



MALPRACTICE ALERT!

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This issue of ***Malpractice Alert!*** features an article on the disciplinary process by guest author George D. Jonson, Managing Partner of the firm of Montgomery, Rennie and Jonson, LPA, in Cincinnati, Ohio. Attorney Jonson's practice focuses on the defense of legal malpractice claims in addition to commercial and coverage litigation. He also provides ethics advice to attorneys and represents attorneys, judges and other professionals in disciplinary actions. Thanks to Attorney Jonson for contributing this article.

This issue will also discuss the recent amendments to Rule V of the Supreme Court Rules for the Government of the Bar of Ohio, which take effect January 1, 2015.

I hope you will find the articles in this issue useful and informative. If you have comments or suggestions, please let me know. OBLIC is here for YOU!

Gretchen Mote, Editor
Malpractice Alert!

Just Suppose Someone Files a Grievance Against You...

By George D. Jonson

Filing a grievance against a lawyer is easy.

A grievance can be filed by anyone –

- a client,
- another lawyer,
- a judge, or
- a neighbor who is mad about the way you cut your grass.

Instructions on how to file a grievance can be found on the Ohio Supreme Court's website,

along with a complaint form. The form prompts

- a description of the situation,
- identity of witnesses,
- the relief sought, and
- supporting documents.



A grievance against a lawyer can be submitted to and investigated by the Office of Disciplinary Counsel (ODC), the certified grievance committee of a local bar association or the OSBA (collectively referred to here as a Disciplinary Authority). No matter which Disciplinary Authority receives the grievance, it is handled in the same way.

Some disciplinary investigations arise from anonymous grievances—or from no grievance at all.

No formal grievance is necessary to begin an investigation. A Disciplinary Authority has authority under the Ohio Rules for the Government of the Bar to investigate any matter filed with it (even anonymously), or any matter that *comes to its attention*.

This means that phone calls, unsigned grievances or letters, reports in the media, or any other source of information can start the process of a disciplinary investigation. So if it is reported in the paper that you were charged with OVI and assaulting a police officer, you can expect an investigation, even if no one files a grievance.

In some instances, consider the value of a self-report.

If you do something you think does or may violate the Rules, you should consider filing a self-report. A self-report is simply a letter to a Disciplinary Authority that describes the conduct. If a complaint is filed against you as a result of your self-report, you often get “credit” for having self-reported.

There are significant strategy decisions involved in a self-report.

- Do you need to file one, or are you concerned about conduct that an objective lawyer, knowledgeable about the Rules of Professional Conduct (Rules), would tell you is not a violation?
- Is there a strategic reason to self-report to a particular Disciplinary Authority over another?
- What should you say, and what documents should you submit with the self-report?

These are all decisions that should be made in consultation with counsel experienced in defending disciplinary investigations.

How is the grievance evaluated/investigated?

Initially, a Disciplinary Authority reviews a grievance to see if it alleges conduct that would constitute a violation of the Rules. If not, the grievance is dismissed without the lawyer being asked any questions.

If the grievance does allege conduct that potentially violates the Rules, the lawyer will usually get a letter, which may or may not enclose the grievance and which sets forth questions about the underlying situation. This letter is referred to as a letter of inquiry.

However, if the Disciplinary Authority believes it has sufficient, conclusive evidence of a violation, it may not send a letter of inquiry; but may instead simply pursue the certification of a probable cause complaint (described below). That is unusual.

A grievance and the ensuing investigation are confidential prior to a finding of probable cause UNLESS you waive confidentiality by discussing the grievance with people with whom you do not have a privilege.

An investigator will often make personal contact with the grievant and other witnesses. So you may be contacted by people, informing you that they were interviewed. The investigator will not mention a pending grievance.



Although the fact that an investigator is asking questions may be enough for a knowledgeable listener to assume there is a grievance pending, the matter is still confidential. So don't talk about the grievance. (And do not contact the person who filed the grievance and try to get it withdrawn. The grievance cannot be withdrawn.)

Responding to a letter of inquiry.

