



The Discipline Process for Insurance Producers & Lawyers

LPL/Legal Malpractice Conference

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Presented by:

Steven M. Carpenter

Joseph P. Garin

John S. Gleason

Joseph J. Hester

Michael S. Ross

Authority

- The legal profession is regulated by the State Bar and the State's Rules of Professional Conduct (RPC).
- The legal profession also self-regulates in the sense lawyers can report another lawyer's violation of RPC.

Courts retain inherent authority to control admission and order discipline.

Investigations

Complaint

If it implicates an ethical issue under RPC, investigation commences



Screening Attorney or Panel

Decides whether the case should be heard a panel of the Disciplinary Board



If Complaint has no factual basis/does not constitute misconduct

Dismissed and lawyer notified of such dismissal



Non Client Complaints



Confidentiality and Privilege

Rule 1.6 “Safe – Harbor” is not so safe for non-client complaints

Third Party Plaintiffs

Critical to avoid disclosure of client competency in your response.

If under investigation, make certain you know who complainant is before revealing confidences.



Disciplinary Board

Many states use presiding disciplinary judges or trial judges.

Other states use a pool of lawyers and non-lawyers who are appointed to individual hearing panels to hear the case against an attorney.



Hearing Procedures

- The Complaint is referred to the judge or hearing panel.
- Bar Counsel serves as the prosecutor.
- Hearings can be either informal or formal depending on the severity of the alleged misconduct.

When You Receive a Notice from your State Bar:



- Don't panic or take it personally. This may be difficult.
 - Think of self as attorney advising client, acting rationally not emotionally. It will not go away by simply ignoring it
- **OPEN THE LETTER.**
 - Be aware of the **RESPONSE DATE.**
 - Get an extension if necessary.

When You Receive a Notice from your State Bar:

- A Response is **REQUIRED** as a positive obligation. Failure to respond constitutes more than a default.

Failure to respond is itself a rule violation.

- Discuss it up front.



Acknowledge all adverse facts.



Discuss with knowledgeable attorney, at least in assessment of further course of action.

When You Receive a Notice from your State Bar

- Assess the gravity of the complaint:
What can it lead to?
 - Admonition?
 - Suspension?
 - Censure?
 - Disbarment?

DO:



Plan for the future depending on what you see as the outcome



Read the Professional Conduct Rules

STRATEGY:

- Preparing a measured response:



How much information to reveal
to regulatory authorities



When to disclose



When to propose resolution

Assess possible charges:

- Dishonesty; theft of money, lying, falsification of documents
- Commingling of funds
- Neglect of client matters
- Failure to communicate
- Misconduct; contempt of court or disregard of court directions, unbecoming conduct toward others, clients, or other attorneys, sexual misconduct with client

Possible defenses:

- Psychological, esp. if tending to negate any required intent – such as depression
- Simple, non-occurrence of event complained of or actual performance work or activity claimed neglected

A disability of infirmity offered as a defense or mitigation could ultimately be viewed as a ground for disability suspension. BE CAREFUL



-Assemble evidence required to defend or mitigate or required to simply answer truthfully and adequately

-Think very carefully before answering. Lying is never an option. Besides being wrong in itself, its discovery by disciplinary authorities will only add to your problems

-Cast matters in light most favorable to yourself, but if and only if consonant with the truth

-Present facts in a light which establishes a defense or mitigation, or both, if available; however presentation cannot be far-fetched.

The inability to accurately and candidly assess own conduct will count against you.

When You Receive a Notice from your State Bar

The complainant, oftentimes the client, is not the opposing party when and if charges are brought.
It is the grievance committee.



Don't attack the complainant (character, veracity or any other aspect) if not relevant to answering the charges.

Example: The complainant's despicable character is no defense for misuse of escrow funds if, in fact, **you misused them.**

Gratuitous attacks will only count against you. (But, if in issue, attack away, making sure it's on point and not overblown.

Consulting Disciplinary Counsel

- Think seriously about getting advice from experienced disciplinary counsel before submitting an answer, at least to review if not draft an answer.
- At the complaint/investigation stage the matter can be terminated without formal charges if suitable and your side is presented well.

