

YOUR CLIENT HAS FILED A BAR COMPLAINT

The first section of this article discusses several communication issues with clients who are criminal defendants. The second section discusses the lawyer disciplinary process in Kentucky. Finally, common issues presented in bar complaints filed by defendants in criminal cases are highlighted so that practitioners may anticipate and address these issues before they present ethics concerns. The suggestions made are based, in part, on the author's experience as a criminal law practitioner at the trial and appellate level over a period of several years and experience as the Consumer Assistance Manager and a Deputy Bar Counsel with the Kentucky Bar Association (KBA).

Managing Client Expectations

Attorneys who represent criminal defendants are regularly confronted with challenges not presented to those who practice other areas of the law. Where the outcome of the matter presents the loss of personal freedom as a significant possibility, the client will understandably be motivated to a higher degree than many other clients to achieve a favorable outcome. It is also possible the attorney may have a distinctly different perspective from the client as to what a "favorable outcome" means. Find out early what the client feels that concept means in their case because it may impact the entire focus of the representation.

Effective communication with the client is invaluable in helping the attorney determine early on whether the client genuinely appreciates the practical and ethical limitations on what the attorney can do to achieve the most favorable result. Where there is a large gap between what the client expects or desires and the attorney's legal assessment of what can be achieved, the attorney is well-advised to bridge the gap. Managing client expectations is not only essential to a workable attorney-client relationship, but is critical to the attorney's ability and ethical obligation to provide the

client sufficient information for an informed decision regarding the representation.

Basic issues such as the lawyer's availability to meet with the client and discuss the case are simply different in criminal defense work. Your clients may have significant limitations on their freedom of movement or their ability to even call to discuss the case. Awareness of how these basic issues impact the representation is pivotal when representing criminal defendants.

A confined client who is unable to contact their attorney may well discuss their issues with someone close to them, such as the person with whom they share a jail cell. Absolutely devastating information may be revealed to someone unconstrained in the conversation by attorney-client privilege – someone who may see it in their own interest to share sensitive information about your client with one who would listen carefully - such as the prosecutor.

For these and many other reasons, the first substantive conversation the attorney has with a criminal defendant client must cover attorney-client privilege and the potentially disastrous impact of the client discussing the facts of the case with someone else. The conversation not only lets the client know that your priority is protecting their interests, but informs the client that you are the only person with whom they can speak candidly about the details of the case. The discussion is also a solid foundation for open communication with the client to assist you in determining what is or is not accurate in the prosecution's case.

Clients need to know that you absolutely must hear the unfiltered truth from them. Pursuing a line of defense based on an incomplete or untrue scenario can have devastating consequences when the prosecution proves the client's "facts" to be false. The trier of fact, judge or jury, is not likely to appreciate being misled by either side. Moreover, the deception need not be significant.

It need only be provably false. On the other side of the coin, it can be most beneficial when your client is able to enlighten you specifically as to how a prosecution witness is being untruthful. For this to occur, information must flow openly and freely between you and the client. Listening closely to the answers can be as important as the questions asked.

Criminal defendants may well know that the prosecution has the burden of proving the case beyond a reasonable doubt. However, they are less likely to appreciate the specific facts the prosecution needs to prove to satisfy the burden of proof in their case. You need to enlighten the client early on as to the elements of the offenses and how difficult or easy some of them may be to prove. The practical benefit of this information is that it helps you focus the client on the concept of relevant evidence. That basic knowledge helps the client appreciate why some things are more or less important than others as the representation proceeds, and why you may ask certain specific questions later. Where the prosecution can easily prove three of the four elements of a charge, the informed client will understand why you devote most of your effort into exploiting weaknesses in the proof of the fourth element.

Do not hesitate to tell your client your assessment of the prosecution's evidence, particularly when it appears to be strong. In that event, your client will be motivated to provide information that could alter your assessment. You have to decide how to characterize such new information. You can explain that the prosecution will likely do this or that, but you should consider not rejecting new information from the client out of hand. That can cause the client to shut down. If the new information is not relevant, explain why. You can let the client know through your explanation that you are still "on their side", but that it is important to the client for you to put yourself "in the prosecutor's head", first so there are no surprises at trial and secondly so you know the soft spots in the prosecution's case.

There will be clients with whom you will need to have "the talk." In criminal cases where what is at stake is so dramatic, you owe it to the client and yourself to let the client know your assessment of the strengths, not only of the prosecution's case, but of the case you have assembled. With that stated, you then give the client your assessment of the worst case scenario, including the possible sentence. This gives you the opportunity to explain the options available, and also allows you to make it clear that you are ready for trial.

After this discussion the client may be anxious about a trial, but will have a realistic basis for knowing the possibilities. Some clients are unable to admit openly what they have done, while others are simply willing to accept the risk, and will insist on going to trial. The purpose of "the talk" is to learn whether your client still wants to go to trial despite the potential risks and whatever offer the prosecution has tendered. After all, it is their decision to make. You can effectively manage a trial when you know in advance that the client will not testify. Whether the client elects to testify or not, you have given your client the most valuable information available and have allowed the client to make an informed decision. Regardless of the outcome, you will know you have done your best for this client and have kept them informed of the critical issues.

Another important topic is how to respond to your client after the filing of a bar complaint. Criminal defense lawyers, especially public defenders, do not have absolute flexibility as to whom they represent, nor may they be able to withdraw as could a private attorney in a civil matter. The case may be very close to trial when a complaint is filed. For whatever reason, you may not have the option of withdrawing. Even so, such complaints may be nothing more than the client's effort at communication with you.

Some complaints against defense attorneys are often simple manifestation of the client's inability to have enough time with you to sort out the details of the case. In other situations, the client may not understand why certain things

have not happened due to the “time with client” issue or because the client’s expectations are not aligned with reality. Some clients may believe they will be appointed another attorney if they file a bar complaint on the current one.

