

Managing Your Office To Stay Out Of Trouble

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By

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1. Why Plaintiff Attorneys Get in Trouble

- ⌞ Often find themselves so overworked that they miss deadlines or fail to communicate with clients.
- ⌞ Sometimes experience money worries and violate ethical rules by “borrowing” from the clients’ trust accounts.
- ⌞ Do not have enough support staff to manage correspondence or back them up when they are involved in a trial, become ill, or take a vacation.
- ⌞ Frequently, in contrast to large firm attorneys, do not cooperate with ODC investigations of alleged misconduct or have the resources to employ a defense attorney.
- ⌞ Often, even when they cooperate, do not have documentation to defend themselves against the allegations.

Report by The State Bar of California
2001

2. Is There Bias Against Plaintiff Attorneys?

- ⌞ The numbers and percentages of disciplinary prosecutions are commensurate with the numbers and percentages of investigations opened against solo practitioners and small firm practitioners, as compared to large firm attorneys.
- ⌞ It is the number of complaints filed against solo practitioners and small firm practitioners that is disproportionate to the general attorney population in the three sizes of law firms.
- ⌞ There is no institutional bias against solo practitioners and small firm attorneys.

Report by The State Bar of California
2001

3. Sample of Disciplinary Cases Prosecuted and Completed

<u>Law Firm Size</u>	<u>Number of Attorneys</u>	<u>Percentage of Total</u>
1	163	78.37%

2-10	40	19.23%
<u>11+</u>	<u>5</u>	<u>2.40%</u>
Total	208	100.00%

Report by The State Bar of California
2001

4. Sharing Legal Fees I

A division of fee between lawyers who are not in the same firm may be made only if:

- (1) The client agrees in writing to representation by all of the lawyers involved and is advised in writing as to the share of the fee that each lawyer will receive;
- (2) The total fee is reasonable; and
- (3) Each lawyer renders meaningful legal services for the client in the matter.

Rule 1.5(e)

5. Sharing Legal Fees II

The client must be ADVISED IN WRITING of the SHARE OF THE FEE that each lawyer will receive. The client does NOT have to approve or agree in writing to the fee division, and the information may be conveyed to the client at any time before the payment of the fee. For example, it can be contained in the settlement disbursement sheet.

Rule 1.5

6. Sharing Legal Fees III

Each lawyer must render "meaningful" legal services for the client in the matter to share in the fee. "Meaningful" probably means less than "substantial," but more than "case brokering" or a mere referral.

Rule 1.5

7. No Aggregate Settlement Without Each Client's Consent

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client, or a court approves a settlement in a certified class action. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Rule 1.8(g)

8. No Pre-Settlement Power of Attorney

A lawyer shall not solicit or obtain a power of attorney or mandate from a client which would authorize the attorney, without first obtaining the client's informed consent to settle, to enter into a binding settlement agreement on the client's behalf or to execute on behalf of the client any settlement or release documents. An attorney may obtain a client's authorization to endorse and negotiate an instrument given in settlement of the client's claim, but only after the client has approved the settlement.

Rule 1.8(k)

9. Distributing Funds Involving Third Persons

“(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property.”

Rule 1.15(d) (in pertinent part)

10. Problem Areas Involving Third Persons

- ⊣ Medicare Liens
- ⊣ Health insurance reimbursement or subrogation
- ⊣ Healthcare provider bill for services
- ⊣ See Kleinpeter & Schwartzberg website, www.kleinpeter-schwartzberg.com, under publications.

11. Distributing Funds In Which Someone Claims An Interest

“(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.”

Rule 1.15(e)

12. Lawyer Must Pay Litigation Costs

The Office of Disciplinary Counsel of the Louisiana Attorney Disciplinary Board takes the further position that a lawyer must pay costs associated with litigation, although not necessarily out of the proceeds of a settlement. Litigation costs include, for example, court reporter's fees, expert's fees, and filing fees.

Rule 1.15 Caveat
From Office of Disciplinary Counsel Letter

13. Termination

Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues related to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

Rule 1.16(d) (in pertinent part)

14. Candor Toward the Tribunal I

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. . . .

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter. . .

