

## ETHICS De-mystifying The ODC

### I. Where and How it All Begins:

For years, the statistical reports from the Office of Disciplinary Counsel have remained relatively steady with anywhere from 3000 to 3200 complaints received in writing on an annual basis. Complaints received in our office are the things that launch the screening process. Where the complaint alleges misconduct against someone who is not a Louisiana licensed attorney (or an out of state attorney here pro hac vice), the ODC has no jurisdiction. Examples of those over whom we have no jurisdiction but against whom we routinely receive complaints are full time sitting judges, clerks of court, bailiff's, the Governor, the President, and an occasional electrician.

Additionally, we receive complaints which allege facts which, even if true, would not be a violation of the Rules of Professional Conduct. "The jury verdict was too low." "My lawyer let the other side take a deposition of me." "My lawyer wouldn't lend me money during my case." are all examples of the types of complaints which even if true, are not rule violations.

Finally, there are certain areas where the ODC has traditionally determined that we will not intervene such as when inmates file complaints which essentially allege ineffective assistance of counsel. Where that is the sole allegation, and where the convicted client still has appellate or post conviction options available, we have generally declined to allow the disciplinary arena to be used as a substitute for relief in the criminal justice system.

Collectively, these matters make up between 1000 and 1200 complaints annually that are **not opened for investigation**. We write back to each and every complaining party to let them know why the matter is not appropriate for disciplinary action. Supreme Court rules do not provide for appellate review of ODC screening decisions.

Of the remaining complaints received annually, nearly 400 are referred to the Louisiana State Bar Association practice assistance program and/or the diversion program. Typically, complaints that are clearly fee

disputes, raise 'return of file' issues, or where minor unintentional misconduct occurred are good candidates for this type of referral. Also, complaints that allege the lawyer's 'lack of professionalism' including calling someone names, using profanity, or similar actions are likewise sent to the LSBA as a 'relational referral'; and an opportunity is provided to the lawyer to use the practice assistance counsel to mediate an apology or similar 'relational' effort.

The remaining annual complaints totaling between 1500-1600 are opened for investigation. What are these complaints and who is doing the complaining?

## II. Complaints and Those Who Complain

By far the largest source of complaints is **clients**. Opponents in legal proceedings are also a rich source of discontent and complaints. Increasingly, judges and lawyers are filing disciplinary complaints bringing to the attention of the ODC conduct and actions of a lawyer so that the Disciplinary Counsel can 'take such action as may be appropriate'. Because Supreme Court Rule 19 requires ODC to investigate 'information coming to his attention', investigations are also opened when there is no complaining party—such as when misconduct appears on the face of pleadings, or in newspaper articles. While the following is not intended to represent an exhaustive listing, much of what follows reflects the regular and routine complaints dealt with by ODC.

Both in Louisiana and across the country, the single most frequent complaint voiced by clients about their lawyer is a *failure to communicate*. While failing to return phone calls surely falls within this category, the scope of the duty to communicate with ones client is much broader than that limited irritant. The rules require that lawyers provide information so as to allow clients to participate in a meaningful fashion in the legal matter, make decisions, and understand their legal rights. Where lawyers fail in that obligation, clients are left feeling as though they are 'in the dark' unable to understand not only the choices available to them, but also the implications of the course of action taken on their behalf. (See Rules 1.2(a) and 1.4)

Typically, the angry client is not only upset about not hearing from their lawyer or having their phone calls returned, but also that their legal

matter has been neglected and that the lawyer has not been using appropriate levels of diligence in moving their matter forward to conclusion. Indeed, one might cynically suggest that perhaps in many instances the lawyer is not returning the client's phone calls because he/she has nothing to report, having taken no meaningful actions on the client's behalf. This is particularly galling to the client when the lawyer has made extravagant promises to entice the client to hire them, but which they can rarely deliver given the demands of their practice and the law applicable to their client's case. The rules do impose a duty on lawyers to act with *reasonable diligence and promptness* in the representation of a client. (See Rule 1.4)

