

By MARTIN COLE

Crunching Numbers

File aging can be a legitimate issue in the operation of the lawyer disciplinary system, but in the past year or so it feels as if there has been more anecdotal concern expressed about how long disciplinary investigations take than ever before. But analysis and decisions based upon anecdotes can be misguided.

There are, of course, reasons to desire that disciplinary investigations do not take an inappropriate length of time to resolve. Complainants and respondent attorneys alike want allegations of misconduct to be resolved promptly, as do other constituencies such as the Court, the bar and, of course, the public. At the same time, everyone wants a thorough investigation that protects a lawyer's due process rights, and a process that ultimately reaches the "correct" result (which, of course, may be a completely opposite result in the mind of each participant) and does not dismiss matters simply out of administrative convenience. Can these sometimes competing goals be reconciled in a reasonable amount of time?¹

There are also valid reasons why some percentage of lawyer disciplinary matters will always take longer than hoped or anticipated. Chief among the factors that can cause a particular file to age are the level of cooperation received from the respondent attorney (and occasionally from

the complainant as well). Cases in which an attorney receives multiple complaints over time can also create delay, especially in light of the fact that the Supreme Court has expressed its preference that lawyer disciplinary matters not be prosecuted serially. Perhaps not surprisingly, these two factors often occur in tandem. Another reason for some matters to age is that the

Director's Office sometimes must wait for some related criminal, civil or other disciplinary matter to be completed.

Times Have Changed

I've been handling lawyer discipline matters for over 31 years, so I think I can speak with some credibility about the days gone by. When I began working at the Office of Lawyers Professional Responsibility (OLPR), there were approximately 700 open investigation files in the system and just over 200 files that were more than one year old. In February 1985, the Lawyers Board Executive Committee approved new targets for case handling to reduce those numbers to 500 open files and 100 year-old cases (although different terms were used for the two categories, my legislative history research indicates that they were being used interchangeably). Those same targets remain in effect over 30 years later.

To some extent, the lawyer discipline system has been defined and judged ever since by its ability to achieve these targets. They have been achieved only irregularly over the years. In recent years, the Lawyers Board has considered amending these targets to reflect the changed realities of the disciplinary system, allowing future Directors and Lawyers Board Chairs² to have more meaningful guidance in evaluating the performance of the system. So far, however, the board has not amended what it recognizes are intended to be aspirational targets.

The total open file number is the easier to gauge. While occasionally achieved, more often the total number of open files in the system at any given time has fluctuated between 550 and 590. No doubt, 500 was a convenient number, and reflected a goal that was less than the number open at the time, yet still reachable. Nevertheless, if the actual number of open files is slightly above the target, this should not cause great concern. In part, this is because what constitutes a file in the lawyer discipline system has been changed administratively since that target was established in 1985. For example, at any moment there are 20-30 complaints in the process of being dismissed without investigation (summarily dismissed).

Should these be considered "open" files when they are already in the process of being closed? They were not so considered in 1985, and thus, not part of the 500 target. Later, once computer databases were "discovered," it became simple to count and include these matters as open files even though they remain "open" for only approximately two weeks from complaint receipt to the issuance of the dismissal. These 20-30 matters are now counted and reported as part of our open file totals.

A lawyer resigning from the bar was almost unheard of in 1985. I truly do not recall there being any in the 1980s. In the past 12 months, 59 lawyers resigned their Minnesota law licenses for a variety of reasons, most often being a lawyer who resides and practices out-of-state and who chooses to no longer pay Minnesota's licensing fee or comply with Minnesota's CLE requirements for a license she no longer uses. These matters are not individually complex but they nevertheless require some time and processing for submission to the Supreme Court. These matters are now counted as open files, when once they were not; same for probation revocation matters (attorneys who fail to comply with the terms of their probation when no one else has complained) and trusteeships over the practice of a deceased, disabled or disappeared lawyer. These tasks were performed as needed in 1985, but were not treated or counted as an open file, as they are now.

Altogether, at any given time there may be up to 50 open files as counted today that were not counted in 1985. Viewed with these facts in mind, the system is functioning within reasonable parameters as intended.

