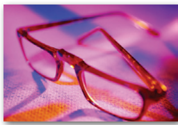

State Bar Inquiries Not To Be Taken Lightly

Most of us know generally that we are supposed to be cooperative and professional whenever Bar Counsel asks us for information in connection with a disciplinary matter. This is spelled out clearly in ER 8.1 (Bar Admission and Disciplinary Matters) in Arizona's Rules of Professional Conduct.[1] But what many of us may not be aware of is that Arizona Supreme Court Rule 54 (Grounds for Discipline), at subsection (d), spells out *very* clearly what ER 8.1 may have left unsaid: that failure to cooperate with Bar Counsel; or to furnish records, files and accounts; or to furnish, in writing, "a full and complete response to inquiries and questions", is also considered grounds for discipline.

Failure to cooperate with Bar Counsel, or to furnish records, files and accounts, is considered grounds for discipline.

For those who have never received the dreaded "20 day letter"[2] and for those of us who may someday get one, a likely first reaction is probably going to be somewhat defensive. What it should never include is nonchalance or evasiveness; neither is a good idea when dealing with a disciplinary matter. At this point you need to remember that the folks in Bar Counsel's office, besides being very good lawyers, are understandably not known collectively for their sense of humor—regarding discipline matters, anyway. And in case you have any doubts about this, you need to talk to Massachusetts lawyer Ilya Liviz.

Ethics Opinions and the Rules of Professional Conduct are available on p. 67 and at https://azbar.org/for-lawyers/ethics/

After what appears to have been some sort of procedural drama before a federal district court in Massachusetts that resulted in a report to the local disciplinary authorities involving his conduct, the investigators sent him an inquiry asking him to provide, among other things, the names and contact information for the parties he did not identify by name in the litigation in which he appeared as plaintiffs' counsel, the dates of his engagement, engagement letters and fee agreements, the dates of his last communication with his clients, identifying information concerning cases in which he had been removed as counsel or ordered not to speak to certain parties, cases in which he had been sued for malpractice, and cases in which he had appeared as counsel since 2016.

To these requests, Mr. Liviz replied in one simple sentence: "SILENCE. (BOOM SHAKALAKA)"

Because this did not comport with the Massachusetts counterpart of ER 8.1, Mr. Liviz was administratively suspended and held in contempt. His appeal to the Supreme Judicial Court of Massachusetts was denied and the administrative orders confirmed.[3]

Lawyers in Arizona have had similar experiences. This has included a lawyer who was disciplined for lack of responding and attending hearings, even though he was represented by counsel,[4] a lawyer who was simply late in responding to a request from Bar Counsel,[5] and a lawyer who intentionally lied in his responses to Bar inquiries.[6] Most of the reported cases have involved lawyers who chose to ignore the disciplinary process entirely.[7]

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Not all cases go against the lawyer, at least as concerns ER 8.1. In one case, a lawyer was found to have at least attempted to comply with Bar Counsel's requests, even though he was late in doing so.[8] In another, the lawyer had simply submitted a copy of a pleading he had filed in the underlying case that restated his position on one of the issues. The Court held that by doing so the lawyer had technically complied with ER 8.1 but had clearly violated the clear mandates of Rule 54(d) and was disciplined accordingly.[9]

If you should ever find yourself in a position of being notified of a complaint against you brought by a client, a former client, a judge or a third party, keep two things in mind:

1. It is universally accepted that you should seek counsel, if only to review the response that you draft to Bar Counsel's request for information. This could save later embarrassment should the matter not get resolved and get more complicated later; and
2. Although it may be tempting to counterattack with unflattering information against the complainant who started the process, remember that if it involves a client, ER 1.6 (Confidentiality of Information), at subsection (d)(4), allows you to disclose some of what may be client confidences in order to defend yourself but, as explained in Comment [12] thereto, only insofar and to the limited extent as "the lawyer reasonably believes necessary to establish a defense." The same holds true for a former client.[10]

The bottom line is that in dealing with Bar Counsel you are in effect dealing with a person who may eventually be opposing counsel, and that difficult matters always seem to go more smoothly when both sides cooperate and conduct themselves professionally.

endnotes

1. Rule 42, ARIZ.R.S.CT.
2. As described in Arizona Supreme Court Rule 55(b) (Screening Investigation and Recommendation by Bar Counsel)
3. *In re Liviz*, Case No. SJC-12732, Supreme Judicial Court of Massachusetts (May

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endnotes

12, 2020); www.mass.gov/files/documents/2020/05/12/f12732.pdf

4. *In re Brady*, 186 Ariz. 526, 923 P.2d 836 (1996).
5. *In re Miller*, 178 Ariz. 257, 872 P.2d 661 (1994).
6. *In re Varbel*, 182 Ariz. 451, 897 P.2d 1337 (1995).
7. Cases are collected in ARIZONA LEGAL ETHICS HANDBOOK (4th ed. 2016) at p. 8.1-3.
8. *In re Coburn*, 181 Ariz. 250, 889 P.2d 608 (1995).
9. *In re Goodman*, PDJ 2011-9054 (Arizona Supreme Court, May 8, 2012).
10. In a New Jersey case, a lawyer was disciplined for retaliating against a former client who gave him a bad Yelp review in a domestic relations case when he revealed her past convictions for shoplifting and DWI having nothing to do with the complaint she had made against him. *In re Calpin*, Case No. 083821 (Supreme Court of New Jersey, May 7, 2020); www.abajournal.com/news/articles/lawyer-suspended-for-giving-clients-business-a-bad-review-in-good-for-the-gander-retaliation