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11 Tips for Responding to an Ethics Complaint

By Michael Downey

If you receive a disciplinary complaint from the Office of Chief Disciplinary Counsel (“OCDC”) or the Illinois Attorney Registration & Discipline Commission (“ARDC”), take comfort that you are not alone. OCDC alone reports that it received more than 1900 complaints and opened more than 840 formal investigations in 2013. This is 1 complaint for every 12 Missouri lawyers.

Providing an appropriate response is critical to avoiding more serious consequences, including a formal charge or “information” that might put your law license at risk. Often I defend lawyers who face a formal charge, or a frustrated bar counsel, largely because the lawyer mishandled the initial investigation.

Therefore, I offer you the following eleven suggestions – drawn upon my experience of helping with perhaps 100 responses – for responding to an ethics complaint.

1. Take a breath. When you receive an ethics complaint, it is important to remain calm. Disciplinary counsel generally conducts only a preliminary, jurisdictional review before requesting that a lawyer “respondent” respond to a disciplinary complaint.

Your receipt of an ethics complaint, therefore, is not evidence that disciplinary counsel thinks you did something wrong. Rather, disciplinary counsel has simply received a complaint alleging you may have violated the ethics rules and wants to hear your side of the story.

Also realize that lawyers often receive complaints from difficult clients, or difficult opposing parties or counsel. Great, loving relationships with great, loving people usually do not foment ethics complaints. Often the

complainant was difficult and unreasonable and put himself or herself in a tough situation – and is now blaming you for it.

2. Consider notifying your insurer. You may want to notify your lawyers’ professional liability (LPL or legal malpractice) insurer when you receive a complaint. LPL policies are normally “claims made” policies, which require the insured to tell the insurer upon receiving notice of a potential claim. An ethics complaint may constitute notice.

In addition, some LPL insurance policies help fund counsel to respond to ethics complaints. Some policies provide such funds for the response to the initial complaint, while other policies require the filing of a formal charge before funds are available. When the funds are available, however, it is usually first-dollar coverage. The insured generally does not have to pay a deductible.

3. Consider retaining counsel. Whether you or your insurer is paying, it is generally a good idea to retain counsel to help you with the response. You do not want to be the proverbial fool representing yourself. Further, counsel knowledgeable about the lawyer discipline system can help you evaluate your situation more objectively, fashion an appropriate strategy and response, and help ensure you do not make your situation worse.

Generally I think it is smart to receive help with the initial response. You want to end the matter as soon as possible, before you incur the significant attorney fees, anguish, and damage to your professional reputation and practice that a formal ethics charge may cause.

4. Review the file. Review the file at issue in the complaint and the underlying facts before preparing your response. Do not trust your memory. You need to make sure your response is as accurate as possible. Disciplinary counsel may view errors or inconsistencies as signs you are lying or hiding something.

5. Review the law. You should (re-) familiarize yourself with the legal ethics rules and potentially the substantive legal issues surrounding the complaint. Sometimes lawyers try to defend their conduct by admitting other violations of the Rules of Professional Conduct.

6. Prepare a careful response. Missouri Rule 4-8.1 and Illinois Rule of Professional Conduct 8.1 require a lawyer to respond to disciplinary counsel's request for information. Therefore you must prepare a response. Make sure it is careful, thoughtful, and complete. This is your chance to defend yourself and avoid a costly, time-consuming formal proceeding.

Your initial period to respond to a complaint is often short, likely only two to three weeks. You often can receive a short extension, but you should ensure your response is timely.

7. Provide details. Sometimes lawyers respond dismissively, suggesting they are too busy or important to provide a thorough response. This is a mistake. Your response should address each major issue the complaint raises.

That said, some complaints run dozens of pages. You do not need to write a book in response. I have prepared a response that addressed only key issues, and invited disciplinary to notify us if they wanted additional information. In at least once instance, disciplinary counsel instead closed the investigation.

8. Be succinct. Although you want a thorough response, it is best to be succinct. A longer letter may only increase the chances for you to say something wrong. As the judge I clerked for used to say, "You normally don't get in trouble for something you don't say."

9. Provide proof. You should include key documents that support your response. Often I advise that, if you need to drive 500 miles to obtain a document that will exonerate you, go get it. This is your chance to prove the investigation should be closed without discipline.

That said, you should be judicious with your attachments, because – again – you do not want to give disciplinary counsel more than they need. If you want to prove a matter was quite litigious, for example, you can probably provide the court docket, not the foot of documents listed on the docket.

10. Be professional. Maintain a professional tone. You have been accused of misconduct, and you need to demonstrate that you did not engage in the alleged misconduct. If you stole money from a bad person, you can still be disciplined for stealing the money. Therefore, any attacks on the character and conduct of the complainant should be delivered with restraint – particularly if the complainant is your client or a judge.

11. Be honest. Every aspect of your response should be accurate. If you made a mistake, in fact, often you should admit it. If you are dishonest, you may find that you have provoked OCDC to bring a formal charge – perhaps even for lying to OCDC, a violation of Rule 4-8.1(a). □

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