



Office of General Counsel

Bankruptcy at the Beach Seminar

June 2, 2023

Roman Ashley Shaul

Roman.Shaul@alabar.org

General Counsel

Henderson State Park, Florida

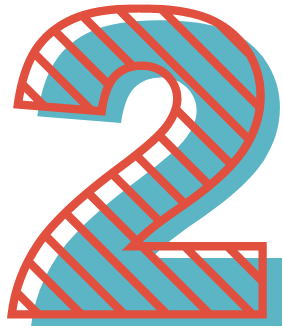
ABA Task Force on Lawyer Well-Being (2017)

“Lawyer well - being is part of a lawyer’s ethical duty of competence. It includes a lawyer’s ability... to help them[self] make responsible decisions for their clients.”



GIBSON VANCE

147th President of the Alabama State Bar



GOALS OF DRIVE FOR FIVE:

1. VISIT ALL 41 JUDICIAL CIRCUITS IN ALABAMA
2. PUT LAWYER WELLNESS AT THE FOREFRONT



Statistics

Suicide is the **third** leading cause of death among attorneys

36% of attorneys consume alcohol at levels considered problematic drinking

36% of attorneys struggle with substance abuse

28% of attorneys are struggling with depression

19% of attorneys show symptoms of anxiety

40% of law students reports severe anxiety upon graduation

ASB LAWYERS HELPLINE

1-800-605-8678

CONFIDENTIAL HELP IS JUST A CALL AWAY



ALL ASB MEMBERS GET FIVE FREE HOURS OF COUNSELING HELP

Alabama Lawyers Assistance Program:

Why you should call !

Pursuant to Rule 8.3(c) & (d), Alabama Rules of Professional Conduct employees of the ALAP are forbidden from disclosing information related to a lawyer's interaction with that program.

Committee Comments

In order to encourage a lawyer or judge who has or believes he or she may have problems with addiction or any other mental - health- related disorder to seek help, that person can be assured that disclosure to any lawyer who is on the Alabama Lawyer Assistance Program Committee, on the staff of the Practice Management Assistance Program, or on any other committee or subcommittee of the Alabama Lawyer Assistance Program designed to assist lawyers with these problems will be treated with confidentiality as though a lawyer- client relationship exists.

Alabama Lawyers Assistance Program:

Why you should call !

Pursuant to Rule 27 (e), Alabama Rules of Disciplinary Procedure:

(e) Disciplinary Proceedings Stayed.

A pending disciplinary proceeding against the respondent shall be held in abeyance so long as the respondent remains on disability inactive status.



**Alabama State Bar
Office of General Counsel**

What We Do

Disciplinary Counsel:

- Investigate & Prosecute
- Disability & Reinstatement Proceedings
- Character & Fitness Appeals
- Continuing Legal Education Compliance
- Continuing Legal Education Presentations
- “Any other duty or responsibility conferred ... by the Executive Committee of the Board of Commissioners of the Alabama State Bar.”

Ethics Counsel:

- Ethics Opinions
- Represent the Bar in Litigation
- Support the Executive Director & Bar Departments
- Continuing Legal Education Presentations
- “Any other duty or responsibility conferred ... by the Executive Committee of the Board of Commissioners of the Alabama State Bar.”

Number of Full Time Staff

Alabama	10
Arkansas	7
Florida	127
Georgia	23
Louisiana	28
Mississippi	5
Tennessee	33

