

**DEFENDING A GRIEVANCE**

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## **Introduction**

This presentation is intended to meet the requirement for one hour of ethics credit for compliance with Oklahoma Mandatory Continuing Legal Education and to increase awareness in ethics and professional responsibility.

The focus is early stage decision making about responding to grievances and how, or if, to respond. A general understanding of the entire process is needed to appreciate things to be considered for responding to a grievance.

Part I is an overview of the Oklahoma lawyer disciplinary system necessary to understanding how the grievance process works and how grievances may be defended. Part I addresses the original, exclusive, and nondelegable jurisdiction of the Oklahoma Supreme Court to regulate lawyers and the practice of law through various rules of the Supreme Court governing admissions, licensing, the practice of law, professional conduct and discipline. The overview summarizes the role of the Supreme Court, the Professional Responsibility Commission (“PRC”), the General Counsel, and the Professional Responsibility Tribunal (“PRT”) in the disciplinary process under the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A (“RGDP”). All disciplinary proceedings are subject to the exclusive original jurisdiction of the Supreme Court and its ultimate authority over lawyers and the practice of law.

Part II covers procedural aspects of Rule 5.2, RGDP, regarding investigations by the General Counsel, responses to grievances and the range of PRC options for disposition of grievances. Suggestions are offered about how grievances may best be defended and considerations for making appropriate responses during the investigation stage to reach the most satisfactory disposition.

## **Part I: Overview of the Oklahoma Lawyer Disciplinary System.**

Understanding the disciplinary system and its scope requires knowing something about the number or volume of grievances received each year and what happens when grievances reach their final disposition. The statistics noted below are taken from two reports for the year 2018:

(1) Annual Report of the Professional Responsibility Commission, may be found at, <https://www.okbar.org/wp-content/uploads/2019/01/190131-PRC-Annual-Report.pdf> ;

and

(2) Annual Report of the Professional Responsibility Tribunal may be found at, <https://www.okbar.org/wp-content/uploads/2019/01/190131-PRT-Annual-Report.pdf> .

### **Volume of Grievances 2018.**

While the number and type of grievances varies to some degree from year to year, the overall range in either number or type of grievances does not change enough over time to reveal much about meaningful trends one way or another. Statistics in either category over a period of years are relatively more stable as opposed to fluctuating widely.

On December 31, 2018 total membership of the Oklahoma Bar Association was 18,033 lawyers. In 2018 the total number of formal and informal grievances involved 889 lawyers which is approximately five percent of the number of licensed lawyers in Oklahoma.

Seventy-one percent (71%) of all grievances stemmed from just five practice areas: criminal defense, twenty-five percent (25%); family law, fifteen percent (15%); personal injury, twelve percent (12%); probates/ estates, ten percent (10%); and litigation, nine percent (9%).

Seventy-nine percent (79%) of all grievances stemmed from just six types of alleged misconduct: neglect, forty-three percent (43%); misrepresentation, fifteen percent (15%) ;

personal behavior, eight percent (8%); incompetence, five percent (5%); excessive fees, four percent (4%); and conflicts of interest, four percent (4%).

The discipline system may reach an increasing percentage of practicing lawyers due to the sheer number and type of grievances received by the OBA each year. This means the longer a lawyer practices law the greater the risk there is for the lawyer to receive a grievance. This also means there is greater risk for any practitioner to receive a final disposition with an unfavorable outcome resulting in imposition of discipline. The need to avoid being disciplined is why properly defending grievances warrants full attention by all lawyers. Disbarment or suspension result in loss of ability to practice law with obvious negative consequences. Discipline at any level that becomes public knowledge may pose a threat for damage to a lawyer's reputation with unpredictable and perhaps irreparable harm.

In 2018, the Office of the General Counsel ("General Counsel") received 242 formal grievances involving 176 lawyers and 917 informal grievances involving 713 lawyers. In total, 1,159 grievances were received against 889 lawyers. The total number of lawyers does not equate with the number of involved lawyers because some lawyers received both formal and informal grievances. On January 1, 2018, 141 formal grievances were carried over from the previous year accounting for a total caseload of 383 pending formal investigations during 2018. 236 investigations were completed by the General Counsel and presented for review to the Professional Responsibility Commission ("PRC"), with 147 investigations pending at year end.

