

Passion^{with} Respect

2019 KBA Annual Convention



6.12-14.2019
Galt House Hotel
Louisville

UNDER THE PUBLIC DISCIPLINE RADAR: NON-PUBLIC LAWYER DISCIPLINE

CLE Credit: 1.0 Ethics
Sponsor: KBA Office of Bar Counsel
Wednesday, June 12, 2019
2:25 – 3:25 p.m.
Combs-Chandler
Galt House Hotel
Louisville, Kentucky

A NOTE CONCERNING THE PROGRAM MATERIALS

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Kentucky Bar Association

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THE PRESENTERS

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JANE HERRICK was named the Kentucky Bar Association's Chief Bar Counsel in November 2017. Ms. Herrick has worked for the Kentucky Bar Association for 22 years. Prior to her work at the KBA, she was a law clerk for Fayette Circuit Judge James E. Keller and was an associate for Brock, Brock, and Bagby in Lexington. An honors graduate of Centre College and the University of Kentucky College of Law, she was a staff member of the *Kentucky Law Journal*. Her works on attorney ethics have been published in a variety of publications. Ms. Herrick is a member of the American Bar Association, the National Organization of Bar Counsel (NOBC), and the National Client Protection Organization (NCPO). In 2017-2018, Ms. Herrick served as the secretary for the NCPO.



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PETER L. OSTERMILLER has been in the private practice of law in Louisville, Kentucky, since 1980. He is a sole practitioner concentrating in legal ethics and professional responsibility matters. He represents attorneys in disciplinary and reinstatement proceedings, judges in judicial ethics matters, and bar exam applicants. He has also represented parties in attorney's fee dispute proceedings, attorneys in legal proceedings in which sanctions have been sought against the attorney, represented parties in attorney disqualification proceedings, and counseled lawyers and law firms in their respective rights, responsibilities and duties to other attorneys and their clients. Mr. Ostermiller has also served as an expert witness in legal ethics/legal malpractice matters. He is a member of the Kentucky Bar Association, Louisville Bar Association, and Association of Professional Responsibility Lawyers. He served on the Kentucky Bar Association's Ethics 2000 Committee which proposed changes to the Rules of Professional Conduct to the KBA, which resulted in the July 2009 revisions to the Ethics Rules. Mr. Ostermiller is AV rated through Martindale-Hubbell.

I. ATTORNEY DISCIPLINE PROCESS GENERALLY

A. Background

1. Attorneys are a self-regulated profession, (which is rare).
2. Kentucky Constitution, [Section 116](#), gives the Kentucky Supreme Court exclusive authority to "govern admission to the bar and the discipline of members of the bar."
3. Kentucky Supreme Court Adopted Rules.
 - a. Created the Kentucky Bar Association ([SCR 3.025](#)).
 - b. Kentucky Rules of Professional Conduct ("Ethics Rules") ([SCR 3.130 to 3.130\(8.5\)](#)).
 - c. Attorney Advertising Rules are located within Ethics Rules in [SCR 3.130, Section 7](#).
 - d. Procedures and processes of enforcement, plus reinstatement and/or restoration to practice ([SCR 3.140 to 3.530](#)).
 - e. CLE, arbitration regarding negligence, fees, and attorney disputes, Client Security Fund claims, IOLTA, and KYLAP ([SCR 3.600 to 3.995](#)).

B. Nature of Proceedings

1. "...[I]nquisitorial, but civil in nature, not criminal or even quasi-criminal." *KBA v. Signer*, 558 S.W.2d 582 (Ky. 1977).
2. Primarily complaint driven process although some inquiries initiated *sua sponte* by the Office of Bar Counsel based on information provided other than by a Bar Complaint.
3. Alternative sources of information could be media coverage, Court Opinions, informal reports of misconduct, etc.

II. OVERVIEW OF DISCIPLINE PROCESS, INFORMAL AND FORMAL

A. Informal Discipline Process

1. All attorney disciplinary proceedings begin as informal matters.

2. Process may begin from different sources.
3. Most disciplinary cases resolved at informal stage.
4. Informal proceedings before Inquiry Commission.
5. If not considered appropriate for informal resolution, case proceeds to formal stage.