You need to confront the client bar complaint head-on. If it raises case-specific issues, address them with the client as openly as possible. If it presents issues that have been addressed since it was filed, you can use the situation to make sure you and the client are now on the same page with the case. Even if the client filed the complaint in the effort to get a different lawyer, you can make that the basis of a meaningful discussion. The point is simply that the client seldom appreciates that filing a complaint does not terminate the representation, or get a lawyer from the KBA to oversee what you are doing as the case progresses. In these situations, the client is clearly anxious about the future and you now have the opportunity to find out why. Whatever may have motivated the complaint, it is important to only end the discussion when you have determined that you and the client are back on track.

It is very important to document your client contacts. Timing of events is often critical, such as when the last time was that you spoke with your client before the bar complaint was filed. Your client contact notes should be sufficient to trigger your memory of the topics discussed. There are many good reasons for doing this. Only in the movie dramas do some people have a perfect memory. You, on the other hand, are subject to human frailties including an imperfect memory. If the client waits until an appeal is in progress, potentially years later, you will need your notes to recall that you did speak to the client about claimed alibi witnesses on Tuesday afternoon six weeks before trial. It is not rocket science; it is often tedious, hard work, but it is important to memorialize the conversations throughout. Additionally, for many, seeing something on paper reinforces the ability to recall a conversation on the topic.

The Disciplinary Process

Article 116 of the Kentucky Constitution provides: “The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.” Pursuant to that broad grant of authority, Supreme Court Rule (SCR) 3 sets forth rules regarding the practice of law in Kentucky. SCR 3.130 contains the Kentucky Rules of Professional Conduct, which are similar to the ABA Model Rules in many regards. Other sections of SCR 3 specify the process for the handling of complaints against attorneys from their receipt through a final disposition by the Kentucky Supreme Court. The comments to the Rules are extremely helpful in many situations and should be consulted regularly.

SCR 3.160 requires that a complaint be “a sworn written statement.” Initial intake of complaints reviews them to determine whether they present a potential ethical violation. In the absence of facts, if true, that would present a violation of the Rules of Professional Conduct a complaint will be dismissed without investigation. The attorney receives a copy of such complaints for informational purposes only.

Alternative Disposition

If the complaint contains sufficient facts to present an ethical issue that would not “more than likely result in a suspension”¹ the Rules provide for an initial review process called alternative disposition. This process is less formal in that a written response from the lawyer is not required for a preliminary investigation to determine whether the complaint should be closed, or sent to the lawyer for a formal written response. Complaints handled through alternative disposition frequently present short-term communication, diligence, or file return issues. Complaints of this nature are relatively common when the complainant is a criminal defendant.

Such Complaints are mailed to the attorney identifying the complaint as being reviewed through alternative disposition under SCR 3.160(3)(c). Telephone contact with the

¹ SCR 3.160(3)(B).

attorney permits discussion of the issues presented in the complaint, affording the attorney the opportunity to indicate whether the issues have been addressed, or to provide other information pertinent to the substance of the complaint. On occasion, the attorney will be requested to email or fax a document to the deputy bar counsel assigned to the file. The information is typically sought to document that certain specific things have transpired in the matter and to verify that the client concerns have been addressed. The process can be brief, but nonetheless efficiently determine that the issues presented in the complaint have been addressed and resolved.

It is completely appropriate, and is indeed encouraged, for the attorney to initiate contact with the Office of Bar Counsel (OBC) upon receipt of a complaint identified as being processed via alternative disposition. The sooner it can be determined that the issues are resolved or the circumstances clarified, the sooner the parties will be notified that the preliminary investigation has concluded.

On occasion, a complaint processed through alternative disposition may present circumstances warranting remedial action. A warning letter or remedial ethics training are among the options available. It is important to note that these options are not considered disciplinary in nature and consequently they are not adverse actions. There is no permanent record available when such remedial action is completed because completion of the remedial measures generally results in the complaint being dismissed at that level.

Do not fail to respond to calls from the OBC concerning a complaint you have received when it is identified as being processed through alternative disposition. You cannot assume the OBC knows that corrective action has been taken on the issues presented in the complaint. The failure to respond virtually guarantees that the matter will be formally processed for a written response and subsequent review by the Inquiry Commission (IC).

When a complaint initially handled though the alternative disposition process presents issues during the preliminary investigation that would warrant the matter being reviewed by the Inquiry Commission, that option is available. The complaint would then be sent to the lawyer for a written response, as specified in SCR 3.160(1). The response of the lawyer would be provided to the complainant for any supplemental comments. Following investigative activity by OBC, the matter would be presented to the Inquiry Commission for review and action as deemed appropriate.

Review of Complaints by the IC

The IC is a body of nine members appointed by the Supreme Court and is comprised of three panels, each with two lawyer members and a lay member. The IC functions essentially as a probable cause body when it reviews complaints. The IC has a variety of options upon review of a complaint, ranging from dismissal to the issuance of a formal Charge for specific violations of the Rules of Professional Conduct. The Commission reviews the Complaint, the written response from the lawyer,² any supplemental comments by the complainant and any other investigative material obtained during the investigative process.

The fact that a complaint is reviewed by the IC does not mean that disciplinary action against the attorney is inevitable. It does not necessarily mean that the complaint was not initially suitable for alternative disposition because it presents issues that could result in disciplinary action. The majority of complaints reviewed by the IC are resolved without public discipline. Dismissal, conditional dismissal, a warning letter, remedial ethics training,³ or a private

² When it is determined that a complaint is to be mailed to the attorney for a written response, the instructions accompanying the complaint reflect that the response is due within twenty (20) days. Should a short extension of time be required, the attorney must contact the OBC counsel assigned to the matter to discuss the extension. Such a discussion should occur before the time period allowed has expired; otherwise a motion would need to be filed with the Inquiry Commission.