2 benefits of Consulting Counsel

- Experienced counsel knows procedure & substantive law & usually has working relationship with disciplinary counsel
- Emotional distance is necessary when you are the party: self-representation or at least uncensored, uncounseled self-representation is loaded with pitfalls.

Practice Management Tips

... before you get a notice

Do:

- Be organized, like a well-run business
- Be scrupulous on other people's money, never treating it as your own
- Make sure the terms of reimbursement, subject & limits of representation (including conditions of termination) are spelled out
- Memorialize, even when not required. Consult & follow rules regarding execution & filing retainer agreements/statements
- Meet deadlines
- Keep clients informed

Practice Management Tips

Keep:

- Notes on everything
- Scrupulous records of money held in trust/escrow. Read and follow the rules on holding funds in escrow.
- Contemporaneous accounts of time spent & work done on behalf of clients
- Accounts of messages received, responded to, and of responses & communications, both with clients and others on behalf of clients



Don't get in over your head!

Factors Considered in Determining Discipline

Aggravation and Mitigation

Aggravating and mitigating circumstances may be considered in deciding what sanction to impose and may be admitted into evidence at a disciplinary hearing.

1. **Aggravating circumstances** are any considerations or factors that may justify an increase in the degree of discipline to be imposed. The following list of examples is illustrative and is not exclusive:

- (a) prior disciplinary offenses;
- (c) a pattern of misconduct;
- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders;
- (g) refusal to acknowledge the wrongful nature of conduct;
- (i) substantial experience in the practice of law;
- (k) illegal conduct, including that involving the use of controlled substances.

- (b) dishonest or selfish motive;
- (d) multiple offenses;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary hearing;
- (h) vulnerability of victim;
- (j) indifference to making restitution;

Factors Considered

2. **Mitigating circumstances** are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. The following list of examples is illustrative and is not exclusive:

- (a) absence of a prior disciplinary record;
- (c) personal or emotional problems;
- (e) full and free disclosure to disciplinary authority or cooperative attitude toward proceeding;
- (g) character or reputation;
- (b) absence of a dishonest or selfish motive;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (f) inexperience in the practice of law;
- (h) physical disability;
- i) mental disability or chemical dependency including alcoholism or drug abuse when:
 - (1) there is medical evidence that the respondent is affected by chemical dependency or a mental disability;
 - (2) the chemical dependency or mental disability caused the misconduct;
 - (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;

Forms of Discipline

- A letter of reprimand
 - Kept in permanent file with the Bar
 - Maybe accompanied by a fine or restitution up to \$1,000
- A public reprimand
 - Published in the local newspapers and official State Bar publications
- Suspension of Lawyer's license to practice law
- Probation with conditions
- Disbarment



Multi-Jurisdictional Practice & Reciprocity

Collateral Estoppel
of Court Sanctions

- Who can / should appeal?

Reciprocal
Discipline

- Impact on related licenses

Resignation with
charges pending

- Acknowledgment required by Bar in Resignation

Discipline Process – Substance Abuse

- What to Expect during Investigations:



A call from a doctor to attorney



Doctor examination(s)



Questioning to attorney in-person or via telephone



Attorney appearance for his/her hearing

Nevada's Approach to Substance Abuse – Lawyer's Capacity

- **Rule 117. Proceedings when an attorney is declared to be incompetent or is alleged to be incapacitated.**
- **1. Judicial declaration of incompetency or commitment.** Upon proof that an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, the supreme court shall enter an order transferring the attorney to disability inactive status until the further order of the court.

Substance Abuse – Lawyer’s Capacity

- **2. Petition to determine competency; notice.**

If disciplinary board or a hearing panel believes that an attorney is incapable of continuing the practice of law because of mental infirmity, illness, or addiction, it may file a petition with the supreme court seeking a determination of the attorney’s competency. Such a petition may also be filed by joint stipulation of the parties. A petition to determine an attorney’s competency should be filed separately from any discipline matter that may be pending and should be marked confidential in accordance with Rule 121.

