



**LAWYER TO LAWYER MENTORING PROGRAM  
WORKSHEET S  
INTRODUCTION TO THE GRIEVANCE PROCESS**

Worksheet S is intended to facilitate a discussion about the grievance process and a lawyer's duty to cooperate with a disciplinary investigation.

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- Share with the new lawyer an overview of the disciplinary process, including how complaints are initiated, who may file a complaint against an attorney, with whom they are filed, what happens during an investigation, what to expect if a formal complaint is filed by the disciplinary agency, what types of discipline can be imposed in Ohio, etc. See the attached Disciplinary Process explanation and chart.
- Discuss a lawyer's obligation to assist in a disciplinary investigation. See Gov. Bar R. V(4)(G).
- Discuss whether you should, and the best time to, obtain an attorney as your counsel in a disciplinary investigation against you.
- Review the suggestions in the attached article and discuss their application to the Ohio disciplinary process. Marcia L. Proctor, *What to Do When Disciplinary Counsel Calls*, THE COMPLETE LAWYER, Winter 1998.
- Discuss the effect a grievance filed against you by your client has on your attorney-client relationship, including the following:
  - Do you have a duty to withdraw as counsel?
  - If so, what steps should be taken to do so?
  - What obligation do you have to protect the client's interests if the client indicates in the grievance that s/he wishes to discharge you but there is a hearing or statute of limitations or other deadline approaching in the client's case?
  - Is it appropriate to communicate directly with your client to resolve the grievance, especially if it was a result of simple miscommunication?
- Discuss the propriety of resolving a grievance with your client, how doing so affects (if at all) your obligation to cooperate with the disciplinary authority. See Prof. Cond. Rule 1.8 and Gov. Bar R. V(4)(G).
- Discuss when you have an obligation to report the misconduct of another attorney to a disciplinary authority. See Prof. Cond. Rules 8.3 and 8.4.



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**RESOURCES**

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**Ohio Rules of Court  
Rules for the Government of the Bar of Ohio**

**RULE V. DISCIPLINARY PROCEDURE**

**Section 4. Investigation and Filing of Complaints.**

**(G) Duty to Cooperate.** The Board, the Disciplinary Counsel, and president, secretary, or chair of a Certified Grievance Committee may call upon any justice, judge, or attorney to assist in an investigation or testify in a hearing before the Board or a panel for which provision is made in this rule, including mediation and ADR procedures, as to any matter that he or she would not be bound to claim privilege as an attorney at law. No justice, judge, or attorney shall neglect or refuse to assist or testify in an investigation or hearing.

**Ohio Rules of Professional Conduct**

**I. CLIENT-LAWYER RELATIONSHIP**

**RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES**

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**(h)** A lawyer shall not do any of the following:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice or requiring arbitration of a claim against the lawyer unless the client is independently represented in making the agreement;
- (2) settle a claim or potential claim for such liability unless all of the following apply:
  - (i) the settlement is not unconscionable, inequitable, or unfair;
  - (ii) the client or former client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith;
  - (iii) the client or former client gives informed consent.

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View complete rule and comments at

[http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1\\_8](http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_8)

**VII. MAINTAINING THE INTEGRITY OF THE PROFESSION**



### **RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT**

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.

(c) Any information obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation, shall be privileged for all purposes under this rule.

View comments at

[http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule8\\_3](http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule8_3)

### **RULE 8.4: MISCONDUCT**

It is professional misconduct for a lawyer to do any of the following:

(a) violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;



(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;

