

## **DISCIPLINARY PROCEEDING**

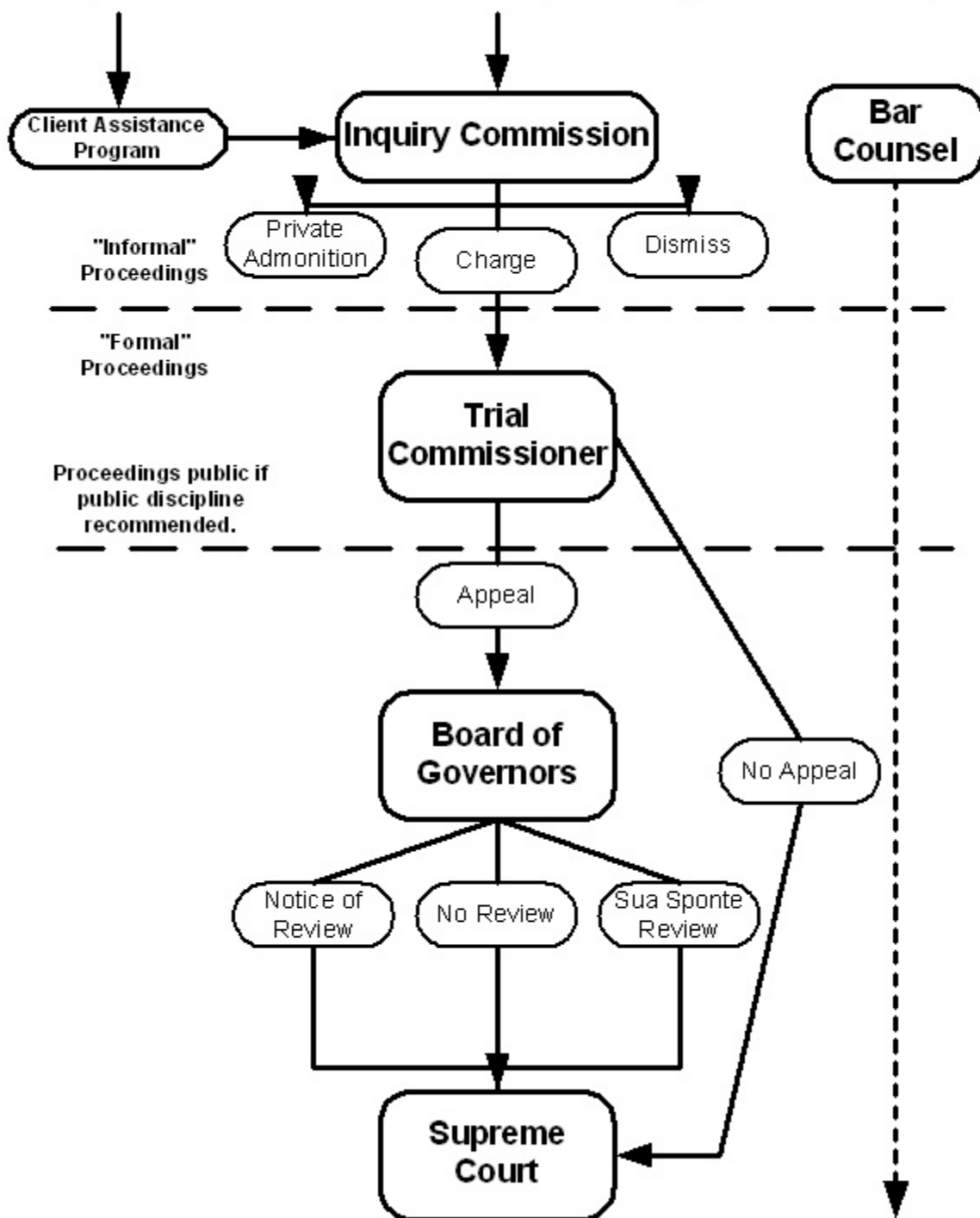
### **A. DISCIPLINARY PROCESS**

Most disciplinary cases are resolved at the Inquiry Commission level. However, prudent practice, whether you are representing yourself in the disciplinary matter, or whether you are representing another attorney, dictates that you be at least generally familiar with the overall disciplinary process and the various levels of bureaucracy which exist within the Kentucky Bar Association regarding attorney discipline.