Rule 3.3 (in pertinent part)

15. Candor Toward the Tribunal II

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3 (in pertinent part)

16. Communication with Person Represented by Counsel I

In representing a client, a lawyer shall not communicate about the subject of the representation with:

(a) a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.2

17. Communication with Person Represented by Counsel II

(b) a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization and

(1) who supervises, directs or regularly consults with the organization's

lawyer concerning the matter;

(2) who has the authority to obligate the organization with respect to the matter; or

(3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Rule 4.2

18. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in a matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

New Rule 4.3

19. Respect for Rights of Third Persons

(b) A lawyer who receives a writing that, on its fact, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, shall refrain from examining the writing, promptly notify the sending lawyer, and return the writing.

Rule 4.4(b)

20. Internet Advertising I

Beware of services that "screen" clients or phone calls about a case. It may be the unauthorized practice of law.

A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Rule 5.5(b)

21. Internet Advertising II

Beware of services that assign you all cases in a venue or area code. This violates advertising rules.

A lawyer shall not give anything of value to a person for recommending the lawyer's services; provided, however, that

(b) A lawyer may pay usual, reasonable and customary charges of a lawyer referral service operated by the Louisiana State Bar Association, any local bar association, or any other not-for-profit organization, provided the lawyer referral service:

- (I) prohibits lawyers from increasing their fee to a client to compensate for the referral service charges; and
- (ii) refers all persons who request legal services to a participating lawyer;
- (iii) fairly and equitably distributes referral cases among the participating lawyers, within their area of practice, by random allotment or by rotation.

Rule 7.2(b)

22. No Blanket Or “Administrative” Fee May Be Charged Client

Charging an “administrative fee” is not provided for by the rules. An attorney may recover out-of-pocket expenses. These out-of-pocket expenses may include items such as postage and copying costs. These expenses, if deducted from the client’s portion of any recovery, should be itemized and included in any “case settlement sheet” reflecting the disbursement of funds. A blanket fee, however, is not permissible.

23. Responsibility of Partners, Managers, And Supervisory Lawyers I

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Rule 5.1 (a) and (b)

24. Responsibility of Partners, Managers, And Supervisory Lawyers II

- (c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if
 - (1) the lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.1(c)

25. Insurance Coverage For Disciplinary Proceedings

Lawyer malpractice policies typically provide for insurance coverage for disciplinary proceedings. For example, a standard policy provision is:

Although not Damages, the Company will pay, in addition to the applicable limit of liability:

Up to \$10,000.00 for any Insured and in the aggregate, for attorney fees and other reasonable costs, expenses or fees (the "Disciplinary Fees") resulting from a Disciplinary Proceeding incurred as the result of a notice of such Disciplinary Proceeding both first received by the Insured and reported to the Company during the policy period, arising out of an act or omission in the rendering of legal services by such insured. Except as set forth below, the amount payable hereunder shall not exceed \$10,000.00 despite the number of Insureds hereunder or the number of proceedings.

26. New Rules of Professional Conduct Effective April 1, 2006

(c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest and other charges, and the scope of limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e)

New Rule 1.4 (c)

(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. A copy or duplicate original of the executed agreement shall be given to the client at the time of execution of the agreement. The contingency fee agreement 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; the litigation and other expenses that are to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. 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.

New Rule 1.5 (c)

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except as follows.

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter, provided that the expenses were reasonably incurred. Court costs and expenses of litigation include, but are not necessarily limited to, filing fees; deposition costs; expert witness fees; transcript costs; witness fees; copy costs; photographic, electronic, or digital evidence production; investigation fees; related travel expenses; litigation related medical expenses; and any other case specific expenses directly related to the representation undertaken, including those set out in Rule 1.8(e)(3).

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(3) Overhead costs of a lawyer's practice which are those not incurred by the lawyer solely for the purposes of a particular representation, shall not be passed on to a client. Overhead costs include, but are not necessarily limited to, office rent, utility costs, charges for local telephone service, office supplies, fixed asset expenses, and ordinary secretarial and staff services.

With the informed consent of the client, the lawyer may charge as recoverable costs such items as computer legal research charges, long distance telephone expenses, postage charges, copying charges, mileage and outside courier service charges, incurred solely for the purposes of the representation undertaken for that client, provided they are charged at the lawyer's actual, invoiced costs for these expenses.

With client consent and where the lawyer's fee is based upon an hourly rate, a reasonable charge for paralegal services may be chargeable to the client. In all other instances, paralegal services shall be considered an overhead cost of the lawyer.

