

Client Complaints
and
Dealing with Bar Complaints

Louisville Bar Association
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INTRODUCTION

Certain Rules of Professional Conduct, (“RPC”), reflect more serious misconduct than other Rules. For example, a violation of RPC 1.4, regarding communications with a client, although a serious issue, is less serious than conduct involving fraud and misrepresentation violative of RPC 8.3. The purpose of listing selected Rules set out in this handout is to briefly address certain Rules which come before the Kentucky Bar Association in disciplinary proceedings more often than other Rules. Certainly, all of the Rules of Professional Conduct are important, and an alleged violation may subject the attorney to disciplinary inquiry. The Rules which appear with more frequency than others are as follows:

- RPC 1.1 Attorney to provide competent representation.
- RPC 1.3 Attorney to act with reasonable diligence and promptness.
- RPC 1.4 Attorney to keep client reasonably informed about status of case and explain matters to client to permit informed decisions.
- RPC 1.5 Attorney’s fee to be reasonable, and fee splitting.
- RPC 1.7 Conflict of interests between existing clients, former clients,
and 1.9 a third person or the attorney’s own interests.
- RPC 8.3 Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Issues such as competence, conflicts of interest, maintaining clients, terminating employment, and attorney’s fees, all reflect the same over-arching ethical obligation of an attorney. That obligation is greater than his or her obligation to a particular client. Moreover, the ethical obligations of an attorney exist before, during and after representation

of a particular client.

RPC 1.1: Competent Representation

Rule 1.1 reads, in full:

"A lawyer shall provide competent representation to a client. Competent representation means a legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Comment 2 specifically addresses the situation of a new attorney. That Comment reads, in part:

"A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all problems."

The language of RPC 1.1 is very broad and expansive, and the Rule uses very subjective language. However, it would be a very rare circumstance where an attorney was charged with violating RPC 1.1 without having alleged to have violated any other Rule.

Lack of competence as an ethics violation rarely stands alone in a disciplinary proceeding. If there is a lack of competence in an attorney's practice, other ethics violations will also arise, such as:

Client neglect

Lack of candor to client and court

Failure to communicate with client

Misrepresentation to client

_____The reported decisions reflect the reality that a violation of RPC 1.1 is usually reflective of allegations of more serious violations. To a certain degree, violations or

potential violations of RPC 1.1, 1.3 and 1.4 are like the canary in the mine shaft. The violations of these lesser Rules is typically evidence that without control or some corrective action being taken, more serious violations may occur.

An example of cases in which violations of RPC 1.1 were part of many other allegations against the attorney is as follows:

Kentucky Bar Association v. Shelburn, Ky., 931 S.W.2d 153(1996). Attorney resigned under terms of disbarment. Attorney acknowledged she had failed to provide competent representation, failed to consult with clients, failed to act with reasonable diligence, improperly provided financial assistance to clients in pending litigation, failed to keep her own funds separate from her client's funds, had misappropriate client funds, and engaged in fraud and misrepresentation. The latter allegations of mishandling of client funds, misuse of client funds, and dishonesty, are serious allegations, and for those violations to occur, typically the other Rules 1.1, etc., have also been allegedly violated.

Kentucky Bar Association v. Newcomer, Ky., 960 S.W.2d 464 (1998). Attorney received one year suspension for alleged misconduct including failing to file Appeal documents, failing to respond to Show Cause Orders, failing to file Briefs in two Appeals and failing to respond to the Inquiry Commission's Complaint. This last allegation, which would be a violation of RPC 8.1, is interesting. Failing to respond to the Inquiry Tribunal's Complaint, and letting the disciplinary case go by way of default is independent confirmation to the KBA of the accuracy of the allegation that the attorney committed the underlying misconduct, in this case, failing to file Appeal documents including a Brief.

Kentucky Bar Association v. Bodell, Ky., 838 S.W.2d 395 (1992). Attorney

disbarred as a result of numerous ethics violations, including, providing incompetent representation to the client. In addition, the attorney was found to have failed to file income tax returns on behalf of the client, having falsely testified under oath, failed to communicate with client and keep client informed of case status.

Kentucky Bar Association v. Darnall, Ky., 771 S.W.2d 44 (1989). Attorney suspended for 59 days for handling a legal matter which attorney should have known he was not competent to handle and allowing another person to improperly influence the attorney's professional judgment.

