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Guest columnist

Dealing with professional misconduct complaints

Response requires careful, calculated approach

You receive a letter from the disciplinary or licensing board, the group that authorizes you to practice your profession. Your heart begins to beat quickly, your face pales and you experience extreme anxiety.

Some attorneys' knee-jerk reaction is to answer the inquiry immediately. Many others bury it under a pile on their desk and attempt to put it out of their mind while waiting as long as possible to even consider drafting a response. Both courses of action — or non-action — can be reckless and riddled with repercussions.

Disciplinary boards are charged with the responsibility of reviewing the facts and making an initial determination as to whether the complainant has grounds for claiming professional misconduct. To obtain an immediate dismissal of the complaint because it is unfounded or frivolous would certainly be the preferred result.

If the allegations on the face of the complaint reveal professional misconduct, legal counsel familiar with the disciplinary process should be immediately engaged.

Even if the allegations do not reveal substantive professional misconduct, certain tasks are essential to the preparation of a well-executed response.

- **Start a file.** Open a separate file into which the original inquiry and all relevant information will be placed. The file should become one of the business records of the respondent and any firm with which the respondent is employed

instead of becoming part of the client's file.

- **Review.** Begin a careful review of the correspondence, electronic communications, documents and notes related to the services provided to the client.

- **Start writing.** Prepare a memorandum that recites the facts accurately and completely, and photocopy the relevant written materials that confirm your recitation of the facts. Do not attempt to write the response to the inquiry or complaint; more than likely you will engage in hyperbole and defensive rhetoric to justify your position. As Sergeant Joe Friday from the celebrated television show "Dragnet" used to say: "Just the facts, ma'am."

- **Meet and confer.** Calmly and dispassionately meet with a lawyer who is conversant with the rules governing the alleged professional misconduct, and discuss the possible approaches to preparing a response.

Typically, it is better to have the respondent prepare the initial draft of the response so that he or she has an opportunity to state all of his or her grievances against the complainant. My experience has been that after the initial response is drafted, the respondent is better able to listen to — and absorb an objective assessment of — the alleged misconduct and entertain the thought of substantially revising the initial approach.

- **Modify.** When the lawyer revises the response, it is often the case that the respondent's draft is largely covered in red ink to delete substantial portions or to change some of the more argumentative and abusive descriptions.

The response will need to incorporate a factually accurate recitation of what transpired, with references to documentary evidence in support of the facts and a brief analysis of the

reasons that the alleged conduct is *not* a violation of the rules of professional conduct. It is understandable that the respondent may not be able to divorce his or her outrage and anxiety from the task at hand, but that inability should not result in the submission of a less than factually accurate response that refutes the alleged misconduct.

The revised response prepared by the lawyer should be reviewed by the respondent, who should be instructed to provide notations with respect to his or her questions or modifications.

- **Meet again as needed.** A second meeting between the respondent and the lawyer should occur to resolve any questions and incorporate the required modifications. The lawyer should prepare a second, and possibly, a final draft. When the alleged misconduct is substantial and complex, multiple meetings and numerous revisions may be required.

- **Submit for review.** The final response should contain copies of all relevant and referenced documents for review by the disciplinary authority. It must be submitted without typographical errors or omissions, first for review by any malpractice insurance carrier if required by the terms of the policy, and then to any governing or management body of the firm with which the respondent is employed.

The existence of the complaint and the information relative thereto should be held in strict confidence by all individuals involved in the process.

Conclusion

While these steps may seem overly cautious and cumbersome, consider the angst and loss of sleep that result when the disciplinary authority decides to pursue more formal proceedings.

The lesson is as simple as it is significant: An objective and informed adviser can better orchestrate and oversee the preparation of a response to a distasteful and embarrassing complaint than can the individual professional involved.

EXAMPLE

An experienced trial lawyer receives from Bar Counsel a lengthy letter of complaint submitted by a dissatisfied client. The complaint alleges professional misconduct during a lengthy representation and litigation of a domestic relations matter.

The trial lawyer prepares a response which consists of approximately 20 pages that precisely detail each factual innuendo made by the complainant.

After a discussion with the lawyer and a careful review of the proposed response and facts, the superfluous and irrelevant gratuitous comments are deleted,

The final response is presented in a concise manner and contains the necessary facts, supporting written materials and required analysis of the alleged misconduct. The response consists of three pages plus several pages of supporting written materials.

A written dismissal is received by the lawyer within a short time.

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