

I GOT A BAR COMPLAINT



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This information is not intended to substitute for obtaining legal advice from an attorney.

Although I like to think I know what I'm talking about, no person should act or rely on any information in this book without seeking the advice of an attorney.

Dedication

To all the lawyers who “got a Bar Complaint,” become indignant and immediately respond with arrogance, and details of how much they do for charity and the legal community.

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INTRODUCTION

Driving down the street, looking in the rear view mirror and seeing the lights flashing on the roof of a police car brings about the same emotion as receiving a Bar Grievance.

“I did nothing wrong.”

“Did I do anything wrong?”

“How dare the client, that scumbag!”

Regardless of the subject of the Bar Complaint, it is initially viewed as a personal attack on your honor, credibility, and mere existence. It upsets you. It angers you. It causes you to stop in your tracks and begin responding, immediately.

Stupid.

Dumb.

Big mistake.

Before you do that, read on.

OPENING THE ENVELOPE AND READING THE “LIES, LIES, LIES.”

In my opinion the first and most important thing to do is this:

Nothing.

Let's begin with a little terminology. Although it means little to you, the first thing to know is that there is a difference between a “Bar Grievance” and a “Bar Complaint.”

A *Bar Grievance* is what is filed by a “complainant.” That's usually your client. A *Bar Complaint* is like a real civil complaint, and it's filed by the Bar, before the Supreme Court.

You “got” a grievance, not a complaint. It's even less than an accusation in a criminal case, it's usually the opinion of a person who didn't get what they thought they were going to get.

As I stated earlier, in my opinion the first thing to do when you open that envelope, is *nothing*.

The next thing? *Think.*

Think about the client, the history of the case, the entire matter.

Then *think* some more.

Take the night off. Don't write a thing.

Now write a *draft* response.

Read the *draft* response, three times.

Write new *draft* response.

Bounce it off a couple lawyers and non-lawyers.

If the grievance is something more than "I'm unhappy with the result," consider retaining counsel. The last thing lawyers want to do is hire lawyers, and it's usually the first thing they should do. The goal is for this to go away, not for you to litigate the issue.

You've spent a fortune on law school, made an investment in your future, and now you want to be cheap and stupid and handle this yourself? A hundred thousand dollars for law school, tens of thousands invested in your practice, years of building a reputation with clients and the community, and now when your law license is on the line, you think is a good time to save five or ten thousand bucks?

HOW THE BAR WORKS - THE INITIAL REVIEW

After the Grievance is filed it is reviewed by Bar Counsel.

The initial review determines two issues:

1. Is the inquiry concerning a member of The Florida Bar over whom prosecutorial jurisdiction exists?
2. If proven, does the alleged misconduct constitute a violation of the Rules Regulating The Florida Bar warranting the imposition of discipline?²

If the answer to either question is no, Bar Counsel may summarily determine that no inquiry is to be pursued. The complaining party then receives a letter notifying them that no disciplinary action will be taken. This decision may be reviewed,³ but the complaining party may not appeal.⁴

If the answer to both questions is “yes,” the allegations become a “complaint” and a file is opened by The Florida

² Rule 3-7.3(a), Rules Regulating The Florida Bar

³ Rule 3-7.3(a), Rules Regulating The Florida Bar

⁴ Rule 3-7.4(i), Rules Regulating The Florida Bar

Bar.⁵

At this point, the accused attorney receives notice, along with a form requiring disclosure to his/her firm.⁶ You can send in a lengthy, detailed response, but if that form is not included, your response will not be read. Sometimes I think that form is more important to the Bar than the actual response.

After the response *and the disclosure form* is returned, Bar Counsel begins to conduct an investigation to determine whether the attorney violated the Rules Regulating The Florida Bar.

At this point Bar counsel may again dismiss the case, subject to further review.⁷

In summary, prior to referral to a grievance committee, the allegations may be dismissed after review by Bar Counsel, or after an investigation by Bar Counsel.

