BY: Nicholas C. Cooper

AVOIDING COMMON GRIEVANCE COMPLAINTS

Grievance complaints, "common" or otherwise, should be avoided to whatever extent possible, because even if the complaint is wholly without merit, its mere filing permits the disciplinary authority to conduct a wide-ranging inquiry into any aspect of the lawyer's practice. Indeed, that inquiry need not even be related to the subject matter of the original complaint.

Such an expended inquiry generally is permitted under the Grievance and disciplinary Committee's sua sponte powers, which can include a self-initiated investigation.[1] Furthermore, even if a complaint is withdrawn by the complainant, that withdrawal is not binding on the Appellate Divisions' disciplinary or grievance committee, which may proceed with the investigation or prosecution, the withdrawal notwithstanding.[2]

Therefore, if a potential complaint looms on the horizon, the attorney should very clearly recognize that the risk relates not only to the conduct specifically at issue, but more importantly any conduct the Committee may elect to examine. A recent Second Department disciplinary decision illustrates the point:

In *Matter of Tinubu*, the Appellate Division sustained five charges including conversion of client funds, commingling of funds and filing a false statement with the Office of Court Administration – falsely certifying that he was in compliance with record keeping requirements – and imposed a one-year suspension.[3] Ironically the matter, which initiated the Committee's inquiry was the return of a single small denomination escrow check.

The Grievance Committee discovered the respondent's bookkeeping lapses long afterwards when a check for a $70 filing fee was returned for insufficient funds because a corresponding deposit had not been made.[4]

Following are four areas, which commonly generate complaints along with suggestions of ways of avoiding such complaints.

(1) No Written Retainer Agreements.

Many disputes arise because the understanding between the client and the attorney as to the scope of his employment is not clear. Therefore, the following steps should be followed:

- Set forth in general terms in a written agreement

the work you expect to perform, and;

- Set forth your fee agreement in terms the client can hopefully understand.

(2) Lack of Communication with the Client.

Failure of communication between the attorney and the client is probably the single most common source of complaints against lawyers. Understanding that you are under an obligation to reasonably comply with the client's request for information, those complaints manifest themselves as follows:

- "My lawyer doesn't answer my phone calls."
- "I don't know what's happening with my case."

To avoid these complaints, you should:

- Return client phone calls as soon as possible,
- Keep the client reasonably apprised of the status of the case, and;
- While you are not captive to the client who calls every day, use reasonable efforts to keep him satisfied.

(3) Fee Disputes

These disputes are a constant source of grievance complaints and although pure fee disputes are not “grievances" within a disciplinary context, they may, as noted above, very often result in a broader investigation. The lawyer should do the following:

- Try to resolve fee disputes even. if you feel that the client is trying to get the services too cheaply;
- Try to avoid harsh characterizations of the client in either verbal or written communications;
- If the relationship breaks down totally, ask to be discharged by the client;
- If you must move to withdraw, avoid unreasonably harsh criticism of the client, since he may determine to present the entire matter to the disciplinary committee for review.

(4) Disputes With Other Lawyers

These types of disputes now make up a very large percentage of the complaints filed in the disciplinary system, some of which are mandated by DR 1-l02(A) of the Code, which provides that a lawyer shall report his knowledge that raises a “substantial Question as to another lawyer's honesty, trustworthiness or fitness. . ." which violates DR 1-102. However, many of these matters are an abuse of the Code since the reporting attorney may be motivated by a desire to threaten his adversary or

seek an advantage in litigation. The following guidelines should be considered:

• When a client drops you and retains a new attorney you may understandably be angry with both the client and new attorney. However, try to work out a smooth transition, including settlement of your fee claim. If things get out of hand, someone is going to file a complaint, which, under any circumstances, is not in your best interest.

Following the above advice is often very difficult since the attorney's reaction to the client is one of anger. However, you have much more to lose than the client. The filing of a complaint could complicate matters far more than they otherwise seem to be.

Examples of Conduct

The following problems with Questions and answers exemplify some of the more common ethical issues:

Example #1 Duty to Disclose to adversary and court.