Kentucky Bar Association v. Clem, Ky., 554 S.W.2d 360 (1977). Attorney suspended for two years as a result of misconduct arising out of divorce case. Attorney falsely told client that appeal would be taken, falsely told client that appeal had been taken, and generally neglected client's case. The Court, in imposing the sanction, noted that the public has a right to expect an attorney to maintain a "high degree of competency."

RPC 1.3: Reasonable Diligence and Promptness

This Rule is one sentence long:

“A lawyer shall act with reasonable diligence and promptness in representing a client.”

Notwithstanding the brevity of the Rule's language, an alleged violation of this Rule is frequently found in disciplinary cases. Client neglect is a fairly common aspect of many disciplinary cases. Moreover, an allegation of neglect typically is accompanied by an alleged violation of RPC 1.1, regarding competent representation, or, perhaps more frequently, an alleged violation of RPC 1.4, requiring the attorney to keep the client reasonably informed

of the case status.

Moreover, as with RPC 1.1 and RPC 1.4, an alleged violation of RPC 1.3 usually accompanies more serious allegations, or, at the very least, reflects the concern that more serious allegations may be present.

In a broader sense, an alleged violation of RPC 1.1, 1.3 and/or 1.4, may be deemed by a disciplinary authority as the “smoke” in the phrase “where there is smoke there is fire.” Although an unfair assumption, the assumption nevertheless is out there to be considered in the event allegations are made of client neglect.

As seen by the cases discussed in RPC 1.1, allegations of lack of diligence and neglect frequently accompany other allegations of a similar or greater nature.

RPC 1.4: Communication with Client

Rule 1.4 reads, in full:

"(a) A lawyer should keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

"(b) A lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

NOTE: The Model Rules of Professional Conduct provides slightly different language in paragraph (a) of Rule 1.4. The Model Rule provides that "a lawyer shall keep a client reasonably informed" Kentucky's version reads “should” rather than “shall.”

Effective September 1, 1993, the Kentucky Bar Association adopted a Code of Professional Courtesy. Sections 2 and 8 of the Code address the issue of communication. Section 2 of the Code of Professional Courtesy reads:

"2. A lawyer should promptly return telephone calls and correspondence from other lawyers."

Further, Section 8 of that Code reads:

"8. A lawyer should strive to maintain a courteous tone in correspondence, pleadings and other written communications."

The Louisville Bar Association has also adopted, effective January of 1989, a Creed of Professionalism. Sections 2 and 8 of that Creed are substantially similar to the corresponding provisions of the Kentucky Bar Association's Code of Professional Courtesy on the issue of communication.

Neither the KBA's Code of Professional Courtesy, nor the LBA's Creed of Professionalism, are part of the disciplinary rules, and a violation of either the Code or the Creed would not, but that very fact, subject an attorney to any disciplinary sanction.

An attorney has an affirmative obligation to keep the client informed of the status of the case. The attorney's obligation to promptly comply with a client's reasonable request for information is a separate obligation. Therefore, even though a client does not expressly request to be informed about the status of a case, the attorney has an affirmative duty to keep the client so informed.

As with other ethics rules, a failure to communicate is frequently associated with other ethics violations, such as misrepresentation. For example, the attorney may fail to keep the client reasonably informed of the status of the case or may fail to reply to the client's requests for information. At some later point in time, that attorney confers with the client and misstates and misrepresents the status of the case or gives erroneous information in

response to that request for information. Such conduct will additionally expose the attorney to a violation of Rule 8.3 for dishonesty and misrepresentation.

_____ Reported decisions reflect the frequency with which a violation of RPC 1.4 arises in a disciplinary proceeding, and also that the allegation is usually coupled with other more serious allegations of ethical misconduct.

Gains v. Kentucky Bar Association, Ky., 994 S.W.2d 514 (1999). Attorney received six months suspension for failure to return telephone calls from client, failure to keep client advised of the status of the proceedings, and for representation of clients while suspended from the practice of law for non-payment of Bar dues.

Allen v. Kentucky Bar Association, Ky., 985 S.W.2d 347 (1999). Attorney received a one year suspension for conduct including failure to act with reasonable diligence in representing a client, failing to return telephone calls from the client, practicing law during suspension for non-payment of Bar dues, and failing to respond to a Bar Complaint. (As a side note, an attorney who ignores a Bar Complaint has potentially done one of the dumbest things a person can do in the disciplinary process. There are reasons why an attorney will not timely respond to a Bar Complaint, many of which provide appropriate evidence of mitigating circumstances. However, as a general rule, there is no good excuse for failing to respond to Bar Complaint. An attorney ignores the KBA at his or her peril.)