### **Disposition of Grievances 2018.**

The time required to complete investigations may vary considerably depending on the circumstances, the seriousness and complexity of allegations, as well as the difficulty identifying

witnesses and obtaining their statements and other evidence. It is common for investigations to last several months before reaching final disposition by the PRC in the following categories.

1. Formal Charges. In 2018 the PRC voted to file formal disciplinary charges against 14 lawyers involving 23 grievances. Formal charges were filed in 11 summary disciplinary proceedings under Rule 7, RGDP. Summary proceedings are provided by the rules when a lawyer is convicted of a crime or enters a plea, or when a lawyer is disciplined in another jurisdiction. Rule 7 summary proceedings are filed with the Chief Justice of the Oklahoma Supreme Court without the necessity of a pre-filing formal investigation as with grievances.
2. Private Reprimands. In 2018, the PRC issued private reprimands to 20 lawyers involving 30 grievances pursuant to Rule 5.3(c), RGDP. The PRC only has authority to impose a private reprimand if the involved lawyer agrees to accept the reprimand. Reprimands may be used to dispose of matters where less serious misconduct is involved or if mitigating factors warrant reducing the level of more serious discipline that could be imposed.
3. Letters of Admonition. In 2018 the PRC issued letters of admonition to 36 lawyers involving 44 grievances cautioning that the conduct of the lawyer was dangerously close to a violation of a disciplinary rule which the PRC believed warranted a warning rather than discipline.
4. Dismissals. The PRC dismissed five grievances due to the loss of jurisdiction after the resignation pending disciplinary proceedings or disbarment of the respondent lawyer. The PRC dismissed 19 grievances upon successful completion of a diversion program by the lawyer. The remainder of grievances were dismissed where the investigation did not substantiate the allegations by clear and convincing evidence.

5. Diversion Program. The PRC may also refer respondent lawyers to the discipline diversion program where remedial measures are taken to ensure that any deficiency in the representation of a client is not repeated in the future. In 2018, the PRC referred 46 lawyers to the diversion program for conduct involving 67 grievances.

The diversion program is tailored to the individual circumstances of the participating lawyer and the misconduct alleged. Oversight of the program is by the OBA Ethics Counsel with the OBA Management Assistance Program Director involved in programming. Program options include: Trust Account School, Professional Responsibility/Ethics School, Law Office Management Training, Communication and Client Relationship Skills, Professionalism in the Practice of Law, and referral to the Lawyers Helping Lawyers program.

#### **A. Oklahoma Supreme Court Jurisdiction.**

As one of three branches of government under the Oklahoma Constitution the Supreme Court is vested with powers and jurisdiction necessary to perform its governmental functions. In its simplest terms the Supreme Court exercises controlling authority over everything to do with lawyers and the practice of law. The Court has repeatedly said in its decisions that it possesses the nondelegable, constitutional responsibility to regulate the practice and the ethics, licensure, and discipline of legal practitioners is solely vested in the Court. The Court has explained the rationale for this responsibility noting the regulation of the practice of law is a judicial function and an inherent power of the judiciary is to ultimately determine the qualifications of those to be admitted to practice in its courts. The Court said in *In re Integration of State Bar of Oklahoma*, 1939 OK 378, 95 P.2d 113:

¶4 Section 1, art. 7, Constitution of Oklahoma, vests the judicial power of our state in this and other courts named therein, in the following language:

"The judicial power of this state shall be vested in the Senate, sitting as a court of impeachment, a Supreme Court, district courts, county courts, courts of justices of the peace, municipal courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law."

¶5 There is no express grant of power in the Constitution of Oklahoma giving to any of the three departments of government the right to define and regulate the practice of law, but the very fact that the Supreme Court was created by the Constitution gives it the **right to regulate** the matter of who shall be **admitted to practice** law before the Supreme Court and inferior courts, and also gives it the **right to regulate** and control the **practice of law** within its jurisdiction.