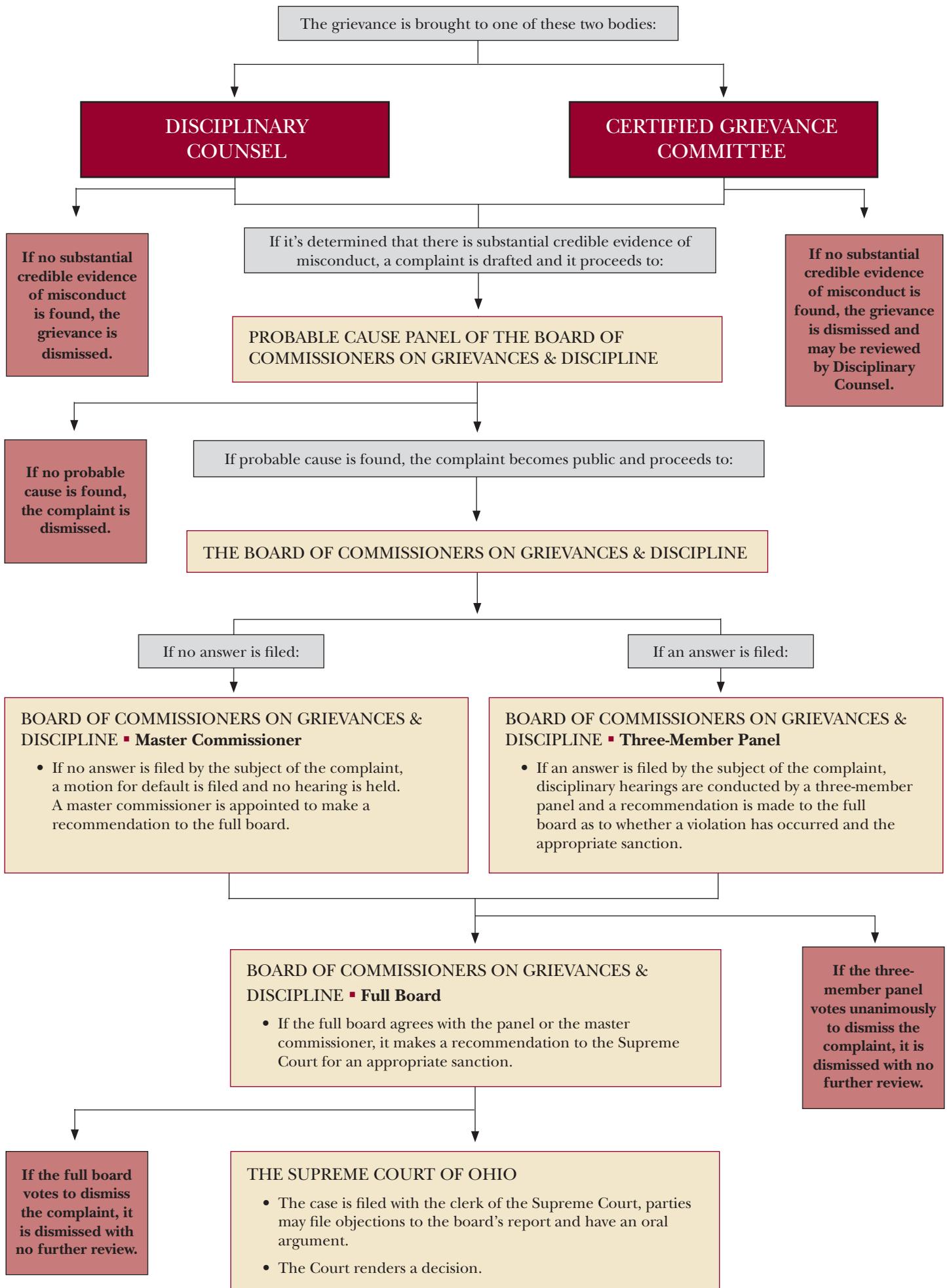
(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

View comments at

[http://www.supremecourtohio.gov/rules/profConduct/profConductRules.pdf#Rule8\\_4](http://www.supremecourtohio.gov/rules/profConduct/profConductRules.pdf#Rule8_4)

# DISCIPLINARY PROCESS

Grievances can be made about a judge or attorney to the Disciplinary Council or a certified grievance committee of a local bar association. If either of those bodies finds that the grievance has probable cause, a formal complaint is drafted. It then moves to a probable cause panel of the Board of Commissioners on Grievances & Discipline, which determines if there is probable cause. If the panel determines that there is probable cause, the formal complaint becomes public and is filed with the Board of Commissioners on Grievances & Discipline. Hearings are then conducted by the board and if it finds a violation, a recommendation is made to the Supreme Court of Ohio. The Supreme Court of Ohio makes the final decision as to findings of misconduct and issues an appropriate sanction.



## What to Do When Disciplinary Counsel Calls

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### BY MARCIA L. PROCTOR

*Marcia L. Proctor is a senior lawyer in the Detroit office of Butzel Long, concentrating her practice in professional responsibility and risk management*

An inquiry from the disciplinary agency is as welcome as a malpractice claim or a personal lawsuit. Like military draft notices and IRS letters, grievances are likely to cause discomfort and tension for even the most experienced and ethical lawyer.