**ABA Survey on Lawyer Discipline Systems

Number of Disciplinary Lawyers

Alabama	3
Arkansas	3
Florida	42
Georgia	7
Louisiana	10
Mississippi	2
Tennessee	8

**ABA Survey on Lawyer Discipline Systems

Case Load Per Lawyer

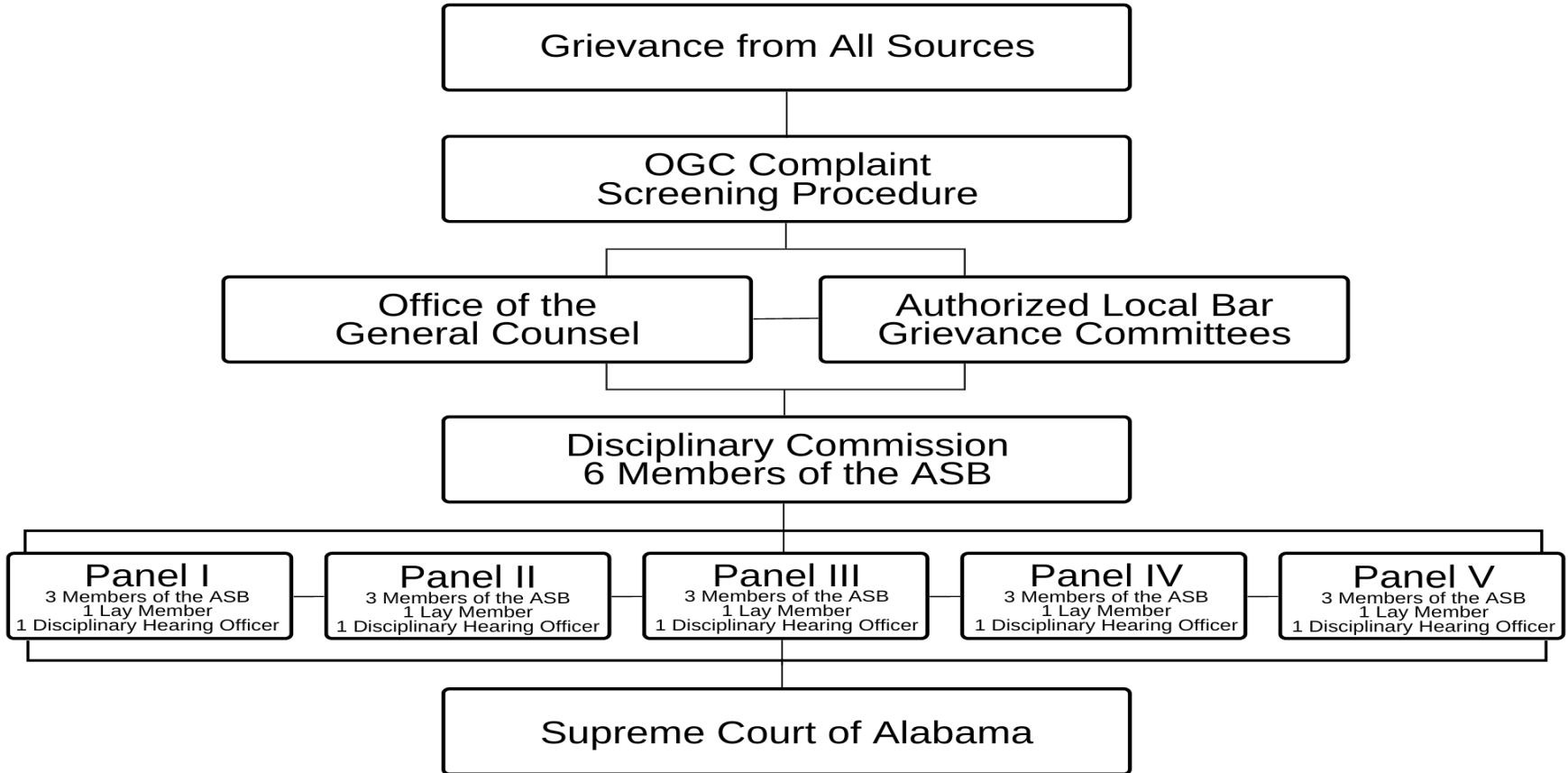
Alabama	332
Arkansas	216
Florida	211
Georgia	32
Louisiana	243
Mississippi	35
Tennessee	155

**ABA Survey on Lawyer Discipline Systems / Alabama OGC Internal Records

Lots of Hoops Before Discipline is Issued



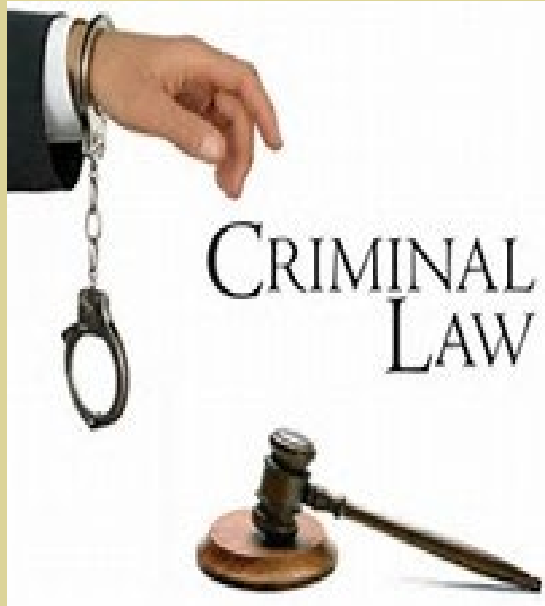
Grievance Flowchart



2022 OGC Statistics

• Complaints Received	897
• Complaints Screened Out	870
• Private Reprimands	27
• Public Reprimands	13
• Transfer (Rule 27)	9
• Suspensions	24
• Disbarments	12
• Surrender of License	2
• Informal Opinions Issued	2250
• Disciplinary Commission Cases	134
• Disciplinary Board Hearings	12
• Number of CLE/Programs	99

Beware Criminal and Family Law?



