



## LIMITING EXPOSURE TO COMPLAINTS AND DISCIPLINE

BY KENNETH L. JORGENSEN

*“Many ethics complaints are attributable to unrealistic client expectations about the results that can be achieved or the amount of legal fees.”*

**A**lthough lawyers universally fear being the subject of an ethics complaint, the odds of being complained against are extremely remote for most lawyers. Last year the Director’s Office received 1,165 complaints despite there being over 24,000 licensed Minnesota lawyers. This one-in-20 chance is further reduced by the fact that more than a handful of lawyers received multiple complaints, and at least one received as many as a dozen.

Despite lawyers’ limited exposure, the Office of Lawyers Professional Responsibility routinely receives requests for CLE or other educational presentations about how to avoid ethics complaints and what to do when an ethics complaint is filed. Because adversaries as well as clients can file complaints, not every ethics complaint can be avoided. At the same time, some issues are clearly foreseeable. Much of what follows is derived from 20 years of reviewing ethics complaints and lawyer responses to those complaints.

### BEFORE A COMPLAINT IS FILED

#### ■ Unrealistic Client Expectations.

Many ethics complaints are attributable to unrealistic client expectations about the results that can be achieved or the amount of legal fees. Impractical estimates about fees often become the baseline for dissatisfied clients and constitute their subjective justification for filing ethics complaints. Similarly, idealistic lawyer predictions about probable outcomes increase the potential for disgruntled clients regardless of the quality of the legal services.

Only through frank and candid discussions about fees, results, and the probability of obtaining such results can lawyers avoid complete responsibility for this problem. Many clients view legal problems from a cost-benefit perspective only after the work is completed and the final bill is due. Competent and professional advice requires that lawyers advise clients whether the remedy sought is worth the time or cost involved.

■ **Fee Agreements.** Although discipline for fee-related issues is limited, the number of fee-related complaints is disproportionately high. More importantly, fee-related

complaints tend to include other allegations that may lead to discipline. Lawyers who wish to limit their disciplinary exposure should rarely, if ever, represent clients without a written agreement. Many types of post-termination disputes are readily foreseeable. Provisions that address recurring issues such as the refundability of the retainer<sup>1</sup> or responsibility for photocopy expenses for client files<sup>2</sup> can provide guidance and insulation from discipline.

Lawyers who employ “one-size fits all” agreements may find themselves victims of their own extraneous and irrelevant provisions in fee-related complaints. Separate agreements should be developed for representations in different areas of the law. Fee agreements should also be periodically updated to accommodate changes in the law.

■ **Bill Regularly.** A hallmark of good lawyering is regular billing practices. Although less frequently than in the past, complaints continue to arise about lawyers who fail to send a single bill until the representation is either concluded or the lawyer has been terminated. In areas such as family law or litigation, the failure to bill regularly is a recipe for disaster and begs ethics complaints.

Regular billing statements can also pay dividends beyond simply getting paid. Properly detailed invoices can apprise

clients of the status of their cases, thereby partially fulfilling the obligation to communicate with clients. In addition, clients who are cognizant of their fees and costs may tend to be more rational or reasonable in considering settlement proposals and legal advice to settle.

■ **Be Honest With Clients.** The most diligent lawyers do not meet every deadline and the best lawyers still make errors and lose cases. Lawyers who lack candor in communicating with clients about errors, omissions, or bad results run the risk of converting a small or inconsequential problem into one of major import. Lawyers have transformed minor or insignificant violations into suspension and other forms of public discipline by being less than honest with their clients.<sup>3</sup> Misrepresenting or concealing bad news from clients can also have civil liability consequences, including disgorgement of fees,<sup>4</sup> punitive damages, treble damages<sup>5</sup> and tolling of the malpractice statute of limitations.<sup>6</sup>

### AFTER A COMPLAINT IS FILED

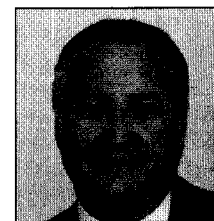
#### ■ Discuss the Complaint With Another Lawyer.

Not all ethics complaints require the retention of counsel. Nevertheless, before responding, lawyers should consult a partner, colleague or friend to ensure objectivity. Ethics complaints from dissatisfied clients or angry adversaries are often emotional and accusatory. A disinterested perspective is invaluable in ascertaining the salient issues and analyzing the lawyer’s exposure to discipline.

■ **Use the Rules to Frame Responses to Complaints.** Responses to ethics complaints are analyzed in the context of the

**KENNETH L. JORGENSEN is director of the Office of Lawyers Professional Responsibility. He has served the**

**cause of lawyers’ self-regulation in Minnesota for over 20 years.**



Rules of Professional Conduct. Using the Rules to structure your response to an ethics complaint facilitates a more prompt resolution of the complaint, avoids unnecessary coverage of irrelevant issues, and can assist the lawyer in understanding why the complaint was selected for investigation.

