

Asleep At The Wheel

Florida Bar Shows No Signs of Changing Despite Widespread Consumer Frustration

By Suzanne M. Mishkin*

The Florida Bar is at it again. Despite receiving a new study documenting a massive crisis in the state's attorney discipline system, the bar is back to business as usual—patting itself on the back, conducting meetings and bogging itself down in endless bureaucracy. Instead of taking long-overdue measures to correct deficiencies in a system that's been repeatedly criticized for failing Floridian legal consumers, the bar is busying itself with publicizing self-serving press releases that praise its own "relentlessness [in] seeking input from all possible sources."

While the bar engages in its ongoing parade of self-promotion, thousands of local citizens who depend on the bar to hold unscrupulous, negligent and incompetent attorneys accountable, find themselves without any protection or recourse. The bar's recent survey reveals that while attorneys, grievance committee members and referees are perfectly satisfied with Florida's system of attorney regulation, the bar neglects, frustrates and discourages the vast majority Florida citizens who file an ethics complaint against an attorney each year.

Unfortunately, these findings come as no surprise. In 2002, we released a Lawyer Discipline Report Card, which revealed that Florida's system is plagued by self-regulation, laxity, and biased procedures. In reviewing the American Bar Association's latest survey, we found that the Florida Bar imposes sanctions in less than four percent of investigated cases. When the bar does render discipline, it usually takes the form of a simple slap on the wrist.

Since our report card delivered Florida a disappointing C+ two years ago, little appears to have changed. Just in the last two months, many Florida attorneys walked away with nothing more than reprimands for fraudulently handling client trust accounts, incompetently representing clients, ignoring bar counsel's inquiries, and deceiving clients through false claims in advertisements.

When the Florida Bar imposes minimal or no sanctions in case after case of appalling misconduct, is it any wonder that the bar's survey found that 70 percent of attorneys express satisfaction with the bar, while a whopping 74 percent of surveyed complainants are dissatisfied with Florida's system of discipline?

Striking disparities between the perceptions of the system held by attorneys and those held by consumers pervade the survey results. Although 87 percent of surveyed attorneys

approve of disciplinary decision outcomes, only 14 percent of complainants believe the outcome reached by the board was appropriate. Eighty-two percent of complainants told the bar that the punishment imposed was “not tough enough.” Seventy percent of complainants did not even understand the outcomes in their cases, and nearly as many found the quality of the written opinion unsatisfactory.

When complainants have questions about the grievance process, the responses they receive from bar counsel and grievance committee members are inadequate. Fifty-eight percent of complainants told the bar that they were not pleased with the explanation they received, saying the information was vague, the person with whom they spoke demonstrated a lack of interest or displayed an unprofessional attitude or their voice mail message was never returned.

Perhaps most alarming, 77 percent of complainants view Florida’s disciplinary process to be unfair, saying that proceedings seemed biased in favor of attorneys, the bar failed to communicate with them throughout the process and investigations were not sufficiently thorough; naturally, 81 percent of respondent attorneys disagree.

In a self-regulated system that is often characterized as “of the lawyers, by the lawyers and for the lawyers,” this difference of opinion is understandable but hardly acceptable. An attorney discipline system that caters to lawyers at the expense of consumer protection is one that fails to fulfill its core mission. To transform Florida’s system into one that complainants respect and trust, we believe four fundamental reforms are needed.

First, lawyer discipline cases should be heard by publicly controlled disciplinary panels where non-lawyers have at least a majority voice. Current rules only allow a token lay person to serve on a grievance committee and never permit non-lawyers to serve as the referees who decide cases. While we trust that most decision-makers attempt to be objective, the fact that the system is controlled by lawyers leads to, at a minimum, the appearance of impropriety. The Florida Bar can rely on lawyer experts to help grievance committees understand technical issues, but attorneys should stay out of the decision-making process.

Second, the discipline system must come further out into the open. Florida abolished its gag rule in 1990, yet the bar’s Web site continues to advise grievants: “Do not talk to anyone about your Florida Bar inquiry/complaint—except Florida Bar staff, investigators, grievance committee members or your new lawyer—until the case is closed.” Warnings such as this one, which is at odds with Florida law and intimidates citizens from exercising their constitutional right to free speech, must discontinue. In addition, hearings should be open to the public. A complainant’s right to attend should be absolute—not left to the discretion of a referee. And complaints against lawyers and sanctions should be a matter of public record, available to every citizen.

Third, disciplinary policies should more closely approximate the rules governing the civil justice system. To prevail, bar counsel must satisfy the difficult burden of demonstrating a lawyer's misconduct through "clear and convincing" evidence. However, if the preponderance of the evidence demonstrates that an attorney has violated the rules of professional conduct, the attorney should be sanctioned. In addition, the complainant should have the right to appeal a decision rendered by a grievance committee or a referee.

Finally, the glacial pace of attorney discipline must come to an end. Florida is one of only a few states that refused to provide the ABA with information related to promptness. Despite the bar's concealment, we know that the system's response rate frustrates many Floridians; we hear regularly from citizens who had filed complaints with the bar months earlier and have yet to receive a reply—let alone a decision in the matter. Imposing real deadlines—requiring a preliminary disciplinary hearing within 90 days, for example—would be a giant step toward jettisoning bureaucratic red tape and creating a system that actually brings justice to victims of misconduct.

All who practice law in Florida have a shared interest in creating a system that deliberates openly, investigates promptly and weeds-out unethical or incompetent attorneys who damage the profession's reputation. By finally addressing long-recognized failures in the current disciplinary system, the bar has the opportunity to create a structure that engenders consumer trust and respect, rather than alienation and resentment. After the dramatic results of this survey, can the Commission afford to do less?

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