Changes to the Alabama Rules of Disciplinary Procedure



**time to
UPDATE**

2022 Disciplinary Rule Changes

Disciplinary Commission (“DC”):

1. Expand from 4 members to 6 members.
2. Members of the DC are not required to be a Bar Commissioner.

Disciplinary Board (“Board”):

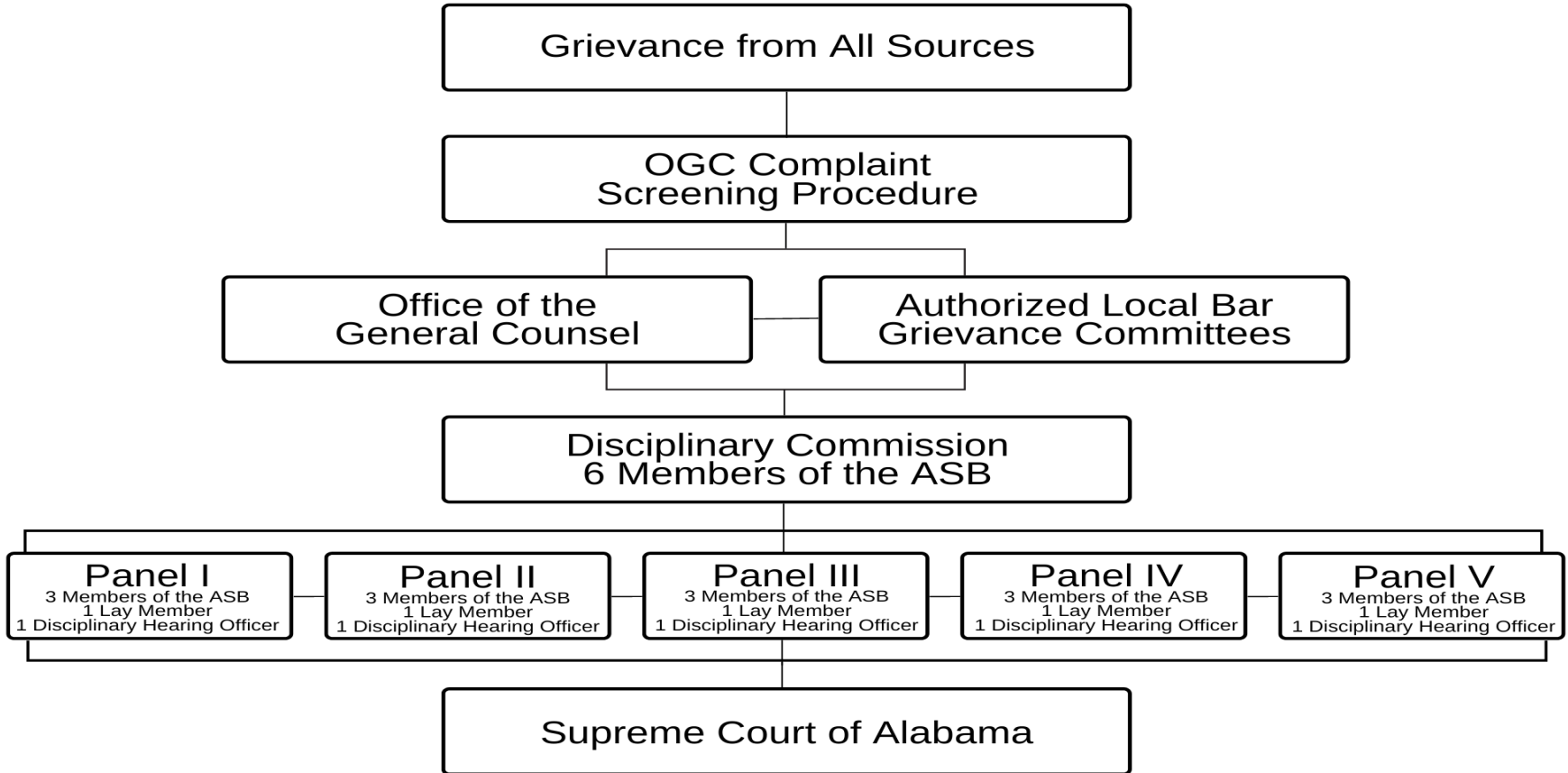
1. Expand from 3 panels to 5 panels.
2. Members of the Board are not required to be a Bar Commissioner.

2022 Disciplinary Rule Changes

Goals:

1. Involve more members of the Alabama State Bar and transparency.
2. Increase diversity.
3. Become more efficient.

Grievance Flowchart



2021 Disciplinary Rule Changes



2021 Disciplinary Rule Changes

Rule 3(c) – The Alabama Supreme Court can now initiate its own investigation into any lawyer who is a member of the Alabama State Bar.