Kentucky Bar Association v. Kennedy, Ky., 856 S.W.2d 891 (1993). Attorney suspended for nine months for neglect of legal matters and failure to communicate with clients.

Kentucky Bar Association v. Bodell, Ky., 838 S.W.2d 395 (1992). Attorney failed

to have regular communications with client and failed to keep client informed of case status. As a result of this and other ethics violation, attorney disbarred.

Kentucky Bar Association v. Cowden, Ky., 727 S.W.2d 403 (1987). Attorney failed to keep client informed about true status of case. In light of two prior disciplinary sanctions, and failure to appear for depositions and misrepresenting letter as having come from a witness, warranted five year suspension. As can be seen in Cowden, the failure to keep a client informed about the status of the case is usually the first indication of other misconduct or is a precursor to other misconduct such as misrepresentation.

Kentucky Bar Association v. Albert, Ky., 668 S.W.2d 62 (1984). Attorney received public reprimand as a result of neglect of a lawsuit which was dismissed due to lack of prosecution. Additionally, the attorney failed to truthfully and accurately inform the client of the case status.

RPC 1.5: Attorney's Fee

This Rule addresses several different topics on the issue of attorney's fees:

- (a) Factors regarding the reasonableness of an attorney's fee.
- (b) Preference that fee arrangements be in writing.
- (c) Contingent fee agreements must be in writing.
- (d) No contingent fee agreements in domestic relations matters or in criminal matters.
- (e) Division of attorneys fees between lawyers who are not in the same firm.

Rule 1.5 reads, in full:

- (a) A lawyer's fee shall be reasonable. Some factors to be considered in

determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) The fee customarily charged in the locality for similar legal services;
 - (4) The amount involved and the results obtained;
 - (5) The time limitations imposed by the client or by the circumstances;
 - (6) The nature and length of the professional relationship with the client;
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) Whether the fee is fixed or contingent.
- (b) When the lawyer has not regularly represented the client, the basis or rate of the fee should be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
- (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Such a fee must meet the requirements of Rule 1.5(a). A contingent fee agreement shall be in writing and should state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon recovery of any amount in a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and showing the remittance to the client and the method of its determination.

- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, maintenance, support, or property settlement, provided this does not apply to liquidated sums in arrearage; or
 - (2) A contingent fee for representing a defendant in a criminal case.

- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
 - (1) (a) The division is in proportion to the services performed by each lawyer or,
 - (b) By written agreement with the client, each lawyer assumes joint responsibility for the representation; and
 - (2) The client is advised of and does not object to the participation of all the lawyers involved; and
 - (3) The total fee is reasonable.

A fee dispute is not necessarily an ethics violation. The KBA has a Legal Fee Arbitration procedure set forth in SCR 3.810, which is not part of the disciplinary process.

Generally, a pure fee dispute will not show up on the KBA's "radar." However, if other issues are raised regarding the scope of representation, services rendered, etc., it may be that under certain circumstances, the attorney's fee charged may also become an area of disciplinary inquiry.

RPC 1.7 and RPC 1.9: Conflicts of Interest

Rule of Professional Conduct 1.7 reads, in full:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) Each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) The lawyer reasonably believes the representation will not be adversely affected; and
 - (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

And, RPC 1.9, reads, in full:

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Rule of Professional Conduct 1.7 generally addresses the issue of an alleged conflict of interest between current clients, a current client and a third person, or a current client and the lawyer's own interest. Rule of Professional Conduct 1.9 addresses the issue of an alleged conflict of interest between a present and former client.

Conflict of interest issues occasionally arise in a non-disciplinary context during the

course of litigation. Allegations of a conflict of interest may arise in the context of litigation when one party seeks to disqualify the counsel for the other party. Such Motions are typically disfavored and run the risk of being viewed as an attempt by one party to manipulate the Court process by excluding chosen counsel of record for the opposing party.

A conflict of interest may be the subject of a disciplinary proceeding, as reflected in reported decisions.

Kentucky Bar Association v. Banks, Ky., 847 S.W.2d 58 (1993). Disciplinary proceeding primarily concerned several adoption cases. One of the allegations raised in the proceeding was the conflict of interest given the attorney's representation of both parties in a private adoption case.

Kentucky Bar Association v. Roberts, Ky., 579 S.W.2d 107 (1979). Attorney was suspended for ninety days for representing a client in a lawsuit against another client while representing the latter client in a separate but related action. The potential conflict of interest was sufficient regardless of whether there was an actual conflict.

