

Expunction of disciplinary files

by

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When a lawyer has a complaint filed against him or her, and no discipline is warranted, does the Office of Lawyers Professional Responsibility retain that file forever? No.

The handling and confidentiality of OLPR files is governed by Rule 20 of the Rules on Lawyers Professional Responsibility. Although the RLPR are a set of rules that most lawyers likely have never read, should a lawyer be the object of a complaint, reading the RLPR is essential to understanding how the lawyer discipline system works.

Rule 20(e) governs the expunction of files at the OLPR. The rule provides:

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

(1) Destruction Schedule. All records or other evidence of a dismissed complaint shall be destroyed three years after the dismissal;

(2) Retention of Records. Upon application by the Director to a Panel Chair chosen in rotation, 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 three years as the panel chair deems appropriate.

In other words, a file that results in any sort of discipline is retained permanently. Should a matter not result in discipline, with or without investigation, the general rule is that the files and records of the OLPR about the matter will be expunged after three years. This includes not only documents in the file, but entries in the OLPR database concerning complaints and files.

As noted in Rule 20(e), the director may request permission to retain a dismissed file for more than three years.

There are several reasons why this may occur. A subsequent complaint against the lawyer may be received, which arises out of or relates to the prior matter. The prior complaint may involve similar conduct or other facts which are relevant to a subsequent complaint. There may be other reasons in a given matter, as well.

Although many lawyers may view expunction of files as a benefit, and in many instances it may be,

sometimes it may not be. Occasionally, the OLPR receives a complaint, reviews it, determines that investigation is warranted and requests the lawyer to respond. Unknown to the OLPR, however, because of the expunction rule, the same person had previously filed a complaint against the same lawyer, making the same allegations, and more than three years previously the OLPR had determined discipline was not warranted. A lawyer receiving such a complaint may wonder why the director has commenced an investigation and requested a response when the matter was investigated previously.

The answer is the expunction rule, Rule 20(e). If the prior matter was concluded more than three years previously, because of the expunction rule the OLPR has no record of the prior matter.

In such a situation, the lawyer responding to the complaint should contact the assigned investigator, explain the situation and offer to provide the prior determination together with other documentation connected to the prior complaint. Generally, that can resolve the matter.