AVOIDING BAR COMPLAINTS

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Below are my "Top Ten" ways of avoiding Bar Complaints. In preparing this discussion, I assumed that, generally, attorneys want to do the right thing. But we all make mistakes. A simple mistake does not normally rise to the level of ethical misconduct. How one deals with a mistake (or a problem that is not of the attorney's own creation), however, frequently does determine whether or not a client (or some other interested party) will file a Complaint with the Virginia State Bar.

The discussions below address Rules that are frequently violated and (hopefully) helps understand the Rules by highlighting ways in which compliance with the Rules may not only decrease the likelihood of winning a Bar Complaint, but decrease the likelihood of the having a Bar Complaint filed against you to begin with.

I. Read the Rules

The Virginia Rules of Professional Conduct (RPC) are rules of reason, but they are not always intuitive. Some of the Rules are common sense (e.g. RPC 1.1; Competence). Other Rules are somewhat technical and provide specific instructions that must be complied with (e.g. RPC 1.15 Safekeeping of property.)

Ultimately, familiarity with Rules of Professional Conduct is a simple issue of competence. If an attorney makes an error because he or she is not familiar with the relevant Rule(s) will likely be considered a violation of Rule 1.1 (Competence). Accordingly, take the time to read the Rules as well as the official comments to the Rules.

The Rules of Professional Conduct can be found at Part 6, Section II of the Rules of the Supreme Court of Virginia. They are located in the printed Code of Virginia in the Rules of the Supreme Court volume. They are also available online at the VSB Website as are Legal Ethics Opinions.

Rules implicated: 1.1 (Competence)

II. Keep The Client Informed

Good, bad or otherwise, make sure your client knows what is going on. Bad news does not get better with time. Clients do not like bad news, but they like old bad news even worse. Clients can be surprisingly forgiving regarding bad outcomes if the attorney properly, promptly and forthrightly explains what has transpired.

Communicating information today is easier today than ever. In addition to face to face and/or telephone communication, one can text or e-mail information. There is no excuse for not communicating. BUT, be careful to not be the victim or the perpetrator of information overload.

Early in your representation of the client, establish your guidelines for communication. RPC 1.4 (a) provides that a lawyer shall promptly comply with reasonable requests for information, but prompt does not mean instantaneous. If your client is the kind who sends multiple e-mails daily, you do not need to respond to every e-mail. You also do not need to be on your smart phone or computer at 9:00 p.m or on Saturday afternoon responding to e-mails simply because the client sent you an "urgent" e-mail that is not really urgent at all.

Notwithstanding the fact that some clients will try to "over communicate", telephone calls and e-mails (even abusive ones) should be returned in a timely manner, but wait until you have the time to respond properly. Even if you don't have the time, make the time, and respond properly. A single e-mail, acknowledging response, may be sufficient for the client who sends multiple e-mails. Calls from the client who gets on the phone (or appears at your office) and talks incessantly, need to be returned, but the client needs to understand that he or she will be billed for your time and time spent explaining the same thing over and over might not be the best use of the client's money.

When responding to e-mails or texts think (and then think again) before you hit send. Electronic messages last forever and one sent without proper thought or editing may re-appear as an attachment to a bar complaint. Text messages are frequently sent out when one does not have time to properly compose a message or to process information received. One should therefore probably avoid sending text messages more complicated than, "Received your message. Will call later". (Consider a policy of "just saying, No" to sending texts.)

Communication with the client is an ethical responsibility, but every opportunity to communicate is also an opportunity to build the relationship.

Rules implicated: RPC 1.3 (Diligence); 1.4 (Communication)

III. Avoid Procrastinating

Procrastination is one of the greatest causes of bar complaints. When you take in a new case, whether you have recruited the client or the case is assigned to you by a supervising partner or if it is court appointed, engage in it as soon as possible. Determine what needs to be done and do it. Bar Counsel frequently see complaints where an attorney engaged in a case late and discovered that the matter was more difficult than expected. The predictable result is missed deadlines, going into court underprepared and, ultimately, the disgruntled client.

Most attorneys have one or more cases in their filing cabinets that are, for whatever reason, troublesome. Regardless of the reason for the trouble (unreasonable client, unreasonable opposing counsel, difficult subject matter or all of the above) these cases frequently get set aside and ignored. (Often as not, the attorney does not perceive that he or she is "ignoring" the case; rather, one sees it as waiting until he or she has the time to devote proper attention to the case.) Do not let this happen to you.

These cases are time bombs. These cases must be worked aggressively. Sometimes difficult issues "resolve themselves". Far more often, they become more difficult due to neglect. Delay can be an effective strategy, but ignoring a case is not.

