

RESPONDING TO A BAR COMPLAINT

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It is not the type of letter, telephone call or even a knock on the door which any lawyer would welcome. A complaint has been made to the Alabama State Bar (“Bar”). Whether the complaint is based upon some statutory provision, i.e., ALA. CODE § 34-3-1, et seq., the Alabama Rules of Professional Conduct (ARPC) or Alabama Rules of Disciplinary Procedure (ARDP), an investigation will follow. This can lead not only to embarrassment and stress, but also legal fees, suspension, and in some cases, disbarment or even imprisonment. Fortunately, most lawyers enjoy a practice away from such experiences. When a complaint is filed and an investigation begins, however, the consequences are real. Every attorney needs to understand how to respond and should consider the following nine points:

1. Respond.

An investigation may be initiated for any reason and upon a complaint by any person, not just a client, or by the Bar’s own motion. (ARDP 3(c); 4(b)(1)). The complaint may even be filed anonymously. *Ex parte Alabama State Bar*, 3 So. 3d 178 (Ala. 2008). No matter how frivolous a complaint may be perceived, a response must be made in a timely and appropriate fashion. To ignore an inquiry by the Bar is simply to invite more problems. In fact, the failure to respond is, in and of itself, a ground for discipline. (ARPC 2(e)).

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Often, a complaint is filed without the attorney's knowledge. Although rare and usually because an attorney has failed to respond to other efforts, the first notice may even be an unannounced face-to-face meeting with the Bar representative at your office. While lawyers should be mindful and absolutely respectful of the Bar's authority, due process provides you with certain rights. *Ex parte Case*, 925 So. 2d 956 (Ala. 2005). The requirements of due process include adequate notice and a reasonable opportunity to respond. ALA. CODE § 34-3-83.

Practically speaking, this means you should first ask for a copy of any written complaint or petition. You should have an understanding of the scope of the complaint. Second, you should allow yourself a reasonable opportunity to respond to the Bar's inquiry. This may mean consulting another lawyer. In communicating with the Bar representatives, it is important to convey that your decision to seek a lawyer's advice is not a refusal to respond, but only an effort to protect your rights. You should be mindful that seeking such legal counsel does not allow an open-ended time to respond. Thus, if the Bar requests information by a time certain, you should reply. The failure to timely comply may lead to the Bar exercising its right to obtain an emergency court order in its favor. (ARDP 20). It is therefore imperative to understand that the complaint is not going to be dismissed based upon your inaction.

Equally important to the timing of your response is the manner. There is no need to "kill the messenger." *Asam v. Alabama State Bar*, 675 So. 2d 866 (Ala. 1996). Experience shows that the Bar's request for information is not reflective of some prejudgment already formed against the lawyer. Rather, the investigation is driven to

secure information to fairly evaluate the complaint. Most always, an investigation will precede an emergency suspension or before the filing of formal charges. The chance to convey your position to the Bar is critical to resolving the problem at the beginning. The investigation may lead the Disciplinary Commission to recommend no formal charges be filed. (ARDP 12(c)(11)). At all times, you should demonstrate a willingness to cooperate and resolve the complaint. Incivility and arrogance simply have no place in a response to a Bar problem. Remember, the same individuals who investigate the complaint will ultimately have a tremendous influence over the resolution.

2. Do Not Underestimate the Bar's Authority.

The authority of the Bar is prescribed by the Alabama Legislature, the ARPC and ARDP. Though subject to appeal, those powers are enormous. ALA. CODE § 34-3-80. The Bar's jurisdiction over a lawyer extends to misconduct outside the attorney-client relationship. (ARDP 1(a)). As such, it is not defense to a charge of misconduct that the act was somehow separate and distinct from the provision of legal services. ALA. CODE § 34-3-86; § 34-3-87.

In addressing an attorney's exposure, ARPC 8.4 broadly defines professional misconduct to include "dishonesty, fraud, deceit, or misrepresentation, . . . or any other conduct that adversely reflects on his fitness to practice law." The Committee Comments to ARPC 8.4 cite specific examples of abuse of offices outside the practice of law such as acting as a trustee, executor, administrator, guardian, agent, officer, or manager. These examples are not exclusive. Questions have arisen in certain cases where the complaint is directed toward a collateral entity such as a title company which is owned or managed

by the attorney. While this entity may be separate from the law firm, it is the attorney's conduct which is at issue. *Alabama State Bar v. Quinn*, 926 So. 2d 1018 (Ala. 2005). As such, any act of wrongdoing by a person admitted to the practice of law in Alabama will subject that individual to the Bar's jurisdiction. (ARDP 12).