¶6 The Supreme Court has the right to exercise all powers fundamental to its existence, and it is fundamental that it has the **inherent power** to regulate **admission** to the bar, and to control and regulate the **practice of law** of those admitted to the bar. It is not necessary to cite authorities to the effect that attorneys practicing in the courts of this state are **officers of the courts**, because of their peculiar relationship to the courts and to the public. In general, they are **responsible to the courts** because their position is one of honor, they are advisers to the courts, and advisers to their clients, and because of those relationships the **courts have the right to protect themselves and the public from the acts of their officers**. (emphasis added)

Id at ¶4-6.

In addition to the inherent power to regulate lawyers and the practice of law, the power has been codified in the Court's own rules, and serves to remove all doubt about the reach of the Court's authority. Rule 1.1, Declaration of Jurisdiction, RGDP, unequivocally provides:

This Court declares that it possesses **original and exclusive jurisdiction** in all matters involving admission of persons to practice law in this State, and to **discipline for cause**, any and all persons licensed to practice law in Oklahoma, hereinafter referred to as lawyers, and any other persons, corporations, partnerships, or any other entities (hereinafter collectively referred to as "persons") engaged in the unauthorized practice of law. This Court retains jurisdiction to impose discipline for cause on a lawyer whose name has been stricken from the Roll of Attorneys for non-payment of dues or for failure to complete mandatory continuing legal education. This Court further declares that a member of the Bar of this State may not take unto himself any office or position or shroud himself in any official title which will place him beyond the power of this Court to keep its roster of attorneys clean. Nothing in this declaration is intended to limit this Court's **inherent power over anyone engaged in the practice of law**. In the exercise of the foregoing jurisdiction, this Court adopts and promulgates the following rules which shall govern disciplinary and unauthorized practice of law proceedings. (emphasis added)

Rule 1.1, RGDP.

Disciplinary decisions commonly refer to the Court's exclusive original jurisdiction and explain how the discipline process works. Understanding the standard of review applied in disciplinary cases is essential for defending grievances that advance to the stage of formal proceedings after the filing of a formal complaint in the Supreme Court. In the recent case of *State ex rel. Oklahoma Bar Association v. Bednar*, 2019 OK 12, several basic principles were succinctly restated:

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I. Standard of Review

¶2 The Supreme Court of Oklahoma possesses **original, exclusive, and nondelegable jurisdiction** to control and regulate the **practice of law, licensing, ethics, and discipline** of attorneys. 5 O.S.2011, § 13; RGDP 1.1; *State ex rel. OBA v. Braswell*, 1998 OK 49, ¶ 6, 975 P.2d 401, 404. The purpose of our licensing authority is not to punish the offending lawyer but **to safeguard the interests of the public**, the courts, and the legal profession. *State ex rel. OBA v. Friesen*, 2016 OK 109, ¶ 8, 384 P.3d 1129, 1133. To determine whether discipline is warranted and what sanction, if any, is to be imposed, the Court conducts a full-scale, **non-deferential, de novo review** of all relevant facts. *State ex rel. OBA v. Schraeder*, 2002 OK 51, ¶ 5, 51 P.3d 570, 574.

¶3 While accorded great weight, the report and recommendations of the Trial Panel are merely advisory in nature and carry no presumption of correctness. *State ex rel. OBA v. Boone*, 2016 OK 13, ¶ 3, 367 P.3d 509, 511; *State ex rel. OBA v. Anderson*, 2005 OK 9, ¶ 15, 109 P.3d 326, 330. Likewise, the specific rule violations listed in the complaint do not limit our discretion. See *State ex rel. OBA v. Bedford*, 1997 OK 83, ¶ 15, 956 P.2d 148, 152. The **ultimate decision-making authority rests with this Court**. *Anderson*, 2005 OK 9, ¶ 15, 109 P.3d at 330. (emphasis added)

Id at ¶2-3.