2021 Disciplinary Rule Changes

Rule 12 (c) – All complaints against:

- a) Members of the BBC;
- b) Lawyers employed by the Bar (including ED and GC); and
- c) Any Hearing Officer.

**Must be sent to the Alabama Supreme Court immediately.

2021 Disciplinary Rule Changes

Rule 6 (c) -

“The Board of Bar Commissioners’ decisions concerning the appointment of the General Counsel, the General Counsel’s compensation, and the termination of the General Counsel’s employment shall be subject to the approval of the Supreme Court of Alabama.”

2021 Disciplinary Rule Changes

Rule 12(f)(5) – For all suspensions and disbarments **that are not appealed** - the Disciplinary Clerk must provide the full record to the Supreme Court within 14 days of the expiration of the appeal deadline.

Litigation Under the Disciplinary Rules



Walden v. Alabama State Bar, 320 So.3d 545 (2020)

The trial court ... dismissed his action, explaining to Walden in a reasoned order that **matters involving the discipline of members of the State Bar were within the exclusive jurisdiction of the State Bar** “with review by the Supreme Court of Alabama.” (emphasis added) Rule 1(a)(1), Ala. R. Disc. P. This governing principle has not changed since then; to the contrary, it has only been reinforced. See, e.g., Nichols v. Alabama State Bar, 815 F.3d 726, 732 (11th Cir. 2016) (recognizing that “Alabama law delegates to the State Bar, with supervision by the Supreme Court of Alabama, the power to investigate and discipline attorney misconduct”). **Simply put, circuit courts in this State have no authority to reverse a judgment made by the State Bar in a disciplinary proceeding, to admit an attorney to the State Bar, or to direct the State Bar to reinstate an attorney who has previously been disbarred.** (emphasis added).

Alabama State Bar v. Giardini, 324 So.3d 1216 (2020)

Facts:

1. Sex-crimes prosecutor caught arguably soliciting sex from minors, as well as having graphic sexual conversations in chat rooms soliciting nude pictures from minors.
2. Admitted his conduct, but tried the case just on punishment. Received a 3-year suspension from the practice of law.
3. Petitioner complied with all terms of his suspension including getting counseling and was determined not to be predatory or opportunistic by therapist in a “comprehensive” psychological examination.

Alabama State Bar v. Giardini, 324 So.3d 1216 (2020)

Reinstatement pursuant to Rule 28, Alabama Rules of Disciplinary Procedure.

Standard for reinstatement:

“At the hearing, **the petitioner shall have the burden** of demonstrating by **clear and convincing evidence** that he or she has the **moral qualifications to practice law** in this state and that his or her resumption of the practice of law within the state **will not be detrimental to the integrity and standing of the Bar or the administration of justice, and will not be subversive to the public interest.**”

Rule 28(c), Ala. R. Disc. P.

(emphasis added).

Alabama State Bar v. Giardini, 324 So.3d 1216 (2020)

1. The Alabama State Bar lost the case in front of the Disciplinary Board in a 4-1 opinion.
2. Appealed to the Supreme Court of Alabama.
3. Supreme Court reversed in a 6-2 opinion saying that reinstatement would be **detrimental to the integrity and standing of the Bar and would be subversive to the public interest.** Id. at 1230.

Alabama State Bar v. Kaminski, 2022 WL 570835 (February 25, 2022)

Facts:

1. Judge was having an undisclosed affair with a lawyer who frequently appeared in his courtroom. The judge assigned the lawyer cases and took judicial action in those cases.
2. Both parties admitted they violated the *Rules of Professional Conduct* and tried the consolidated case just on appropriate punishment.
3. Disciplinary Board issued a 90-day suspension for the lawyer and a 180-day suspension for the judge, to be run consecutively instead of concurrently.
4. Both sides appealed to the Supreme Court of Alabama.

Alabama State Bar v. Kaminski, 2022 WL 570835 (February 25, 2022)

1. Supreme Court reversed the Disciplinary Board as to both suspensions.
2. 5-4 vote with a lengthy dissent.
3. The majority opinion noted that the Bar had not proven a “tangible, concrete injury.”
4. The majority opinion concluded that the two individuals should receive “at most, a public reprimand.”
5. Majority/Dissenting opinions turn on the aggravating and mitigating factors in the case.

