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Legal Ethics in Practice: Making Mistakes, Duties to Third Parties, and Other Selected Topics

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Introduction

Ethical problems can come up for even the most diligent practitioners. Many practice areas generate a good number of grievances each year, with complaints ranging from improper advocacy and lack of communication to trust account violations and unreasonable fees.

While it is impossible to address every pressing issue within a CLE, this presentation will address some questions we see in our defense of lawyers facing disciplinary charges, as well as provide an overview of the process itself. We invite your participation and feedback.

I. Communication and Risk Mitigation: What Happens When A Lawyer Makes Mistakes?

Every lawyer makes mistakes, and in many cases it makes sense to admit to them. It may seem counterintuitive, but admitting that you messed up in an important way can

help make things better in the long run. The client should learn the nature of the error and the reasonably foreseeable consequences of the error; this gives the client the opportunity to seek new counsel and make informed decisions. It also offers you the opportunity to do what you can to mitigate the damage (including, at the very least, not charging for the error). You don't have to say the word "malpractice" (because not every mistake is malpractice) but you should make the client aware that he or she should seek independent advice to see if there is a viable claim. This won't necessarily help you avoid the grievance (though when a client feels respected and included in decision making it lessens that possibility), or a malpractice claim, but you will have complied with your ethical responsibilities.

While there is no bright line Supreme Court Rule as to what constitutes an error or omission requiring disclosure to the client, it is not necessary for lawyers to tell their clients about every error. Generally, mistakes that do not adversely affect the case, strategic decisions that ultimately did not work but were reasonable given the circumstances, and errors that have been remedied without detriment to the client do not need to be disclosed (though clients should not be charged for work made necessary by the attorney's error or omission).

On the other hand, Wisconsin Ethics Opinion E-82-12 provides that attorneys have a duty to tell clients about omissions that are significant enough to give rise to a potential malpractice claim. The State Bar Professional Ethics Committee came to this conclusion in light of the Supreme Court Rules (as written at the time) requiring attorney competence, assistance in maintaining the integrity of the profession, and precluding the attorney from limiting his or her liability to a client for malpractice.

A later article, "What to Do After Making A Serious Error," was authored by State Bar Ethics Counsel Tim Pierce and now-retired WILMIC Vice President of Claims Sally Anderson and was published in the February 2010 *Wisconsin Lawyer*. Pierce and Anderson add to that analysis the fact that SCR 20:1.4 requires lawyers to reasonably explain matters to their client as necessary to permit the client to make informed decisions, and that SCR 20:1.7 provides that a conflict of interest exists if there is a significant risk that a lawyer's personal interest may materially limit representation of a client:

> When a lawyer commits an error giving rise to a possible malpractice claim, the client must make important decisions as to whether to pursue the possible claim against the lawyer, immediately or at a later date, and whether to continue the representation, and the lawyer must provide the client with information sufficient to ensure that the client is reasonably informed about these matters.

Even given a duty to report to the client, the lawyer should refrain from confessing malpractice liability to the client or otherwise discussing the merits of filing a grievance or malpractice suit. Attorneys do have a duty to refer clients (or anyone else) to the Office of Lawyer Regulation (OLR) if they express a desire to file a grievance. SCR 21:1.15(3).

Sometimes, despite the attorney's best efforts, clients or opposing parties are unhappy with some aspect of the case and file a grievance with the OLR. Attorneys have a duty to cooperate with the investigation and may reveal client confidences to the extent necessary to respond to the grievance. (An overview of the response process is provided later in this packet.) Attorneys also may have a duty to put their malpractice carrier on notice; what exactly triggers that duty is contained in the policy language and does vary by carrier.

In addition, sometimes the bizarre circumstance occurs where a current client files a grievance but still intends to have the lawyer continue representation. Unless continued representation would require the lawyer to violate rules of professional conduct or other law, the lawyer may continue representation if he or she feels comfortable doing so (see SCR 20:1.6(b)). However, it is difficult to see how that would be the case, and in most instances the lawyer should withdraw.

II. "Offensive Personality"—Dealing With (Really) Difficult People

The Attorney's Oath has implications for practice. Violating the Oath is sanctionable under Chapter 20. See SCR 20:8.4(g). Though the Oath includes a number of interesting promises,[1] relevant to our discussion are disciplinary matters stemming from violating the promise to "abstain from all offensive personality."