The point here being that in the end the Court alone determines whether discipline is warranted and what discipline, if any, is to be imposed. This is based upon the Court conducting a full-scale, non-deferential, de novo review of all relevant facts. While accorded great weight, the report and recommendation of the PRT's assigned Trial Panel are merely advisory in nature

and carry no presumption of correctness. The Supreme Court is the final arbiter of all matters regarding lawyers and the practice of law. While there are other components and participants in the disciplinary process such as the Professional Responsibility Tribunal (“PRT”) with its assigned function to preside over all hearings held and to make findings and recommendations, the Supreme Court has complete discretion to decide all issues without exception.

### **B. Rules Governing Disciplinary Proceedings (“RGDP”)**

The RGDP, effective July 1, 1981, as amended, are the procedural rules adopted by the Supreme Court regarding all disciplinary proceedings. The rules govern a lawyer’s rights and responsibilities in disciplinary proceedings. All lawyers recognize the seriousness of disciplinary proceedings because any proceeding regardless of circumstances presents risk of adverse consequences for the lawyer’s license and ability to practice law in the future. Important aspects of the rules include: (1) exclusive original jurisdiction of the Supreme Court; (2) composition, appointment, powers and duties of the Professional Responsibility Commission (“PRC”); (3) the General Counsel of the OBA and duties to investigate and prosecute disciplinary matters under the supervision of the PRC; (4) the Professional Responsibility Tribunal (“PRT”) and its duties to hold hearings and make findings, conclusions and recommendations to the Supreme Court regarding imposition of discipline; (5) the filing and processing of grievances and requests for investigation; (6) the procedural requirements and rules governing formal proceedings before the Supreme Court and the PRT; (7) Summary Disciplinary Proceedings; and (8) rules governing reinstatement after the imposition of discipline.

To summarize the discipline process, the PRC and General Counsel investigate and PRC decides how disposition of grievances will be made under the rules. The PRC options to dispose of grievances include issuing an admonition, administering a private reprimand, requiring

participation in the diversion program, dismissing the grievance, or some combination of the authorized options, without filing formal charges in the Supreme Court. The PRC also has the discretion to authorize the filing of formal charges by Complaint filed in the Supreme Court. A formal Complaint is assigned to a PRT Trial Panel for hearing on the merits. The Trial Panel makes findings of fact, conclusions of law and a recommendation for imposition of discipline in a Trial Panel Report filed with the Supreme Court. The Supreme Court will order the filing of briefs either in support of or in opposition to the Trial Panel Report. The Court decides the case after conducting a non-deferential *de novo* review of the entire record sitting as a licensing court exercising exclusive original jurisdiction as opposed to sitting as an appellate court exercising appellate jurisdiction.

An index or outline of the RGDP is useful for finding information needed for understanding the procedures overall. The rules are few in number but have multiple subparagraphs with many details. Below are caption headings for each rule that will help in understanding how the investigation stage fits into the bigger picture of the entire process. This in turn may help getting the most out of Part II below focused on Rule 5.2 governing investigations of grievances and responses by the involved lawyer in the investigation stage.

- Rule 1 - Supreme Court Exclusive Original Jurisdiction
- Rule 2 - Professional Responsibility Commission
- Rule 3 - General Counsel
- Rule 4 - Professional Responsibility Tribunal
- Rule 5 – Filing Processing Grievances Requests for Investigation
- Rule 6 – Formal Proceedings Before Supreme Court and Tribunal
- Rule 7 – Summary Proceedings Before Supreme Court
- Rule 8 – Resignation Pending Disciplinary Proceedings
- Rule 9 – Procedure Following Discipline Action- Notice- Winding Up
- Rule 10 – Suspension for Personal Incapacity to Practice Law
- Rule 11 – Reinstatement
- Rule 12 – Winding Up Business of Lawyer Who is Deceased, Incapacitated or Missing

### **C. Professional Responsibility Commission (“PRC”)**

The Professional Responsibility Commission (PRC) was established by Rule 2.1, RGDP, upon adoption of the rules effective July 1, 1981. The PRC is vested with prosecutorial discretion and supervisory authority over the General Counsel in disciplinary matters.

