BY: Nicholas C. Cooper

ANSWERING THE GRIEVANCE COMPLAINT

It is 9:15 Monday morning. You have just settled in behind your desk with every intention of spending the day attacking the stack of files in the "To Do" pile. First, a look at the mail. Although "light" on client fee checks, it does contain a letter conspicuously marked "Personal and Confidential," with a return address mysteriously noted as "Municipal Building--12th Floor, 210 Joralemon Street, Brooklyn, NY 11201" or "North Shore Atrium II, 6900 Jericho Turnpike, Suite 102LL, Syosset, NY 11791",[1] or less mysteriously noted as "Departmental Disciplinary Committee, Supreme Court, Appellate Division, First Department, 41 Madison Avenue, NY, NY 10010" or "State of New York, Grievance Committee for the Ninth Judicial District, Crosswood Office Center, 299 Knollwood Road, Suite 200, White Plains, NY 10603."

Inside is a letter from the Disciplinary/Grievance Committee requesting that you submit a written response to the allegations of the enclosed complaint. The natural reaction would be to reach for your Digitalis and then, the telephone with every intention of calling Committee counsel to tell him/her that the complaint is absolute trash and your soon-to-be former client, the complainant, is an unmitigated liar.

Fortunately, discretion prevails, since calling Committee counsel under these circumstances was extremely inappropriate.[2] A better move would be to contact an attorney experienced in these matters, to assist you in preparing an answer to the complaint that is not only thoughtful and candid, but presents factual and legal arguments in a favorable light.

This article describes the important steps from a defense perspective in handling grievance matters before the respective Disciplinary/Grievance Committees of the Appellate Divisions, First and Second Departments.

In preparing an answer to the grievance complaint[3] you should be aware of certain fundamental considerations, that is, the need to be candid and direct in an attempt to narrow the issues while avoiding the tendency to expand the inquiry by presenting unnecessary factual details or unnecessarily "counterattacking" the complainant, whether that person is a client or fellow attorney.

Candor and directness require simply that the attorney acknowledge any indiscretions, arguing, where appropriate, that: 1) the admitted conduct does not constitute "misconduct" within the Code of Professional Responsibility, or 2) the code violation

is minor at best, not deserving a sanction beyond a private admonition or reprimand. Under these circumstances the essential purpose of the answer is to avoid the filing of charges before a hearing panel or subcommittee and rather to resolve the matter with a private sanction and without a hearing.

"Directness" mandates that the attorney address the central issue set forth in the complaint. Whether the complainant has "clean hands" is of little consequence if the allegation against the attorney appears to be substantiated. To the same extent, generally speaking focusing on the complainant's motives – for example, to obtain a return of the fee, or to enhance a malpractice claim – is not wise unless it goes directly to the merits of the complaint.

Attorney-Complainants

Regrettably, it has become quite common for lawyers to present complaints against fellow attorneys under circumstances outside of the scope of DR 1-103(A).[4] The reasons for this phenomenon include a tendency by a subsequent attorney to mollify a client who refuses to accept that his case is weak or without merit, by attempting to placement blame on the former lawyer.

In responding to this type of complaint, point out the forgoing and, if it is also the case, you may note that the complainant/attorney is also derelict. But there are several reasons why filing a formal cross-complaint is a bad idea.

First, it may tend to expand an investigation that the respondent you should be trying to narrow. Second, it raises further issues of fact which may tend to make a resolution short of a hearing on charges much more difficult. And finally, it really doesn't matter whether the subsequent counsel is disciplined. The only thing a respondent should care about is whether he or she is disciplined. To avoid that result, narrow the issue factually and legally to support your argument that the facts do not warrant a finding of serious misconduct.

Mitigation

In those situations where it seems clear that the complaint will likely result in a finding of misconduct at some level against the attorney, factors in mitigation should be presented in the initial answer. These factors should either support the argument that "public" discipline is not warranted, or 2) set the tone of the defense in those matters which will likely result in the filing of formal charges. Generally, factors in mitigation include:

- No loss to the client;[5]
- No intent to violate Code of Professional Responsibility;[6]
- Medical problems;[7]

• Mental or emotional infirmities and treatment therefore;[8]
• Restitution;[9]
• Isolated instance in otherwise clear prior record;[10]
• No gain or profit by respondent/attorney;[11]
• Excellent general reputation and character in professional and social communities;[12]
• Respondent/attorney has taken appropriate steps to cure problem resulting in misconduct;[13]
• Personal problems, including serious financial difficulties;[14] and
•Expression of remorse.[15]

Exemplary Answer

The following example illustrates how an effective answer deals with the specific aspects of a particular complaint addressing not only the "liability" question, but also the appropriate disposition.

