

Lawyer Discipline – And 20 Tips On How to Avoid It

J. Scott Rhodes

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www.jsslaw.com

Presenter

J. Scott Rhodes

General Counsel

Chair, Professional Licensure & Discipline Practice Group

Jennings, Strouss & Salmon, PLC

Phoenix, AZ

P: 602.262.5862

E: srhodes@jsslaw.com

www.jsslaw.com

Brief overview of Arizona's lawyer regulation system

Jurisdiction: The Arizona Supreme Court has jurisdiction over the practice of law in Arizona. Rule 31(a)(1), Ariz.R.Sup.Ct.. Accordingly, rules applicable to the regulation of the practice, including the Arizona Rules of Professional Conduct (the "Ethical Rules" or "ER ____") are found in the Arizona Rules of the Supreme Court. The Ethical Rules are codified at Rule 42, Ariz.R.Sup.Ct.. (*See also* ER 8.5(a).)

Brief overview of Arizona's lawyer regulation system

Precedent and Authority: Case law related to lawyer regulation consists of published Arizona Supreme Court cases, decisions of the Disciplinary Commission of the Arizona Supreme Court (which acts as the equivalent of a court of appeals for lawyer discipline cases), and reports of Hearing Officers (who are the equivalent of administrative law judges for lawyer discipline cases).

Brief overview of Arizona's lawyer regulation system

Other relevant sources of authority include:

- American Bar Association's STANDARDS FOR IMPOSING LAWYER SANCTIONS (1992);
- Arizona Ethics Opinions;
- ABA Ethics Opinions;
- Ethics opinions and case law of other jurisdictions;
- various treatises.

Rules that govern lawyer conduct

- Oath of Admission (see Rule 31, Ariz.R.Sup.Ct., Notes to 2002 Amendments);
- Lawyer's Creed of Professionalism (see *id.*);
- Rule 41, Ariz.R.Sup.Ct.: Duties and Obligations of Members
- Ethical Rules (Rule 42, Ariz.R.Sup.Ct.);
- Rules 43-44, Ariz.R.Sup.Ct.: Trust Accounts;
- Rule 45, Ariz.R.Sup.Ct.: Mandatory Continuing Legal Education

Role of the State Bar of Arizona

The State Bar has disciplinary jurisdiction, pursuant to Rule 46(a), Ariz.R.Sup.Ct.

Rules 47-59 govern the procedure for discipline cases.

Rule 60 establishes the various possible sanctions.

Duty to cooperate

- Lawyers are required to cooperate with the State Bar in lawyer discipline proceedings; indeed, failure to cooperate is a ground for discipline.

Duty to cooperate (cont.)

- Rule 53(d), Ariz.R.Sup.Ct.. In connection with any “bar admission application” or “a disciplinary matter,” ER 8.1 is a prohibition against “knowingly making a false statement of material fact” or “fail[ing] to disclose a fact necessary to correct a misapprehension known by the [lawyer] to have arisen,” or “knowingly fail[ing] to respond to a lawful demand for information from an admissions or disciplinary authority”.

Duty to cooperate (cont.)

[NOTE: This requirement is limited somewhat by ER 1.6 (confidentiality). However, there is not an absolute limitation. Lawyers facing State Bar investigations whose responses might contain client confidences are well-advised to seek the advice of counsel before making their disclosures.]

Who gets disciplined?

- Lawyers who practice in the area of Criminal Law (23%) and Family Law (22%) receive the most complaints. (2007 statistics.)

Who complains most often?

- Clients are the most common source of complaints (56%), followed by opposing clients (10%). (2007 statistics.)

What are the most common complaints?

- The most common allegations against lawyers relate to communication (13.05%), diligence (12.96%), and lack of compliance with client directions (12%).
(2007 statistics.)

What to do if you receive a Bar complaint

- Take it seriously;
- Control your emotions;
- Consider seeking counsel from someone with experience;
- Collect and organize all relevant documents;
- Begin working on your response;
- Be timely with your response;
- Be honest and complete in your response, but don't "fall on your sword" unless you have to.



