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DEFENDING A BAR COMPLAINT—
WHEN FORMAL CHARGES ARE FILED

If a Bar complaint is not resolved at the Local Grievance Committee stage, then what? If the alleged offenses are deemed serious enough, formal charges will be filed pursuant to the Alabama Rules of Disciplinary Procedure. This is probably the worst thing that can happen to an attorney, professionally speaking. Hopefully, it will never happen to you. But if it does happen to you, or someone looking to you for advice or representation, you may want to consider the following:

Formal Charges—An Overview

The proceedings arising from the filing of formal charges are described as “neither civil nor criminal, but are sui generis.” Rule 3. “Sui generis” means literally, of its own kind or class. However, in my mind, the proceedings are quasi-criminal with a twist. The twist (in my analogy) is that the Alabama State Bar (the “Bar”), in its various forms, serves as the prosecuting authority, the prosecuting attorney, the judge and the jury. Keep this in mind when you ponder what will be the ultimate outcome of the proceedings. The Disciplinary Board of the

Alabama State Bar, a five-member panel, serves as the prosecuting authority. The panel members are three attorneys who are Bar commissioners, one lay person, and the Disciplinary Hearing Officer. The General Counsel for the Alabama State Bar serves as the prosecuting attorney. The Disciplinary Hearing Officer serves as the judge. The members of the Disciplinary Board (including the Disciplinary Hearing Officer) serve as the jury. See, Rules 4, 4.2, and 6.

There is also the Disciplinary Commission of the Alabama State Bar, that serves an important role in the administration and settlement of the proceedings. The Disciplinary Commission consists of four attorneys who are Bar commissioners appointed from the Board of Commissioners of the Alabama State Bar. See, Rules 5 and 24.

The range of “discipline” (punishment) that the Disciplinary Board can impose on the responding attorney, from most to least severe, includes the following under Rule 8:

1. Disbarment. Rule 8(a).
2. Suspension (The suspension can be up to five years and if it is more than 90 days, the lawyer must apply to the Bar for reinstatement.) Rule 8(b), (c), (d), and (e).
3. Public Reprimand with general publication (The reprimand is published in *The Alabama Lawyer* magazine and a newspaper of general circulation in each judicial circuit in which the respondent maintains a law office. Rule 8(f)(1).

4. Public Reprimand without general publication (The reprimand is published in *The Alabama Lawyer*, but no newspaper publication is permitted. This reprimand “is nevertheless public and may be released upon request by any interested party.”) Rule 8(f)(2).

5. Private Reprimand. Rule 8(g).

The Disciplinary Board may also impose additional “sanctions and remedies,” including restitution, cost assessments, limitations upon practice, requiring the lawyer to attend CLE courses, and “Other requirements consistent with the purposes of lawyer discipline.” Rule 8(i).

General Procedure When Formal Charges Are Filed

Under Rules 12(e) and 16, the formal charges are filed by the Office of General Counsel with the Disciplinary Clerk at the Bar’s headquarters located at 415 Dexter Avenue, Montgomery, Alabama 36104. Note, the General Counsel’s mailing address is P. O. Box 671, Montgomery, Alabama 36101. His telephone number is (334) 269-1515 and his toll-free number is (800) 354-6154. The formal charges will look like a pleading filed in a criminal or civil proceeding. They consist of a summons and petition to be served on the respondent attorney. The petition will have a detailed statement of the facts and charges with copies of pertinent documents attached as exhibits. The stated purpose of the formal charges is to “reasonably inform the respondent of the alleged misconduct.” Rule 12(e)(1).

The formal charges I have seen do not set forth the discipline sought to be imposed. Once the charges are filed, the discipline becomes a matter reserved for the Disciplinary Board's determination.

The respondent attorney must serve a copy of his answer to the formal charges upon the General Counsel and file the original with the Disciplinary Clerk within 28 days after service of the formal charge petition. If the respondent fails to answer, the charges ordinarily are deemed admitted. However, whether the respondent answers or not, expect the Disciplinary Hearing Officer to set a time, date, and place for a disciplinary hearing. See, Rule 12(e).

Rule 17 allows for the subpoenaing of witnesses and production of documents in connection with the hearing and allows for discovery, including the taking and use of depositions, in accordance with the Alabama Rules of Civil Procedure. A pre-hearing conference is allowed for the purpose of streamlining the case. The pre-hearing matters are generally overseen by the Disciplinary Hearing Officer or the Disciplinary Commission. See, Rule 17(e).

