

March 15, 2013

Thomas Jefferson School of Law – Center for Solo Practitioners

# **AVOIDING THE STATE BAR DISCIPLINE SYSTEM**

# Overview in Numbers

**238,000 attorneys**  
(176,000 active)

**16,156 complaints**  
**2,766 reportable actions**

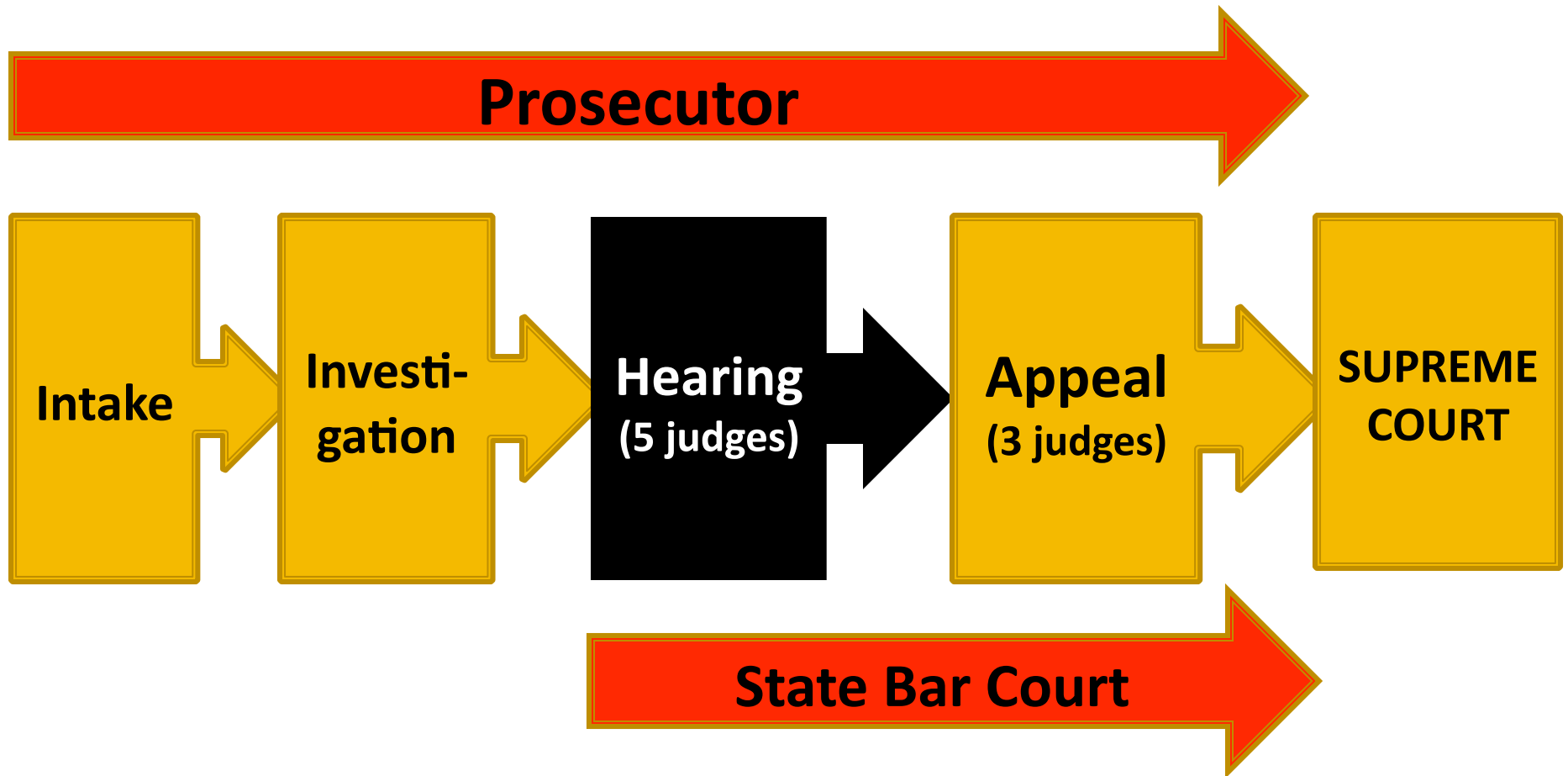
**5,530**  
**investigations**

**2,231**  
**filed**

# Sources of State Bar Cases

- **Clients**
- **Opposing Counsel**
- **Courts**
- **Law Enforcement Agencies**
- **Banks (NSF transactions in CTAs)**
- **Self-reporting**
- **State Bar Office of Probation**
- **State Bar Investigations**