Twenty Tips For Avoiding Lawyer Discipline

1. Communicate promptly and professionally

- ER 1.4. Communication:
 - (a) 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 ER 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

1. Communicate promptly and professionally (cont.)

- > (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
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation
- (c) In a criminal case, a lawyer shall promptly inform a client of all proffered plea agreements

2. Have a firm communication policy and stick with it

- It is not enough just to **have** a communication policy, you need to **practice** it. This includes training (and re-training staff). The policy should cover not only the frequency and mode of communication, but also the quality and tone of communications.

2. Have a firm communication policy and stick with it (cont.)

Possible topics to cover:

- Time and manner for staff to transmit phone messages to attorneys
- Response time for attorneys to return calls
- Documentation of telephone calls
- “Script” for answering the phone
- E-mail protocols, including expectations of professional language, tone and grammar
- Cover letters for “routine” correspondence to clients
- In-firm communications -- expectation of courtesy and respect for all employees
- How to deal with “difficult” people

3. Be careful how you use websites and e-mails

- Review ERs 7.1, 7.2 and 7.3 related to lawyer advertising. In addition, consider the following issues/suggestions:
 - Do not overstate your qualifications in your website
 - Do not promise results
 - Give only verifiable facts
 - Be careful how you describe your fee structure.
 - You cannot use a trade name for your firm, which includes not using one on your website. (Arizona Ethics Op. 97-04.)

3. Be careful how you use websites and e-mails (cont.)

- Your domain name does not have to be the same as your firm name, but it cannot be misleading. You cannot use “.org” if the firm is for-profit. (Ariz. Ethics Op. 01-05.)
- On-line intake forms are risky unless a conflicts check is performed BEFORE the potential client fills it out.
- If there is an invitation to “Contact Us” by email on the website, add a disclaimer that a potential client should not relate any confidential information in such an email but should only request general information as to the firm’s services. (Ariz. Ethics Op. 02-04.)

3. Be careful how you use websites and e-mails (cont.)

- Do not send emails to potential clients who you know are in need of legal services unless you comply with ER 7.3.
- Avoid answering specific questions in “chat rooms,” “news groups,” blogs, etc.
- Consider adding a confidentiality disclosure to all your emails.
- Advise your clients not to forward privileged emails to third parties without first consulting with you.

3. Be careful how you use websites and e-mails (cont.)

- Consider adding “Attorney-Client Privileged Communication” (or “Privileged”) to the subject line of your privileged communications.
- There is no duty of confidentiality to individuals who send you UNSOLICITED emails. (Ariz. Ethics Op. 02-04.)

4. Confidentiality - periodically remind your staff

- When hiring new staff, conduct ethics training related *at the least* to confidentiality, conflicts checks, and court docketing.
- Periodically, remind staff about the importance of keeping client confidences.
- Discuss ways in which client confidences can accidentally be disclosed, such as: emails forwarded (or copied) to third parties; “elevator talk”; discussions near the firm waiting room or lobby; cell phone conversations in public places; social events.

5. Non-engagement and closure letters

- Whenever, for whatever reason, you do not enter into a formal attorney-client relationship with a potential client, *always* send a letter or email confirming that you do not represent the client. If appropriate, inform the client of the applicable statute of limitations.
- When a matter ends for a client, send a letter confirming it. Do this even if you expect (or hope) to receive more work. In that case, your letter should confirm that the *matter* (not the representation) is concluded.

5. Non-engagement and closure letters (cont.)

- Checklist for closing out a matter or client representation:
 - Promptly return any unearned fees;
 - Promptly return any original documents or other items;
 - If you want to apply unused advanced fees to another matter for the same client, request your client's authority to do so;

5. Non-engagement and closure letters (cont.)

- If appropriate, give the client an accounting (*e.g.*, if the case has settled and settlement proceeds have been received);
- If any settlement funds are being retained in trust due to outstanding third-party liens, include that information on the accounting and discuss your plan for resolving the liens;
- If you have reduced your fees, say so in the letter!

