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## Defending an Ethics Matter: Don't Go It Alone

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[Legal Ethics and Attorney Discipline](#)

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There is one area of the law which concerns all attorneys yet provokes little interest or curiosity among us. Unless an attorney has already been caught in its crosshairs or served on a District Ethics Committee, we are generally ignorant about the attorney disciplinary system. We may read the published cases and scan Disciplinary Orders for names we know, and we can even be familiar with most of the RPCs, but few of us can articulate the difference

between a *censure* and an *admonition*, or a *grievance* and a *complaint*. Most of us will never have to. Since ignorance is bliss, most attorneys never investigate the world of attorney discipline until they are respondents. Then, under the gun and under siege, they decide how to proceed. Many do so without counsel.

Since every lawyer knows that attorneys who represent themselves have fools for clients, it might be surprising that even one attorney would appear pro se in a matter so directly affecting her license. Oddly, if asked for advice by a colleague in similar straits, that same attorney would probably encourage the colleague to seek counsel immediately. Nevertheless, hundreds of New Jersey lawyers undergo investigations, interviews, and random or demand audits every year without seeking advice or assistance from more experienced colleagues. Many lawyers even respond to grievances and answer ethics complaints on their own, assuming they will have the time to learn to navigate these new waters. Since many of these pro se respondents ultimately retain counsel before the end of the ordeal, it is instructive to know why they originally thought they could go it alone.

There is a handful of reasons that explain why attorneys avoid retaining counsel in ethics cases. One principal reason is that lawyers who are unfamiliar with the attorney disciplinary system are confident that the process will be analogous to a civil, criminal, or administrative procedure. These are all systems which the attorneys have mastered, and their track records assure them that they will figure out the maneuvers once inside. They rely on the same skills and instincts that serve them so well in their practices. This is unfortunate, as the system is unique and the substantive and procedural similarities we perceive belie the deep differences between this jurisprudential creature and any other.

Some attorneys count on their judgment or experience to tell them when the water that surrounds them is getting too deep or too hot. They rarely doubt they will have the time and opportunity to seek counsel if need be. Although the OAE will rarely interfere with a pro se attorney's timely request to retain counsel, in most cases where the lawyer belatedly senses the need for representation, the damage has already been done. Every ethics attorney has read transcripts from attorney clients who, while pro se, said something irretractable that will haunt them when the quantum of discipline is determined.

Another reason attorneys go bareback into the ethics rodeo is the personal and professional stigma of being the focus of a disciplinary action. An ethics investigation can be embarrassing, and some lawyers are reluctant to reveal their circumstance to a colleague. Many respondents do not even discuss the matter with their friends, their law partners, or their spouses. Some even hide it from their assistants. Even when they finally contact counsel, many attorneys begin by posing their predicament as a hypothetical.

A surprising number of lawyers genuinely believe that "lawyering up" will cause the OAE to draw a negative inference about what they did. On the contrary, the OAE prefers that attorneys be represented. Despite our plenary license to practice law, unrepresented attorneys are still pro se, and the OAE—like most courts—appreciates when all parties are represented by counsel. The disciplinary process can be quicker, smoother, and more successful when a respondent has experienced counsel.

Some lawyers are afraid of the cost of counsel. The cost of counsel varies widely, and a helpful, instructive consultation with an expert is generally not prohibitive. The consultation may reveal options and offer strategies even if

the cost of defense might exceed their budget. Interestingly, lawyers with “errors and omissions” coverage often forget to review their policies or contact their carriers to learn whether assistance—and maybe even the assignment of counsel—might be available. Some policies oblige the carrier to compensate or subsidize ethics counsel chosen by the insured. Where coverage is unavailable, some ethics attorneys—realizing the protracted nature of ethics investigations and the slow pace of prosecution—are willing to accept installment payments, allowing the attorney a year or more to complete the obligation.

Finally, there is a substantial bloc of lawyers who go pro se because they are certain that they did nothing wrong. They assume that, since the burden of proof is on the OAE, the defense will prevail, the system will exonerate them, and the attorneys will go merrily on their way thereafter. Some of them assume correctly; others do not. If you are tempted to fire the opening salvo in your own defense, consider the advice you would give to a murder suspect who has a perfect alibi. Although clear to you that no one will be able to prove his guilt beyond a doubt, would you advise him that he doesn’t need a lawyer?

The disciplinary system is not analogous to any other, and most attorneys will have a difficult time assessing it. Perhaps they fall into one of the categories above. Perhaps there are other reasons for their decision to go pro se. In any case, once they learn how different the attorney disciplinary system is, few attorneys remain satisfied with their decision to represent themselves.

We offer this free advice, dear reader, not to stimulate business activity for me or my ethics colleagues, but as important information to attorneys who find themselves in the crosshairs and who are unrepresented by counsel. You

have a plenary license which allows you to plead any case in any forum in New Jersey. Think twice when that license is in jeopardy.

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