# Life Cycle of a Complaint



# Discipline Litigation Timeline

<u>Day</u>	<u>Activity</u>
1	Case filed
25	Response due
40	Last day to serve discovery
65	Last day to respond to discovery
65-120	Settlement, pretrial conferences
125	Trial <b>Must</b> Begin
135	Case submitted
	(depending on length of trial)
225	Decision filed

# Disciplinary Outcomes

	2011
Disbarments	89
Suspensions (actual or stayed)	304
Public Reprovals	55
Private Reprovals	62
Agreements in Lieu of Disc.	34
Warning Letters	675

# Why Attorneys Get Into Trouble

- Ignorance
- Carelessness/Laziness
- Poor Delegation/Supervision
- Lack of Office Policies & Procedures
- Bad Judgment
- Procrastination
- Greed/Dishonesty
- Stress/Burn-Out
- Mental Health and/or Substance Abuse Issues  
(Estimated 40-60% of Misconduct is Related)
- State Bar Does Not Prosecute Mere Negligence

# Sources of Ethical Obligations

- **California Rules of Professional Conduct**
- **The State Bar Act**
  - Bus. & Prof. Code §§ 6000, et seq.
- **Case Law**
  - California Supreme Court Cases
  - State Bar Court Review Department Cases  
(Published in California State Bar Court Reporter)



# The Most Common Disciplinary Violations

- **Failure to Keep Client Advised of Significant Developments**
- **Failure to Respond to Status Inquiries from Client**

# Duty to Keep Client Informed

## **B&P Code § 6068(m)**

It is the duty of an attorney . . .

To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

## **Rule 3-500, Rules of Professional Conduct**

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

# The Most Common Disciplinary Violations

## ■ Failure to Act with Competence

### **Rule 3-110, Rules of Professional Conduct**

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) "Competence" shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of the legal services.

(C) If member does not have sufficient learning and skill, member may still perform competently by 1) associating with or professionally consulting another attorney reasonably believed to be competent, or 2) acquiring sufficient learning and skill before performance is required.

# The Most Common Disciplinary Violations

- **Mishandling Termination of the Client Relationship**
  - Failure to Return Client Files
  - Failure to Take Steps to Avoid Foreseeable Prejudice to Client
  - Failure to Refund Unearned Fees

# Attorney's Duties on Termination

## Rule 3-700, Rules of Professional Conduct

- (A)(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.
- (D) A member whose employment has terminated shall:
- (1) Subject to any protective order or nondisclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, depositions transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and
  - (2) Promptly refund any part of a fee paid in advance that has not been earned.

# The Most Common Disciplinary Violations

- **Mishandling Client Trust Accounts**
  - Commingling
  - Misappropriation (B&P Code § 6106)
  - NSF Checks
  - Failure to Maintain Records/Provide Accounting
  - Failure to Promptly Pay Out Funds
  
  - Client Trust Accounting is a Non-Delegable,  
Fiduciary Duty
  - Culpability for Acts of Others
  - Conduct Need Not Be Malevolent

# Client Trust Account Duties

## **Rule 4-100, Rules of Professional Conduct**

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California . . .

No funds belonging to the member or law firm shall be deposited therein or otherwise commingled therewith except as follows:

- (1) Funds reasonably sufficient to pay bank charges.
- (2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

# Client Trust Account Duties (cont.)

## Rule 4-100, Rules of Professional Conduct (cont.)

(B) A member shall:

- (1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.
- (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedures of the State Bar.
- (4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.



# The Most Common Disciplinary Violations

- **Misrepresentations**
  - To Clients
  - To Courts
  - To Opposing Counsel/Others
  - To State Bar

# Rules Prohibiting Attorney Misrepresentations

## **B&P Code § 6068(d)**

It is the duty of an attorney . . .

To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

## **B&P Code § 6106**

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a case for disbarment or suspension.

# Rules Prohibiting Attorney Misrepresentations (cont.)

## **Rule 5-200, Rules of Professional Conduct**

In presenting a matter to a tribunal, a member:

- (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
- (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;
- (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision; . . .

## **Rule 5-220, Rules of Professional Conduct**

A member shall not suppress any evidence that the member or member's client has a legal obligation to reveal or produce.

# The Most Common Disciplinary Violations

- **Failure to Comply With Court Orders**

## **B&P Code § 6103**

A willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.

