

Nonlawyers Help Keep Lawyers out of the “Discipline Corner”

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by Pegg Lowden

In most states of America, disciplinary panels hear evidence about complaints that are brought against lawyers alleging violations of the rules of professional conduct. After the evidence is heard, the panel deliberates and either dismisses the complaint or recommends disciplinary action against the lawyer. In the situation where the complainant is the accused lawyer’s client, the hearing is the place where clients often paint a picture of personal betrayal and a loss of confidence in the legal system. Testimony may be through cracking voices, angry words, and tears. The accused lawyer speaks and offers evidence in defense. Neither complainants nor lawyers leave the hearing room appearing to be satisfied. However, rising out of the ashes of this unpleasant experience there are lessons of hope for clients and lawyers.

COMMUNICATION

One lesson concerns communication between lawyer and client. A client retains a lawyer most often when they have a problem or crisis in their life. The client has an expectation that the lawyer will not only help with the crisis, but will reduce the client’s stress related to the problem. In some cases, however, the client experiences additional stress from unreturned telephone calls, inadequate or nonexistent notification of case events, or lack of prompt responses to questions and concerns. As a result of the client’s unfulfilled expectations, the client feels personal betrayal followed by a lack of confidence in the legal system.

Communication Practices – Admittedly, it is often inconvenient when a client calls with concerns because you are extremely busy meeting the constantly demanding deadlines of the legal business. However, each client’s needs and concerns are important to them, and should be important to you. Absent clients, you would probably be looking hungry!

In order for a client to feel that their needs and concerns about the legal matter will be attended to, there are three telephone handling communication practices that you can use. These practices are identified below:

1. Assure that a client’s telephone calls are returned within a reasonable time period, usually the same day, unless you tell the client otherwise.

2. At times, the lawyer is not able to return a call personally within a reasonable time due to traveling, depositions, trial, etc. You should feel comfortable to take the initiative to return the call to inform the client that the lawyer is aware of the call and will return their call as soon as possible. It is important that a client receive contact from someone with the lawyer's office, even if it is simple assurance that the lawyer is attentive to client concerns and needs.

3. Be aware that clients may telephone several times within the same day or over a period of days. Do not assume that all of the calls are for the same purpose. Ask the client about the reason for each call to the lawyer's office. It is a good practice, when you are in doubt about the status, to pick up the telephone and make a quick courtesy call to the client to ask if all of their calls were answered.

Through daily use of these three practices, you cultivate a communication style and process that develops relationships of respect and trust with clients. Be courteous, helpful, prompt and reassuring in your contacts. When the lawyer is busy, paralegals and support staff are charged with the responsibility to keep the client informed about when the lawyer will return their call. Paralegals and legal secretaries should work together to assure that this crucial communication occurs on a continual basis.

CLIENT AND BUSINESS RECORDS

The second lesson deals with the creation and maintenance of client and business records by the lawyer. These records help the client to understand what work was done for them and why specific tasks were performed. Additionally, records are essential to fully defend against a client complaint. Unfortunately, and frankly a surprise to me, many lawyers fail to maintain records at a level that is helpful to defend themselves in a disciplinary panel hearing.

Nonlawyer Roles in Creation and Maintenance of Records –

The creation and maintenance of client and business records is an area where paralegals, legal secretaries and administrative staff have important roles to help lawyers. By creating and maintaining records daily, you help lawyers take adequate precautions in their law practices to assure compliance with many rules of professional conduct. Records set the foundation for an effective defense against a disciplinary complaint. The records should consist of work completed by lawyers, paralegals, and secretaries concerning all phases of representation, but especially of communication with clients and counsel for other parties. The records should be maintained daily.

THE RULES OF PROFESSIONAL CONDUCT

What are the rules of professional conduct? The American Bar Association (ABA) created the *Model Rules of Professional Conduct* (Model Rules) to define a lawyer's

responsibilities and duties to clients, the public and as officers of the court and the American legal system. A majority of the states adopted the ABA's Model Rules for use within their own jurisdiction. If you are not familiar with these rules, find them and review them for your jurisdiction. Some of the rules are discussed in the following paragraphs.