The disciplinary process for attorneys is solely within the jurisdiction of the Supreme Court. Whereas in some jurisdictions, where the practice of law is regulated by the State Legislature, such is not the case in Kentucky. The concept of “separation of powers,” as a constitutional principal, is reflected in Kentucky’s lawyer disciplinary process.

To fully understand and appreciate the attorney disciplinary process requires a detailed knowledge of the procedural rules, as written and as applied, and the Rules of Professional Responsibility.

# Overview of Disciplinary Process



### **Major Players in Attorney Disciplinary Process.**

The attorney disciplinary process is very bureaucratic with many different “players.” One of the bigger mistakes to be made is to view the KBA as a single monolithic entity. The KBA is composed of many parts, some having short term involvement in a particular case at a particular stage. However, each stage and entity must be taken seriously.

The major players in the attorney disciplinary process are as follows:

1. Client Assistance Program
2. Office of Bar Counsel
3. Inquiry Commission
4. Trial Commissioner
5. Board of Governors
6. Supreme Court

**1. Client Assistance Program.** This program, (“CAP”), is not part of the Office of Bar Counsel and is technically not part of the disciplinary process. The program is an initial screening mechanism to address client complaints which do not necessarily implicate ethics violations. Many, if not most, Bar Complaints originate from a breakdown in attorney/client communications, or neglect or lack of diligence on the part of the attorney. While a breakdown in communication may occasionally be part of a bigger problem, in those instances where such is not the case, the intervention of the CAP may address the client’s concerns and put the attorney back on track. The involvement of CAP is short term but should be viewed as an opportunity to “short-circuit” a potential disciplinary matter before it festers into something more serious.

**2. Office of Bar Counsel.** The Office of Bar Counsel is composed of a Chief Bar Counsel and four Deputy Bar Counsel. Two more Deputy Bar Counsel will soon be hired. The Office is not an independent agency of the KBA, and the counsel serve at the pleasure of

the Board of Governors. The Office of Bar Counsel is responsible for the prosecution of all disciplinary cases at all levels of the disciplinary process.

**3. Inquiry Commission.** The Inquiry Commission is composed of nine members which sit in three panels of three members each. Each panel is composed of two lawyers and one lay person. The Inquiry Commission panels generally meet on a monthly basis. Perhaps the best way to describe the function of the Inquiry Commission is that it has a quasi-Grand Jury function in determining whether probable cause exists that formal disciplinary proceedings should be brought against an attorney. The Inquiry Commission also exercises an adjudicatory function by determining if the allegations raised are sufficient to support a disciplinary sanction, but not the institution of formal disciplinary proceedings. In such instances, the Inquiry Commission is authorized to issue a Private Admonition.

The Inquiry Commission considers all Bar Complaints filed with the KBA, not resolved by CAP, and may also initiate its own investigation or Bar Complaint if evidence comes before it of a possible ethics violation through other means, such as newspaper articles, reported court decisions, complaints from Judges, etc.

Ultimately, the Inquiry Commission is authorized to do essentially three things when faced with a Bar Complaint, i.e.:

1. Dismiss the Complaint.
2. Issue a Private Admonition.
3. Issue a Charge.

**4. Trial Commissioner.** The appointment of a Trial Commissioner only occurs if the Inquiry Commission has issued a Charge against the attorney. The institution of the Charge represents the beginning of the formal disciplinary process. The Trial Commissioner conducts the evidentiary hearing, makes findings of fact and conclusions of law, and, if the Trial Commissioner finds the attorney guilty, makes a sanction recommendation. The burden of proof is on the KBA to establish facts by a preponderance of the evidence.

