Raising the Bar in Ethics

What to Do When You Receive a Letter from the ODC?

By Evan R. Shirley

Out of the blue, like a bolt of lightning, you receive a complaint from the Office of Disciplinary Counsel (ODC). It is marked CONFIDENTIAL and encloses a copy of the complaint that was submitted to ODC. The letter also provides a relatively short summary of the asserted acts of professional misconduct and says "so we can assess the matter, please provide your detailed written response to this office" within two weeks. It also advises "please be aware that attorneys have a duty to cooperate in ethics investigations and failure to do so violates HRPC 8.1(b), HRPC 8.4(a), and HRPC 8.4(d)."

What to do, what to do?

Lawyers who are the subject of Hawai'i disciplinary complaints often do one or more of three things – none of which is good.

Sometimes a lawyer-respondent tries to negotiate with the complaining witness to withdraw or otherwise terminate the disciplinary complaint.

Another response is to fail to provide a timely reply or otherwise communicate with ODC.

At other times, the Hawai'i lawyer, himself or herself, responds in a wholly inappropriate manner to the complaint.

Each of these three alternatives is inadvisable for obviously different reasons.

Trying to Get the Source of the Complaint to Withdraw It

A common misconception of Hawai'i lawyers is that a disciplinary complaint can be withdrawn or terminated at the request of the complaining person. A lawyer does no good whatsoever by attempting to pay off, mollify, or otherwise settle a disciplinary complaint with the complaining witness. Indeed, any such attempt at negotiations is frowned upon by the ODC.

Moreover, a complainant has no standing. In *Akinaka v. Disciplinary Board of the Hawai'i Supreme Court*, 91 Haw. 51, 979 P.2d 1077 (1999), the Hawai'i Supreme Court held that the disciplinary complainant, Akinaka, had no standing to participate in the disciplinary process because "the only one who stands to suffer direct injury in a disciplinary proceeding is the lawyer involved." *Id.* at 58, 979 P.2d at 1084. "This is because the private individual has no interest in the outcome of a disciplinary proceeding, inasmuch as the purpose of the disciplinary system is to protect the general public and the legal profession, not the private individual, from attorneys who commit professional misconduct." *Id.* The Court noted that if a lawyer has harmed an individual, such a private citizen should pursue his or her claims against the lawyer in a civil action. *Id.*

To ensure that persons who bring the lawyer's alleged misconduct to the attention of ODC have no ability to control the prosecution of a disciplinary complaint, the Hawai'i Supreme Court has long maintained Rule 2.9 of the *Rules of the Supreme Court of the State of Hawai'i* ("*RSCH*") ("Refusal of complainant to proceed, compromise, etc."). The rule provides: "Neither unwillingness nor neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement, compromise between the complainant and the attorney or restitution by the attorney, shall, in itself, justify abatement of the processing of any complaint." Almost invariably, any attempt to have the source of the disciplinary complaint withdraw the ODC complaint just make matters worse for the respondent-lawyer.

Failure to Provide a Timely Reply to the ODC

Year after year the largest category of complaints to the ODC involves client neglect. It is therefore not surprising that the neglect of a lawyer to cooperate with a disciplinary investigation is also a large source of lawyer suspensions. To make matters worse, many lawyers — whether out of embarrassment, competitive concerns, or lack of understanding — seek to keep secret the existence of a disciplinary inquiry against them. This isolation can itself result in inaction, misdirected self-help, and inappropriate aggravating conduct. In terms of a group practice, the failure of a lawyer to disclose promptly to the partners that a disciplinary complaint has been lodged constitutes a breach of fiduciary duty and may also imperil indemnification under a professional liability policy.

Cooperation with disciplinary counsel is more than appropriate and practical; it is mandatory. Disciplinary inquiries have discrete time limits within which to respond. Doing nothing, that is, failing to provide *any* response, is not just a default, but also supplies separate grounds for lawyer discipline. A pair of disciplinary rules require Hawai'i lawyers to "respond to a lawful demand for information from ... [a] disciplinary authority" (HRPC Rule 8.1(b)), and "to cooperate during the course of an ethics investigation or disciplinary proceedings" (HRPC 8.4(d)). Lack of candor to the disciplinary authority or failure to cooperate may also be an element in aggravation at the sanctioning stage of the proceedings.

