CNA

PROFESSIONAL COUNSEL℠

ADVICE AND INSIGHT INTO THE PRACTICE OF LAW®

How to Handle an Ethics Grievance

Attorneys who practice long enough may encounter the prospect of receiving a letter from a bar disciplinary office containing notice of a complaint from a client or third party. Similar to legal malpractice claims, the majority of ethics grievances involve alleged misconduct by sole practitioners and lawyers in small law firms.[1] An array of negative emotions, including anger, embarrassment and fear, may afflict the recipient attorney in this situation. Data from state bar disciplinary authorities reveal that, in most instances, attorneys need not panic. More than 90% of such grievance letters result in no disciplinary charges being filed.[2] While that statistic reflects good news for attorneys the vast majority of the time, it does not mean that the substance of the charges or the disciplinary process should be treated in a cavalier manner.

Lying in a disciplinary matter will rarely alleviate a lawyer's predicament and will usually make matters much worse. As one court opined: "[l]awyers who choose to engage in fabrication of evidence,deceit, misrepresentation of facts, and distortions of truth do so at their own peril."[4]

The Worst Thing to Do

The predominant lesson derived from the Watergate scandal cautioned that the cover-up was worse than the crime. The same often holds true in disciplinary matters. Attorneys, therefore, should avoid the temptation to deceive a bar disciplinary authority in an attempt to evade sanctions. Honesty and trustworthiness are bedrocks of the legal profession, and all attorneys should realize the importance of a good reputation. If those aspirational goals provide inadequate motivation for scrupulous behavior, more practical considerations should be considered.

State bar disciplinary bodies operate with seasoned lawyers, investigators and support staff trained to detect and prosecute attorney misconduct. These entities are typically empowered to subpoena documents, interview witnesses under oath, and conduct audits of lawyer trust accounts, among other responsibilities. The more suspicious or unusual a statement or purported fact, the more likely that resources will be dedicated to either verify or refute any questionable assertion by the lawyer. *ABA Model Rule of Professional Conduct* 8.4(c) prohibits attorneys from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." Thus, lawyers who intentionally mislead during the investigation stage of a disciplinary matter may then risk facing an additional allegation of violating *ABA Model Rule of Professional Conduct* 8.4(c), including an increased sanction if the charge is proven.[3] Lying in a disciplinary matter will rarely alleviate a lawyer's predicament and will usually make matters much worse. As one court opined: "[l]awyers who choose to engage in fabrication of evidence, deceit, misrepresentation of facts, and distortions of truth do so at their own peril."[4]

1 *See ARDC Annual Report 2017*(Illinois), p. 38.
2 ABA/BNA Lawyers' Manual on Prof. Conduct, *Disciplinary Process*, 101:2103.
3 *See for example Toledo Bar Assoc. v. Scott*, 953 N.E.2d 831 (Ohio 2011) (attorney submitted phony billing records and lied about consultations with client to disciplinary office; Ohio Supreme Court rejected more lenient sanction recommendation from disciplinary board and suspended attorney for two years with one year stayed upon conditions).
4 *Id.*

The Second Worst Thing to Do

Some attorneys ignore the ethics grievance, failing to submit any response. In some instances, the non-response may indicate a larger problem, such as a mental health or substance use disorder. Regardless of the reasons, a sustained stance of not responding to bar disciplinary demand for information will potentially result in a suspension or disbarment. Per *ABA Model Rule of Professional Conduct* 8.1, lawyers have a duty to cooperate in bar disciplinary investigations. As one court noted, a "lawyer's failure to cooperate with an investigation into professional misconduct is serious misconduct that constitutes separate grounds for discipline."[5]

Courts tend to issue severe sanctions for these types of violations due to concerns about protecting the public from unethical attorneys. If an attorney will not respond to a lawful demand for information from a government agency authorized to recommend suspension or disbarment, little assurance exists that such a lawyer will communicate with and diligently represent clients.

Now that we have established how not to respond to an ethics grievance, let us turn to the constructive steps a lawyer should take in response to an ethics grievance.