- If, upon due consideration, the court concludes that the attorney is incapacitated for the purpose of practicing law, it shall enter an order transferring him or her to disability inactive status. Any pending disciplinary proceeding or investigation against the attorney shall be suspended.

Substance Abuse – Lawyer’s Capacity

- **3. Transfer to disability inactive status prior to determination of competency.** If, during the course of a disciplinary proceeding or investigation, the attorney contends that he or she is suffering from a disability due to mental or physical infirmity, illness, or addiction, the supreme court shall enter an order transferring the attorney to disability inactive status.
- If the court determines that the attorney is not incapacitated from practicing law, it shall take such action as it deems necessary, including a direction for the resumption of the disciplinary proceeding against the attorney.

Substance Abuse – Lawyer’s Capacity

- **4. Resumption of practice by disabled attorney.**
An attorney transferred to disability inactive status under the provisions of this rule may not resume active status until reinstated by order of the supreme court.
- The panel may direct that the attorney establish competence and learning in law, including certification by the bar examiners that the attorney successfully completed an examination for admission to practice subsequent to being transferred to disability inactive status.
- The panel shall render a written decision within 30 days of the hearing’s conclusion, which shall be filed with bar counsel’s office and served pursuant to Rule 109(1).

Substance Abuse – Lawyer’s Capacity

- (4 cont’d) Bar counsel shall forward the record of the hearing panel proceeding to the supreme court within 30 days of the decision’s entry. Receipt of the record shall be acknowledged in writing by the supreme court clerk.
- The parties shall have 30 days from the date the supreme court acknowledges receipt of the record within which to file any objection to the panel’s recommendation. If none is filed, then the matter shall be submitted for decision. If the supreme court concludes that the attorney’s disability has been removed and that the attorney is fit to practice law, then the supreme court may reinstate the attorney to active status, with any conditions that may be appropriate to protect the attorney’s clients or the public.

Substance Abuse – Lawyer’s Capacity

- (4 cont’d) When an attorney who has been transferred to disability inactive status is later judicially declared to be competent, the attorney may file a petition for reinstatement with the supreme court, attaching a copy of the judicial declaration of competency.
- The petition shall state whether any disciplinary proceedings were pending against the attorney at the time he or she was transferred to disability inactive status. Upon the filing of such a petition, the supreme court may dispense with further evidence that the attorney’s disability has been removed and may direct the attorney’s reinstatement to active status upon such terms as are deemed appropriate, or may direct the state bar to resume any disciplinary proceedings that were suspended by the attorney’s transfer to disability inactive status.

Substance Abuse – Lawyer’s Capacity

- **5. Burden of proof.** In a proceeding for transfer to disability inactive status or for reinstatement under this rule, the burden of proof rests with the petitioner.
- **6. Waiver of privilege and disclosure by filing petition for reinstatement.** The filing of a petition for reinstatement under this rule waives any doctor-patient privilege with respect to any treatment, diagnosis, or prognosis of the attorney during disability. The attorney shall be required to disclose the name of every treatment provider by whom or in which the attorney has been examined or treated since being transferred to disability inactive status.
- **7. Notice.** An attorney who is transferred to inactive status must comply with Rule 115, if he or she is able to do so. If the attorney’s disability precludes compliance with Rule 115, or if the attorney fails to comply, then bar counsel shall proceed under Rule 118. Bar counsel shall also comply with Rule 121.1.

Substance Abuse – Options

- Attorneys at issue provided with following options, independent of sanctions:
 - Abstinence
 - Lawyers Assistance Program (NLAP)
 - Outpatient therapy
 - Inpatient therapy
 - Lawyers Concerned for Lawyers (similar to AA)

Insurance Issues

-Applications & disclosure of “claims”

**-Coverages / Typical Policy Sub-Limit
Coverages**

-When to give “notice”

-Selection of Counsel

Risk Management Points

-Conflicts and Client Screening

-Non-Engagement Letters

-Engagement Agreements

-Meticulous Records

-Handling Money

-Detailed/Timely Billing

-Withdrawal

-File Closing Letters



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