

Tips From Bar Counsel

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Some statistics (FY2019)

- 40,393 attorneys licensed to practice in Maryland
- 1,657 complaints received
- 278 complaints docketed for investigation
- 26 disbarments
- 20 suspensions
- 30 reprimands
- 9 conditional diversion agreements

Most Common Rule Violations

Rule 1.1 (competence): An attorney shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 (diligence): An attorney shall act with reasonable diligence and promptness in representing a client.

Most Common Rule Violations

Rule 1.4 (communication): An attorney shall

- Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required;
- Keep the client reasonably informed about the status of the matter;
- Promptly comply with reasonable requests for information;
- Explain a matter to the extent reasonably necessary to permit the client to make informed decisions.

Tips Relating to Competence, Diligence and Communication

- Screen difficult clients;
- Screen cases that are beyond your practice area or get competent co-counsel;
- Make lists, keep calendars, keep up with filing, keep track of your time;
- When, and how, to respond to clients;
- Set expectations early and be consistent;
- Tips for dealing with the demanding client.

Second Most Common Rule Violations

Rule 1.5 (fees): An attorney shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

Rule 1.15 (safekeeping property): An attorney shall hold property of clients or third persons that is in an attorney's possession in connection with a representation separate from the attorney's own property.

Tips for Setting and Collecting Fees

- Communication
- Retainer Agreements
- Communication
- Regular billing practices
- Communication
- Replenishment of retainer amounts when appropriate
- Communication

Flat Fees

- What are the benefits? Risks?
- Are they deposited in your trust account or operating account?
- When is the fee earned?
- What's the difference between a flat fee and an engagement fee?

Flat Fees Belong in Your Trust Account Unless...

- **Rule 1.15 (a)**: An attorney shall hold property of clients or third persons that is in an attorney's possession in connection with a representation separate from the attorney's own property.
- **Rule 1.15 (c)**: Unless the client gives informed consent, confirmed in writing, to a different agreement, an attorney shall deposit legal fees and expenses that have been paid in advance into a trust account and withdraw only when the fees are earned or expense incurred.

Flat Fees and Informed Consent

- **Informed consent** denotes the agreement by a person to a proposed course of conduct after the attorney has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Rule 1.0(f)
- **What are the material risks?**
- **What are the available alternatives?**

When are Flat Fees Earned?

- Upon receipt (nonrefundable)?
- When milestones are reached?
- When date has past?
- When hours are spent?
- When the case is concluded?

How and When Can a Fee be Split?

- A division of a fee between attorneys who are not in the same firm may be made only if:
 - The division is in proportion to the services performed by each attorney or each attorney assumes joint responsibility for the representation; and
 - The client agrees to the joint representation and the agreement is confirmed in writing; and
 - The total fee is reasonable.

What to do when there is a fee dispute

- Get advice;
- Communicate with the client (or their attorney);
- Attend fee arbitration or mediation;
- When and how to file suit: Interpleader actions and collection cases.

Safekeeping/Recordkeeping

- Rule 1.15 addresses safekeeping requirements
- Maryland Rules 19-407 through 19-410 cover record-keeping:
 - Creation and maintenance of records;
 - Monthly reconciliations;
 - Commingling prohibited;
 - Cash withdrawals prohibited;

Best Practices for Your Trust Account

- Do not authorize a non-attorney to make disbursements
- Do not use a signature stamp
- Do not sign blank checks
- Use different colored checks for your IOLTA and operating accounts
- Daily/weekly/monthly review of account and related records

Other Common Violations: The Cover-up

- Rule 8.4(c): States that it is professional misconduct for an attorney to . . . Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
- Rule 8.1 (b): Provides that an attorney, in connection with a disciplinary matter, shall not knowingly make a false statement of material fact.

The Cover-up

- Misrepresentations to the client
- Failure to respond to the client
- Misrepresentations to the Court
- Misrepresentations to Bar Counsel
- Falsification of evidence/documents

Private Conduct and Rule 8.4

- Rule 8.4 provides that it is misconduct for an attorney to:
 - (b) commit a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as an attorney in other respects;
 - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
 - (d) engage in conduct that is prejudicial to the administration of justice

Private Conduct and Rule 8.4

- Examples of private conduct that constitutes a violation of the Rules of Professional Conduct:
 - Certain (most?) types of criminal conduct
 - Tax issues: failure to file, failure to pay, failure to withhold
 - Failure to pay child support
 - Drug use
 - Road rage
 - Misrepresentations on your resume
 - Misrepresentations on campaign materials

Responding to Bar Counsel

- If you receive a letter from Bar Counsel, check your malpractice insurance under the “Supplemental Payment” provision
- Representation provided with NO deductible up to a limit

Responding to Bar Counsel

- Wait at least 1 day before doing anything
- Request an extension if needed
- Review all relevant documents, do not rely on your memory
- Write a draft response and have it fully vetted by another attorney who is not involved
- Proofread. Then proofread. Finally, proofread again.
- Respond timely and completely with copies of any relevant documents
- Do not attack the complainant or Bar Counsel or blame others

Other consideration:

- Professionalism and civility
- Issues relating to the youngest/newest members of our bar
- Issues relating to the oldest members of our bar
- Mental health and substance abuse issues

Questions?

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