AGGRAVATING FACTORS

1. prior disciplinary offenses
2. dishonest or selfish motive
3. a pattern of misconduct
4. multiple offenses
5. bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency
6. submission of false evidence, false statements, or other deceptive practices during the disciplinary process
7. refusal to acknowledge wrongful nature of conduct
8. vulnerability of victim
9. substantial experience in the practice of law
10. indifference to making restitution

MITIGATING FACTORS

1. absence of a prior disciplinary record
2. absence of a dishonest or selfish motive
3. personal or emotional problems
4. timely good faith effort to make restitution or to rectify consequences of misconduct
5. full and free disclosure to disciplinary board or cooperative attitude toward proceedings
6. inexperience in the practice of law
7. character or reputation
8. physical or mental disability or impairment
9. delay in disciplinary proceedings
10. interim rehabilitation
11. imposition of other penalties or discipline
12. remorse
13. remoteness of prior offenses

May v. Alabama State Bar, 311 So.3d 758 (2020)

Facts:

1. The lawyer was given a 2-year suspended sentence for misuse of his trust account. While on probation he committed repeated violations resulting in a revocation and suspension of his license to practice law.
2. While suspended, he knowingly practiced law on at least two occasions.
3. The lawyer was disbarred by the Disciplinary Board.
4. Lawyer appealed arguing that there was “no actual injury” and therefore disbarment was excessive.

May v. Alabama State Bar,
311 So.3d 758 (2020)

Supreme Court of Alabama affirmed
the disbarment in a 9-0 opinion.

May v. Alabama State Bar, 311 So.3d 758 (2020)

Holding:

“Although the Bar did not attempt to prove that May's violations directly caused an injury to a client, it argued that May's violations injured the public and the legal system, to which he owed ethical duties under the Alabama Standards for Imposing Lawyer Discipline.”

“Those ethical duties require every lawyer to ‘exhibit the highest standards of honesty and integrity’ and ‘to not engage in conduct involving dishonesty, fraud or interference with the administration of justice... A lawyer also owes an ethical duty to the legal system to operate within the bounds of the law. We agree with the Bar.”

“By participating in more than one legal matter while he was suspended, May knowingly breached those ethical duties to the detriment of the public and the legal system, making him subject to disbarment under Standard 8.1(a).”

(internal citations omitted)

What's



Trending?

Nonrefundable Retainers

THINGS THAT DON'T EXIST:



BIGFOOT



FAIRIES



UNICORNS

Non-
Refundable
Retainers



Rule 1.8 – Prohibited Transactions (l) & (m)

(l) A lawyer shall not engage in sexual conduct with a client or representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship, including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of legal representation;

(2) continuing to represent a client if the lawyer's sexual relations with the client or the representative of the client cause the lawyer to render incompetent representation.

(m) Except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitive. This presumption is rebuttable.

LAWYER²⁴⁷

Data Breaches

Getting struck
by a lightning



1 in 960.000

Dating a
millionaire



1 in 220

Experiencing a
data breach



1 in 4

“Cyber Crime is on the rise in Alabama, FBI says...”

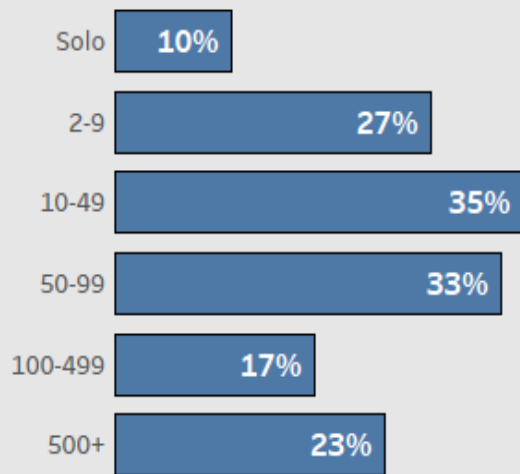
“We are inundated with it...[a] nd while some business and entities may not think they are vulnerable, authorities say it’s probably only a question of time. That means hospitals, energy companies, emergency services, infrastructure sectors, and even regular businesses”

- AL.Com (August 16, 2022).

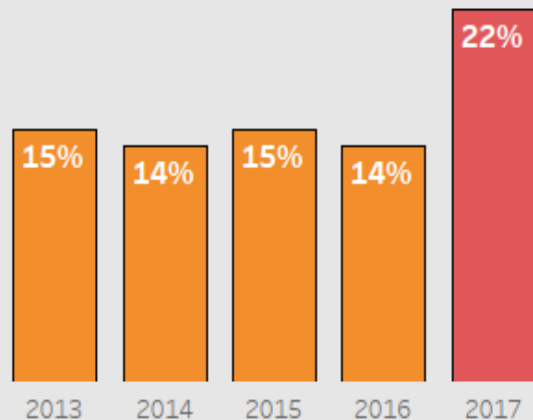
Midsize Law Firms Report Most Breaches

Over a third of firms with 10 to 99 attorneys were reportedly compromised in 2017.

