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How to avoid a State Bar complaint

PUT THE CLIENT'S INTERESTS AHEAD OF YOUR OWN — AND RETURN PHONE CALLS

Generally, an attorney's practice area will dictate the number of complaints that can be expected to be filed against the attorney. For example, collection attorneys have a large number of complaints lodged against them by debtors who are unhappy with the attorneys' collection efforts. These cases are routinely resolved by the State Bar without having to contact the attorney, since most of these types of complaints lack merit. Similarly, criminal-defense attorneys receive a large number of complaints from the prisoners they previously represented, who have substantial time on their hands and who often file serial habeas petitions and claim ineffective assistance of counsel.

There are, however, some things attorneys can do to avoid having a State Bar complaint lodged against them. It is not necessary to know the ins-and-outs of all the new Rules of Professional Conduct by number to steer clear of the discipline system in California. The most important thing attorneys can do to avoid complaints is to live by the "Golden Rule." The Golden Rule can be summed up as follows:

- Always put the client's interests ahead of the attorney's interests; and
- As an officer of the court, never lie!

Attorneys who live by this two-pronged Golden Rule should never have to open one of those frightening white envelopes from a State Bar investigator seeking the attorney's explanation of

what happened and all the supporting documents. At the very beginning of a potential representation, the attorney can do one thing to avoid an almost inevitable State Bar complaint – the attorney can say "NO." When a client comes in with a laundry list of former attorneys against whom the client has filed State Bar complaints, it is very likely the attorney will be the next in order if the attorney accepts the client. Chronically unhappy clients make State Bar complaints.

When, after careful consideration, an attorney decides to take on a client, another important action to undertake to avoid problems, and a potential State Bar complaint, is to manage the client's expectations. Attorneys are required under Rule of Professional Conduct 1.4(a)(2) to "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation." From that start of the representation, it is imperative to know what those objectives are and to come to an understanding on how the client's objectives can be achieved. This is also the time to emphasize that the attorney is not providing any guarantees. Making sure the client knows the range of what is possible from the representation can avoid confusion, frustration and a State Bar complaint later on.

The most common complaint lodged with the State Bar is that the attorney will not return the client's



phone calls. Every attorney should have a system in place to track all incoming and outgoing calls. There are many case-management software programs that can help, but even the old-fashioned spiral bound books with the carbon-copy "While You Were Out" messages can suffice. Under Rule of Professional Conduct 1.4 and Business and Professions Code section 6068(m), an attorney has a duty to communicate with clients. There are two facets of the duty to communicate:

- The duty to respond to reasonable status inquiries; and
- The duty to communicate significant developments.

Rule of Professional Conduct 1.4(a)(3) provides that attorneys must "keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." Business and Professions Code section 6068(m) requires attorneys "to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

It is important to establish a clear method to communicate with the client from the inception of the representation. One option is to send a welcome email

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to the client that requires the client to respond. The attorney should regularly contact the client by email and solicit responses from the client to maintain an open line of communication. The attorney also needs to document all communications and to train staff to properly document all interactions with clients. Determining what a “reasonable status inquiry” is depends on the facts and circumstances of the representation. If the matter is urgent, waiting a week or more to respond to a client inquiry may fall short of what is required under the Rules.

Under Rule of Professional Conduct 5.3, Responsibilities for Nonlawyer Assistants, an attorney is responsible to supervise subordinate, non-attorney staff to ensure that the “nonlawyer’s conduct is compatible with the professional obligations of the lawyer.” Even before the adoption of the new Rules in November 2018, attorneys were required to oversee the actions of their staff. The attorney is responsible for the conduct of the non-lawyer staff members of the office.

As for the second prong of the duty to communicate, the attorney needs to inform the client of all significant developments in the case. Here, the key is to document all communications, and the basic test for whether something is a “significant development” is whether it is something that the client would reasonably be expected to want to know. So, if an attorney loses a summary judgment motion, even if the attorney is certain the issue will be resolved on appeal, the attorney should immediately communicate the development to the client. Bad news does not get better with age. The sooner the client is informed of the development, the better.

Almost always, when a client complaint raises communication issues, there will also be allegations that the attorney did not properly handle the legal matter entrusted to the attorney. Under Rule of Professional Conduct 1.1(a):

A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

The standard for establishing misconduct in a discipline case for failing to

perform with competence is much higher than the standard for legal malpractice. However, attorneys have been found culpable for violating the duty to perform with competence even in a single client matter. This is why it is imperative to have systems and procedures in place to track incoming mail, faxes, emails and checks, to ensure all calendar entries are input on at least two separate calendar systems, and to “tickle” each client matter on a regular basis to determine the current status of the case.