Trial Commissioner process is significant since the disciplinary proceedings are confidential pursuant to SCR 3.150 up until the expiration of 60 days after the Trial Commissioner finds the attorney guilty and makes a recommendation of a public sanction. There is a procedure in the Rules for seeking a waiver of the public disclosure.

If either party is aggrieved by the Trial Commissioner's Report, that party must file a Notice of Appeal within 30 days after the filing of that Report.

**5. Board of Governors.** In the event a Notice of Appeal is filed, the matter is reviewed by the Board of Governors. The Rules regarding the disciplinary process give the Board of Governors the right to determine whether it will conduct an appellate review or de novo review. In other words, the Board of Governors may determine if it will act as a trial court or as an appellate court in reviewing the findings and conclusions of the Trial Commissioner. Regardless of what standard of review is used by the Board of Governors, no new evidence is heard by the Board of Governors, and the matter is considered by the Board by Briefs and Oral Argument, if requested.

**6. Supreme Court.** The ultimate decision maker in any disciplinary case in which a formal Charge has been filed is the Supreme Court. The Supreme Court conducts de novo review of disciplinary cases, and is not bound by any factual or legal determinations made by the Trial Commissioner or the Board of Governors. The Supreme Court is fully authorized to accept, reject or modify recommendations made to it, as is plainly reflected in the reported decisions.

**Disciplinary Process in Summary.** The overall disciplinary process may be quite complex, given a particular case. However, the following is a general overview of the steps in the process:

1. Inquiry Commission Stage: Considers all Bar Complaints, and is the initial step in the disciplinary process.

2. Trial Commissioner: If a formal Charge is issued by the Inquiry Commission the Trial Commissioner will conduct the evidentiary hearing and make a recommendation as to guilty or not guilty.
3. Board of Governors: If either party does not like the Trial Commissioner's Report, an Appeal may be taken to the Board.
4. Supreme Court: Ultimate decision maker. Reviews actions taken by Trial Commissioner and Board of Governors.

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### **Types of Bar Complainants**

Although most Bar Complaints come from clients, Bar Complaints may come from different sources, the significance of which relates to the nature of the allegations, seriousness of the allegations raised, and the manner in which the Response should be prepared. The five main sources of Bar Complaints are as follows:

**Client**. Most Bar Complaints come from clients, present or former. Although attorneys have many ethical duties and obligations under the Rules of Professional Conduct, most of these duties and obligations run to the present or former client. Therefore, as a practical matter, the primary ethics exposure will be to claims made by this class of Complainants.

**Adverse Party**. Occasionally, a Bar Complaint will come from an adverse party (sometimes coached by the adverse party's attorney), who will file a Bar Complaint against the attorney for the other side. Such Bar Complaints rarely go anywhere since under the Rules of Professional Conduct there are few ethical duties and obligations which an attorney owes to an adverse party. Additionally, the filing of a Bar Complaint by an adverse party during pending litigation will be seen for what it is, i.e., an attempt to manipulate the disciplinary process in order to gain an improper advantage in a pending civil suit, a possible violation of

RPC 3.4. That Rule prohibits an attorney from threatening or pursuing disciplinary proceedings against an attorney in order to gain an advantage in a civil suit.

**Judges.** Sometimes, a Judge will enter an Order sanctioning an attorney, and forward the Opinion to the Kentucky Bar Association for consideration for possible disciplinary proceedings. Or, the Judge may have presided over a case in which the attorney was found to have engaged in alleged wrongful conduct, such as civil fraud, misuse of funds in a probate action, etc., which would give rise to a possible disciplinary proceeding. As discussed in more detail below, Kentucky has no “squeal rule” requiring attorneys to report alleged ethical misconduct to the KBA. However, Judges, under the Judicial Code, have an ethical duty to report attorney’s potential ethical misconduct.

