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Five Things Not to Do When Responding to a Bar Complaint

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Over the years, I have read a lot of responses to bar complaints written by lawyers representing themselves. Some were stellar. Others not so much. The ones that were stellar usually brought the same degree of professional analysis and writing that would be expected from an excellent brief filed with a court. The ones that were lacking often had a variety of issues that led them to be less than effective. In this column, we'll look at five particular areas to avoid when responding to a bar complaint.

Before we do, three qualifiers are in order.

First, many lawyers conclude from the outset that having another lawyer respond for them is the best way to go. Understandably, that is both a personal and financial decision for the lawyer involved. At the same time, just as a personal injury lawyer wouldn't take on a securities offering, having a seasoned disciplinary defense counsel handle the response brings a level of technical expertise that is difficult for a lawyer unfamiliar with bar proceedings to replicate.

Second, although I have included five areas, these should not be considered an exhaustive list. Rather, they are simply a collection of recurring themes.

Finally, I will use the term "bar complaint" because most Oregon lawyers still use that phrase colloquially even though the technical word under the Oregon State Bar Rules of Procedure for initial proceedings is now "inquiry."

Don't Respond Immediately

A natural human tendency for some is to respond immediately—often with less than lawyerly rhetoric. Although this impulse may feel good initially, it is often counterproductive longer term in at least two respects. First, particularly when a lawyer "vents their spleen," it may undercut the lawyer's credibility by making the lawyer look unprofessional. That first impression may linger for the duration of the proceedings. Second, under RPC 8.1(a), a lawyer must respond truthfully. A quick, "off-the-cuff" response risks including mistaken facts that will color the proceedings moving forward. These problems can be avoided by taking the time necessary to prepare a careful response addressing the issues raised by the complaint and, ideally, having a colleague with sound judgment review the resulting draft for tone.

Don't Wait Too Long

Responding to a bar complaint understandably is not an enjoyable exercise. Like many unenjoyable tasks, lawyers sometimes put off preparing their response until the eve of being due. If a lawyer needs additional time

stemming from, for example, an upcoming trial or a long-planned vacation, the lawyer should approach the Bar in advance for a reasonable extension. Simply putting the response off, however, will not make it go away. Waiting until the last minute to start risks a less-than-thorough response that does not put the lawyer in the best light and may lead to mistakes that create problems for the lawyer under RPC 8.1(a). Lawyers should approach a bar response as they would a summary judgment motion for a client: thorough, tethered to the record, analytical, and prepared with sufficient time for appropriate edits and review.

Don't Say Too Much

Lawyers sometimes think the Bar needs to know the entire history of a representation in exhaustive detail. While that may be true in some instances, often it is not if a particular event within the overall context of a representation triggered the complaint. In the latter instances, this can be the legal version of the old saw: "don't explain how to build a clock when the question is 'what time is it?'" Including minute detail not relevant to the Bar's review risks obscuring the key points on which the Bar's determination will ultimately turn. As a matter of routine, the Bar will tell respondent lawyers the particular RPCs that it feels may be implicated. It usually makes sense to take that cue and build the response around those.

Don't Reveal Unrelated Confidential Information

Responses often require that at least some client confidential information be disclosed. This is generally permitted by the "self-defense" exception to the confidentiality rule, RPC 1.6(b)(4). The self-defense exception, however, is tempered with an important qualifier: the lawyer may only reveal confidential information "to the extent the lawyer reasonably believes necessary[.]" Albeit in the context of responding to a negative online review, the Oregon Supreme Court discussed both the self-defense exception and the accompanying limitation at length in *In re Conry*, 368 Or. 349, 491 P.3d 42 (2021). As an illustration, if the gist of the complaint is that the lawyer missed a key deadline due to a calendaring error, that doesn't automatically trigger the ability of the lawyer to include the client's unrelated "deep dark secret" in the response. Carefully tailoring the response to the complaint is usually the safest way to avoid this potential pitfall.

Don't Charge the Client

Oregon lawyers have been disciplined for charging their clients for the time involved in preparing responses to bar complaints. Although there may be exceptions when, for example, the complaint was filed by a party-opponent as a thinly disguised strategic attempt to create a conflict forcing a lawyer's

withdrawal, those situations are rare. Rather, lawyers have typically been disciplined under RPC 1.5(a) (and the prior equivalents) for charging the client a "clearly excessive" fee because this cost was not reasonably contemplated by the fee agreements involved.

ABOUT THE AUTHOR

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