Tennessee Commission on Continuing Legal Education & Specialization

LAWYER TO LAWYER MENTORING PROGRAM

WORKSHEET S

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.

WHAT WENT WELL?

Start by sharing with each other a brief story of something that went well in your practice this week:

_____

_____

Share your reflection by on one of these questions: What caused the good event? What does it mean? How did you contribute? Others? How can you have more such events in the future?

ACTIVITIES FOR TODAY

- 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 Tennessee, etc. See the attached Disciplinary Process explanation and chart.
- Discuss a lawyer's obligation to assist in a disciplinary investigation.
- 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 Tennessee disciplinary process. Marcia L. Proctor, *What to Do When Disciplinary Counsel Calls*, THE COMPLEAT 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 Tennessee Rules of Professional Conduct Rule 1.8.
- Discuss when you have an obligation to report the misconduct of another attorney to a disciplinary authority. See Tennessee Rules of Professional Conduct Rules 8.3 and 8.4.

ACTION STEPS

End the session by discussing what action steps you can take to either improve or set yourself up for future success based on today's discussion. Discuss how one or more of your Signature Strengths can help you achieve success in these steps.

_____

_____

RESOURCES

TENNESSEE RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP RULE

1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer 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:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client to the lawyer or a person related to the lawyer, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other

relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

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

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

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

(f) A lawyer shall not accept compensation or direction in connection with the representation of a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by RPC 1.6.

(g) 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:

(1) each client is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction; and

(2) each client gives informed consent, in a writing signed by the client. 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.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client or prospective client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless the lawyer fully discloses all the terms of the agreement to the client in a manner that can reasonably be understood by the client and advises the client in writing of the desirability of seeking and gives the client a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) [Reserved]

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

VII. MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Disciplinary Counsel of the Court of the Judiciary.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6 or information gained by a lawyer or judge while serving as a member of a lawyer assistance program approved by the Supreme Court of Tennessee or by the Board of Professional Responsibility.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

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

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(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 a tribunal or a governmental agency or official on grounds unrelated to the merits of, or the procedures governing, the matter under consideration;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

View completes rule and comments at: http://www.tsc.state.tn.us/rules/supreme-court/8

PERSPECTIVES

An attorney's guide to insurance and risk management

MSP L 09/01 "What to Do When Disciplinary Counsel Calls" September, 2001

What to Do When Disciplinary Counsel Calls

By Marcia L. Proctor

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

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

There is evidence that suggests lawyers do not understand their professional obligations. This can worsen their position before disciplinary agencies due to ignorance of the procedures and applicable case law. A disturbingly high number of disciplinary matters result in defaults when the respondent attorneys fail to respond at all, or fail to respond within the required period of time.

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.

(Continued on page 2)

Published by

Cavignac & Associates

INSURANCE BROKERS

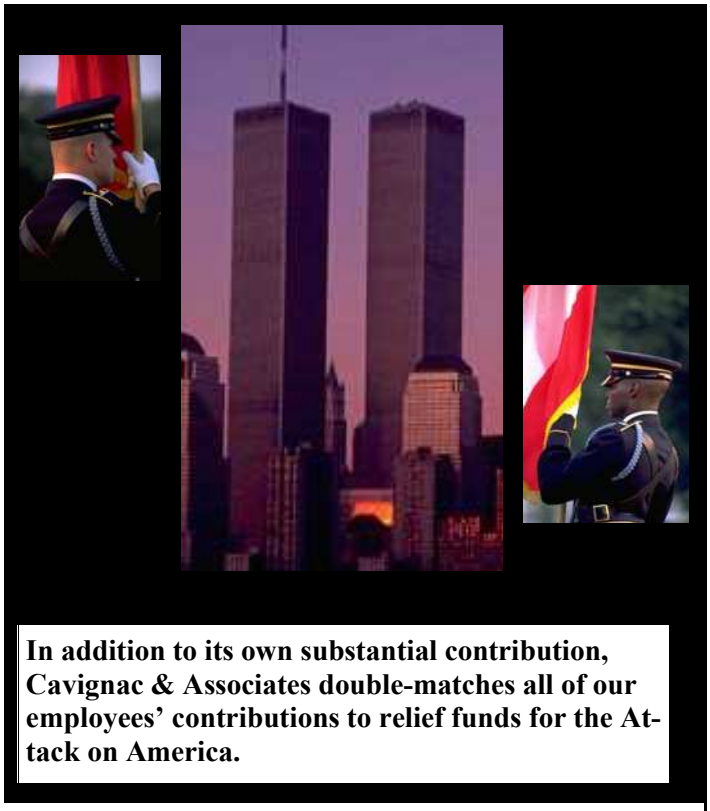
License No. OA99520

1230 Columbia Street, Suite 850, San Diego, CA 92101-3547

Phone: 619-234-6848

Facsimile: 619-234-8601

Website: www.cavignac.com



In addition to its own substantial contribution, Cavignac & Associates double-matches all of our employees' contributions to relief funds for the Attack on America.

