

— or — The Disciplinary Process in 10 Short Chapters



## Bar Complaint

Pat Sallen is an attorney with the State Bar of Arizona Lawyer Regulation Department.

here are basically two categories of lawyers in Arizona: those who already know and understand the lawyer discipline system and those who don't.

If you're familiar with the system, then chances are you have been investigated or prosecuted, or you represent lawyers who have been, or you're a current or former bar counsel, hearing officer, Disciplinary Commission member or Supreme Court justice.

But unless you participated in a disciplinary proceeding as a volunteer or as part of your job, do you really want to admit you know anything about it?

Why should you care? After all, you may comport yourself at all times with professionalism, grace and ethics. You may handle everything timely and diligently because you devote your life to your practice or, alternatively, you handle everything so well because you perfectly balance your professional and personal lives. You are not greedy. You are not obnoxious. You treat everyone fairly, responsibly and respectfully, and all your clients love you. Or maybe you work for a public agency.

In short, you are not a magnet for bar complaints, so you don't really need to know anything about the system. You'll never ever get one of those letters from the State Bar—the envelope with the big CONFIDENTIAL stamp.

Think again.

Do you practice even a little bit of family law? Continuing a long tradition, that area generated the highest number of complaints in 2004.

Do you ever have opposing counsel? In 2004, the secondhighest number of complaints came from opposing counsel.

Do you have a trust account? In 2004, trust account overdrafts—remember, banks have to report them to the State Bar—accounted for the third-highest source of complaints.

You get the point. It could happen to you.

But if you got a bar complaint, just how long would you feel like a deer in the headlights? Longer than you need to, unless you become familiar with the system.

Atticus, a lawyer known as a paragon of morality, kindness and decorum, is the last person you would expect to receive a bar complaint. Nonetheless, a client—let's call her Maudie has written a letter to the State Bar alleging that she hired Atticus to do estate planning for her. He now won't return her telephone calls or respond to her e-mails, but he has cashed the check she gave him as an advance fee. The lack of communication is crucial, she writes, because she already has a bad heart and may need brain surgery. She hired Atticus because everyone knows he can write an airtight will.

\* With compliments and apologies to Harper Lee and all the fans of To Kill a Mockingbird.

## **Atticus Gets a Bar Complaint**



Maudie's letter arrived at the State Bar on a balmy January day, the sort of winter day that Midwestern attorneys would kill for, although maybe not if they had to take another bar exam.

A staff attorney with the State Bar's Attorney/Consumer Assistance Program, which handles intake for the Lawyer Regulation Office, reviewed Maudie's letter, with its spidery handwriting on lined paper torn from a spiral-bound notebook. If the letter alleged facts that, if true, would constitute unethical conduct or incapacity, then Rule 54(b)(1)(D), ARIZ.R.S.CT., required that it be submitted for a "screening investigation."

Because the letter didn't allege any deceit, dishonesty, criminal conviction, theft, trust-account problems or the like, the A/CAP attorney called Atticus to try to mediate Maudie's dispute with him. After all, maybe it was just some miscommunication, and maybe Atticus didn't know that Maudie had been trying to reach him. Besides, Atticus didn't have a history of discipline or any other pending bar complaints.

Atticus didn't return the A/CAP attorney's voice-mail message. When the A/CAP attorney called a second time, he reached Atticus's secretary, Titus.

"Atticus has been too busy to respond to Maudie because he's been in an important trial," Titus snapped. "Besides, Maudie is a demanding pain in the neck and Atticus has other fires to put out before he can attend to her matter. She can wait. It's not like she's dying or anything."

Hmm, the A/CAP attorney thought. I wonder if Atticus knows he has a supervision problem?

Later that day, Maudie faxed over a supplement to her original complaint. In balancing her checkbook, she found that the \$500 check she originally wrote to Atticus had been altered to \$1,500.

With the allegation of misconduct now serious, the A/CAP attorney forwarded the file to a staff bar counsel for a screening investigation.



Titus was out to lunch when the mail arrived. Atticus flipped through the stack.

CLE advertisement, letters from opposing counsel in several cases, yet another mandatory arbitration appointment and ... what's this? An envelope from the State Bar with CONFIDEN-TIAL emblazoned on the front.