The PRC is required to consider and investigate any alleged ground for discipline or alleged incapacity, of any attorney called to its attention, or upon its own motion, and to take such action as deemed appropriate to meet the purposes of the RDGP. The PRC has responsibility to supervise the General Counsel in conducting investigations of all matters involving alleged misconduct or incapacity of any attorney called to the attention of the General Counsel by grievance or otherwise. The General Counsel is required to report the results of all investigations conducted to the PRC. The PRC then determines the disposition of grievances either by dismissal, admonition, reprimand or by directing the General Counsel to file a formal complaint for alleged misconduct or personal incapacity of an attorney.

The PRC is composed of seven members consisting of five lawyer members and two non-lawyer members. The lawyer members are appointed for rotating three-year terms by the OBA President subject to approval of the Board of Governors. The two non-lawyer members are appointed, one each by the Speaker of the Oklahoma House of Representatives and the President Pro Tempore of the Oklahoma Senate, respectively. Terms expire on December 31st at the conclusion of the three-year term.

### **D. General Counsel**

The General Counsel of the Oklahoma Bar Association was authorized by Rule 3.1, RGDP for employment by the OBA Board of Governors with the concurrence of the PRC and serves at their discretion. The General Counsel has primary responsibility to investigate and

prosecute all disciplinary matters subject to PRC discretion and supervision, and the General Counsel represents the OBA in all reinstatement proceedings.

#### **E. Professional Responsibility Tribunal (“PRT”)**

The Professional Responsibility Tribunal (“PRT”) was established by Rule 4.1, RGDP, at the same time the rules became effective July 1, 1981.

The PRT has primary responsibility to conduct all hearings in the disciplinary process including formal complaints charging either professional misconduct or personal incapacity and petitions for reinstatement.

The PRT is a 21-member panel of Masters, consisting of 14 lawyers and 7 non-lawyers. One of the lawyer PRT members is elected to serve as Chief Master to organize and administer the PRT. The lawyer members of the PRT must be active OBA members in good standing appointed by the OBA President, with approval of the Board of Governors. The 7 non-lawyer members are appointed by the Governor of the State of Oklahoma. Each member is appointed to serve a three-year term, and limited to two terms. Terms end on June 30th of the last year of a member's service.

When a new proceeding of any kind is commenced, it is assigned by the Chief Justice of the Supreme Court to the Chief Master of the PRT. In turn, the Chief Master assigns the proceeding to three Masters appointed to serve as members of a three member Trial Panel. Each Trial Panel consists of two lawyer Masters and one non-lawyer Master. One of the lawyer Masters is appointed to act as the Presiding Master for the Trial Panel in each assigned case. The PRT Trial Panel has responsibility to conduct hearings, to make findings of fact, conclusions of law and a recommendation for imposition of discipline in a Trial Panel Report to be filed with the Supreme Court.

## Part II: Rule 5.2, RGDP - Investigations - Responding to Grievances

The starting point for defending grievances is understanding Rule 5.2, RGDP, and the procedure following the involved lawyer being notified a grievance has been received and opened for formal investigation. Suggestions for how to defend grievances include deciding whether to respond by making the required full and fair disclosure or whether to decline responding based upon constitutional grounds or privilege. Rule 5.2, RGDP provides:

### Rule 5.2. Investigations.

After making such **preliminary investigation** as the General Counsel may deem appropriate, the General Counsel shall either (1) **notify the person filing** the grievance and the lawyer that the **allegations** of the grievance are **inadequate, incomplete' or insufficient** to warrant the further attention of the Commission, provided that such action shall be reported to the Commission at its next meeting, or (2) **file and serve a copy** of the grievance (or, in the case of an investigation instituted on the part of the General Counsel or the Commission without the filing of a signed grievance, a recital of the relevant facts or allegations) **upon the lawyer**, who shall thereafter make a written **response** which contains a **full and fair disclosure** of all the **facts and circumstances** pertaining to the respondent lawyer's alleged misconduct unless the respondent's refusal to do so is predicated upon expressed constitutional grounds. Deliberate misrepresentation in such response shall itself be grounds for discipline. The failure of a lawyer to answer within twenty (20) days after service of the grievance (or recital of facts or allegations), or such further time as may be granted by the General Counsel, shall be grounds for discipline. The General Counsel **shall make such further investigation** of the grievance and response as the General Counsel may deem appropriate before taking any action. (emphasis added)

Rule 5.2 requires the General Counsel to notify the involved lawyer of the grievance regardless of whether the grievance is treated informally or made the subject of a formal investigation. If the grievance is opened for formal investigation, the involved lawyer is required to provide a mandatory response within twenty (20) days that contains a full and fair disclosure of all the facts and circumstances pertaining to the lawyer's alleged misconduct unless the respondent's refusal to do so is predicated upon expressed constitutional grounds, whatever they

may be. The nature and scope of possible constitutional grounds that may be raised as a basis to decline responding is beyond the reach of the discussion here.