Law firms that reported security breaches in 2017, by attorney count



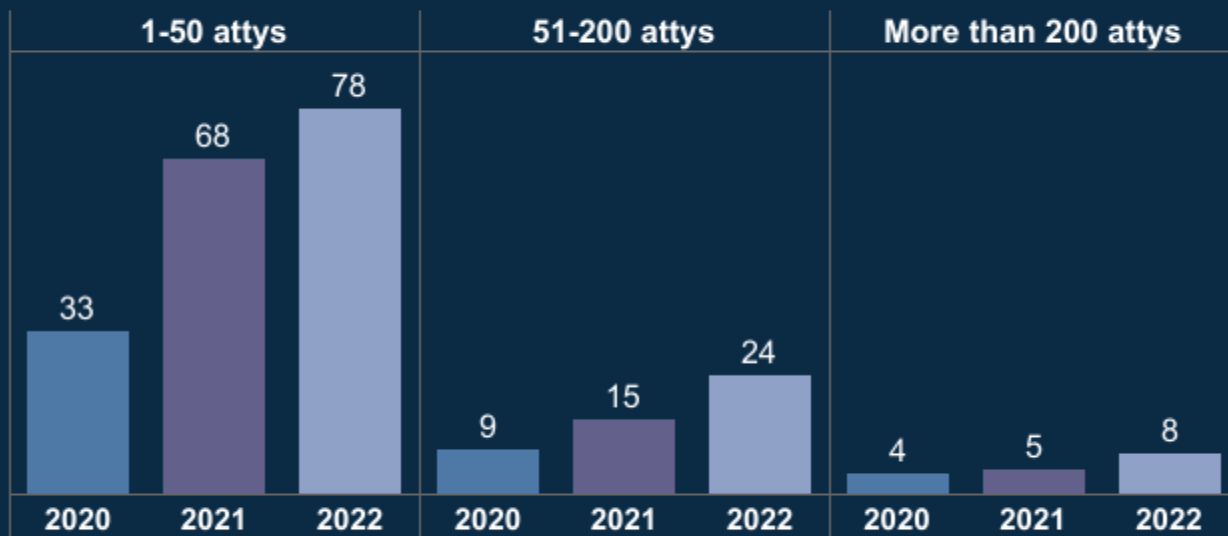
The number of firms surveyed that have experienced a breach in the past jumped 8 percentage points



Source: ABA Techreport 2017

Law Firm Data Breaches Surged Again in 2022

Over 100 law firms reported data incidents to state authorities in 2022, exceeding the previous two years.

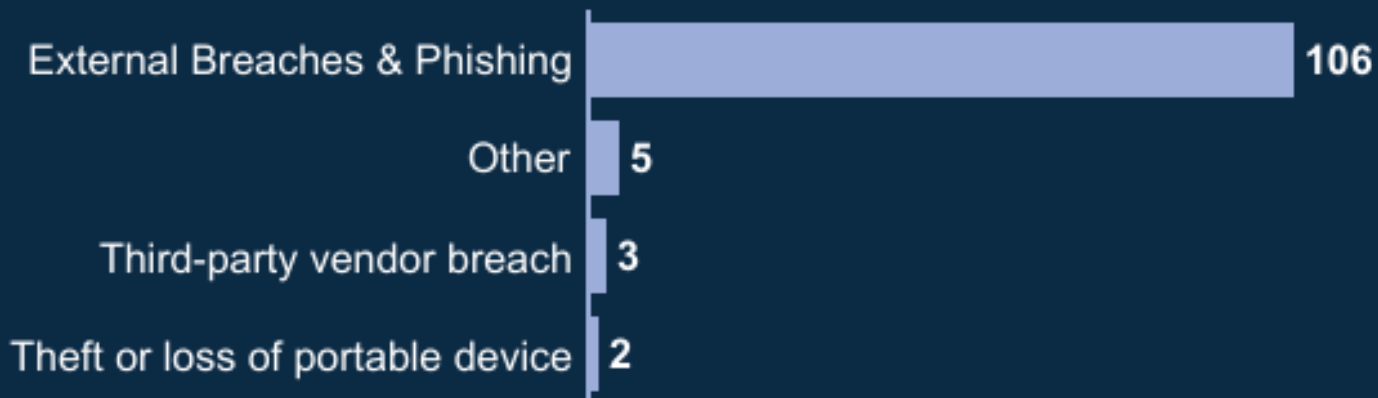


Source: State public disclosure records for breaches reported in 2022. (Does not include all states)

 LAW360 | Pulse

How Law Firms Were Breached

External breaches, including phishing, hacking and malware attacks, were the most commonly identified source of data exposure events.