⁵ Rule 3-7.3(b), Rules Regulating The Florida Bar

⁶ Rule 3-7.1(g), Rules Regulating The Florida Bar

⁷ Rule 3-7.3(d), Rules Regulating The Florida Bar

IS IT A RULES VIOLATION OR FEE DISPUTE

The Bar is aware that clients file grievances to obtain fee refunds. The Bar also encourages the friendly resolution of all fee disputes whenever possible.⁸

One method available to resolve fee disputes is the Legal Fee Arbitration Program. To participate, both the client and the lawyer must agree to arbitrate the fee dispute, and the decision is binding on both parties.

The Florida Bar website provides valuable information on how to avoid fee disputes, including providing written fee agreements, explaining the term “non-refundable,” and sending out monthly statements.

Before you break out the checkbook, remember: you are entitled to be paid for your work, even if the client is not happy with the results. Clients will file the Bar Grievance, or threaten to, just for the purpose of intimidation. I personally loathe this practice and have never been involved in a matter where I advised my client to return money. I have also never participated in the Fee Arbitration Program. This is not to say I do not think it is a good program, I have just never reviewed a case where I felt it to be appropriate.

⁸ <http://www.flabar.org>

THE GRIEVANCE COMMITTEE

If your complaint is referred to a Grievance Committee, it's time to realize the seriousness of the Grievance.

If Bar Counsel determines that the attorney violated a rule, the case is referred to a grievance committee,⁹ and the attorney is notified of referral to grievance committee.

Each grievance committee is made up of lawyers and non-lawyers and generally meets with bar counsel monthly.

Each file is assigned to a member, deemed an "Investigating Member," and the accused attorney receives notice of his/her identity.

The investigating member receives the file, which includes each and every document relevant to the case, including all correspondence. The correspondence includes e-mails sent to Bar Counsel.

The investigating member may seek the Bar's subpoena authority to obtain documents and testimony.

⁹ *Rule 3-7.3(f), Rules Regulating The Florida Bar.* At this point in the investigation, bar counsel may also seek the agreement to dismiss from the grievance committee chair due to unusual circumstances.

There is no formal requirement for the conduct of an investigation, so don't play the game where you try to figure out whether the Bar is violating some "rule" of their investigation. Obviously they are required to act in a professional manner and respect the assertion of any legal privileges.

Generally the investigating member will confer with both the complaining party and the accused attorney prior to submitting recommendations to the grievance committee. They are not, however, required to speak to you, so don't think that "no one contacted me" is a valid defense.

At the Grievance Committee meeting, the investigating member, if a lawyer, may not vote, but may participate in the discussion before the committee.¹⁰

¹⁰ *Rule 3-7.4(g), Rules Regulating The Florida Bar*

FINDINGS OF THE GRIEVANCE COMMITTEE

The grievance committee may find the following:

- I. No Probable Cause, or No Probable Cause with a letter of advice.
 - a. Both findings are subject to review.
 - b. If the committee finds No Probable Cause, the accused attorney receives notice, and the reasons for the finding.¹¹
 - c. If the committee finds no probable cause with a letter of advice, a letter is written addressing specific areas where the attorney may have come close to violating a rule, and may suggest ways to avoid future violations.
 - d. Whether the finding is no probable cause, or no probable cause with a letter of advice, neither creates a disciplinary record.
2. Minor misconduct

¹¹ *Rule 3-7.4(k), Rules Regulating The Florida Bar*

- a. If the grievance committee finds that the allegation(s) constitute a violation of the rules, a finding of minor misconduct can be made under certain specific circumstances.¹²
 - b. Minor misconduct is the equivalent of proceeding by information in federal court. The lawyer and the grievance committee must agree to dispose of the case with a finding of minor misconduct, and then the Bar orders an appropriate sanction.
3. Probable cause
- a. A finding by the grievance committee of probable cause means that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action.¹³

¹² *Rule 3-5.1, Rules Regulating The Florida Bar* states in part “misconduct shall not be regarded as minor if any of the following conditions exist: misappropriation of a client’s funds or property, conduct resulted in or is likely to result in actual prejudice to a client or other person, the accused attorney has been publicly disciplined in the past 3 years, the misconduct is of the same nature as misconduct for which the respondent has been disciplined in the past 5 years, or the misconduct includes dishonesty, misrepresentation, deceit, fraud or the commission of a felony.

