When Disciplinary Comes Calling

By Briggs Cheney

I must preface my comments in this outline with the caveat that what I am sharing here are my experiences from representing many lawyers in the disciplinary process. These are my observations and assumptions only.

A. The stated policy of lawyer discipline is to protect the public and not to punish the lawyer. Our Supreme Court has "repeatedly stressed that the purpose of attorney discipline is not to punish attorneys but to protect the public." *In the Matter of D. Diego Zamora, Esq.*, 130 N.M. 161, 164, 21 P.3d 30 (2001). This philosophy has been followed by the Disciplinary Counsel's Office. I can say without exception or hesitation that the Disciplinary Counsel I have dealt with over the years have had that as their goal. They have always been true to their mission of protecting the public, but they have done everything within their power not to punish a lawyer. When punishment has been the result, it has generally been because the subject lawyer has brought it on him/herself.

B. The anatomy of a disciplinary complaint. Purposely oversimplifying the disciplinary process, I would suggest the following stages:

- **Screening phase** – On receipt of a disciplinary complaint, the Disciplinary Counsel's Office will send the lawyer a letter – *the letter from Virginia Ferrara*. The letter is a form letter which I understand is sent in every instance. The thrust of the letter is simple and to the point: we have received the attached complaint, please respond on or before "x" date.

- **Investigative phase** – It is not uncommon on receipt of the lawyer's response to initial letter for disciplinary counsel to request additional information and documentation.

- **Formal phase/Specification of Charges** – If the complaint is found to have merit, Disciplinary Counsel's Office is required to file Specification of Charges. Specification of Charges are not unlike a complaint; they must be answered. Failure to file a response results in the charges being deemed admitted. When this occurs, the only remaining issues for future consideration are matters *in aggravation and mitigation* and *discipline* as provided for under the Code of Professional Responsibility.

- **Hearing Committee** – A hearing will first be held before a committee comprised generally of two attorneys and one lay individual. The hearings, while informal, are very important and are hearings of record. "Important" because this is the only evidentiary hearing a respondent lawyer will have in the disciplinary process. Following evidentiary presentations by the Disciplinary Counsel's Office and the subject lawyer, the Hearing Committee will issue Findings of Fact, Conclusions of Law and Recommendations.

- **Hearing Panel** – The Hearing Committee's findings and conclusions will be referred to a Hearing Panel. The Hearing Panel is comprised of three members of the Disciplinary Board. No additional evidence may be presented to the Hearing Panel. I hesitate to describe the Hearing Panel phase as an appeal stage, but it resembles that process. The Hearing Panel will hear argument from disciplinary counsel and the subject lawyer. The Hearing Panel can accept the findings, conclusions and recommendations of the Hearing Committee or they can reject them. That does happen on occasion.

- **Approval by the entire Disciplinary Board** – As I understand the process, the Hearing Panel's decision is then referred to the entire Disciplinary Board for its approval before submission to the Supreme Court.

- **Supreme Court approval** – The Supreme Court retains ultimate jurisdiction over the disciplinary process and all recommendations flowing through the disciplinary process are ultimately submitted to the Supreme Court for its approval. Depending on the circumstances, this may involve a hearing before the court where the Disciplinary Counsel's Office and the lawyer (and his lawyer) will appear. At the risk of simplifying too much, generally hearings occur when the respondent lawyer requests a hearing and seeks to challenge the findings, conclusions and recommendations of the Hearing Committee and Hearing Panel.

C. The *short version* of the disciplinary process. I will not hazard a guess at a percentage, but I feel comfortable repeating what I have heard disciplinary counsel report at other CLE presentations and that is that the large majority of disciplinary complaints filed are rejected in what I have called the initial screening and investigatory phases above. This occurs, generally, through the good faith participation of the subject lawyer.

I have also heard it reported by disciplinary counsel that a surprising number of disciplinary complaints which would not have ever gone beyond the initial stages have proceed further because the respondent lawyer has ignored the initial letter from the Disciplinary Counsel's Office or because the respondent lawyer refused to cooperate fully and honestly.

Those complaints which are not dismissed or rejected in the initial phases are often handled through a Consent to Discipline. A Consent to Discipline is nothing more than an agreement entered into by and between the Disciplinary Counsel's Office and the respondent lawyer. The Consent to Discipline is a negotiated agreement and reflects the goals of the disciplinary process: **to protect the public and not for the purpose of punishing the lawyer**.

If a Consent to Discipline is agreed to in principle, Specification of Charges must be filed and a formal Consent to Discipline is entered into. The Consent to Discipline is then submitted to a Hearing Committee for its approval and subsequent approval by the Hearing Panel. The Consent to Discipline is ultimately submitted to the Supreme Court for its final approval.

D. Random thoughts and recommendations on the disciplinary process. To the extent I can offer any wisdom from my years of representing lawyers in the disciplinary system, the following would be some of that wisdom:

- The disciplinary counsel are truly decent folks. I cannot think of an occasion where I have represented a lawyer in the disciplinary process where the lawyer was not treated with absolute courtesy and fairness.

- If you receive a disciplinary complaint and the letter from Virginia Ferrara, do not ignore it. Although it sounds incredible, a very high percentage of lawyers ignore the letter or, if they do not ignore it, their response to Ms. Ferrara is less than forthcoming and overly self-serving.

- When a disciplinary complaint is not dismissed in the screening or investigative phases, in most instances the respondent lawyer has engaged in conduct which violates the Code of Professional Responsibility.

- It is very difficult for a lawyer to represent him/herself in the disciplinary process. REMEMBER, if you have professional liability insurance, you probably have disciplinary coverage which generally will provide up to $2,500 reimbursement to have a lawyer represent you in the process.

- I do not view the disciplinary process as an *advocacy process*. I make very clear to lawyers I represent in the disciplinary system that my goal is not to assist them *to skate* on a violation of the Code of Professional Responsibility. I view it almost as a conflict of interest; a conflict which I try to make clear to the client at the outset of any representation. I feel an obligation to the profession and will not be involved in assisting a lawyer who has violated the Code or who represents a danger to the public our profession serves continue to practice law without addressing the problem. And that is my goal in every case where I represent a lawyer in the discipline system – to identify why the lawyer violated the Code of Professional Responsibility and help the lawyer address that problem. With the assistance of disciplinary counsel, I then attempt to negotiate a Consent to Discipline which serves as a tool to *help* the respondent lawyer and allows him/her to continue to practice law, uninterrupted.

- Do not be afraid of the disciplinary system – it doesn't bite.