He ripped it open and frantically skimmed the text of a form letter. His eye caught only isolated words and phrases. Professional conduct ... written response ... ethical rules ... protective order ... diversion ... cooperation.

A disciplinary proceeding! Maudie had never said anything to him about being unhappy. Granted, he'd been out of pocket, because while he normally practiced just estate planning and domestic relations, he'd decided to take on a pro bono criminal-defense client whose case had taken up a huge amount of time. Luckily, the trial was over—he won—so he could attend to other work that had piled up in the meantime.

He read Maudie's two letters—her original complaint and the supplement she faxed about the check—that accompanied the State Bar's letter. She's wrong, oh so wrong, he thought. Why didn't she come directly to him? They're neighbors, for crying out loud. She loves his kids.

His heart sank. He was exhausted. The criminal trial and all the media coverage of it had worn him out. A mountain of work was on his desk, and the last thing he needed was a directive from the State Bar.

But he took a deep breath and re-read the letter, this time in detail. He hated doing it, but he knew he had to. Submit a response within 20 days of the date of the letter ... address Ethical Rules blahblah, blah-blah ... protective order ... diversion. What the heck is diversion?

He can't imagine what went wrong. Life had suddenly become so ... messy. How could anyone think he's done anything unethical? And just as he was planning on applying for a judicial opening. Oh, boy.

Overwhelmed, he folded the letter, stuffed it in the ripped envelope and jammed the whole mess into his maroon Arizona Rules of Court paperback. He shoved the book into his bookcase.



He tossed and turned in bed that night, thinking of all the arguments he'd make in defense to the bar complaint.

First, Maudie could be a cranky pain in the neck. Second, he certainly hadn't taken her money without planning on doing any work for her, and he certainly never altered a check for an advance fee. That check thing obviously was just someone's big error. Third, she knew—she knew!—when he agreed to do her estate planning that he had a big criminal case that was going to take all of his brain cells. Geez, everyone knew about his big criminal case.

If he couldn't sleep, he might as well get something down on paper. He hadn't reviewed Maudie's file, or his law office's financial records. He wasn't even sure where to find the ethical rules these days. No matter.

He toted his laptop outside to his patio table. When he plunked it down, he startled his rabbit, Charlie, who lived in the backyard. Under a full moon, he pounded out a response to the complaint.

There is absolutely no basis to this bar complaint, he wrote. He boldfaced the words and then, for added emphasis, underlined them.

He wrote pages upon pages about how the State Bar should be supporting attorneys rather than denigrating them, and that having to respond to meritless bar complaints simply took time away from his legitimate work for clients. He railed about the use of his bar dues for witch hunts.

Hours later, emotionally spent, a 10page, single-spaced response drafted, he shut off his laptop, scratched Charlie behind the ears and went back to bed.

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Atticus began avoiding Maudie like the plague. An avid gardener, she constantly puttered in her front yard, so he left as early as possible each day for work and delayed coming home until after dark. He knew from the State Bar's letter that Maudie knew he was being investigated for her allegations.

Although he had drafted his response, and thought he'd vented enough, he'd had

more sleepless nights since receiving the bar complaint than he could ever remember having. As he drank his 12th cup of coffee one morning, he decided he'd had enough. He called one of his best law-school chums, Alexandria, who used to be a member of the State Bar's board of governors, and suggested they meet for lunch. Far away from their offices.

After they updated each other about their personal lives—his nonexistent, hers too busy—she leaned across the table.

"Hey, did you see the last issue of ARIZONA ATTORNEY?"

Atticus had been so busy that he couldn't remember the last street sign he'd read, let alone what had been in the State Bar's magazine.

"Bradley got suspended," Alexandria continued. "Can you believe that?"

Atticus blinked. "Bradley suspended?" he blurted. "For what?"

"Trust-account problems. Can you imagine?"

Atticus stared at Alexandria. Can I imagine? Oh, boy.

Alexandria kept talking and gesturing, but Atticus's senses had stopped working. Bar complaint. Bar complaint. Geez, what was the date? Had he sent that draft he'd pounded out under the full moon? He whimpered.

"Atticus, are you OK?"

"It's really ... well, a little problem ... I've got ... Uh ... Oh, boy."

"What? Could you mumble that again?" The tale of the bar complaint tumbled from his lips.

She narrowed her eyes. "You haven't responded? You have to respond."

