This distinction implies that any program that is not technically "regulatory" could and perhaps should be abandoned, despite the existing rule of court authority to operate the program, and despite the positive influence that the program has on the delivery of quality legal services and the development of high professional standards. Likewise, the conclusion in the report that the bar is only spending about half of its resources on its "regulatory" mission (p. 130) is not accurate if, as we believe, resources spent on such matters as education, operation of the Clients' Protection Fund and publication of consumer information will help prevent mismanaged trust accounts and neglected client matters.

Many of the programs that the JLARC staff categorizes as "non-regulatory" are important to our regulation efforts, as they lower the disciplinary workload and assist and protect the public. Examples of these vital adjuncts, which are given no credit in the JLARC staff's analysis of the bar's "regulatory" resource allocations, are the following:

(1) the Mandatory Professionalism Course, which has now exposed more than one third of the active membership of the Virginia State Bar to outstanding lawyers and judges addressing the subject of what it means to function as a true professional;

(2) the liaison work with local bar associations, which are an important resource in inculcating professional values and reporting lawyer misconduct to the state bar when it occurs in a given locality;

(3) the pro bono initiative, which encourages professional responsibility, better legal services for the poor and a public perception that the justice system does not favor only the rich;

(4) the Lawyers Helping Lawyers program, an effort that seeks to identify and

intervene with lawyers having substance abuse problems before they are caught up in the disciplinary system;

(5) the Clients' Protection Fund, which provides reimbursement to clients injured through fraud or dishonesty on the part of a lawyer;

(6) the fee dispute resolution program, which seeks to resolve these matters early and keep them out of the disciplinary system;

(7) the Lawyer Referral Service, which insures that members of the public seeking the services of a lawyer are referred to a person whose disciplinary record is clear and who has malpractice insurance;

(8) the bar's educational work, much of which focuses on legal ethics and professionalism, accomplished through the practice sections and the *Virginia Lawyer*; and

(9) the cost of council and executive committee meetings, which are in large part devoted to regulatory matters, as noted on page 95 of the draft report.

Instead of using a bright line distinction, it may be more appropriate to view all of the bar's activities as falling along a continuum from those that are only disciplinary in character, to those that have relatively little to do with disciplining the profession or protecting the public. As the draft report acknowledges, almost none of the latter involve expenditure of any significant mandatory dues dollars.

(B) **Commercial Activities.** Section IV of the report questions activities that "appear to be within the bar's authority," but that are viewed as "unusual" for a state regulatory agency. (p.133) However, the draft report acknowledges that (i) the bar is unique among the state's regulatory agencies, especially as it is an arm of the Supreme Court, and (ii) these activities are not unusual when compared to other unified state bars. In fact, when compared to other mandatory bars around the country, the Virginia State Bar is only modestly involved in activities that could be characterized as commercial. Most such bars, for example, are heavily involved in promoting office products, long distance telephone services, magazine subscriptions, credit cards and other office or personal items. We have nothing comparable in Virginia. Nevertheless, we understand the JLARC staff's concerns, and we offer a brief explanation.

The bar's endorsed insurance programs and LEXIS legal research group discount program are authorized by statute and rule of court. We also believe that they provide benefits to both our members and the public. With respect to insurance, one issue is access to coverage. While it is true that malpractice and personal insurance products can be made available to lawyers through other voluntary bar organizations, there is no assurance that all licensed attorneys would be eligible for coverage endorsed by such voluntary groups. Group insurance contracts and underwriting standards often impose as a requirement that policies be made available only to members of the endorsing organization.

We want all of our members to have access to affordable professional liability coverage, as this provides important protection for clients. Thus, we continue to endorse

such a product as a resource, especially for the many lawyers who practice in small firms or on their own, and who are not members of bar groups other than the VSB.

With respect particularly to the life, disability, and health insurance, the draft report perhaps implies that the 1995 legislation enacting Va. Code § 54.1-3917.1 was sought because the bar knew it was in error for the 40 odd years it had sponsored personal lines insurance. On the contrary, the bar was following the General Assembly's message in the 1994 Appropriations Act -- essentially to examine our mission and make certain our activities are within our assigned mission. This examination showed that: (i) personal/health insurance had been sponsored by the bar for members since the 1950's; (ii) no one seriously questioned the bar's authority to do so for 40 years; (iii) members had in those years become dependent on the coverage, and wrote to us that they would suffer hardship if coverage was discontinued; and (iv) if we concluded, as we did, that the sponsorship should continue, we should seek to amend the Code to make sure we were in line with the General Assembly's concerns. The bill providing specific statutory authority for sponsoring personal lines of insurance passed both houses of the General Assembly unanimously in 1995.

The rationale is similar for the computerized legal research group discount program. Many of our members have no access to a large law library. The purpose of offering a group discount for members subscribing to LEXIS is to put the solo practitioner in Lee County on equal footing with the 100-lawyer firm in Richmond, whether or not he or she belongs to any other bar group.

As section IV of the report indicates, there are many ways to structure the professional regulation of lawyers, and different states certainly have chosen to do it in different ways. A significant number have chosen to lodge that responsibility in a unified state bar functioning with delegated responsibility from the state supreme court, just as Virginia has. The court has indicated in the past that it is well pleased with the bar and the way in which it is carrying out its responsibilities. We will actively promote greater dialogue with the court, and if the court has any concerns in light of the information developed in the JLARC staff report, the bar will look forward to addressing those.

Conclusion

We appreciate this opportunity to provide comments on the exposure draft of the JLARC report, and we look forward to meeting with the commission on December 11 to discuss the report and answer any questions that members of the commission may have.

Attachment A

State Bar Associations**

Average Membership of State Bars:

	1980	1983	1987	1991	1995	% Increase 80-95
Voluntary	8,100	9,170	11,024	12,915	13,762	41%
Unified	10,226	12,245	14,669	16,691	16,823	37%
All States	9,353	10,982	13,172	15,140	15,695	40%

Average Staff Size of State Bars:*

	1980	1983	1987	1991	1995	% Increase 80-95
Voluntary	12	14	17	24	29	59%
Unified	29	33	47	61	66	56%
All States	22	25	35	46	52	58%

Average Expenditures of State Bars:

	1980	1983	1987	1991	1995	% Increase 80-95
Voluntary	731,304	993,025	1,555,178	2,617,380	3,016,558	76%
Unified	1,389,442	2,160,363	3,611,559	4,518,915	6,140,665	77%
All States	1,119,131	1,680,920	2,766,97	3,737,928	4,989,678	78%

Average Top Dues Level of State Bars:

	1980	1983	1987	1991	1995	% Increase 80-95
Voluntary	n/a	96	119	142	164	41%
Unified	n/a	132	157	192	201	34%
All States	n/a	117	141	172	187	37%

*We asked for information on both full-time and part-time staff in 1995. For purposes of the averages, each part-time staff person was tabulated as a .5 full-time staff person.

**American Bar Association, 1995 Bar Activities Inventory 2-3.

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Special Report: Evaluation of a Health Insuring Organization for the Administration of Medicaid in Virginia, January 1992
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Review of the Department of Taxation, January 1992
Interim Report: Review of the Virginia Medicaid Program, February 1992
Catalog of State and Federal Mandates on Local Governments, February 1992
Intergovernmental Mandates and Financial Aid to Local Governments, March 1992
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Follow-Up Review of Community Action in Virginia, September 1995
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