³ The Ethics Professionalism Enhancement Program (EPEP) is a one-day remedial ethics program presented by the OBC. It covers a variety of ethics issues commonly encountered by

admonition are among the options available to address the varying degrees of conduct presented in complaints.

SCR 3.185⁴ sets forth the options available to the IC for disposition of a complaint. It is important to note that a private admonition issued by the IC is considered discipline, unlike the other options available. An attorney may reject a private admonition, in which case the IC would determine whether to issue a formal Charge.

During the investigation of a complaint being processed to the IC, it is critical to timely respond, not only to the complaint itself, but to investigative inquiries from the OBC. The requested information may well be the critical information needed to resolve the issues presented in the complaint. Here again, do not assume someone else has provided that information. Furthermore, the fact that you and the complainant have resolved your differences, does not mean the complaint or investigative inquiries can be ignored. Finally, once a complaint has entered the process, it does not matter that the complainant has changed their mind and wishes to withdraw the complaint.⁵ The issues presented still need to be addressed in the attorney's response to the complaint.

Sometimes attorneys responding to a complaint feel compelled to characterize the complainant negatively. This is not generally helpful. Even

so, there may be facts pertinent to the issues in the complaint that reflect unfavorably on the complainant. When such a situation arises, the attorney should provide the information appropriate to the issues presented in the complaint. For example, the fact that the attorney has a signed receipt for the client file is obviously pertinent even though the client has asserted the file has not been provided. Similarly, when the client asserts that six calls to the lawyer were not timely returned, it is certainly reasonable to point out that all six calls were made in a period of an hour when the attorney was in court and that contact was made soon thereafter.

The complaint, response and results of investigative inquiries are all presented to the IC for its determination of what happens next. When the attorney fails to respond, the IC will nonetheless review the matter based on the complaint and the investigative materials obtained by OBC. By not participating in the process, the attorney essentially abandons the opportunity to explain the circumstances and correct any incomplete or erroneous information. Additionally, the failure to respond to the complaint or investigative inquiries can result in an additional charge of misconduct under SCR 3.130-8.1(b). While your client's decision not to testify cannot be used against him/her, your decision not to respond to a bar complaint can be.

A Charge Issued by the IC

The most serious disposition taken by the IC is the issuance of a formal Charge. Such action reflects the determination that probable cause exists to believe the attorney has committed a violation of the Rules of Professional Conduct and that lesser action is not sufficient to address the violation.

The response to a Charge is called an Answer. The Answer filed by the attorney should address the specific violations stated in the Charge. Simple denials or assertions of various defenses such as laches and statute of limitations, as is common in civil litigation, are not beneficial to

practitioners and presents current case law and other resources to assist in identifying and properly resolving such matters.

⁴ After a complaint against an attorney for unprofessional conduct is investigated and a response filed, the Inquiry Commission may direct a private admonition, with or without conditions, to the attorney if the acts or course of conduct complained of are shown not to warrant a greater degree of discipline. The attorney so admonished may, within twenty (20) days from the date of the admonition, reject such admonition and request that a charge be issued and filed as is provided by Rule 3.190; whereupon, the issues shall be processed under the applicable rules. The Inquiry Commission may also issue a warning or a conditional dismissal letter including, but not limited to, conditions such as referral to KYLAP, or attendance at a remedial ethics program or related classes as directed by the Office of Bar Counsel.

⁵ The person who files a complaint is not a "party" to a disciplinary proceeding, but may be called as a witness at the hearing.

the attorney or the IC. The Answer is the attorney's opportunity to formally set forth the facts and circumstances reflecting that a violation has not occurred. A formalistic Answer asserting civil defenses or stating that the complainant desires to withdraw the initial complaint abandons the opportunity to address the asserted facts and issues.

Here again, it is critical to respond. The failure to file an Answer to a Charge will be treated as a default under the Rules and will be submitted to the Board of Governors without any input from the attorney. In defaults, the allegations of the Charge may be deemed true.⁶ Surprisingly, defaults in disciplinary cases are not uncommon.

After an Answer is filed, if the issues are not resolved or the facts adequately clarified in the Answer, inquiry will be made as to whether the attorney wishes to resolve the Charge through a negotiated disposition. When the attorney is not interested in that option, or the negotiations are not successful, a Trial Commissioner will be appointed. Trial Commissioners are appointed by the Supreme Court and preside over the evidentiary hearing. These proceedings are civil in nature with the attorney being afforded significant due process.⁷ After the hearing and any post hearing memoranda filed by the parties, the Trial Commissioner issues a Report setting forth findings of fact, conclusions of law and a recommendation regarding a sanction if a violation is found. If neither party files an appeal from the Trial Commissioner's Report, the matter goes directly to the Supreme Court for final disposition.

Either side may appeal the Trial Commissioner's Report to the Board of Governors. Appeals to the Board of Governors typically present factual and/or legal issues the appealing party believes arise from the Trial Commissioner's Report. The Board may review the record *de novo* or issue a report accepting the Trial Commissioner's Report.⁸ In some cases, an appeal to the Board is

presented as a "law only" case. A party may request oral argument before the Board. The Board will also issue a Report and Recommendation. Absent a notice of review to the Supreme Court by a party presenting specific issues, the Court will automatically review the record and issue a final decision.

Disciplinary matters are not final until reviewed by the Supreme Court. The Court may elect to adopt the recommendation of the Trial Commissioner or the Board, or may review the matter *de novo*. Decisions by the Supreme Court in disciplinary cases resulting in a public sanction are published in the Southwest Reporter. On occasion, the Court will publish an Unnamed Attorney opinion where a non-public sanction was imposed. The objective is to inform the membership of the bar that certain acts violate of the rules. Except for the attorney involved, whose identity is redacted, an Unnamed Attorney opinion is essentially an advisory opinion from the Court on an issue that is likely to recur. Unnamed Attorney opinions often clarify the rules and the commentary to enable practitioners to appropriately address the issue.