"I wrote one. I did that right away."

"How 'right away' is 'right away'?"

"That night. I couldn't sleep so I got one done. Yeah, I guess I need to send it in. It's just ...."

"Whoa right there, buckaroo. I've never had a bar complaint, but I've learned a few things hanging around people who know about the disciplinary system. And from serving as the probable-cause panelist. And I've read the rules. Have you read the rules?"

The State Bar has to investigate any suggestion of misconduct or incapacity brought to its attention. It later may turn out to be nothing, or it could be something, but they don't know until they investigate.

Atticus shrugged. "I think I started to. Well, I picked up my rules book. I was so irritated ...."

"OK, that's problem number one. Not that you were irritated, but that you didn't look at the rules. The State Bar has to investigate any suggestion of misconduct or incapacity brought to its attention. It later may turn out to be nothing, or it could be something, but they don't know until they investigate. Problem number two is that you haven't responded. You can get dinged for not responding to the State Bar, did you know that? And problem number two and a half is that you've got to think long and hard about sending that response you wrote. You know how Dear Abby tells you to write letters you may never send just so you get it out of your system? With bar complaints, you don't want to send that response you wrote so fast. You were venting and spewing. Did you get defensive? Did you attack whoever filed the complaint against you?"

He whimpered again. "Yeah, of course. It's groundless. I feel attacked as a person. She's criticizing me. Me!"

"Stop right there. Your *conduct* is being criticized. The minute you start whimpering, stop."

"Do I need to hire a lawyer?"

"Not necessarily. You can if you want to. If you're really freaked out by this, maybe you should. But the biggest thing to keep in mind is that you need to tell the story. The bar counsel assigned to your case doesn't know what happened, except what—what's her name? Maudie?—said in her complaint. *You need to tell the story*."

"But how do I know what ethical rules 1.3 and 1.4 and 1.5 and 1.15 and blah blah blah all mean? I can barely keep up with all the civil rule changes let alone these stupid ethical rules. I still haven't gotten used to the fact that the uniform rules are gone."

"I'm hearing stress talking, Atticus. Big-time stress. Not surprising, except that it's coming from you. Having a problem isn't necessarily the biggest cause of stress. Having a problem but not having a plan to address it is."

"How am I supposed to know how to address *my* problem? I've never had a bar complaint. Frankly, it's hard enough to sit here and tell *you* that I've had a bar complaint, so how am I supposed to know the first thing about dealing with it?"

Alexandria threw a packet of sugar substitute at him.

"*I'm* telling you! You can't learn much when your lips are moving, so shut up and listen."

Atticus slumped back in his chair.

"You must have been the only one who paid attention during our ethics class in law school," he grumbled.

"Actually, just use some common sense.

And I *was* the probable-cause panelist. That's like the grand juror for the discipline system. The important thing is that you've got to tell the story to bar counsel. You have to explain a case to a judge or jury, right? Do the same with bar counsel. Just the facts. Be persuasive, but leave out the invective. Attach exhibits. Explain why the specific ethical rules bar counsel told you to address do not apply to you. 'Fess up if you screwed up. If you could have handled something better, acknowledge that and make it clear that you *get it.*"

"Get what?"

"Stop being dense. You're too smart. If you acknowledge that you messed up, make it clear that you understand why. Any idea why Maudie filed the complaint?"

Atticus shrugged.

Alexandria looked skeptical. "None?" "None."

"Okay, then, you'll just have to wait. Generally, bar counsel has to send a copy of your response to the complainant, so Maudie will get a copy of your response. She gets 15 more days to read it and submit a reply. Sometimes a complainant doesn't even submit anything else. If she does, bar counsel sends you a copy of her reply so you can do a second response, if you want, within 15 days."

Atticus groaned. "It'll take that long?" "What do you want? Instant gratification? It'll take even longer than that. Sometimes, with all that back and forth, bar counsel will have enough information. But sometimes not. Sometimes the bar counsel or staff investigators do some additional research and investigation. Looking at court records, interviewing witnesses, asking you to answer specific questions. Sometimes I'd review bar complaints that had been pending for a year or more."

Atticus looked aghast. "It can't take that long!"

"So what are you, a narcissist? You're not the only lawyer on the planet with a bar complaint. They've got hundreds of investigations in process. It could be several months *after* you submit a second response before they even pick up the file."