Rule 19 contemplates a hearing on the formal charges similar in nature to an administrative hearing in a state agency proceeding. The Alabama Rules of Evidence apply. However, the rules may be relaxed by the Disciplinary Board "if a strict application of those rules would otherwise preclude the admission of highly

probative and non-cumulative documentary or demonstrative evidence.” The Disciplinary Board has the burden of proof and the standard of proof is “Clear and convincing evidence.”

The respondent attorney has the right to appeal an adverse decision of the Disciplinary Board to the Supreme Court of Alabama within fourteen days after the decision is filed with the Disciplinary Clerk, and he has the same amount of time to file a post-trial motion, all under the provisions of Rule 12(f). (Those provisions are somewhat vague as to filing a post-trial motion.)

Rule 24 (Discipline by Consent) provides for the settlement of the formal charges prior to the disciplinary hearing through the use of a conditional guilty plea. This procedural tool will usually be the respondent attorney’s best avenue for getting a good result and is discussed in more detail below.

The Respondent Attorney’s Defense Strategy and Options

Assume that the respondent attorney is you (or your client). What is your strategy? What are your options? What decisions should you make to get the best result when formal charges are filed? You would hope you could convince the General Counsel to recommend dismissal or at worst, a private reprimand. That is not going to happen. In fact, the General Counsel may be unwilling to recommend to the Disciplinary Board public reprimand. I say this because the Disciplinary

Rules allow the General Counsel, Local Grievance Committee, and Disciplinary Commission to resolve matters of dismissal, private reprimand or public reprimand without the filing of formal charges and having to involve the Disciplinary Board. That is, if the General Counsel and Disciplinary Commission conclude formal charges should be filed, they are likely seeking suspension or disbarment. See, Rule 12(a), (b), and (c).

Keep this also in mind. The General Counsel and his staff, and the members of the Disciplinary Commission and Disciplinary Board, are not out to get you (or your client). They would like to help you if they can (except maybe in a repeat offender situation or where the conduct is especially egregious). They are, however, public servants (the Commission and Board members being also volunteers) charged with the duty of protecting the public from incompetent or dishonest attorneys. So, it would help to show some humility and penitence when interacting with them.

In deciding on your overall defense strategy, I recommend you consider these options:

Hiring an attorney

If formal charges were filed against me, I would want an attorney representing me in the disciplinary proceeding. And, not just any attorney. The

choice of an attorney here can make a world of difference. I would want someone who would command the attention and respect of the General Counsel, Disciplinary Commission, Disciplinary Hearing Officer, and Disciplinary Board. For instance: a reputable, veteran litigator or trial attorney; someone skilled at handling proceedings presided by a hearing officer; and if possible, someone who is also a past Bar president, officer, commissioner, or other person familiar with Bar disciplinary proceedings. A respondent attorney representing himself may have, for obvious reasons, problems with credibility and persuasion at every stage of the proceedings. Having a respected attorney, who is essentially vouching for you, can definitely help you achieve a better result.

Answering the formal charge petition

Obviously, you should timely answer the formal charge petition. Here, the issue is what the answer should contain. Note, your answer is your first opportunity to cure any deficiencies in the response to the Bar complaint you (or your client) provided to the local grievance committee. This is a common failing that can lead to the filing of formal charges. I recommend that your answer does the following:

1. Respond to the formal charge petition's statement of facts and charges with the same specificity as set forth in the petition.

2. If the petition states the facts incorrectly, include a corrected statement of the facts supported by e.g., witness affidavits, key exhibits, or other documentation.
3. If any of the specific charges are unwarranted or do not apply, set forth the specific reasons why, with the appropriate citations to the Alabama Rules of Professional Conduct, case law or other authority.
4. If the petition omits pertinent documents, attach them to the answer and reference them as needed.
5. If significant mitigating events have occurred since the filing of the charges (for example, settlement of any litigation related to the Bar complaint, or any preemptive action taken to cure a matter complained of by the complainant), include a statement of those events.
6. Definitely consider including a statement as to any applicable “Factors That May Be Considered in Mitigation” under Standard 9.32 of the Alabama Standards for Imposing Lawyer Discipline (ABA Standards). These mitigating factors are as follows:
 - (a) absence of a prior disciplinary record;
 - (b) absence of a dishonest or selfish motive;
 - (c) personal or emotional problems;
 - (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
 - (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
 - (f) inexperience in the practice of law;
 - (g) character or reputation;
 - (h) physical or mental disability or impairment;
 - (i) delay in disciplinary proceedings;
 - (j) interim rehabilitation;
 - (k) imposition of other penalties or discipline;
 - (l) remorse;
 - (m) remoteness of prior offenses.

