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I Don't Want to Ruin Your Day ...

A brief overview of what happens when a grievance or complaint is filed against you with the Office of Attorney Ethics.

By Marc Garfinkle | September 11, 2017

Despite having passed the requisite Professional Responsibility exam and collected many hours of Ethics CLE credits, many attorneys still seem to have little knowledge and less curiosity about the form and function of the New Jersey Office of Attorney Ethics (OAE). Many of us treat the OAE as we might treat the Workers' Compensation Court or the Immigration or Patent or Tax Courts if our practices did not concern themselves with those matters. Not having business in such tribunals, we don't fill our data banks with information about them. We don't need to know where the courthouse is, who the judges are or how their proceedings proceed. We needn't know the players, follow changes in the law or know how to file a motion.

From this perhaps we can conclude that New Jersey attorneys' general indifference about the OAE stems from our knowledge that we'll never have a reason to cross paths with the Bar or to visit their offices out on Bear Tavern Road in Ewing. Being certain of our good ethics, we are comfortable with our superficial understanding of the investigatory and disciplinary apparatus that is quietly and constantly working in the background. Hence, most respondents learn about the OAE on a need-to-know basis.

A better way to learn about the OAE is membership on a District Ethics Committee, volunteering to investigate and process alleged violations of the Rules of Professional Conduct (RPCs). Attorneys in good standing with over five years at the bar should consider this; but understand that this is *not* a "no-show" job. Real effort is expected, and the volunteers perform a thankless service of inestimable value to their colleagues and to the profession. At the same time, they will acquire a better understanding of the OAE—that omnipotent arm of the Supreme Court that owns our licenses and controls everything thereto appurtenant.

For those attorneys who neither serve on a committee nor wish to wait for a need-to-know, today we present a brief overview of what happens when a grievance or complaint is filed against you. Although we shall attempt to simplify matters where we can, nothing here negates our belief that "water flows uphill" in the world of attorney discipline, and that all lawyers should consult with ethics counsel whenever they interact with the OAE. Even though our attorney disciplinary apparatus is a creature of the Supreme Court and not of the legislature (in which case, discipline would be by the attorney general), it is still adversarial.

Most lawyers' contacts with the OAE are incidental and benign. Sometimes a colleague, known to you or otherwise, has been under investigation or has provided information about a matter in which you may have information or documents; your testimony and/or files may be required. Your introduction to the OAE may come as the result of the Random Audit Program, which annually selects 500 law firms at random for compliance with the recordkeeping requirements. Perhaps someone complained about an advertisement or other published material of yours which may run afoul of the advertising rules. These matters will be assigned to the specialized Committee on Advertising, a sort of subset of the Ethics Committee. Similarly, a fee dispute with a client may end up before the Fee Arbitration Committee, another arm of the OAE. An action in one of these forums is not likely to have consequences of magnitude for the attorney. Not so the grievance or complaint.

Generally speaking, ethics cases arise either as a grievance or inquiry. A grievance sounds like: "My attorney stole my money." An inquiry sounds like: "I think my attorney stole my money; can she do that?" Either format results in a review by the secretary of the committee who decides whether the matter should be assigned for investigation. Most

matters are investigated and adjudicated by the District Ethics Committee in the practitioner's vicinage. Other matters, particularly those involving misappropriation of client funds, other crimes, matters of great complexity, lengthy matters and special cases may be assigned to the bar's team of professional investigators.

Although some investigators phone the respondent to give a heads-up, your first contact with the committee will probably be a letter from the Ethics Committee. This is sometimes called the "In re: Gavel letter" or the "10-day letter," and it advises that the OAE has received a grievance or inquiry about you. The letter usually specifies the offensive acts and the RPCs involved, and it advises that a copy of the grievance is attached, although it often isn't. It affords you (now the "respondent") 10 days in which to respond, setting forth all defenses and mitigating circumstances, and providing details, witnesses' names and documents. Your response should be timely, as requests for adjournment are not warmly received, and delaying the process may result in additional charges. Candor and completeness are critical. Don't forget that as a committee of the *Supreme Court*, Ethics Committee matters automatically trump whatever Superior Court matters you have in your diary, and most judges know that, so try not to whine about your "court-ordered deposition" wrestling for priority.

The grievant, if there is one, is then sent a copy of your response and is invited to comment thereon. Sometimes, the investigator may wish to interview the respondent or the grievant or a third party. If the grievant is not cooperative, the investigator may still pursue the matter. (If an uncooperative grievant or witness is an essential part of the OAE's case, the effect may favor the respondent.) The investigator will then prepare a report to the committee advising which, if any, of the Rules of Professional Conduct they can prove you violated, and attaching proofs.

Once the determination of unethical behavior has been made, it is decided whether your unethical behavior was minor in nature. Cases involving minor unethical behavior may be put in a special track called "diversion from discipline." The respondent is offered the opportunity to enter an Agreement in Lieu of Discipline (ALD). Successful completion of the diversion program results in the dismissal of the action. Bear in mind that misappropriating two cents from trust for two minutes will not be minor. It is also important to note that the admission to the program will not be allowed once a complaint has been filed. This is quite unlike the Consent to Discipline, a handy device for resolving matters, which may be entered at any point in the matter up until the Hearing Panel renders a decision.

An ethics proceeding is unlike any other proceeding that it may resemble in name or form. Unlike a criminal matter, the outcome of an ethics case is often not a function of the number of violations or the dollar amounts involved or the number of victims affected. The charges are based on literal interpretations of the RPCs, and they will stand or fall with the proofs. The standard of proof is "clear and convincing evidence." There is no plea bargaining allowed; most of the OAE's staff ethics counsel are former prosecutors, and pleading the Fifth might get you disbarred. Fortunately, despite popular belief, there is never a negative inference when a lawyer retains counsel. Enough said.

If an appropriate Consent to Discipline cannot be fashioned during this period of uncertain duration, the grievance will be formalized as complaint and you will be served. There is little discovery, but letters of character reference may prove helpful, as the battle is not so much about what you did as it is about the quantum of discipline to be imposed. There is a limited selection. Despite distinctions between admonition, reprimand and censure, it is suspension and disbarment that concern us most. Faced with suspension, most lawyers would agree to be censured. Surprisingly, it is not the consent of the parties (the OAE and respondent) nor their joint will which determines the ultimate discipline—that is the province of the Disciplinary Review Board (DRB) which has final say in many disciplinary areas, and semi-final say in your discipline. Even though the DRB has rejected your Consent to a Reprimand, and directed that you be censured, the Supreme Court, on automatic review, can suspend you, anyhow. Appeals and opportunities for argument exist along the way.

Some cases cannot be resolved by agreement. These go to a hearing before a three-person panel, two of whom are lawyers. The "prosecutor" will be either a professional from the OAE or an attorney member of the District Ethics Committee—the same committee from whom the panel is chosen! Rules of evidence are relaxed, grievants waive confidentiality, character witnesses are welcome. If you must have a hearing in an ethics matter, be prepared to wait for the disposition. The wheels turn slowly, and the wait can be cruel.

There you go, dear reader. Anticipating the "bad mail day," we brought you this little overview. Hope it helps. •

Next Week...