Ben Cowgill
Chief Bar Counsel

Discipline is Different

It is a troubling thing to observe. The lawyer across the table is making the same mistakes that many other lawyers have made in disciplinary proceedings. I wish I could take him out in the hallway and help him see that he is shooting himself in the foot. But I can't. This is an evidentiary hearing and I have slipped into the room to observe the work of the Deputy Bar Counsel who is presenting the case. So I decide instead to put my thoughts into my next column for Bench & Bar *magazine, in the hope of saving some other lawyer from making the same mistakes. I start writing the column in my head, and it begins something like this:*

I am not surprised by the mistakes lawyers make in disciplinary proceedings. I am not surprised because I understand why they are acting the way they do. They are acting the way they have learned to act in civil and criminal proceedings. It is often a mistake to act the same way in a disciplinary proceeding. The reason is simple: *Discipline is different.*

Disciplinary proceedings are *sui generis*. They are unlike civil and criminal proceedings in a variety of ways. Consequently, they require an approach that is unlike the customary approach to the defense of a civil or criminal case. Lawyers who appear in disciplinary proceedings – as respondents or as counsel – fail to appreciate this fact at their peril.


Ben Cowgill

To be sure, disciplinary proceedings are similar to civil proceedings in many procedural details. This similarity can be deceptive. A lawyer receives a call from an old law school friend who has just been served with a disciplinary charge. The lawyer scans the Supreme Court Rules and sees that they provide for the filing of an answer, the introduction of evidence at a hearing, the submission of briefs and the presentation of oral arguments. It all sounds quite familiar and unremarkable. So he calls the friend back and says "sure, I can handle it, " then proceeds to file an answer asserting civil defenses that have no relevance in a disciplinary proceeding – defenses like accord and satisfaction, laches, estoppel and lack of standing. He is off on the wrong foot already, because he failed to understand that discipline is different.

The Inquisitorial Nature of Disciplinary Proceedings

The lawyer across the table shocks my attention back to the hearing room with his strident words. "I don't know why you all have chosen to side up with that liar and go after me like this. But let me tell you one thing. I fight back."

A disciplinary proceeding is fundamentally inquisitorial, not adversarial, in nature.[1] Most of the mistakes that lawyers make in disciplinary proceedings can be traced to their failure to understand that fact.

A disciplinary proceeding is "inquisitorial" because it is an inquiry into a lawyer's conduct, not a mechanism for resolving a dispute.[2] It is designed to assist the Supreme Court of Kentucky in determining whether a member of the bar is guilty of professional misconduct and, if so, how he or she should be disciplined. It is not designed to resolve, much less adjudicate, a dispute between lawyer and client, even though it may require an inquiry into how and why the dispute arose.

To say that a proceeding is fundamentally inquisitorial does not mean that it lacks any adversarial elements. Disciplinary proceedings borrow "adversarial" procedures from the world of civil litigation in order to frame the issues, take evidence and create a record of arguments about the facts and law. A particular proceeding may also become "adversarial" in the colloquial sense if the Respondent aggressively contests a charge of serious misconduct. But when all is said and done, the ultimate purpose of the proceeding is to make inquiry regarding the conduct of the

lawyer. After all, he has been granted the privilege of practicing law on the condition that he will comply with certain rules of conduct.

The inquisitorial nature of a disciplinary proceeding is apparent in many ways, big and small. It is why the lawyer is called a "respondent" and not a "defendant." His obligation is to *respond* to an inquiry concerning his conduct, not to *defend* himself against allegations. The distinction is not merely a matter of semantics. A civil defendant fails to defend himself at the risk of suffering a default judgment for the amount of the claim. But a respondent who fails to respond risks something more: he risks being charged with an *additional* count of professional misconduct simply because he failed to respond. He has an ethical *duty* to respond to a proper request for information from a disciplinary authority, because the Court's power to inquire into his conduct should not be frustrated by his failure to respond.

The Complainant's Role

Now the lawyer across the table is directing his anger at his client. "I can't believe he had the audacity to file a bar complaint against me. But after I received the bar complaint, I fixed the situation and refunded part of the fee. Why do these people at the KBA insist on making something out of it when my client has agreed to withdraw his complaint?"

A disciplinary proceeding is ultimately a matter *between* the Supreme Court of Kentucky and the Respondent. It is also a matter between the KBA and the Respondent, because the KBA acts as an agent of the Court in disciplinary matters. It is ***not*** a matter between the Respondent and the person who filed a bar complaint (assuming that the case even began with a bar complaint, rather than an Inquiry Commission investigation).

Bar complaints serve an *informational* or *reporting* function in the disciplinary process. They bring matters to the attention of the disciplinary authorities for investigation and prosecution, as appropriate. It is a crucial function, because many instances of professional misconduct would never come to the attention of the Board and Court without such a mechanism for clients and others to make their grievances known. In this respect, a complainant in a bar proceeding is akin to a complaining witness in a criminal case.

In many cases – perhaps in most cases – the complainant is a dissatisfied client who has filed the bar complaint in an effort to get something from the lawyer. It might be something tangible (e.g., a higher level of attention or a reduction in the lawyer's fee) or intangible (e.g., the vengeful satisfaction of getting the lawyer "in trouble"). This is hardly surprising: after all, it is only human nature that most complainants have taken the time to prepare their bar complaints because they are hopeful that doing so will advance their self-interest. Indeed, the particular self-interest being pursued is usually apparent from the face of the bar complaint.

