

Responding to Bar Complaints

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Here it is -- a letter from the State Bar advising you that someone has filed a complaint against you. Oh, boy. The good news is you have a lot of work to do in responding (or helping your lawyer respond) to the complaint -- keeping busy helps you not to worry as much!

First, some general advice:

* **Don't ignore it.** Complaints come with deadlines. Failure to respond is itself a sanctionable violation. If you need an extension, contact the bar.

* **Lawyer up.** Few are the ethics complaints these days that do not carry substantial risk. Moreover, different complaints require different types of lawyers -- experience in ethics investigations is a must, but if the underlying matter involved, for example, a bankruptcy, criminal or patent matter, defense counsel should have experience defending ethics charges in these particular contexts.

* **Notify your carrier.** Your malpractice policy typically requires you to report bar complaints as well as "facts that could lead to claims" promptly. Failure to do so could jeopardize coverage in the event of a later malpractice suit.

* **Check your malpractice policy for defense coverage.**

You probably have “supplemental payments” coverage (i.e., for costs of defense only) up to a fixed amount, usually between \$5,000 and \$50,000, for defense counsel, but you have to comply with the policy’s reporting requirements. Typically, the carrier will appoint experienced counsel to represent you. However, you may be able to request that the carrier assign a specific attorney whom you want to represent you; and your carrier may agree to that request even if the attorney is not on the carrier’s panel, so long as they have the right experience. In all cases, make sure you speak to the proposed attorney about their experience with bar complaint defense.

* **Gather your records**, including e-mails or other electronic records. If you communicated with your client by text messaging (which you shouldn’t do), get those into a format where they can be produced to your counsel.

* **Don’t alter the file.** Don’t destroy anything, alter anything, or add anything like a self-serving file memo. The bar investigator will figure it out. Should you later be sued for malpractice, your conduct could void your coverage.

* **Institute your own litigation “hold”** -- stop all automatic destruction of paper and electronic documents and take any necessary steps to preserve them.

* If the representation is still ongoing, **determine (with advice from your counsel and/or the bar) whether you must, or should, withdraw.**

* **Do not speak with anyone other than your lawyer** about the complaint.

* Keep in mind that **responses to bar complaints are shared with the complainant**, who more and more often these days seems to be opposing counsel, so privilege considerations come into play. This is what the D.C. bar advises regarding that aspect of the response:

If the complainant is not the client, the lawyer needs to consider who may see the response and whether there may be ethical considerations in responding. Although Rule 1.6(d)(3) (confidentiality of information) of the District of Columbia Rules of Professional Conduct permits a lawyer to use or reveal client confidences or secrets “[t]o the extent reasonably necessary to establish a defense to a ... disciplinary charge ... based upon conduct in which the client was involved,” this provision requires the exercise of reason and does not permit the lawyer to make blanket disclosures. In fact, even Rule 8.1(b) recognizes that the duty to respond to inquiries by Bar Counsel is subject to the disclosure limitations in Rule 1.6. Thus, the lawyer needs to consider who will view the response and what the consequences of that viewing might be.

J. Peters, *Avoiding Disciplinary Traps: Three Tips from Bar Counsel*, Washington Lawyer, February 2005.

* **Mitigation:** get your counsel's advice on what you can and should do to mitigate any damage you may have caused your client. The bar will look at whether violations continued after you were alerted to them. Such continuing violations may lead to harsher sanctions.

Meeting with Your Defense Counsel

Now to the specifics of responding to the bar complaint and preparing for an interview with a bar investigator. The first thing you will likely do, at the direction and with the assistance of your counsel, is assemble a complete history of the representation. Hopefully, everything you did and every communication you had is memorialized somewhere, even if only on your bill and time records. Your counsel may ask you to review those communications and flesh out for your lawyer the full nature of the communications, often by writing down all of your recollections in connection with each stage of the representation.

Specious complaints often spring from a client's disappointment with results -- especially settlements, which no one seems happy with after the weekend passes. Records and recollections of every question your client asked, every draft document your client received, and every piece of advice you have regarding settlement proposals and strategy, will be critical to your defense. Make sure defense counsel goes through all of this with you in detail, and determine together what records are missing.

You will need a complete file of all documents and transcripts related to hearings -- if you don't have them, make sure your counsel knows what is missing and gets it.

If you weren't the only person involved in the representation, or with maintaining contact with the client, pull together a list of everyone who was and provide it to counsel so they can speak with them. Extend your "litigation hold" to each of them, and gather their records as well.

Every other party or lawyer involved in the underlying matter is an important source of information regarding your diligence, especially with regard to charges of neglect. Put a "witness list" together and give it to counsel.

In your first meeting with any lawyer assigned to defend you, you need to speak about costs. Your policy's sublimit will likely be exhausted before the bar is through with you. Defense of diligence- and communications-based complaints can be particularly costly because the factual underpinnings usually encompass the entire history of the representation. Make arrangements in advance for retaining counsel directly after the policy coverage runs out. Insurance defense attorneys usually work for a reduced fee for a carrier and may be willing to continue that reduced rate for you.

The law that governed or informed your representation of your client will be important in helping define what was reasonable in terms of what you chose to do or not do for your client. You will know this law better than your attorney -- get started on pulling it together and consider how it may have affected each stage of the underlying representation.

Answering the Complaint

Working with your attorney, you will want to reach a decision about certain strategies you might pursue in answering the Complaint.

* **Which rules of professional responsibility are likely implicated by the complaint?** The Bar typically doesn't tell you what specific violations are implicated by a particular complaint. Typically, however, you will want to address compliance with specific rules that appear to be relevant.

* **How detailed should the response be?** A response should anticipate the questions bar counsel is likely to have regarding the complaint, and address them in a clear, organized fashion, with sufficient detail to allow bar counsel to understand why certain actions were taken or not taken.

* **Emphasis factual misstatements in the Bar Complaint.** The Bar typically does not like complaints based on untruths. Underscore them in the response -- but be absolutely certain that what are underscoring really is false. Obviously, make sure everything you say in your response is factually correct.

* **Provide supporting documents.** Again, without violating privileges, attach every document that supports every fact you assert in your response.

* **Make sure your counsel follows up with bar counsel.**

Bar counsel assigned to your complaint is busy; and your complaint may not be sitting at the top of the pile. Your counsel can typically establish a line of communication with bar counsel that can be helpful in making sure the bar has everything it wants by way of information and documents to evaluate the claim.

* **Keep it as simple as possible.** Bar counsel assigned to your file may have no experience with the type of practice at issue, so simple explanations of procedure and why certain things are done in certain types of cases can be very helpful.

With luck, the bar complaint will be dismissed following bar counsel's review of the materials, or after an investigator meets with you and your counsel to gather additional facts. Preparing for an interview with an investigator is a whole other article; but your experienced defense counsel will know how to get you ready.