Evidence suggests that lawyers do not understand their professional obligations and worsen their position before disciplinary agencies through ignorance of the procedures and applicable case law. A disturbingly high number of disciplinary matters result in defaults when the respondent lawyers fail to respond within the required period of time or at all. Many respondents attempt to represent themselves, even though they have no prior disciplinary experience and are not familiar with the rules or the proceedings.

It is also true that responding to a disciplinary inquiry, even at initial stages, can take a tremendous amount of time, preventing the lawyer from attending to client business. If the lawyer is a solo or small firm practitioner, this down time can strain already overextended resources. There is also a level of frustration in having to jump through the procedural hoops when the lawyer believes the grievance to be without foundation.

Although the disciplinary rules of each state differ, there are enforcement similarities that can guide the lawyer who has received a disciplinary inquiry.

#### **Consult Counsel and Perform Research**

Even if you personally are an expert in disciplinary law, seek the input of counsel, or at least have a qualified lawyer colleague read your answer before it is submitted to the disciplinary agency. More and more, lawyers are engaging in "professional responsibility" practice, making themselves available to colleagues in malpractice, licensing, and risk management matters.

Those who concentrate in this legal field can be located by reviewing ads in lawyer publications, contacting authors of regulatory articles, or noting the counsel of record in published cases. Other sources are the Association of Professional Responsibility Lawyers, members of the state bar ethics committees (not the enforcement arm), professional liability carriers, and law school ethics professors.

Take the time to research the ethics issues and whether discipline has been imposed in similar matters before responding. In addition to ethics rules, some jurisdictions consider criminal offenses (including misdemeanors) and court rule violations as grounds for discipline. Become familiar with any ethics rule that might conceivably apply to the inquiry, and use terminology from those standards in the response. Most states have reference tools available such as ethics opinions, disciplinary case law, and court decisions. Westlaw, Lexis/Nexis, and the ABA/BNA Lawyers Manual on Professional Conduct provide national references on most ethics topics.

### **Tell Law Firm Colleagues**

Whether out of competitive concerns, embarrassment, or lack of understanding, many respondents keep a disciplinary inquiry secret. If the respondent is a member of a multi-lawyer firm, however, the respondent owes a fiduciary duty to other firm members to disclose information that may affect the firm's liability, reputation, or the way firm clients are served. If the respondent is a sole practitioner, arrangements may need to be made for handling client matters when the respondent cannot.

Firm members and office sharers might be contacted about the grievance during the investigation, or may be able to serve as mitigation or character witnesses. If they do not know about the inquiry, they cannot be prepared to render the best assistance. Firm procedures may need to be adjusted or audited in order to determine the extent of any problem or to corroborate that no problem exists. Firm members may need to assist in gathering records, attending meetings, and responding to the disciplinary inquiry.

The firm's professional liability policy might cover disciplinary defense costs. If the inquiry is never reported, the respondent loses that source of expertise and financial assistance should the process become lengthy and complex.

Some disciplinary systems offer probation, counseling, mentoring, and other diversionary dispositions in lieu of formal discipline. If the law firm or office sharers know of the disciplinary situation and are willing to participate in such programs, it may be easier to negotiate a diversionary resolution.

The firm is responsible for handling client matters when the respondent is unable to do so. If disciplinary rules require the respondent to attend a hearing, the law firm may have to stand in for a client matter in another forum. Also, if the respondent's license is suspended or revoked, the law firm must manage the transition of the workload.

If the respondent is a sole practitioner, having other lawyers ready to cover client matters is an even greater necessity. If the sole practitioner does not ensure that clients continue to be served promptly and competently, there may be no practice to preserve once the grievance is resolved. Office sharers, other lawyers in the respondent's field of practice, or other lawyers whose offices are located proximately to the respondent's are candidates for the respondent's confidences.

The respondent may become less productive in the firm because of the stress of the grievance and insecurity about a position in the firm, to the point that counseling or leave time will be appropriate. If the firm knows the reasons for the respondent's distraction, the firm is more likely to be understanding and accommodating.