Rules implicated: 1.1 (Competence); 1.3 Diligence

IV. Aggressively avoid conflicts.

Be aware of possible conflicts of interests with past clients as well as current clients. Frequently the conflict(s) or the possibility of conflict is not immediately become apparent. When the issue is discovered, however, act promptly to obtain a waiver from all concerned if possible. If a waiver is not possible (e.g. non-waivable conflict or one or more individuals concerned declines to waive the conflict) withdraw (or request permission to withdraw) as soon as possible. Delay will complicate the issue and make the fact of withdrawal more expensive to the client (and possibly to you).

Treat "possible" conflicts as actual conflicts. If the conflict or potential conflict involves a current client, and the conflict *can* be waived a written waiver is needed. Extreme caution is urged, however, because cases frequently take unexpected turns and the attorney may discover that the potential conflict becomes real and possibly non-waivable. Aside from immediate financial ramifications, the attorney may now have multiple disgruntled clients.

Unforeseeable (or at least unforeseen) conflicts are sometimes discovered after the case is well underway (for example, a potential witness for the opposing party is a former client of the attorney.) Do not ignore these surprises. Act promptly to notify all concerned and take appropriate action. Appropriate action includes investigating to determine whether and the extent to which a conflict might exist or may be waived. Obtain waivers if possible/necessary and/or withdraw if the conflict is cannot be properly waived.

The conflict does not have to be with another client; the representation may come into conflict with the personal interest of the attorney. This is especially likely when the attorney finds himself representing neighbors, friends and family members. Difficult thought it may be to say "No" to the seemingly reasonable requests for assistance from family and friends, the possibilities of conflict are endless. The better course is to avoid these entanglements. (A surprising number of complaints come from individuals who claim to have been close friends with a family member of the attorney.)

Rules implicated: 1.7 Conflict of Interest: General Rule; 1.8 Conflict of Interest: Prohibited Transactions; and 1.9 Conflict of Interest: Former Client

V. Take Care Of Your Trust Account

Trust account violations ***will*** *get you in trouble.* Money in your trust account does not belong to you. It is in your care because of the special trust placed in attorneys by the law. Do not abuse this trust.

Money that goes into the trust account includes advance fees that are paid by the client, but not yet earned. (Special note: Flat fees, paid in advance, are yet earned by the attorney.

Such fees must be deposited in trust until earned by the attorney.) Money received by the attorney from a third party for disbursement to the client or other third parties also remain in the trust account until time for disbursement to the client, other third parties and/or the lawyer himself (e.g. funds received from a personal injury settlement or real estate closing). The trust account must not include funds that belong to the attorney but remain in trust as a "slush fund" to avoid reporting to the IRS or to avoid possible overdrafts.

If you are in a solo practice or a joint practice where you have your own trust account, budget time to perform the required accounting for the trust account. Get help if necessary (e.g. CPA) but the attorney ultimately remains accountable for the trust account. Do not let anyone other than yourself have signatory authority over checks.

If you are in a partnership or small group practice with a joint trust account, get personally involved with how the trust account is maintained. Do not assume that someone else is taking care of funds that are untrusted to you.

Attached as an addendum to this presentation is a "cheat sheet" that addresses the high points of what one must do and what one may not do with one's trust account along with references.

Rules implicated: 1.15 Safekeeping Property

VI. Know What Is Expected Of You

Often as not, your client is new to the legal process. He or she may never have been to court and he or she may have never previously been in a law office. His or her expectations of the legal process are likely to have been shaped by TV and or the advice that a friend (who is not a lawyer) has provided.

Ensure that you understand what the client is expecting you to accomplish and ensure that the client understands what your limitations may be. Not every attorney is as capable as Perry Mason, Matlock, Harmon Rabb or Sarah McKenzie and those of us who do have such capabilities probably cannot accomplish it all in one hour.

"Scope of Representation" issues frequently arise when there is a disconnect regarding what is expected of the attorney to begin with or, as the case progresses, and additional issues develop, what is needed to move the case forward. Most attorneys recognize that, the best way to initially establish the Scope of Representation is through some form of written contract or confirmatory letter. Many such letters are ineffective, however because they do not clearly state what the attorney is supposed to do. (For example, a criminal retainer agreement might state that the retainer is "for representation on charges in the General District Court of a certain county, but fail to state what the charges are. What happens if additional charges are added?)

The agreement should be concise enough so that it clearly states what is expected of the attorney. Use plain language. Avoid agreements or confirmatory letters that are written so lawyerly that the client needs another attorney to understand what you are supposed to do.

If you perceive that the scope of representation has changed or is changing, engage the client to ensure that there continues to be a meeting of the minds as to what is expected. To the

extent possible or reasonable, send some form of confirmatory writing regarding the changed scope of representation.

