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Practice Tips

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RESPONDING TO BAR COMPLAINTS: DON'T DO IT OFF THE TOP OF YOUR HEAD (IT'S NOT THE BAR EXAM)

Every year, when July rolls around, I think of the bar exam. I remember writing for hours, off the top of my head, thinking afterward that if an attorney really drafted pleadings like an answer to a bar exam question, it would likely be malpractice. About a year later, before I began working for the state bar, I met an attorney who bragged that he completed a Ninth Circuit Court of Appeals brief, from research to final draft, in nine hours. Unsurprisingly, that attorney is not currently eligible to practice law.

Given, there are times an attorney has to work off-the-cuff, such as when meeting with clients, at hearings and during negotiations. No doubt it's an important skill. Still, there are times when going off the top of your head is a bad idea. One of them is when answering a bar complaint.

Responding to the state bar without first looking at the file in question can be, as my four-year-old son would say, "a sad choice," especially when the attorney has a high-volume practice. Equally sad is when an attorney is asked to explain his or her conduct in light of a specific rule, and the attorney then defends the conduct without actually reading the rule.

Here's why you should review the file. A while back, we received a complaint from a person who was being wrongfully sued by an attorney in a collections matter. In short, the attorney had the right name but the wrong person. The complaint alleged that the attorney, even after being informed that he was the wrong person, continued collection efforts against him, including obtaining a default judgment, which was filed with the county in which he lived.

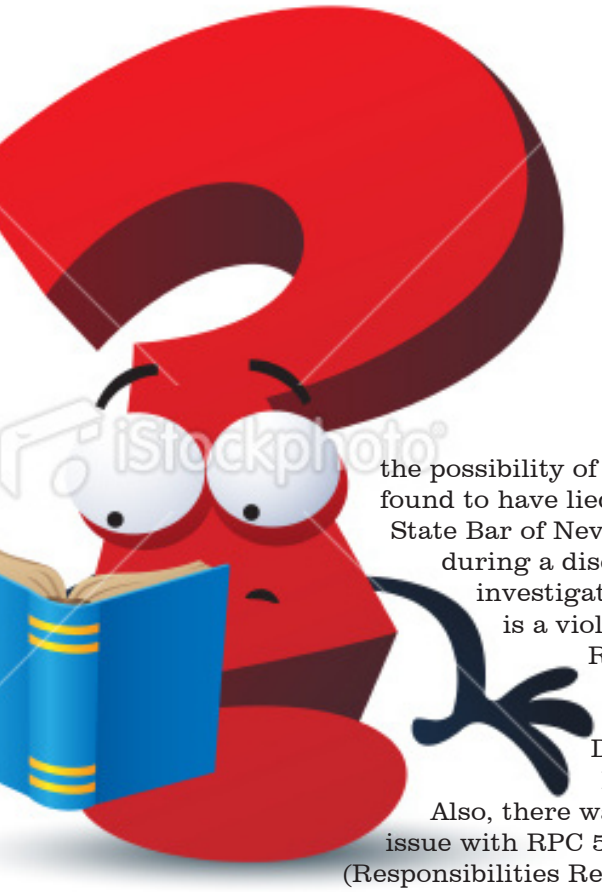
When the attorney responded to the state bar, he indicated that the matter was resolved. In fact, the responding attorney noted that his office had spoken with the grievant's attorney and that his concerns were satisfied.

We then sent the attorney's response to the grievant, who subsequently denied that any such conversation had taken place; in fact, the default judgment against him remained filed with the county.

Given the dispute, we contacted the grievant's attorney, who confirmed that he had never spoken with the attorney in question. In fact, he double-checked his phone records to make sure that no one from his office had called the collections firm that month.

The grieved-about attorney, once informed of the discrepancy, finally reviewed his file and realized that no such conversation had ever taken place. The mistake occurred because his initial response was solely based upon an informal conversation he had with his secretary. He also realized that his staff had failed to follow through on his instructions to get the default judgment vacated. The grievant's concerns were truly resolved shortly thereafter.

Although the Disciplinary Board Panel reviewing the file ultimately concluded that the error was inadvertent, the attorney faced



the possibility of being found to have lied to the State Bar of Nevada during a disciplinary investigation, which is a violation of RPC 8.1 (Bar Admission and Disciplinary Matters). Also, there was an issue with RPC 5.3 (Responsibilities Regarding Non-lawyer Assistants).

Attorneys also get in trouble when we inquire about a specific rule and they fail to review that rule before responding. Believe it or not, some attorneys, in defending their conduct in light of a disciplinary rule, offer an explanation that essentially demonstrates their lack of knowledge of the rule in question.

One case concerned a collections attorney and SCR 42.1(2) (Practice of attorneys admitted in Nevada but not maintaining Nevada offices), which states that:

> Association or designation for service. Upon filing any pleadings or other papers in the courts of this state, an attorney who is subject to this rule shall either associate a licensed Nevada attorney maintaining an office in Nevada or designate a licensed Nevada attorney maintaining an office in the county wherein the pleading or paper is filed, upon whom all papers, process, or pleadings required to be served upon the attorney may be so served, including service by hand-delivery or facsimile transmission. The name and office address of the associated or designated attorney shall be endorsed upon the pleadings or papers filed in the courts of this state, and service upon the associated or designated attorney shall be deemed to be service upon the attorney filing the pleading or other paper.

Our office received a complaint about an out-of-state Nevada attorney who had failed, on numerous occasions, to comply with this rule. In certain cases, a Notice of Association of Counsel was filed. Now, reread the rule. You'll notice that the rule does not require such a filing, because the designated counsel is to appear on each pleading.

The attorney, in his response, was adamant that the rule was complied with because he usually filed the association of counsel along with the complaint. At a subsequent hearing, he asked me, nicely, why the notice didn't satisfy the rule. I read him the rule and noted, as I did in the prior paragraph, what the rule required. He appeared perplexed. A member of the hearing panel then explained it to him as well.

The attorney's facial expression noticeably changed when he realized that, in fact, he was never in compliance with SCR 42.1. If he had taken the time to read the rule before filing his pleadings and, if not then, before responding to the state bar, he would have not have had to face a disciplinary panel while proffering an inherently flawed argument.

The moral of this article: Answering off the top of your head works for bar exams, but not so well when responding to the state bar. ■