¹³ *Rule 3-2.1(j), Rules Regulating The Florida Bar*

- b. The accused attorney has the opportunity to plea guilty prior to the filing of a “complaint” with the Florida Supreme Court.¹⁴

3. Diversion

- a. As in criminal cases, the Bar may also seek diversion in cases where there would otherwise be a finding of no probable cause with a letter of advice, or minor misconduct.
- b. Diversion may include but is not limited to Florida Lawyers Assistance, Inc., CLE seminars, or ethics school.

¹⁴ The accused attorney may also plea guilty subsequent to the filing of the complaint.
Rule 3-7.6, Rules Regulating The Florida Bar.

MY OPINIONS FOR ADDRESSING THE BAR

Relax. Read the letter from the bar, along with the attached allegations from the client.

Put it aside. Determine whether to ask Bar Counsel for more time to respond. They will always give you a few more days or more to prepare a proper response. There is no prize for responding within the initial 15 days.

Cooperate.

Responding to the Bar is required.¹⁵ Timely comply with all requests for documents. Ask bar counsel to issue a subpoena to protect certain privileges, rather than failing to comply and forcing bar counsel to issue one.

Think and research.

Review the file, and review the applicable rules.

Prepare a response and put it aside for 24 hours.

Most importantly - -address the *issues*.

¹⁵ *Rule 4-8.4(g), Rules Regulating The Florida Bar*

Review your draft response with one thought in mind, that the only relevant question of the Bar is:

Whether there was a violation of a rule of professional conduct.

The lack of a previous violation of the Rules of Professional Conduct is irrelevant to the issue of whether there is a current violation. If the question of whether there is a violation requires a judgment call, your lack of history of rule violations will work in your favor.

Additionally, lose the attitude.

Omit statements in your response that endeavor to bolster your credibility.

Do not criticize the client and do not question the Bar's wisdom in asking for a response. The old "how dare you" attitude never works.

Address only the allegations, and the facts that negate those allegations.

Seek advice.

Have the response letter reviewed by at least two people, one lawyer, and one non-lawyer. Research previous opinions by The Florida Supreme Court on Bar cases.

Finally, be patient.

Many grievances are filed. The quick decision is not always the right decision.

THE TOP THREE SUBJECTS OF BAR GRIEVANCES

- i. Ignoring clients - Failing to Communicate.
 - a. The Bar requires attorneys to keep clients reasonably informed about the status of the representation.
 - b. Promptly comply with reasonable requests for information.
 - c. Explain matters to the client.¹⁶
 - d. Take client calls.
 - e. Send copies of all documents.
 - f. Update clients with letters, and keep copies in the file.
2. Laziness
 - a. The Bar requires attorney to act with reasonable diligence and promptness.¹⁷

¹⁶ *Rule 4-1.4, Rules Regulating The Florida Bar*

¹⁷ *Rule 4-1.3, Rules Regulating The Florida Bar*

- b. The commentary to the rule mentions “procrastination,” “carry through,” and “unreasonable delay.”
 - c. The lawyer’s workload should be controlled so that each matter can be handled “adequately”
 - d. Make lists.
 - e. Follow up on cancelled depositions immediately.
 - f. Look ahead 6-8 weeks.
 - g. Consider turning down a case.
3. Arrests
- a. Sanctions depends on charge and the disposition.¹⁸
 - b. Rule 3-4.4 Criminal Misconduct