5. Non-engagement and closure letters (cont.)

- If there is a dispute between you and the client regarding fees, describe the dispute as you understand it and how you are handling it. **Remember:** you must hold disputed funds in your trust account and disburse undisputed funds. Suggest a resolution of the dispute, as opposed to threatening litigation. Suggest the possibility of State Bar fee arbitration.
- Remind the client of your file destruction policy.
- End the relationship on a positive note.

6. Specify scope of representation and explain the process

- ER 1.5(b) provides: “The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.”

6. Specify scope of representation and explain the process(cont.)

- Lawyers often make one of two mistakes related to the scope of the representation:
 - (1) the scope is too general, thus exposing the lawyer to allegations that she did not perform a service that was within the scope (*e.g.*, “for your general business needs”);
 - or (2) the original scope is specifically stated, but the lawyer does not memorialize a later expansion of the scope. (cont.)

6. Specify scope of representation and explain the process(cont.)

- The danger with (1) is that a client will later claim that the lawyer was retained to perform a task that the lawyer never knew about or was competent to handle.

The danger with (2) is that the lawyer will be accused of performing services she was not retained to perform.

The best practice is to define the specific scope of the original task(s), then memorialize (by email or letter) any later changes to the scope.

6. Specify scope of representation and explain the process(cont.)

- Explain to clients what to expect, and then explain it again from time to time in the course of a representation. Only bill for doing this if the explanation is part of a strategic discussion with the client.

7. Laypersons do not understand diligence in legal matters. Explain it.

- Help the client to understand what is reasonable to expect of you *and what you are expecting of the client*. Explain those aspects of your services that are dictated by others, such as a court, so the client knows what is in your control and what is not, as well as the consequences of failing to be diligent.
- Also help staff to understand the importance of being diligent and careful.

8. If you're overwhelmed, do something. Ignorance is not bliss!

- All lawyers get overwhelmed. You are not alone when it happens.
- Be proactive. Ask for help. Admit your concern. **DO NOT MAKE UP FALSE EXCUSES.**
- Beware of signs that the stress is becoming too much to handle: self-medication (including drugs and alcohol); anger management issues; missing deadlines; health issues.
- **Get help! Call the State Bar's Member Assistance Program: 602-340-7334**

9. Know the rules on fees: contingent fees in general

- ER 1.5. Fees...
 - > (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. (cont.)

9. Know the rules on fees: contingent fees in general (cont.)

- The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

9. Know the rules on fees: contingent fees in general (cont.)

- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof;
 - (2) a contingent fee for representing a defendant in a criminal case; or

9. Know the rules on fees: contingent fees in general (cont.)

- (3) a fee denominated as "earned upon receipt," "nonrefundable" or in similar terms **unless** the client is simultaneously advised in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to paragraph (a).

10. Splitting fees with other lawyers requires special agreements

- Referral fees are always unethical in Arizona. (ER 7.2(b); Ariz. Ethics Op. 04-02.)
- It is permissible to divide fees among lawyers who are not in the same firm ONLY if:
 - Each lawyer receiving any portion of the fee assumes joint responsibility;
 - The client agrees *in a writing signed by the client* to the participation of all lawyers; and
 - The total fee is reasonable.

10. Splitting fees with other lawyers requires special agreements (cont.)

- “Joint responsibility” means that the lawyer “assumes financial responsibility for any malpractice that occurs during the course of the representation.” (Ariz. Ethics Op. 04-02.)

11. Fee agreements in general: use them and abide by them

- All fee agreements must be in writing and “communicated to the client ... before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.” (ER 1.5(b).)
- The State Bar web site has a sample fee agreement:
<http://www.myazbar.org/Members/Brochures/SampleFeeAgreement.cfm>

11. Fee Agreements in general: use them and abide by them (cont.)

- Know, and periodically review and revise, your fee agreement.
- Any staff (especially bookkeepers, etc.) should also know and understand your fee agreement.
- If you charge a “nonrefundable” or an “earned-upon-receipt fee,” your fee agreement must state that the client “may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based on the value of the representation.” (ER 1.5(d)(3).)