Unfortunately, this prompts many respondents and their counsel to misperceive the complaint investigation process as an exercise in ombudsmanship or mediation. Proceeding from this mistaken perspective, they believe that the issues are (a) whether the complainant has clean hands, (b) whether the complainant's demand is fair and equitable, and (c) whether the respondent is willing to offer some compromise to make the complainant happy. In reality, the issues are whether the lawyer's conduct violated any provision of the Kentucky Rules of Professional Conduct, and if so, how the lawyer should be disciplined. Yes, the investigating attorney in the Office of Bar Counsel wants to know the full story, and yes, it may be relevant to the issue of professional misconduct that the client had unreasonable expectations. In the final analysis, however, a disciplinary case is about the conduct of the lawyer, not the client.

In a civil proceeding, the defendant can conclude the matter at any time by reaching an agreeable settlement with the plaintiff. The court has no reason to pursue the matter further because the court has no interest in the matter except to assist the parties in reaching a resolution of their dispute. Discipline is different. In a disciplinary proceeding, the Court's primary interest is not whether the complainant has been made whole, although that can be a relevant factor. Rather, the Court's primary interest is whether the Respondent violated the Rules of Professional Conduct. The Court may find that a disciplinary sanction needs to be imposed even though the complainant has been appeased.

Consequently, a complainant does not have the power to terminate a disciplinary proceeding by "withdrawing" a complaint, and a respondent is not entitled to expect that an investigation will be closed merely because he has made the complainant whole. Once a complaint has been filed and an investigation has commenced, the lawyer's conduct is the focus of the inquiry, and the inquiry is controlled by the rules of the Supreme Court of Kentucky, not the person who filed the bar complaint.

Bar Counsel's Role

The lawyer across the table continues. "When I got the bar complaint, I couldn't believe the KBA had opened a file and was demanding a response. After

all, any lawyer worth his salt could see that there was nothing to those ridiculous allegations. But then the Inquiry Commission started asking me about other things and ended up charging me with something that wasn't even in the complaint! Now I suppose the KBA lawyer feels that he's got to win this thing and get me suspended just to and prove that the charge was proper or put a notch on his gunstock. Well, don't expect any cooperation from me. As far as I'm concerned, this is war."

The Office of Bar Counsel is charged with investigating and prosecuting all disciplinary cases in accordance with the requirements of the Supreme Court Rules. This prosecutorial function prompts some respondents to regard the responsible Bar Counsel attorney as the functional equivalent of a criminal prosecutor. But disciplinary proceedings are not criminal or even quasi-criminal in nature, and a respondent may therefore do himself a disservice by operating from a criminal defense model.

Criminal prosecutors enjoy a significant measure of discretion in deciding whether to pursue matters that are brought to their attention by complaining witnesses. By contrast, a sworn complaint against a lawyer must be processed in accordance with the procedures established by the Supreme Court Rules. In particular, a sworn bar complaint *must* be forwarded to the lawyer for response unless it fails to state facts which, if true, would constitute an ethical violation. Under this liberal standard, a hand-written complaint which merely states that "my lawyer hasn't been doing anything on my case" must be forwarded to the lawyer for response. The sense of this requirement can be understood by reference to the inquisitorial nature of disciplinary proceedings which results, in turn, from the unique relationship between the Supreme Court and the members of the bar. Ordinary citizens are not asked to defend themselves against criminal charges in the absence of a probable-cause determination by a grand jury. But a lawyer has an ethical duty to *respond* to an inquiry from a disciplinary authority, even before any probable-cause determination has been made, because a license to practice law is a privilege accompanied by obligations that are higher than those of ordinary citizens.

. . .it is counterproductive to discipline an attorney who is not guilty of professional misconduct, because the whole point of the process is to maintain the discipline of the bar.

Comparisons to civil litigation are equally dangerous. In a civil proceeding, the scope of inquiry is generally defined by the complaint, petition or other initial pleading. The defendant should not be required to address matters outside the subject matter defined by that initiating document. Discipline is different. The scope of the disciplinary investigation is not limited by the allegations contained in the bar complaint, because the bar complaint merely serves the informational purpose of bringing the lawyer's conduct to the attention of the disciplinary authorities. If the investigation of the complaint uncovers facts which indicate that the respondent may be guilty of some other kind of professional misconduct, there is no reason why the investigation should be limited to the matters known to the complainant or criticized in his bar complaint.

The good news is on the other side of the same coin. Whenever it appears that a charge was improvidently issued (for example, because of evidence that was not produced during the investigative stage), there is nothing to prevent Bar Counsel from cooperating in an effort to conclude the proceeding. In a typical civil case, "success" is defined by a judgment or settlement favorable to the client, and the lawyer has an ethical duty to seek that result within the boundaries of the law. Fortunately, discipline is different. In a disciplinary proceeding, "success" is defined by how closely the outcome of the case approximates the "right" result under the facts and the law. After all, it is counterproductive to discipline an attorney who is *not* guilty of professional misconduct, because the whole point of the process is to maintain the discipline of the bar. The ethical duty of a Bar Counsel attorney is not to "win" the case but to obtain the right result, even if that means dismissing the charge. The "client" is the Kentucky Bar Association and the client's "marching orders" are to assist the Board and the Court in reaching the right result. Thus a respondent does himself a disservice, and may indeed cheat himself out of an opportunity to resolve the proceeding on agreeable terms, by assuming that the Office of Bar Counsel is his adversary.

So why in the world would I use this column to offer advice that puts a respondent's lawyer on an equal footing with the Office of Bar Counsel? I gave you the answer in the title: *discipline is different*. ■

ENDNOTES

1. In re Stump, 114 S.W.2d 1094 (Ky. 1938).
2. Kentucky Bar Association v. Signer, 558 S.W.2d 582 (Ky. 1977).