

The Mysterious Ways of the Florida Bar: The Lawyer Disciplinary Process

By:

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Introduction

When a lawyer receives a letter in the mail and the return address says, “The Florida Bar,” immediate panic sets in. But, a Florida Bar Complaint letter is not always the end of a law practice. Even excellent and very experienced lawyers receive Bar Complaints. Some lawyers have never received a Bar Complaint in 50 years of practice and some lawyers routinely receive Bar Complaints for a variety of reasons – some very minor and others serious.

Here are the statistics. There are over 100,000 lawyers who are currently members of the Florida Bar. The Bar receives approximately 20,000 complaints each year and reports a total number of 27,918 Bar Disciplinary cases were opened in the 2012-2017 time period or on average 5,500 each year. However, only approximately 25 percent or less of those cases went on to discipline in 2012-2017. Of those disciplined, 274 lawyers were disbarred and 833 were suspended, with many others receiving another type of less serious discipline, both public and private. The trend has been a decline in the number of files opened each year by The Bar but more attorneys being disciplined every year. The approximate cost of all these attorney disciplinary cases to the Florida Bar was about \$21 million in 2017.

One reason for panic at the thought of a Bar inquiry letter is because most lawyers don’t know or understand the many intricacies of the Florida Bar Disciplinary Process. The Florida Bar is governed by its own rules of procedure that are different from the civil or criminal rules of procedure. This paper will give you an overview of the Three Step Florida Bar Disciplinary Process.

Three Steps in the Florida Bar Disciplinary Process

The Florida Bar Disciplinary System is set up in a three-step process. Not all complaints go through the entire process and they may be closed or settled before the process is complete, just like any civil or criminal case. However, upon receiving a

complaint it is very important to understand the whole process, possible outcomes and exposure. Lawyers should familiarize themselves with the Rules Regulating the Florida Bar¹ where these steps and procedures are outlined.

Step 1: “Bar Complaint” at Grievance Committee Level

When most lawyers hear “Bar Complaint” they think about the first letter that is received from the Florida Bar (the aforementioned panic letter) attaching a complaint form from a client. This is actually a confusing term, because a “Bar Complaint” can refer to this initial inquiry letter mailed to the lawyer and also to the formal document that is filed in the second phase of a Bar case by Bar Counsel² in the Florida Supreme Court. The formal Bar Complaint is similar to a Complaint in a civil case or an Information/Indictment in a criminal case, which will be discussed in detail in Step 2.

A. Initial Bar Complaint/ Inquiry Letter

The “Bar Complaint Letter” is really an inquiry letter, and it is the first event that puts an attorney on notice that he is beginning the Florida Bar Disciplinary Process. This is how it starts: a client, opposing counsel, judge or any party makes a written complaint against a lawyer with the Florida Bar. Many times the complaining party calls the Florida Bar or goes to the Florida Bar website to lodge the complaint. The party will be required to fill out a written form called The Florida Bar Inquiry/Complaint Form that must be under oath and then provided to the Florida Bar – either the local branch office or the main branch in Tallahassee. Sometimes, the Florida Bar hears about an incident or sees an incident in the press and can then open a file and send an inquiry letter on its own without a complaining party. Lastly, sometimes a Bar Complaint Letter

¹ These Rules can be found on the Florida Bar Website at www.floridabar.org.

² “Bar Counsel” is the attorney who represents the Florida Bar at every stage of this proceeding beginning with the Bar Complaint Letter, similar to a prosecutor in a criminal case.

is triggered automatically from your bank when a trust account check bounces. But most Bar Complaints come from another party called the complainant.

A Bar Complaint Letter will be mailed to the attorney's address listed with the Florida Bar and requires a written response by the attorney within 10 days. An extension of this 10-day deadline may be granted by Bar Counsel upon request. Although the initial letter may come from Bar Counsel in ACAP (Attorney Consumer Assistance Program) in Tallahassee, if it proceeds, the complaint is ultimately sent to the Florida Bar Branch Office that services the attorney's jurisdiction. The Florida Bar has a main office in Tallahassee and 5 Branch offices throughout the State with approximately 35 Bar attorneys.

Bar Counsel will review the complaint letter and the attorney's response and determine if the complaint file should be closed or moved to the Grievance Committee for investigation.

B. Grievance Committee

The Florida Bar Grievance Committee is a group of not fewer than 3 members (usually more) that consists of both lawyers and non-lawyers who volunteer their time to review and investigate Bar Complaints and determine whether there is probable cause to file a formal complaint. It's somewhat like the Grand Jury of the Bar process. A lawyer may have an attorney represent him before the Grievance Committee and at any step of the proceeding. All proceedings before the Grievance Committee are confidential unless and until a finding of probable cause is made.

Each Branch Office has a different number of Grievance Committee Panels and different methods for conducting an investigation. For example, in Miami, or the 11th Circuit, there are 15 Grievance Committees that normally don't take testimony from the Attorney but only review the written response at their monthly meeting. But in other

Circuits the Grievance Committees do call witnesses and hear live testimony, including from the Respondent Attorney.

