

Dealing with Client Complaints and the Disciplinary System

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The best way to deal with an ethical complaint is not to have one in the first place. A panel including LSBA Ethics Counsel and Screening Counsel with the Office of Disciplinary Counsel will discuss ways to avoid and deal with common complaints. When that fails, it is wise to be know the ins and outs of the screening process, investigation and attorney prosecution.

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I. INTRODUCTION

Complaints against attorneys are commonplace. Roughly 2500 complaints were filed last year against attorneys. You are particularly vulnerable to accusations of unethical conduct if you are a solo or small firm practitioner or deal in the criminal or family law arena. The good news is that most complaints are eventually dismissed. However, when a complaint is opened as an investigation, attorneys should always treat it seriously.

II. HOW AND WHERE A COMPLAINT IS FILED

Upon contact with the disciplinary agency, the complaining party (“complainant”) is told that his complaint must be made in writing. The complainant is provided with a form either by mail or by downloading the form from the LADB.org website. The complainant is directed to complete the form and mail or deliver it to the Office of Disciplinary Counsel.

All complaints are received by the Office of Disciplinary Counsel in Baton Rouge. The “ODC” is the investigative and prosecutorial arm of the Louisiana Attorney Disciplinary Board. The Louisiana State Bar Association does not receive/handle disciplinary complaints and has not done so since before 1990.

If you have never received a complaint, you should nevertheless, familiarize yourself with Louisiana Supreme Court Rule XIX, which sets forth the procedures and rules for lawyer disciplinary enforcement. The full text of Rule XIX can be found in the Louisiana Rules of Court or on the LADB.org website under the heading “publications.”

The ODC may investigate any information coming to its attention; however, the most common source of complaints are dissatisfied clients. The ODC on a consistent basis receives approximately 2500-3000 complaints per year.

A. The Screening Process

All complaints received by the ODC are first evaluated by the screening counsel who is a full-time attorney employed by the ODC. The screening counsel evaluates the complaint for the purpose of determining whether or not the complaint should be opened for investigation. **If the information alleges facts which, if true, would constitute misconduct or incapacity, an investigation is conducted.** Rule XIX, Section 4B(2) and 11A. Information can be inconsequential or extremely serious. A complaint must still be opened if Disciplinary receives any information of potential misconduct.

Approximately 1,000-1,200 complaints per year do not survive the screening process and are not opened for investigation. The complainant will receive a letter stating why the complaint was not opened. If you are the subject of one of these complaints, you will not receive notice. Rule XIX does not provide for appellate review of screening decisions not to investigate a complaint.

Approximately 1,500-1,600 complaints per year are opened for investigation. The complaint is not a “charging” document. The decision to open the file for investigation does not mean that the ODC believes a rule violation has occurred. In accordance with Rule XIX Section 11(D) the screening counsel with ODC must open a file for investigation when the facts alleged in the complaint, if true, may be a violation of the Rules of Professional Conduct.

When the screening decision is made to open the matter for investigation, the complainant will receive a letter from the ODC stating that the complaint was received and will be investigated. The investigative file is assigned to one of approximately (10-12) disciplinary counsel who are employed as full-time attorneys to investigate and if warranted prosecute any charges stemming from the investigation of the complaint.

B. Resolution of Minor Complaints through the Relational Referral Program

- Informal Mediation of Complaints.

Approximately 200 - 300 complaints per year are referred by the ODC to the LSBA Attorney- Client Assistance Program. Complaints of unintentional minor misconduct, fee disputes, communication issues and return of file issues are often referred to the program. Complaints alleging unprofessional behavior are often sent to this program as well, in an effort to resolve the problem between the lawyer and the complainant. Participation in the program is voluntary. If you are invited by the LSBA to participate and refuse participation, or if you participate and the problem is not resolved, the matter will be sent back to the ODC screening counsel for the purpose of determining whether or not the complaint at that point should be opened for investigation.

First, it's important to note that the Attorney-Client assistance Program is NOT an investigation. It is a facilitation/mediation program. The ODC essentially screens the matter and determines that the complaint has a possibility of being resolved. The program was created in part as a safety valve for both clients and attorneys. Complaints used to be opened on every minor fee and communication issue. The complaints upset the attorney who would withdraw leaving the client without counsel and an incomplete legal matter. Both parties were upset by the end. The Attorney-Client Assistance

Program is hopefully there to facilitate the relationship and to resolve miscommunications. Referrals deal with complaints concerning Communication, Diligence, Ineffective Assistance of Counsel (Communication issues with Appointed Counsel), Fee issues, and Failure to Pay Court Reporter or Experts or other third-party obligations in the litigation stream of commerce.

