# How to Respond to an ARD CARD CARD CARD TAINT

You get a letter from the Attorney Registration & Disciplinary Commission asking you to respond to a complaint about your conduct. After your blood pressure returns to normal, what do you do? Here's a brief step-by-step guide.

By Michael L. Shakman and Arthur W. Friedman

by a former client or someone else, you should first take comfort in the fact that most complaints do not result in any disciplinary action against a lawyer. In 2002, for example, the ARDC received more than 6,100 complaints about Illinois lawyers. According to its annual report, about 5,700 were closed based on the inadequacy of the initial complaint or the ARDC's investigation of the matter. Thus, more than 90 percent of initial complaints are disposed of without charges being brought.

In determining whether to take action, the ARDC normally writes to the lawyer about whom a complaint has been filed. It provides a copy of the complaint and asks for the lawyer's response. Typically, two weeks is allowed for the response. But virtually without exception, the ARDC will extend the time upon request. The ARDC normally provides a copy of the lawyer's response to the complaining party and affords that party an opportunity to comment before deciding whether to pursue the matter.

Complaints about lawyers most commonly allege neglect of the client's matter, failure to communicate with the client, fraudulent or deceptive activity, excessive fees, or improper management of trust funds. In most cases there are good answers to the complaints, and no disciplinary proceeding should result – provided that the lawyer gives the ARDC a clear and complete response.

But before you rush off your response to the ARDC, there are several factors to consider. One is whether you want someone else to respond for you or help you with your response. A second is whether you should report the complaint to your professional liability insurer. Normally, the answer to each question is "yes."

### **Professional liability coverage**

Often professional liability insurance policies provide coverage for responding to disciplinary charges, so be sure to check your policy. When you do, you will also likely learn that you run the risk of losing malpractice coverage if you don't promptly report the facts giving rise to a claim once you re-

Michael L. Shakman <mlshak@aol.com> and Arthur W. Friedman <afriedman@millershakman.com> are partners in the Chicago firm of Miller Shakman & Hamilton, LLP. ceive the ARDC notification letter.

In most situations, it will serve your interest promptly to inform your malpractice insurer of the claim. Even if the policy does not expressly provide coverage for responding to a disciplinary inquiry, an insurer may elect to assign an attorney to assist in your response because the ARDC complaint may lead to a malpractice claim as well.

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### **Bringing in another lawyer**

If you don't have insurance coverage that provides counsel, you may wish to ask a colleague or friend who is a lawyer to assist you in responding. Because of the emotional impact of being charged with wrongdoing – which can affect the accused lawyer's good judgment – it is always a good idea to turn to someone not directly involved to work on the response.

It is important to remember that lawyers have a duty to report certain major types of misconduct to the ARDC when they learn that another lawyer has committed the conduct. Reporting is rejuired by Rules 8.3 and 8.4 of the Illinois lules of Professional Conduct when the onduct is criminal, fraudulent, or the ke. There is, however, an exception to he reporting obligation for information protected as a confidence by these Rules r by law."2 Accordingly, before you tell our side of the story to a lawyer friend r acquaintance, be sure you establish lat your consultation is to obtain legal lvice and that the information is subject the attorney-client privilege.

# ow to prepare a response

When it's time to prepare a written reonse to the ARDC, take the following ps:

Review all relevant documents. A eful review of all documents relating the claimed misconduct is essential. len, useful material to rebut a charge sts and can be provided to the ARDC.

Moreover, once a client or former client charges a lawyer with wrongdoing, the attorney-client privilege does not apply to the materials that the lawyer reasonably believes he needs to disclose to defend himself.<sup>3</sup>

Understand the facts. Often the complaining party does not provide all the relevant background, sometimes omitting important information that affects

how the charge will be viewed by the ARDC. Be sure to explain all the relevant facts. If you are asked to assist someone in responding to an ARDC complaint, be sure you ask for and obtain all the relevant facts.

If some of the facts are not reflected in documents, consider obtaining one or more affidavits from persons with relevant knowledge. Filing an affidavit with a response is not required but is often a good idea because it tells the ARDC investigator that you have evidence to support your position. An affidavit will also document testimony you may later have to present, and helps pin down facts before recollections wane.

