



DEALING WITH DREADED DISCIPLINE

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Your secretary drops an envelope on your desk. Staring back at you is the State Bar of Nevada’s seal. You open the envelope. Someone filed a grievance against you. They accused you of being incompetent, unethical, or worse. An investigator—some faceless bureaucrat—demands a response. Your stomach drops to the floor. Your heart rate spikes. **You gasp for breath. Then you read the letter again. True or not, you are sick.**

Most lawyers get a grievance complaint against them at some point during their careers. Grievances are inevitable. Honorable attorneys receive grievances. Unfortunately, few lawyers know much about the disciplinary process. This article provides an overview and a convenient reference guide.

Understanding the Players

The Nevada Supreme Court regulates the legal profession. It delegates a portion of that authority to the State Bar of Nevada. The court directed the state bar to form disciplinary boards—one in the north and one in the south.¹

Disciplinary boards depend on volunteers. The Board of Governors appoints at least 35 lawyer volunteers and 12 nonlawyer volunteers to serve on each.² The board appoints one lawyer as chair.³

Chairs form panels of three board members to preside over disciplinary cases. Two panel members must be lawyers. One must be a nonlawyer.

A panel lawyer serves as chair. The chair presides over hearings much like a judge. They hear and rule on procedural and evidentiary issues. All three panel members deliberate like a jury to make factual findings.

Panels may issue a Letter of Caution or a reprimand.⁴ If a panel finds serious misconduct, it recommends disbarment or suspension to the Supreme Court. Only the court can order a disbarment or suspension.⁵

The court tasked the Office of Bar Counsel with investigating and prosecuting these matters.⁶

Intake

Most disciplinary matters begin with a grievance. Grievances often come from a client, an adversary and occasionally a judge. The state bar receives about 1,500 grievances every year. We may also initiate an investigation on our own if misconduct is “called to bar counsel’s attention” through the media or some other source.⁷

We recognize the burden a grievance places on a lawyer. We review every grievance before opening a formal investigation. Our job is to protect the public, but sometimes clients have unreasonable expectations, and they blame their lawyer for not meeting those unreasonable expectations. If a grievance lacks merit on its face, then we dismiss it with a polite letter to the grievant. If the allegations are unclear, then we may ask for clarification.

We often refer minor misconduct to a state bar program. Fee Dispute Arbitration, Lawyers Concerned for Lawyers, Nevada

Lawyers Assistance Program, the Clients' Security Fund and other programs help. The court and Board of Governors constantly enhance these programs to resolve minor misconduct, which allows the disciplinary boards to concentrate on serious matters.

We dismiss roughly 60 to 70 percent of grievances at intake. However, the grievant may "appeal" the decision. If so, a second lawyer reconsiders the grievance. On rare occasions, a lawyer may get notification of a dismissal and later notification that we reopened the matter because of a reconsideration.

If a grievance alleges professional misconduct, then we open a formal investigation.

Investigation

An investigation opens with a request for a written response; although,

it is more demand than request. Rule of Professional Conduct 8.1 requires lawyers to respond.

A lawyer's written response is critical. The lawyer can explain or mitigate. Written responses often lead to dismissal or significant mitigation. We typically send a lawyer's response to the grievant for comment. A nonresponse, on the other hand, is damning. Disciplinary boards view it as consciousness of guilt or contempt.

Many lawyers feel that the state bar should protect lawyers, not clients. The state bar works diligently to benefit its members. Bar counsel, however, has a specific duty to protect the public, uphold the integrity of the legal system, and assure the fair administration of justice. We enjoy helping members with minor misconduct or practice management, but for serious misconduct, we must seek suspension or disbarment.

Three tips for lawyers that receive a grievance are: "cooperation, candor, and contrition."⁸

I know, it is self-serving for bar counsel to recommend cooperation. But RPC 8.1 requires it, and obstruction can have severe consequences. For example, the court will most certainly suspend your license.

Honesty is the best defense. Deception during a disciplinary investigation can hurt a lawyer more than allegations. Recently, a lawyer facing some personal problems wrote an unauthorized check from his firm's account. The firm immediately confronted him. Candor would have ended the incident, but he attempted to deceive the firm. The firm filed a grievance, and the lawyer attempted to deceive the state bar. During the hearing, the lawyer attempted to deceive the hearing panel. Ultimately, what would have resulted in treatment without discipline ended in suspension.

Show contrition. Acknowledging mistakes can be difficult, but remorse is a cure-all.