They stared at each other. Alexandria's cell phone started playing *Für Elise*. Before she could reach for it, Atticus cleared his throat.

"But I have to renew my malpractice insurance. And I want to apply to be a judge."

"Then be as prompt and thorough as possible when you respond to the bar complaint. This is the best time for you to tell your side of the story and try get the whole mess resolved. *Capice?*"



When Atticus got back to his office, Titus was on the telephone, his back to the entry, his feet propped up on his desk.

"Yeah, it's a Rolex," Atticus heard Titus say. "Got a really good deal on it." Pause. "Hmm, well, sometimes things just fall into your lap. Good fortune is a blessing, especially when you work for a sole practitioner."

Atticus rolled his eyes. Titus could be so corny. A good secretary. A little snotty sometimes. He had quotations and inspirational sayings taped all over his desk.

Atticus shut the door to his office and pulled out his draft response to the bar complaint. He also pulled from his shirt pocket a napkin on which Alexandria had scribbled key words for him in black felt tip.

Screaming investigation, he read. Hmm. Screaming investigation? No, that's not it. Oh, yeah, *screening* investigation. The State Bar's process of investigating a bar complaint.

*Different animal.* The discipline system is sui generis, different from civil and criminal litigation, and is kind of its own brand of administrative law.

Don't take criminal defense approach. What was her point? You can't insist that the State Bar prove everything, like the prosecution in a criminal trial. You've got to explain and provide information.

*Opportunity*. Opportunity? What did she mean? Oh, yeah. This is *my* opportunity to explain what happened in a reasonable, objective manner. Don't blow it. I don't want this opportunity, but I have no choice.

Summary. Bar counsel reviews the file and prepares a written summary, and bar

counsel can dismiss a complaint. This is what I want, he thought. Or if the State Bar believes the lawyer has violated the ethical rules, bar counsel can recommend that the lawyer be referred to a diversion program, be required to pay restitution, issued an informal reprimand or ordered to serve probation, or there may be a finding of ...

*Probable cause.* The probable-cause order is kind of like an indictment and starts the formal proceeding.

*Panelist.* Probable-cause panelist. A member of the State Bar Board of Governors—traditionally the first vice president—or another member of the bar who sits essentially as a grand juror, reviewing bar counsel's summaries. The panelist can issue orders, like probation, and can make a finding of probable cause.

"I got a big taste of the discipline system during that year as one of the panelists," she'd told him at lunch. "Lots of good lawyers get in trouble. Lots of bad lawyers get in trouble. I thought long and hard before I signed a probable-cause order, because I was holding a lawyer's professional life in my hands."

Atticus shivered. Ooh, I don't want that probable-cause order, he thought.

He scanned Alexandria's list again and, with those things in mind, he re-drafted his response. He hadn't told Titus about receiving the bar complaint, and he didn't want to. Too embarrassing, even to share with his secretary. Instead, he personally mailed his response later that day.



Three months passed. He'd gotten a letter from the State Bar advising that it had received his response and a copy would be provided to Maudie, but had heard nothing, not from Maudie or the State Bar, since then.

He was trying to be patient, like Alexandria had told him to be, but how could anyone with a pending bar complaint be patient?

Maybe he should call Bradley. Alexandria had been helpful, but Bradley

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had been the subject of a disciplinary proceeding. Atticus, Alexandria and Bradley all had been friends in law school. Because of work and personal lives, they hadn't done a good job at keeping up with each other. Atticus was appalled when he realized it had been about two years since he'd talked with Bradley.

Before he called Bradley, Atticus read the summary in ARIZONA ATTORNEY about Bradley's suspension, and had even gone online to the Disciplinary Clerk's office and read the final report in which the Disciplinary Commission recommended suspending Bradley for 90 days. Bradley had had lots of problems, including failing to keep adequate trust-account records.

"I'm back in the saddle now," Bradley told Atticus when they finally spoke by telephone. "Reinstated. The whole proceeding took two years, and then I had to do my 90-day suspension. Trying to put it behind me. I feel for you, man, having to deal with a bar complaint. Man, I never want to go through that again, although now that I know the procedure, maybe I ought to start representing lawyers. Hmm. Might be a good little profit center."

"I don't mean to bring back bad memories," Atticus said, "but could you give me an idea about the whole process? I mean the process beyond that probablecause thing."

