

## Ten Tips for Responding to an ARDC Inquiry

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Each year, about 7 percent of lawyers registered to practice in Illinois become the subject of a grievance filed with the Attorney Registration and Disciplinary Commission. Receiving an “ARDC letter” ranks among the worst nightmares of many lawyers. Let’s examine the process by which ARDC investigates grievances and review some guidelines for the lawyer who must respond to an ARDC inquiry.



### Take heart

Even if you are the subject of a grievance, things may not be as bad as they seem.

First, the ARDC may decide to take no action on the grievance. Of course, the ARDC reviews every grievance it receives, and investigates all with even marginal validity. In a fair number of cases, however, the ARDC closes its file after initial review, with no response required from the lawyer. In 1999, for example, the ARDC docketed 5,877 grievances. Of these, 1,131 were closed after initial review. When that happens, the ARDC simply sends the lawyer a copy of the grievance with a letter stating that no response is necessary.

Second, even if the ARDC asks you to respond to the grievance (indeed, it does so in most cases), most grievances ultimately are dismissed without a recommendation of formal disciplinary action against the lawyer.

### Take action

Your timely, appropriate response is the key to bringing about a successful conclusion to an ARDC inquiry.

If the ARDC determines that further inquiry is necessary, you will receive a copy of the grievance letter with a request for your response within 14 days. Don’t make the mistake of ignoring the letter and hoping the ARDC will go away. It won’t. Furthermore, failing to

***Being the subject of an ARDC grievance is a lawyer’s nightmare. Here’s what to do – and what not to – if it happens to you.***

cooperate with an ARDC investigation is a separate ethical offense subject to discipline. See ARDC Rule 53.

I asked attorney Warren Lupel, an ethics authority and former chair of both the ISBA Joint Committee on Professional Conduct and the ISBA Committee on Liaison with the ARDC, for some advice about responding to an ARDC inquiry. Warren’s 10 tips are discussed below.

### Take a tip or 10

***Don’t leave your client in the lurch.*** You cannot just stop representing a client who wrote a grievance letter. While it is likely that you will need to withdraw from the representation, you must do so professionally and in accordance with the Supreme Court Rules. This means taking reasonable steps to avoid foreseeable prejudice to the client. So, for example, if you are representing a client in litigation, you must continue to represent that client until a proper order allowing you to withdraw has been

entered, and you must assist in a smooth transition of the file. You must also refund promptly any fees paid in advance that have not been earned. See Rule 1.16.

***Know the rules.*** You wouldn’t dream of representing a client in a matter without reviewing the applicable law. Likewise, don’t even consider drafting a response to the ARDC letter without familiarizing yourself with the Rule(s) of Professional Conduct that you are accused of violating.

If you need assistance in identifying the applicable rules, consider calling the ARDC Ethics Inquiry Program. This is a free telephone inquiry service whereby the ARDC provides information about attorneys’ ethical issues and the Rules of Professional Conduct. Questions are to be asked in the hypothetical, and ARDC does not keep information about callers’ identities. The ARDC will not assist you in drafting a response to an inquiry, but it can help identify the relevant Rules of Professional Conduct and case law.

***Accept responsibility.*** If you made a mistake, don’t deny it. You can, of course, offer an explanation of the circumstances. “I failed to file a complaint in the Jones matter within the statute of limitations. My wife recently passed away and I was distracted by grief and the responsibility of caring for our children.” If the circumstances are unique, state that too: “This is the only time in 30 years of practice that I have...”

***Don’t pass the buck.*** “My paralegal did it” is not a complete answer. While you are not necessarily subject to discipline for the misconduct of your secretary, law clerk, paralegal, or other non-lawyer staff, you are responsible for making reasonable efforts to ensure that their conduct comports with your professional obligations. See Rule 5.3. State the facts regarding who did what and

when, but do not suggest your lack of responsibility for your employees' actions.

**"Everyone else is doing it" isn't a good defense.** Your perception that other attorneys are violating the Rules, too, is not persuasive to the ARDC. Indeed, in some instances, your knowledge of other attorneys' misconduct may trigger a *Himmel* obligation to report them to the ARDC.

In short, "everyone else is doing it" works about as well with the ARDC as it does when your child says it to you – that is, not at all.

**Don't use the attorney/client privilege as a shield or sword.** Unless your accuser is not your client, you cannot assert the attorney/client privilege as a reason to withhold information from the ARDC. When your client accuses you of wrongdoing, the attorney/client privilege is no longer applicable. Rule 1.6(c)(3) permits you to disclose confidences or secrets necessary to defend yourself against an accusation of wrongful conduct.

While the attorney/client privilege is not a shield in an ARDC inquiry, it is not a sword, either. You may disclose client confidences only if *necessary* to your defense. Disclosure for the purpose of at-

tacking or embarrassing your former client is impermissible.

**Provide documents to support your position.** The ARDC inquiry may include investigation of facts disputed by you and your client. If there are documents that support your version of the facts, attach them to your response. Your response should also include information about how the ARDC can contact any fact witnesses.

**Stay focused.** Be as specific as possible in addressing the charges set forth in the grievance letter, and provide any background necessary for the ARDC to understand the situation.

**Avoid the toxic response.** However much you may ache to, do not attack the author of the grievance letter in your response. Anger, sarcasm, and personal attacks make you appear unprofessional and do nothing to clarify the issues. Have a trusted colleague read your response and edit out all traces of these toxins before they have a chance to poison your ARDC response.

**Consider calling your insurance carrier.** Many carriers – including ISBA Mutual – offer assistance for lawyers facing an ARDC inquiry or other disciplinary proceeding. For example, ISBA Mutual offers up to \$5,000 per policy

period toward the legal fees of an attorney retained by ISBA Mutual to assist you in responding to the ARDC inquiry. To qualify for this benefit, however, you must give ISBA Mutual notice *before* responding.

Even if you feel that you don't need assistance in drafting your response, there is another good reason to call your insurance carrier. Most professional liability policies require you to give notice when you are aware of a situation that is likely to result in a claim. The fact that your client has filed an ARDC grievance may be construed as notice to you that a claim is imminent.

Discussing your ARDC inquiry with your insurance carrier might not only yield valuable advice, it could enable you to avoid allegations of late notice down the road.

### End the nightmare

For most lawyers, the prospect of an ARDC inquiry is a dreaded nightmare. With an understanding of the inquiry process, the ethical obligations while it is underway, and the elements of a good response, a lawyer has a better chance of bringing the "nightmare" to a swift and satisfactory conclusion. ■