Avoiding and Defending Malpractice Complaints and Grievances

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Malpractice Suits and Grievances

- A malpractice suit is a personal injury suit designed to recover monetary damages.
- The grievance process is designed to determine the fitness of an attorney to practice and to protect the public and Courts.

2011-2012 Reporting Period

- 17,857 active lawyers
- 1,730 grievances (initiated 73 on its own) (11.6% increase)
- 996 dismissed
- 734 requests for response
- 254 grievances after 7/1/11 [53 in ’08-’09]
- 34 Verified Complaints (63 in previous period)
What to do if a Grievance is filed

- Contact your insurance carrier or agent
  - If you do not contact your carrier immediately, they may decline coverage on the grievance as well as subsequent malpractice suit.
  - The carrier may even provide counsel to represent you in the grievance process.
- Consult an experienced attorney!
- Do not contact your client about dismissing the grievance. Matter of Ramirez, 853 N.E.2d 121 (Ind. 2006).

Screening Clients

- This is your best chance to avoid malpractice suits and grievances.
- Conflict Check before meeting.
- Make sure you can comfortably handle the representation (both the expertise and time) and the client suits you.
- Watch out for:
  - Unrealistic expectations;
  - Too emotionally involved;
  - Nothing else to do but monitor the litigation;
  - Overly involved;
  - Has already had one attorney (this should be a red flag);
  - Prior history as a litigant.

Prospective Clients

“Duties to Prospective Clients”

- Duty to maintain the confidential nature of the communications shared by the prospective clients.
- In re Anonymous, 932 N.E.2d 671 (Ind. 2010) (violated 1.9(c)(2) by disclosing that client was getting divorced) (no exception for public information).
- Independently verify the facts – (proper parties, statute of limitations issues, etc.).
Evaluation Letter

- Send a letter informing the client you are assessing whether to accept the representation.
- Until you accept the case, in writing make it clear that no attorney-client relationship has been formed and you do not represent them.
- Ask them to waive all conflicts in return for your evaluation and make them sign it. Rule 1.18(d)(2) Safe Harbor.

Objective Evaluation

- “About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.” Hill v. Norfolk & Western Rwy. Co., 814 F.2d 1192, 1202 (7th Cir. 1987) (imposing sanctions for frivolous litigation).

Letter Declining Representation

- Language: no attorney-client relationship formed, no duties owed to protect your interests, there are certain notice requirements and statute of limitations issues – so you should retain counsel.
Competence

- An attorney must be competent in subject matter of representation to accept the case. Rule 1.1.
- Only one of three options:
  - Be competent;
  - Become competent (through research);
  - Hire competent co-counsel.
- You cannot contract a lower standard of care.

You cannot charge to learn

- **Buni v. Kleinerman**, (N.Y. Supreme Court July 1, 2013). Represented 2 clients. Collected $22,371. Additional $6,239 in unpaid fees. Fee dispute program awarded the clients $5,000. Lawyer sued clients. Judge ordered atty to return $21,621 to clients. “Rather than bill these clients, ... he should have moved to withdraw ... and not continue to build up legal fees.”

Local Counsel is Responsible

- You are responsible. See **Leveski v. ITT**, (S.D. Ind. 3/26/12) (finding local firm jointly and severally liable for $394,998.33 in attorney fees for defendant, under Rule 11, for serving as local counsel for a frivolous lawsuit). Reversed on other grounds, **Leveski v. ITT**, 719 F.3d 818 (7th Cir. 2013).
Don’t rent your license

- **Matter of Joyce**, 9 N.E.3d 142 (Ind. 2014) (agreed 6 month suspension w/o reinstatement for doing estate planning referred by United Financial).
- **Matter of Dilk**, 2 N.E.3d 1263 (Ind. 2014) (6 month suspension w/o reinstatement for doing work referred by Foreclosure Solutions) (court rejected 6 months with reinstatement).

Engagement Letters

- You must draft a careful and proper engagement letter. Very important tool for defending malpractice complaints and grievances.
- Written fee agreements are increasingly recommended for all cases.

Clarify Client and Conflicts

- Who is your client? Make that clear!
- Rule 1.18.
- Personal interests? Positional conflicts?
- Draft Conflict Waivers and recommend independent counsel to review the conflict waiver.
Who is your client?

- Ky. Bar Ass’n v. Hines, (Ky. June 20, 2013). Suspending attorney 120 days for violating duty to corporate client by representing dissident shareholders against wishes of majority of board and turning over client information to successor. “The simple fact is that [the lawyer] was hired by the corporation, which acts through its board and officers.”

Conflict Screening

- Matter of Godshalk, 987 N.E.2d 1095 (Ind. May 23, 2013). Represented RM, who was accused of battering JB. Moved to exclude JB testimony for failure to appear for dep. Legal assistant accepted rep’n of JB for probation issue. RPC 1.1 (failing to perform conflict check), 1.7(a) (concurrent conflict), 5.3(b) (failing to supervise non-lawyer employee), 5.5(a) (UPL by employee). [Even though JB lied about being the witness.]

