

## **A Reminder: Avoiding and Surviving Attorney Ethics Complaints in Texas\***

### **A. THE BASICS FOR AVOIDING A GRIEVANCE**

Grievance claims in Texas have risen at a rate directly correlated to attorney growth. In the 2007-2008 year, the number of lawyers had increased to 81,601 with a record of 7,308 filed grievance claims. In general, grievance claims are not only complex, but disbarment can end an attorney's legal career. As described by the Supreme Court of Texas, "the preliminary investigation of an attorney for alleged misconduct has been compared to an inquisition by a grand jury."<sup>1</sup> Any inquisition needs serious attention by the attorney who is grieved.

The Texas Lawyer's Creed states that each attorney owes to their clients "allegiance, learning, skill and industry," and they should be "courteous, civil and prompt in oral and written communications." (www.texasbar.com) Moreover, the Creed acknowledges that a lawyer "owes to the administration of justice personal dignity, integrity, and independence... [And] Should always adhere to the highest principles of professionalism." However, grievance claims continue to exist: the majority of which arise against solo practitioners or lawyers at small law firms. Mr. Thomas Watkins, member of the Commission for Lawyer Discipline, estimates that every new attorney licensed after '99 will have at least two disciplinary complaints filed against them during their career.<sup>2</sup>

A grievance is a written statement intended to allege professional misconduct by a lawyer, lawyer disability, or both. Professional Misconduct is defined as an act or omission by an attorney that violates one or more of the Texas Disciplinary Rules of Professional Conduct (TDRPC). Areas of law that most commonly witness ethical grievance claims include criminal law (45%), family law (19%), probate will claims (14%), and non-client claims (13%). As explained by Brian Fruehling of the New Jersey Law Journal, "many ethics complaints emanate from a client's maiden voyage into the legal system," primarily because "if the client doesn't know what to expect, chances are that client will be displeased with how the matter progresses."<sup>3</sup> It is necessary that an attorney makes every effort to act professionally in dealing with the client, especially in light of the emotional attachment that the clients will have to their case.

Grievance claims tend to fall into certain categories. The most common violation is neglect by attorneys, averaging about 46% of all ethical grievance claims.<sup>4</sup> Rule 1.01 of the TDRPC describes neglect as "inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients."<sup>5</sup> Further, Rule 1.01 states that "In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients." A lack of competent and diligent representation in the form of neglect has the potential of destroying a client's claim and

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<sup>1</sup> *State v. Sewell*, 487 S.W.2d 716, 718 (Tex. 1972).

<sup>2</sup> Bennett, Robert S. "Bob." "Recent Changes in the Grievance Process and How They will Affect Your Law Practice." 2006.

<sup>3</sup> Fruehling, Brian. "Strategies to Avoid Attorney Ethics Complaints and Survive a Probe." *New Jersey Law Journal*, April 29, 2009.

<sup>4</sup> Bennett, Robert S. "Bob." "Recent Changes in the Grievance Process and How They will Affect Your Law Practice." 2006.

<sup>5</sup> *Texas Disciplinary Rules of Professional Conduct*

it is the lawyer's professional responsibility to assure that active measures are taken in order to be as prompt and complete as possible.

Two other areas of complaint common in grievance claims include an attorney's lack of communication or breach of confidentiality (Rules 1.03 and 1.05), and the inability or failure to safeguard property (Rule 1.14). Rule 1.03 of the TDRPC states that "a lawyer shall keep a client reasonable informed about the status of a matter...promptly comply with reasonable requests for information... [And] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>6</sup> Rule 1.05 of the TDRPC requires that a lawyer "shall not knowingly reveal confidential information of a client or a former client to a person that the client has instructed is not to receive the information, or anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm."<sup>7</sup> These areas of complaint are typically easy to avoid if the attorney is able to actively communicate and respond to the client's concerns. It is necessary that attorneys pursue "clients' interest within the bounds of the law," and this can easily be accomplished through competent and diligent representation as a whole.<sup>8</sup>

The safeguarding of client's property is governed by Rule 1.14, which centers on the proper use of an IOLTA Trust Account. For all practical and ethical considerations, there is no such thing as a non-refundable retainer. All client funds must be placed in the attorney's IOLTA account until at least 30 days after invoicing, to allow your client an opportunity to contest any portion of the invoice. Settlement funds always go into your IOLTA account; then a distribution sheet is prepared and approved by your client and checks from the IOLTA account are used to transfer funds to your client, medical providers on Letters of Protection, the attorney's fees and reimbursement of file costs. Violation of Rule 1.14 is the quickest way to be disbarred!

## **B. GRIEVANCE PROCEDURE**

The grievance process commences when a grievance is filed. The Office of Disciplinary Counsel (OCDC) has thirty days to determine whether the claim contains allegations of professional misconduct. If there is no evidence of professional misconduct, the claim will be dismissed as an inquiry. However, in the event that the allegation of misconduct is successfully substantiated, a complaint will be filed and the attorney will receive a written notice of the alleged acts. In the standard grievance process, "the attorney has the opportunity to present the facts underlying the alleged misconduct. The reviewing body that hears the evidence and imposes sanctions—whether an evidentiary panel or district court—may also consider any mitigating circumstances in determining the appropriate degree of discipline."<sup>9</sup>

The first and most important tip to avoid disciplinary complaints is to communicate with and educate your client by discussing fees, expectations, and probability of chance of success in the claim. Never "promise" or "guarantee" a particular outcome! Keep the client informed on each step of the process through letters, phone calls, or meetings depending on what is necessary.

