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## Come On, This is Easy: Avoiding Discipline

Getting out of trouble is good; avoiding trouble is better. It's also easier.

By **Marc Garfinkle** | March 12, 2020



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There are some odd notions in the world of attorney discipline; sometimes things seem to be as they shouldn't. For example, we think of attorney discipline as punishment. Granted, it can feel like punishment. But, in fact, it is not penal; it is corrective and protective. "Penal" is about the Attorney General and proof beyond a doubt, with punishment to fit the crime. Attorney discipline is about the Supreme Court doing what it sees fit to protect the public and the profession. That suggests another odd notion: The field we call "legal ethics" has less to do with ethics than with industry-specific rules—the Rules of Court and the RPCs.

Today, we'll look at the violations that dominate the disciplinary landscape and see how easily lawyers can avoid problems with the OAE. Lawyers *can* get into trouble for many reasons, but they *do* get in trouble for relatively few. Conflicts of interest, the unauthorized practice of law, retainer agreements, interference with the administration of justice, business transactions with clients, gross negligence, violations of advertising rules, record-keeping violations, privilege issues, criminal acts, fraud and misrepresentation, breaches of

confidentiality, fees and fee sharing, problems with demeanor, and lack of candor all can result in discipline. In my practice, however, I estimate that only four types of violations account for 80% of my clients' trouble. These are competence, diligence, communication and general record-keeping violations.

Hence, my intrigue when invited to sit on a panel last month at the NJSBA Solo and Small-Firm Seminar. The topic was, "The Three Ethics Rules that Will Help You Avoid 80% of the Trouble." The panel featured Ryan Moriarty, a Deputy Ethics Counsel from the OAE with whom I have enjoyed working on matters. I wondered what his three ethics rules were.

Before I could find out, however, I was asked to participate on a different panel in the same time slot—this one on "The Ethics of Retainer Agreements." At the conference, just before show time, I ran into Mr. Moriarty and asked him what the three RPCs were. He replied instantly, "Competence, diligence and communication." I asked, "What about record-keeping?" His reply: "That's the bonus topic."

I was sorry to have missed Mr. Moriarty's panel. However, not one to relinquish easily an opportunity to speak to lawyers, I will resume that program here. Imagine, dear reader, that it is now my turn to speak, with only five minutes left in the session. In view of the space limitation here, I won't have time to take your questions.

The first avoidable violation is any violation of **RPC 1.1. Competence**. In New Jersey, attorneys are prohibited from gross negligence. Forty-nine other state bars plus Washington D.C. consider *any* negligence a violation, but our bar only asks us to avoid *gross* negligence. What's so tough about that?

Here is the formula for competence: Know your stuff, and know your depth. Unsure of how much you'll need to know? Then you don't know enough. If you want to learn more, that's easily done. Hook up with a colleague, consult with an expert, read a book, take some CLE.

Still out of your depth? Bit off more than you can chew? Get out of the case! Refer it to a colleague and make a friend—maybe even a fee. But don't balk; withdrawal gets harder, especially when the matter is in litigation. Deal with fee issues later, but get out of the case *now*. No lawyer ever complained about having withdrawn from a case too soon. The reverse is not so true.

Then, get better at *not* taking bad clients or cases. Trust your instinct at the front door to recognize potential problems, and act sooner rather than later. Few bad cases or impossible clients will ever be worth the fee.

Do you have problems with health, luck, family or finances that are affecting your work and your relationships? These problems will not be impressive defenses to an ethics charge. Be smart; don't ignore your case load. Be proactive; reach for help. Put your clients first.

Next to avoid is any problem with **RPC 1.2. Diligence**. Attorneys must act with reasonable diligence and promptness. Not sure what "prompt" means? Look at the facts. Are you writing the check or expecting it? Not sure what "reasonable" means? Then, you are in the wrong profession. Reasonableness is our lodestar. Our tort law is based on the reasonable person. Our criminal justice system needs us to recognize a reasonable doubt. Our fees must be reasonable. What is the problem with achieving reasonable promptness and reasonable diligence in our cases?

So, counsel, just improve your promptness and diligence. It's easy. Make notes, reminders, ticklers. Delegate. Hire a temp. Reconcile your accounts on time. Review *all* your cases regularly, on a schedule, so your garden-variety oversight doesn't become a life-altering event.

Finally, **RPC 1.4. Communication**. These violations are *all* avoidable. But the big one is this: *unreturned phone calls and emails*. Unreturned communications compose the greatest single trigger for grievances, and they the easiest to avoid. The rule requires us to keep our client abreast of the matter sufficiently to make

informed decisions. That's easy as long as you don't assume that all clients have the same expectations. Manage their expectations. Anticipate issues and discuss them.

You can also avoid trouble by defining the client's objectives and the scope of your representation. Confirm anything significant in writing. Let the client see your work. Some clients never see how good their lawyer really is. Make your clients aware of all your efforts on their behalf. Send them updates, and tell them they should call with any comments or questions.

Well. I see we've run out of time. Remember: Getting out of trouble is good; avoiding trouble is better. It's also easier. You've been a great audience.

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