B. Formal Discipline Process

1. Initiated by return of Charge by Inquiry Commission.
2. Consensual resolution process available.
3. If not resolved by consensual resolution, resolved by contested proceedings.
4. Trial Commissioner conducts evidentiary hearing and makes advisory recommendation.
5. Appeal to Board of Governors.
6. Supreme Court makes final decision.

III. INFORMAL DISCIPLINE PROCESS

A. Source of Disciplinary Inquiry

No standing requirement, and disciplinary inquiry may arise from multiple sources including:

1. Client or former client filing Bar Complaint.
2. Opposing party filing Bar Complaint.
3. Friends or family of client or former client or other participant in legal process, or any third party, filing Bar Complaint.
4. Another attorney either in compliance with reporting Rule [SCR 3.130-8.3](#) or by Bar Complaint.
5. Judge reporting attorney pursuant to duty under Judicial Code.
6. *Sua sponte* investigation by Inquiry Commission if information from any source comes to its attention that attorney may have engaged in unprofessional conduct.

B. Intake

1. Initial review by Office of Bar Counsel of all Bar Complaints.

- If Complaint does not state an ethics violation and not suitable for alternative disposition, Office of Bar Counsel may decline, without investigation, to consider Bar Complaint. ([SCR 3.160\(3\)\(E\)](#)).
2. Office of Bar Counsel, in conjunction with Inquiry Commission, may initiate *sua sponte* disciplinary inquiry investigation if information from any source indicates attorney may have engaged in unprofessional conduct.
 3. If Inquiry Commission believes, following investigation, there is sufficient evidence to file a Complaint, Inquiry Commission will file an Inquiry Commission Complaint. [SCR 3.160\(2\)](#).
- C. Response from Attorney
1. Attorney will be served with copy of the disciplinary inquiry, (Bar Complaint, Inquiry Commission Complaint, or Investigative File letter), and requested to respond.
 2. In some instances, attorney may be sent a copy of the Complaint and advised that a written Response does not need to be filed at that time, and that attorney may be contacted by the Office of Bar Counsel.
 - Typically, when Office of Bar Counsel does not necessarily believe a Response is necessary, but Office of Bar Counsel may have questions concerning statements made in the Bar Complaint.
- D. Complaints: Verified Bar Complaint of IC Complaint ([SCR 3.160](#))
1. Complaint is mailed to Respondent (signed certified mail, sheriff, or constructive service on Executive Director ([SCR 3.160](#))).
 2. Written Response required within 20 days – no Mailbox Rule.
 3. Responses to Bar Complaints are sent to complainant for supplemental comments.
 4. Investigation by OBC may include requesting court records, interviewing witnesses, any additional information from respondent, etc.
 5. The file may be placed in abeyance at request of OBC or Respondent attorney ([SCR 3.180\(2\)](#)).
 6. After Investigation, the matter is submitted for review to the Inquiry Commission.

E. Responding to a Bar Complaint

Common characteristics of good Responses:

1. Not treated as an Answer in a civil case, (admit, deny, assert affirmative defenses).
2. Addresses all factual matters raised in the Bar Complaint.
3. Objective document.
4. No overt personal attacks on the person who filed the Bar Complaint.
5. Reflects an understanding and application of the Rules of Professional Conduct.
6. Exhibits and Affidavits if appropriate.
7. Place the events in proper factual context of the overall legal representation.

F. Following Filing of Response or Time Has Run for Filing Response

Options available to Inquiry Commission:

1. Issue Private Admonition, with or without conditions, if conduct of attorney does not warrant greater degree of discipline. ([SCR 3.185](#))
2. Private Admonition served on attorney who has 20 days from Admonition to reject the Private Admonition.
3. If Private Admonition rejected, Charge is issued, thereby initiating formal disciplinary proceeding.