Review Your Insurance Policy

Many CNA lawyers' professional liability policies provide reimbursement coverage up to a specified monetary amount[6] for attorney fees and other reasonable costs, expenses, or fees paid to third parties, resulting from a disciplinary proceeding investigating an alleged violation of a rule of professional conduct in the performance of legal services. These reimbursed funds are supplementary payments in addition to the policy's limits of liability and are not subject to the deductible.

Some attorneys decide not to report an ethics grievance to their insurer believing either that the matter is insignificant or that their premiums will increase as a consequence of reporting these matters. This rationale, however, is often ill-advised and shortsighted.

What may seem inconsequential to a lawyer may be viewed differently by others. Disciplinary counsels, unlike most private practitioners, possess a thorough knowledge of all the rules of professional conduct. Conduct that an attorney regards as harmless may, in fact, rise to the level of an ethics violation. Moreover, ignorance of a particular ethics rule not only fails to protect an attorney from discipline, it also may prevent the strongest defense possible being offered to refute a charge of misconduct.

Additionally, plaintiffs' lawyers in the legal malpractice arena frequently use the disciplinary process as a means of gathering free discovery to support a subsequent lawsuit. Notably, courts often hold that sworn statements and depositions of lawyers in a disciplinary proceeding become admissible in a related legal malpractice matter. Failing to properly handle an ethics grievance, therefore, poses not only a threat to a lawyer's ability to practice law in the future but also may result in serious financial consequences as well.

The mere act of reporting an ethics grievance to an insurer should not in itself result in a premium increase. The substance and legitimacy of a grievance, however, may indicate issues in a lawyer's practice that could lead to a premium increase or, in a worst-case scenario, a non-renewal. Since a sizeable percentage of ethics grievances do not move beyond the initial intake stage, reporting a disciplinary complaint to the insurer does not necessarily result in these underwriting actions. But even under less favorable circumstances, where attorneys know or strongly suspect that they have violated a rule of professional conduct, a report to the insurer should still be made in accordance with policy provisions. Minimizing any potential disciplinary sanction and maintaining professional licensure should remain the paramount concerns. Once those matters are resolved, any repercussions from the disciplinary matter that may affect the attorney's legal malpractice insurance can be addressed.

Additional Considerations

Obtain Counsel

The old adage that a lawyer who represents himself has a fool for a client applies to disciplinary matters. A lawyer may be highly proficient in her chosen practice areas but such skill and experience do not necessarily translate into effective advocacy in the disciplinary arena. While certain skills, such as the ability to litigate, may apply in some disciplinary matters, all practitioners who become the subject of a grievance can benefit from the proficiency of an outside practitioner experienced in disciplinary cases to objectively assess the facts and circumstances and provide a defense. A veteran disciplinary defense counsel who knows the substantive law, as well as procedural issues, can sometimes make the difference between no charges being filed and a formal complaint issued by the regulatory authority.

5 *In re Disciplinary Action Against Sayaovong*, 909 N.W.2d 575, 582 (Minn. 2018)
6 Insureds should check their insurance policy or discuss with their insurance broker the monetary limits for this provision.

Maintain Your Client File

Documentation within the client file also may assist in responding to a grievance. For example, an attorney accused of negligence may be able to access the client file and produce an engagement letter demonstrating the limited scope of representation and that the attorney never agreed to represent the client in the purportedly neglected matter.[7] In other cases, such documentation may have the opposite effect, helping to prove the allegation of misconduct. Irrespective of its effect, the client file must be maintained and preserved once the lawyer either becomes aware or reasonably should know of the possibility of a grievance. Destroying a client file in an attempt to evade discipline can lead to claims of spoliation, resulting in the presumption that any missing evidence reflected unfavorably upon the attorney and may precipitate additional charges of misconduct.

When Appropriate, Acknowledge Mistakes and Express Remorse

A lawyer's attitude and behavior during the disciplinary process often influences the outcome. In close call cases, disciplinary authorities will seek assurances that the attorney recognizes the wrongful conduct and will make efforts to prevent a reoccurrence of the error or omission. In certain circumstances and with the guidance of disciplinary defense counsel, it may behoove the attorney to acknowledge any mistakes and express regret for any harm caused. If the matter proceeds to a formal hearing, the disciplinary body and ultimately, the relevant court, must weigh aggravating and mitigating factors in deciding upon an appropriate sanction. In some cases, an attorney may help his or her own cause by admitting the wrongdoing and showing genuine remorse. Of course, if the defense consists of denying the rule violation and asserting the attorney's innocence, much of this guidance will not apply. Irrespective of the defense strategy, the lawyer and disciplinary counsel should be careful to avoid overzealousness and obtuseness throughout the entire disciplinary process. Failing to acknowledge wrongdoing and to express remorse in instances where the misconduct is obvious often counts against the attorney as an aggravating factor.