The broad scope of the Bar's jurisdiction is matched by its specific powers. On its own initiative, the Bar can commence an investigation, request records, issue subpoenas, administer oaths, and compel the attendance of witnesses. (ALA. CODE § 34-3-82; ARDP 17). At its discretion, the Bar can move to temporarily suspend the license of an attorney without notice to the attorney, or before a hearing is held on the merits. (ARDP 20)(a)(2)). If warranted, the Bar may issue a reprimand, monetary fine, suspend or permanently disbar your right to practice. (ARDP 8). In those rare instances where a disbarred lawyer continues to unlawfully practice, the punishment may be a prison term up to six months. ALA. CODE § 34-3-1.

Control over the investigation remains with the Bar. The Bar may proceed with its inquiry even if the complainant refuses to cooperate, or there has been restitution made by the lawyer. (ARDP 13). The Bar is not precluded from performing an investigation or finding wrongdoing even when the local Grievance Committee has failed to investigate or refused to take any action. (ARDP 7(b); *Alabama State Bar v. Caffey*, 938 So. 2d 942 (Ala. 2006). Further, under the circumstances of a lawyer surrendering his or her license, the Bar is not required to terminate its investigation. (ARDP 1(c)). An investigation will however, be stayed if an attorney becomes appointed or elected to the judicial bench and only lifted once the attorney leaves the bench. *Ex parte Alabama State*

Bar, So.3d 178 (Ala. 2008). Given such power, you should not underestimate the Bar's authority.

3. Consult Another Lawyer.

By no means is every investigation intended as a disruption of the attorney's practice. Nevertheless, it is wise to contact another attorney regarding the Bar's investigation, even if the contact is a brief telephone call for a second opinion. Because the Bar has its own counsel and will be guided by sound legal advice, you too should proceed with advice of counsel.

In consulting with your attorney, the focus of the investigation can be confirmed. An attorney can assist in formulating a written response to the Bar that is limited to the proper inquiry. Further, your attorney will oversee the production of documents and any interviews or depositions given to the Bar by you and your staff. As needed, your attorney may converse with the Bar's counsel or Disciplinary Officer to address any legal issues including pretrial negotiations. (ARDP 4.2(b)(3)). Should there be a resolution prior to a hearing on the merits, you will want an attorney's advice before entering into any Consent Order. Moreover, there are specific procedural and substantive provisions to be satisfied such as filing deadlines, and reporting requirements. (ARDP 20, 26). These need to be fully complied with so as not to waive a defense or create a new problem. (ARDP(2)(d)).

Consideration must also be given to those cases where there is a potential criminal implication. As an example, complaints arising out of the misappropriation of client funds may not stop with the Bar investigation. *Ex parte Bryant*, 682 So.2d 39 (Ala.

1996). Prudence dictates that a lawyer must recognize any exposure to criminal charges, and seek guidance. *Ex parte Price*, 715 So.2d 856 (ALA. CRIM. APP. 1997). Notably, the fact there may be an ongoing criminal investigation will not automatically stay a Bar investigation. (ARDP 14).

4. Know the Rules.

The rules that govern the practice of law are codified in the Alabama Code, § 34-3-1, et seq as well as the ARPC and the ARDP. A lawyer is presumed to know the rules, such that a lack of knowledge is not a valid excuse for any violation. ALA. CODE § 34-3-20. The rules and statutory provisions are detailed, and a requirement may be overlooked absent careful study. As an example, there are specific provisions that govern client funds (ARPC 1.15; ARDP 11), fees (ARPC 1.5), continuing education (ARDP 10), conflicts (ARPC 1.7, 1.8, 1.9, 1.10), and advertising (ARPC 7.2). These are rules designed to prevent complaints.

There are separate rules which govern a lawyer's duty once a complaint has been filed. For instance, it is necessary for an attorney to notify members of his or her law firm. (ARDP 12(a)(3)). Moreso, a disbarment or suspension carries with it specific obligations to inform all clients and to protect the clients' interest. (ARDP 20, 26). These requirements place an affirmative duty upon the attorney to advise the Bar of the attorney's full compliance. (ARDP 26(d)).

Helpful to understanding a lawyer's duty is the Bar's web site, www.alabar.org. The site offers information on the practicality of running a law firm, client relations, marketing and rule compliance. There is even a comprehensive manual entitled *Trust*

Accounting for Alabama Lawyers. Given the obligation of a lawyer to know the rules, and availability of various resource to access the rules, defending a violation on the grounds of ignorance is unconvincing.