"Offensive personality" is, of course, not defined, but discipline has been imposed based on this phrase. For example, the Court has found "offensive personality" worthy of discipline to exist when:

- An attorney threatened to kill an adverse party and smashed his tractor into that party's vehicle. *Matter of Disciplinary Proceedings Against Beaver,* 181 Wis. 2d 12, 510 N.W.2d 129 (1994) (90 day suspension).

- An assistant district attorney made offensive comments about a court reporter's breasts and used state e-mail to send and receive inappropriate sexual and other offensive content. *In re Disciplinary Proceedings Against Beatse,* 2006 WI 115, 297 Wis. 2d 292, 722 N.W.2d 385 (public reprimand).

- An attorney called a police detective repeatedly, represented to the dispatcher that it was a "life or death" emergency, used vulgar language; same attorney essentially took over an administrative hearing and refused to obey the

[1] E.g., "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice."

procedural rules. *In re Disciplinary Proceedings Against Eisenberg*, 2004 WI 14, 269 Wis. 2d 43, 675 N.W.2d 747 (one year suspension).

- An attorney distributed a printout accusing the father of her child of being an "accused serial-rapist" and urging a boycott of the father's wife's law firm. *Matter of Disciplinary Proceedings Against Johann*, 216 Wis. 2d 118, 574 N.W.2d 218 (1998) (six-month suspension).

In *Matter of Disciplinary Proceedings Against Heilprin*, 168 Wis. 2d 1, 482 N.W.2d 908 (1992), the respondent attorney challenged the constitutionality of the "offensive personality" language, on the basis that it was unconstitutionally vague. The attorney was found to have directed sexually explicit and suggestive comments and questions and two of his clients, both women, during conferences, in violation of the Attorney's Oath. However, the Court did not reach the issue of constitutionality, because in 1973, the attorney had been suspended for an indefinite period for the same sort of conduct (giving the attorney ample notice that he is not supposed to engage in such behavior). The attorney's license was revoked.

The Court returned to the issue two years later when Attorney Beaver challenged the Offensive Personality provision as impermissibly broad and vague. It concluded that "the context in which the term 'offensive personality' is used and its application to lawyer disciplinary proceedings restrict its meaning to conduct that reflects adversely on a person's fitness as a lawyer." *In re Beaver*, 181 Wis. 2d 12 at 22. There is still not a bright-line rule but the Court did clarify that there had to be some connection to the practice of law.

III. Ethical Settlements: What are Attorneys' Obligations Regarding Liens and Other Third-Party Interests?

A. Don't Demand, Don't Agree – Settlements that Require Plaintiff's Counsel to Protect the Releasor from Liens

On occasion, proposed settlements seek to make plaintiff's counsel a party to the settlement itself, for various reasons. One version of this scheme conditions settlement on plaintiff's counsel serving as guarantor or otherwise agreeing to indemnify and hold the releasor harmless from third-party liens or claims. It is prohibited to demand such a provision or to agree to one. "[L]awyers may not propose, demand or enter into such agreements." (Wis. Formal Opinion E-87-11.)

Such a rule exists in all or nearly all jurisdictions for a simple reason: it inserts an attorney into a financial transaction with his or her client and, if the provision ever becomes applicable, it creates conflicting interests between them. SCR § 20:1.7 prohibits, generally, a lawyer from representing a client where they have adverse interests. Additionally, SCR 20:1.8 is more specific to the matter at hand:

> **Prohibited transactions**
>
> (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.
> >
> > . . .

> (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.

While there is no explicit and specific prohibition on an attorney agreeing to protect a releasor from third party liens, such a provision either immediately puts the attorney's and client's interests at odds or creates the possibility that it will happen in the future.

There may be narrow circumstances in which a settlement agreement that includes a provision involving plaintiff's counsel (unrelated to liens/third-party claims) that does not run afoul of the rules. Per Wis. Stat. § 757.38, plaintiff's counsel does need to consent to any settlement of a personal injury, but this does not insert the lawyer into the transaction itself. Demanding or agreeing that plaintiff's counsel protect a releasor from liens/third-party claims does in essence make the lawyer a party, which is prohibited by a bright-line rule that is universal or nearly so, premised on SCR 20:1.7, 20:1.8 and a number of others dealing with the attorney-client relationship.

