Wayne County CAP Program

Law Practice Management & Attorney Grievance Issues

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Hypo #1: New retained client comes into your office, meets with you, you set a fee and the client says ok and gives you a check or cash. What do you do? Do you have the client sign a written fee agreement? Is there an ethics problem if you don't have a written fee agreement? What do you do with the check or cash? Where do you record your receipt of the fee?

Hypo #2: What two areas of practice receive the greatest percentage of grievances year in and year out?

AGC 2017 Annual Report
- criminal law 37%
- family law 13%

Out of 1,944 grievances submitted, only 167 approved for formal disciplinary proceedings = 8.6%

Common aspects of negligent misconduct –

- failure provide competent representation
- failure to prepare adequately
- failure to keep your client reasonably informed as to the status of their matter and/or other failure to communicate adequately with your client
- failure to pursue the client's lawful objectives
- neglect of a matter

Links between good office management and avoiding grievances –

- good record-keeping system, including keeping copies of motions, briefs, letters, emails, discovery material, etc.

- keeping the file well-organized so that material can easily be pulled if needed

- keeping a time record or activity log so you can identify with specificity what you did when in relation to a file in the event of a (1) discovery dispute with the other side or (2) complaint by your client, either private complaint or R/I that you didn't do something

- maintaining not just a calendar but a duplicate calendar

- maintaining a tickle system so that you build in advance notice of upcoming deadlines

- having policies in place to ensure compliance with the rules by subordinate employees and practices to enforce those polices so that subordinate employees, in fact, comply with the rules

MRPC 5.1, 5.3

Office management resources –

State Bar of Michigan

Practice Management Resource Center

SBM website generally michbar.org

helpline 800.341.9715 or pmrchelpline@michbar.org

Tips & Tools seminar May & November each year

ICLE

how-to kits, buying guides, seminar materials
1-2 tech seminars/yr, annual ethics seminar

Hypo #3: After you complete your representation of a client, the client trashes you on social media. You're annoyed, especially since you did a very good job and got the client a fine result. What can you do or say in response? Is the client's criticism a waiver of the privilege?

Hypo #4: After you unsuccessfully represent a client at trial, the client's appellate lawyer asserts that you provided constitutionally ineffective assistance. The trial judge has granted the Defendant a Ginther hearing, and the prosecutor on the file wants (1) to interview you and (2) a copy of your entire client file. What do you do? Does the assertion of a claim of ineffective assistance of counsel constitute a waiver of the privilege and/or of confidentiality?

A. No. The mere allegation of ineffective assistance does not constitute a waiver of either the attorney-client privilege or attorney-client confidentiality.

B. Yes. The mere allegation of ineffective assistance constitutes a waiver of both privilege and confidentiality.

C. Yes. The allegation accuses you of professional misconduct, and you have a right to disclose to the government anything you learned in the course of the representation that will help you defend yourself against that charge.

D. No, unless your former client gives informed consent and any disclosure is judicially supervised.

Rule 1.6(c)(5); ABA Formal Ethics Opinion 10-456 (2010)

Hypo #5: After you conclude a representation, the client's sibling files a grievance against you. Since the sibling wasn't the client, the filing of a grievance doesn't waive the privilege – if the client had filed, there would have been an automatic, irrevocable waiver per MCR 9.113(C) – and you need to disclose confidential information in order to defend yourself. What do you do?

> MRPC 1.6(c)(5) – a lawyer "may reveal . . . confidences or secrets necessary . . . defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct"

Responding to a grievance –

- If you are grieved, you must answer, and you must answer timely.
- "fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct"
- 21 days unless extension; AGC very accommodating about extensions
- answer must be signed by the respondent
- failure timely to answer = misconduct
- misrepresentation in answer = misconduct
- duty to cooperate in investigation as it goes on
- no standing requirement for filing a grievance
- no statute of limitations re filing a grievance

Obligation to self-report misconduct in two circumstances –

- A lawyer is required to self-report misconduct to the Commission *and* to the Attorney Discipline Board in two circumstances – when the lawyer has been convicted of a crime, MCR 9.120(B)(1), and when the lawyer has been the subject of an order of discipline in another jurisdiction. MCR 9.120(B)(2).

- A required self-report must be made within fourteen (14) days of the conviction or entry of the order of discipline.