5. Integrity of the Client's File.

Paramount to defending any complaint, whether it is before the Bar or one for legal malpractice, is the obligation to maintain the integrity of the client's file and all other records. The file will serve as the basis for your defense. If well maintained, the file should constitute the strength of your defense, not the weakness. Under no circumstances should the file be altered in response to an investigation, or any reason for that matter. The temptation to add some lengthy self-serving narrative must be avoided. Instead, the file should be maintained and a copy produced to the Bar in its original form. Altering the file simply creates more problems. Any attempt to create "new documents" such as emails to a client so to refute a claim of failure to communicate will be quickly recognized during the investigation. Further, should a civil suit be filed, an altered file may be grounds for your professional liability carrier to deny coverage.

Specific and careful attention needs to be given to financial records. There is no more of a serious charge than the mismanagement of a client's funds. *Bonner v. Disciplinary Board of the Alabama State Bar*, 401 So. 2d 734 (Ala. 1981). "Creative" accounting simply has no place in a law firm. A lawyer has an absolute duty to maintain trust and operating accounts in an orderly fashion. If a mistake does occur, the mistake must be timely corrected. You should contact the Bar and explain what happened and why. The failure to maintain accurate financial records has substantial consequences.

The Bar has traditionally had a “zero tolerance” in those cases where client funds have been knowingly misappropriated. For such wrongdoing, the question is not if the lawyer will be suspended or disbarred, but how long the suspension or disbarment will be enforced. *Alabama Standards for Imposing Lawyer Discipline*. (ASILD 4.1).

6. Notify Your Professional Liability Carrier.

Policies issued for professional liability may carry an endorsement which provides coverage for responding to a Bar complaint. The coverage may be limited to the cost of defense, and not include payment for any fines. Even if the policy is limited or does not include coverage, notification to your insurance carrier is recommended. While a Bar complaint is not discoverable in a suit for legal malpractice, the underlying conduct may lead to such a suit. ALA. CODE § 6-5-578. If so, your insurance carrier needs to understand when and what complaint has been made. Your carrier may need to take immediate steps to protect your interest in anticipation that a civil action will follow. So to prevent the mistake from reoccurring, the insurance carrier may often have risk management services available. These programs or materials are generally provided at no cost.

The failure to provide timely notice may be a ground for the insurance carrier to later deny coverage should there be civil action. Lawyers should also be mindful that notifying their carrier may lead to a rate increase or even the policy being non-renewed or canceled. The risk of remaining silent however is greater. There are certain to be expenses and these can quickly mount with meetings and hearings before the Bar in

Montgomery. If there is coverage for the complaint, you should take advantage of the policy for which you have paid premiums. Further, most policies require notification.

7. Expect an Investment of Time and Money.

Responding to a Bar complaint is stressful and often expensive -- both in terms of lost time, money, and even your license. Given the serious nature and consequences of an investigation, you should expect to devote the necessary resources. You should prepare for any meetings with the Bar and its investigators as if you are preparing your own client for a deposition or trial. While lost time is frustrating, a lost reputation can never be fully regained.

In addition to loss of income, you may be subject to specific costs associated with the Bar's investigation and finding. Under certain circumstances, you may be ordered to participate in a course of legal study or submit to a behavioral examination. *Nichols v. Alabama State Bar*, 981 So. 2d 398 (Ala. 2007; ARDP 21(b)(4-11)). As these courses may last several days or more, the cost could exceed several thousand dollars. (ARDP 21(b)(9)(c)). As part of an investigation, you may be responsible for paying a court reporter, witness fees, the travel and incidental expenses for Disciplinary Hearing Panel. (ARDP 33). Your cost may include the publication in a local newspaper of some adverse finding. (ARDP 33). In the case of an attorney seeking reinstatement, the costs are to be paid in advance. (ARDP 28(e)). Should the Bar ultimately prevail, an administrative fee of \$750 may be awarded to the Bar. (ARDP 33(e)).

8. Consider All Options.

Not every Bar investigation will lead to a full hearing before a Disciplinary Board, much less an appeal to the Alabama Supreme Court. (ARDP 12). Such a course of action is unusual both in terms of time and expense. If, however, an appeal were to occur, the defense cost could be substantial, and the matter take months, if not a year or more, to conclude. During this time, your practice could be subject to some interim suspension or other limitation imposed by the Bar. This could include a Trustee being appointed to monitor your practice so to protect the interest of the clients as well as the lawyer. (ARDP 29). Given this potential, a careful review of all options, including a negotiated agreement with the Bar, should first always be considered. These options can be discussed with the Bar representative outside the formalities of a hearing. This may mean taking affirmative steps such as limiting the scope of your practice, supervision from other practitioners, or participation in some ongoing practice management program.