G. Alternative Options Available to Inquiry Commission under Informal Admonition Procedure, [SCR 3.185\(2\)](#)

1. Inquiry Commission may issue warning letter or conditional dismissal letter including, but not limited to, conditions such as:
 - a. KYLAP Referral.
 - b. Attendance at remedial ethics program or related classes directed by Office of Bar Counsel, typically Ethics and Professionalism Enhancement Program (EPEP).
 - c. Fee Arbitration referral under [SCR 3.810](#).
2. Attorney who receives warning letter, within 30 days from date of letter, may request reconsideration by Inquiry Commission.

- H. Alternative Disposition By Inquiry Commission [SCR 3.160\(3\)\(A\)](#)
1. Office of Bar Counsel, under the direction of the Inquiry Commission and its Chair, may determine if case is appropriate for alternative disposition.
 2. Alternative disposition may include, but not limited to:
 - a. Informal Resolution.
 - b. Fee Arbitration Referral, [SCR 3.180](#).
 - c. Legal Negligence Arbitration [SCR 3.800](#).
 - d. Legal or Management Education Programs.
 - e. Remedial Ethics Education Programs, (typically EPEP).
 - f. KYLAP Referral under [SCR 3.970\(1\)\(c\)](#).
 - g. Warning Letter.
- I. Cases Not Suitable for Alternative Disposition, [SCR 3.160\(3\)\(B\)](#)
1. Disciplinary allegation concerns serious misconduct for which sanction would more likely result in suspension, *i.e.*, public discipline.
 2. Some ethics violations providing for Private or Public Reprimand may not be eligible for alternative disposition.
- J. Consensual Discipline [SCR 3.480](#)
1. At informal stage or formal stage of disciplinary process, disciplinary case may be resolved by consensual resolution.
 2. Requires agreement by the Office of Bar Counsel and the Respondent attorney.
 3. Consensual discipline may occur at the informal stage in the proceedings, *i.e.*, investigative or Bar Complaint stage.
 4. May occur at the formal stage, following the return of a Charge, before the commencement of the evidentiary hearing before a Trial Commissioner under [SCR 3.240](#).
 5. Office of Bar Counsel and Respondent attorney must agree on proposed resolution.
 6. Proposed resolution must be approved by the Inquiry Commission Chair and the Past President of the KBA.

7. If agreed by all, Verified Motion from Respondent's attorney, Response from the Office of Bar Counsel, and the file are submitted to the Supreme Court for consideration of the proposed consensual resolution.
8. If Supreme Court denies Motion, depending upon directions of the Court, the parties may either attempt another consensual resolution, or the case will proceed through the Trial Commissioner/ Board of Governors/Supreme Court process.

K. Inquiry Commission

1. Consists of six KBA members and three lay members, which sit in panels of three, two lawyers and one lay member. All are appointed by the Kentucky Supreme Court ([SCR 3.140](#)).
2. Inquiry Commission may issue subpoenas for evidence ([SCR 3.180\(3\)](#)).

L. Types of Attorneys' Conduct Which May Make Private Resolution Appropriate

1. Every disciplinary case is different and fact-driven.
2. Whether an attorney has a prior disciplinary record may be a mitigating or aggravating circumstance based on the existence or non-existence of such a record.

In the event the attorney has a prior disciplinary record, relevant considerations as to whether that record represents an aggravating circumstance may be dependent on a number of factors, including:

- a. Whether the conduct and the applicable disciplinary rules in the present proceeding are similar to the facts and applicable rules in the earlier proceeding(s).
 - b. Whether the prior disciplinary record is recent or remote in time.
3. The following is a non-exclusive list of the types of conduct which would likely support a private resolution.
 - a. Attorney negligent in dealing with client property, causing little or no actual or potential injury to client.
 - b. Lawyer negligently reveals confidential information not lawfully permitted to be disclosed with disclosure causing little or no actual or potential injury to client.

