

**RESPONDING TO A BAR COMPLAINT
OR
“THE GOOD, THE BAD AND THE UGLY”**

June 2, 2000

Peter L. Ostermiller
Attorney at Law
239 South Fifth Street
Suite 1800
Louisville, KY 40202
(502) 736-8100
502-736-8129(fax)
peterlo@ploesq.com

INTRODUCTION

Okay, maybe there is not much “Good,” if a Bar Complaint is filed against you.

However, reduced to its basics, this is the point I am trying to make:

“The Good.” A “wake up call” to the attorney that corrective measures may need to be taken.

“The Bad.” Your ethics, character, etc., are under attack.

“The Ugly.” Formal disciplinary proceedings are instituted and a sanction is imposed.

OUTLINE OF TOPICS

1. Complainants.
2. Respondent Attorneys.
3. Respondent Attorney’s Areas of Practice.
4. Complaint.
5. Common Characteristics of Bar Complaints.
6. Office of Bar Counsel.
7. Representation by Separate Counsel.

8. Response.
9. Defenses Which Do Not Work.
10. Burden of Proof.
11. Avoiding Bar Complaints.

1. 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. What makes this category a “wild card,” is that the level of education, sophistication, etc., of clients is across the spectrum. Therefore, a Bar Complaint from a business person may bear little, if any, resemblance to a Bar Complaint from a person with little or no formal education, and perhaps of dubious literacy.

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. Additionally, if the attorney for the adverse party is involved in such a maneuver, there is always the risk of the adverse party's attorney running afoul 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. To a certain extent, the Judge will be obligated to do so, given the separate obligation which a Judge has under the Judicial Code to report attorney misconduct. If the KBA considers the allegations raised by the Judge to be of sufficient strength, the Inquiry Commission may authorize an investigation or issue an Inquiry Commission Complaint against the attorney. In that Complaint, the Commission would ask the attorney to comment on the adverse determinations made in the Trial Court's Order.

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. Under such a rule, an attorney would be required to report serious ethical misconduct to the Bar Association or risk an ethics violation for failing to report the alleged misconduct of the other attorney. However, since Kentucky has no such "squeal" rule, an attorney may not hide behind that non-existent rule to justify filing a Bar

Complaint.

Inquiry Commission: The Inquiry Commission, in certain circumstances, may issue its own Complaint. Sometimes newspaper articles or other information comes to the attention of 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 investigation matter only, it may very well be that the attorney does not know about the inquiry until later in the process.

2. RESPONDENT ATTORNEY

Typically, Respondent attorneys fall into the category of sole practitioners, practitioners in a small firm, i.e., two or three lawyers, or attorney who merely office share with other attorneys.

The common elements for such attorneys is that they have less staff, less resources, and typically little or no oversight regarding their individual conduct which may give rise to an ethics issue.

A clear minority of Bar Complaints arise from the public sector, such as attorneys who work for government agencies, or attorneys who work in mid to large size law firms. In the case of these categories of attorneys, there is typically a formal or informal mentoring program, back up support, and general oversight regarding the actions of any one attorney. Additionally, in larger law firms, there may be a formal process, including an attorney in the firm who is

responsible for ethics issues if they arise within the law firm.

One category of government attorneys which may give rise to possible disciplinary proceedings is the situation of part-time County Attorneys and part-time Commonwealth's Attorneys. The conflict between the private practice of such a part-time government attorney and such an attorney's public duties and responsibilities may give rise to potential conflicts.

3. RESPONDENT ATTORNEY'S AREAS OF PRACTICE

Most Bar Complaints arise in the area of litigation. Although attorneys who do transactional work may certainly be exposed to ethics issues, the absence of a pure adversary system, as is present in litigation, makes transactional work attorneys less likely to be the subject of disciplinary proceedings.

Areas of litigation which may give rise to disciplinary proceedings falls in the category of domestic relations, personal injury plaintiff's work, probate matters and bankruptcy. Not coincidentally, these are also areas of practice where the attorneys are either sole practitioners or practitioners in very small firms.

Occasionally Bar Complaints will be made against attorneys who represented a defendant in a criminal case. Although not necessarily thought out to this degree by the Complainant, one of the reasons which such a Bar Complainant may have in filing a Bar Complaint is an attempt to get some type of a favorable determination by the Bar Association. The defendant would then use that adverse determination against the attorney as the basis for an RCr 11.42 Motion for an alleged ineffective assistance of counsel.

4. COMPLAINT

Most Bar Complaints are dismissed. Approximately eighty percent or so do not make it past the Complaint stage and never become a 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 be converted to a Charge.

5. COMMON CHARACTERISTICS OF BAR COMPLAINTS

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.

6. OFFICE OF BAR COUNSEL

A mistake which many attorneys make when they represent themselves in a disciplinary proceeding, or seek to represent another attorney in a disciplinary proceeding, is to view the Office of Bar Counsel as your enemy. Bar Counsel is doing a job and they are not evil people. Viewing Bar Counsel as your enemy will cause you to say things and do things were are counter-productive to the proper defense of your case.

Similarly, in your dealings with Bar Counsel, your emotions and lack of objectivity are themselves enemies to be avoided. Substantial and avoidable damage may be done by an attorney pro se who engages in unnecessarily loose and speculative telephone conversations with Bar Counsel or, even worse, puts down inappropriate defenses and improper allegations in seeking to respond to a Bar Complaint.

7. REPRESENTATION BY SEPARATE COUNSEL

At the Complaint stage, representation by separate counsel is not essential and in many instances unnecessary. However, for some attorneys, they are not willing, able or capable of representing themselves even at the Complaint stage.

At the Complaint stage, at the very least, an attorney who is going to represent himself or herself, should have another attorney review the Response which the attorney proposes to file with the Bar Association. It may very well be that the attorney's pro se Response contains statements and allegations which are either confusing, or at worse, add inappropriate fuel to the fire.

Of course, part of the problem of separate counsel is knowing when you need separate counsel. Even if the attorney is not inclined to retain separate counsel, and even if the

attorney is not going to show his or her Response to another attorney before it is filed, the attorney should at least talk with another attorney so that some other attorney may determine if the Respondent is being sufficiently objective in not retaining or conferring with other counsel.

In those instances where a Charge is filed, and formal disciplinary proceedings are instituted, separate representation is a necessity. An attorney who represents himself or herself at the Charge stage is really making a big mistake. Do not represent yourself.

8. RESPONSE

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.

9. DEFENSES WHICH DO NOT WORK

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.

10. BURDEN OF PROOF

Under the Rules in effect since October of 1998, the KBA must prove facts in a disciplinary case by a preponderance of the evidence under SCR 3.330. However, as a practical matter, the burden of proof is going to be on the attorney to establish their innocence. It is unwise for an attorney defending a disciplinary case to simply sit back and assume that the KBA will not be able to meet its burden.

11. AVOIDING COMPLAINTS

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 are not aware of as being the subject of the Rules of Professional Conduct.

Other issues relevant to avoiding a Bar Complaint are also relevant in avoiding legal malpractice liability. Usually these matters are addressed by proper client screening. For example, the attorney who takes a client who has already had several attorneys, is likely to have problems with the client during the representation.

CONCLUSION

The Kentucky Rules of Professional Conduct and the Rules governing the procedural aspects of an attorney disciplinary proceeding are contained in the Supreme Court Rule section of the State volume of the Kentucky Rules of Court published by West Group. I am always amazed by attorneys who do not know that all of the Rules, both substantive and procedural, are contained in the Rules of Court book.

There is a good time and a bad time to become familiar with the Rules of Professional Conduct and the procedural Rules concerning disciplinary proceedings.