

Claims of Professional Misconduct: What to Do When You've Been Grieved and Sued

by Christopher B. Little

Reproduced by permission. ©2008 Colorado Bar Association,
37 *The Colorado Lawyer* 65 (June 2008). All rights reserved.

Every attorney is subject to risk for professional misconduct. A risk can be a claim for legal malpractice or a complaint to the Office of Attorney Regulation Counsel (OARC). In some cases, it's both. This article is dedicated to the midnight worry that you've been grieved administratively—and your client has sued you, too. The article will provide an overview of the administrative complaint process, explore complications that can arise due to the differences between the administrative complaint process and the civil process, and offer attorneys steps for responding once such claims have been made against them.

Professional Responsibility Complaints

Many lawyers do not understand what happens when a client, an opposing party, or even a third party requests an investigation of professional misconduct. Colorado law schools don't cover the professional responsibility complaint process, and there are only a few continuing legal education programs devoted to it. However, responding to a request for investigation will be less daunting if you have a general understanding of this process.

The rules governing professional responsibility complaints are part of the Colorado Rules of Civil Procedure. Specifically, C.R.C.P. 251 sets up the process for the investigation that occurs when a professional responsibility complaint is made.

Professional responsibility complaints are handled by OARC, which has the authority to investigate conduct by every attorney licensed to practice in Colorado.¹ In 2007, OARC reported that it received 4,016 complaints about attorney conduct.²

OARC employs two groups of attorneys to handle these types of complaints. Attorneys in the "intake" division field complaints from the public. If the intake attorney decides a complaint has merit, an attorney within a second group performs the investigation and prosecutes the case.

Intake attorneys receive dozens of calls, letters, and e-mails every day from clients, third parties, judges, and opposing counsel wishing to make complaints against attorneys. In most cases, a formal investigation is not opened because the intake attorney makes a professional judgment that the claim does rise to the level of a violation of the Colorado Rules of Professional Conduct. Often, the complaint is dismissed without consultation with the respondent attorney.³

However, if the intake attorney decides further investigation is warranted, OARC sends a form letter to the respondent lawyer via certified mail requiring the respondent attorney to respond in writing to the inquiry within twenty days of the date of the certified letter. In some cases, by the time the request for investigation has been sent, the aggrieved client has sought counsel for a civil claim against the respondent lawyer, as well.

Responding to Complaints

If you have received a request for investigation or a summons, you should report the matter immediately to your insurer in writing and request assistance. Usually, both civil suits and professional responsibility claims are covered by your insurance policy.⁴ Most professional liability insurers provide an endorsement to the claims made and reported policy that allows for a limited amount of reimbursement for some of the expense in responding to the OARC investigation.⁵ This coverage is in the form of indemnification for attorney fees paid to the lawyer whom you engaged to provide you advice when responding to the twenty-day letter, and possibly to the formal investigation that follows. The coverage usually is limited to about \$7,500. This amount likely will not defray all the expenses—but it helps.

Some insurance companies have "panel counsel" and will give you the choice of counsel on their list. Other companies let you



About the Author

Christopher B. Little is a director at Montgomery Little Soran & Murray, P.C.—(303) 773-8100, clittle@montgomerylittle.com. He specializes in representing lawyers who have been sued or who have been asked to respond to a professional conduct complaint.

This Department is sponsored by the CBA Lawyers' Professional Liability Committee to assist attorneys in preventing legal malpractice. The Department welcomes articles and ideas or suggestions for article topics. For more information, for writing guidelines, or to submit an article or topic suggestion, contact Andrew McLetchie—(303) 298-8603, a_mcletchie@fsf-law.com; or Reba Nance—(303) 824-5320, reban@cobar.org.

choose who will represent you. If you have that choice, do some research and find a lawyer who has experience with regulation matters or one who has defended more than one legal malpractice claim. Too often, to defray some costs of hiring an attorney, lawyers will hire a partner or a friend to provide them assistance in responding to a request for investigation and to serve as counsel for the civil suit. However, no matter how good an attorney your partner or friend might be, this often is not the best practice.

A more advisable option is to hire someone who is highly experienced with both administrative and civil complaint processes and thus understands the differing standards and responsibilities for each forum. You may even consider hiring two lawyers—one to assist you with the administrative grievance and one to handle the civil suit.

Understanding the Different Processes

Attorneys should be aware of the differences between the administrative process and the civil process, as each process has unique elements, goals, and standards of proof. For example, the civil case is proven by a preponderance of the evidence, whereas the administrative case requires proof by clear and convincing evidence. The civil case usually is presented to a jury of six who probably have little prehearing understanding of the issues being tried. Conversely, the administrative case will be tried before the Presiding Disciplinary Judge (PDJ) and two members of the Attorney Regulation Committee who will understand the nuances in the issues being presented. In addition, the obligations of the attorney

in the two forums may be quite different, and there may be potential consequences if too much information is given in one forum or the other.