The reality is lawyers are rewarded in the disciplinary process for accepting responsibility for actions they took and decisions they made, and they are disfavored for not doing so. Effective advocacy requires careful balancing of the lawyer's duty to make full disclosure in a way that acknowledges acceptance of responsibility while presenting facts in the most favorable light without offering excuses or a denial of responsibility. This is a delicate task requiring careful analysis of the facts and understanding how any actions taken or decisions made by the lawyer may be criticized for any reason.

Declining to respond on any issue or declining to answer on a given point based upon constitutional grounds is seldom advisable and rarely successful in avoiding discipline. A decision to decline responding has its own risks of adverse consequences resulting from the mere exercise of the legal right to decline responding. As a practical matter, declining to respond does not end the inquiry into alleged misconduct and does not prevent the investigation and prosecution from proving professional misconduct resulting in findings warranting imposition of discipline even in the absence of a response from the lawyer. Most often the result of declining to respond is simply to forego and forfeit the lawyer's best opportunity to answer and defend against the allegations without improving the lawyer's position or chances for a more satisfactory outcome. The decision to give up what may be the only opportunity to affirmatively defend against the allegations must be carefully analyzed and is almost never productive. While the PRC and General Counsel have broad authority to require lawyers to respond to grievances, there are other limitations in the rules in addition to what may be considered as constitutional grounds permitting a lawyer to decline responding.

For example, in describing the PRC power to require lawyers to respond, Rule 2.8 (d) says there is a privilege against responding if by doing so the lawyer's answers might disclose matters that are privileged or that would tend to incriminate him or show him guilty of an act or an offense that would be grounds for discipline. The privilege against responding provided by Rule 2.8 (d) is not the same as the Fifth Amendment Privilege under either of the constitutions of the United States or of the State of Oklahoma but the privileges have some things in common.

Rule 2.8 (d) provides:

(d) To require lawyers and other persons to respond or give testimony in connection with Commission investigations. When a lawyer-respondent is called upon to answer or give testimony, the respondent **shall make specific and complete disclosure** as to all material matters **unless** the respondent shall personally state that he declines to answer any particular question on the grounds that his answers might disclose matters that are **privileged** or that would **tend to incriminate him** or show him guilty of an act or an offense that would be **grounds for discipline**. (emphasis added)

In the absence of an advisable basis to decline responding either by asserting a constitutional ground or by asserting a privilege under Rule 2.8 (d), the lawyer must provide a timely response that contains a full and fair disclosure of all the facts and circumstances pertaining to the lawyer's alleged misconduct.

Once a decision has been made that the lawyer must provide a response, the essence of a successful defense to the grievance depends almost entirely on what the response will contain and the manner in which it will be presented and understood by the investigating and prosecuting authorities. Credibility of the responding lawyer and the substance of the response cannot be compromised in the interest of advocacy. Professional disciplinary proceedings are not a time or a place for aggressive or overstated advocacy that cannot withstand intense scrutiny.

It is counterintuitive for most lawyers to be willing to provide a full and fair disclosure of all the facts and circumstances pertaining to the lawyer's alleged misconduct. There is often an

understandable reluctance to do so for varied reasons. Self-incrimination is understandably a common concern. Lawyer's conduct and decisions they make often fall short of perfection in the eyes of some observers and there is frequently disagreement when viewed by others. Regardless, in most instances lawyers are better served by providing a full and fair response truthfully acknowledging the problems involved rather than trying to avoid talking about what really happened and why.