Most grievances are filed by members of the public, both clients and nonclients. A much smaller number are initiated by lawyers and judges. If other members of the firm have unrelated cases before the complaining judge or with the same opposing party, the lawyers may wish to adjust strategies of the case. If the firm represents the complaining client on other matters, conflict rules may require withdrawal. (According to ABA Model Rule 1.7(b), the lawyer's interest in defending the grievance may materially limit representation of the complainant in other matters.)

### **Answer the Inquiry**

Neglect of legal matters is one of the most frequently raised complaints, and one of the areas of conduct most frequently sanctioned. It is not surprising, therefore, that respondents as a group neglect disciplinary inquiries. They fail to answer, fail to answer on time, and fail to appear in proceedings.

Although every communication from the disciplinary agency should be taken seriously, the initial inquiry should receive immediate and professional attention. The initial inquiry is an opportunity for the respondent lawyer to resolve the matter without further proceedings. By sending the notification, the agency is affording the respondent due process rights of learning of the complaint and providing

an explanation. The vast majority of complaints are closed at early stages, either because the facts are different from those alleged in the complaint, or because the complaint alleges problems that are not violations of the ethics code.

There is a set time frame for response to a disciplinary inquiry. Doing nothing, i.e., failing to provide any response, is not just a default but may also be separate grounds for misconduct. If a respondent believes there is a constitutional right to refrain from answering all or part of the inquiry, that claim must be made within the prescribed time frame. Failing to respond may be deemed lack of cooperation with the disciplinary process, and may result in the imposition of discipline even when you are acquitted of the underlying misconduct.

All jurisdictions have a version of ABA Model Rule of Professional Conduct 1.6(b)(2), which allows a lawyer to candidly respond to grievances without fear of improperly revealing client confidences and secrets. Many jurisdictions also provide that a client who files a grievance waives any attorney-client privilege.

The answer to an initial disciplinary inquiry may be of sufficient quality to dispose of the disciplinary matter without further proceedings. Although you should not volunteer information beyond the scope of the inquiry, your response should be completely candid. A false or untruthful answer to a grievance is a separate ground for discipline. Your response should be professional and unemotional, and avoid derogatory references to the complainant, the court, or the discipline system. The response might be shared with the complainant, or might eventually become part of a public record if formal proceedings are initiated.

### **Duties to Clients**

You are not prohibited from having contact with the complainant. If a current client was the complainant and you could not communicate, the underlying representation could not proceed and withdrawal could not be accomplished, since it requires notice to the client and proper counseling of the client's options.

If contacting the complainant about the grievance, take care to follow ethics rules governing contacts with represented and unrepresented persons under ABA Model Rules 4.2 and 4.3. Do not negotiate with the complainant to withdraw the grievance, do not use threats, and, if the complainant is a current client, do not cease performing legal work. Do not ask potential witnesses not to cooperate with the disciplinary investigation. Some states have opined that a lawyer may not offer or make an agreement restricting a party or counsel for a party from bringing information concerning a lawyer's ethical misconduct to the attention of the disciplinary agency.

Further, since disciplinary authorities may act *sua sponte* and need not await a "complainant," an agreement to withdraw a grievance would have no practical benefit. In virtually every state, complainants and complaints are immune from suit for communications made to the disciplinary agencies.

Even if the complainant is a current client, you may not be able to withdraw from the representation. Every grievance does not create grounds for withdrawal. If a matter is before a tribunal, withdrawal is not effective until the adjudicator rules on the motion to withdraw, even if the client is in favor of discharge.

It is improper to charge a complaining client for the time you take to prepare your response to the grievance. Fulfilling professional responsibilities to the disciplinary system is a personal obligation of the lawyer, and not something chargeable to a client. The contract between you and the client is for services you are to perform in the client's legal matter. The client has not agreed to be charged for your grievance defense.

### **Private Dispositions**

The disciplinary rules of most states provide a range of disciplinary sanction options, both public and

private. Private dispositions are available at the initial inquiry stages before formal charges have been filed and before the matter becomes public. If the inquiry is not dismissed as meritless after you respond, you may wish to consider private disposition.

Private dispositions may be a reprimand or admonition to which the respondent consents, or diversionary options such as alcohol counseling, mentoring, or supervised practice. Diversionary options are tailored to the needs of the particular respondent and negotiated with the disciplinary agency. If the terms of the diversion are not fulfilled, the underlying conduct may be reopened for formal proceedings.