The process is very informal. Notice is given to the Respondent. Do they want to participate? If so, does the client want to participate? Many times a brief response is requested from the Respondent but other times it might just be a request to visit the client or talk to a family member. If the matter is not easily rectified, then a conference call or in person facilitation is scheduled. If it cannot be resolved, it is returned to the ODC to be rescreened. If it is resolved, ODC is informed and it is treated as an administrative closure.

C. Dreaded Certified Letter

When the investigative file is assigned to a particular disciplinary counsel, in almost all cases, a certified letter is mailed to the “respondent” attorney enclosing a copy of the complaint. The certified letter from the ODC will request a written response to the allegations set forth in the complaint within fifteen (15) days of receipt of the letter. Routinely, the ODC will grant an additional fifteen (15) days in which to provide a response.

The certified letter from the ODC will almost always arrive at a terrible time when you are preparing for a big trial, on vacation or during the Christmas holidays. The complainant will almost always be the client whom your gut told you in the beginning would be trouble, but you

decided to represent out of the goodness of your heart. The complainant will almost always be a client who owes you money and may include misrepresentations and half truths.

Do Not Ignore the Complaint:

- Failure to respond is an invitation for the ODC to issue a subpoena for you to appear and provide a sworn statement under oath before a court reporter.
- Failure to respond or cooperate with the ODC is in itself a violation of Rule 8.1(c) of the Rules of Professional Conduct.
- Failure to respond will not make the complaint go away. The ODC is obligated to investigate.
- Failure to respond will frustrate the ODC's obligation to move the process forward and will set a poor tone for the investigation.

Do Not Contact the Complainant about the Complaint:

- Direct contact about the complaint with the complainant almost always results in disaster.
- Negotiations with the complainant to drop the complaint are almost always reported to the ODC and may result in a separate rule violation. (Attorney-Client Assistance Program is different)
- Even if the complainant notifies the ODC that he wishes to drop the complaint, it will not go away. The ODC is obligated to fully investigate with or without the ultimate cooperation of the complainant.
- Do not file a lawsuit against the complainant in response to the complaint. Rule XIX protects complainants and witnesses in the disciplinary process from retaliation in the form of civil suits. See Rule XIV, Section 12. Doing so constitutes a violation of the Rules of Professional Conduct. See Rule 8.4(d).
- If the complainant is a current client, you may wish to withdraw from the representation. If so, be mindful of your ethical obligations to properly terminate the representation pursuant to Rule 1.16(d). If you do not wish to withdraw from the representation (believing the complaint is a misunderstanding and will ultimately be resolved) you are not prohibited from contacting your client about the representation.

CAVEAT: A decision to continue to represent a client who has filed a complaint against you should be made only after consulting with a lawyer who is an

experienced Respondent's counsel. If the complaint is forwarded to the LSBA for the Practice Assistance Counsel to resolve, then generally it is considered acceptable to continue the representation as that is a resolution program.

D. Should You Hire Counsel?

If you have to ask yourself this question, then the answer is yes!

“A man who represents himself has a fool for a client and a fool for a lawyer.”

It is true that some lawyers handle their own responses to disciplinary complaints without a problem. The difficult question is how do you know when you can safely and appropriately handle the response on your own? The answer is you can't. At the very least, you should consult with a lawyer who has experience representing lawyers in disciplinary matters. The consultation should be arranged immediately upon receipt of the complaint. **DO NOT HIRE YOUR PARTNER/BEST FRIEND** and **DO NOT** hire a lawyer who has experience with the discipline system as a Respondent!

Your malpractice insurance policy may provide coverage for attorney's fees incurred in defense of a disciplinary complaint.

Still not convinced to hire counsel?

Many lawyers write their own response to the complaint when they are angry and emotional. Although understandable, this is a mistake. The response will be a part of the record and cannot be retracted. The ODC investigation is not limited to the allegations made in the complaint. In fact, the ODC may pursue an issue brought to its attention by the lawyer's response.

Additional considerations for hiring counsel:

- 1) If you are charged with a crime;
- 2) If the complaint alleges mishandling of funds;

- 3) If you receive more than one complaint within a short period of time, especially if the complaints allege the same type of misconduct;
- 4) If you have a prior disciplinary record;
- 5) If the complaint is filed by another lawyer or a judge;
- 6) If the complaint alleges the lawyer has a substance abuse or other lack of fitness to practice issue;
- 7) If the “ODC” is the complainant;
- 8) If the ODC asks you to consider permanent resignation from the practice of law.

If you choose to respond without counsel and you are asked to provide additional information or appear at the ODC for a sworn statement, strongly consider consulting counsel. Remember that your license and livelihood may be at risk!

III. THE INVESTIGATION

A. The Response to the Complaint

The response is your opportunity to tell your side of the story completely and clearly. The response should be supported with documentation which corroborates your side of the story. DO NOT EVER make misrepresentations in your response. DO NOT EVER provide false evidence or testimony to the ODC. Do not make personal attacks on, curse or insult the complainants.