Rule 1.2 is another rule especially problematic and creates risk the respondent lawyer may be exposed to misconduct not specifically identified in the grievance. This is because the failure of the grievance to specify a particular act of misconduct is not a defense to misconduct that actually occurred. It is not required for a grievance to describe each act of misconduct and the enumeration of the grounds for discipline is not all-inclusive. A general description in the grievance of the conduct involved is sufficient to create a duty for the lawyer to provide a full and fair disclosure of all the facts and circumstances involved. A full and fair disclosure by the lawyer creates risk of exposing the lawyer to potential misconduct beyond what is alleged in the grievance. This risk requires consideration to be given to provisions of Rule 1.2 regardless of what allegations have been made in the grievance and regardless of what specific rule violations are identified by the OBA in the letter transmitting the grievance to the respondent lawyer.

Rule 1.2. Implied Exceptions Negated provides:

The **enumeration** herein of **certain categories** of misconduct as grounds for discipline **shall not be all-inclusive** nor shall the **failure to specify** any particular act of misconduct be a tolerance thereof by this Court. (emphasis added)

The literal meaning of Rule 1.2 is misconduct may be found to include acts that are not specifically described in the grievance. This requires careful attention in framing a required response that may need to address issues that necessarily go beyond the specific allegations in the grievance. The subtleties involved cannot be ignored because of the risk a lawyer's response

may be viewed as deliberately incomplete, misleading, false or fraudulent. If so, the risk of an adverse outcome increases substantially.

Rule 1.3 is another problematic rule that creates risk the respondent lawyer may be exposed to findings of misconduct regardless of whether the conduct occurred in the course of the lawyer's professional capacity, or otherwise. This would be where an act would reasonably be found to bring discredit upon the legal profession. If so, the conduct may be grounds for discipline, whether or not the act is a felony or misdemeanor, or a crime at all. This is troubling for the defense because of the omnibus scope of the rule literally meaning, "for everything". This means all issues of misconduct may be raised without prior notice of a specific rule violation as long as prior notice of the conduct in question is given. Nothing could be worse for defense counsel trying to give meaningful advice to a responding lawyer client about what to include in a response to the grievance. The broad scope of Rule 1.3 creates exposure to discipline for unspecified violations without notice of what misconduct may be attributed to the acts. Rule 1.3 provides:

Rule 1.3. Discipline for Act Contrary to Prescribe Standards of Conduct.

The commission by any lawyer of any act contrary to **prescribed standards of conduct**, whether in the course of his professional capacity, **or otherwise**, which act would reasonably be found to **bring discredit** upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all. Conviction in a criminal proceeding is not a condition precedent to the imposition of discipline. (emphasis added)

There is obvious tension between a duty to provide a full and fair disclosure of all the facts and circumstances pertaining to the lawyer's alleged misconduct and the risk of misconduct being determined from the substance of the disclosures themselves regardless of whether or not the conduct occurred in the course of the lawyer's professional capacity, or otherwise. If the conduct

would reasonably be found to bring discredit upon the legal profession, the lawyer is exposed to being disciplined.

Representing a lawyer responding to a grievance requires communicating the meaning of both Rule 1.2 and Rule 1.3 adequately for the responding lawyer to understand the risks of providing a response with all details weighed against the risks of failing to do so. It presents a challenge to convince lawyer clients to make disclosures that may be against their interest in one sense in order to avoid exposure to discipline for failing to make the required full and fair disclosures. This is the counterintuitive part of the problem, convincing a lawyer client to consider making voluntary disclosures against the lawyer's own interests in order to reach a more satisfactory outcome.

Deciding to forego invoking a privilege in order for the lawyer to decline responding has consequences. If a response is made, it must be full and fair. It must be complete. There no safe middle ground. Either a privilege must be asserted to permit the responding lawyer to say nothing at all about the issue in question, or the lawyer must disclose everything. A successful defense most often turns on a determination of which facts cannot be denied and understanding that undeniable facts simply cannot be successfully denied. The entire process is virtually unlimited in its search for the truth that in almost all cases will be revealed. The response must be completely accurate and the responding lawyer must be prepared to stand on the response as submitted and hope for the best.

## **GARY A. RIFE**

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