.....whether the alleged misconduct constitutes a felony or misdemeanor The Florida Bar may initiate disciplinary action regardless of whether the respondent has been tried, acquitted, or convicted in a court for the alleged criminal offense; however, the board may, in its discretion, withhold prosecution of disciplinary proceedings pending the outcome of criminal

¹⁸ Rule 3-7.2, 3-4.4, Rules Regulating The Florida Bar.

proceedings against the respondent. The acquittal of the respondent in a criminal proceeding shall not necessarily be a bar to disciplinary proceedings nor shall the findings, judgment, or decree of any court in civil proceedings necessarily be binding in disciplinary proceedings.

- c. Rule 3-7.2 - Procedures Upon Criminal Or Professional Misconduct; Discipline Upon Determination Or Judgment of Guilt Of Criminal Misconduct

This rule is long, and can be summarized as follows:

- (1) For purposes of The Florida Bar disciplinary process, there is no difference between a withhold of adjudication or adjudication.
- (2) If a lawyer is arrested for a felony and an information or indictment is filed, the lawyer is required to notify the Executive Director of The Florida Bar within 10 days.
- (3) When the felony case is over, if there is an adjudication or withhold of adjudication (pre-trial diversion or an acquittal don't count), the lawyer is required to notify the executive director of The Florida Bar and include a copy of the judgment and sentence.

- (4) Upon receiving notice that a member of the bar has been determined to be or adjudicated guilty of a felony, the bar will file a “Notice of Determination or Judgment of Guilt” in the Supreme Court of Florida. At that point, the lawyer is suspended pursuant to rule 3-5.1(e).

In summary, an arrest for a felony resulting in withhold of adjudication results in automatic suspension from practicing law. Hopefully a lawyer, or lawyer representing a lawyer in a criminal case, knows this prior to standing at the podium to take a plea.

A lawyer is required to notify the Bar within 10 days of an arrest for a felony, and 10 days after a conviction for any criminal offense. (read: misdemeanors)

The sanctions for an arrest are varied. The Bar will take into account the seriousness of offense and the history of the attorney.

Alcohol related offenses

Florida Lawyers Assistance, Inc.,¹⁹ is the place to call if you have, or think you have a problem with alcohol or drugs. It is confidential.

¹⁹ 1-800-282-8981

WHAT IF THE CRIMINAL CASE IS DISMISSED OR I AM FOUND NOT GUILTY?

Congratulations, but The Bar may take action regardless of the outcome in the criminal case.²⁰

²⁰ The failure of a trial court to adjudicate the convicted attorney guilty of the offense(s) charged shall be considered a matter of mitigation only. *Rule 3-7.2(i)(3), Rules Regulating The Florida Bar.*

CONCLUSION

To avoid Bar Grievances, and no one can avoid the meritless “I want my money back,” I went to jail” grievances: read and understand the rules, seek advice, talk to and write to clients, and be prepared for court.

It’s really that simple.

AUTHOR



Over 70 percent of Brian Tannebaum's clients are lawyers or law students.

Brian advocates for his lawyer and non-lawyer clients in Criminal and Bar Admission and Disciplinary cases. He is a former Vice-chair of a Florida Bar Grievance Committee and currently serves as President of the Florida Association of Bar Defense Lawyers. He will be installed as President of the Florida Association of Criminal Defense Lawyers in June of 2010, and is a member of both the Florida Bar's Criminal Law Section Executive Council and Criminal Procedure Rules Committee.

Brian obtained his law degree from Stetson University College of Law and is a Martindale-Hubbell AV rated lawyer listed in the Bar Register of Pre-Eminent Lawyers.¹

His commentary on Florida Bar Admission and Disciplinary issues can be found at www.mylawlicense.com.

¹ An AV rating certifies that a lawyer's peers rank him or her at the highest level of professional excellence. A lawyer must be admitted to the bar for 10 years or more to receive an AV rating.