Your immediate reaction? Disgust, anger, fear, or perhaps even outright panic driven by the idea of your license being placed at risk and only having 10 days to respond.

If you find yourself in this situation, remember four things:

1. Don’t do anything rash.
2. Immediately calendar that 10-day deadline, because the only thing that ignoring the complaint will make go away is your license.
3. Start making plans to talk with another lawyer about representing you.
4. Pull out a copy of your malpractice insurance policy and take a look through its provisions.

Malpractice policy? Really? Yes. You may be surprised to find out that, even though no malpractice claim has been filed against you, your policy may just contain a provision offering serious financial help in hiring a lawyer to defend you during this frightening moment in your professional life.

Further below, this article offers guidance for working through your policy to see if you have this type of coverage and...
a primer regarding the issues that may arise as to just when such coverage becomes available. But first, some discussion of lawyer discipline in Tennessee is helpful in order to place the insurance coverage questions in context.

Tennessee’s lawyer disciplinary process has two very distinct phases. That ominous letter from the Board marks the beginning of the informal, investigatory phase. After disciplinary counsel gets your initial response, they will forward it to the complainant and give them time to respond to it. Once disciplinary counsel gets a further response from the complainant, they will package that up and send it to you to see if you have a further response to make. That process can go on for several rounds and even stretch on for a few months.

But do not be misled: Just because this phase is informal does not mean that it is not incredibly important. Of course, Tennessee Rule of Professional Conduct 8.1 imposes serious obligations of candor on you with respect to your communications with disciplinary counsel, and misstatements can get you in serious disciplinary trouble. More importantly, however, your initial response is a golden opportunity to immediately put your best foot forward and begin to explain one of two things. (1) You haven’t violated any disciplinary rules. (2) Your conduct, although it violated one or more disciplinary rules, only merits some lesser form of discipline such as a private reprimand or perhaps even no discipline at all. The tone and tenor of your initial response can make a huge difference. With disciplinary counsel, as in life, you really never do get a second chance to make a first impression.

At the end of the informal phase, disciplinary counsel will reach a conclusion about what should happen next. If you have not been able to convince disciplinary counsel that the matter should be dismissed, then the informal, investigatory phase of the process is going to end one of two ways: either the Board, through Disciplinary Counsel, will propose some form of public or private discipline on your license, or the Board will publicly file a formal petition for discipline against you thereby beginning the second phase of the process. Are you convinced you need a lawyer yet?

The second phase looks a lot like the pursuit of a civil lawsuit with a three-member hearing panel playing the part of the judge and jury. You will have to file an answer to the petition, the hearing panel will enter a scheduling order, there will be discovery including the right to take depositions, and ultimately you will try your case to the hearing panel. The hearing panel’s ruling can be appealed to circuit court or chancery court and, from there, directly to the Tennessee Supreme Court.

“"If and when the gray cloud of a disciplinary complaint arrives in your mail from the Board of Professional Responsibility, be sure to pull out your malpractice policy.”

Because of a change in disciplinary procedure a few years ago, once the petition for discipline has been filed, the whole proceeding is public like other civil lawsuits. Significantly, this also means that the respondent lawyer’s ability to walk away with a private reprimand is now gone. Once this Rubicon has been crossed, a lawyer has to either win the case completely or face some form of public discipline, as the lowest form of discipline that can be imposed by a hearing panel is a public censure.

It should come as no surprise then that many disciplinary cases end up being won or lost based on the back-and-forth communications that occur during the informal, investigatory phase. In fact, given the importance of a lawyer’s reputation to the ability to practice, a win that comes only after formal proceedings before a hearing panel can still end up feeling like a loss given the public nature of the proceedings. The overwhelming importance of a lawyer’s responses during the investigatory phase leads savvy lawyers to understand that the decision to hire counsel should be made very early in the process and not sloughed off until the Board decides to file a formal petition for discipline.

Depending on how serious the allegations are, you might only need a lawyer to serve as a sounding board or a second set of eyes for your draft response. For a more serious complaint, however, you may need to fully engage a lawyer and turn the keys and the steering wheel over to your lawyer just as your clients should do when they hire you. Depending on the circumstances, you might want your lawyer to play a role somewhere in between those two options on the spectrum.

Now you may be saying to yourself, well of course he would say that — he practices in this area and has a vested interest in convincing lawyers that they need help. Guilty as charged, but that does not make anything I said above any less true. And, if you don’t believe me, put in a call to any of Tennessee’s disciplinary counsel and ask them if they believe that lawyers are better off defending themselves in disciplinary matters or engaging another lawyer to help them.