B. Not So Fast: Lawyers Do Have Obligations Regarding Liens and Third-Party Claims

Lawyers' duties are not all "zealous advocacy" and undivided duty of loyalty – SCR 20:1.15(e) imposes a duty on lawyers to keep part or of a client's recovery in trust for the benefit of a third-party creditor or lien-holder. Disbursement of the client's funds can be, under certain circumstances, a violation. In relevant part, SCR 20:1.15(e) provides:

> **(e) Prompt notice and delivery of property**

> (1) Notice and delivery. Upon receiving funds or other property in which a client has an interest, or in which a lawyer has received notice that a 3rd party has an interest identified by a lien, court order, judgment, or contract, the lawyer shall promptly notify the client or 3rd party in writing. Except as stated in this rule or otherwise 148 permitted by law or by agreement with the client, the lawyer shall promptly deliver to the client or 3rd party any funds or other property that the client or 3rd party is entitled to receive.
>
> (2) Accounting. Upon final distribution of any trust property or upon request by the client or a 3rd party having an ownership interest in the property, a lawyer shall promptly render a full written accounting regarding the property.
>
> (3) Disputes regarding trust property. When a lawyer and another person or a client and another person claim an ownership interest in trust property identified by a lien, court order, judgment, or contract, the lawyer shall hold that property in trust until there is an accounting and severance of the interests. If a dispute arises regarding the division of the property, the lawyer shall hold the disputed portion in trust until the dispute is resolved. Disputes between the lawyer and a client are subject to the provisions of SCR 20:1.5(h).

A lawyer can be civilly liable if the lawyer is a party to an agreement. *Yorgan v. Durkin*, 2006 WI 60, 290 Wis. 2d 671, 715 N.W. 2d 160. In *Yorgan* the client signed a chiropractor's "Authorization and Doctor's Lien" giving him an interest in funds recovered in the court case. The document specifically authorizes the attorney to disburse payment to the chiropractor. The lawyer was aware of the agreement (which contained a space for his signature) but never executed it or otherwise became a party to it, precluding contractual liability.

If the lawyer is not a party to such an agreement but has notice of a third party's lien or other legal interest in funds held in trust, the lawyer is probably not exposed to civil liability but disbursement in derogation of the third-party's rights violates SCR 1.15(d). *Disciplinary Proceedings Against Barrock*, 2007 WI 24, 299 Wis. 2d 207, 727 N.W.2d

(disbursement of settlement proceeds with knowledge of another lawyer's lien thereon a violation).

C. Fee Divisions: What Happens When A Client Terminates One Lawyer and Resolves the Case with a Second?

Despite our best efforts, sometimes clients seek new counsel mid-representation. With hourly work, figuring out fees in this situation is usually straightforward—lawyers can just bill for the hours worked and when the new lawyer takes over, the hours and billing starts over. However, when the fee is contingent, the calculus is more complex, and resolution needs to comply with the reasonableness requirements of SCR 20:1.5.

Tonn v. Reuter, 6 Wis.2d 498, 95 N.W.2d 261 (1959) established the framework for apportioning a contingent fee where a client retains a lawyer pursuant to a contingent fee agreement but then discharges the lawyer "without cause" and enters into another contingent fee agreement with a different lawyer who obtains a recovery from the client.

The *Tonn* Court held:

> where the attorney has been employed to perform specific legal services, his discharge, without cause or fault on his part before he has fully performed the work he was employed to do, constitutes a breach of his contract of employment and makes the client liable to respond in damages.

The Court then defined the measure of damages as "the amount of the contingent fee . . . less a fair allowance for the services and expenses which would necessarily have been expended by the discharged attorney in performing the balance of the contract." 6 Wis. 2d at 505, 95 N.W.2d 261.

Generally, it had been understood that the second lawyer would receive the "fair allowance" on the theory that the "services and expenses" the first lawyer was spared by

the discharged were provided and borne by the second. "Fair allowance" has not been clearly defined.

But from the perspective of the second lawyer, "fair allowance" may not be the important issue.

> *Tonn* contemplates that a client may be liable to attorneys for more than the amount she would have owed under one contingency fee agreement [but] a client is *not necessarily* liable for successor counsel's *full* contingency fee. Rather, the circuit court remains free to exercise its supervisory authority to determine whether a successor counsel's, not just a discharged counsel's, fee agreement is reasonable.

