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Self-Defense: Representing Yourself in Lawyer Disciplinary Proceedings

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Oregon State Bar statistics reflect that approximately one Bar complaint is filed annually for every 10 lawyers. Although not every complaint warrants hiring outside counsel, all require a prompt and serious response by the lawyer involved. This column looks at three related questions. First, should you represent yourself? Second, if you do, what works? Third, again if you do, what doesn't?

Should You Represent Yourself?

Whether you should represent yourself triggers a blend of economic and personal considerations.

On the economic side, you will be paying out hard dollars if you hire someone to represent you. At the same time, representing yourself is not cost-free. The time devoted to representing yourself likely means that you are not handling other paying work. You should also consider when hard dollars on outside counsel may be best spent. If the issue involved is legally complex, using outside counsel early may improve your odds of an earlier disposition that saves you money in the long run.

On the personal side, you need to honestly assess whether you can maintain the same professional detachment defending yourself that you bring to

the table when handling client work. An analogy that I have used at CLEs on this point is: doctors rarely do surgery on their own navels because it is an uncomfortable position and hard to see. If you decide to handle your own defense, it is usually prudent to have a trusted colleague review and edit your response. Another option is to retain counsel to at least edit your work. You will hopefully benefit from a perspective that is difficult to reach when you are defending yourself.

What Works?

Three words summarize what works: (1) be prompt; (2) be specific; and (3) be professional.

Be Prompt. We have a duty to cooperate with a Bar investigation under RPC 8.1(a). Responding "promptly," however, involves two separate notions beyond the baseline regulatory duty of cooperation. First, don't stall in the hope that the dark cloud will magically disappear. It won't. If you need additional time to gather your evidence or to clear adequate time in your schedule to prepare your response, then by all means ask for it. But, don't drag your feet solely for the sake of delay because that will likely become readily apparent to Bar counsel. Second, don't procrastinate. Although preparing a response can be difficult, putting it off can invite disaster. Just as you wouldn't start on a client's response

to a summary judgment motion the night before it is due, allow yourself plenty of time to marshal your evidence, do any necessary legal research and work through drafting.

Be Specific. The Bar will usually let you know which RPCs it wants you to address. Although sufficient background is important to put your analysis of those RPCs in context, the Bar doesn't necessarily need to know every fact that might go into your summary judgment motion or trial brief in the underlying case. The risk of "over-sharing" is twofold. First, your analysis of the RPCs may get lost in a hyper-detailed recitation of unnecessary facts. Second, you may inadvertently open further avenues for the complainant to grouse about.

Be Professional. The shortest route to undermining your credibility as an advocate on your own behalf is to sound less than lawyerly. Even if you are justifiably angry at having to respond to a complaint from a horrible former client, you need to maintain the same sense of professional decorum in your response as you would in client work that you would file with a court. In particular, don't engage in personal attacks on either the complainant or Bar counsel.

What Doesn't?

Case law provides ready examples of what doesn't work. Three stand out: (1) don't attack the system; (2) don't sue; and (3) don't lie.

Don't Attack the System. Even if you feel that you have been unjustly accused, attacking the system won't get you very far. Due process rights in lawyer disciplinary proceedings are generally limited to notice and the opportunity to be heard (*see, e.g., In re Ruffalo*, 390 U.S. 544, 88 S Ct 1222, 20 L Ed2d 117 (1968)). If you want to improve the system, a more productive path is to volunteer your time to be part of it—such as running for the House of Delegates or volunteering to be a Disciplinary Board trial panel member.

Don't Sue. On the theory that a "strong offense is the best defense," lawyers sometime envision obtaining injunctions against disciplinary proceedings. Don't count on that either. The Oregon Supreme Court has held that it is the only state court with direct regulatory authority (*see, e.g. State ex rel Bryant v. Ellis*, 301 Or 633, 724 P2d 811 (1986)). Similarly, the United States Supreme Court in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 US 423, 102 S Ct 2515, 73 L Ed2d 116 (1982), found that principles of abstention generally preclude federal trial courts from enjoining state lawyer disciplinary proceedings.

Don't Fudge. It is imperative that you are absolutely accurate in your response. The ultimate disciplinary risk in any case will increase exponentially if

you are accused of lying in your response—which will likely result in a separate charge under the "dishonesty rule," RPC 8.4(a)(3).

ABOUT THE AUTHOR

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