Year-Old Files

As to year-old files, in addition to the level of cooperation and the number of complaints against a particular attorney, there exist other reasons why more complaints are taking over one year to resolve. The manner in which many lawyer discipline cases and disciplinary investigations are handled is very different from when I began working in the Director's Office in 1984. By and large, lawyer discipline cases are litigated



MARTIN COLE
is director of the
Office of Lawyers
Professional Responsibility. An alumnus
of the University of
Minnesota and of the
University of Min-
nesota Law School,
he has served the
lawyer disciplinary
system for 25 years.

more aggressively than when I began in this field. First, it is my perception (and maybe just my unsupported opinion) that District Ethics Committee (DEC) investigations are afforded less respect by attorneys than previously. The DEC's are affiliated with the local bar associations and peopled mostly by bar association lawyers (and non-lawyers, too, of course). Especially in the Twin Cities metro area, many younger lawyers may not perceive these particular individuals as "peers," or as someone with whom they will continue to deal regularly and whose opinion matters to their reputation and practice. Therefore, while the quality of DEC investigations and recommendations remains top notch, current respondents and their counsel seem more inclined to challenge a DEC investigator's findings and recommendation rather than accept their opinion. Thus, fewer complaints in which the DEC's recommend discipline can be promptly resolved.

Few lawyers retained counsel to assist them in responding to complaints when I started. Many of those lawyers who did practice in discipline defense were criminal defense lawyers for whom the civil arena was sometimes foreign and for whom "plea bargaining" was the norm. Today, there is an experienced and competent defense bar who practice almost exclusively in lawyer discipline and related ethics areas. And they know their stuff! Malpractice insurance coverage for ethics complaints also is now reasonably available, combining to ensure that a much higher percentage of respondent attorneys have counsel. This is certainly not a bad thing, but it is a different situation. We all know that the presence of counsel does not guarantee an expedited process. Discovery issues, depositions and motion practice were once quite rare in disciplinary matters, but are now becoming much more commonplace.

There are also some different types of investigations than previously. For example, the trust account overdraft notification program generates both "inquiries" (initial requests for information that clear up most overdrafts) and disciplinary investigations, when that initial inquiry is ignored or establishes sufficient evidence to believe that proper records are not being kept or that money may be missing. Auditing of trust accounts is painstaking and very time consuming for OLPR staff, and, of course, takes time away from processing other matters. The overdraft program did not exist until 1990, after the 500/100 targets were established in 1985. Attorneys in our Office also service the Client Security Board (which also did

not exist in 1985), participate in numerous CLE presentations, oversee many internal departments such as probation, and perform other non-casework activities. Although we have added staff and resources over the years, we may not have completely kept pace.

Finally, the length of time involved in a contested matter even once it enters the litigation track of charges, petition, hearing, briefing and oral argument is greater on average than it was 30 years ago. Several public discipline decisions from the past few years have taken well over a year to complete after the public petition was filed, even without any particular delays, not unlike civil litigation in general (from filing of the petition, to serving and filing an answer, to appointing a referee, conducting any discovery, holding a hearing, submitting proposed findings, receiving a referee recommendation, ordering a transcript, full Supreme Court briefing, oral argument, then under advisement until a Supreme Court opinion is issued will take over nine months with no delays whatsoever). Even when cases settle (by means of a stipulated recommendation for discipline filed with the Court), it may be occurring further along in the litigation process. So, while there remain more year-old files than desired, many should come with an asterisk attached.

Conclusion

As targets, the Lawyers Board's open file and year-old file numbers can be a valuable tool in monitoring and motivating the lawyer discipline system's performance. But goals should remain just that and not take on an independent importance beyond their intended purpose. I am reasonably certain that the next Director will be expected to generally expedite the disciplinary process. That, too, is not an unreasonable goal but cannot be an end unto itself; fairness also requires it be balanced against the system's other important objectives of a thorough and accurate investigation. ▲

Notes

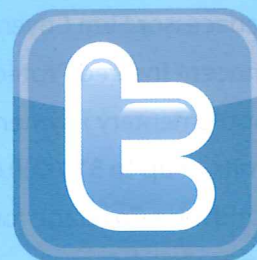
¹ Rule 2, Rules on Lawyers Professional Responsibility, states that "[i]t is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability and unprofessional conduct be promptly investigated and disposed of with fairness and justice . . ."

² I am retiring effective December 31, 2015, and Lawyers Board Chair Judith Rush's six-year term ends on January 31, 2016.

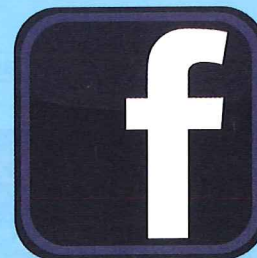
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