"Ya gotta read all the rules, right? Not just the formal stuff. Supreme Court Rules 46 through 72. Read 'em. All. Carefully. Discipline has its own lingo. Its own system. Its own clerk. Volunteer hearing officers and settlement officers. Procedures different from either civil or criminal.

"For example, I ended up settling with the State Bar. You know how in civil the judge really doesn't care what your settlement is? You just file a notice of settlement? In the discipline system, once you're in formal proceedings, most of the time you have to go all the way up to the Supreme Court to get your settlement approved. In my case, the State Bar filed a formal complaint against me and I filed my answer and then we settled. We had to draft a written consent agreement that had to be vetted by a hearing officer and approved by the Disciplinary Commission, then the Supreme Court had to issue a judgment and order. Man, the whole process was gut-wrenching."

Atticus's own gut clenched. "And if you hadn't settled?"

"Then we would have done the whole litigation dance." Bradley adopted a singsong tone of voice. "Disclosure statements, mandatory settlement conference, prehearing conference, evidentiary hearing."

Atticus could almost see Bradley sling his long, surfer-boy blond hair out of his face for emphasis.

"We still had to justify our consent agreement to the hearing officer. Ain't no fun seeing yourself in findings of fact and conclusions of law. Hated seeing me in ARIZONA ATTORNEY, but that's required by the rules."

"I can't believe it happened to you." In a smaller voice, Atticus added, "I can't believe this is happening to me."

"Think about the criminal system. The cops investigate lots of cases that go nowhere. Then lots of others end up at the county attorney's office. In some of those, the defendant takes a plea. In others, the county attorney and the defendant have different ideas about the truth of what happened, and they do the litigation dance."

"But sometimes one of the dance partners ends up in prison."

"Yeah. It can be bad. But we don't go to the slammer. We got our own purgatory. Disbarment, suspension, censure. And man, even if you've done something wrong, you might not get a ticket south. There's diversion, for example. Not for really serious stuff, but if you do it, the complaint gets dismissed."

Atticus and Bradley fell silent. Atticus kept thinking about how he'd explain his bar complaint on the judicial application. Bradley, however, was thinking deeper thoughts.

"Know what? We got it better than the doctors and architects and beauticians. We regulate ourselves. We can't abuse that. Was I a happy camper about being suspended? No way. But I'm still the same dude I was before. I'm not evil. I just messed up. And now I know how to keep a client ledger and do a three-way reconciliation of my trust account."



Over the next couple of months, Atticus nearly forgot about the bar complaint. Maudie, a snowbird, left in June to go to her loft in San Francisco. Every so often, Atticus saw his bar complaint file in his cabinet, and wondered about the status, but figured that no news was good news. The State Bar knew how to reach him.

In September, Titus, his eyes filled with tears, told him that he needed to make an emergency visit to his gravely ill grandmother out of state. Atticus had no idea Titus even had a living grandparent, but he of course allowed Titus the time off. Titus was caught up on all his work, his desk almost obsessive-compulsively neat except for the quotations and inspirational sayings—and Atticus had no pressing deadlines for which he needed Titus's help.

In fact, Atticus was having an unusally slow period. It was a good thing he had some money put away, because his trust account didn't have much activity, and his clients all were abnormlly slow about paying their bills. Must be due to economic downturns, he thought. Even the mail seemed unusually sparse.

On Friday of the week Titus was gone, Atticus personally met the mail carrier at the office door. He wanted to sift through the mail and take care of any emergencies so he could leave early to go to a baseball game.

He dropped the stack of mail on Titus's desk and plopped down in his secretary's desk chair. He noticed for the first time that the voice-mail light on Titus's phone was stuttering. Funny, because Atticus had told Titus to forward all calls to Atticus's phone. Titus should not have had any voice-mail messages. Oh well. Titus would be back on Monday.

Atticus turned his attention to the mail. CLE brochure, CLE brochure, a motion in a case that could wait until Monday and ... an envelope from the Disciplinary Clerk. The Disciplinary Clerk? According to Alexandria, the Disciplinary Clerk only got involved in cases once they became formal disciplinary proceedings, which was only *after* the

State Bar filed a formal complaint. But his case wasn't anywhere near that kind of development. He'd never even heard any-thing from the probable-cause panelist.