Scope of Engagement

- Carefully describe the scope of your services to limit your responsibility. RPC 1.1, 1.2. Flatow v. Ingalls, 932 N.E.2d 726 (Ind. Ct. App. 2010), trans. denied.
- What matter does the engagement cover?
- Scope of services in the matter?
- What are you not doing?
- (Ex: Corporate formation only. Separate engagement for further legal work.)
Diligence and Adequate Communication

- Most common disciplinary complaints
  - Rule 1.3 regarding diligence and promptness
  - 1.4(a) keeping client adequately informed
  - 1.4(b) explaining matter sufficiently to client
- Make sure you have the time to handle the case.
- Use your calendar.
- Keep copies of all communications (includes notes of voicemails from and phone conferences with clients).
- Establish guidelines for communication.
- Keep client reasonably informed – provide objective analysis of case (including weaknesses and worst case recoveries).

Determine Client’s Wishes

- In re termination of the Parent-Child Relationship of I.B. v. Indiana Dept. of Child Services, 933 N.E.2d 1264 (Ind. 2010) (“It is improper for a parent’s trial lawyer, after the lawyer has exercised due diligence to determine the parent’s wishes with respect to an appeal, to pursue an appeal without the parent’s authorization.”)

Document Client’s Decisions

- Rule 1.2 allocates the authority between client and lawyer.
- You must provide the information necessary for the client to make informed decisions.
- Then document the Client’s decision – in a follow-up writing.
Advice on Billing and Fees

- You cannot stop rendering services until you receive payment.
- Rule 1.4(a), duty to keep client reasonably informed, likely includes estimating costs versus likely recovery. (Ability to collect?)

Must Explain Fees

- In re Lauter, 933 N.E.2d 1258 (Ind. 2010). Lauter agreed to $750 fee to take case through EEOC process. EEOC found no probable cause. Suit filed anyway, and client paid additional $4,250. Recovered $75,000. So, client grieved Lauter. Public reprimand for not disclosing "what the additional retainer would be or how it would be determined." Id. at 1262.

Timesheets

- Always keep track of your time, regardless of the fee arrangement.
- They are a valuable tool for defending malpractice complaints and grievances.
- They are admissible as business records.
- Think “defensively” when writing your narrative.
- Explain: who, what, why.
- “Clients lie, and clients die.” Olmstead.
Fee Agreements

Clauses you should consider include:

- The client shall pay reasonable costs and expenses regardless of recovery in suit.
- Representation will not begin until the attorney receives payment in full of the advance fee.
- The client consents to the attorney’s withdrawal in the event the client does not promptly pay the attorney’s bill. Fidelity Nat’l, 310 F.3d 537 (7th Cir. 2002) (permitting attorney to withdraw).
- Attorney shall have a lien on the proceeds and the file until paid in full.

Don’t sue your client for fees

- Some insurers estimate that 90% of fee claims result in a counterclaim for legal malpractice.
- Oftentimes, your insurer will ask whether you sue for fees (because it makes you a higher risk).
- There is little point in suing a client who cannot pay.

Don’t sue

- Matter of Beacham, 934 N.E.2d 735 (Ind. 2010). In 2003, agreed to nonrefundable retainer of $5,000, plus the greater of $200/hr. or 25%. Work “provided no value,” and was “of poor quality and rambling.” Final bill of $233,484. Client settled her case for $20,000. Beacham sued for fees (in Indiana), defaulted client, forcing her into bankruptcy.
Letter Terminating Representation

- Never assume the attorney-client relationship has been terminated. Write a letter.
- Letter should establish the date of termination.
- Letter should be short but designed to cover you in case of subsequent lawsuit or grievance.
- Letter should inform client of potential lien against client’s file and proceeds of the litigation as security for your fees and expenses.
- Helps defend issues regarding continuous representation.

Trust Accounts

- An increasing point of emphasis is the proper maintenance of trust accounts.
- Separate ledger for each client.
- Each client must have balance above $1.

Trust Accounts

- Matter of Goldberg, 2011 WL 3793677 (Aug. 24, 2011) (failed to keep adequate records, failed to hold funds in trust, used some funds to pay filing fees for other client) (90 days, 30 served with 60 stayed subject to 2 years of probation).
- Matter of Smith (2006) (60 days because he didn’t use attorney trust account or IOLTA account for awhile and then mismanaged the accounts he opened).
What to Do When You Mess Up

- Notify your insurance carrier/agent.
- Prepare a letter explaining the mistake made and what can be done about it.
- Owning up to your mistake immediately can mitigate your damages.

Top 10 List

1. Lawyer role trumps business role
2. Develop referral / co-counsel networks
3. Use engagement letters
4. Use termination of engagement and declination of engagement letters
5. Clearly define methods of communication and expectations with client (return calls within 24 hours)

Top 10 List (cont’d)

6. Use timesheets
7. Use a trust account and be diligent
8. Hire a bookkeeper or accountant
9. Get your fees up front when possible, and do not sue your client for fees
10. When you mess up (we all do), consult with experienced counsel