B. What To Expect After the Response

1. Back and forth correspondence

The response to the complaint will almost always be sent to the complainant for written reply and comment. Therefore, personal insults and sarcastic comments directed toward the complainant makes the process more difficult for the respondent.

The complainant’s reply to your response will usually be sent to you for further comment. Many of ODC’s investigations begin in this manner so that complaints which can be

resolved will be resolved quickly. This process tends to flesh out the important issues and the position of each party. In many instances, the back and forth correspondence of the Respondent and complainant will resolve the issues and the complaint may be dismissed.

2. ODC Dismissed the Complaint, Now What?

Should the complaint be dismissed, the Respondent and complainant will be notified in writing. The dismissal letter from the ODC advises the complainant of the right to appeal the dismissal within thirty (30) days. If the complainant chooses to appeal, the entire investigative file is sent to a Hearing Committee for review to determine whether or not the disciplinary counsel abused his discretion. The Hearing Committee will either affirm the dismissal of disciplinary counsel or remand the matter back to the ODC for further investigation or the filing of formal charges. If the dismissal is affirmed, the complainant has additional levels of appeal to the Louisiana Attorney Disciplinary Board and the Louisiana Supreme Court.

3. And the ODC Investigation Continues

If the complaint is not dismissed, the ODC may continue to investigate. The ODC employs full time investigators who assist the disciplinary counsel in gathering information such as tape-recorded statements of witnesses, court records and bank records. Some of the investigators are certified in computer forensics. The ODC may obtain and copy computer hard drives as a part of its investigation.

4. The Sworn Statement

The disciplinary counsel may choose to obtain the sworn statement of the Respondent. The Respondent may be subpoenaed to appear at the ODC's office in Baton Rouge to give testimony under oath before a court reporter. There are various reasons why the ODC may decide that taking the statement is necessary. The most common reason is due to the failure of

the Respondent to provide a written response. The statement is also used to obtain additional information not provided in the response, and to confirm, under oath, the Respondent's position taken in the response. The statement may also be used to explore additional issues of concern brought to the ODC's attention not by the complaint, but by the Respondent's response.

The transcript of the sworn statement will almost always be introduced as an exhibit at any subsequent hearing on the formal charges. The sworn statement may be used to impeach the testimony of the Respondent at any hearing on formal charges. In any event, always keep in mind that the sworn statement transcript will become a permanent part of the record in the proceedings. Always obtain counsel to represent you at a sworn statement.

IV. EASY WAYS TO AVOID COMMON COMPLAINTS

- A. Always Communicate
- B. Have written and signed fee agreements/contracts
- C. Agree on scope of representation
- D. Do not allow client to have unrealistic expectations.
- E. Screen Your Clients or do not take unreasonable clients.
- F. Be careful with your fee agreements. Never charge an unreasonable fee or a non-refundable fee.
- G. Always account to the client upon request.
- H. Always return a file promptly upon request.
- I. Pay litigation bills timely.
- J. Explain delay to your client.
- K. Reconcile Trust account quarterly.
- L. Return unearned fees promptly and segregate disputed funds.

V. AFTER THE INVESTIGATION, WHAT WILL THE ODC DO WITH ME NOW?

When the ODC has completed its investigation, it may recommend one of the following dispositions: (non-exclusive)

- Dismissal;
- Diversion;
- Probation;
- Admonition;
- Formal Charges;

A. Dismissal

Dismissal of the complaint by the ODC is subject to appeal by the complainant as referenced above. If the complainant does not appeal the dismissal, the matter is closed. The investigative file is kept in closed file status and stored by the ODC for a period of three (3) years and then destroyed.

B. Diversion

Disposition of the investigative file may be accomplished by offering a diversion opportunity to the Respondent. Diversion may be offered when the misconduct is minor and the result of negligence. The diversion opportunity is for the most part offered to inexperienced lawyers who have no prior disciplinary record. Diversion is not a sanction, but rather an alternative to discipline. However, the fact that the Respondent previously utilized his diversion opportunity may be used as evidence in any subsequent disciplinary proceeding. The complainant may not appeal ODC's decision to offer diversion and as such is not subject to

review by a Hearing Committee. The Respondent must agree to participate and sign a “Diversion Contract” which usually involves attendance at LSBA’s Ethics School, Trust Accounting School, Law Practice Management Consultation, or other reasonable condition. Should the Respondent fail to complete the terms of the contract to which he has agreed, the matter may be referred back to the ODC for further investigation or prosecution.

C. Probation

Probation, in itself, is not a common disposition of a disciplinary complaint. If ODC disposes of the matter by way of probation, the Respondent is notified of the proposed disposition by correspondence and is given fourteen (14) days to demand a formal proceeding. Failure to respond to the proposed disposition is deemed as consent by the Respondent to the disposition. Probation is more commonly used in combination with another sanction, such as suspension.