Maybe Alexandria was wrong.

The telephone rang. It was his friend, Horton, with whom he was going to the baseball game, calling to make arrangements for where they would meet downtown.

Atticus, deciding to multi-task and open mail while he talked to Horton, tried to open Titus's desk to get out an envelope opener. Stuck. He pulled and pulled, but the drawer wouldn't budge. He tried the second drawer, too, but no luck.

Titus had locked the desk.

Atticus growled. He now had two bones to pick with Titus on Monday.

He slid his thumb under the flap of the envelope from the Disciplinary Clerk's office, getting a paper cut in the process. He pulled out the sheet of paper, smudging blood on it. He stuck his thumb in his mouth. It was an order, setting something called an aggravation and mitigation hearing because the respondent had defaulted on the formal complaint.

Default? Respondent? *He* was the respondent. *He* hadn't defaulted on anything.

He jerked his thumb out of his mouth. His cut reopened. Drops of blood fell on one of the scraps of paper taped to Titus's desk: "Experience is the name everyone gives to their mistakes." — Oscar Wilde, Anglo-Irish wit and author (1854-1900).

Five minutes later, after calling the Disciplinary Clerk's office, Atticus laid his head on his desk and cried.



Atticus did not go to the baseball game that Friday afternoon. Instead, he spent the time with the head of the State Bar's Member Assistance Program, who talked him out of committing suicide and also talked him out of killing Titus.

Titus never returned from his trip.



It was a very long fall for Atticus.

Sorting out the procedural status of the bar complaint was the easy part.

In his indignant haste to respond to Maudie's bar complaint, he'd neglected to answer the allegations about the altered check, because how could anyone think that he had altered a check for an advance fee? After he'd submitted his response, the State Bar had written several times, asking for all sorts of trustaccount records and explanations.

For many reasons, not the least of which was that he had failed to respond to those letters, the probable-cause panelist had found probable cause. The assigned bar counsel had filed a formal complaint against him and, when he failed to answer, default had been entered. Because of the default, the State Bar asked the hearing officer to set an aggravation and mitigation hearing, at which the hearing officer would take evidence and hear argument that would help her decide what sanction to recommend.

After he savagely picked the lock on Titus's desk, Atticus found a treasure trove of mail in one of the drawers. Letter upon letter from the State Bar. Two large envelopes—both ripped open—containing copies of the formal complaint, one sent by certified mail. Notices from the Disciplinary Clerk.

He also found other mail, including letters from a variety of clients, all terminating his legal services, and statements for his operating and trust accounts.

He found a receipt for a used Rolex watch. Paid for by cash.



Late in the afternoon on New Year's Eve,

Atticus and Maudie sat on Atticus's back patio. Maudie had just come back from spending months in San Francisco, where she'd recuperated from her brain surgery. Atticus had just come back from a counseling session. They were drinking wine she'd brought back with her. Atticus's rabbit, Charlie, was hopping around the backyard, periodically burrowing under piles of leaves and acting like no one could see him as long as his head was covered.

"I almost hate to say this, but I learned one thing from Titus," Atticus said. "He had all of these insipid sayings taped all over his desk. One stuck in my head: 'The art of being wise is the art of knowing what to overlook.""

He sipped his wine.

"I overlooked way too much. How could I not have noticed that Titus had bought a Rolex watch? I'm not saying he couldn't have saved his money, but he was constantly complaining about how poor he was and that I needed to pay him more. And why didn't I think about why you had filed a bar complaint? Now I know. Titus had totally alienated you and convinced you that ... well, that's irrelevant now ... and then it looked like I had stolen money from you."

"That's why I felt like I had no other choice, honey."

"I know, Maudie. I should have had the confidence and self-control—oh, heck, I should have had the courage—to come talk to you directly."

Atticus reached for the wine bottle and refilled his glass.

"I should have paid more attention to a lot of things, including the discipline rules," he continued. "I never thought I'd have to deal with them. I've never had any problems with the State Bar. Trying to become familiar with the whole disciplinary system while I was stuck in the middle of it was definitely not a good idea."

He took another sip of wine. "Yep, that's what I would tell any lawyer. Pay attention. To your law practice, to your clients. Don't overlook important things, or even the little things."

Maudie cleared her throat dramatically. Atticus glanced at her. She waved her empty glass.