You have represented a personal injury plaintiff for three years. The case resulted from a two-car accident, driver against driver, in which both plaintiff and defendant claim that the red light was against the other driver. Extensive investigation and discovery was conducted, except that the defendant's attorney elected not to conduct a deposition of the plaintiff and her testimony was not preserved. There is no independent evidence corroborating the position of either side. The case depends solely upon the credibility of your client.

Sixty days prior to trial defendant's counsel makes an offer of settlement which your client refuses to accept. Thirty days thereafter your client dies.

Question:
Must you disclose the fact of your client's death to defense counsel?
Answer:
Yes. The attorney no longer has a client upon his death and can take no further action on the deceased client's behalf except to seek appointment of an administrator/executor.

Question:
May you reopen settlement negotiations and accept the prior offer, without disclosing the plaintiff's death?
Answer:
No. The attorney would be acting in a deceptive manner; i.e., as if he had authority to negotiate and settle the case for his client, who in fact was dead. The attorney's authority to

settle the case ceased to exist upon the client's death.

Parenthetically it should be noted that in *McCormack v. County of Westchester*, the Appellate Division, Second Department, upheld sanctions of an attorney for failing to disclose to the Court the death of the party represented by the attorney, in violation of 22 NYCRR 670.2(g).[5]

Example #2: Frivolous Conduct in Civil Litigation

The law firm of A, B and C is prosecuting civil litigation against a defendant represented by Attorney D. Attorney C, who is primarily responsible for prosecuting the litigation on behalf of his law firm, is contemplating bringing on a sanctions motion against Attorney D based upon C's belief that D willfully failed to comply with a discovery order. C's proposed action is notwithstanding D's claim that his failure was unintentional and due to a personal problem. The interaction between C and D during the course of this litigation has been extremely contentious.

Attorney C discusses his proposed sanctions motion with his partners, A and B, who advised against the motion upon the grounds that it does not appear that the evidence will support C's claim of willfulness. Nevertheless, C proceeds to prepare and file his motion, which results not only in opposition by D but a cross-motion for sanctions against C on the grounds that C's motion was frivolous [22 NYCRR 130-1, CPLR 8303(a)].[6]

Attorney C was so incensed by the cross-motion that he filed a complaint based upon his claim with the disciplinary committee. Parenthetically it should be noted that Attorneys A and B, although voicing disagreement with C's motion, took no steps to prevent him from filing same.

Question:

Is Attorney C guilty of misconduct for bringing on his sanctions motion?

Answer:

Yes. Upon the facts stated, Attorney C did not have evidence sufficient to establish that Attorney D acted willfully in failing to comply with the discovery order. Therefore, C's motion was frivolous and in violation of DR 7-102(A)(1)(2) because:

"In the representation of a client, a lawyer shall not:

1. File a suit, assert a position, conduct a defense or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

2. Knowingly advance a claim or defense that is unwarranted under existing law. . .".[7]

Question:

Is Attorney C guilty of misconduct by filing a complaint with the grievance committee based upon the grounds set forth in the sanctions motion?

Answer:

Yes. It is clear from the facts stated above Attorney C's filing of a complaint with the disciplinary committee was for the sole purpose of enhancing his position in the pending litigation to the detriment of his adversary. To that extent, his conduct equally violates DR 7-102(A)(1) and (2).

Question:

Are Attorneys A and B guilty of any misconduct?

Answer:

Yes. Although it is apparent that neither Attorney A nor B actively participated in the preparation or submission of the sanctions motion by their partner, Attorney C, since they knew his proposed action was inappropriate and took no steps to prevent it; they are vicariously responsible for his misconduct.[8]

Example #3: Fee Dispute, withdrawal/discharge and attorneys' liens.

Attorney A was retained by client to represent him in the exercise of a purchase option set forth in a lease agreement and to handle the purchase of the subject property. The retainer agreement provided for three fee payments, the first due upon the signing of the retainer agreement, the second due upon the issuance of the letter exercising the purchase option, and the third upon completion of the transaction.