■ **Respond Within the Required Deadlines.** All notices of ethics investigations establish a deadline for response. Extensions may be obtained from the investigator where necessary. Untimely responses or failure to respond increase the likelihood that the complaint will receive greater scrutiny during the investigation. Serious delinquencies in cooperating can serve as an independent basis for discipline even if the underlying complaint fails to establish a violation.<sup>7</sup>

■ **Responding to Client Dissatisfaction.** Occasionally, an ethics complaint is the lawyer's first notice that a client is dissatisfied. Nothing prohibits lawyers from taking action to satisfy a client or otherwise respond to client concerns outside the ethics investigation process. However, in doing so, lawyers should not condition responsive or corrective action on the client's withdrawal of an ethics complaint. Once complaints are referred for investigation, they cannot be withdrawn by the client. On the other hand, the fact that a client's dissatisfaction has been ameliorated by the lawyer's remedial measures should be communicated to the investigator so it can be considered in determining whether discipline is warranted. Civil settlements of disputes with unrepresented clients, that release the lawyer from liability, require that the client be advised in writing that independent representation is appropriate. See Rule 1.8(h), Minnesota Rules of Professional Conduct.

■ **The Best Defense is not a Good Offense.** Caution and restraint should be

**“Caution and restraint should be exercised in taking affirmative action against those who file complaints.”**

exercised in taking affirmative action against those who file complaints. The procedural rules of the ethics complaint process confer immunity to complainants for all statements made during ethics investigations.<sup>8</sup> Retaliatory suits or threats of suit for communications made in connection with an ethics complaint are without legal basis and will likely expose the lawyer to discipline. Similarly, lawyers may not retaliate by billing clients for the time spent responding their ethics complaints.<sup>9</sup>

■ **Respond Professionally.** As agonizing as they can be, even the most vituperative complaints do not justify “in kind” responses from the lawyer. Ethics complaints are not license to disclose every unflattering client fact possessed by the lawyer. The ability to disclose confidential client information is limited to that which is necessary to defend the lawyer against the ethics charge(s). See Rule 1.6(b)(5). Moreover, unnecessarily caustic responses increase the chance for appeal<sup>10</sup> after a complaint is dismissed and thereby prolong the complaint scrutiny process.

While not every ethics complaint is avoidable, lawyers can limit their exposure by instituting firm policies and using retainer agreements that focus on foreseeable problems. Lawyers who are required to respond to ethics complaints should approach the task like any other legal problem by analyzing the facts in light of the applicable law, consulting others where necessary, and responding in a professional manner. □

**NOTES**

1. See e.g. *Opinion No. 15 of the Lawyers Professional Responsibility Board.*
2. See *Opinion No. 13 of the Lawyers Professional Responsibility Board.*
3. See e.g. *In re Thomas*, 542 N.W.2d 378 (Minn. 1996) *where a lawyer who failed to obtain his client's consent to conflict of interest and then photocopied the client's signature onto a consent form after an ethics complaint was filed. Although the conflict of interest would likely have resulted in at most some form of private discipline, the lawyer was suspended for six months when it was determined he had fabricated the consent document.*
4. *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982).
5. *Minn. Stat.* 481.071.
6. *Appletree Square I, Ltd. Partnership v. Investmark, Inc.*, 494 N.W.2d 889 (Minn. App. 1993).
7. See e.g. *Rule 25, Rules on Lawyers Professional Responsibility, Rule 8.1, Minnesota Rules of Professional Conduct, and In re Cartwright*, 282 N.W.2d 548 (Minn. 1979).
8. *Rule 21, Rules on Lawyers Professional Responsibility.*
9. *In re Panel No. 94-17*, 546 N.W.2d 744 (Minn. 1996).
10. *Rule 8 (e), Rules on Lawyers Professional Responsibility.*

**PROVEN SUCCESS**  
In Major Litigation

**6 \$ INJURY AND WRONGFUL DEATH JURY VERDICTS FOR CLIENTS OVER \$1,000,000**

If you need help in maximizing your client's recoveries in complex litigation, Mark N. Stageberg can help with consultations, second opinions, associations, or direct referrals. Now representing only injury and wrongful death clients in the areas of Product Liability, Motor Vehicle Accidents, Malpractice, Dram Shop, Aviation, and Farm Accidents.



- Recognized in Best Lawyers in America
- Certified Civil Trial Specialist
- 32 years experience
- Many insurance company contacts
- Metro and outstate practice
- Referral fees paid

**MARK N STAGEBERG**

5101 Thimsen Avenue, Minnetonka, MN 55345 • (952)470-5242 • (800)340-5242 • Email: STAGEBERGLAW@cs.com