The client who files a grievance waives the attorney-client privilege relevant to the subject matter of the grievance. So, in responding to a letter of inquiry, you can defend yourself with what would have been privileged information and documents.

Suppress the urge to fire off a quick and indignant response. The informal nature of the letter of inquiry and the relatively short response time which will be set forth in that letter invite a quick narrative response. But what you say and don't say in response to the letter of inquiry will be a permanent part of the case against you if one goes forward.

Get counsel, and have your counsel ask for an extension of time to respond – they are freely given. Then work with your counsel to draft a response.

In order to efficiently use your lawyer's time, write out a complete narrative of the situation described in the grievance and respond to all questions stated in the letter of inquiry. Gather all related documents and list relevant witnesses.

You have an obligation to truthfully disclose all material facts requested by the investigator. (Rule 8.1) In fact, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omit a material fact in connection with a disciplinary investigation into his or her own conduct.

So take your time and make sure your draft response is complete and accurate. Then get it to your counsel.

Your counsel will likely have questions for you and will prepare a draft response for your review and input. Ultimately, your lawyer will (in most cases) submit your response over his or her signature.

Rarely should affidavits be submitted with the response: they are not necessary and there is no reason to create evidence at this stage of the proceedings. Your lawyer can include in the letter what others have to say about the incident without documentary support.

As a general matter, you should not call the investigator to talk about the grievance. Communicate in writing.

If you are asked for an interview by the investigator, you must cooperate. If interviewed,

you need to prepare as you would for a deposition. Make yourself fully conversant with all the facts. Anticipate what hard questions might be asked. ODC has a policy that all interviews are under oath and before a court reporter.

Some certified grievance committees will want to interview you without a court reporter present. Understand what the set-up will be beforehand. And take counsel with you.



Forget about how long the investigation is taking

There are time limits on the investigation, but they are relatively meaningless. See Gov. Bar Rule V, Section 9(D).

The time limits are not jurisdictional. And while investigations that extend beyond one year from the date of filing are prima facie evidence of unreasonable delay, the rule states: "No grievance filed shall be dismissed unless it appears that there has been an unreasonable delay and that the rights of the respondent to have a fair hearing have been violated." (Emphasis added)

In other words, you have to prove that your rights to a fair hearing have been violated even if the investigation takes longer than one year. And that likely means proving some exculpatory evidence is no longer available due to the length of time the investigation has taken.

At the conclusion of the investigation

If the investigating Disciplinary Authority concludes there is substantial, credible evidence that a violation has occurred (probable cause), a draft complaint (called a probable cause complaint) will be prepared and filed, along with supporting information, with the Board of Commissioners. You will have an opportunity to oppose the probable cause complaint with your own written materials.



A three-member panel of the Board will review the complaint and both sides' materials to make a determination. If probable cause is found, the complaint will be certified and publicly filed, and the public hearing process will begin. If not, the matter is dismissed. The hearing process itself is beyond the scope of this article.

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Bottom Line

There is a lot of information here – what do you really need to remember? Your law license is probably your most valuable asset. Protect it. If you are the subject of a grievance, immediately hire counsel who is experienced in the process and follow their advice.

Gov. Bar R. V Disciplinary Procedure Amendments Effective January 1, 2015

Following a two-year review process, the Supreme Court adopted amendments to Gov Bar R. V. Amendments in Sections 1-3 change the name of the Board of Commissioners on Grievances and Discipline to the Board of Professional Conduct. Sections 5 and 6 contain several notable changes regarding jurisdiction and operation of certified grievance committees.

Other significant changes were made to former Section 8(F), now Section 26 File Inventories that at (A) eliminate the 60 day period to commence a file inventory, (C) allow costs of certain file inventories may be recovered from a disciplined attorney or the estate of a deceased lawyer, and (E) provide that inventoried files in possession of disciplinary counsel may be destroyed after 7 years.

A complete copy of Gov. Bar R. V is available on the website of the Supreme Court of Ohio, www.sconet.state.oh.us/Boards/BOC.