Failing to respond without good cause will be deemed lack of cooperation with the disciplinary process. It may result in the imposition of discipline even if the lawyer is acquitted of the underlying charge of misconduct. *RSCH* Rule 2.12A provides for the suspension of a lawyer by the Hawai'i Supreme Court "... pending consideration of the charges ... upon a finding that the attorney is guilty of a failure to cooperate with the investigation or disciplinary proceeding..."

For example, in *Office of Disciplinary Counsel v. Baker*, 2004 Haw. Lexis 248 (April 19, 2004) , the Hawai'i Supreme Court immediately suspended

Respondent Baker who had not shown good cause for his failure to cooperate with ODC's investigation. *Id.* at 1-2.

No one, it is often said, has "a natural or constitutional right to practice law." *In re Avery*, 44 Haw. 26, 29, 352 P.2d 607, 609 (Haw. 1959). Nevertheless, a law license is "something more than a mere indulgence, revocable at the pleasure of the court ... It is a right of which [the lawyer] can only be deprived by the judgment of the court, for moral or professional delinquency." *In re Gibbs*, 35 Ariz. 346, 278 P. 371 (1929).

Responding to the ODC in a Wholly Inappropriate Manner

The initial letter to the respondent-lawyer from the Office of Disciplinary Counsel has a twofold purpose: first, it advises the lawyer of the complaint and its general nature; second, it seeks a response from the lawyer. The notification of possible discipline and the seeking of a response springs from the cornerstone of due process in modern lawyer disciplinary proceedings. *In re Ruffalo*, 390 U.S. 544 (1968) (establishing that a respondent in a lawyer disciplinary hearing has a due process right to fair notice of the charges and an opportunity to be heard).

The ODC critically examines the lawyer's initial written communication. An uninformed response can haunt the writer, often tremendously. Evidence suggests that a substantial number of lawyers do not understand their rule-based professional obligations and substantially worsen their position before disciplinary authorities through ignorance of the procedures and applicable law.

The initial ODC letter to a respondent-lawyer does not seek a confession, a plea, and certainly not a novella. By the same token, any responsive letter must be scrupulously accurate and precisely written. A responsive letter is essentially an admission of a party opponent. Extreme care should be exercised as to the form of the response and the statements made in it. In a worst case scenario, factual disputes may be foreclosed and potential defenses may be forever lost if the letter is other than careful,

accurate, and restrained. The letter also should contain no legal conclusions.

Lawyers who routinely represent their colleagues before disciplinary authorities believe that the average practicing lawyer simply does not fully appreciate the scope of the risks involved in un-counseled communication with the ODC. To illustrate this point, consider that in virtually every ODC matter there are two fundamental elements: first, whether the respondent violated one or more rules of the *Hawai'i Rules of Professional Conduct*; and, second, whether there are circumstances in mitigation of the violation. A response from a lawyer to an ODC complaint that, in effect, unnecessarily admits things or contains legal conclusions — let alone, an outright mea culpa — may well foreclose the ability to later say in the proceeding, "I didn't do it," even if the earlier admission was not fully factually or legally supported or even knowingly made. In such case, the respondent is left with only the single defense of mitigation.

Another hazard relating to the receipt of a letter from the ODC is that the communication often provokes an emotional, visceral response. The lawyer can become his or her own worst client. Lawyers are prone to forget the wise old courthouse saying that "a lawyer who represents himself has a fool for a client and the client has a fool for a lawyer." For this reason, it is generally advisable to obtain knowledgeable, experienced, and objective counsel.