# The Most Common Disciplinary Violations

## ■ Failure to Report to State Bar B&P Code § 6068(o)

Attorney has a duty to report to the State Bar within 30 days:

- The filing of 3 or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful professional conduct.
- The entry of a civil judgment against the attorney for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.
- The imposition of judicial sanctions against the attorney of \$1,000 or more except discovery sanctions.
- The bringing of a felony prosecution against the attorney.
- The conviction of the attorney of any felony or designated misdemeanor.
- The imposition of discipline by another agency or board.
- Reversal of judgment based on attorney's misconduct, gross incompetence, or misrepresentation.

# The Most Common Disciplinary Violations

- **Mishandling Fee Issues**
  - Lack of Adequate Fee Agreement
  - Improper Responses to Fee Disputes
    - The Elusive True Retainer*
  - Illegal/Unconscionable Fees
  - Improper Fee-Sharing
  - Mishandling Payment of Fees by Third Party

# The Most Common Disciplinary Violations

## ■ Improper Handling of Business Dealings with the Client

### Rule 3-300, Rules of Professional Conduct

An attorney shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless:

- (A) The transaction and its terms are fair and reasonable to the client and are fully disclosed in writing to the client in a manner which should reasonably have been understood by the client;
- (B) The client is advised in writing that the client may seek advice of independent attorney of the client's choice and is given reasonable opportunity to seek that advice; and
- (C) The client thereafter consents in writing to terms of transaction.

# The Most Common Disciplinary Violations

- **Unauthorized Practice of Law**
  - Unexpected Ways Attorney Can Become Not Entitled to Practice
    - Failure to Pay Bar Fees
    - Failure to Comply With MCLE
    - Failure to Make Support Payments
    - Criminal Convictions
    - Prior Discipline, Failure to Pass MPRE
    - Entry of Default
  - What Constitutes Unauthorized Practice
  - Culpability for UPL of Others



# The Most Common Disciplinary Violations

## ■ Violation of Duties to State Bar

**B&P Code § 6068(i)** - Duty to cooperate/participate in State Bar Disciplinary investigation/proceeding against attorney.

**B&P Code § 6068(j)** - Duty to maintain current office address, phone number, etc. with State Bar as required by B&P Code § 6002.1.

**B&P Code § 6068(k)** – Duty to comply with terms of disciplinary probation.

**B&P Code § 6068(l)** – Duty to comply with terms of agreements in lieu of discipline.

# The Most Common Disciplinary Violations

- **Violation of Duties to State Bar (cont.)**

**Rule 1-110, Rules of Professional Conduct** – Duty to comply with conditions of public and private reprovls.

**Rule 9.20, California Rules of Court** – Duty to notify in writing clients, co-counsel, opposing counsel or party, and courts or other tribunals in which litigation is pending of attorney's disbarment or suspension (90 days or more), and duty to return client papers/property and refund unearned fees.

# The Most Common Disciplinary Violations

## ■ Criminal Convictions

### B&P Code §§ 6101-6102 and case law

- Discipline imposed for convictions involving moral turpitude or other misconduct warranting discipline (including DUIs).
- Summary Disbarment imposed for felony conviction where an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or if the offense involved moral turpitude per se.
- Interim Suspension imposed for any felony and any misdemeanor involving moral turpitude per se.
- Disciplinary Trial re facts and circumstances of offense.
- Elements of crime deemed proved by conviction.

# The 3D Disbarment

- **Disappearance** - Due to invalid official State Bar membership address—results in unintended and unknown attorney misconduct.
  - Unknown Ineligibility
    - Failure to pay State Bar fees
    - Failure to comply with MCLE
  - Failure to Respond to State Bar Inquiries
- **Disciplinary Charges**
  - Disciplinary Charges – Sent to official membership address; Service valid even if envelope returned as “Undeliverable.”
- **Default = Disbarment** (Rule 5.85, Rules of Procedure)

# State Bar Resources

- **Ethics Hotline** – 800-2-Ethics (800-238-4427)
- **Membership Records for Notification of Change of Address** – 415-538-2577
- **Lawyer Assistance Program** – Confidential. Not discipline. Includes resources for mental health (including attorney burn-out), alcohol or drug issues (legal or illegal). 213-765-1190 or toll free 877-527-4435  
LAP@calbar.ca.gov

## State Bar Resources (cont.)

- **State Bar Website** – [www.calbar.ca.gov](http://www.calbar.ca.gov)  
Free online resources.
- **Handbook on Client Trust Accounting for California Attorneys** – May be downloaded from State Bar website—Free.
- **State Bar Ethics School**
- **State Bar Client Trust Accounting School**

# Contact Information

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