D. Admonition (Private Discipline)

Admonition may be offered as a disposition when misconduct is minor and unintentional. If ODC disposes of the matter by way of admonition, the Respondent is notified by correspondence from the ODC and is given fourteen (14) days to demand a formal proceeding. Failure to respond is deemed to be consent by the Respondent to the admonition. The ODC’s Motion for Admonition is considered by a Hearing Committee Chair or lawyer member. The Order of Admonition is issued to the Respondent with notice to the complainant. The admonition is considered discipline and although private, the issuance of same may be used as evidence of prior discipline in any subsequent disciplinary proceeding. Conditions such as LSBA Ethics School can also be attached to an Admonition.

E. Request For Permission to File Formal Charges

If the ODC proposes to dispose of the matter by way of formal charges, a Request for Permission to do so is required before charges are filed. The request usually sets forth the factual background of the matter, the proposed rule violations and a summary of the evidence to be offered. The request is reviewed by a Hearing Committee chair or lawyer member and is either approved or denied. If permission is granted, the ODC may proceed with the filing of formal charges.

VI. DISCIPLINARY PROCEEDINGS

A. Formal Charges

Formal charges are a “charging document” which sets forth the factual allegations and the proposed rule violations. The formal charges are filed with the clerk at the Louisiana Attorney Disciplinary Board in Metairie. The charges are served on the Respondent who should file an answer to the charges within twenty (20) days. If the Respondent fails to file an answer within twenty (20) days, the ODC may file a Motion for Deemed Admitted (similar to a motion for preliminary default) asking that the formal charges be deemed admitted and proven. The Respondent has twenty (20) days to request an order to recall.

If there is no request to recall the order, the factual allegations may be ordered deemed admitted.

If the Respondent files an answer to the formal charges, the matter is given a docket number and is assigned to a Hearing Committee.

Within sixty (60) days of the filing of the answer, witness and exhibit lists are exchanged and depositions may be taken. Notices from the Board concerning scheduling of the hearing date, pre-hearing conference date and pre-hearing memorandum deadlines are issued to the parties.

B. The Hearing

The hearing is presided over by a Hearing Committee before a court reporter. The Hearing Committee panel consists of two lawyers and a public member. The hearing will usually be conducted in the judicial district where the Respondent's practice is located and in a similar manner to a trial.

The ODC has the burden of proof which is clear and convincing evidence.

The Hearing Committee takes evidence and testimony and a record is developed. When the hearing is completed and taken under advisement, the Hearing Committee renders a written report which sets forth its findings of fact, conclusions of law and recommendation of sanction

C. Review by the Board

The Respondent and the ODC have an opportunity to object to the Hearing Committee's recommendation. The objections are heard by a panel consisting of three members of the Louisiana Attorney Disciplinary Board. The ODC and Respondent file briefs and present their arguments before the panel. The panel writes an opinion upon which the entire Board votes. A written recommendation by the Board is filed in the Louisiana Supreme Court.

D. THE FINAL STOPTHE LOUISIANA SUPREME COURT

The Respondent and ODC have an opportunity to file objections to the recommendation of the Board. If objections are filed, the Court sets forth a briefing schedule and the matter is placed on the docket for oral argument. The Court renders an order of final discipline.

VII. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

Rule XIX, Section 10(c) states as follows:

In imposing a sanction after a finding of misconduct, the court or board shall consider the following factors:

- (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system or to the profession;
- (2) whether the lawyer acted intentionally, knowingly or negligently;
- (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and
- (4) the existence of any aggravating or mitigating factors.

The aggravating or mitigating factors considered are set forth in the ABA Standards For Imposing Lawyer Sanctions. The standards are an ABA publication and may be obtained from the American Bar Association.

Section 9.0 of the standards set forth factors which after misconduct has been established, may be considered in deciding what sanction to impose:

§9.21 Definition. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.

§9.22 Factors which may be considered in aggravation.

Aggravating factors include:

- (a) prior disciplinary offenses;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
- (f) submission of false evidence false statements, or other deceptive practices
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) indifference to making restitution;
- (k) illegal conduct, including that involving the use of controlled substances

Mitigation.

§9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed

§9.32 Factors which may be considered in mitigation.

Mitigating factors include:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical disability;
- (i) mental disability or chemical dependency including alcoholism or drug abuse when;
 - (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
 - (2) the chemical dependency or mental disability caused the misconduct;
 - (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely
- (j) delay in disciplinary proceedings;
- (k) imposition of other penalties or sanctions;
- (l) remorse;
- (m) remoteness of prior offenses.

VIII. TYPES OF SANCTIONS

- 1. Disbarment;
- 2. Suspension;
- 3. Probation;
- 4. Public Reprimand; and
- 5. Permanent Disbarment