**Other Lawyers.** Although this is behavior which is somewhat cannibalistic in nature, and notwithstanding the concerns of an improper attempt to manipulate the Bar process, some Bar Complaints are filed by other attorneys. This would typically be a rare occurrence. An attorney who wants to pursue a Bar Complaint will typically do it through a surrogate, such as an adverse party or some other lay person.

Kentucky does not have a “squeal” rule. Kentucky is in the distinct minority among the States, and the ABA Model Rules contain such a provision. However, an attorney in Kentucky may not hide behind that non-existent rule to justify filing a Bar Complaint against another attorney.

**Inquiry Commission.** The Inquiry Commission, in certain circumstances, may issue its own Complaint. Sometimes, newspaper articles or other information comes to the attention of Bar Counsel who pass the information along to the Inquiry Commission. Sometimes, if the Inquiry Commission does not believe that what has been asserted is sufficient even to rise to the level of a Complaint, the Inquiry Commission will authorize Bar Counsel to begin an investigation regarding the matter. The investigation may or may not be with notice to the attorney. If a Complaint is filed, the Rules require that the attorney be

served with the Complaint. However, if it is an investigative matter only, it may very well be that the attorney does not know about the inquiry until later in the process.

### **Types of Bar Complaints**

Most Bar Complaints are dismissed. Approximately eighty percent or so do not make it past the Complaint stage and never become a formal Charge. Most of the violations which arise in Bar Complaints are fairly low in the “food chain” of ethics breaches. For example, many Bar Complaints may contain factual allegations which would support an alleged violation of RPC 1.1, regarding competent representation, RPC 1.3 regarding a lack of diligence, and RPC 1.4 regarding communication with the client.

The more serious allegations regarding dishonesty and misrepresentation and allegations of criminal misconduct represent a very small percentage of Bar Complaints. However, such allegations are more likely to end up as a Charge.

As noted above, most Bar Complaints come from clients, and clients come in flavors too numerous to list. However, there are certain typical and common characteristics of most Bar Complaints.

Bar Complaints are typically conclusory. The Bar Complainant will talk in very broad and sweeping terms and engage in a high degree of hyperbole. This gross exaggeration, typically an attempt by the client to make a point, actually decreases the validity which such a Complaint will be given by the KBA. Also, such conclusory allegations will be viewed as an attempt to avoid an appropriate and detailed discussion of the factual allegations which the client says support an ethics violation.

Bar Complaints are also typically incomplete factually. Sometimes this is the result of a good faith attempt by the client to only talk about certain things which they feel support a Bar Complaint. In other instances, the client’s selected reference to certain facts is not an innocent omission. Sometimes a client will deliberately leave out certain critical facts and reference to certain critical documents in an attempt to make their case look better.



Bar Complaints are typically inaccurate documents. Again, this inaccuracy may be the result of either an intentional act or an innocent act on the part of the client. Sometimes the inaccuracy is innocent because the client does not have all of the necessary documents in front of them and does not know what is or is not relevant, and does not know what is or is not an ethics violation. As a result, the client may take matters out of context, out of chronological order, and otherwise paint an inaccurate picture of what actually occurred.

A common issue in most Bar Complaints is that the client will base the allegations on flawed independent memory. Independent memory is generally worthless, either as the basis for a Bar Complaint, or as the basis for the attorney's Response to the Bar Complaint. The client's reliance on independent memory is typically an opening for the Respondent attorney, in his or her Response, to fully and completely review the actual facts, documents, evidence, correspondence, etc., which support what actually happened in the underlying matter. Doing so will establish the inaccuracy of the independent memory relied on by the Bar Complainant.

A real problem with a Bar Complaint is that unless it is from the Inquiry Commission, the Bar Complaint will rarely, if ever, contain citations to any Rules of Professional Conduct. Therefore, it is necessary that the attorney review the Bar Complaint, determine which Rules of Professional Conduct could be violated under any reasonable reading of the Bar Complaint, and then address those allegations and legal issues in the Response. Therefore, a good working knowledge of the Rules of Professional Conduct is important when responding to a Bar Complaint.