Source: State public disclosure records for breaches reported from January 2021 through April 2022. (Does not include all states.)



ABA Formal Op. 477R (5/21/2017)

“Securing Communication of Protected Client Information”

1. Duty to prevent inadvertent or unauthorized disclosures
2. Reasonable efforts standard (safeguards) (sensitivity, likelihood, cost, difficulty, ease to use)
3. Special protections by agreement, law or the circumstances

What are “Reasonable Efforts”

1. Did you call the bank or your client before you acted?
2. Do you understand your technology. (Security on?)
3. Is the software manufacturer still in this business?
4. Are you backing up your data?
5. Are you working with reputable vendors?
6. Are you training your staff?

ABA Formal Op. 483 (10/17/2018)

“Lawyers’ Obligations After an Electronic Data Breach or Cyberattack”

- Before breach, develop data breach plan
- Must monitor for data breach
- Stop breach and restore systems
- Reasonably determine what occurred
- Provide notice of data breach to clients
- Notice must give sufficient information

Statutory Obligations

- Alabama Data Breach Notification Act (6/1/2018)
 - * Applies to lawyers and law firms
 - * Deals with “SPII”
 - * Requires tech safeguards & timely notice
- HIPPA
- Gramm Leach Bliley Act
- Sarbanes Oxley

When Your Home is Now Your Office



When Your Home is Now Your Office

- Same security obligations exist.
- Home systems are generally more vulnerable.
- How are you backing up data from your home system?
- Are you using your firm issued computer?
- Be mindful of people in your home.

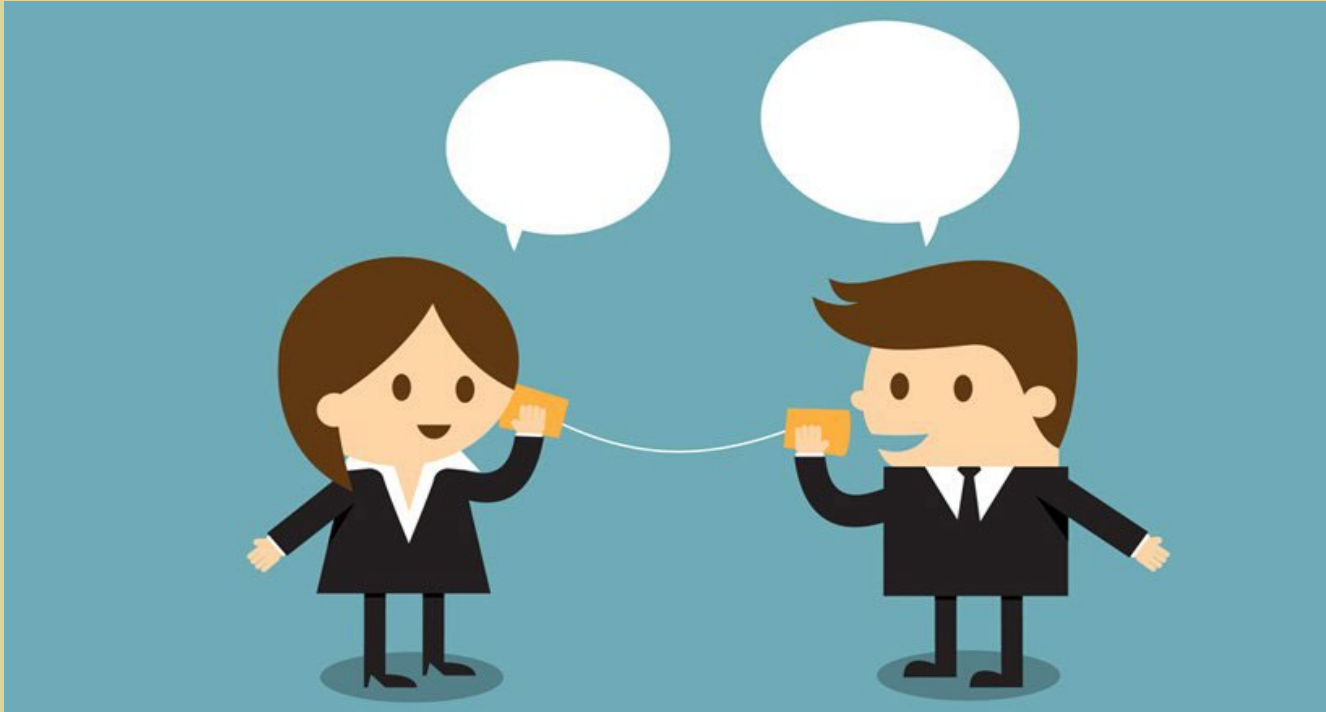


Data Breach Lawsuits Are Steadily Increasing

Most Common Disciplinary Issues for Bankruptcy Lawyers




You *MUST* Communicate With Your Clients



Rule 1.4 Communication

(a) A lawyer shall keep a client **reasonably informed** about the status of a matter and **promptly** comply with **reasonable** requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