If a reasonable resolution can not be reached, you should be prepared to defend yourself with conviction. The statute of limitations requires the filing of formal charges within six (6) years from the accrual of the offense. (ARDP 31). There is a one year savings provision for fraud. (ARDP 31). Further, the statute may be tolled if there has been a continuing violation. *FLC v. Alabama State Bar*, 38 So.3d 698 (Ala. 2009). An Answer is to be filed within twenty-eight (28) days after service of the complaint. The burden of proof is that of clear and convincing evidence, and it is upon the Bar. (ARDP 19(a)). This same standard of proof is the attorney's burden in any application for reinstatement. (ARDP 28(c)). You will be allowed to depose witnesses, obtain

documents and present witnesses at the trial. (ARDP 12(e)(3)). This would include retaining experts on your behalf.

The discovery and hearing will be conducted before a Disciplinary Board and in accordance with the Alabama Rules of Evidence. (ARDP 19(b)). The make up of the Disciplinary Board will be five (5) members, including three persons who are Bar Commissioners, one layperson, and the Disciplinary Hearing Officer. (ARDP 4(a) 11). The ruling by the Disciplinary Board is subject to review by the Alabama Supreme Court. The standard of review is whether the Disciplinary Board's ruling was "clearly erroneous." *Alabama State Bar v. R.G.P., Jr.*, 988 So.2d 1005 (Ala. 2008).

When preparing a defense, there should be caution to those who believe long, drawn out discovery, "papering" the Bar, or asking for multiple continuances will lead to a dismissal. Though such unencouraged tactics may work in some civil cases, do not test the resolve of the Bar in this manner. *Alabama State Bar v. McBrayer*, 20 So. 3d 100 (Ala. 2009). For those who have made a mistake, the better course to follow is to be upfront, contrite, and willing to take proper steps to correct any problem. If, however, you are not liable, be prepared to move forward with your defense in a deliberate and civil manner.

9. Be Proactive.

The best way to avoid an investigation is to know the rules. It is understood that lawyers are not always going to prevail, and clients or third parties will become dissatisfied. A complaint, however, is often the product of unrealistic expectations and a lack of good communication. A timely response to a concern and a proposed plan of

action will go a long way to avoiding a complaint. On the other hand, indifference and a failure to respond may leave a dissatisfied client or any other party with no recourse. Close attention by you and your staff is necessary to those individuals who express or show dissatisfaction. If a problem is recognized, address the issue in a timely and thoughtful manner. It is much easier to resolve any problem face-to-face at the time the complaint is first recognized. To ignore anyone's concern is simply to invite that person to contact the Bar.

In addition to understanding the rules, the Bar itself is a good source for help. Lawyers are encouraged to contact the Bar if there is a question about compliance with the rules. While the Bar can not give an opinion on a question of law, it can provide an opinion on an ethical issue. ARDP 18 in fact provides immunity to a lawyer who seeks the Bar's advice for a matter which later becomes the subject of a complaint. Here, ARDP 18 states as follows:

Conduct not subject to disciplinary action:

If, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, in writing, to the General Counsel, and receives therefrom a written opinion, concurred in by the Disciplinary Commission, that the proposed conduct is permissible, such conduct shall not be subject to disciplinary action.

Any lawyer seeking an opinion, however, must make sure that all facts and circumstances are adequately disclosed. Otherwise, the opinion may be deemed defective as not being based upon sufficient information.

If for whatever reason a problem does occur, be the first to acknowledge. Advise the Bar of the issue before the Bar finds out on its own. In so notifying the Bar, have a

plan of action ready to correct the problem. Seek the Bar's input and approval of your plan. While being proactive will not cause the problem to just vanish, these positive steps will help your cause. In determining the scope of misconduct and appropriate punishment, the Bar will consider both aggravating and mitigating factors. (ASILD 9). *Alabama State Bar v. Hallett*, 26 So. 3d 1127 (Ala. 2009). Among the considerations is an attorney's recognition and willingness to correct a problem. To the contrary, inaction is your worse enemy. *Tipler v. Alabama State Bar*, 866 So. 2d 1126 (Ala. 2003). An attorney is simply naïve to believe that the Bar is "bluffing" or does not have the resources to uncover misconduct.

In summary, the state of Alabama has prescribed rules which must be followed in connection with the privilege of practicing our profession. Lawyers are not perfect. Clients and others will complain despite the lawyer's best efforts. When a complaint is filed, the Bar has an obligation to investigate. It is the lawyer's duty and, in their best interest, to properly respond to any investigation. By careful and thoughtful deliberation, a complaint can be addressed and resolved. If there is merit to the complaint then the wise course is to acknowledge the problem and be willing to work with the Bar. Should the complaint not be valid then you should prepare a defense to protect your right to practice. Understanding these nine basic rules will hopefully assist in a fair resolution.