In a very broad sense, allegations of dishonesty and misrepresentations make up the next most frequent category of complaints. In some instances, they are tied to anger over a lack of communication or a lack of diligence as when the lawyer tells staff to advise the client that he is not there only to be seen by the client as he ducks out the back door; or where the lawyer claims that a pleading has been filed, but the client discovers that the lawyer lied following a quick trip to the clerk of court's office. More sinister are the allegations that the lawyer has settled a case without the client's knowledge; stolen funds belonging to the client; or knowingly presented false testimony or evidence. Almost without exception, these complaints are worthy of full investigation and are routinely opened. A lawyer, as an officer of the court, has a duty to be honest, truthful and candid in his dealings with his client, the court and opponents. Engaging in conduct involving *dishonest, fraud, deceit or misrepresentation* is inconsistent with the trust we place in those who hold the privilege of practicing law. (See Rule 8.4(c))

In varying percentages which shift from time to time, other complaints from clients include prohibited *conflicts of interest* (see Rules 1.7 thru 1.9 generally); charging or collecting clearly *excessive fees* (see Rule 1.5); and accepting representation when the lawyer is *incompetent* in a particular area (see Rule 1.1).

When the complaining party is an opposing party in a legal matter, the nature of the allegations typically change. Those include suggestions that the lawyer has brought a *non meritorious claim* (see Rule 3.1); is intentionally *delaying the progress of litigation* (see Rule 3.2); or *obstructing access to discoverable information* (see Rule 3.4). In the

context of criminal cases, the accused often alleges that the prosecutor has *failed to disclose information that negates guilt* (see Rule 3.8(d)) or is engaging in a *vindictive prosecution without probable cause* (see Rule 3.8(a)).

Both the Rules of Professional Conduct applicable to lawyers (see Rule 8.3(a)) and the Code of Judicial Conduct applicable to judges (see Canon 3(b)(3)) impose obligations to report attorney misconduct to the Office of Disciplinary Counsel. Increasingly, both lawyers and judges are embracing that obligation (whatever the motivation) such that the ODC has seen a growing tendency towards those groups becoming the source of information about attorney misconduct. Where the lawyer reporting misconduct represents the opponent in the legal matter, the ODC is mindful that the motivation might well be to seek an advantage in the civil or criminal proceedings. Supreme Court Rule 19 allows the ODC to seek a stay of its investigatory efforts where there are material similarities in pending civil or criminal proceedings (see Rule 19, section 18(g)). Often, however, the complainant lawyer is successor counsel who, having interviewed the client and reviewed the file, finds evidence of rule violations that must be reported.

Where the complaining party is a judge, the ODC has observed that the nature of the complaints are that the lawyer has not engaged in *candor to the tribunal* (see Rule 3.3); has been derelict in his duty to appear timely or take actions as directed by the judge which *prejudices the administration of justice* (see Rule 8.4(d)); or has exhibited signs or symptoms which call in to question the lawyer's *fitness in other respects* (see Rule 8.3(a)). In the latter category are lawyers beset with alcoholism, drug addiction or physical and/or emotional disorders.

### III. Tips On Avoiding Complaints:

In the August/September 2007 issue of the **Louisiana Bar Journal**, Shannan L. Hicks wrote a wonderful article on law practice management entitled "10 Ways 'Solo' Made Me A Lawyer". In it, she noted 10 observations that proved effective in making her practice more successful and enjoyable. While ODC cannot lay claim to any surefire methods of avoiding complaints (some clients or others will complain no matter what!), the following ideas have proven effective in reducing the chances that a complaint will be filed.

