



WHAT TO DO WHEN THE OPD CONTACTS THE DESIGN PROFESSIONAL

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The Office of Professional Discipline ("OPD") investigates and prosecutes claims of professional misconduct against, among others, design professionals. When a complaint is filed with the OPD, usually by a disgruntled client, the OPD notifies the design professional of the scheduling of an interview by an Investigator at the OPD. The design professional is permitted to have legal counsel present at the interview to assist in protecting the interests of the design professional. The design professional's legal counsel should immediately communicate with the OPD advising of the representation of its client and requesting that all future communications be between the OPD and counsel, and not with the design professional.

Notably, a copy of the actual complaint is not provided to the design professional. In most instances, the design professional is unaware of who filed the complaint and what the specific allegations are in the complaint. The reason for such anonymity is to prevent a chilling effect on people filing complaints should their identity become known to the professional being accused of some form of misconduct.

After counsel has had an opportunity to meet with the design professional and prepare the design professional for its interview, the design professional and its counsel appear at the interview to be conducted by the OPD Investigator. Unless objected to, the interviews are usually recorded by the interviewer. At the conclusion of the interview, the design professional's counsel may submit documents and a written Position Statement addressing some or all the issues raised during the interview. The Position Statement can assist the design professional in the defense of the claims, some or all of which as noted may not have been known to the design professional prior to the interview. Thereafter, the OPD may pursue the following courses of action in response to the interview and documents provided by counsel:

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1. In the first instance, the OPD may advise that the investigation has ended with no action being taken, or it may issue a letter providing an administrative warning, which is non-disciplinary in nature. Should the OPD decide to provide merely an administrative warning, the design professional will need to return to the OPD with their counsel in order to receive the appropriate warning;
2. In the event the OPD decides not to proceed with an administrative warning and keeps the investigation open, an OPD prosecutor will contact the design professional, or its counsel if counsel has been retained. The OPD prosecutor will advise of the pending allegations, the charges, and the disciplinary action to which the OPD is willing to agree. This is the first opportunity the design professional has to attempt to settle the matter. Disciplinary actions may include:

i) surrender of licenses; ii) suspension; iii) probation; iv) partial stay suspension; v) monetary fines; and/or vi) educational courses.

Any disciplinary action agreed to will be published on the OPD website and placed in the National Practitioner Databank.

3. Should the design professional disagree with the OPD prosecutor's requested settlement, the design professional may request an Informal Settlement Conference ("ISC"). At the ISC, both sides informally put forth their respective positions before an OPD Hearing Officer (attorney), and a client who is actually a member of the OPD Board. No witnesses are sworn and no testimony is taken. The Hearing Officer and the client will confer at the end of the conference and provide their conclusions. This is another opportunity to attempt to settle the dispute;
4. If the parties are unable to resolve the dispute following the ISC, the OPD prosecutor will draw up charges and the matter will proceed to a hearing. A hearing is an administrative trial at which witnesses and experts provide testimony under oath. The overwhelming majority of OPD investigations, to the extent not closed following the initial interview, are resolved through settlement and do not proceed to a hearing;
5. In the event the design professional accepts the charges as provided by the OPD prosecutor in the first instance, the charges must then be reviewed and accepted by several other individuals, before being formally accepted by the OPD. Specifically, following the agreement between the design professional and the OPD prosecutor, the charges are sent for review and approval to: a) a Board member of the OPD, b) then to the Director of the OPD, c) next to a member of the Board of Regents, d) then to the Professional Practice

Commission of the Board of Regents, and e) lastly to the full Board of Regents for review and approval. This process usually takes several months and the charges offered to the design professional by the OPD prosecutor can be objected to at any point along this review process. Should that occur, new charges may be offered to the design professional. Once the charges have been reviewed and approved by the full Board of Regents, the OPD and design professional will memorialize the agreement in a signed writing, at which time the sanctions will go into effect.

CONCLUSION

Based on the range and severity of penalties that can be imposed by the OPD, it is imperative that the design professional not delay once it receives notification of a complaint from the OPD. It is clearly in the best interests of the design professional to immediately retain counsel familiar with these proceedings. Experienced counsel can provide the appropriate advice necessary to fully protect the interests of the design professional and prevent the design professional from perhaps making statements at the interview against the design professional's interests. Further, legal counsel familiar with these proceedings may also prove successful in negotiating a lesser penalty than the ones offered directly to the design professional by the OPD.

This article is intended only as a general discussion of the subject topic and as such does not create an attorney-client relationship with the reader and is not meant to provide legal advice in any manner.