- c. Attorney engages in isolated instance in negligently determining no conflict of interest, causing little or no actual or potential injury to a client.
- d. Attorney is negligent in not diligently representing client, causing little or no actual or potential injury to a client.
- e. Attorney engages in isolated instance of negligently failing to disclose accurate or complete information to client causing little or no actual or potential injury to the client.
- f. Attorney in official or government position engages in isolated instance of negligence in not following proper procedure or rules, causing little or no actual or potential injury to a party or to the legal process generally.
- g. Attorney engages in isolated instance of neglect in determining whether certain statements or documents are false or in failing to disclose material information upon learning of information's falsity, causing little or no actual or potential injury to a party or to the legal process generally.
- h. Attorney engages in isolated instance of negligence in complying with a court Order or rule, causing little or no actual or potential injury to a party or to the legal proceedings generally.
- i. Attorney engages in isolated instance of negligently engaging in improper communications with an individual in the legal system, causing little or no actual or potential injury to a party or to the legal proceedings generally.
- j. Attorney engages in isolated instance of negligence in determining whether his or her conduct violates a duty owed as a professional, causing little or no actual or potential injury to a client, the public, or the legal system generally.

IV. FORMAL DISCIPLINE PROCESS

- A. Degrees of Discipline Available at Formal Stage of a Disciplinary Proceeding, [SCR 3.380](#)
 - 1. Private Reprimand.
 - 2. Public Reprimand.
 - 3. Suspension, with or without conditions, and with or without any of the period of suspension probated subject to conditions.

- a. Suspension of 61 days or more: Attorney must notify active clients and all Courts in which matters are pending of suspension.
 - b. Suspensions of 180 days or less: Attorney subject to automatic reinstatement pursuant to [SCR 3.510](#).
 - c. Suspension of 181 days or more: Attorney must file for Reinstatement, file Application and proceed through the Kentucky Office of Bar Admissions' Character and Fitness Committee, KBA Board of Governors, and the Court.
 - d. Suspension of five years or less: Attorney does not take a limited Bar Examination for Reinstatement.
 - e. Suspension of five years or more: Attorney must take a limited Bar Examination.
4. Permanent Disbarment.
- B. Charges ([SCR 3.200](#))
- 1. Charge is mailed to Respondent (signed certified mail, sheriff, or Executive Director ([SCR 3.035](#))).
 - 2. Motion to Reconsider/Dismiss Charge to Inquiry Commission any time before case submitted to Trial Commissioner ([SCR 3.285](#)).
 - 3. Written Answer required within 20 days – no Mailbox Rule.
 - 4. If no Answer is file, case continues as a default case; proceeds to Board of Governors ([SCR 3.210\(1\)](#)); Board then makes recommendation to Supreme Court ([SCR 3.370\(5\)\(b\)](#)).
 - 5. If the Answer admits the alleged misconduct, the matter is deemed a “law only” case and no evidentiary hearing before a Trial Commissioner held. Case proceeds to Board ([SCR 3.210\(2\)](#)), Board only considers sanction, then makes recommendation to Supreme Court ([SCR 3.370\(5\)\(b\)](#)).
 - 6. Otherwise, if an Answer is filed, and case is not “law only,” a Trial Commissioner is appointed and the case proceeds either as a contested proceeding or resolved by a consensual resolution.
- C. Trial Commissioner Hearings
- 1. The Chief Justice appoints Trial Commissioners (TC) from the 15 Member Trial Commission ([SCR 3.225](#)).
 - 2. Parties notified of appointment ([SCR 3.240](#)).

3. Challenges to TC appointment must be within 20 days ([SCR 3.240](#)).
4. Pretrial conference permitted.
5. Pleadings are filed with Disciplinary Clerk at the Kentucky Bar Center – no Mailbox Rule.
6. Right to counsel, compel witnesses, introduce evidence, submit briefs, etc. ([SCR 3.300](#)).
7. Subpoena witnesses, prehearing discovery, burden of proof (preponderance), briefs ([SCR 3.330](#)).
8. Introduction and admissibility of evidence/evidence taken in other proceedings ([SCR 3.340](#)).
9. Trial Commissioner has 30 days to file Report, with 60 day extension available ([SCR 3.360](#)).
10. Report includes Findings of Fact, Conclusions of Law, and any recommended sanction ([SCR 3.360](#)).
11. Motions to Amend to be filed within 10 days ([SCR 3.360\(3\)](#)).
12. Either party may Appeal to the Board of Governors ([SCR 3.360\(4\)](#)).
13. If neither party appeals the Trial Commissioner's Report, the matter is submitted to the Supreme Court ([SCR 3.360\(4\)](#)).

