

# Dealing With Bar Complaints

by Kathryn R. Montgomery, Assistant Bar Counsel

IF YOU'VE EVER RECEIVED an envelope from the Virginia State Bar stamped "Personal & Confidential" in red ink, you know the feeling: a mix of disbelief, fear, and anger. Here you were, minding your own business, when suddenly you find yourself the subject of a bar complaint. You feel like you've been punched in the stomach, but you know a response is required. Before taking action, however, it may be helpful to understand how the bar complaint arrived on your desk.

All complaints received by the Virginia State Bar are analyzed by intake counsel. The standard for review is "does the conduct questioned or alleged present an issue addressed by the Rules of Professional Conduct?" For example, a bar complaint that asserts a lawyer was rude usually would not present an issue under the Rules, but an allegation that a lawyer failed to return a client's telephone calls would implicate Rule 1.4, which governs client communication. If the complaint meets the standard of review, a copy is mailed to the subject lawyer (respondent) for a response within twenty-one days. If the complaint is facially insufficient, the bar takes no action other than to advise the complainant of its decision. The subject lawyer is not notified. Internally, the bar refers to these as "no action taken" cases. Intake counsel estimates that half of the complaints received by the VSB become "no action taken" files.

So what should an attorney do upon receipt of a bar complaint?

## **Respond promptly.**

Perhaps the worst response to a bar complaint is no response. While silence may be golden in criminal matters, it can fail miserably in bar proceedings. Bar counsel has the authority to dismiss complaints after receiving the respondent's answer, but cannot do so if the lawyer fails to give his or her side of the story. Therefore, in the absence of a response, bar counsel almost always refers the complaint to a bar investigator to gather documents and interview wit-

nesses, which usually include the complainant and respondent. Another reason to answer is that, unless criminal activity is involved, there is no Fifth Amendment right to silence in disciplinary matters. Finally, a failure to respond could be deemed to be a violation of Rule 8.1 of the Rules of Professional Conduct, which provides that a lawyer shall not "fail to respond to a lawful demand for information from an admissions or disciplinary authority."

## **Consider whether to retain counsel.**

Many lawyers who receive a bar complaint retain or at least consult with another lawyer to prepare the response. Even the U. S. Supreme Court has quoted the adage "a lawyer who represents himself has a fool for a client." *Kay v. Ehrler*, 499 U.S. 432, 438 (1991). When a lawyer is too close to a legal issue, as he or she may be when accused of ethical misconduct, good judgment and common sense are often cast aside. Hiring counsel, or at least having a colleague review the response, may help ensure that the lawyer's license does not suffer the same fate.

That being said, many respondent attorneys do not retain counsel and submit well-prepared and persuasive answers. All effective responses have one thing in common: they objectively and thoroughly explain the lawyer's side of the story and, when appropriate, attach supporting documentary evidence.

## **When appropriate, attach supporting documents.**

The more information a lawyer submits to support his side of the story, the more likely the bar complaint can be dismissed without further investigation. For example, if a complainant alleges that her lawyer failed to communicate, a response that includes copies of the lawyer's letters or e-mails to the complainant may be sufficient evidence upon which bar counsel may dismiss the complaint without further investigation.

## **Respect client confidences**

Under Rule 1.6, which governs client confidences, a lawyer may reveal confidential information to respond to allegations contained in a bar complaint. The lawyer must be careful to reveal only what is reasonably necessary to defend himself, and must avoid disclosing unrelated client confidences. In cases where the complaint was filed by the client, the respondent lawyer may be tempted to reveal embarrassing information about the client or to make intemperate remarks. Resist the urge.

## **Do not bill the client for responding to the bar complaint.**

Another urge a lawyer may have upon receipt of a bar complaint is to bill the client for responding, especially if the client is the complainant. Billing for time spent answering a bar complaint, however, could be construed as a violation of Rule 1.5, which governs fees. While the Supreme Court of Virginia has not spoken on the issue, a few years ago the Oregon Supreme Court affirmed a public reprimand imposed upon a lawyer for billing his client \$67.50 for responding to a bar complaint filed by the client. That court found that the legal fee was clearly excessive because it was charged for time spent exclusively representing the lawyer's own interests, not those of the client. *In re Paulson*, 71 P.3d 60 (Or. 2003).