Discussions and meetings with General Counsel and his staff

I urge you to discuss your case and meet with the General Counsel and his staff in Montgomery. The current General Counsel is Roman Shaul, who is from Tuscaloosa. I have found that Mr. Shaul is accessible and will listen to you. His staff is very accommodating and will freely share information to guide you in the right direction. Protocol and common sense probably dictate that you first contact the Assistant General Counsel and his assistant. I recommend you meet with them personally. They investigated the case and drafted and assembled the formal charge petition. If your goal is to get a lesser discipline, I recommend starting with them (and if you can get Mr. Shaul to also meet with you or at least discuss the case with you, even better). These discussions and meetings are your best opportunity for persuading the General Counsel toward your position on the case and determining whether the charges can be settled.

Fighting the charges

If it is obvious the General Counsel and Disciplinary Commission will insist on a discipline that is unacceptable, or if you are convinced they are wrong and the charges should be dismissed, you may decide there is no alternative except to fight the charges, insist on the hearing, and take your chances with the Disciplinary Board. Good luck! Make sure your attorney (if you have one) is up to the task.

Consider having reputable attorneys appear at the hearing to testify on your behalf regarding standard of care, character and any other mitigating factors. Having members of the Bar attend the hearing to vouch for you would be especially helpful.

Here, it should be noted that the respondent attorney is not required to agree to any discipline recommended or proposed by the local grievance committee, General Counsel or Disciplinary Commission. He can invoke the provisions of Rule 12(d) and demand in writing that the General Counsel file formal charges against him to have his case decided by the Disciplinary Board.

Settlement under Rule 24 Conditional Guilty Plea

In most cases, however, the best option for resolving the formal charges will be settlement under the Rule 24 Conditional Guilty Plea procedure, which works something like this:

1. Hopefully, your dealings with the General Counsel and his staff have resulted in a tentative settlement or understanding regarding the discipline to be imposed on the formal charges against you (or your client).
2. You may then tender to the General Counsel (you will actually be dealing mostly with the Assistant General Counsel) a proposed conditional guilty plea. See, Rule 24(a). The tendered plea does not have to take any particular form. However, in my opinion, it should probably be as detailed as your answer. The plea should contain a fair and accurate statement of the facts you would hope the General Counsel would accept and possibly use in any public reprimand. It should delineate the charges to which you (or your

client) are pleading guilty and any charges you are still contesting and the reasons why (so that, e.g., in the case of a public reprimand, maybe all the charges will not have to be mentioned). It should also include a statement as to any applicable mitigating factors. Lastly, the proposed plea should state clearly the agreed form of discipline, e.g., public reprimand without general publication (probably the least form of discipline the General Counsel would ever consider where formal charges have been filed).

3. Notwithstanding any artful draftsmanship on your part, the General Counsel may take the conditional guilty plea you tendered to him and make changes. However, most likely, he will draft his own plea document incorporating at least some of your language. He will then tender to you the conditional guilty plea with his changes or drafting for signing by you (or your client). If you can live with the changes, the plea is then signed and returned. See, Rule 24(b).

4. Under Rule 24(b), the General Counsel afterward will submit to the Disciplinary Commission the conditional guilty plea together with the pending charges and any comments he chooses to make. If both the General Counsel and the Disciplinary Commission approve the tendered plea, the charges are settled, and the case will not be submitted to the Disciplinary Board. If the General Counsel and the Disciplinary Commission disagree as to the tendered plea, the matter will be submitted to the Disciplinary Board for its approval, rejection, or modification of the plea deal. (I am paraphrasing Rule 24(b).)

5. However, in most cases, if you are able to reach an understanding with the General Counsel, you can finally start feeling more at ease knowing the formal charges against you (or your client) are now largely a matter of paperwork.

Conclusion

This paper is intended as a roadmap for defending a Bar complaint when formal charges are filed. I sincerely hope you never have to go down that road.

This paper might, however, help someone you know who is dealing with formal charges. I hope it will help if you (like me) are ever called upon to advise or represent someone who is going down that road.

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