1. **Take the time to set reasonable client expectations.** For the busy lawyer, time management is key. Make sure the new client knows that you are expected to address the concerns of your other clients and that their case is not the *only* case in your inventory. Explain your policy of communicating regularly (and live up to your promises!) and sharing relevant correspondence or pleadings. **DO NOT** promise a particular result such as acquittal in a criminal defense matter, or a dollar amount of recovery in a personal injury case.
2. **Explain to the client that you practice in a professional fashion and that ‘T.V. lawyers’ do not reflect reality.** Whether justified or not, the legal profession is beset with entertainment programming which paints a wholly unrealistic picture of the legal system and the conduct of lawyers who operate within it. If you do not practice a ‘Rambo’ style of litigation (and I certainly hope you don’t), make sure the client knows that you embrace the Code of Professionalism where courtesy and accommodation are often as important as the evidence you present.
3. **Accept representation only in areas of your competence.** Rarely will a client hire a lawyer if they know that the lawyer has never handled a case like theirs, is unfamiliar with an applicable area of the law, and that the lawyer will be ‘learning’ on their nickel. In today’s ever changing maze of laws, regulations, and jurisprudence, venturing into completely unknown territory far removed from the lawyer’s comfort zone of past experience is fraught with peril. If the client agrees, consider associating experienced or knowledgeable co-counsel which will serve the client’s needs and allow you to expand your knowledge base and gain experience. Otherwise, refer the client to someone knowledgeable and experienced who can more properly help them.
4. **Get your fee agreement in writing.** By far, the most common element contained in complaints filed with ODC is the allegation regarding disputes over fees—and it is an area that the Disciplinary Counsel’s office most hates to be involved. My single largest regret with the Ethics 2000 overhaul of the Rules of Professional Conduct in Louisiana is that we failed to require that all fee agreements be placed in writing. While the rules require only contingency fee contracts to be in writing, all

fee arrangements should be as well. The most compelling reason is that it *protects the lawyer from misunderstandings and vindictive/disappointed clients* who later file complaints.

5. **Avoid business relationships with your clients.** It is true that Rule 1.8(a) permits lawyers to enter into business transactions with clients so long as the potential conflict has been explained and a waiver is obtained in writing (along with a host of other requirements), doing so practically *invites* a disciplinary complaint when the inevitable dispute occurs.
6. **No one should sign your trust account checks or balance your bank statements but you.** Irregularities in the handling of client funds are the largest, historic reasons that lawyers are disbarred. While the busy practitioner often relies upon support staff members such as secretaries, paralegals and assistants, the one area the lawyer should never delegate is the proper handling and review of the trust account. DO NOT allow a non-lawyer in your office to sign trust account checks. It is your law license on the line. Do not allow the same person who writes the checks (in either the operating or trust account) to balance the bank statement when it arrives at the end of the month. If you are mathematically ‘impaired’, get someone else within (or outside) the office to do it. A dishonest or financially strapped employee who both writes your checks and balances your bank statements is almost never caught—until it is too late.
7. **Be clear who the ‘client’ is.** Routinely, the ODC receives complaints from those who pay the attorney fees for an incarcerated inmate or someone going thru a domestic case alleging that the lawyer won’t talk to them. Such persons be them parents, friends or relatives have been left to believe that if they pay the fee, they have a say in the representation and that your ethical duty includes them. Unless confidentially has been waived by the client (and that’s a dangerous thing), the lawyer’s duty is to the client and not to those who pay the bill. Similarly, in succession matters, a lawyer doesn’t represent “the succession” and the Supreme Court has so held. Where an administrator or executor has been appointed, that is your client; not the several heirs. Where you represent a particular heir, make clear to others that unless they hire you as well (and there is no conflict), your ethical duty is to only your client.

