The Intricacies of Attorney Discipline

By Michael Alan Schwartz

One of the most stressful episodes any lawyer may encounter is receiving a request for investigation from the Attorney Grievance Commission. Despite what many believe, the Commission is not part of the State Bar of Michigan. Rather, it is the prosecution arm of the Michigan Supreme Court for the regulation of the legal profession.[1] The Commission and the Attorney Discipline Board, the Supreme Court's disciplinary adjudicatory arm,[2] receive their funding from the State Bar.[3]

While various actions can cause an attorney to find himself or herself in trouble, some are self-evident. For example, it is professional misconduct to lie to judges, steal money from clients, or be convicted of a felony. However, all types of conduct resulting in disciplinary action may not be as obvious and some issues may not be well known to most lawyers.

Did you know there is no statute of limitations for alleged professional misconduct?[4] Were you aware that, in settling a matter with a client, it is professional misconduct to include a confidentiality provision that would require the client not to make any report to the Attorney Grievance Commission—even if the client is represented by independent counsel?[5] Did you know that under the Code of Judicial Conduct, a judge may not engage in the appearance of impropriety but under the Rules of Professional Conduct, such a prohibition does not apply to lawyers who are not judges?[6]

Did you know that in Michigan, even if you are disbarred, you still can be the subject of disciplinary prosecutions and subject to additional disciplinary sanctions?[7] Were you aware that in Michigan, you could be found guilty of professional misconduct by a hearing panel and receive no discipline?[8] These are a few examples of actions that are not necessarily obvious to most lawyers. There are others as well.

Referring clients

Rule 1.5(e) of the current American Bar Association Model Rules of Professional Conduct states:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.

Michigan had the same rule under the old Code of Professional Responsibility (DR 2-107) before October 1, 1988.[9] However, when the Michigan Supreme Court was considering the ABA Model Rules in the 1980s and I was grievance administrator of the Attorney Grievance Commission, I sent a memorandum to the Court indicating why the ABA's rules were not in the interest of the client public. I noted that under the old DR 2-107, many lawyers tried to learn the law in question rather than refer the matter to a practitioner seasoned in the field. In many cases, the lawyers never learned the law and either neglected or failed to handle cases adequately, resulting in damage to the clients. Without the DR 2-107 prohibition, lawyers could receive referral fees without working on the cases and clients would not be prejudiced in any manner. Whether attorney fees were kept in total by the lawyers who did the work or shared with referring lawyers, the fees to the clients would be the same. The Supreme Court recognized the merit of changing the rule, and the current MRPC 1.5(e), which is different from the ABA Model Rule, governs in Michigan. It allows a referral fee to be made even if the referring lawyer does nothing other than refer the client—provided the client is advised of the division of fees between lawyers, does not object to the participation of all lawyers involved, and the total fee is reasonable.

In Michigan, the referral agreement does not have to be in writing, although it is

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preferable that the agreement be memorialized to avoid potential misunderstandings at a future time.

IOLTA accounts

While a lawyer is forbidden from commingling client funds with the lawyer's own money, did you know it is professional misconduct for a lawyer to put his or her own money in an IOLTA account beyond what is necessary to pay bank fees or otherwise maintain the account, even if there are no client funds in that account?[10] Once money is deposited into an IOLTA account, some of which is the property of the lawyer, it is incumbent upon the lawyer to withdraw funds that are his or her property within a reasonable time after funds are collected. Of course, if there is a dispute concerning ownership of the funds, the funds should remain in the IOLTA account until the dispute is resolved.[11]

Communication with your client

Clients are usually upset if they call their lawyers' offices and do not receive a response. MRPC 1.4 requires a lawyer to keep a client reasonably informed about the status of a matter and to comply promptly with reasonable requests for information. Failure to heed this requirement subjects the lawyer to discipline, which may even result in a suspension from practicing law. Accordingly, a lawyer ignores a client's requests for information at his or her peril.

Dealing with a request for investigation

What should a lawyer do when he or she receives a request for investigation from the Attorney Grievance Commission? Of course, the request must be answered by a full and fair disclosure of facts pertaining to the allegations.[12] Making a misrepresentation in the response is the surest way for a lawyer to lose his or her license. Failure to answer a request for investigation has a similar result. In both instances, a lawyer who fails to answer or, worse, makes a misrepresentation in an answer, is not unlike a soldier who goes into a night battle wearing a large neon sign that states "shoot me." The consequences are predictable.

A request for investigation should be taken seriously, even if the recipient perceives the grievance to be without merit. While answering a request may appear to be a mundane exercise, it can be more complex than revealed by a cursory review. Most requests are written by unsophisticated clients. The Commission generally serves the unedited request on the lawyer who is the subject of that grievance.[13] However, the Commission is not limited to the allegations set forth in the request. Depending on what the recipient states in his or her response, the Commission may broaden its investigation beyond the four corners of the request. Thus, while a response to a request must satisfy the requisites of MCR 9.113(A), it is not necessary to refer to extraneous items in making a response. Moreover, it is inadvisable to make any statements that appear to be factual when they are only assumptions. If an assumption turns out to be incorrect, the Commission may conclude that the statement is a misrepresentation and the lawyer may suffer the slings and arrows of misfortune.

Disciplinary representation

Just as it is not recommended for a lawyer to represent himself or herself in a disciplinary investigation or formal hearing, it is also recommended that a lawyer consult with an attorney knowledgeable and experienced in the area of professional disciplinary law. To the extent that a lawyer's livelihood and reputation may be compromised, sometimes fatally, because of a mistake in connection with a response to a request for investigation or in defending against a formal complaint before a hearing panel, it is worth getting professional assistance.

A relatively small number of practitioners have a comprehensive knowledge and understanding of disciplinary law and procedure. Disciplinary law is a discrete field of law and it is best to receive counsel and representation from someone well versed in the intricacies of attorney discipline. ■

Michael Alan Schwartz, a graduate of Fordham University School of Law, was grievance administrator of the Michigan Attorney Grievance Commission from 1979 to 1988 and a former adjunct professor at Wayne State University Law School and the University of Detroit School of Law. He currently represents attorneys who need ethics advice or are the subject of disciplinary charges.

ENDNOTES

1. MCR 9.108(A).
2. MCR 9.110(A).
3. MCR 9.105(B).
4. *Grievance Administrator v Bielfield, et al*, Attorney Discipline Bd (Case No. 87-88), decided August 30, 1993.
5. MCR 9.104(10).
6. See Code of Judicial Conduct, Canon 2(A) for the prohibition as it applies to judges. Canon 9 of the former Code of Professional Responsibility prohibited lawyers from engaging in the appearance of impropriety, but this language was deleted when the code was superseded by the Rules of Professional Conduct on October 1, 1988. See Dubin & Schwartz, *Michigan Rules of Professional Conduct and Disciplinary Procedure* (ICLE 1989, 1994 supp), p 1-160.
7. *Grievance Administrator v Hibler*, 457 Mich 258; 577 NW 2d 449 (1998).
8. *Grievance Administrator v Deutch*, 455 Mich 149, 163; 565 NW 2d 369 (1997).
9. Schwartz & Dubin, *Michigan Rules of Professional Conduct v Michigan Code of Professional Responsibility*, 35 Wayne L Rev 197, 203–204 (1989).
10. MRPC 1.15(f).
11. MRPC 1.15(c).
12. MCR 9.113(A).
13. MCR 9.112(C)(1)(b).