(Continued from page 1)

You should perform research on 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

Do not keep the disciplinary inquiry a secret from your law firm. Your reputation specifically, and the reputation of your law firm generally, can be impacted by any grievance. Every grievance potentially places your practice privileges at risk, and you have a fiduciary duty to the firm to disclose that potential. Even if this were not the case, it makes good sense to disclose the problem as soon as possible for several reasons.

Firm members 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. The law firm's knowledge of the problem and willingness to participate in such programs can be a valuable asset in negotiating such resolutions.

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

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

Most grievances are filed by members of the public, both clients and non-clients. 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. See, 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 discipli-

(Continued on page 3)

(Continued from page 2)
nary agency should be considered 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 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 Conduct1.6(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, the discipline system, etc. 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 Rule 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

(Continued on page 4)

(Continued from page 3)
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 which 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 varies 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 only apply in itemized instances.

Pleadings must be served on the disciplinary counsel, 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, 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 good cause shown.

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 timely raised. 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, e.g., ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 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 discipline 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 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 for 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 addresses 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, the respondent 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 rule-making bureaucracies anyway, and lawyers are more likely to tend to their clients' needs than to the lawyers' own regulatory rule-making

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 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 United States Supreme Court.

Stipulated Discipline

A respondent may offer a plea of *nolo contendere*, admit 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

(Continued on page 5)

(Continued from page 4)

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 not admissible in discipline proceedings. A large number of disciplinary dispositions each year are stipulated matters.

Do Not Attempt to Resign

In most jurisdictions, a resignation from the bar will not be accepted while a grievance is pending.

Prepare for the Consequences 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.✳

Marcia L. Proctor is General Counsel at Butzel Long, a multistate law practice based in Detroit, Michigan, and concentrates her practice in professional responsibility and risk management. Butzel Long serves as panel counsel and loss prevention counsel for DPIC. This article presents the personal views of Ms Proctor and should not be attributed to Butzel Long or DPIC.

A Buyer's Checklist

When most people purchase professional liability insurance, they typically look for two things: **price** and **coverage**.

That's not enough. Professional liability insurance should be more than an expensive necessity. It should be a genuine business asset, helping your firm perform at its best. Price and coverage matter, of course. We think that **value** matters just as much. You have the right to expect more from your insurance company than a policy and a bill.

What follows is a list of attributes that every carrier, broker and policy should have in order to provide genuine value. Go through the list and check off the items that are important to you. Then go through it again, and check off the ones your current carrier, broker and policy provide.

If there's a perfect match between your interests and your current coverage, congratulations! You've found an insurance partnership that works for you. If, on the other hand, there are gaps between what you care about and what your carrier, broker and policy provide, it suggests that you could be getting a lot more return on your insurance investment.✳

	Important	Currently Provided
The Right Carrier		
Financial stability	☐	☐
Integrity	☐	☐
Quality of reputation	☐	☐
Focus on risk management and policyholder education	☐	☐
Premium credits and financial incentives offered to policyholders	☐	☐
Involvement before a claim	☐	☐
Dedication to early resolution and efficient claim handling	☐	☐
Support for alternate dispute resolution	☐	☐
Options for coping with the cost of a claim	☐	☐
Continued relationship after a claim	☐	☐
The Right Broker		
Service is a top priority	☐	☐
Experience with my profession	☐	☐
Focus on loss prevention / risk management	☐	☐
Advocate in negotiating the most appropriate terms and ensuring service from the carrier	☐	☐
Partner in developing programs and policy features tailored to my firm	☐	☐
Influential with insurance company	☐	☐
The Right Policy		
Limits and deductibles	☐	☐
Exclusions	☐	☐
Coverage that matches my professional objectives	☐	☐
Coverage tailored to my firm's unique risks	☐	☐
Rewards for good management and risk prevention	☐	☐
The Right Value		
Partnership that helps conserve resources	☐	☐
Partnership that helps maintain my firm's financial health	☐	☐
Partnership that helps to operate efficiently	☐	☐
Partnership that helps sustain peace of mind	☐	☐