Duty to Cooperate

The duty of cooperation is a conceptual distinction between a civil case and the administrative investigation.⁶ In civil cases, litigants generally are required to disclose and produce information that relates to the material allegations of the complaint. In the administrative court, the attorney must “cooperate” by answering OARC’s investigation.⁷ If the attorney fails to cooperate either by failing to respond to the request for investigation or by failing to produce information or records requested by OARC, then OARC may file a petition for suspension of the attorney’s license to practice law.⁸ An exception to cooperation occurs in limited situations and usually only when a response would violate the respondent’s constitutional privilege against self-incrimination.⁹

Colorado Rules—Objectives

The Colorado Rules of Professional Conduct are designed to protect the public. They were not designed to achieve restitution or loss compensation. Prior to January 1, 2008, the Rules were not standards by which attorneys are judged in the civil setting.¹⁰ The Rules are not meant to create a private cause of action.¹¹ This precedent may soon be modified or interpreted differently.¹²

The Colorado Rules of Civil Procedure are designed to promote just, speedy, and inexpensive determination of every action.¹³ On the civil side, where a lawyer-client relationship can be established, the legal malpractice case begins with the presumption that a result unsatisfactory to a client does not justify a suit charging an attorney with negligence, fraud, or conspiracy.¹⁴ This fundamental concept has been adopted as a standard jury instruction.¹⁵ This concept generally is not accepted in the administrative process. There, the attorney is licensed so long as the public’s interest is protected. The “public” includes both the client of the attorney and the public at large.

Third-Party Complaints

Another distinction between the civil and administrative process may help alert the lawyer to areas of risk management and avoidance. Generally, absent a lawyer-client relationship, third-party nonclients have extremely limited causes of action against lawyers in civil cases.¹⁶ An attorney cannot be liable to a nonclient absent a finding of fraud or malicious conduct by the attorney.¹⁷ In the regulation arena, OARC investigates third-party claims without concern for duty.

A lawyer can be required to answer to a third-party complaint for many reasons. Sometimes, the lawyer is asked to respond to an opposing party’s complaint that the lawyer is using obstreperous tactics in litigation or that the lawyer is holding documents or funds that allegedly belong to the third party. If the complaint is determined to be in violation of the Colorado Rules of Professional Conduct, the lawyer will have to answer and defend.

In the administrative arena, however, the attorney may be duty bound to answer a request for investigation by a third party, who could be a complete stranger. Responding to that third party may be complicated and the lawyer may have to divulge client confidences in his or her response. Does the client consent? Will

OARC agree to keep the response confidential? An experienced attorney who has practiced before OARC will know how to use C.R.C.P 251 to the benefit of the attorney client.

Standards of Care and Causation

A legal malpractice case is two lawsuits combined into one—a case within a case.¹⁸ Once the underlying claim is established, the client has the burden of proving by a preponderance of the evidence that the accused lawyer’s conduct fell below the standard of acceptable practice for attorneys doing similar work under similar circumstances, and that this substandard conduct prevented the client from recovering what he or she has established should have been recovered.¹⁹

Usually, in the civil context, the case is proven with the assistance of expert testimony.²⁰ In Colorado, the confines of the expert’s opinion have not yet been limited or restricted. It may be possible for the expert to opine on the standard of care and causation, and the expert can testify about appropriate remedies and damages that can be awarded to the client. Whether the same type of expert can be used in the administrative case, and whether it is even necessary to have an expert, depends on the nature of the charge.

In Colorado, there are four forms of discipline and a diversion. Discipline can be disbarment, suspension, public censure, and private admonition.²¹ Diversion also is an option.²² Presumably, the PDJ may become the expert on the ethics of the case. If any rule of professional responsibility is violated, a sanction will have to issue. Can the PDJ accept an expert to opine on the standards of conduct to prove the attorney acted in conformance with the rule? Will that expert be rejected? Disciplinary proceedings do not require any injury at all. However, the existence of actual or potential injury may bear on the severity of the sanction.²³

Steps for Responding

Those are but some of the complexities involved if the lawyer is forced to defend an administrative and civil action at the same time. Once you have attained experienced counsel, your attorney (or attorneys) will be your best resource in determining how to handle the intricacies of your particular situation. However, here are some immediate measures you can take to improve your circumstances upon learning you have been grieved and sued:

