

Professional Responsibility

By SUSAN HUMISTON

So you've received an ethics complaint. What now?

Receiving mail from the Office of Lawyers Professional Responsibility (OLPR) in an envelope marked "Personal and Confidential" is sure to ruin any lawyer's day. Even lawyers who serve as district ethics committee volunteer investigators hate getting mail from the OLPR, notwithstanding the fact that those envelopes are specifically marked "DEC Materials." Having been on the receiving end of the dreaded "Personal and Confidential" envelope, I know the sinking, pit-in-the-stomach feeling it evokes. On the one hand, this is good. Lawyers should have a healthy respect for the office tasked by the Minnesota Supreme Court with regulating lawyer ethics, and should take it very seriously when someone questions their ethics. On the other hand, the natural emotional reaction of dread or upset that many feel can get in the way of effectively addressing a complaint that, statistically speaking, will more likely than not result in a dismissal. The following are some tips on what to do and what not to do when a complaint is received.

Do not panic

The OLPR receives more than 1,100 complaints annually. Approximately one half of those complaints are not investigated because they do not meet the threshold for investigation.¹ Many people complain because they are unhappy with the results of the representation or do not like the amount charged. These types of complaints generally do not meet the threshold for investigation,

and the first time you receive notice of the complaint is when you receive a document entitled "Determination that Discipline is Not Warranted, Without Investigation." This means the office summarily dismissed the complaint. Open the envelope; you may be surprised to find that no action is needed.

But if you receive a notice of investigation with a copy of the complaint, do not panic. Again, statistically speaking, most cases that are investigated result in a dismissal. On average, only 20 percent of complaints result in some form of discipline, and most discipline is private. Even if your complaint is being investigated, odds are it may be dismissed. This is not because we do not take the rules seriously or tend to give lawyers a lot of breaks, but because in general attorneys take their professional obligations very seriously such that when the matter is reviewed, no rule violation is found.

If you are not surprised to see the complaint or have a feeling that you may have messed up, still do not panic. Most discipline issued is private because it is "isolated and non-serious."² While no one wants to receive any form of discipline, ethical mistakes do happen and it is not the end of the world.

Seek help

Not all, or even most, ethics complaints that are investigated require the retention of counsel. However, because of the personal and sometimes inflammatory nature of the allegations, many lawyers have a difficult time responding professionally and objectively on their own behalf. Consulting with a disinterested peer or trusted friend can bring valuable perspective to the situation and provide insight into the relevant issues. Lawyers hate asking for help but the smart move is not to handle a complaint on your own. Trust me on this one.

Some signs that you may wish to retain counsel instead of relying on a trusted peer or friend: You are too embarrassed to share the complaint with another person; you feel overwhelmed or intimidated by the process; you do not believe you can be objective in your own defense; you find yourself

procrastinating getting through the complaint or gathering the required information; or you are concerned you may have made a mistake and are unsure of the implications. Counsel who are familiar with the rules and the disciplinary process can add a lot of value in these circumstances.

Do not attack the complainant

Personal attacks against the complainant are unprofessional and never helpful. This is difficult advice for lawyers to follow, because complainants often attack the lawyer aggressively, and our naturally competitive, tit-for-tat instincts kick into gear. Do not sink to that level. You are the professional and your response should reflect that fact even if the complainant is the worst individual with whom you have ever had the misfortune to associate.

We also do not want to hear every terrible thing the client has done. While Rule 1.6(b)(8), Minnesota Rules of Professional Conduct (MRPC), allows for disclosure of confidential client information the lawyer "reasonably believes" is necessary to establish a defense in a disciplinary proceeding, this is not permission to share irrelevant client information that may be embarrassing or unflattering to the complainant just because you are upset with things they have said about you. Responding in this manner reflects poorly on you, may cause complainants to dig in their heels, and demonstrates a lack of understanding of your professional obligations.