(4) In addition to costs of court and expenses of litigation, a lawyer may provide financial assistance to a client who is in necessitous circumstances, subject however to the following restrictions.

(i) Upon reasonable inquiry, the lawyer must determine that the client's necessitous circumstances, without minimal financial assistance, would adversely affect the client's ability to initiate and/or maintain the cause for which the lawyer's services were engaged.

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

(iv) Financial assistance under this rule may provide but shall not exceed that minimum sum necessary to meet the client's, the client's spouse's, and/or dependents' documented obligations for food, shelter, utilities, insurance, non-litigation related medical care and treatment, transportation expenses, education, or other documented expenses necessary for subsistence.

(5) Any financial assistance provided by a lawyer to a client, whether for court costs, expenses of litigation, or for necessitous circumstances, shall be subject to the following additional restrictions.

(i) Any financial assistance provided directly from the funds of the lawyer to a client shall not bear interest, fees or charges of any nature.

(ii) Financial assistance provided by a lawyer to a client may be made using a lawyer's line of credit or loans obtained from financial institutions in which the lawyer has no ownership, control and/or security interest; provided, however, that this prohibition shall not apply to publicly traded financial institutions where the lawyer's ownership control and/or security interest is less than 15%. Where the lawyer uses such loans to provide financial assistance to a client, the lawyer should make reasonable, good faith efforts to procure a favorable interest rate for the client.

(iii) Where the lawyer uses a line of credit or loans obtained from financial institutions to provide financial assistance to a client, the lawyer shall not pass on to the client interest charges, including any fees or other charges attendant to such loans, in an amount exceeding the actual charge by the third party lender, or ten percentage points above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding, whichever is less.

(iv) A lawyer providing a guarantee or security on a loan made in favor of a client may do so only to the extent that the interest charges, including fees or other charges attendant to such a loan, do not exceed ten percentage points (10%) above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding. Interest together with other charges attendant to such loans which exceeds this maximum may not be the subject of the lawyer's guarantee or security.

(v) The lawyer shall procure the client's written consent to the terms and conditions under which such financial assistance is made. Nothing in this rule shall require client consent in those matters in which a court has certified a class under applicable state or federal law; provided, however that the court must have accepted and exercised responsibility for making the determination that interest and fees are owed, and that the amount of interest and fees chargeable to the client is fair and reasonable considering the facts and circumstances presented.

(vi) In every instance where the client has been provided financial assistance by the lawyer, the full text of this rule shall be provided to the client at the time of execution of any settlement documents, approval of any disbursement sheet as provided for in Rule 1.5, or upon submission of a bill for the lawyer's services.

(vii) For purposes of Rule 1.8 (c), the term "financial institution" shall include a federally insured financial institution and any of its affiliates, bank, savings and loan, credit union, savings bank, loan or finance company, thrift, and any other business or person that, for a commercial purpose, loans or advances money to attorneys and/or the clients of attorneys for court costs, litigation expenses, or for necessitous circumstances.

New Rule 1.8

27. Highlight of New Rule 1.4(c)

A lawyer who provides any form of financial assistance . . . shall prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made . . .

28. Highlights of New Rule 1.5(c)

Contingent fee agreement considerations include:

- A writing signed by the client
- A copy or duplicate original furnished client at execution
- Contingency fee shall state method of calculation
- List the litigation and other expenses to be deducted
- Provide client with a written statement upon conclusion

29. Highlights of New Rule 1.8(e)

Court costs and expenses of litigation include:

- Filing fees
- Deposition costs
- Expert witness fees
- Transcript costs
- Witness fees
- Copy costs
- Photographic, electronic, or digital evidence productions
- Investigation fees
- Related travel expenses
- Litigation related medical expenses

With informed consent of the client the lawyer may charge:

- Computer legal research charges
- Long distance telephone
- Postage and copying
- Mileage and outside courier service
- Actual invoice costs incurred solely for the purposes of the representation

Paralegal services are overhead except if lawyer's fee is based upon an hourly rate.

Financial assistance, if made by a lawyer's line of credit, or financial institution loan requires:

- Good faith effort to procure favorable interest rate
- Can't be more than 10% over prime as of 1/15 of each new year
- Must pass on actual charges only
- Applies to a guarantee or a security on a loan
- Written consent of client to terms
- Full text of this rule shall be provided to the client at execution of settlement, disbursement, or submission of a bill