Disciplinary Statistics and Discussion

The most current fiscal year disciplinary statistics are available on the KBA website under the Ethics heading and are attached as an appendix. For the previous several years, the OBC has annually received more than a thousand complaints on lawyers admitted in Kentucky. As part of the intake process, an effort is made to determine the ethics issues that appear to be presented in any complaint that is not dismissed for failure to present a colorable ethics issue. The most common issues presented are invariably Diligence (SCR 3.130-1.3), Communication (SCR 3.130-1.4) and matters related to Client Property and Termination of Representation, to include return of the client file and unearned fees (SCR 3.130-1.15 and SCR 3.130-1.16(d)). These Rules are discussed below in the context of representation by criminal defense lawyers to

⁶ SCR 3.370(5)(b).

⁷ See SCR 3.300.

⁸ See SCR 3.370(5)(a).

the extent that the issue has not been addressed above.

SCR 3.130-1.3 provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.” The key word is obviously “reasonable”. What may be reasonable in one case may be problematic in another. Of course, the prosecution has the task of going forward with the case, but the defense has responsibilities as well.

Clients need to be aware that certain steps in the process are largely beyond the defense attorney’s control, such as the scheduling and completion of a competency examination. Ensuring that the client is aware of the steps in this process can minimize client frustration that the lawyer is not pursuing the matter with due diligence. Similarly, the timing of various motions may well depend on steps taken by the prosecution, some of which may eliminate the need for a particular motion. While explaining the subtleties of the process may be time consuming, keeping the client apprised of such details can go a long way to minimizing the anxiety that arises from believing that nothing is happening because the defense attorney is not doing his or her job.

The critical steps in the process from a criminal charge being filed through the trial could be outlined on a single-page form and explained to the client. Reference to the process steps allows the client to observe movement toward the trial and the actions that would normally be taken at each step. If a particular matter does not require certain steps, that fact presents another opportunity for discussion. While this may seem tedious to the experienced criminal defense attorney, it must be kept in mind that the client typically has no such in-depth experience.

SCR 3.130-1.4(a) provides that:

“A lawyer shall:

- 1) *promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;*

- 2) *reasonably consult with the client about the means by which the client's objectives are to be accomplished;*
- 3) *keep the client reasonably informed about the status of the matter;*
- 4) *promptly comply with reasonable requests for information; and*
- 5) *consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”*

SCR 3.130-1.4 (b) provides: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

It is worth noting that the word “reasonable” in one form or another appears in this rule four times. The obligation is reality-based and is subject to the dynamics of the situation presented. Earlier discussion of communication issues with criminal defense clients covers each of these obligations to some degree.

Compliance with subsection 3 can do much to address the other provisions. When the client knows what is going on at any given time and what you are doing to prepare the case since the last discussion, the need for contacting you to ask basic questions will be decreased. Letting the client know that at certain points the next action must come from the prosecution is clearly beneficial to the client and minimizes anxiety as to why you are not moving the matter forward at that point. This is especially true when you have already discussed with the client the planned response to what you anticipate the prosecution is contemplating. If you are generally aware of and have explained the options available, the client will observe that you have thought the matter through and have “a plan” to deal with the situation. When something unexpected happens, you can explain how that changes nothing or requires a re-evaluation of the strategy of the case.

Subsection 4 is often raised in complaints filed against criminal defense lawyers in the context of unreturned telephone calls. Even when the client knows you are not readily available to take calls, several unanswered calls may result in a complaint on this issue alone. For this reason it is important to let clients know that repeated calls in a short time period may not be productive. The obligation is another reason that client contacts or contact efforts should be logged.

A related matter concerns client family members, who may be well-intended when they ask specific questions about the case. Letting the client know that you are hesitant to discuss details of the case with family members for a variety of reasons is also worthwhile as complaints arising from such situations are not without precedent. There are many good reasons to refrain from discussion of case details with the client's family members. The most obvious reason is that they are not within the coverage of SCR 3.130-1.6. Even when a family member is a potential defense witness, it is advisable to exercise caution in disclosing too much information without specific, written client consent. You cannot control who the family member talks to about any information you may have provided.

SCR 3.130-1.16(d) provides, in pertinent part:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

Criminal defense representation seldom involves hourly billing, but is commonly conducted on some type of fixed fee plus costs basis. "Flat fee" arrangements or "non-refundable retainers" are not uncommon. If the client terminates the representation before the contemplated services

are completed, unearned fee issues may arise. It is not difficult to prevent such circumstances from presenting serious issues in a client complaint.

SCR 3.130-1.5 deals with fees and provides a nonexclusive list of eight factors for assessing whether a fee is "reasonable." There are specific sections of Rule 1.5 that prohibit or allow certain fee arrangements. For example, section (d)(2) prohibits "a contingent fee for representing a criminal defendant." Section (f) allows that a "fee may be designated as a non-refundable retainer," but imposes the requirement that such an agreement be "in a writing signed by the client evidencing the client's informed consent, and shall state the dollar amount of the retainer, its application to the scope of the representation and the time frame in which the agreement will exist." Section (f) essentially codifies KBA Formal Ethics Opinion E-380, which was issued in June 1995.