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *In re Lock*, 54 S.W.3d 305, 307 (Tex. 2001).

Also, have a written agreement with the client and be cautious in handling the client's money. When a client is paying for a service, they expect only the best and most dedicated effort by their attorney, and it is not only important but also necessary to be both aware and wary of how you use your time and the consequences of each action. Always be honest with the client when assessing a claim, even if the case is lost, and if discharged from service, cooperate fully with the next lawyer. Finally, read and reread the Texas Disciplinary Rules of Professional Conduct, as this is the very foundation of ethical conduct as an attorney.

In attempting to avoid grievances, consider using the OCDC's Attorney Ethics Helpline to answer any questions about an attorney's ethical obligations to clients, courts, and the public as established by the Texas Disciplinary Rules of Professional Conduct. The Helpline can provide access to rules, verbal ethical opinions, and prior written ethics that will help you make informed decisions about your law practice. Previous written opinions by the Professional Ethics Committee of the Supreme Court (Texas) are also available from the Texas Center for Legal Ethics and Professionalism ([www.txethics.org](http://www.txethics.org)).

However, if notified of a grievance, it is important to respond immediately to the notice and cooperate fully with the disciplinary boards and investigators. Failure to timely respond to a Grievance is a separate violation under Rule 8.04(8).<sup>10</sup> Since receiving a grievance notice is a very emotional and stressful event, smart lawyers will remember that they need to provide a coherent, dispassionate response. This is difficult to do on one's own behalf. Keeping in mind the old adage and the reasons for it ("The attorney who represents him/herself has a fool for a client"), seeking counsel rather than attempting to answer *pro se* is the better way to go; especially as one must be aware of making admissions against your own interest!

It is necessary to provide a thorough response to the grievance notice and cooperate through every aspect of the investigation. When faced with a grievance claim, review any documents that you may have thoroughly and familiarize yourself with the facts and chronology of the claim. Then you are ready to speak with an independent counsel regarding the grievance filed against you. However, remember that you only have thirty (30) days from the receipt of the grievance, so time is of the essence.

Under the current system, the initial stage of the grievance and your response to the complaint are paramount to a summary judgment motion. Admissions against interest may mistakenly be made. If you lose this all important first round, you are facing trial either before an Evidentiary Panel or District Court Judge.

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<sup>10</sup> Tex.Disc. R. of Prof. Conduct 8.04(8).

When misconduct on the part of an attorney is alleged to have occurred, the OCDC has the task to conduct an investigation to determine if there was just cause.<sup>11</sup> “Just Cause” refers to “such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed, or suffers from a Disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation.”<sup>12</sup> If no just cause is determined after investigation, the grievance is referred to the Summary Disposition Panel for dismissal. However, if just cause is determined, the Respondent attorney must make an election for trial before an evidentiary panel or in district court.

Typical forms of discipline used by the OCDC are sanctions and disbarment. A disability docket is also available; but this forum definitely requires experienced counsel due to a fast track timelines and because a disability suspension can easily become permanent (i.e. equivalent to disbarment) if not properly handled. Yet the disability docket does provide a viable option other than outright disbarment.

The range of sanctions proceeds in upward order: private reprimand, public reprimand, suspension (including partially probated suspension), and disbarment. A private reprimand (the lowest sanction) can only be received if the responding attorney has elected to proceed before an Evidentiary Panel rather than District Court. Monetary sanctions are frequently determined by the court depending on factors such as the nature and degree of the misconduct, the circumstances surrounding the claim, and loss or damage to the clients.<sup>13</sup> Typically when an attorney has been convicted of an intentional crime, disbarment will result in the suspension of his or her license to practice law. In a standard grievance process, mitigating circumstances will be considered when determining the appropriate degree of discipline. The TDRPC permit the reviewing body to “disbar the offending attorney, but also make available a range of lesser sanctions, including various types of suspension and reprimand.”<sup>14</sup> In determining sanctions, either the Evidentiary Panel or the District Court will consider “the nature and degree of the professional misconduct, the seriousness of and circumstances surrounding the misconduct, the loss or damage to clients, the damage to the profession, the assurance that those who seek legal services in the future will be insulated from the type of misconduct found, the profit to the attorney, the avoidance of repetition, the deterrent effect on others, the maintenance of respect for the legal profession, the trial of the case, and other relevant evidence concerning the attorney's personal and professional background.”<sup>15</sup>

As grievance claims increase in frequency, it is necessary for attorneys to understand and deal with the possible repercussions of an ethics complaint. Avoiding neglect; communicating with your clients, and understanding your professional responsibility as an attorney are all core steps to not only avoiding complaints, but also being an effective lawyer. When dealing with any

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<sup>11</sup> *Galindo v. State*, 535 S.W.2d 923, 925 (Tex. App.—1976)

<sup>12</sup> *Weiss v. Comm. For Lawyer Discip.*, 981 S.W.2d 8, 13 (Tex. App.—1998).

<sup>13</sup> *Texas R. Disc. Pro.* 3.10

<sup>14</sup> *Lock*, 54 S.W.3d at 307.

<sup>15</sup> *The State Bar v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994).

claim it would do well to remember: “Ours is a society which lives under law, and lawyers, as well as courts, are its chief protectors.”<sup>16</sup>

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<sup>16</sup> Sewell, 487 S.W.2d at 719.