Don't Try to Compel the Client to Not File/Withdraw an Ethics Grievance

When faced with a potential or actual ethics grievance, some lawyers may be tempted to try and bargain with their clients to avoid discipline. Such an attempt, however, potentially violates the ethics rules. *ABA Model Rule of Professional Conduct* 1.8(h) permits attorneys, under strict conditions, to limit their civil liability by settling actual or potential legal malpractice lawsuits with clients or former clients. The *ABA Model Rules of Professional Conduct* do not expressly address the circumstance where an attorney attempts to avoid discipline by reaching an agreement with a client not to file or to withdraw an ethics grievance. Those jurisdictions that have examined the issue proscribe the practice due to public policy concerns. As one ethics opinion noted: bar disciplinary authorities serve "to aid the Court in carrying on and improving the administration of justice; to foster . . . high standards of conduct; to the end that the public responsibility of the legal profession may be more effectively discharged. . . . Allowing a lawyer to bargain with a client to avoid these procedures, would significantly impair the Bar's ability to regulate its members as well as protect the courts, the legal profession, and the public's confidence in the integrity and competence of the judicial system, thereby seriously interfering with the administration of justice."[8] At least one jurisdiction has amended its rules of professional conduct to prohibit the practice.[9]

This proscription against negotiating to suppress an ethics grievance does not mean that an attorney must eschew any action that might mollify an angry client, persuading the client to refrain from making such a grievance. For example, an upset client might threaten a disciplinary complaint if the attorney does not immediately refund the client's retainer funds. The attorney may in his or her discretion make the prompt refund hoping that the client's motivation for making an ethics grievance disappears. It is only when the attorney takes the additional step of conditioning the refund upon no grievance being filed that the attorney courts trouble.

7 *SCB Diversified Mun. Portfolio v. Crews & Assocs.*, 2012 WL 13708 (E.D. La. 2012) (Law firm hired as bond counsel for a planned residential community used an engagement letter with narrow scope of representation section. When the real estate deal faltered due to environmental concerns, law firm avoided liability and defeated clients' claim that it was negligent in failing to evaluate and advise on environmental issues.)

8 D.C. Bar Ethics Op. 260 (October 1995)

9 Conn. Rule of Prof. Conduct 8.3 states, in relevant part: "A lawyer may not condition a settlement of a civil dispute involving allegations of improprieties on the part of a lawyer on an agreement that the subject misconduct not be reported to the appropriate disciplinary authority."

Conclusion

No lawyer facing the prospect of discipline should try to navigate the process on his or her own. Lawyers that have malpractice insurance should take advantage of the coverage offered by their insurer, which may include monetary and legal assistance. Notwithstanding the availability of resources through the insurer, all lawyers who have been accused of misconduct should retain a lawyer who concentrates in the area of lawyer discipline. Listening to the advice of counsel, cooperating with disciplinary authorities, and comporting themselves in a professional manner can help attorneys not only endure the disciplinary process but, in many cases, can place them in a position to either avoid or minimize a disciplinary sanction.

This article was authored for the benefit of CNA by:
Sean Ginty

Sean Ginty is a Risk Control Consulting Director for CNA's Lawyers Professional Liability Program. He collaborates with other CNA Risk Control lawyers on the design and content of lawyers' professional liability risk control services, products and publications. Sean lectures frequently at CNA-sponsored events and at state and local bar associations and national seminars hosted by industry-leading organizations. He also writes articles focusing on law firm risk control and professional responsibility issues. Prior to joining CNA, he served as Chief of Staff and General Counsel for an Illinois state agency and practiced law with a Chicago-based law firm, as well as serving as conflicts counsel for an international law firm. He is admitted to practice in Illinois and United States District Court, Northern District of Illinois.