8. **Return the client's file upon request.** All too often today, the client 'jumps ship' and changes lawyers while a legal matter or dispute is pending. Supreme Court jurisprudence makes clear that the client has an 'unfettered' right to discharge their lawyer with or without cause. The frustrated and angry lawyer who has been discharged is often owed fees and costs from the now departing client who failed to appreciate all that has been done on their behalf. Rule 1.16(d) is unequivocal—the client gets the *entire file* and it cannot be held 'hostage' until the client pays the fee or costs of the discharged lawyer. If the lawyer chooses to copy the file so that they can protect themselves in the future from malpractice claims, disciplinary complaints, or to collect fees and costs (and you should), the initial cost of copying is the lawyer's expense to bear, not the client's. Take a deep breath, give them the file, and if you think it is worth it (that is, if you don't mind the disciplinary complaint that is sure to follow), file the necessary intervention or suit to collect what is owed you including the cost of copying the file for the departing client.
9. **Have a "healthy respect" for your opposing counsel.** This admonition is intended to have multiple meanings. Respect between colleagues at the bar is warranted in our profession and we should accord one another the courtesy we ask for in return. Honor reasonable scheduling requests, extensions of time or continuances since it won't be long before you will be in the position of asking for the same treatment. However, in today's legal environment practicing 'defensive lawyering' is necessary. *Confirm conversations and agreements in writing.* We can all bemoan the by-gone era where the practice of law was conducted on a handshake, where another lawyer's 'word was their bond'. We are, however, in a different era. Accept it.
10. **Never, never, never lie or mislead a judge.** It is said that elephants have an amazing memory. Judges make elephants appear to have dementia—they have long, long memories; and they have the power of contempt! Judges are fond of lawyers who do their jobs, who are properly prepared, and who are respectful of the often difficult jobs they are called upon to perform in the courtroom. Judges rely upon lawyers to make the system of justice function in as efficient a fashion as possible. In short, judges *trust you*. Don't blow it. If you lie to

or mislead a judge on facts or the law, your potential short term victory will pale in comparison to the long term consequences.

#### IV. How To Survive A Disciplinary Investigation:

If you practice law long enough, there is an extraordinary chance that you will become the subject of a disciplinary complaint. Knowing how the investigative process works and what is expected of you is therefore important.

At the outset, let's agree that a disciplinary complaint is just that—a complaint. It is not proof of guilt but rather just a set of allegations. If it has been opened as a disciplinary investigation it means only that screening counsel with ODC concluded that if the facts alleged are true, a violation of the Rules of Professional Conduct *may* have occurred. The facts and surrounding circumstances will ultimately govern the final determination of whether or not a rule violation *in fact* occurred, and whether discipline is appropriate. The first step is to avoid panic. Emotions are often high when a lawyer first receives a complaint and include anger, anguish, fear, or combinations of all of these. Take a deep breath and do what lawyers do best—analyze the problem.

The threshold question is whether the lawyer should attempt to address the complaint alone or with the benefit of counsel. If the dispute is simple and can be easily explained, the lawyer may not feel the need to hire a lawyer to represent their interests. On the other hand, where the matter is more complex (either because of the facts, the surrounding circumstances or the law), hiring counsel should be the first thought. When in doubt, hire a lawyer. Today, there are many attorneys whose practice includes the representation of lawyers facing disciplinary complaints. Their fees vary significantly as do their approaches to disciplinary representations. Find a lawyer who understands the disciplinary process, whose personality comports well with your own, and in whom you have confidence either by reputation or experience. *We strongly advise that you avoid hiring your partner, best friend or suite mate within your office complex.* You are looking for someone who will give you independent, unbiased advice on how best to address the complaint and with whom you feel comfortable. (Note: Most

malpractice insurance policies have an additional, supplemental coverage which will pay the attorney fees incurred to defend against a disciplinary complaint. Check your own policy for specifics and limits on coverage.)