- Read and adhere to Formal Ethics Opinion 113.²⁴
- Inform your firm’s partner or partners of the situation.
- Notify your insurance carrier in writing. Read the policy and comply with each and every notification requirement.
- Be mindful of your duty to cooperate with your malpractice insurance carrier.
- Be mindful of your duty to cooperate with OARC.
- If you are uninsured or your carrier offers you the choice, select defense counsel with expertise in the defense of either discipline or malpractice claims.
- If you have separate counsel, keep them advised of all current developments.
- Analyze whether a strong and immediate defense to the civil case is required. If the civil case is settled, the administrative case may be dismissed.
- In the unique situation where criminal charges are pending against you, invoke the Fifth Amendment privilege, delay the administrative charge, and stay the civil case, if possible. Be

sure to hire separate criminal counsel—civil or ethics counsel may not be equipped to handle a criminal investigation.

Conclusion

Lawyer responsibility to clients is an important but complicated subject. The lawyer who recognizes a problem and seeks immediate independent advice usually will have a better outcome. The longer the lawyer waits to address the issue, the bigger the problem will become.

Notes

1. C.R.C.P.251.1(b).
2. Telephone correspondence with James C. Coyle, Deputy Regulation Counsel, Colorado Supreme Court Office of Attorney Regulation Counsel (OARC) (April 29, 2008).
3. See Rothrock, "Attorney Discipline and Disability Process and Procedure," 36 *The Colorado Lawyer* 23 (Feb. 2007).
4. This may itself create conflicts for the lawyer. The insured's duty to cooperate in the civil case is very different from the lawyer's duty to cooperate with OARC.
5. Most Lawyers Professional Liability (LPL) policies are written on a claims-made basis. That means the policy only covers claims made and reported during the policy year. Most LPL policies are not written with a separate endorsement, a bonus to coverage, or a separate agreement that says the insurance company will pay a limited sum to indemnify the lawyer for fees and costs associated with the OARC investigation.
6. C.R.C.P.251.8.6.
7. *Id.*
8. C.R.C.P.251.5(d).
9. *Id.*
10. See *Olsen & Brown v. City of Englewood*, 889 P.2d 673, 676 (Colo. 1995) (finding that the rules of professional conduct guide the attorney-client relationship but are not designed to alter civil liability or to serve as a basis for such liability); *Bryant v. Hand*, 404 P.2d 521, 522-23 (Colo. 1965) (stating that the ethics rules are not binding on the courts and do not have the force of law but instead provide guidance on professional discipline).
11. See *Norton Frickey, P.C. v. Turner*, 94 P.3d 1266, 1270 (Colo.App. 2004), citing *Taylor v. Grogan*, 900 P.2d 60, 63 (Colo. 1995).
12. The reader is reminded that the Colorado Supreme Court adopted material changes to the Colorado Rules of Professional Conduct (Rules or Colo. RPC), effective January 1, 2008. The Court now says that "since the Rules do establish standards of conduct by lawyers, in appropriate cases, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Preamble, Comment 20, Colo. RPC.
13. Colo. RPC 1(a).
14. See *Eadon v. Reuler*, 361 P.2d 445, 450 (Colo. 1961).
15. See *Colorado Jury Instructions-Civil*, 15:24 (5th ed., 2004).
16. See *Weigle v. Hardesty*, 549 P.2d 1335, 1337 (Colo.App. 1976); *Mebaffy, Rider, Windholz & Wilson v. Central Bank*, 892 P.2d 230, 235 (Colo. 1995).
17. See *Schmidt v. Frankewich*, 819 P.2d 1074, 1079 (Colo.App. 1991); *Zimmerman v. Dan Kamphausen Co.*, 971 P.2d 236, 239 (Colo.App. 1998); *Glover v. Southard*, 894 P.2d 21, 23 (Colo.App. 1994); *Sbriners Hosp. v. Southard*, 892 P.2d 417, 418 (Colo.App. 1994); *Montano v. Land Title Guarantee Co.*, 778 P.2d 328, 330-31 (Colo.App. 1989).
18. See *Miller v. Byrne*, 916 P.2d 566, 579 (Colo.App. 1995).
19. See *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78 (Colo. 1999).
20. See *Crystal Homes, Inc. v. Radetsky*, 895 P.2d 1179, 1183 (Colo.App. 1995).
21. C.R.C.P.251.6.
22. C.R.C.P.251.12.
23. See Althoff, "Lawyer Disciplinary Sanctions," 2001 *ABA Prof. Law* 105 (May/June 2001).
24. Ethics Opinion 113 was adopted by the Colorado Bar Association Ethics Committee and generally encourages a lawyer to report a negligent act to his or her client so the client can determine what steps to take in the future. ■