Last year the Virginia State Bar received approximately 4,200 bar complaints. Despite an attorney's efforts to stay on the right side of the ethics rules, at some point in his or her career the lawyer may be on the receiving end of a "Personal and Confidential" envelope from the bar. Should you find yourself in this unpleasant situation, remember to stay calm, consider talking to counsel, file a prompt and thorough response, and maintain a professional demeanor toward the client.

# Fee Dispute Resolution Saves a Lawyer's Time, Money, and Reputation

by Nader M. Hasan

HAS A CLIENT QUESTIONED YOUR FEES after an unfavorable or mediocre result?

As attorneys, there is nothing we fear more than a letter from the Virginia State Bar stating that a client has filed a complaint against us. Regardless of the complaint's validity, the time required to review the file and prepare a detailed response leads to unnecessary stress. The same holds true when it comes to fee disputes with a former client. A sample letter reads:

Dear Virginia State Bar:

I paid my attorney \$750 to represent me on a reckless driving charge. I never actually met with him until my court date. From the moment we met that morning, he recommended I accept a plea agreement. I accepted his advice, and as I waited for my case to be called, I realized that people with the same charge and driving record received the same sentence *without* attorneys. I asked him to see my file and there may have been one or two pages in the folder. I later learned (while paying my fine) that he had three other cases that same day, and all of his clients told me the same thing happened to them. He only worked fifteen to twenty minutes to negotiate a deal I could have negotiated myself. I want my money back.

Sincerely,  
Former client

P.S. My only word-of-mouth advertising for this lawyer is that he's a scam artist.

Early in my career, I was fortunate enough to have a friend and colleague, Timothy R. Hughes, introduce me to the Virginia State Bar Fee Dispute Resolution Program (FDRP). While providing me guidance as a solo practitioner, he impressed upon me the importance of maintaining your credibility by standing behind the services you provide to the public. He gave me a simple paragraph to add to my retainer agreements to help prevent letters such the example above. The agreement clause reads (with minimal modification):

The last thing our firm wants is to have a dispute with our clients regarding our representation, our fees, or any other matter. Further, we do not want to create litigation in court over fees associated with legal representation. Our firm agrees that any fee disputes will be arbitrated through the Virginia State Bar Fee Dispute Resolution Program. More information regarding this program is available at <http://www.vsb.org/site/public/fee-dispute-resolution-program/>. If litigation or arbitration is required to enforce this agreement, and it is not through the Virginia State Bar Fee Dispute Resolution Program, then the prevailing party will be entitled to their attorney's fees and costs. The laws of the Commonwealth of Virginia will apply in connection with this agreement.

When reviewing this paragraph with my client, it provides me with an additional opportunity to establish trust in my firm, as well as my credibility as an attorney. I explain to my client that

the VSB licenses me to practice law and that I am willing to accept the opportunity to defend the reasonableness of my fees before VSB's Fee Dispute Resolution Program. I further explain that a panel of attorney and non-attorney arbitrators makes the decision and that it only costs \$20 to initiate the hearing process.

Neither the client nor the lawyer needs to retain counsel to participate.

I am surprised to learn how few of my colleagues know this program exists and the benefits it provides to the firm. The program informs the client that it cannot hear their dispute unless it is purely monetary, and that there is no existing claim of an ethical violation. Their signature agreeing to this is required to proceed with the FDRP.

Clients will typically agree to this because of time. If they do not agree, then they are left with the option of pursuing any ethical or malpractice claim they may have. The FDRP can provide a hearing sixty to ninety days after receiving the petition.

The benefits for the attorney are legitimacy, credibility, an alternative to an ethical violation claim, less expense, and expeditious resolution. Why not use it? It works, and the legitimacy of your firm and our profession are bolstered.