Let’s return to our discussion of the serious financial help to defray the cost of hiring an attorney to represent you in a disciplinary matter that may be lurking for you in your malpractice policy. The good news is that many malpractice insurance policies contain a supplemental payment provision for the defense of disciplinary proceedings. The even better news is that your deductible requirement typically does not apply and the amount to be paid for defense costs is separate from and does not work to reduce your general policy limits.

The dollar amounts available for these supplemental payments vary significantly. (I’ve seen policies that provide for as little as $5,000 and as much as $25,000.) Certain other policy details, such as who continued on page 22
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gets to choose counsel to represent you, tend to vary, but one important detail is fairly universal: the requirement that you report the disciplinary complaint to your insurer if you want to seek coverage. Indeed, be aware that your policy may require you to report a disciplinary complaint, even if no coverage is available in a particular case for disciplinary defense costs. Read your policy.

Given the two phases of the disciplinary process in Tennessee discussed above, one thorny detail is whether this supplemental defense cost coverage in the insurance policy is available to pay for your attorney’s efforts to get the complaint administratively dismissed or otherwise resolved without the filing of a formal petition for discipline or only available after a formal petition for discipline is filed against you.

Although there are many different examples of policy language you may encounter, I’ve set out below two examples: one that ought to provide you with smooth sailing in terms of coverage for responding to the investigatory phase and one that presents a more difficult question of coverage availability prior to the filing of a formal petition for discipline.

Example 1
The following is an example of policy language that should be treated as clearly covering the investigatory phase of the disciplinary process in Tennessee.

D. SUPPLEMENTARY PAYMENTS

2. The Company will pay on behalf of the Insured the reasonable fees, costs, and expenses incurred in responding to a Disciplinary Proceeding initiated against the Insured and reported to the Company during the Policy Period. The maximum amount payable under this provision, regardless of the number of Disciplinary Proceedings or the number of Insureds, shall be $5,000 total for all Disciplinary Proceedings covered under this policy. Any payments made by the Company under this part shall be in addition to the applicable limits of liability and shall not be subject to the deductible.

SECTION II. DEFINITIONS

E. Disciplinary Proceeding means any proceeding initiated by a regulatory or disciplinary official or agency to investigate charges made against an Insured alleging professional misconduct in rendering or failing to render Professional Services.

Example 2
The following is a provision that is less clear as to its scope. Under this type of provision, where “administrative proceeding” is not defined, the scope of the coverage availability will have to turn on whether the investigatory phase, or only the public phase after filing of formal petition for discipline is treated as an “administrative proceeding.”

E. Additional Defense Coverage

Subject to the terms, conditions and exclusions set forth in this Policy, the Company will pay on behalf of the Insured reasonable legal fees and expenses to defend only an administrative proceeding or hearing commenced against such Insured by a state attorney licensing or disciplinary agency or board and first reported to the Company in writing during the Policy Period or any Extended Reporting Period. The Company’s liability under this Paragraph E shall be limited to a maximum of $25,000 for all such proceedings and hearings, and is separate from the Limit of Liability under Section VI., Paragraph C … Under coverage provided under this Paragraph E the Insured agrees to be represented by legal counsel appointed or approved by the Company, within the Company’s sole discretion … The Deductible, as stated in the Declarations, shall not apply to proceedings or hearing subject to this Paragraph E.

Conclusion

If you find yourself having to wrestle with the specific language of your policy on this point, do bear in mind that, for once, you stand to benefit as the “little guy” when the rules of contract construction are applied. The law in Tennessee, as in most jurisdictions, construes ambiguities in a contract of insurance against the insurer and in favor of coverage. Thus, unless your policy provision makes it unambiguously clear that the supplemental payment provision is not available until a formal petition for discipline has been filed, then you should at least be in a position to argue for coverage from the moment that first letter arrives in the mail from the Board of Professional Responsibility. For example, if your policy uses the term “disciplinary proceedings” to describe the trigger for coverage but does not provide a definition of that term which clearly excludes the investigatory phase, then the fact that the Board opens and assigns a file number to a matter at the investigation stage should be helpful in attempting to prove that “disciplinary proceedings” have already commenced and coverage is available.

The moral is simple: If and when the gray cloud of a disciplinary complaint arrives in your mail from the Board of Professional Responsibility, be sure to pull out your malpractice policy and see if it will help underwrite your hiring a lawyer to defend yourself. You might be surprised at what you find.

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