It is critical to appreciate that a non-refundable retainer is not necessarily non-refundable. A properly executed non-refundable fee agreement does allow the attorney to deposit the funds in an operating account, as opposed to an escrow account.⁹ However, Comment 11 to Rule 1.5 provides that: "The amount of a non-refundable retainer fee must be reasonable in amount and comply with Rule 1.5." What this means in reality is that it is wise to track your time in criminal defense work even though you have executed a Rule compliant non-refundable retainer agreement. If the client terminates your representation for any reason before the contemplated services are provided, your time records would allow you to demonstrate what was actually earned by the date of termination: i.e. what part of the fee paid is reasonable. Simply asserting that the fee was non-refundable

⁹ Comment 10 to Rule 1.5 provides: "If a lawyer collects an advance deposit on a fee or for expenses, or a flat fee for services to be performed, the lawyer must deposit the funds in the lawyer's trust account until the fee is earned or the expense incurred, at which time the funds shall be promptly distributed. In the event the full amount that is held is not ultimately earned, or due to other factors, such a termination of the attorney-client relationship, is not reasonable, the funds must be returned to the client as provided in Rule 1.16(d)."

is insufficient when the contemplated services are not completed. E-380 recognized this reality nearly twenty years ago.

When a flat fee or non-refundable retainer agreement is employed in criminal defense work, it should clearly state how far in the case the lawyer will continue for the stated amount. There should be no doubt in the client's mind as to whether the attorney will be going forward with an appeal in the event of a conviction. Although not required for these "fixed fee" arrangements, it is worth considering inclusion of information on the lawyer's hourly rate. Finally, while only certain fee agreements are specifically *required* to be in writing, it is better practice for *all* fee agreements to be in writing and signed by the parties.

As public defenders are not concerned with fees from clients, the 1.16(d) issue typically relates to the file.¹⁰ When there is a conviction, the file is invariably necessary for any sort of appeal. While it is clear the client is entitled to the file, the issue arises with some degree of frequency. The reason for this is not because criminal defense lawyers are unaware of the obligation or fail to comply. The problem often arises in the context of the lawyer being unable to document that the file was provided, or when the client loses the file while in custody at correctional facilities.

Whether the lawyer personally delivers the file to the client, or the task is accomplished by someone else in the office, it should be a routine matter for the client to sign and date a receipt for the file materials. This document should go in the attorney's copy of the file.

However, in many cases, there may be no opportunity for face-to-face delivery. This situation arises when the client is sentenced to confinement and leaves the courtroom in

custody for delivery to a correctional facility that may be hours away from the attorney. While file delivery and documentation thus become more awkward, the goal is not insurmountable.

The level of custody assessment may take a period of time, which means the client may be at a particular facility for a few weeks or longer, and then be relocated. There is no guarantee that papers given to the client in the courtroom will stay with the client to the ultimate destination. Unless the destination is known with certainty, it may be more practical to inform the client that the file will be provided once the client reaches that destination. Service by mail at the facility with a contemporaneous letter to the client indicating the mail receipt number for the file provides the lawyer with ample documentation to demonstrate when and how the file was provided.

It is a matter of simple reality that not all correctional institutions have the same facilities available for inmates to review their file materials. While some facilities may have the capability for computer access by inmates, others will not. Even though the facility has such access, your client may not for a variety of reasons beyond your control. When it is known that such access is available to your client, a scanned file copy may be the more appropriate and economically practical avenue.

If the trial attorney has ready access to electronic storage capability, that option is certainly worth considering. Case documents can be saved in PDF format on a single disc or thumb drive by category directories, enabling prompt access to items of interest. Storage of discs or thumb drives is more economical than storage of paper files. Also, if a subsequent copy is desired, the task can be accomplished in seconds as opposed to hours, and at a nominal cost.

The trial attorney is not ethically obligated to provide multiple copies of the file to the client at their own expense. Depending on the logistics that could be required, it may be more practical to wait until the client has relocated to a more permanent facility before providing the client

¹⁰ Discussing the discovery obtained from the prosecution in detail does not mean that the materials should be left with an incarcerated client. Not only can they disappear through no fault of the client, but they can fall into the hands of others if the client is relocated to another facility. It may require multiple sessions with the client to cover the discovery adequately, but it is absolutely necessary that it be accomplished.

copy. If that approach is used, a forwarding letter should accompany the file detailing the contents by category. Attorneys who follow these practices will not need to devote significant time to responding to a complaint from a former client requesting the file as the attorney's contemporaneous documentation reflects what has already happened.

more effective preparation, and ultimately the best possible outcome.

Realizing that they are going to be located to a distant facility, a client may request that their copy of the file be provided to a relative. Here again, documentation is important. Not only should the client sign a document setting forth such a request, but the document should reference that the client has been advised of the confidentiality issues in providing the case file to someone outside the scope of SCR 3.130-1.6. If a separate mailing to the desired party is required, the cover letter should be modified accordingly.

Requests for the file sometimes arise years after conclusion of the trial representation. Until all appeals are resolved, the trial attorney should maintain their copy of the file intact. An appellate court is unlikely to be enthusiastic about accepting trial counsel's recollection of events from several years prior without contemporaneous documentation.

Conclusion

Criminal defense lawyers serve a critical function in the American criminal justice system. They serve to enhance the overall accuracy and fairness of the process through the competent representation of their clients. While all criminal defense lawyers are subject to the same ethics responsibilities as any other lawyer licensed in Kentucky, they face unique challenges. It is truly not the type of work suited to the light-hearted.