Under the new Rules of Professional Conduct, unreasonable delay alone can subject an attorney to discipline. Rule of Professional Conduct 1.3 provides:

- (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.
- (b) For purposes of this rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

The best way to avoid a State Bar complaint from a client is to keep the client informed of the progress on the case regularly, and to document all communications. The attorney will be routinely reviewing the case and will be moving the case forward toward resolution. An attorney who does these things won’t receive complaints for failing to communicate or failing to perform with competence.

Clients and lienholders complain when they are not timely paid settlement funds. To avoid a State Bar complaint concerning the handling of monies, an attorney needs to ensure that the client trust account is in order. Under Rule of Professional Conduct 1.15(a):

All funds received or held by a lawyer or law firm for the benefit of a client, or other person to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled “Trust Account” or words of similar import, maintained

in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client’s business and the other jurisdiction.

Whenever an attorney is holding money for a client or “other person to whom the lawyer owes a contractual, statutory, or other legal duty,” the attorney needs to ensure the funds remain in trust until the competing claims for the funds are resolved. When an attorney settles a case and deposits the settlement funds into the client trust account, the attorney needs to ensure all liens are negotiated and paid before distributing the disputed portion of the funds to the client. The attorney has to resolve not only the medical liens the attorney approved, but also Medi-Care and Medi-Cal statutory liens, and any bills which the attorney was aware of at the time of settlement.

At the time the settlement monies are disbursed, it is important to ensure the client knows how the settlement monies are allocated. Having the client sign off on the disbursement sheet is a good practice and required under Rule of Professional Conduct 1.15(d)(4). As soon as an attorney comes into possession of client funds, the attorney has the duty to notify the client (and the lien-holders) of the receipt of the funds under Rule of Professional Conduct 1.15(d)(1). The attorney has a duty to promptly pay out entrusted funds under Rule of Professional Conduct 1.15(d)(7). By taking these steps, an attorney can avoid serious complaints concerning potential misuse of the client trust account.

The final area of a significant number of client complaints is an attorney’s conduct at termination. Under Rule of Professional Conduct 1.16(d):

A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).

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Even where a case has no value, if the attorney cannot convince the client to dismiss the case, the attorney has to formally withdraw by filing a motion and seeking leave of court. Until the attorney is released from representation of the client, the attorney needs to take all steps necessary to avoid reasonably foreseeable prejudice to the client, and under Business and Professions Code section 6068(e), must maintain client confidences. In the motion to withdraw, the attorney has to balance the need to disclose enough to the court to be allowed to withdraw, with the duty to ensure the client's position in the case is not harmed by the attorney's withdrawal or the attorney's disclosure of client confidences.

If an attorney receives a substitution form signed by a now-former client, the attorney has an obligation to sign the substitution promptly and to release the client file in a reasonable time. The attorney should not contact the former client since the client is a represented party under Rule of Professional Conduct 4.2. The attorney can file a notice of lien for the attorney's interest in the attorney fees.

At the time the attorney withdraws or is substituted out of a case, the attorney

needs to provide the client with the file, since the file belongs to the client. Rule of Professional Conduct 1.16(e)(1) provides:

subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

Even where the client has not paid for the expert report or the deposition transcripts, they belong to the client. The client file includes the electronic communications and electronic file. This includes email. That is why it is imperative to have a system in place to track case-specific email as part of the client file. It is an open question about whether the attorney needs to provide the Word or WordPerfect versions of documents created by the attorney for the client.

However, all work product on the file is owned by the client. The safest course is to provide the complete electronic file to the client (except documents the attorney needs to withhold which are subject to a protective order).

The most important thing an attorney can do to avoid a State Bar complaint is to make the clients happy. Usually, the client who is dissatisfied or confused will contact the attorney for an explanation or redress first before lodging a State Bar complaint. Regularly communicating with clients and keeping them up to date on their legal matters is the best way to avoid a State Bar complaint.

Erin Joyce has extensive experience in State Bar investigations and disciplinary proceedings, plus over twenty five years of civil litigation practice. Erin was admitted in 1990 and practiced for nearly eight years in an intellectual property boutique before joining the Office of Chief Trial Counsel as a prosecutor for the State Bar, from 1997 through 2016. Before going into private practice, Erin served as Chief Special Investigator for the Los Angeles Fire Department, as a prosecutor for the State Bar of California, and as a lawyer for multiple private practices.