

EXPUNCTION OF DISMISSED COMPLAINTS

By

Michael J. Hoover, Director
Minnesota Office of Lawyers Professional Responsibility

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During the past year, I have served as treasurer of the National Organization of Bar Counsel. Thus, I have had the opportunity to work both at national and local levels for the adoption of a procedural rule making disciplinary procedures less onerous for the many lawyers who are subjects of dismissed complaints.

In discussing disciplinary matters with Minnesota lawyers, I found that one of the most frequently asked, and most difficult questions to answer, was why files pertaining to dismissed complaints were retained indefinitely. One rationale was that an earlier complaint in isolation might warrant dismissal while later complaints of the same nature would demonstrate the existence of a pattern of conduct which itself warranted disciplinary action.

Previously, I tended to accept this reasoning as dispositive. After several years of administering a system now generating over a thousand complaints per year, I began to have doubts about the wisdom and fairness of retaining permanently dismissed complaint files.

In practice, newly discovered evidence pertaining to old complaints either appears within a relatively short time after the file is closed or it does not appear at all. The pattern rationale is fallacious because several dismissed complaints do not, by definition, prove a pattern of unethical conduct. A disciplinary agency should not attempt to bootstrap itself into a disciplining posture in response to a later complaint by relying upon earlier dismissed files.

Besides my personal doubts about the validity of the principal reasons cited for indefinite retention, I also have become concerned about potential abuses by bar admission agencies, judicial nominating commissions and others receiving reports about the disciplinary records of Minnesota lawyers. Most inquiries are broad-sweeping and require disclosure of all files in our possession. I realize that we cannot control the scope of requests made by outside agencies, but we can possibly control the amount of data available for disclosure in response to those requests.

Finally, there is no inexpensive way to maintain permanently the large numbers of files which have accumulated in the Board's offices after 12 years of operation.

Last year I was asked by NOBC to chair a committee on expunction. The NOBC committee's charge was to work with the American Bar Association's Standing Committee on Professional Discipline to modify the standards on lawyer discipline and disability proceedings to provide for expunction of dismissed complaints. This work was promptly completed and the ABA House of Delegates approved an expunction standard last August in San Francisco.

Earlier this year, the Lawyers Professional Responsibility Board proposed that the Rules on Lawyers Professional Responsibility be amended to provide for expunction of dismissed complaints. On April 14, 1983, the court amended Rule 20, Rules on Lawyers Professional Responsibility, to add a subsection D which provides as follows:

(d) Expunction of Records. The Director shall expunge records relating to dismissed complaints as follows:

- (1) All records or other evidence of the existence of a dismissed complaint shall be destroyed five years after the dismissal, except that the Director shall keep a docket showing the names of each respondent and complainant, the final disposition, and the date all records relating to the matter were expunged.
- (2) Effect of expunction. After a file has been expunged, any Director response to an inquiry requiring a reference to the matter shall state that it was dismissed and that any other record the Director may have had of such matter has been expunged. The respondent may answer any inquiry requiring a reference to an expunged matter by stating that the complaint was dismissed and thereafter expunged.
- (3) Retention of records. Upon application to a Panel by the Director, for good cause shown and with notice to the respondent and opportunity to be heard, records which should otherwise be expunged under this rule may be retained for such additional time not exceeding five years as the Panel deems appropriate. The Director may, for good cause shown and with notice to the respondent and opportunity to be heard, seek a further extension of the period for which retention of the records is authorized whenever a previous application has been granted for the maximum period (five years) permitted hereunder.

There are several important points about this expunction rule:

1. It applies to dismissed complaints only. It does not apply to files in which warnings, admonitions or formal disciplinary actions are taken.
2. The presumption is that files pertaining to dismissed complaints will be destroyed at the end of five years. This presumption can be overcome, but only if the Director convinces a panel at a hearing at which the lawyer is entitled to be heard. In practice, I expect this remedy will be exercised only rarely by the Director. After reviewing approximately 3,600 files eligible for expunction, we are considering asking for retention in only about 40 cases, or about 1 percent.
3. When a file is expunged, all record of it will be destroyed except for the names of the respondent and complainant, the final disposition and the date of expunction. Such minimal information is, in fact, a protection for the respondent to insure that an earlier matter will not be reinvestigated. In addition, it is a protection for the agency which must maintain some minimal record to insure that it can demonstrate that it considered a matter, disposed of it, and later expunged it.
4. Once a file is expunged, a lawyer may answer an inquiry concerning the matter by stating that the complaint was dismissed and thereafter expunged. Similarly, our office will state that

the matter was dismissed and later expunged.

Implementation of the expunction rule has required substantial administrative resources. Now that our backlog of files eligible for expunction has been reviewed, we will be reviewing files on a quarterly basis to either expunge them or petition a panel for retention. Lawyers will, of course, be notified prior to any hearing seeking retention. In the absence of such notice, a lawyer can assume that any dismissed file pertaining to him or her has been expunged five years after dismissal.

Two other related matters merit mention. First, now that expunction has occurred in the Director's office, I will ask that the district ethics committees also abide by the spirit of this new rule. I will be contacting the district ethics committee chairpersons in the near future concerning expunction of their own files. Also, I will be seeking to convince them that in preparing reports on current complaints, information about prior dismissed complaints should not be given weight in determining whether misconduct has occurred in the pending matter.

Second, as mentioned above, I am concerned about the breadth of inquiries made by other bar admission agencies and judicial nominating commissions, and other requestors of disciplinary data. In my opinion, the only information which should be requested is that which pertains to files in which discipline has been imposed. Nevertheless, we are not in the position to control the requests made by these agencies. We do, however, as a matter of policy, include in all reports a disclaimer that in our opinion no inference adverse to a lawyer should be drawn from any file in which there has been a determination that discipline is not warranted.

If there are any questions about this new rule or its application, my office will be happy to answer them.