- As to criminal convictions, the reporting obligation also applies to the prosecutor and defense attorney on the case. MCR 9.120(B)(1).

- A guilty or *nolo contendere* plea taken under advisement or otherwise not entered as a judgment of the court is ***not*** a conviction for purposes of MCR 9.120 and, therefore, does not trigger an obligation to self-report.

How best to help yourself in responding to a grievance; how to avoid digging yourself into a hole –

- In general, the answer should be fact oriented and as factually detailed as possible.

- Conclusory statements are generally unhelpful.

- Use a business-like tone; avoid expressions of anger, frustration, snark, righteous indignation. The risk of a grievance is a part of life in the practice of law, and even justifiable emotions are best vented elsewhere. If expressed in the response to a grievance, they may well be counter-productive.

- It is also important to provide appropriate context for statements made in the answer while remaining focused on the allegations made and the responses to those specific allegations.

- Wherever reasonably possible, factual statements made in the response should be supported with references to attached documents, which might be pleadings, transcripts, letters, emails or other correspondence, bank records or other relevant documents.

- While it should go without saying, lawyers should be very careful as to the accuracy of all statements made in a response. Not only will the entire response lose credibility if the response includes a factual error, but, as noted above, misrepresentation in a response is itself misconduct. MCR 9.113(A).

- Except as to grievances presenting legal issues that require explanation of a specialized area of law, in most cases the applicable legal or ethical standard will be sufficiently self-evident and/or known to Commission staff counsel that arguing the relevant law is unnecessary. As to a grievance that complains about conduct in an area of practice that is likely to be unfamiliar to Commission staff, the response should succinctly set out the applicable law as relevant to both the allegations of misconduct and the factual statements made in the response.

- It is generally also helpful to include a brief introductory section about who the respondent is, the nature of the respondent's practice and relevant experiences as a lawyer as part of providing relevant context for the response.

• With respect to whether or not to hire a lawyer to represent you as to a response, many grievances obviously lack merit, as borne out by the high percentage of grievances dismissed by the Commission. If a grievance is clearly frivolous, it is likely unnecessary to retain counsel to represent you in preparing and presenting your response in the matter. Even where a lawyer represents herself or himself in responding, however, it is generally helpful to have someone neutral review their draft answer for both content and tone before finalizing and submitting it. That said, some lawyers are simply not good writers or are prone to over-explaining or rambling. Such lawyers are well-advised to retain counsel even as to a relatively straight-forward or obviously groundless grievance to ensure that the response is presented as clearly and effectively as possible.

• Also, note that many malpractice policies include coverage for discipline defense at the investigative stage. If you are insured, check your policy language to determine whether your policy covers discipline defense and, if so, the scope of the coverage and the reporting obligation to the carrier.

What happens after you submit your response –

• One Commission staff attorney is assigned to review all responses when they are submitted in order to determine whether the grievance should be closed at that point or assigned to another staff attorney for further investigation. While some grievances are closed at this stage – in which case you will receive a closing letter not long after submitting your response – if there is any additional information that appears to be relevant to the Commission's consideration of the grievance the file will be assigned to another staff attorney for that investigation.

• When a file is assigned to a staff attorney for investigation, the investigation often takes many months before being concluded. Staff counsel often request production of additional documents from and/or pose follow-up questions to the respondent. Document production requests and questions to the respondent are often communicated in a letter asking for additional information, but the Commission also has the authority to require any witness, including the respondent, to provide a statement under oath, subject to assertion of an applicable constitutional privilege. MCR 9.112(D). Particularly as to factually complex grievances, it is not unusual for staff counsel to require one or more witnesses and/or the respondent to appear for a sworn statement. This is not necessarily a negative sign; it's just an indication that staff counsel is doing their job conscientiously.

• It is also important to keep in mind that, if the grievance was generated by a complaint from an identified complainant – *e.g.*, John Doe as to Attorney X – the complainant will be provided with a copy of your answer and offered an opportunity to comment. You will not see the complainant's comments during the investigative phase.

• In the case of a respondent who is represented by counsel, respondent's counsel will generally stay in periodic contact with staff counsel in order to facilitate responses to requests for additional information as well as maintaining an open line of communication.

