

OCDC SPOTLIGHT

You've Got Mail — But Don't Panic!

By Sam Phillips

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A letter from disciplinary authorities seems to cause absolute panic in some lawyers. Lawyer friends, some of whom I have known for many years, have told me that they dread my calls, at least until I tell them I just want to go to lunch. Even some judges have said that letters and calls from the OCDC worry them, despite the fact that sitting judges' conduct is primarily regulated by the Commission on Retirement, Removal and Discipline of Judges.

Disciplinary authorities, including the OCDC and Regional Disciplinary Committees, are required by Rule 5 to investigate complaints made against attorneys. We want and need to get evidence, and perspective, from the lawyer against whom a complaint has been made. More often than not, lawyers have records in their files that can explain or refute the complaint. The lawyer is often our best source of information about the client's case. And, whether the complaint is about a missed telephone call or a missed statute of limitations, investigations eventually include responses by the lawyers.

THE PROCESS: AN OPPORTUNITY TO EXPLAIN

Most of our cases begin with a complaint from a client. Our staff reads every complaint. About 60 percent of those complaints are not opened, because we do not find in the complaint a violation of the rules that we can address in the disciplinary process. In those cases, a lawyer's response is not necessary. But if an investigation is undertaken, the lawyer is usually given the first opportunity to enlighten, explain, and persuade the OCDC. That opportunity typically comes in the form of responding to a letter or call from the

OCDC or the Regional Disciplinary Committee.

Many attorneys immediately consider the complaint, gather records, seek clarification if necessary, and respond professionally, as if they were representing their most important client. Others immediately seek counsel, being wary of the risks of representing themselves in emotionally charged proceedings.

A few lawyers seem to think that the complaint will go away if they simply say, "It never happened." These lawyers respond, but without supportive records or explanations. Obviously, those investigations take longer to complete, usually increasing the lawyer's anxiety about the process. Given the Supreme Court's directive to us to investigate allegations of misconduct, we are unlikely to simply accept a brush-off from a lawyer under investigation.

CAN IT GET ANY WORSE?

Unfortunately, when the OCDC starts asking questions, some lawyers simply dig holes and hunker down. Whether that response is the result of denial, panic, or rationalization based on a sense of innocence, it doesn't work. And, it puts those lawyers at risk of several unwanted consequences.

First, of course, pending disciplinary cases do not just fade away. The cases will go forward, with or without the lawyer's input. Second, lawyers who do not respond invite further investigation into their fitness to practice. We would not be doing our job if we failed to follow up and find out what other problems exist when lawyers fail to respond to professional mail.

The Missouri Supreme Court said it this way:

"...neglect of an attorney's own interests by failing to respond to correspondence from the Bar Committee casts doubt on the attorney's ability to represent others." *In re Staab* 785 S.W.2d 551 (Mo. banc 1990).

Third, failure to respond to disciplinary investigations establishes a violation of Rule 4-8.1. Lawyers violating that rule have been publicly disciplined, even where the allegations in the underlying complaint are unfounded. *In re Hardge-Harris*, 845 S.W.2d 557 (Mo. banc 1993).

Finally, if after an investigation formal charges (Informations) are filed, lawyers are required to submit Answers. When lawyers don't answer formal disciplinary Informations, the consequences are certain, swift and severe: "The failure to file an answer or other response to the information shall be deemed as consent by the respondent for this Court to enter an order disbarring respondent without further hearing or proceeding." Rule 5.13. In those circumstances, disciplinary authorities have no discretion: "If an answer or other response is not timely filed, the information shall be filed in this Court as an information with notice of the default." Rule 5.13.

WHAT IS THE COURT'S ATTITUDE TOWARD NON-RESPONSIVE AND MISLEADING ATTORNEYS?

Obviously, Rule 5.13 sets the tone: Disbarment results when lawyers ignore formal charges. As to cooperation with investigators, the Court has provided additional guidance in its written disciplinary opinions:

- "Respondent's explanation for his lack of cooperation is that he

suffered severe panic attacks whenever he saw mail from the Bar Committee and Court. . . . Because of his panic he did not open the mail, and therefore was not aware of the nature and extent of the Bar Committee's request. He offers this explanation as evidence that his failure to comply was not willful. These factors do not overcome the manifest showing in the evidence nor do they mitigate the seriousness of the offense, but, demonstrate the tragedy involved." *In re Staab*, 785 S.W.2d 551 (Mo. banc 1990).

• "[W]e . . . expect the members of the Bar to deal promptly and candidly with any charges. . . . The individual attorney's responsibility to the profession in this respect is no less important than the attorney's ethical responsibility to a client and to the court." *In re Hardge-Harris*, 845 S.W.2d 557 (Mo. banc 1993).

• "[A] lawyer should regard a letter from the Office of Chief Disciplinary Counsel with the

respect accorded with communications from the Internal Revenue Service." *In re Shelhorse*, 147 S.W.3d 79 (Mo. banc 2004), Senior Judge Blackmar concurring in part and dissenting in part.

• "[Lawyers] who knowingly seek to mislead those committees, and in so doing interfere with their work, do so at their peril." *In re Donaho*, 98 S.W.3d 87 (Mo. banc 2003).

• "...leniency might be appropriate were it not for the remaining charges, all of which involve intentional deception of the very committee charged with ensuring that those licensed to serve as members of the bar act with the moral fortitude befitting the profession. . . . This Court regards dishonesty before a disciplinary committee to be especially egregious." *In re Donaho*, 98 S.W.3d 87 (Mo. banc 2003).

Additionally, the Court often refers to sanction guidelines established by the American Bar Association, *Standards for Imposing Lawyer Sanctions* (1992).

Those standards establish the following as *aggravating factors* in determining appropriate discipline:

- "intentionally failing to comply with rules and orders of the disciplinary agency";
- "submission of false evidence, false statements or other deceptive practices during the disciplinary process";
- "refusal to acknowledge wrongful nature of conduct."

The existence of those factors can turn a minor offense into something with a harsher result.

On the other hand, "full and free disclosure to [the] disciplinary board or a cooperative attitude toward [the] proceedings" serves as a *mitigating factor*, and can help justify a reduced sanction.

Disciplinary phobia is real; we understand that. But it should be evident that more bad things can happen when lawyers don't fully cooperate with disciplinary inquiries. If you don't want to go to lunch with me, just say so; but ignoring official calls and letters from disciplinary authorities is risky business.

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