During the Grievance Committee investigation an Investigating Member of the Committee is appointed by Bar Counsel, gathers all the information and presents it to the Committee either in writing or orally before the Committee votes on the outcome.

The possible outcomes from the Grievance Committee include a finding of probable cause (including for minor misconduct) or a finding of no probable cause (including with a letter of advice). If there is a finding of no probable cause, the case should be closed at that point, but the Bar has the authority to reopen the case for various reasons. After a finding of probable cause, the Grievance Committee can recommend discipline for the attorney when it involves an admonishment for minor misconduct or diversion. The attorney does not have to accept this offer of an admonishment or diversion. The Grievance Committee has no authority to make any other recommendations. If neither of these applies, a finding of probable cause will result in the filing of a formal Bar Complaint by Bar Counsel in the Florida Supreme Court. This formal Complaint will specifically allege which Rules Regulating the Florida Bar have been violated and how.

Step 2: Litigation at the Referee Level

Florida Bar Disciplinary Cases have original jurisdiction in the Florida Supreme Court. However, the Supreme Court Justices do not take testimony and evidence. The “trial” phase of a Bar disciplinary case is conducted by a Referee who is a sitting Circuit or County Court Judge within the attorney’s circuit and is appointed by the Supreme Court to act as a type of “magistrate.” The Referee acts as the Judge who presides over a bench trial governed by the Rules Regulating the Florida Bar, which are similar but not exactly the same as the Florida Rules of Civil Procedure. Discovery is permitted, but the Florida Rules of Evidence do not apply. A disciplinary proceeding is neither civil nor

criminal but is a quasi-judicial administrative proceeding. Having this split-level system with a Referee and the Supreme Court can be somewhat confusing to a lawyer who is not familiar with the disciplinary procedure.

A Florida Bar trial, or final hearing, is conducted in a manner that the Referee deems appropriate as far as setting trial dates and scheduling. After the trial concludes, the Referee will issue a written report making findings of fact and recommendations as to guilt. If the Referee finds guilt related to any Count, then he will make a recommendation as to discipline pursuant to the Standards for Lawyer Sanctions based upon aggravating and mitigating factors and applicable precedent.

Step 3: Review at the Supreme Court Level

Either the Bar or the Respondent can request the Supreme Court review any and all findings and the discipline. The Supreme Court is required to review all cases where the Referee recommends probation, public reprimand, suspension or disbarment. This occurs in the majority of cases that go to trial. The Florida Supreme Court can decide to accept or reject any or all of the Referee's findings, recommendations or discipline. Therefore, after a complete bench trial the Supreme Court can change everything, and they frequently do - many times finding lawyers guilty and handing down more severe sanctions than the Referee recommended.

The Review before the Supreme Court is similar to an appeal, including written briefs by each party. Oral argument can be requested and is sometimes mandated by the Court. Lastly, the Supreme Court issues a written opinion. There is no appeal of this decision. However, as long as the decision is not the maximum sanction - permanent disbarment - then the attorney can either automatically return to the practice of law (on a suspension of 90 days or less) or apply for reinstatement to the Florida Bar and retake the Bar exam (on a suspension of more than 90 days). The maximum time a suspension can last is 3 years. If a lawyer is disbarred (not a permanent disbarment) then he may

apply for readmission to the Bar after 5 years. The process is much more difficult than being admitted to the Bar the first time around and readmission after disbarment is rare.

Representation For the Bar Disciplinary Process

Many times lawyers represent themselves – at least at the outset of the process. There is no rule that prohibits a lawyer from representing himself during the entirety of the process. However, when a lawyer represents himself the interaction with the Referee and The Florida Supreme Court at times appears more like cross examination, because the distinction between the Respondent and the Respondent, as his own attorney, is difficult to maintain during the process. Referees and Bar Counsel find it easier to navigate a Bar Case when the Respondent Attorney has a separate attorney representing them.

Oftentimes lawyers recruit friends who are attorneys to assist or represent them in the Florida Bar Disciplinary process. Any lawyer who appears on behalf of an attorney in a Bar Disciplinary matter should be intimately familiar with these procedures, the case law, and discipline (both public and unpublished) in this type of very important case that could impact a lawyer's career. Sometimes getting an attorney friend who has no experience in Bar Disciplinary matters to do a favor for free is not the best way to handle this type of case.

About the Author

Sherri A. Romano is a past Chairman of a Florida Bar Grievance Committee for the Eleventh Circuit and has been defending lawyers against Bar Complaints for 17 years at all 3 stages of the process. She is a solo practitioner located in Miami, Florida where she also defends criminal cases at the State and Federal level in South Florida and defends college disciplinary cases. She graduated magna cum laude from the University of Miami School of Law. Her website can be found at www.sarpalaw.com.