Understand the Rules. The ARDC usually identifies the Rules of Professional Conduct that the lawyer is accused of violating. Be sure to read and understand them. The Illinois Rules of Professional Conduct are largely based upon the American Bar Association's Model Rules, although there are differences. The Illinois Rules, however, were promulgated without detailed comments about each Rule and its purpose. The ABA Model Rules are available with commentary that helps apply them.

Take account of relevant ethics opinions and judicial decisions. The Illinois State Bar Association has published opinions on a large number of issues treated by the Rules. The opinions are available on the ISBA website at <a href="http://www.isba.org/EthicsOpinions/">http://www.isba.org/EthicsOpinions/</a> and can be searched for key words used in the Rules. This is a quick and efficient way to learn if there are interpretations of the Rules affecting your situation.

The Illinois Supreme Court regularly reviews decisions of the ARDC, either on appeal by the subject lawyer or by the Administrator when one or the other is dissatisfied with the result of the proceedings. As a result, there is a substantial body of supreme court case law discussing and applying the Rules to lawyer disciplinary cases. This is an important source for anyone responding to a complaint.

Draft a response that includes all the relevant background. Typically, responses take the form of a letter to the ARDC, explaining the lawyer's side of the matter and attaching relevant documents. The response should address directly and clearly, each element of alleged misconduct. It should be accurate about the facts and explain why the relevant Rule was not violated.

### What happens next?

The ARDC may terminate the investigation based on the lawyer's response and any further input from the party who filed the complaint. Or the ARDC staff attorney may conduct a further investigation. If the staff determines that the matter should be closed, it will notify the lawyer in writing. If it does not close the investigation, it is likely to refer the

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# Staying out of trouble with the ARDC

- Lawyers can get guidance about ethics questions from the ARDC <a href="http://www.iardc.org/ethics.html">http://www.iardc.org/ethics.html</a> and, if they're ISBA members, from the ISBA Ethics Infoline at (800)252-8908 or (312)726-8775.
- Another good resource is the Cornell University Legal Information Institute's collection of Illinois ethics material, which is on the Web at <a href="http://www.law.cornell.edu/ethics/illinois.html">http://www.law.cornell.edu/ethics/illinois.html</a>.
- A dated but still useful article is Avoiding ARDC Anxiety: A Disciplinary Primer by ARDC Administrator Mary Robinson at 84 III Bar J 452 (September 1996). It's online at <a href="http://www.isba.org/member/sept96">http://www.isba.org/member/sept96</a> journal.html>.

<sup>1.</sup> In Re Himmel, 125 Ill 2d 531, 533 NE2d 790 (1988); Skolnick v Altheimer & Gray, 191 Ill 2d 214, 730 NE2d 4 (2000).

<sup>2.</sup> See Rule 8.3(a) of the Rules of Professional Conduct.

<sup>3.</sup> See Restatement (Third) of The Law Governing Lawyers § 64 (2004).

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complaint to an inquiry board made up of two lawyers and one nonlawyer, none of whom is an employee of the ARDC. The accused lawyer will be notified and allowed to make a submission to the inquiry board, which is charged with deciding whether a formal complaint should be filed.<sup>4</sup>

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If a formal complaint is filed, the matain is heard by a hearing board. Proceedings before the hearing board are silar to normal civil litigation, except the hearing board is composed of lawyers and one nonlawyer, who lawyers and one nonlawyer, who law initial decisions on issues of fact and law. The hearing board's report is restable de novo by a review board and limitally by the Illinois Supreme Court, which retains plenary power over all

lawyer disciplinary matters and frequently hears argument and issues published opinions on such matters.

### What if you violated the Rules?

If, after consideration of the facts and applicable Rules, you and your advisor conclude that you are guilty of a violation, you should consider acknowledging that fact and discussing what level of discipline the ARDC will seek. Sanctions can range from reprimand to disbarment. In case of misconduct due to disability, the Commission may defer charges pending treatment.

Whether to "plead guilty" is best discussed in the context of a settlement discussion by counsel for the accused lawyer with the staff attorney at the ARDC responsible for the matter. Because Rules violations and resulting sanctions can range from minor to serious, the proper response when a violation is likely to be proven depends on the nature of the lawyer's action and an evaluation of the likely sanctions, which are matters outside the scope of this article.

<sup>4.</sup> See ARDC Rules, Art. II, Rule 55, and Art. III, Rules 101 thru 108.

<sup>5.</sup> See ARDC Rules, Art. IV, Rules 201 thru 291.