A focus on managing client expectations from the inception of the attorney-client relationship not only facilitates broader system objectives, but also permits the most effective use of time with clients. Keeping the client well informed of the specifics of the case permits

**Supreme Court of Kentucky / Kentucky Bar Association
Disciplinary Statistical Comparison
Total for Prior Fiscal Years Compared to Total of FY 2011-2012**

<i>FY</i> <i>03-04</i>	<i>FY</i> <i>04-05</i>	<i>FY</i> <i>05-06</i>	<i>FY</i> <i>06-07</i>	<i>FY</i> <i>07-08</i>	<i>FY</i> <i>08-09</i>	<i>FY</i> <i>09-10</i>	<i>FY</i> <i>10-11</i>	<i>FY</i> <i>11-12</i>
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I. Disciplinary Intake Statistics

A. Complaints received by KBA and reviewed by Bar Counsel, pursuant to SCR 3.160	953	1,001	1,305	1,297	1,285	1,199	1,223	1,075	1,160
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B. Disciplinary cases initiated by Inquiry Commission, based upon information presented by Bar Counsel, pursuant to SCR 3.160(2)

Complaints authorized*	39	57*	53	26	60	74	69	64	54
Investigations authorized	62	92	65	46	60	61	69	62	51

NUMBER OF COMPLAINTS RECEIVED AND INVESTIGATIONS OPENED AT END OF EACH PERIOD

1,054	1,150	1,423	1,369	1,405	1,334	1,361	1,201	1,265
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* Certain of these Complaints arose from Investigative Files

**Supreme Court of Kentucky / Kentucky Bar Association
Disciplinary Statistical Comparison
Total for Prior Fiscal Years Compared to Total of FY 2011-2012**

II. Disciplinary Disposition Statistics

	<i>FY 03-04</i>	<i>FY 04-05</i>	<i>FY 05-06</i>	<i>FY 06-07</i>	<i>FY 07-08</i>	<i>FY 08-09</i>	<i>FY 09-10</i>	<i>FY 10-11</i>	<i>FY 11-12</i>
A. Complaints returned as insufficient, pursuant to SCR 3.160	~	~	372	376	396	346	252	140	234
B. Closures by OBC through diversion or informal resolution under SCR 3.160(3)(C) or which were declined under SCR 3.160(3)(E).^	262	348	326	309	443	694	779	632	668
C. Complaints dismissed by Chair of Inquiry Commission after referral to CAP, pursuant to SCR 3.160(3), and April 1, 2007 to June 30, 2008 dismissals by OBC with authorization by IC (client assistance diversion). *	69	27	77	157	95	*	*	*	*
D. Complaints dismissed by Inquiry Commission, pursuant to SCR 3.170, including conditional dismissals and warning letters. Also includes closed Investigative files as well as those closed due to death or disbarment in other cases. †	354	443	388	361	288	181	149	228	286
E. Private Admonitions authorized by Inquiry Commission, pursuant to SCR 3.185, including conditional Private Admonitions.	40	67	45	49	43	25	52	31	45
F. Supreme Court Renditions (disbarment, suspension, reprimand, and dismissed)	33	44	57	64	136	101	74	84	101
NUMBER OF DISCIPLINARY FILES CLOSED AT END OF EACH PERIOD	758	929	1,265	1,316	1,401	1,347	1,306	1,115	1,334

† Years prior to 2010-2011 did not include the closed Investigative files, nor those closed due to death or disbarment.

~ OBC began tracking Complaints returned as insufficient during the FY 2005-2006.

^ Years prior to 06-07 represent cases dismissed by the Chair without investigation. In 07-08, a few complaints were still under that category.

* Prior to April 1, 2007 separate statistics were kept for CAP referral by the Chair which were then dismissed. Initially after the diversion rule was passed, OBC continued to separate these numbers. Starting Fiscal Year 08-09, no items appear in this category.

**PERCENTAGE OF LAWYERS IN KENTUCKY WITH DISCIPLINARY CASES AGAINST THEM
FY04-05 to FY11-12**

Complaints Filed Against Lawyers Licensed to Practice in Kentucky

	05-06	06-07	07-08	08-09	09-10	10-11	11-12 [^]
Lawyers Licensed in the State of Kentucky*	14960	15316	15581	15947	16330	16712	17150
Lawyers With Complaints Filed This Year	684	695	683	677	751	736	709
Lawyers Without Complaints Filed This Year	14276	14621	14898	15271	15579	15976	16441
% of KY Lawyers With Complaints Filed This Year	4.57%	4.54%	4.38%	4.25%	4.60%	4.40%	4.13%

Charges Against Lawyers Licensed to Practice in Kentucky

	05-06	06-07	07-08	08-09	09-10	10-11	11-12 [^]
Lawyers Licensed in the State of Kentucky*	14960	15316	15581	15947	16330	16712	17150
Lawyers With Charges Pending	114	87	105	83	102	88	82
Lawyers Without Charges Pending	14846	15229	15476	15864	16228	16624	17068
% of KY Lawyers With Charges Pending	0.76%	0.57%	0.67%	0.52%	0.62%	0.53%	0.48%
% of Lawyers With Charges Pending Who Have Multiple Charges Pending	31.16%	35.89%	37.14%	36.14%	32.35%	41.00%	41.46%
Mean Number of Charges Per Lawyer Who Have Multiple Charges Pending	4.08	4.42	3.67	3.97	3.55	3.25	3.65

* Since the number of lawyers registered to practice in Kentucky changes on an almost daily basis, this number is an average.

[^] Approximately 4,256 lawyers included in this figure are licensed to practice in the state of Kentucky, but do not live here.

