

## Got A Mass. Bar Counsel Letter? Keep Calm And Carry On

By **Edward Cheng** (February 14, 2019, 3:33 PM EST)

Monday morning just got worse. You check your mail and, rather than finding a check from a client, you receive a letter directed to you from the Office of Bar Counsel at the Massachusetts Board of Bar Overseers (or your state's equivalent disciplinary body for lawyers). Tempted to ignore it, or the opposite, to lose your cool? Don't. Do not panic and set the letter on fire, and do not ignore it. Instead, take a deep breath and follow the steps below.



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When a client, another attorney or a judge complains about the conduct of an attorney to the Massachusetts BBO, the matter first goes to bar counsel. In bar disciplinary matters, the BBO acts like a court, while bar counsel is the prosecutor. Bar counsel typically begins the disciplinary process with an investigation, and will send a letter to the respondent (you) that explains the nature of the complaint and asks for a response.

While it seems that bar counsel letters only happen to “someone else,” attorney grievance or disciplinary complaints can happen to anyone. So what do you do if you receive the dreaded bar counsel letter?

First, consider that just because bar counsel has made an inquiry, that does not mean you are going to be disciplined. The most recent annual report from Massachusetts' Office of Bar Counsel reports that its intake unit responded to 3,585 inquiries in the fiscal year ending Aug. 31, 2017. Of this, the office opened files for 643 attorneys, and the BBO sanctioned 118 lawyers with 25 private admonitions and 93 instances of public discipline. Admonitions are non-public discipline letters that declare the conduct at issue improper, but do not limit the lawyer's practice.

There is also the possibility of diversion. For some comparatively minor misconduct that otherwise warrants discipline, bar counsel may opt to put the respondent into its diversion program. This program refers the lawyer to a lawyer assistance program and may impose certain conditions on the lawyer's practice, with bar counsel monitoring the lawyer's compliance.

All that being said, in that same fiscal year only 22 lawyers were disbarred by the Massachusetts BBO. In other words, the vast majority of disciplinary complaints raised by clients, opposing parties or other attorneys are meritless and do not result in any discipline at all.

Second, do not ignore bar counsel. Even if it appears that the complaint is wholly meritless, once bar

counsel has started an investigation, you cannot maintain your silence and hope that the problem takes care of itself. You cannot stonewall bar counsel, because lawyers have an ethical obligation to “cooperate with the Bar Counsel or the Board of Bar Overseers” under Mass. R. Prof. C. 8.4(g).

Many lawyers seem to ignore letters from bar counsel in the hope that the problem will go away. It will not. If you fail to cooperate with the investigation, or if you ignore bar counsel’s letters, you will make matters worse. It should also go without saying that you should not — under any circumstances — be rude or nasty to bar counsel.

Note also that, in Massachusetts, bar counsel investigations are confidential and privileged, though the complainant is under no such restriction. Only after a petition for public discipline has been filed do the allegations of the petition become public. This is why cooperating with bar counsel and trying to get the complaint resolved before such a petition is so important — you will want to keep the entire matter as confidential as possible.

Third, consult with counsel or retain counsel to assist you in this matter. The adage that a lawyer who represents himself has a fool for a client holds true in disciplinary matters. The most difficult aspect of handling such a situation yourself is that it is very hard to be objective. While many inquiries can be handled by a straightforward response — a copy of a canceled check evidencing an alleged missing payment, for example — what appears obvious to you may not be as obvious to bar counsel or the disciplinary body.

At the very least, you should talk about the matter with another attorney — even a partner or colleague — to evaluate the seriousness of the complaint against you and to formulate the appropriate response. The default approach should be to retain outside counsel who has experience handling disciplinary matters (preferably someone who has been a disciplinary hearing officer, or a member of the disciplinary body itself), and who can provide you with an objective evaluation of the situation. Experienced counsel will know the best way to make your case persuasively and know about ethics materials, such as Massachusetts Legal Ethics: Substance and Practice.

Fourth, check your legal malpractice policy. For serious matters, the cost of defense can add up quickly, so you should check for coverage under your professional liability policy. Most policies will reimburse you for expenses incurred in defending against a bar disciplinary matter. This coverage is different from malpractice coverage, in that it does not provide for indemnity, and often, you control the defense by retaining and paying counsel that you choose and then seeking reimbursement.

By contrast, under ordinary malpractice coverage, the insurer provides the defense directly, and generally selects defense counsel from a list of attorneys that the insurer uses regularly. Note that some policies will only provide reimbursement if there is no discipline imposed as a result of the proceedings. Of course, your insurer will be familiar with the defense bar in your jurisdiction, and would be able to refer you to competent defense counsel.

Finally, know that often you and your counsel can resolve matters with bar counsel. A clear explanation of the facts and law from your perspective may convince bar counsel to drop the matter or lead to a settlement. Under Massachusetts bar disciplinary rules, bar counsel can decline to act on a complaint in its discretion if the allegations are determined “to be frivolous, to fall outside the Board’s jurisdiction, or to involve conduct that does not warrant further action.”<sup>[1]</sup> If you settle, you may have to admit to wrongdoing, but you will have some control over your own destiny, and the disciplinary process will be shortened.

Receiving a letter from bar counsel can be alarming, but the key to an effective response is to keep calm and carry on — and consult with another attorney.

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[1] SJC Rule 4:01, § 7(1).