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The (High) Cost of Discipline, Part 2: Trying to Avoid the Numbers

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Last month, we looked at the economic cost of defending against bar complaints. The baseline statistics we used were from 2008 because it is the last year for which both national and regional statistics are currently available. We'll continue to use statistics from that year for illustrative purposes as we shift our focus to practical steps we can take to lower the risk of bar complaints. The Oregon State Bar Disciplinary Counsel's Office 2008 Annual Report furnishes a useful breakdown of disciplinary sanctions imposed by type of misconduct. Those numbers, in turn, provide equally useful suggestions about how to avoid becoming a statistic. We'll look at four areas in particular both because they generate significant disciplinary numbers and because they involve situations where lawyers can take proactive steps to lessen disciplinary risk.

Neglect. Neglect was involved in 41 percent of the cases resulting in disciplinary sanctions in 2008. "Neglect" is a catch-all in this context that suggests multiple solutions. First, don't take on more work that you can realistically handle. The line between "busy" and "out of control" occasionally blurs but we need to have a constant sense of where it is to avoid understandable client disappointment when their work has not be handled in a timely way because it shouldn't have been taken on in the first place. Second,

focus primarily on work that is in your main area of expertise. Most of us are likely to handle matters most efficiently in areas in which we are experienced. Third, set agreed and well-articulated objectives with the client so that you both understand when work or major milestones along the way will be completed. Clear two-way communication can often avoid both misunderstandings and unrealistic client expectations. Finally, keep clients informed of both expected and unexpected events that may affect the timely completion of the work involved. In some instances, it is not the work that has been “neglected.” Rather, what has been “neglected” is telling the client what has occurred or simply that, for example, a motion is under advisement and you won’t have anything to report until the court rules.

Accounting. Inadequate accounting records and trust account violations collectively were involved in 38 percent of cases resulting in discipline in 2008. Most lawyers view practicing law as a profession rather than a business. Nonetheless, we need to ensure that the business aspects of our practices are consistent with our professional obligations. Toward this end, we need to make sure we have adequately trained and supervised staff who understand the absolutely critical nature of our obligation to properly handle and account for client funds.

Excessive Fees. “Excessive” or “illegal” fees were involved in 17 percent of disciplinary cases in 2008. Fees can be a particular flashpoint with clients

large and small. Although it may not be possible to give a client a precise cost estimate at the outset of a new matter, major misunderstandings can often be avoided by outlining (in writing for both clarity and future reference) such key variables as planned staffing, timekeeper rates, agreed mechanisms for changing rates over the duration of the matter and the anticipated scope of the work. Sending clients timely, understandable bills also helps avoid both misunderstandings and “unpleasant surprises.”

Improper Withdrawal. Improper withdrawal was involved in 24 percent of disciplinary cases in 2008 and an often related area—failure to return client property—was involved in another 13 percent. Parting ways short of a matter’s end is almost always difficult for the lawyer and the client alike. In many instances it is not the *reason* for the withdrawal that makes it “improper.” Rather, it’s the way it was done. RPC 1.16(c) and (d) spell out specific steps we must follow in withdrawing—including reasonable advance notice to the client, court permission if required by applicable procedural rule, taking reasonably practical steps to protect the client during the transition and returning unearned client funds and other property. Although files may be subject to possessory lien rights, OSB Formal Ethics Opinion 2005-90 counsels that a client’s need for a file generally “trumps” a lawyer’s possessory lien over the file. In light of that (good) counsel, discretion is usually the better part of valor in dealing with a client’s file upon withdrawal.

Summing Up. As with malpractice claims, good risk management will not avoid all regulatory complaints. But, it will avoid many and will provide sound defenses for still others. Moreover, good risk management does not have to be expensive. More often than not it simply involves the systematic application of practical steps like good communication and documenting the key milestones in a representation. Those simple steps, though, can yield very real economic benefits to lawyers and their firms.

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