

IN PRACTICE

LEGAL PROFESSION

Strategies To Avoid Attorney Ethics Complaints and Tips for Surviving an Investigation

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Attorney ethics can be complex and potentially dangerous to one's legal career. Lawyers typically need to know how to avoid ethic problems, what to do if an ethics grievance is filed against them, and what sort of discipline is meted out for violations. Please find below a compass to help navigate through the twists and turns associated with attorney ethics grievances and investigations.

Danger Zones

A large majority of ethics grievances are filed against solo practitioners or lawyers at small law firms. Part of the explanation for this fact is that many solo practitioners and small firms engage in the type of practice areas ripe for complaints. Many ethics cases (and also fee disputes) arise from the area of matrimonial law, probably in large part because the litigants are already emotionally attached to the proceedings and the basic nature of the case is very personal. In addition to a client's claims against his own attorney, in matrimonial

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matters, there are often claims made by litigants against the opposing attorney.

Another problem area has been in residential real estate transactions. In many instances, a real estate closing is the first and perhaps only time a lay person has contact with an attorney. Like matrimonial cases, the purchase of a house can be very personal and is probably the biggest and most important investment one will make. This results in heightened anxiety and pressure, which can create a virtual target on the unsuspecting attorney's back. Similar issues arise when attorneys are handling wills and trusts. The probate process can be cumbersome and sometimes moves at a pace slower than expected by the client. Consumer collection lawsuits also result in a fair number of ethics complaints, as the debtor is usually faced for the first time in dealing with attorneys. Aggressive attorneys may well be acting within the rules, but the debtor feels violated and wronged when the attorney levies against a bank account to satisfy a judgment.

There appears to be a common thread running through the above referenced danger zones. Many ethics complaints emanate from a client's maiden voyage into the legal system. The client may not be ready for the turbulence, delays and erratic nature of certain le-

gal matters. If the client doesn't know what to expect, chances are that client will be displeased with how the matter progresses. Throw in the personal emotion of a divorce and expense associated with a contested matter, and a virtual perfect storm has been created for an ethics complaint.

Common Issues in Ethics Complaints

Without fail, the largest and most avoidable area of complaint is an attorney's failure to communicate with his client. We're in a service business and results are definitely important. But communicating with the client is oftentimes more important than the result, especially in the context of ethics complaints. In my many interviews of complainants, I would estimate that 75 percent were upset because they couldn't get in touch with their attorney.

Fortunately, this major area of complaint is relatively easy to fix or avoid. If attorneys would be more responsive to clients and actively communicate, I would wager that ethics complaints could be reduced by half. Likewise, when attorneys actively communicate with their adversaries, we see very few ethics complaints filed by attorneys on the other side of the case.

Strategies To Avoid Grievances

- Educate your client, even if the client is savvy and you think he understands the process.
- Explain the attorney's role in the client matter.
- Explain the process — including limitations on what the attorney can achieve.
- Don't over-promise — be conservative in estimating results for the client.
- Return telephone calls.
- Update clients regularly on their case.
- Honestly apprise the client of positives and negatives happening in the case.
- Don't sugar coat the situation, as this only creates a ticking time bomb and perhaps an ethics complaint.

Tips for Surviving an Investigation

Pursuant to Rule 1:20-4(e), attorneys are required to cooperate with an ethics investigation. This rule is vehemently enforced. The Disciplinary Review Board issued a notice to the Bar on August 4, 1997, stating that, "cooperation at all levels of the disciplinary process is expected of every attorney admitted to practice in New Jersey" and that, "discipline may result based solely on a violation of RPC 8.1(b)."

RPC 8.1(b) provides that an attorney shall not, "knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority." Failure to cooperate in an investigation may itself constitute an ethics violation. *In re Rennie*, 162 N.J. 44 (1999).

The following protocol should be considered when facing an ethics investigation: (a) review your file thoroughly and re-acquaint yourself with the facts and chronology; (b) confer with ethics counsel in the event of serious or difficult charges (some malpractice insurance carriers provide for coverage of attorneys fees for the defense of ethics

matters); (c) check your policy and consider reporting the issue to your carrier; (d) provide a timely response to the ethics investigator's request for information, as required by *In re Gavel*, 22 N.J. 248, 266 (1956) and RPC 8.1(b); (e) keep in mind that your written response(s) to the investigative attorney usually are copied and sent to the grievant and therefore do not insult the grievant; and (f) educate the ethics investigator on the matter, including the chronology, legal and factual issues of the underlying case.

Under our ethics rules, the investigator will assume allegations to be true unless addressed by the responding attorney. As such, the response should be thorough.

I cannot stress enough the importance of properly handling an ethics matter in the investigation stage, especially in serious or difficult cases. I generally have been more successful in defending matters when the attorney has counseled with me at the onset of the investigation, as opposed to afterward. What happens during the investigation stage will impact what charges, if any, are brought by way of formal complaint against the attorney. Credibility, cooperation and a focus on the exact charges facing the attorney during the investigation may determine the ultimate disposition of the matter.

Discipline for Ethics Violations

Once an investigation is complete, the decision must be made by the ethics committee (or the Office of Attorney Ethics) on whether to dismiss the matter or proceed to charge the responding attorney by formal complaint. An alternative to a charge is known as diversion, which is available only for minor misconduct. The terms of diversion are contained in an agreement in lieu of discipline that may contain conditions, "to the extent practicable, to the remediation of the cause of the misconduct." Rule 1:20-3(i)(2)(B)(iii).

The other forms of discipline available are: admonition, reprimand and

censure, suspension and disbarment. The discipline imposed is, of course, dependent on the findings of ethics violations and the surrounding circumstances of each particular case. Aggravating and mitigating factors are considered, which may include in some cases, conditions such as mental illness, substance abuse and the damage caused by the misconduct. Many other circumstances are also considered in the context of determining appropriate discipline. *Matter of Stanton*, 110 N.J. 356, 361 (1988). In ethics cases, the objective of the New Jersey Supreme Court is to, "protect the public and preserve public confidence in the bar." *In re Morell*, 184 N.J. 299, 304 (2005). The kind of discipline imposed can vary greatly and may turn on certain facts not immediately thought to be pertinent. As such, a careful and thoughtful approach is necessary in order to evaluate the potential discipline for any given matter.

Conclusion

Avoiding complaints can be tricky for solo practitioners and small firms that practice matrimonial, real estate, wills and trust, and consumer collection law, as well as other areas. Many ethics problems arise due to the client's lack of understanding or unrealistic expectations about their case. Probably the best tool in an attorney's arsenal to avoid ethics complaints is to regularly communicate with the client.

In the event of an ethics investigation, the attorney is obligated by court rule to cooperate with the investigator. However, the attorney should exercise great caution and fully familiarize himself with the file, understand the exact nature of the potential claims that may eventually be levied against him, and intelligently respond to inquiries of the investigator. Proper handling of the matter in the investigation stage is essential, as it will likely have a major impact on what charges, if any, are brought against the attorney. ■