Tesch v. Laufenberg, Stombaugh & Jassak, S.C., 2013 WI App 103, 349 Wis. 2d 633, 653, 836 N.W.2d 849, 859.

Tesch contemplates the possibility that a client is liable for the fee promised each lawyer. Through the lens of contract law, this is two full contingent fees. And in this context the law of contract has to find a way to coexist with the Supreme Court Rules and the sense the contract between a lawyer and client differs in some respects from other types of contracts. The resulting answer seems to be that the second lawyer is entitled to the full fee – subject to a court's notion of "reasonableness."

Hupy v. Barrock, 361 Wis. 2d 285, 862 N.W.2d 619, 2015 WL 751823, 2015 WI App 28 (unpublished) provides an example of how complex fee issues between successive lawyers can become. On the same day, the client signed agreements with two firms but quickly opted to go with one, the Hupy firm. Hupy and Barrock enter into an agreement (made an order of the court) that resolved the fee split in a different case and the new one, reserving 85%-95% of the fee to Hupy. Two years later, the client terminated Hupy

without cause and returned to Barrock who settled the case. The Court held that the agreement made Hupy the attorney in the "first position" for the *Tonn* analysis and that it entitled Barrock to the promised 5%. It then reviewed Barrock's work in settling the matter after the client returned after two years with Hupy. For this portion of the work, Barrock was entitled to the "reasonable allowance" contemplated by *Tonn*.

IV. Overview of the Grievance and Disciplinary Process

The Wisconsin Supreme Court has authority over the practice of law in Wisconsin; the Supreme Court Rules ("SCR") govern attorney conduct. In particular, SCR Chapter 20 sets forth the rules of professional conduct for attorneys, and SCR Chapter 22[2] sets forth procedures for investigation and discipline. Ultimately, the Supreme Court is responsible for determining whether and what discipline should be imposed, and whether a suspended or revoked license should be reinstated.

The Office of Lawyer Regulation is a creation of the Wisconsin Supreme Court and is tasked with investigating attorneys who may have violated the rules. The director of OLR is Keith Sellen. Other important bodies within the regulatory system include the district investigative committees to help investigate grievances; and the preliminary review committee which determines whether there is cause to proceed to a formal complaint and reviews dismissals at the request of the grievant. Both committees include lawyers and non-lawyers. There are also special panels who may handle these functions when members of the lawyer regulation system are involved (see SCR 22.25).

[2] All current Supreme Court Rules, including comments, can be found at https://www.wicourts.gov/supreme/sc_rules.jsp.

A. **Why Do People File Grievances?**

OLR investigations are complaint-driven. According to the Fiscal Year 2017-2018 Office of Lawyer Regulation annual report,[3] clients (current and former) submitted 57.88% of the grievances received by OLR. Other sources of complaints include an adverse party (15.3%), OLR staff (4.7%), a guardian ad litem (4.17%), other attorneys (3.01%), and judges (0.17%).

Grievances may be reported by telephone or in writing; while the complaints usually state a reason (such as lack of communication or perceived misrepresentation, which will be discussed below), the real reason people file grievances isn't always obvious. Often, clients are just upset over the outcome or the cost of representation, neither of which form independent bases for discipline but could pave the way for further investigation. For instance, clients may complain that their attorney blindsided them with a bill many thousands of dollars more than expected for a case they ultimately lost. This complaint may implicate competence (SCR 20:1.1) or communication (SCR 20:1.4), or could prompt the OLR to request billing and trust account records which may reveal other problems (SCR 20:1.15). Or, following investigation, it may be determined that the lawyer did everything by the book and the client simply just didn't like what happened, in which case the fee dispute could be handled by other means such as State Bar Fee Arbitration or court and the OLR complaint could be dismissed.

[3] The most recent report is available at https://www.wicourts.gov/courts/offices/docs/olr1718fiscal.pdf. Reports are published annually in the spring. All grievance statistics in this outline are taken from that report unless otherwise specified.