Rule 1.4 (Communication) – Rule 1.4 requires that the client be promptly and reasonably informed about their matter, along with prompt compliance with the client's reasonable requests for information. Although you understand the nuances of the legal processes, remain aware that the clients do not fully understand what is going on. Clients are sometimes concerned, nervous, frightened and bewildered by the legal system. Often you and the lawyer are perceived as their protectors. Looking from the client's viewpoint, you can understand why some feel betrayed by lawyers and unenchanted with the legal system when their calls are not returned or they do not understand what the lawyer did to earn the fee that was paid by the client.

Rule 1.5 (Safekeeping Property) – Rule 1.15 deals with the safekeeping of a client or another's property in the possession of a lawyer. The rule states,

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

The safekeeping of property includes separateness of the property of others, good accounting practices, documenting the movement of property (i.e.; trust account funds to operating account), prompt disclosure of property in which an attorney or third party holds or develops an interest, prompt and thorough accountings, and prompt distribution of property when required. The production of documents and accountings may, for example, be important where clients pay flat fees for legal services and bring a complaint against the lawyer. Some lawyers take the position that a flat fee is earned by the lawyer whether or not substantial work is done on the case, and, therefore, the creating and maintenance of adequate records and accountings of billed work for the client is not required. The potential consequence of this lack of record keeping is a complaint that alleges an overcharging of fees by the lawyer. It is difficult to deal with this allegation effectively if there are no records or accountings of what was done on the client's behalf.

It is recommended that the lawyer maintain records of services performed on the client's behalf, for all fee arrangements. Adequate records include maintenance of monthly or quarterly statements of legal services performed, correspondence, pleadings, records of telephone communications, and similar records. If you wish to set up procedures and systems of accountings and records, review other Model Rules that pertain to legal fees (Rule 1.5), confidentiality of information (Rule 1.6), conflicts of interest (Rules 1.7, 1.8, and 1.9), and bar admission and disciplinary matters (Rules 8.1 and 8.4), along with any other rules that you and the lawyer may determine applicable to establishing systems and procedures for the practice. It is wise to maintain a backup of billing sheets, phone logs, correspondence, etc., because an attorney in a disciplinary hearing who says that they don't have the evidence to defend themselves due to a computer failure, flood, or fire may sound an awful lot like "my dog ate my homework."

Rules 8.1 and 8.4 (Bar Admission and Disciplinary Matters) – Bar Admission and Disciplinary Matters are good rules to know so that you are fully informed about the potential consequences from a client complaint. These Rules, in part follow:

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

...(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6. (Rule 8.1)

* * *

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

...(d) engage in conduct that is prejudicial to the administration of justice . . . (Rule 8.4)

As a prior disciplinary panel member, I've found it to be rather disheartening to determine that the only rule violation is 8.1(b) because the lawyer failed to respond to the complaint as required under the rules. Moreover, 8.4(a) may be violated by virtue of a Rule 8.1 violation. A lawyer may end up with two rules violations against him/her because of a failure to respond to requests for informal from the Office of Professional Conduct, even where the complaint is determined to be without merit. Unfortunately, this situation does occur frequently; lawyers should respond appropriately and in a timely manner.

What can you do to help the lawyer to stay out of the discipline corner? First, become familiar with the rules in your jurisdiction. Secondly, as you read the rules, notice the common sense and reasoning of the rules. Finally, apply the common sense and reason of the rules to your everyday communication and record keeping practices.

What are the Consequences to the Lawyer of a Rule Violation? The finding of a violation of a rule of professional conduct places the lawyer's license to practice law, as well as his or her reputation, in grave jeopardy. A violation may result in a private or public reprimand, suspension, or the loss of a license to practice law. Additionally, in many jurisdictions, a finding of a rule violation will prevent a lawyer from becoming a judge in the future.

READY..SET...GO!

Now, you may be more familiar with some of the ABA's **Model Rules of Professional Conduct**. You should feel comfortable enough to open discussions with the lawyers in your office about how you and the lawyers may work together toward compliance with the rules of professional conduct. Generally, improved communications, safekeeping of client property, and adequate record-keeping sets the stage for success. The ultimate goal should be satisfied clients who trust in lawyers

and the legal system, which in turn keeps legitimate client complaints at the lowest levels and keeps lawyers out of the discipline corner.

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