Initial Intake Rule Violations Recorded in Disciplinary Files As Opened

RULE	VIOLATION	05-06	06-07	07-08	08-09	09-10	10-11	11-12
Rule 1.1	Competence	56	46	77	77	117	67	74
Rule 1.3	Diligence	245	212	304	269	331	316	287
Rule 1.4	Communications	222	168	293	262	349	332	272
Rule 1.5	Fees	69	64	85	80	119	178	119
Rule 1.6	Confidentiality of information	15	14	13	9	15	17	24
Rule 1.7-1.9	Conflict of Interest	57	67	78	68	69	86	70
Rule 1.15	Client Property	112	158	140	180	202	244	226
Rule 1.16	Termination	84	64	75	69	81	48	35
Rule 3.1	Meritorious Claims	1	4	11	7	8	18	5
Rule 3.3	Candor	10	22	22	31	32	57	36
Rule 3.4	Fairness to Opposing Party	10	23	52	39	50	65	41
Rule 4.1	Truthfulness	19	9	21	30	40	21	23
Rule 4.2	Communications with Represented Persons	8	4	5	6	9	12	12
Rule 4.3	Dealing with Unrepresented Persons	0	5	2	0	0	1	1
Rule 4.4	Respect for Right of 3rd Person	19	10	23	23	39	25	20
Rule 5.3	Responsibility of Non-Lawyer Assistant	3	0	1	0	6	5	7
Rule 5.5	Unauthorized Practice	7	5	7	11	23	26	10
Rule 8.1	Candor in Discipline Process	1	1	0	0	0	1	2
Rule 8.4(b)*	Criminal Conduct	29	14	11	4	32	34	29
Rule 8.4(c)*	Dishonest Conduct	139	62	91	33	74	56	51
Other		36	20	72	142	161	163	148

*Effective July 15, 2009, SCR 3.130 8.3(b) and 8.3(c) were renumbered SCR 3.130 8.4(b) and 8.4(c) without substantive changes.

The alleged Rule Violation with the greatest frequency is highlighted in red.
The next four most frequent alleged Rule Violations are highlighted in gold.

Private Admonition Rule Violations in Disciplinary Files as Determined by the Inquiry Commission

RULE	VIOLATION	05-06	06-07	07-08	08-09	09-10	10-11	11-12
Rule 1.1	Competence	2	3	2	1	3	1	5
Rule 1.3	Diligence	14	13	12	7	11	7	13
Rule 1.4	Communications	11	12	10	8	22	8	25
Rule 1.5	Fees	2	1	6	0	7	3	5
Rule 1.6	Confidentiality of information	0	1	1	0	0	0	0
Rule 1.7-1.9	Conflict of Interest	5	3	4	5	5	4	6
Rule 1.15	Client Property	7	11	3	5	4	2	5
Rule 1.16	Termination	11	9	7	1	9	5	9
Rule 3.1	Meritorious Claims	0	0	0	0	1	0	0
Rule 3.3	Candor	0	0	0	0	0	1	0
Rule 3.4	Fairness to Opposing Party	3	1	6	1	8	4	2
Rule 4.1	Truthfulness	0	0	0	0	1	0	0
Rule 4.2	Communications with Represented Persons	1	1	0	0	0	0	3
Rule 4.3	Dealing with Unrepresented Persons	0	0	0	0	0	0	0
Rule 4.4	Respect for Right of 3rd Person	2	2	0	0	2	0	0
Rule 5.3	Responsibility of Non-Lawyer Assistant	1	1	3	0	0	2	1
Rule 5.5	Unauthorized Practice	0	1	0	0	6	6	4
Rule 8.1	Candor in Discipline Process	10	4	8	1	3	6	2
Rule 8.4(b)*	Criminal Conduct	1	0	1	0	1	1	1
Rule 8.4(c)*	Dishonest Conduct	2	0	0	5	3	0	3
Other		5	4	16	7	5	1	15

*Effective July 15, 2009, SCR 3.130 8.3(b) and 8.3(c) were renumbered SCR 3.130 8.4(b) and 8.4(c) without substantive changes

The specified Rule Violation with the greatest frequency is highlighted in red.
The next five most frequent specified Rule Violations are highlighted in gold.

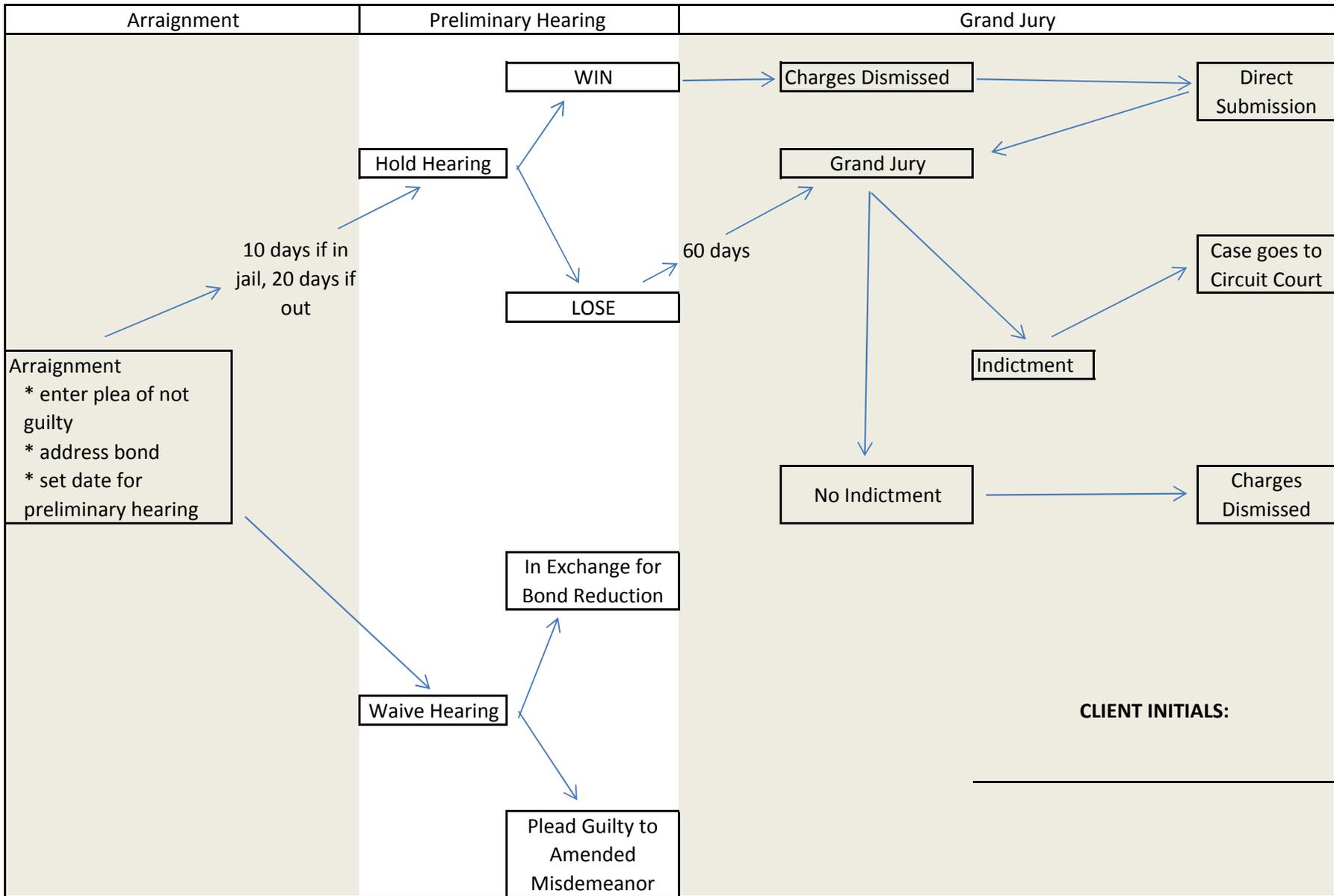
Disposition Rule Violations in Disciplinary Files as Determined by the Supreme Court