Whether answering the complaint yourself or thru counsel, make sure that you respond to the complaint within the time allowed. While the standard procedure of the ODC is to allow for 15 days within which to respond to a complaint, one 15 day extension is routinely granted. If you need it, ask for it. *Do NOT ignore the complaint or fail to respond.* It will NOT go away. We are all ethically obligated by Rule 8.1(c) to cooperate with a disciplinary investigation by ODC. Where lawyers fail to respond or cooperate, the ODC will issue a subpoena requiring that you attend a sworn statement where not only will the substance of the complaint be examined, but so too will a failure to cooperate. *A lack of cooperation sets a poor tone for the remaining investigation and gives rise to concern that the complaint may have merit.*

Answering the complaint provides the lawyer with the opportunity to provide a full, accurate picture of the historical events and facts which gave rise to the complaint. It may be as detailed or as limited as you choose. The ODC will be looking for specific responses to the allegations set forth in the original complaint. Accordingly, while you may provide a much longer and wider ranging account, make sure that you address the specific concerns or allegations set forth by the client in the complaint. Where appropriate and helpful, attach documents to support your presentation of the facts. Provide the names and telephone numbers of those witnesses who are in a position to support your presentation (or better yet, include letters or affidavits from those witnesses). The ODC strongly recommends avoiding responses which are caustic, vulgar, or which unnecessarily impugns the character or reputation of the complainant. While presenting facts that assist the ODC in assessing the credibility of the complainant may be helpful, gratuitous insults seldom are.

Be mindful of the fact that once the response to the complaint has been received, in almost every instance a copy will be shared with the complaining party to see if their concerns have been adequately addressed. In turn, the complainant will be asked to provide comments or information in reply to the lawyer's response. In a large number of cases, these initial exchanges of information clear up the

misunderstanding between the parties and the complaint is often dismissed. Nearly 80% of those matters investigated by ODC are dismissed as reflecting no misconduct. Thoughtful, complete responses to the complaint are the best tool for achieving an early favorable adjudication.

On the other hand, there are things that lawyers may do which will practically insure that disciplinary action will be considered by ODC. A failure to respond or cooperate is one of these. Additionally, submission of false evidence; intimidation of witnesses; attempting to 'buy the complainant off'; or 'settling' a dispute with the condition that the complaint be withdrawn are all independent violations of the rules. (For a disturbing illustration of how NOT to react to a complaint, see *In Re: Ray Charles Harris*, 2003-0212 (la. /09/2003) 847 So.2d 1185, where simple neglect and ineffective assistance of counsel in a criminal case resulted in the respondent's permanent disbarment when he threatened civil litigation against the complainant if the complaint was not withdrawn, fabricated documentary evidence, and committed perjury during the disciplinary proceedings.)

Another healthy reminder is that the Supreme Court rules protect complaining parties and witnesses in the disciplinary process from retaliation in the form of civil suits. (See Supreme Court Rule 19, section 12) This is true even where the allegations made against the lawyer are proven to be false. Accordingly, while it is understandable that the lawyer may want to exact a measure of retribution against someone who has filed a disciplinary complaint, or who has provided adverse testimony, retaliatory civil suits are prohibited and constitute an independent violation of the rules (Rule 8.4(d)) for which discipline is required.

Should the ODC determine that no violation has occurred and that the complaint should be dismissed, you will be notified in writing as will the complaining party. That may not, however, end the matter. Rule 19 allows the complaining party to 'appeal' Disciplinary Counsel's dismissal decision to an independent hearing committee whose review is governed by the test of whether or not Disciplinary Counsel has abused his/her discretion in making the dismissal decision. Additionally, the complainant in Louisiana enjoys appeal rights thereafter to the Disciplinary Board and the Supreme Court. If at any stage in the

appellate review process a 'remand' is ordered, the investigation will be reopened by ODC.

If the complaint has merit (that is, where a rule violation has occurred), quality respondent counsel will always recommend an acceptance of responsibility, full cooperation and a conference with ODC to determine those things that can be appropriately done to demonstrate remorse and to remedy the harm occasioned by the rule violation. Where the violation was inadvertent or thru negligence, there was no harm or the harm was minimal, and there is no likelihood of recurrence, the opportunity for diversion or an admonition (private discipline) may exist.