11. Fee Agreements in general: use them and abide by them (cont.)

- Consider including a document destruction policy in your fee agreement. (See Ariz. Ethics Op. 08-02.)
- Thinking of going “paperless”? If you do, discuss it in your fee agreement. (See Ariz. Ethics Op. 07-02.)

12. Trust account management - read the rule!!

- Random Trust Account audits will begin soon -- Are you ready?
- Read Rules 43-44, Ariz.R.Sup.Ct..
- Sources for guidance/assistance: **Law Office Management Assistance Program (602-340-7313); Trust Account Hotline (602-340-7305).**

13. More trust account tips

- NEVER FAIL TO PERFORM A 3-WAY RECONCILIATION (if you're not sure you're doing it right, get advice!!)
- No signatory authority for non-lawyers, or even lawyers who are not in a position of trust at the firm.
- Remember your trust account is a **fiduciary account**. The money in it does not belong to you and must be treated with the utmost care.
- Keep trust account records five years.
- Back up electronic records.

13. More trust account tips (cont.)

- **Be a stickler for details** -- your staff should have no doubt that you take your obligations very seriously.
- If in doubt about which account to use to deposit certain funds, or when to disburse from your trust account, don't guess. Ask someone with expertise.
- Delegation of duties does not equal delegation of ultimate responsibility. That will always belong to the lawyer.

14. Don't lie to the court or any one else

- ALL lawyers at some point will make a mistake. Admit it when it happens. Telling a lie to mask a mistake risks consequences that are far worse than the original mistake.
- Your duties to the Court trump all other duties, including duties to clients.

14. Don't lie to the court or any one else (cont.)

- A lie to a client is proof of a conflict of interest between your client's interests and your interests. If you cannot be truthful with your client, there are issues that you must address as a matter of your professional responsibility.
- No issue, problem, or concern is worth the detriment to your personal and professional integrity that telling a lie will cause.

15. Don't sue clients - either for yourself or for another client

- A lawsuit over fees often results in a malpractice counterclaim. Ask yourself how much is at stake and whether it is worth it.
- You can't sue one client on behalf of another. Even if you are asked to sue a former client, think about it carefully before you agree.

16. Have joint clients sign informed consents

- Joint representation fee agreements are very hard to “get right.”
- Each client must understand the benefits and detriments of the joint representation.
- Common benefits:
 - Economy of scale
 - Efficiency
 - “United front” or common strategy

16. Have joint clients sign informed consents (cont.)

- Common detriments:
 - If a conflict arises, all joint clients might have to seek new counsel
 - The cost of getting replacement counsel up to speed
 - Possible communication challenges
 - What to do if one of the clients stops cooperating or does not pay his/her share?
- Beware of the aggregate settlement rule and make sure you follow it. (ER 1.8(g).)

17. Do not dabble in practice areas outside of your expertise

- If you are tempted to expand your practice into a new area, have a safety net in the form of a mentor or a lawyer you can associate into your case.

18. Have a conflict checking system that everyone uses - all the time

- Re-train your staff on conflicts from time to time. You may be surprised how many questions they have, even the experienced ones.
- Maintain a non-threatening “open door policy” for conflicts questions. Your staff must be comfortable approaching you about these issues.
- Model the behavior.
- If a conflict develops or a mistake discovered, handle it right away. Do not compound the issue by denying it exists.

19. Have at least one backup to your calendar/tickler system

- One of the best backups is to have someone in the firm (secretary or paralegal) whose calendar “shadows” your calendar for significant deadlines. That person should have absolute freedom to ask you the status of pending matters and remind you about them.

20. Have integrity throughout life

Not just in Court (or in business transactions).

Questions & Answers