Private dispositions become part of the respondent's discipline record, but are not generally released or published. Admonitions are admissible in subsequent grievance matters usually only in determining the degree of sanctions that may be imposed. Since admonitions arise without formal hearing records and perhaps with incomplete investigative files, the respondent should create and permanently maintain a detailed record of any mitigating facts and circumstances, exculpatory information, and any defenses to the grievance giving rise to the private disposition. It might be appropriate, after consultation with counsel, to file a qualified objection indicating that although the admonition is accepted, there are perceived weaknesses in the conclusions set forth in the admonition or in the grievance.

### **Public Proceedings**

If formal proceedings are initiated, a complaint is filed before the disciplinary agency and served on the respondent. The procedural rules applicable are found in the disciplinary enforcement rules of the jurisdiction. The applicability of the rules of civil procedure in disciplinary proceedings vary greatly from state to state. In some states, the civil rules apply unless a discipline rule is on point; in other states, the civil rules do not apply unless specifically referenced in the discipline rules.

Pleadings must be served on the disciplinary counsel, and service must be made by personal service or registered or certified mail. A respondent must file an answer within a specific time, or in most states will be subject to a default with the same effect as a default in a civil action. Extensions of time to respond may be granted upon motion and a showing of good cause. If a respondent is represented by counsel in the formal proceedings, counsel should file an appearance. Affirmative defenses, including a defense of disability or substance abuse, must be raised in a timely manner. Any refusal to answer based upon a claim of constitutional rights must be affirmatively raised within the prescribed time frame.

The rules for disqualification of judges in the jurisdiction generally apply to disciplinary adjudicators. (See the ABA Model Rules for Lawyer Disciplinary Enforcement, Rules 2F and 3F; ABA Model Code of Judicial Conduct, Rule 3E.)

A respondent is required to personally appear at the formal hearing and to submit to cross-examination. If you fail to appear at the disciplinary hearing and fail to file an answer, the charges may be deemed admitted and a default entered. Failure to answer and failure to appear make it impossible for the adjudicating body to determine what is happening with the respondent and is deemed to be a lack of respect for the professional regulatory system. Although you may invoke the Fifth Amendment protection against self-incrimination in a proper case, you may not refuse to testify or to respond to subpoenas for required records.

There are two purposes of the formal hearing: (1) to determine whether the charged misconduct has been established, and (2) to determine the appropriate sanction, if any, to be imposed. The two questions might be addressed in hearings held on separate dates or one immediately following the other. If you are not sufficiently prepared to present mitigating evidence immediately after the misconduct hearing, you should request a continuance. You should be prepared to move forward on the question of appropriate sanction, however, and should not assume continuances will be routinely granted.

### **Constitutional Challenges**

Historically, the disciplinary system has been slow to respond to constitutional law developments. It takes a while for constitutional decision making to percolate through rulemaking bureaucracies anyway, and lawyers are more likely to tend to their clients' needs than to the lawyers' own regulatory rulemaking.

Valid constitutional challenges should be raised in the context of the primary disciplinary proceedings. Too many respondents wait until all disciplinary proceedings have been exhausted and disciplinary sanctions have been imposed before articulating the constitutional arguments that might be applicable. Ancillary attacks in state or federal courts have uniformly been dismissed for lack of jurisdiction. The appellate path of all disciplinary actions will end at the highest court of the state. Appeals from the state supreme courts must be taken to the U.S. Supreme Court.

### **Stipulated Discipline**

A respondent may offer a plea of nolo contendere, admitting all essential facts in the formal complaint or any of the allegations in exchange for a stated form of discipline and on condition that the plea, admission, and discipline is accepted by the adjudicating agency. If the stipulation is not accepted by the hearing panel, the offer is deemed withdrawn and statements made in connection with it are not binding on the respondent or the disciplinary counsel and are not admissible in discipline proceedings. A large number of disciplinary dispositions each year are stipulated matters.

### **Prepare for the Consequences**

While you should not attempt to resign, since in most jurisdictions, a resignation from the bar will not be accepted while a grievance is pending, you should prepare for the possibility of suspension or disbarment. If a respondent is suspended or disbarred, disciplinary rules require notifications to be made to clients, opposing counsel, and tribunals before which any matters are pending, and that the respondent file proof that the notifications were made. A respondent may not engage in the practice of law after the effective date of a suspension or revocation.

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