• When staff counsel completes her or his investigation, the file is submitted to the Commission for consideration at a monthly meeting, often with a recommendation from staff counsel. The Commission then decides whether to –

    • close the file,

- close the file with a cautionary letter,

- offer to close the file with an admonishment, which is *not* discipline, MCR 9.114(B),

- offer the respondent an opportunity to enter into contractual probation, MCR 9.114(C), which is offered in many cases involving substance abuse or mental health problems, often in conjunction with a monitoring agreement with the State Bar's Lawyers and Judges Assistance Program, or

- direct the Grievance Administrator to file a formal complaint. In the less than 10% of files as to which a formal complaint is filed, further proceedings occur before a three-lawyer hearing panel appointed by the Attorney Discipline Board. See generally MCR 9.115. Many formal complaints are resolved through negotiation and presentation of a stipulation for consent discipline to the hearing panel. Files that do not resolve by negotiation proceed to hearing, where the procedure is, in general, comparable to that in a non-jury civil action, MCR 9.115(A), with the important caveat that discovery is very limited. MCR 9.115(F)(4).

Hypo #6: In the course of preparing for trial in an upcoming case, you would like to determine whether you can learn anything useful by examining the various opposing witnesses' Facebook pages. May you ethically do so?

A. Sure. From the perspective of legal ethics, viewing the public portion of a person's Facebook page is no different from observing what a person does in their front yard so long as you are observing from someplace where you have a right to be. It is not only ethically permissible but may well be part of what is reasonably expected of you in terms of preparation in this age of social media.

B. No. Facebook communications are private between the account holder and the rest of the world except for lawyers.

New York State Bar Association, *Social Media Ethics Guidelines* (2015), Guidelines 4A– C, pp 15-15; MRPC 4.2

Hypo #7: May you ethically view the public portions of a prospective juror's social media in order to learn more about the individual's qualifications and/or potential biases?

A. Yes. You may access publicly available information, whether internet-based or not, so long as you don't make direct or indirect contact with the prospective juror.

B. No. You are not permitted to pry into the private life of a prospective juror and must rely on the information provided during *voir dire* in making your decisions as to peremptory and cause challenges.

New York State Bar Association, *Social Media Ethics Guidelines* (2015), Guideline 4A; p 25

Hypo #8: May you ethically attempt to "friend" a prospective juror on Facebook in order to gain information that will help you exercise challenges on a more informed basis?

A. Yes. It's your obligation to gather as much information as possible in order to make the most informed possible choices as to juror challenges.

B. No. It is impermissible to have direct or indirect contact with a prospective juror, and any attempt to do so could have serious negative consequences for you.

New York State Bar Association, *Social Media Ethics Guidelines* (2015), Guideline 6B, pp 26-28

Hypo #9: May you establish a social media under a fictitious name in order to view a witness' or prospective or sitting juror's social media information?

A. Yes. In the case of the juror, so long as you don't make contact with the individual, it doesn't matter what name you use to gather information on them.

B. No. Engaging in deceit to gain access to information from or about a witness or juror is ethically prohibited.

New York State Bar Association, *Social Media Ethics Guidelines* (2015), Guideline 6C, p 28; MRPC 4.1 and 8.4(b)

Hypo #10: May you ethically Facebook "friend" a judge before whom you practice on a regular basis?

A. Yes. A judge has associational rights just as you do.

B. Yes, so long as you don't communicate with the judge while you have a case pending before the judge.

C. Yes, so long as you don't communicate with the judge *ex parte* about any case you have pending before her or him.

D. No. While a lawyer is bound by the rules of professional conduct, which do not include an "appearance of impropriety" standard, a judicial officer is bound by a broader code that prohibits conduct creating even an appearance of impropriety.

MCJC, Canon 2(A)

Hypo #11: You have been Facebook "friends" with a judge before whom you did not expect to appear, but you have now been retained to represent a party in a case before this judge. What, if anything, should you do?

A. Nothing. There was nothing wrong with being Facebook "friends" with the judge before you appeared before the judge, and there is, therefore, no reason to take action now.

B. Nothing, but make sure to avoid communicating with the judge via Facebook while your case is pending before the judge.

C. Promptly "unfriend" the judge, at least while the case is pending, in order to avoid even the appearance of impropriety.

MCJC, Canon 2(A)