Too large a segment of Hawai'i's lawyers have never read the *Hawai'i Rules of Professional Conduct* — let alone the *RSCH* Rules 2.1 through 2.26, which contain highly specific disciplinary rules — or have ever looked at the *Rules of the Disciplinary Board of the Hawai'i Supreme Court*. Most lawyers are simply ill-prepared to assess, evaluate, or respond effectively to a disciplinary complaint and the sui generis nature of the proceedings associated therewith. This is further complicated by the asymmetrical access to the ODC and to members of the Hawai'i bar relating to primary and secondary material on lawyer discipline.

Evan Shirley is a frequent contributor to the Hawai'i Bar Journal on legal ethics and professional responsibility. His practice focuses on advising lawyers and firms on legal ethics matters and representing lawyers in bar disciplinary complaints, fee disputes, disqualification motions, sanctions and contempt proceedings and as an expert consultant and testifying witness concerning the law governing lawyers.

Notices of Discipline

On September 14, 2009, the Hawai`i Supreme Court granted the Office of Disciplinary Counsel's ("ODC") petition for issuance of reciprocal discipline notice to ANDREW S. HARTNETT, pursuant to Rule 2.15(b) of the Rules of the Supreme Court of the State of Hawai'i (RSCH). On the record, it appeared that: (1) on May 12, 2009, the Supreme Court of Kansas accepted Respondent Hartnett's voluntary surrender of his license to practice law in Kansas and disbarred him; (2) RSCH 2.15(b) requires the same or substantially equivalent discipline, or restrictions or conditions upon the attorney's license to practice law in the State of Hawai'i, unless Respondent Hartnett showed cause under RSCH 2.15(c) as to why imposition of the same or substantially equivalent discipline should not be imposed; (3) Respondent Hartnett responded to the court's August 5, 2009 order and stated that he did not object to or otherwise oppose the petition filed in this case; (4) the same discipline is warranted in this jurisdiction; and (5) the same discipline in this jurisdiction is disbarment. Therefore, the court ordered that Hartnett be disbarred.

The Hawai`i Supreme Court suspended Hilo attorney CURTIS T. NARIMATSU from the practice of law, effective upon entry of an Order of Interim Suspension on September 22, 2009. The Court determined there is sufficient evidence to show that Narimatsu may have violated the Hawaii Rules of Professional Conduct and poses a substantial threat of serious harm to the public. Narimatsu will remain suspended until further order of the Court. Narimatsu is ordered to: (a) notify each of his clients in pending litigation or administrative proceedings, and the attorney(s) for each adverse party in such matter or proceeding, of his suspension; and (b) to comply with all other requirements of Rule 2.16, Rules of the Supreme Court of the State of Hawai`i. Narimatsu, 57, was admitted to the Hawaii bar in 1977 and is a graduate of Antioch School of Law.

The Hawai`i Supreme Court granted the request of suspended attorney BARBARA LEE MELVIN, formerly of Honolulu, to resign from the practice of law in lieu of discipline, effective December 9, 2009. Resignation from the practice of law in lieu of discipline is a disbarment for all purposes under the Supreme Court Rules, including reinstatement. Melvin will not be eligible to practice law in Hawai'i until reinstated by the Hawai`i Supreme Court, and she cannot accept any new clients or retainer fees. Melvin was admitted to the Hawai'i bar in 1976 and has been suspended administratively since 2008 for her failure to pay her attorney registration dues. (A copy of the Supreme Court's Amended Order Allowing Resignation in Lieu of Discipline is available upon request.)

The Hawai`i Supreme Court suspended Maui attorney STEVEN B. SONGSTAD from the practice of law, effective upon entry of an Order Denying Motion to Strike and Granting Petition for the Immediate Suspension of Respondent Steven B. Songstad on January 14, 2010. The Court determined that Songstad failed to cooperate with the ODC's investigation and has not shown good cause for his failure to do so. Songstad will remain suspended until further order of the Court. Songstad may move the Court for reinstatement upon evidence, by affidavit and/or exhibit, of full compliance with the ODC's requests for information. Songstad, 63, was admitted to the Hawaii bar in 1975 and is a graduate of Seattle University School of Law.