

The Hardest Perennials

By

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In the October 1971 issue of *Bench & Bar of Minnesota*, Richey Reavill, the first director of the Office of Lawyers Professional Responsibility, wrote in this column, "As of July 31, the new procedures have been in effect for six months. During that period, almost 45 percent of the complaints which crossed our desk involved neglect of clients' business and the failure to keep the client and others entitled thereto advised as to the status quo. Neglect and failure to communicate seem to go hand in hand, probably because the only response the neglectful lawyer can make to an inquiry is that he has done nothing." In his October 1972 article entitled "Communicate!" Mr. Reavill wrote, "Now that the Court has made it clear that it will not permit lawyers to neglect their clients' legal affairs, I hopefully assume that we will receive no more valid complaints of this type of professional misconduct." Such optimism! Perhaps he was just being ironic.

In November 1985, William Wernz, in his first column as director, after also quoting another of Mr. Reavill's exhortations, described neglect and noncommunication as a "hardy perennial." He added that "[f]ormer directors Richey Reavill, Paul Sharood, Walt Bachman and Mike Hoover all lamented the number of complaints of attorney neglect and noncommunication with clients. In 1984, as in 1971, 40-45 percent of all complaints alleged such failures."

The Office of Lawyers Professional Responsibility has been in existence for 36 years now, and while some things have changed immensely, others clearly have not. By a wide margin, neglect and noncommunication remain the most common source of client unhappiness and thus of client complaints. A few months ago, in the March 2007 *Bench & Bar* "Summary of Admonitions," I wrote that, "As in most years, the majority of admonitions last year involved a lack of diligence and/or communication by the attorney." Surely, neglect and noncommunication must be considered the hardest perennials after so many years without change.

LEARNING FROM HISTORY

After all these years, why is this so? Aren't we supposed to learn from the lessons of history? By now shouldn't we recognize procrastination, lack of diligence, neglect (whatever we call it), when we see it? Do we know it only when we see it in others, while failing to recognize it in ourselves?

The applicable Rules of Professional Conduct don't seem especially difficult to understand. Rule 1.3 (Diligence) says that "A lawyer shall act with reasonable diligence and promptness in representing a client." Equally short, Rule 3.2 (Expediting Litigation) adds that "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

On the other hand, a "one size fits all" application of the rules concerning neglect of a client matter, or lack of diligence, at least as to setting some definitive time limit that applies to all situations, is not always possible. Taking no action on a personal injury matter for over six years, such that the applicable statute of limitations has expired, certainly constitutes neglect. But so might failing to file an emergency request for a temporary restraining order within even one or two days of accepting the representation, if that was the action and the time frame agreed to by the lawyer. Missing deadlines? Being a few days late in answering discovery requests may indicate some lack of diligence, but it would be unlikely to result in either a motion to compel or sanctions in today's litigation. Failing to file an appellate brief such that the client's matter is dismissed, however, may bring a motion for an award of fees and discipline. Missing a scheduled court appearance without notice is conduct that can generate a complaint. If an innocent office-scheduling miscue (not really an excuse, and possibly indicative of a different office-procedures problem) truly caused the failure to appear, however, the attorney may be given a second chance by the judge and the disciplinary system.

Noncommunication can be just as tricky to pin down, depending on the circumstances. Not returning one or two phone calls, while a poor business practice, is often forgiven by the client if an apology is proffered. Routinely failing to return phone calls or not replying to correspondence from clients or opposing counsel eventually will lead to disciplinary problems.

How does the lawyer know when and as to what communication is required? Rule 1.4, Minnesota Rules of Professional Conduct, requires communication with a client whenever informed consent is required, and states that the lawyer shall reasonably consult with the client about the means to accomplish the client's objectives, keep the client reasonably informed about the status of their legal matter and promptly comply with reasonable requests for information. Further, consultation with the client if there are ethical limitations on the lawyer's conduct is required, as is an obligation to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

MINIMIZING THE RISK

Since there isn't a clear line of demarcation announcing when an attorney's conduct goes from "that can happen" to "that simply shouldn't happen," the easiest and best solution is not to put yourself so close to the line that you need to be worried about it. Proper office management skills are attainable even for a busy solo practitioner. An office calendar and "tickler system" for court appearances, meetings and the like are essential. An assistant who may handle some routine inquiries or return some phone calls on the attorney's behalf is certainly permissible and can help eliminate much client frustration (that said,

systematically making it impossible for clients to get beyond support staff or ever talk directly with the lawyer may violate the lawyer's duty to communicate). These topics are of sufficient importance that law office management courses are now considered for Continuing Legal Education credit.[Ftn 1](#)

As noted, admonitions issued for neglect and/or noncommunication remain common. The annual summary of admonitions published in this column rarely provides details of these admonitions, however. This past year, attorneys were admonished for taking almost one year to complete a QDRO in a marital dissolution matter, taking over two years to complete a generally uncomplicated estate matter, and putting research on an issue concerning the sale of a client's motor home "on the back burner" (the attorney's words) for many months. Attorneys who failed to communicate with their clients for several months at a time, usually despite several calls or letters from the client requesting (eventually begging) for a response, also received admonitions. Admonitions are generally appropriate when the matter is the lawyer's first valid complaint and the ultimate financial harm to the client was minimal. Frustration is a given.

Believe it or not, the attorneys in our office would rather see and get to know you through a helpful advisory opinion discussion or at a Continuing Legal Education presentation. They'd rather not have to deal with you in the context of a disciplinary investigation. So, one last exhortation: "Don't procrastinate and do communicate!" Do those two things and odds are we'll never meet because of a complaint.

NOTES

¹ In 2004, law office management was added as a special category of credit, along with professional responsibility and elimination of bias. While not mandatory like the other two subjects, up to six credits of law office management may be counted in each three-year reporting cycle. Rule 6C., Rules of the Minnesota State Board of Continuing Legal Education.