Identify the issues

If you do not know which ethics rules are implicated by the facts in the complaint, you may want to consider retaining counsel. In making the determination to investigate your case, the duty attorney assigned to review the matter believed that, if the facts stated are true, one or more ethics rules may be implicated. I have been surprised by the number of responses that demonstrate on their face that the attorney does not have a good handle on the MRPC, and likely didn't even bother to read the rules before responding. This is never good.



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I have also been surprised at how many responses fail to apply the rules to the particular facts presented, the most basic job of any legal response. If you do not know which rules are in issue and decide not to hire counsel, you can always call the investigator assigned to the case and ask which rules they are considering, or call the OLPR attorney who signed the investigation notice. This is not a “gotcha” game. As neutral investigators, our job is to discover the facts and apply them to the rules to determine whether there is clear and convincing evidence of a rule violation. Please approach your response accordingly.

Respond, timely and completely

The notice of investigation provides 14 days to provide a written response. Timely responses are important. Not only is this part of cooperating with the investigation, which is required by rule,³ but it helps demonstrate you are taking the investigation seriously. Failure to respond will, by itself, lead to discipline. Sometimes you may need additional time to respond. A reasonable extension requested in a timely manner will likely be granted, but keep in mind that investigators are expected to keep investigations moving. We know you are busy, but you need to prioritize addressing the ethics investigation regardless of your views on its merits and what else you have going on.

Remember also that you must respond in writing, and that you should provide a copy of your response to your client if the complainant is or was a client (this is detailed in the investigation notice). You should provide supporting documentation where it exists. Do not be surprised when we ask to verify statements that you make. That is the job of an investigator. A good response understands as much, and provides supporting or corroborating information in the first instance—clearly referenced, organized, and labeled. Please also verify your facts before stating them. We will follow up. Failure to provide information or providing inaccurate information needlessly prolongs the investigation, can lead to heightened scrutiny, and makes you vulnerable to a Rule 8.1, MRPC,

violation. Finally, make sure you are fully responding to all allegations. We try to address all allegations in the determination, and in order to do so, we need you to do the same.

Be forthright

Responding to an ethics complaint is not the time to “lawyer the facts.” The best response is candid and honest. Too many lawyers walk themselves into needless grief by trying to massage straightforward information, failing to acknowledge undisputed or easily proven facts, or overstating certain matters. While you can certainly put your best foot forward, an objective, well-reasoned response that acknowledges potential issues or shortcomings is always best. Lawyers sometimes also spend time explaining how great they are or all of the good things they have done. Stick to the facts and rules in issue. While context is important, matters such as where you went to law school, how successful you are, and how much pro bono work you do annually generally are not.

Conclusion

When responding to an ethics complaint, avoid panic, seek help, refrain from attacking the complainant, identify the issues, respond in a timely and thorough manner, and be forthright. These are not earth-shattering insights, but we see lawyers fail to follow this advice day in and day out. Do not let that be you.⁴ ▲

Notes

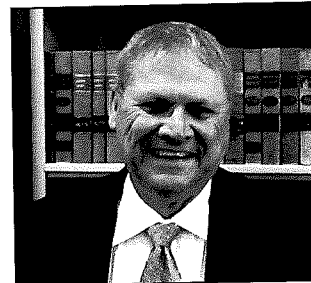
¹ Rule 8(a), Rules of Lawyers Professional Responsibility (RLPR), provides that the Director may investigate a matter if there is a “reasonable belief that professional misconduct may have occurred.”

² Rule 8(d)(2), RLPR, provides for a private admonition if the misconduct is “isolated and non-serious.”

³ See Rule 25, RLPR. Failure to cooperate is a separate grounds for discipline. Rule 25(b), RLPR.

⁴ Ken Jorgensen, former OLPR Director, wrote a similar article in November 2003 in *Bench & Bar*, entitled “Limiting Exposure to Complaints and Discipline.” His article, re-published on the OLPR website at lprb.mncourts.gov under “Articles,” is recommended reading.

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