

## Ten ways to stay out of trouble

From the esoterica of last month's column about lawyer bashing to something more practical, here is a list of some things lawyers can do to stay out of trouble. My focus is staying out of trouble with the Disciplinary Commission, with the added benefit that this same list works well for avoiding malpractice claims. Since they account for the vast majority of all grievances filed against lawyers, I will focus on client relationships.

Each year, the Disciplinary Commission receives about 1,600 grievances against some of our 16,000 active lawyers, or one for every 10 active lawyers per year. Put another way, the average lawyer will receive a grievance every 10 years, or between four and five grievances during a typical legal career. Some practice areas spawn more grievances than others, but odds are at least one will find its way to your door.

Defying the odds, many lawyers never receive a grievance. This is a worthy goal – one that every lawyer should strive to achieve – even though there can be no guarantee that one can avoid all grievances in the rough and tumble of the adversary system. I've had some of my own, but that's a story for another day.

What are the complaints against lawyers that are most easily avoidable? Here's my top 10 list, in no particular order. It isn't scientific, but reflects my impressions after 15 years or so of looking over grievances.



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**First**, know how to operate a trust account. Even if you aren't in charge of your firm's trust account, you still have a responsibility to

Trouble you can't fool me, I see you behind that tree,  
Trouble you can't fool me, trying to get the ups on me,  
Trouble you can't fool me, I see you behind that tree,  
You want to jump on me.

– “*Trouble, You Can't Fool Me*,”  
lyrics by Frederick Knight and Aaron Varnell

make sure that your firm's trust account is being properly managed. Managing a trust account correctly isn't rocket science, but there are a lot of detailed tasks that must be done right. For a fairly comprehensive guide to managing your trust account, look at the manual the Disciplinary Commission publishes on its Web site at: <http://www.in.gov/judiciary/discipline/docs/trust-guide.pdf>.

**Second**, communicate with your clients. There is a client communications death spiral. It goes like this: The client hasn't heard from the lawyer. She wants to know what's going on. She calls the lawyer and leaves a message. There isn't all that much to report, so the lawyer doesn't return the call. The client becomes frustrated. Calls again. Leaves another message. And so it continues. The client is now thoroughly frustrated with the lawyer. And the lawyer has now identified the client as a “problem” client, a pest. Perceiving that the client is no longer a happy client, the lawyer engages in normal human behavior – avoidance of the unpleasant. Wouldn't it be better if the lawyer preemptively contacted the client at regular intervals, rather than waiting to react to the client? Plus, clients can be put at ease about periods of rare communications by being reassured that significant developments in the matter are not expected and that the lawyer can be trusted to promptly contact the client when something arises. Being preemptive doesn't always work, so make sure you respond to all client contacts within 24 hours. If you're too tied up to do it yourself, have a staff person make

the contact to either assist the client or, if it requires your personal attention, explain the reason for your delay. There are many other efficient client communication techniques that preempt client concerns about their cases, including always sending the client a copy of correspondence and pleadings pertaining to the matter.

**Third**, educate your client in order to create realistic expectations. But notice that I didn't say to deflate your client's otherwise reasonable expectations. If you allow your client to leave your office with unrealistic expectations about how long a case is going to take or what the probable outcome of a case is going to be, you are guaranteed to have a frustrated client during the representation and a disappointed client at the end.

**Fourth**, when unforeseen negative developments occur in a case, be prompt and candid about notifying your client. Especially when it is significant, don't hide behind letters or staff. You need to personally contact the client by telephone or schedule the client in for an office meeting. The client is entitled to an explanation of what happened and what can be done to address the problem.

**Fifth**, it is not a betrayal of the client's interests to practice law defensively. This includes documenting the substance of communications with clients, especially when those communications pertain to client decisions about the representation. You should send a confirming letter to the client documenting every client decision that is significant for the case. Sometimes it is good to get a client sign-off on

the written documentation. This is especially so with matters pertaining directly to the outcome of the matter – such as settlement authority and client acceptance of a settlement.

**Sixth**, have your fee understanding with the client documented in writing. I know, Rule of Professional Conduct 1.5(c) requires written fee agreements (signed by the client) only in contingent fee representations. But, c'mon, that doesn't mean it's a good idea to have your fee understanding with the client entirely undocumented. And when you do have a written fee agreement, avoid using words, like "retainer," that don't clearly communicate to the client what is intended. The fee letter should fulfill the broader function of being an engagement letter that clearly defines the scope of the representation and sets out other important aspects of the lawyer-client employment contract. Fee disputes are not always avoidable. But most of them can be resolved when the lawyer and client discuss the dispute in good faith. Lawyers throw fuel on the fire of the client's unhappiness with a fee by avoiding candidly discussing it with the client. And it is a whole lot easier to work things out with the client when the basics of the fee agreement have previously been reduced to writing, and both lawyer and client can refer to it as a foundation for further discussions.

In hourly representation matters, a good initial fee agreement is not enough if the lawyer isn't diligent about billing the client at regular intervals. Most clients are highly sensitive to the transaction costs of using lawyers to resolve disputes. It is the client, not the lawyer, who needs to keep tabs on escalating legal fees in order to make rational economic decisions about forging

on, bailing out, or seeking compromise.

**Seventh**, you're either in, or you're out. Sometimes clients get behind in paying fees. But much like child support and visitation, the client's obligation to pay fees and the lawyer's duty of diligence are not dependent on each other. You can't hold your reasonably necessary legal services ransom as leverage to get your client to pay up. If the client doesn't hold up his end of the fee bargain, you have a basis to terminate the representation. But if you choose to continue, you are still obligated to pursue the client's case with reasonable diligence.

**Eighth**, don't play games with the client's file. I know, I know, the common law of Indiana gives lawyers a right to assert a retaining lien against a former client's file in order to protect the lawyer's claim to unpaid fees. *See, State ex rel. Shannon v. Hendricks Circuit Court*, 183 N.E.2d 331, 333 (Ind. 1962) and a bunch of Court of Appeals cases. But just because you can, doesn't mean you should. Asserting a retaining lien is a brilliant strategy for making an angry client even angrier, perhaps to the point of filing a grievance or making a malpractice claim.

**Ninth**, be careful of what you promise your clients, but when you make a promise, keep it. Promising a specific outcome of a representation is always risky business. It should be avoided. The greatest risk of this occurs when lawyers and prospective clients initially consult on a matter. The client wants to hear a rosy prognosis. The lawyer normally wants the case and is too often ready to give the rosy prognosis the client wants to hear. The lawyer may forget about that conversation, but the client won't.

Along the way, lawyers often make commitments to their clients

to accomplish tasks or otherwise handle aspects of a case within a particular timeframe. There's nothing wrong with this – it's a good thing, especially if you follow through. My point is, once committed, you have a strong obligation to complete the task in line with your promise or, failing that, to notify the client as soon as you know that it can't be done. At that point you owe your client a truthful explanation of why you couldn't keep your word.

**Tenth**, don't aggravate matters by failing to comply with your obligations if you do receive a grievance. This includes timely responding to the grievance in writing with a response that is thorough, accurate and well documented. *See, Lundberg, "Ethics Curbstone: What Do You Do When You Receive a Grievance?"* Vol. 49, No. 2 *Res Gestae* 35 (September 2005).

Applying even the best client relations techniques, there is no guarantee that a grievance will not come your way – if not from your client, then from a disgruntled opposing party. But maintaining good client relations and being a civil advocate will take you a long way to staying off the Disciplinary Commission's radar screen. ☺

The views expressed do not necessarily represent the positions of the Indiana Supreme Court or the Disciplinary Commission.