While this example is to one degree or another drawn from the author's experience, it is not intended to specifically relate to any actual case, which may be protected by statutory confidentiality.[16] The names, dates, places, and other identifying details are fictional and used solely for purposes of illustration.

This "sua sponte" complaint was based upon an anonymous letter, which claimed that Respondent's advertisement in a foreign language newspaper was deceptive. The focus of the answer is to negate the allegation through the opinion of an expert witness demonstrating that the complaint has no merit and should be dismissed. The answer is as follows:

Re: Artyom A. Advocate, Esq.
Docket Number 98.2001
Dear Chief Counsel:

Kindly consider the within letter to be the answer of my above-named client, Artyom A. Advocate, to the sua sponte complaint bearing the docket number shown above.

The complaint which is the subject of this sua sponte matter was, as you are aware, submitted to the Committee anonymously by an individual describing himself as "a member of the bar". You have provided me with the cover letter in which this purported member of the bar states that he is compelled to bring to the Committee's attention certain "violations. . . of the rules regarding advertising by lawyers . . . in [a] leading Russian newspaper. . ." Together with this letter was a copy of the Respondent's advertisement, which is of course in Russian, together with a translation provided by the informant which states, among other things, "former District Attorney of Suffolk and Attorney General of State of N.Y." The informant's position is that these

statements are misleading since "this lawyer claims to be a former district attorney and attorney general. This is not true."

Mr. Advocate emphatically denies that it was ever his intent to make any misleading or untruthful statement in this advertisement. As will be noted hereinafter, there is some latitude in the interpretation from Russian to English, and his continuous belief was that no one in the Russian community in metropolitan New York City would read the statements in his ad to mean that he was the actual district attorney or the actual attorney general.

This position is fully supported by the opinion secured by the undersigned of an official interpreter of the Supreme Court, State of New York, namely Anna Karenina. The conclusion in her written opinion, which is annexed hereto and made a part of this answer, is that "in conclusion, the omission of the word 'assistant' when referring to a prosecutor has become commonplace among large portions of the Russian population as it has in English as well."

The facts are as follows:

Background

The Respondent, Artyom A. Advocate, has been a member of the bar for approximately thirty years and during that time has never been disciplined as an attorney. Approximately four years ago, he placed an advertisement in a Russian-language newspaper with the hopes that such advertisement would increase the volume of his legal business. He had previously been an assistant district attorney in Suffolk County and thereafter a deputy assistant attorney general of the State of New York.

Certain biographical information was provided to Tass and subsequently incorporated into the ad in question, which was specifically drafted by a staff member of the newspaper, who the Respondent believes to have been a Russian. He reviewed the proposed advertisement and, it appearing to be acceptable, authorized it to be placed in the newspaper. Thereafter the ad ran on a regular basis for four years without any complaint from any source. As you are aware, once this complaint was brought to Mr. Advocate's attention, he immediately caused the ad to be canceled, not because he believed it to be misleading, but simply to demonstrate his good faith in the face of this pending complaint.

The Expert Opinion

As noted above, the undersigned, on behalf of the Respondent, secured the expert opinion of Ms. Karenina, a certified Supreme Court interpreter, which opinion is annexed

hereto. Specifically, Ms. Karenina was asked to address the assertion made in the complaint, namely that in the ad the Respondent was wrongfully holding himself out to be "a former district attorney and attorney general". It should be noted parenthetically that the identity of the interpreter who translated the Respondent's ad to English as it appears in the complaint has never been identified. As is noted in Ms. Karenina's report, the translation of legal terms is often inexact, since there are numerous major Russian-speaking countries. As she points out, the common denominator is really an interpretation which uses the "colloquial" or everyday use of the language since it is usually spoken by all those who share a common tongue.

Specifically and significantly, she points out that in her work as a Supreme Court Criminal Term interpreter, the "assistant district attorney" is commonly referred to as "nilats". She points out that this is not withstanding that there are more specific references to the assistant district attorney, namely "undnilats". However, what is significant is that the common and accepted usage is of the term "nilats" (district attorney) refers to the assistant district attorney in charge of a particular case. This is of such common usage that, as pointed out by Ms. Karenina, a Russian-born colleague of hers was not aware of the word "undnilants" being used as a title in his native country.