D. Board of Governors Proceedings

1. Board functions, selection, duties and powers ([SCR 3.070 to 3.100](#)).
2. There are four non-lawyer appointments on the Board of Governors for disciplinary matters ([SCR 3.375](#)).
3. Notice of Appeal shall be filed within 30 days of Trial Commissioner Final Report ([SCR 3.365](#)).
4. Appellant's Brief due to Board 30 days after Notice of Appeal filed ([SCR 3.370\(1\)](#)).
5. Appellee's Brief due to Board 15 days after Appellant's Brief filed.
6. Typically have Oral Arguments before the Board ([SCR 3.370\(1\)](#)).
7. Board of Governors can review *de novo* or adopt Trial Commissioner's Report ([SCR 3.370\(5\)\(a\)](#)).

8. Board can also remand case to Inquiry Commission or to Trial Commissioner ([SCR 3.370\(5\)\(d\)](#)).
9. Board deliberates, votes, issues written Report within 45 days ([SCR 3.370\(3\)](#)).
10. Board also considers default files (no Answer filed to Charge) and law-only cases ([SCR 3.210](#) & [3.370\(5\)\(b\)](#)).

E. Supreme Court of Kentucky Proceedings

1. Regardless of reports from Trial Commissioner and the Board of Governors, the Court considers *de novo*:
 - a. All negotiated sanction Motions. ([SCR 3.480](#))
 - b. All Trial Commissioner Reports not appealed to the Board. ([SCR 3.360\(4\)](#))
 - c. All Board decisions on default files, law-only cases, and appeals from Trial Commissioner Report. ([SCR 3.370](#))
 - d. A finding of no violation, and recommendation of no sanction, is still reviewed.

NOTE: An attorney discipline matter is not over until there is a closed/dismissed/private admonition issued by the Inquiry Commission, or the Supreme Court renders a final Opinion.

2. Either party may appeal a Board Decision to the Kentucky Supreme Court. ([SCR 3.370\(7\)](#))
3. Notice of Appeal with Brief due 30 days after Board Decision.
4. Response Brief due 30 days after Appellant's Brief is filed.
5. Court can request Briefs from the parties in any matter, even if not contested or appealed. ([SCR 3.370\(8\)](#))
6. Supreme Court will issue a Final Opinion in every matter.

F. Supreme Court Rendition

1. Supreme Court Opinions for Dismissal or Private Reprimands are confidential.
2. Supreme Court Opinions for Public Reprimands or greater are public.

3. The Court may impose conditions upon a Reprimand or Suspension Case ([SCR 3.380\(1\)](#)). Such conditions may include, but are not limited to:
 - a. Restitution of attorneys' fees to client.
 - b. KYLAP evaluation and/or participation.
 - c. Attorney must obtain additional CLE or attend EPEP.
 - d. No new Charges within a stated time period.
- G. What Else is There?
1. Reciprocal Discipline ([SCR 3.435](#)).
 2. Temporary Suspension by Motion of Inquiry Commission ([SCR 3.165](#)).
 - a. Stealing money.
 - b. Substantial threat of harm.
 - c. Commit a crime regarding moral fitness to practice.
 - d. Mentally disabled.
 - e. Addicted to intoxicants or drugs.
 3. Indefinite Suspension if attorney in default ([SCR 3.380\(2\)](#)).
 4. Automatic suspension for felonies ([SCR 3.166](#)).
 5. Restoration to Practice following Administrative Suspension for failure to pay bar dues and/or failure to maintain CLE ([SCR 3.500](#)).

Overview of Disciplinary Process