Rules implicated: 1.2: Scope of Representation; 1.5 Fee Agreements

VII. Have a Clear Written Fee Agreement

Do not be shy about discussing money with your client. They want to know how much this is going to cost them and they want to know how they are going to be charged.

There is an old saying that "A workman is entitled to the cost of his wages." You are entitled to be paid and you are doing a disservice to yourself and, ultimately to your other clients if you do not require the client to pay for your good efforts.

Take the time to explain to the client how he or she is to be charged. If the client is to be billed on an hourly basis, ensure that he or she understand that this may include time taken to read and respond to telephone calls and e-mails. The client must understand that whereas communication between the attorney and client is necessary, you want to ensure that their money is being spent wisely. Time (and money) that is spent in communication is time (and money) that is not spent engaging the opposition.

The attorney's part of the bargain is to work efficiently. If you charge an hour's time, ensure that you have provided an hour's worth of effort. Provide the client with periodic account statements and be prepared to discuss the bill and the billing process. (If there are questions about the bill, it is generally not a good idea to charge the client for time spent discussing his or her bill.)

If you have provided an estimate for the cost of a case and it appears that the case is costing more than was estimated, explain to the client why the cost disparity exists. (Often as not, this is because the scope of representation has changed, as was discussed above.)

The addendum (aka cheat sheet) discussed in Section V above also contains specific requirements regarding Fee Agreements provided in RPC 1.5.

I note that simple fee disputes are beyond the purview of the disciplinary process. Issues resulting from defective fee agreements are within the disciplinary process, however, and are a frequent source of bar complaints. One must also note that dissatisfaction with the amount of work provided for the fee charged is likely to cause a dissatisfied client to complain about matters that would otherwise have been overlooked by the client.

Rules implicated: 1.5 (Fee Agreements)

VIII. Fire Yourself When Necessary

Sometimes it is clear that the attorney and the client are not a good fit. When that happens, do not be afraid to fire yourself.

Obviously, this outcome should be avoided. An attorney does not make money by walking away from cases. Nevertheless, the client is entitled to an attorney who believes in his or her case and can maintain the representation with the appropriate zeal. When the attorney

perceives that the attorney client relationship is deteriorating, he or she should attempt to engage with the client to determine the cause of the damage and repair it. If the relationship continues to deteriorate, withdrawal should be considered. Withdrawal should also be considered if the client cannot or will not pay.

Once the decision is made to withdraw, the attorney should act promptly to terminate the relationship. Delay will not help the matter and it may make withdrawal more difficult and/or impossible. If the matter is not yet in court, the attorney should explain his or her reasons to the client and make the termination of representation as amicable as possible. If court proceedings are underway, the attorney must make a Motion to Withdraw and the attorney must remain engaged until the motion is granted. (It will not be granted if the attorney waits until a few days or weeks before a scheduled hearing or trial.)

Upon termination of representation, the attorney must take all reasonable steps to protect the interests of the client. This includes, but is not necessarily limited to providing the client with the full file and cooperating with successor counsel. The attorney must return to the client any unearned funds in the Trust Account, (and the attorney should ensure that they are, in fact, in the Trust Account.) The attorney also consider refunding additional money, even if it has been properly earned through services provided. This would be especially prudent, if the termination is at the behest of the attorney.

Rules implicated: 1.2 (Scope of Representation); Rule 1.16 (Termination of Representation)

IX. Be responsive to complaints

Treat the client with respect. If he or she has a complaint, listen, make sure you understand the nature of the complaint before attempting to respond. Do not respond emotionally, even if the client is emotional towards you.

"Work the problem." Engage with the client in a cooperative posture to resolve the issue. As attorneys, we are problem solvers. If you cannot resolve the concern that the client may have with you, the client may lose trust in your ability to help him the problem for which you were hired. Problem solving of this nature may be time consuming and frustrating, but as long as the client is working with *you* to resolve the problem, he is not working with the Virginia State Bar to resolve the problem.

Some problems with clients just cannot be worked out. If that is the case, as discussed in Section VIII (above), consider firing yourself. A financial settlement with the client may also be appropriate.

Rules implicated: 1.2 (Scope of Representation); Rule 1.16 (Termination of Representation)

X. Do not be afraid to get help.

Attorneys are not born with the skills necessary to resolve every issue. If you are over your head, admit it to yourself and get help. Associate other counsel if necessary. (The client must be made aware of and consent to formal association of additional counsel.)

Ethics advice is available through the VSB Ethics Hotline. (Telephone number (804) 775-0564 or by email through the Virginia State Bar Website (VSB.org).

If you feel overwhelmed, Get Help! Lawyers Helping Lawyers is confidential, non-disciplinary, and free. Its 24-Hour Help Line is 1-877-545-4682. They also have a confidential email line on their website (http://www.valhl.org).

Rules implicated: 1.1 (Competence)