Argument

Disciplinary Rule 2-101(A), entitled "Publicity and Advertising", provides in pertinent part that "a lawyer on behalf of himself . . . shall not use or disseminate . . . any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole." The clear implication of the prohibition of DR 2-101(A) is that in order to be guilty of a violation of this section, namely the dissemination of a false or misleading statement, that false, deceptive or misleading statement must be made in an intentional fashion.

It is abundantly obvious from the above that under no circumstances did the Respondent at any time intentionally cause a false, deceptive or misleading statement to be made in the advertisement. Nor for that matter could it be concluded that he was careless or negligent in permitting this ad to be disseminated as stated. As is apparent from the opinion of the Respondent's expert, the generally accepted – that is, the colloquial or everyday – use of the Russian language permits the description of an assistant district attorney as "nilats" and that according to the expert, 90 to 95% of Russian-speaking persons, presumably within the New York City metropolitan area, would understand that word to refer to an assistant district attorney. It is interesting to note that even the complainant

states that Respondent referred to himself as "a" district attorney, not "the" district attorney.

As noted by Ms. Karenina in her conclusion, "the omission of the word 'assistant' when referring to a prosecutor has become commonplace among large portions of the Russian population, as it has in English as well."

Conclusion

For the reasons noted above, it is abundantly obvious that the evidence does not support the conclusion that the Respondent is guilty of a violation of DR 2-101(A), that is, engaging in false, deceptive, or misleading advertising. The Respondent's conclusion that he is not guilty of any violation of the advertising rules as set forth in the Code of Professional Responsibility is fully supported by the authoritative expert opinion. It is the Respondent's firm conviction that, giving full consideration to the position set forth herein, the Committee will conclude that no violation of the Code has been established. Wherefore the within complaint should be dismissed.

The probable result of this case is that no basis would be found for taking disciplinary action and the matter would be closed.

The foregoing should offer some guidance in preparing an answer which presents a meaningful response in a light most favorable to the Respondent/Attorney. A final thought on the

The filing of an answer, not unlike the filing of income tax returns, is mandatory. If for whatever reason, whether it be procrastination or denial, an answer is not filed, that alone is deemed misconduct. The consequences often can be dire.[17]

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[1] The addresses, respectively, of the Grievance Committee for the 2nd and 11th and for the 10th Judicial District.
[2] N. Cooper, "Lawyer Discipline in the First and Second Departments: A Primer," NYLJ, June 22, 1992, page 5, column 1.
[3] A complaint need only be in writing and may emanate

sua sponte from the Committee itself with or without the cooperation of the client or other third party. 22 NYCRR 603.4(c),691.4(C).

[4] DR 1-103 (A) generally provides that lawyers possessing non-confidential knowledge "that raise(s) a substantial question of another lawyer's honesty . . . shall report such knowledge to . . ." the appropriate authority.

[5] *Matter of Mortenson*, 146 AD22d 446, 541 NYS2d 61, 62, (2nd Dept. – 1989).

[6] *Matter of Goodman*, 146 AD2d 78, 539 NYS2d 461, 462, (2nd Dept. – 1989).

[7] Id.

[8] *Matter of Levine*, 101 AD2d 49, 474 NYS2d 507, 509, (1st Dept. – 1984).

[9] *Matter of Michaelis*, 92 AD2D 278, 460 NYS2d77, (2nd Dept. – 1983).

[10] *Matter of Mortenson,* supra.

[11] *Matter of Pelsinger*, 190 AD2d 158, 598 NYS2d 218, (1st Dept. – 1993).

[12] *Matter of Goodman*, supra.

[13] *Matter of Kraft*, 148 AD2d 149, 543 NYS2d 449, (1st Dept. – 1989).

[14] *Matter of Charles*, 208 AD22d 271, 623 NYS2d 924, 925, (2nd Dept. – 1995).

[15] *Matter of Rubin*, 148 AD2d 269, 544 NYS2d 143, 144, (1st Dept. – 1989); *Matter of Getman*, 147 AD2d 163, 542 NYS2d 896, 897, (4th Dept. – 1989).

[16] Judiciary Law, Section 90(10).

[17] *Matter of Kove*, 103 AD2d 968, 478 NYS2d 191, (3rd Dept. – 1984).