

The Most Common Causes of Bar Council Investigations



Inadequate Communication

- Respond (reasonably) to client calls, emails, texts and letters.
- Keep notes of in-person and telephone communications
- Make sure your staff is trained to be polite and responsive.
- Keep your clients informed of what's going on.
- Contact clients on some regular basis, even if nothing is going on.
- Convey that you care!

What You Must Put In Writing:

- **Fee agreements** –the scope of the representation and the basis and rate of the fee and expenses must be communicated to the client in writing before or within a reasonable time after commencing the representation [Rule 1.5(b) and (c)]. In the case of flat fee agreements be particularly careful in memorializing the exact scope of the work you agree to do for the fee.
- **Consents to conflicts of interest** – amendments to the Mass. R. Prof. C. effective July 1, 2015, require *written* consents to conflicts under Rules 1.7 (general conflicts between clients or client and lawyer) and 1.9 (former client conflicts), as well as under Rule 1.8(a) (lawyer’s business transactions with clients).
- **Notices of fee payments withdrawn from client funds accounts** – On or before paying yourself a fee from your client funds account, you must deliver a written notice to the client with (1) an itemized bill or accounting for your services; (2) the amount and date of the fee withdrawal; and (3) a statement of the balance of the client’s funds in the account after your fee payment. [Rule 1.15(d)(2)]

What You Should Put in Writing to Client.

All settlement offers – especially important if the client is rejecting the offer against your advice.

Non-engagement confirmation– if you have decided not to represent a prospective client, put it in writing, advise the client of any applicable statute of limitations and return any documents the client gave you.

Something has gone wrong: case was dismissed, statute of limitations expired, offer of settlement rejected, etc. Failing to inform the client and, worse, lying to the client, only compounds the problem.

Major case developments: filing of complaint, answer or dispositive motions, hearing dates, court decisions, etc.

Requests for compliance—document that you have asked your client for a response to an offer, discovery information or other information you need to proceed.

Lack of Diligence

- Don't overpromise.
- Don't bite off more than you can chew.
- Do what you say are going to do.
- Don't wait until the last minute.
- Use tickler systems religiously.
- If you can't meet a deadline, timely seek an extension or continuance.
- Know your owns habits and limitations.

Failure to Provide a Copy of the File

- Governed by Mass. R. Prof. C. 1.15A
- Upon termination of the representation, hand over the file promptly to the client or successor counsel.
- Make sure the file is complete in accordance with 1.15A(a)
- Include electronic documents
- Do not hold the file ransom for payment of your bill.
- Charge the client for copying **only** in compliance with Rule 1.15(b)
- Keep a copy of the file
- Document that you have furnished the file to the client.

Not Terminating Representation Clearly and Appropriately

1. Termination is covered by Rule 1.16. There are many permissible reasons for termination, but:
2. Termination should **not** have “material adverse effect” on the client. Rule 1.16(b)(1)
3. You are either in the case or out of it. Do not withhold services because you haven’t been paid.
4. Clearly notify the client in writing that you have terminated the representation and make arrangements to provide the file.
5. If appropriate, send a final bill and refund any unearned retainer funds.
6. If the case is in court, file a motion to withdraw, serve the client and the opposing party and get the court’s permission to withdraw. [Rule 1.16(c)]
7. When you file a motion to withdraw, take care not to disclose confidential information.

Disclosing Client Confidences

- Confidential information is (see Rule 1.6, comment 3A):
 - Information gained during or relating to the representation of the client *no matter what its source*, that is:
 - protected by the attorney-client privilege or
 - likely to be detrimental or embarrassing to the client if disclosed.
- Do not assume that you may disclose information contained in a public record.
- Do not discuss your client on social media or share identifying details in response to a critical on-line review.
- Avoid inadvertent disclosures through email and other forums.
- Be very careful of what you disclose in a motion to withdraw.

Failure to Identify and Avoid Conflicts

- Identify your prospective client at the outset of the representation
- Collect sufficient information from prospective client to check for conflicts.
- Have a conflicts-checking system and use it.
- Consider whether you have a personal conflict of interest.
- If you are considering a transaction or business venture with a client, read Rule 1.8, tread carefully, and advise the client in writing to confer with outside counsel on the matter.
- Consult bar counsel or other expert if you are in doubt about a conflict.

Non-Compliant IOLTA Record-Keeping

- If you handle client funds (including retainers) or fiduciary funds, you must conform to the requirements of Rule 1.15, which require you to:
 - Deposit client funds in an IOLTA account at a Massachusetts bank.
 - Maintain a detailed check register that identifies each deposit and withdrawal with client identifiers;
 - Perform three-way reconciliations — reconcile your check register to your bank statement and to your individual client ledgers at least every 60 days, preferably once a month. They must match!
- Your obligation to maintain IOLTA records cannot be delegated. You may hire a bookkeeper or allow another employee to maintain your records, but ultimately, only you are responsible for compliance.

Misrepresentations to the Court and Opposing Counsel

- Do not make misrepresentations to any tribunal, even with respect to minor matters.
- Do not make misrepresentations to the BBO, bar counsel or CPCS.
- Do not mislead opposing parties and their counsel by telling half-truths or making significant omissions.
- Do not let your clients make misrepresentations to a tribunal.
- If you become aware of a client misrepresentation, understand your duty to take remedial measures (Rule 3.3(a)(3)).
- Be careful in opening statements and closing arguments not to state your opinion or cite to facts not in evidence.

Lack of Professionalism

- Be respectful and pleasant to your clients. Perceived rudeness is a factor in approximately six percent of inquiries to bar counsel.
- Clients who like their lawyer are much more likely to forgive errors or lapses.
- Be civil to opposing parties, counsel, witnesses and court personnel.
- Do not engage in sexual banter, suggestive comments or physical contact with clients.
- Do not be overly casual in professional communications.