A hotly contested suit might tempt a lawyer or client to file a grievance against the opposition. Bar counsel and disciplinary boards hate being used as leverage. We may tell a grievant to raise the issue with the appropriate court. On the other hand, if you receive a grievance, do not negotiate a withdrawal. Supreme Court Rule 102.5(3)(c) prohibits bar counsel and the hearing panel from considering the grievant's withdrawal. And worse, it may appear like an attempt to obstruct the disciplinary proceedings.

Screening

After every investigation, a disciplinary panel screens the matter. The screening panel acts much like a grand jury. It hears the evidence and considers a recommendation from bar counsel. Like intake, the OBC recommends dismissal in about 60 to 70 percent of screenings. A screening panel may dismiss, issue a Letter of Caution, offer a diversion program, issue a Letter of Reprimand or send the matter to a formal hearing.

A Letter of Caution or a diversion program are not "discipline." For example, a lawyer generally need not report them to another state bar. A Letter of Reprimand is discipline. However, a lawyer has 14 days to accept or reject a Letter of Reprimand. If the lawyer rejects it, then the matter goes to a formal hearing.

Formal Hearings

A complaint initiates formal charges. Generally, serious misconduct, such as misappropriation of client funds, fraud or a serious crime warrant formal charges. But a pattern of minor misconduct can also become serious.

Lawyers have due process rights, including the right to notice and a hearing, to counsel, to confront witnesses, to subpoena witnesses and documents, and to present evidence in mitigation. Lawyers retain their Fifth Amendment right against self-incrimination, but discipline is not criminal. The panel may draw an adverse inference.

Generally, panels follow the Nevada Rules of Civil Procedure and the Rules of Evidence, but disciplinary proceedings have special rules. For example, Supreme

Court Rule 109 permits service "by registered or certified mail at the current address shown in the state bar's records." Recently, our process server noted that he could see a lawyer through a window, but the lawyer refused to answer the door. We mailed the complaint to his address on record. He was not happy when he received a default notice and eventual suspension. Hire an attorney who knows the rules.

Sanctions are oddly both formulaic and subjective. Panels and the Supreme Court use standards developed by the American Bar Association (ABA) to determine a baseline

sanction. They consider the rule violation, the lawyer's mental state (like *mens rea* in criminal law) and the injury to the client, public, legal system, or to the profession. These three elements determine the baseline sanction. That part is formulaic.

For example, if a lawyer intentionally misappropriates money from a client to keep his or her firm afloat, then the baseline sanction is disbarment. On the other hand, if a lawyer negligently fails to return a client phone call because of a busy schedule with little to no harm to the client, then the baseline sanction is a Letter of Caution.

A panel or the court then considers aggravating and mitigating circumstances to increase or to decrease the sanction. That part is subjective.

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Post Hearing

The Supreme Court automatically reviews a panel’s recommendation for a suspension or disbarment. The court defers to the panel’s findings of fact, but also reviews legal conclusions and discipline recommendations *de novo*. The court also reviews contested, but not consensual, public reprimands.

Lawyers suspended for more than six months must apply for reinstatement. Lawyers suspended for more than five years must apply for readmission. Yes, that means the lawyer must retake the bar exam.

Disciplinary proceedings are confidential during the intake, investigation, and screening. However, after dismissal or a formal complaint, then discipline records become public.

Hopefully, you never receive a grievance. But if you do, your understanding of the process will help.

ENDNOTES:

1. SCR 100.
2. SCR 103.
3. SCR 103(3).
4. SCR 102(6)-(8).
5. SCR 102(1),(2).
6. SCR 104.
7. SCR 104(1)(a).
8. McShea, Sarah Diane. *When Complaint Is Filed Against You - How Disciplinary System Works*, NEW YORK LEGAL ETHICS REPORTER (May 1998), www.newyorklegalethics.com/when-complaint-is-filed-against-you-how-disciplinary-system-works/.

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grew up in central California. He earned his undergraduate and law degrees from Brigham Young University while working as a real estate agent and broker. He then moved to rural Nevada to work in the two-man Lincoln County district attorney’s office. He successfully ran for district attorney a few years later. He enjoyed two terms as district attorney before accepting the position of bar counsel at the State Bar of Nevada.



When Hooge isn’t working, he spends his leisure time with his wife, Natalie, and six children watching BYU football, cycling, snowboarding at Brian Head, Utah, or boating on Lake Mead.

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