Kentucky Bar Association v. Hibberd, Ky., 753 S.W.2d 547 (1988). Attorney received one year suspension for various conduct, including failure to fully disclose to his clients of a conflict of interest because of the attorney's personal and monetary interest in the outcome of the divorce case.

RPC 8.3:

This is somewhat of a catch-all Rule. The portions of this Rule which typically may be found in a Charge is RPC 8.3(b), which provides that it is professional misconduct for an attorney to commit a criminal act which reflects adversely on the lawyer's honesty,

trustworthiness or fitness as a lawyer, or RPC 8.3(c), which provides that it is professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Regarding RPC 8.3(b), if an attorney is convicted of a felony, the attorney's license is automatically suspended pursuant to SCR 3.166. However, the temporary suspension under SCR 3.166 is not the underlying disciplinary proceeding, and the attorney would otherwise be charged with having violated RPC 8.3(b).

Similarly, if an attorney is convicted of a Class A Misdemeanor, and it appears from the record that the attorney has "so acted as to put in grave issue whether he/she has the moral fitness to continue to practice law," the attorney may be subject to temporary suspension pursuant to SCR 3.165.

Allegations that an attorney has violated Rule 8.3(c), regarding fraud and misrepresentation, may be found in a Charge in which there has also been, for example, an alleged violation of RPC 3.3(a), which states that an attorney shall not knowingly make a false statement of material fact or law to a tribunal. An allegation that the attorney has violated RPC 8.3(c) would typically be viewed as an indication that the misrepresentation or fraud was of a more serious nature.

A review of reported decisions reflects that an allegation of a violation of RPC 8.3(b) or RPC 8.3(c) is typically accompanied by alleged violations by other Rules, such as RPC 1.1 regarding competence or RPC 1.4 regarding client communication.

Kentucky Bar Association v. Taylor, Ky., 997 S.W.2d 464 (1999). Attorney disbarred for multiple ethics violations, including lack of diligence in representing four

clients, dishonesty and fraud in leaving one client to believe an Appeal has been filed and leaving another client to believe that a case had been filed, failing to keep each client informed about the status of the case and failing to respond to a demand for information from a disciplinary authority, a violation of RPC 8.1.

Kentucky Bar Association v. Watson, Ky., 935 S.W.2d 610 (1996). Attorney disbarred who alleged engaged in misconduct by failing to prosecute tort claims, and failing to keep the clients reasonable informed about the status of the case.

RESPONDING TO A BAR COMPLAINT

Responding to a Bar Complaint or a Charge is different than answering a Complaint in a civil suit. In responding to a Bar Complaint or in filing an Answer to a Charge, certain common elements and approached should be used:

1. Response or Answer should be factually detailed and not merely a pleading in a civil suit admitting and denying in short order.
2. Response and Answer should not contain merely a general denial.
3. Response and Answer should not hold back any supposed critical fact or element to “spring on” the KBA at a hearing.
4. Do not rely on independent memory. Independent recollection of events is worthless. Review all pleadings, letters, etc., before addressing the allegations in detail.
5. Do not attack the KBA, the Office of Bar Counsel, etc., in the Response or Answer.
6. Do not represent yourself, or at least, have some other attorney look over your Response or Answer.

Do not go by default in a disciplinary case. Your failure to respond to a Bar Complaint or a Charge will not viewed by the KBA as your good faith admission of the

violation alleged in the Bar Complaint or the Charge. Your default will be viewed as neglect, reflecting your lack of appreciation of the seriousness of the Bar proceedings, and would be a very counter-productive attitude to take. Moreover, under certain circumstances, ignoring the KBA could expose the attorney to a violation of RPC 8.1. That Rule states that an attorney, within the context of a disciplinary proceeding, shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority.

Very few Bar Complaints are converted to a Charge. In many instances, the allegations may be properly and completely addressed by the Respondent attorney without the benefit of separate counsel. However, there is always a gamble and risk associated in that approach. If the Respondent attorney files a Response which the attorney believes to be appropriate, and says something or does not say something which either should or should not be said, undoing the damage at a later step in the disciplinary process may be a difficult, if not impossible, task.

At the Complaint stage, the Respondent attorney should at least have some other attorney look over the Response before it is filed. If formal disciplinary proceedings are instituted by the return of a Charge, under no circumstances should the attorney proceed pro se.