“the single biggest
problem in
communication is the
illusion that it
has taken place”

-George Bernard Shaw

Additional Thoughts on Client Communication

1. Make sure the client knows how to communicate with you (BUT...set appropriate barriers).
2. Be careful contacting clients through social media.
3. Your clients may be very emotional. Do not risk your livelihood over your clients.

Procrastination Kills !



Rule 1.3 Diligence

A lawyer shall not willfully neglect a legal matter entrusted to him or her.

Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Not Being Truthful





Conflict of interest

Rule 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to other clients, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

Rule 1.7 Conflict of Interest: General Rule

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or a third person, or by the lawyer's own interest, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation; or
- (b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

Rule 1.6 (a) Duty of Confidentiality

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

Rule 1.6 (b) Duty of Confidentiality

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
- (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Conflict/Confidentiality Examples

1. You represent a husband and wife at the time of filing the petition, but they later divorce.
2. You represented a husband and wife together in their first bankruptcy. Years later one of the spouses wants you to represent her in a different bankruptcy.
3. What are the Ethical Obligation of an attorney to file an AP ?

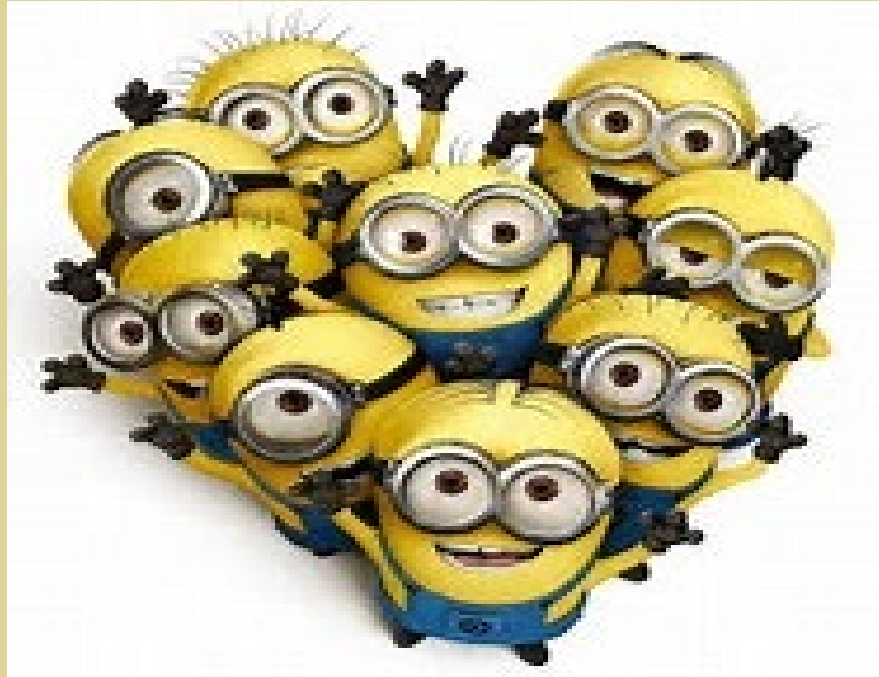
Conflict/Confidentiality Examples

4. You are retained to represent a corporation, but the President and CEO wants you (or a member of your firm) to represent them in a bankruptcy.
5. What if the CEO wants representation in a separate matter ?
6. Specific questions about legal obligations imposed by statutes and rules. (i.e., splitting fees).

E **T** **H** **I** **C** **S**

A 3D illustration featuring six white, stylized human figures standing in a line on a white surface. Each figure is holding a large, thick, 3D letter. From left to right, the letters are: a red 'E', an orange 'T', a yellow 'H', a light green 'I', a dark green 'C', and a blue 'S'. The figures are positioned behind their respective letters, appearing to support or carry them. The background is plain white, and the entire scene is framed by a light olive-green border.

Don't Rely on Your Friends for Ethics Advice



Ethics Opinions

Alabama Rules of Disciplinary Procedure
Rule 18.

Conduct not subject to disciplinary action.

If, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, to the Office of General Counsel, said inquiry shall be considered confidential. Additionally, if said lawyer receives a formal or informal opinion from the Office of General Counsel that the proposed conduct is permissible such conduct shall not be subject to disciplinary action.



Office of General Counsel

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