RULE	VIOLATION	05-06	06-07	07-08	08-09	09-10	10-11	11-12
Rule 1.1	Competence	10	3	5	6	4	3	6
Rule 1.3	Diligence	28	19	27	25	18	19	23
Rule 1.4	Communications	28	26	28	31	19	22	37
Rule 1.5	Fees	6	3	9	10	13	6	8
Rule 1.6	Confidentiality of information	0	0	0	0	0	0	0
Rule 1.7-1.9	Conflict of Interest	4	1	3	12	7	8	8
Rule 1.15	Client Property	14	6	17	15	11	15	14
Rule 1.16	Termination	16	12	25	20	15	16	22
Rule 3.1	Meritorious Claims	0	1	0	1	1	0	0
Rule 3.3	Candor	6	3	5	3	2	11	7
Rule 3.4	Fairness to Opposing Party	10	6	16	15	15	12	17
Rule 4.1	Truthfulness	1	2	1	1	1	0	1
Rule 4.2	Communications with Represented Persons	0	0	0	0	2	0	0
Rule 4.3	Dealing with Unrepresented Persons	0	0	0	0	0	0	0
Rule 4.4	Respect for Right of 3rd Person	2	2	3	2	1	1	1
Rule 5.3	Responsibility of Non-Lawyer Assistant	1	2	0	6	4	0	2
Rule 5.5	Unauthorized Practice	4	2	6	6	4	10	11
Rule 8.1	Candor in Discipline Process	17	13	21	25	14	21	25
Rule 8.4(b)*	Criminal Conduct	8	5	11	8	4	8	15
Rule 8.4(c)*	Dishonest Conduct	14	19	17	13	20	15	25
Other		20	17	14	17	25	8	13

*Effective July 15, 2009, SCR 3.130 8.3(b) and 8.3(c) were renumbered SCR 3.130 8.4(b) and 8.4(c) without substantive changes

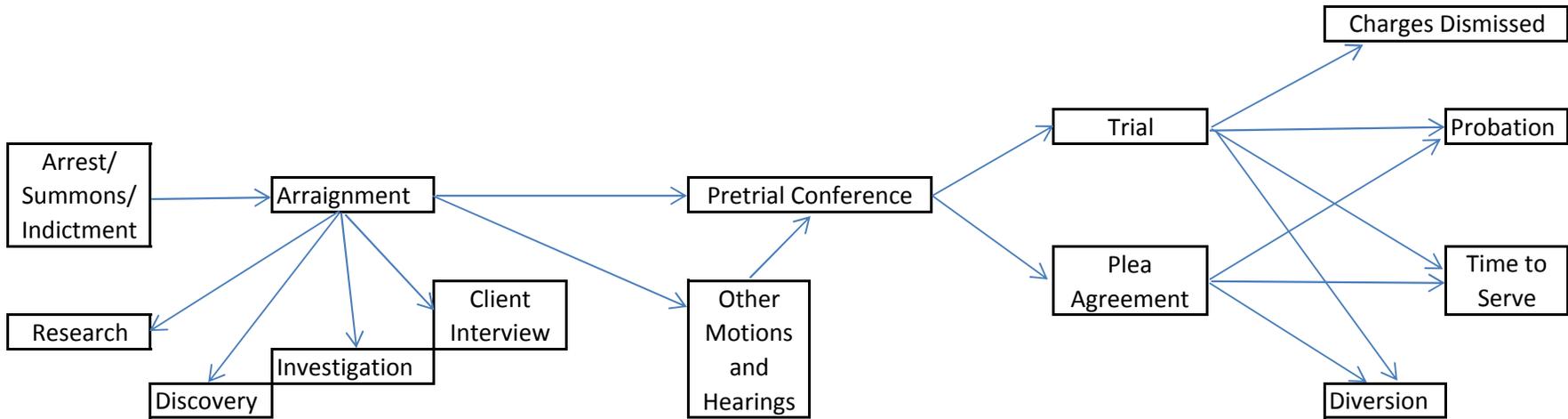
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FELONY CASES IN DISTRICT COURT



(Created by the Department of Public Advocacy)

USUAL TRIAL COURT PROCEDURE (Misdemeanors in District Court, Felonies in Circuit Court)



CLIENT INITIALS:

(Created by the Department of Public Advocacy)