### **General Characteristics of Good Responses and Bad Responses**

Responses to a Bar Complaint have certain common elements. The Response should be complete and address all facts relevant to the case. Frequently, this means that the Response will go into much more detail regarding the underlying proceedings than is reflected in the Bar Complaint. It is important to establish in your Response that you are not afraid of the facts, that you embrace the facts, and that the facts of the case, when completely reviewed, establish that the allegations made in the Bar Complaint are without merit.

A Response should be an objective document. Especially if the attorney is pro se, the subjective tone of such a Response should be avoided. Personnel subjective attacks against the Bar Complainant, the KBA, Bar Counsel or anyone else, is not a wise course of conduct to take.

The Response should be limited to the general nature of the allegations raised in the Bar Complaint. It is important that the attorney not inadvertently give rise to Bar inquiry concerning other matters because the attorney has spoken too broadly in his or her Response. As a result, as noted above, it is important that the attorney preparing a Response be familiar with the Rules of Professional Conduct. Asserting a “defense,” to one allegation which actually constitutes a confession to another ethics violation, does not make much sense.

A Response to a Bar Complaint should also reflect candor and honesty on the part of the attorney filing the Response. Your honesty will be confirmed by reference to documentation of record or correspondence which supports the defenses and allegations which are contained in your Response.

Frequently, a Response should be documented by such things as docket sheets from the case to show activity taken, pleadings, papers and Orders in the case file, correspondence and other documents exchanged between the attorney and the client and other persons, and Affidavits from participants to refute the allegations raised in the Response.

It is also important in preparing a Response to be aware of your audience. After a Response is filed, a copy is sent to the Bar Complainant, and he or she is given an opportunity to file supplemental comments. Thereafter, Bar Counsel will review the matter in detail, determine if any additional investigation needs to be performed, and then present the matter to the Inquiry Commission.

Some lawyers actually consider it a defense to say that they can not believe that a Bar Complaint has been filed by that client since they were not even charging that client a fee. Not charging a fee could imply that the attorney was doing less of a job than would be done if it was a paying client. Therefore, as a practical matter, not charging a fee may be viewed

as evidence of guilt, and not as a defense. Moreover, whether the attorney is or is not receiving a fee is generally irrelevant for purposes of the Rules of Professional Conduct.

Procedural bars are typically not going to work, for a variety of reasons. Procedural bars based on excessive delay in proceedings as being an alleged due process violation, or similar allegations, will usually be viewed by the Bar Association as the defense of the guilty. Moreover, such procedural bars are rarely successful.

As the saying goes “no good deed goes unpunished.” Sometimes Bar Complaints are filed by clients who were friends or are relatives of the attorney. Part of the defense which does not work is, as noted above, that the attorney was not charging a fee. Moreover, if the representation was for a friend or a relative, chances are there is insufficient documentation in the file, and not the type of due diligence activity which would be present in a case which was more at “arm’s length.”

Some disciplinary proceedings may have been part or contain allegations that there were other proceedings before a Trial Court on either contempt, a sanctions Motion under CR 11, or a discovery abuse issue under CR 37. Lastly, in some instances, the attorney may have been subjected to some type of a criminal penalty for the conduct which gave rise to the ethics violation. However, the defense of “I have already been punished enough,” does not work.

Lastly, a plea to sympathy by attempting to point out the financial hardships to the attorney in the event of a suspension or disbarment will not go anywhere

Many Bar Complaints arise merely because the attorney is not sufficiently aware of the terms and provisions of the Rules of Professional Conduct. Ethics issues such as loans to client, advertising, accounting of client fees and expenses, and the limited duties to third parties, are an example of the types of Rules which many attorneys do not fully appreciate as the subject to the Rules of Professional Conduct.