Although the client made the first fee payment, he failed to pay the second installment, notwithstanding that the time to exercise the purchase option had less than one week to run. Attorney A advised his client that he would not perform any further legal services in connection with the matter, including serving notice of the exercise of the option, since the client defaulted on the fee agreement. Client then retained a second attorney, B, who demanded from Attorney A all files and documents in general and the lease agreement in particular, which contained the purchase option. Attorney A refused to provide that documentation, asserting that he had the right to do so under his retaining lien.

Attorney B then advised Attorney A that since less than two days remained within which to exercise the option, A's refusal to turn over the client's documents was tantamount to conduct severely prejudicing the client, which Attorney B considered to be grounds for the filing of a grievance. This not withstanding, Attorney A steadfastly refused to turn over any documents.

Question:

Was attorney A justified in ceasing to undertake any further action on his client's behalf based solely upon the client's failure to pay the agreed-upon fees?

Answer:

No. DR 2-110(C)(f) provides in substance that a lawyer may withdraw from representation "if withdrawal can be accomplished without material adverse affect on the interests of the client, or if . . . the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees."

This section entitled "Permissive Withdrawal" must be taken within the context of DR 2-110(A)(2), which provides in part "a lawyer shall not withdraw from employment until the lawyer has taken steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel and delivering to the client all papers and property to which the client is entitled. . .".

Attorney A's blanket refusal to take any action on behalf of the client disregarded the provisions of not only DR 2-110 but also of DR 6-101(A)(3), which proscribes neglecting “a legal matter entrusted to the lawyer."

Question:

Should Attorney A have immediately moved to withdraw as client's attorney since he was aware that the brevity of time to exercise the option could result in substantial prejudice to the client.

Answer:

Yes. As noted above, the attorney, particularly under the time constraints of this matter, should have promptly obtained the client's consent for him to withdraw or, in the alternative, moved to withdraw as attorney in the matter so as to avoid prejudice to the client's matter and promptly deliver to him all of his papers.

Question:

Did Attorney A properly assert a retaining lien?

Answer:

No. Although a common law retaining lien attaches to all papers, documents, files, etc., of the client in the possession of the attorney who claims unpaid fees, the rule is not absolute. It has been held that if the client makes "a clear showing of the need for the papers, the prejudice that will result from denying him access to them and his inability to pay the legal fees or post a reasonable bond", the Court may order the files released without payment of fees or the posting of a bond (*Pomerantz v. Schandler*).[9]

Indeed, the Court of Appeals has recognized that an attorney may preserve his lien by converting the retaining lien to a contractual lien by agreement with the new attorney in exchange

for the release of the file. Further the letter agreement contemplated a contingent percentage at the conclusion of the case.[10]

Conclusion

In most instances taking a few reasonable steps will prevent a simple misunderstanding or disagreement from rising to the level of a formal complaint. Failure to take those reasonable steps may result in consequences of a most unpleasant nature.

~

Published: New York Law Journal, “Outside Counsel”, September 24, 1999
Distributed: Brooklyn Bar Association, Continuing Legal Education course, January 10, 2000

---

[1] 22 NYCRR 603.4(c), 691.4(c).
[2] 22 NYCRR 605.9.
[3] ___AD2d ___, 688 NYS2d 611 (2nd Dept., 1999).
[4] Supra at page 613.
[5] ___AD2d ___, 685 NYS2d 738 (2nd Dept., 1999).
[6] CPLR 8303-a, defines "frivolous" in part, in pursuit of litigation, as an action being taken "in bad faith without any reasonable basis in law or fact. . .".
[7] *Matter of Marlin*, 250 A.D.2d 997, 673 N.Y.S.2d 247; respondent attorney was suspended for six months based upon his commencement and pursuit of a frivolous action in the U.S. district court where sanctions had been imposed against him and his clients.
[8] *Matter of Neimark*, 13 A.D.2d, 676, 677; see also *Matter of Dahowski*, 103 A.D.2d 354, 479 N.Y.S.2d 755.
[9] 704 F.2d 681, 683 [2nd Cir. 1983].
[10] *Cheng v. Modansky*, 73 NY2d 454, 541 NYS2d 742, 745.