Not surprisingly, certain practice areas generate grievances at much higher rates than others. These tend to be emotionally charged practice areas with major life implications—criminal law generates a plurality of grievances (47.22% in fiscal year 2017-2018), followed by family law (16.65%), estates/wills/probate (5.51%), and litigation (4.81%). Common allegations include lack of diligence (18.85%), scope of representation (12.76%), lack of communications (12.35%), improper advocacy (11.25%), and misrepresentation/dishonesty (8.93%). Trust account violations account for a relatively small percentage of allegations (2.61%), but as the Supreme Court Rules governing trust accounting changed significantly in July 2016 and the OLR has increased its focus on trust accounting, that number may increase.

B. Somebody Filed a Grievance; Now What?

First, it is important to remember that anyone can file a grievance at any time and the barriers to doing so are minimal—it's a matter of making a phone call or filling out a form, and there is no fee to do so. Once a grievance comes in, intake staff conducts a preliminary review (SCR 22.02). The purpose of this review is not to evaluate the merits of the complaint, but to see if it falls within the OLR's jurisdiction and states sufficient information to give rise to investigation. If it does not, the OLR may close the matter, with an opportunity for the grievant to request a written review by the OLR director (SCR 22.02(4)). In certain cases and for good reason, the OLR may refer the matter to another agency such as the Board of Bar Examiners, the State Bar of Wisconsin, or even the district attorney's office (SCR 22.03). In cases involving minor disputes, the intake staff can attempt to reconcile the matter. If there is sufficient information of cause to proceed, the

investigator will refer the matter to the OLR director with a recommendation that the matter be investigated, or diverted (which will be explained below).

Investigation is generally governed by SCR 22.03. Once the matter has been referred to investigation, the OLR must notify the respondent. (In practice, the OLR usually does so during intake.) While historically that notice has come by letter, it is increasingly occurring via email or by a phone call. Once you receive notice, you generally have 20 days to respond; extensions are common and usually given without too much trouble. You may hire counsel to assist you.

You have a duty to cooperate with all facets of investigation, even if the complaint is obviously frivolous. Failing to respond can result in an order to show cause for why your license should not be suspended (SCR 22.03(4)); willful failure to respond or cooperate, or providing false information is considered misconduct (SCR 22.03(6)) and can subject you to discipline even if the underlying grievance is meritless. If the allegations implicate potential criminality, you do retain your Fifth Amendment rights as to those allegations (but still need to respond to allegations that are not criminal in nature).[4]

In some cases, grievances are filed by current clients, and your duties under Chapter 20 continue unless and until you withdraw from representation. (See SCR 20:1.16.) Once you have responded, the OLR will usually provide your response to the grievant and, if necessary, solicit a reply. Once the grievant has replied, you get a copy and will have the opportunity to submit more information. (There may be several rounds of this.) During this time, the investigator can also contact witnesses if warranted, and may ask for an in-person

[4] Note that invoking Fifth Amendment rights may be construed against you in a disciplinary matter, but the alternative is admitting to conduct that will give rise to criminal liability later. Consultation with a criminal defense attorney is advised at this point.

or telephone interview with you. These interviews are not depositions (though they may be tape recorded) and are otherwise generally informal, but you still have a duty to be truthful.

C. What Happens After the Investigation?

An OLR investigation can take a days or months. Sometimes, after a flurry of inquiries and follow-up messages, OLR goes silent. This in itself does not mean anything—sometimes matters sit in OLR's hands for months and then get dismissed; sometimes they sit for months and then a complaint seeking revocation is issued. Regardless of how long it takes, there are several paths to disposition:

1. The OLR may find insufficient evidence of a violation or otherwise find no cause to proceed and may dismiss the case. The grievant has limited appeal rights (to the OLR director or to committee) but dismissals are generally affirmed.

2. The OLR may offer a diversion agreement. (SCR 22.10.) A diversion agreement is, essentially, a deferred prosecution agreement. You agree to abide by certain conditions (for instance, take CLE or submit a matter to fee arbitration, as well as pay costs of the proceeding) and avoid additional findings of misconduct and the matter will be dismissed, then completely expunged after three years. The fact of the diversion is revealed to the grievant but the terms are not. You are not required to accept a diversion agreement.

3. The OLR may offer stipulation to a consensual public or private reprimand. (SCR 22.09.) These terms are largely self-explanatory; a public reprimand is made public and a private reprimand exists in the OLR offices. However, should a formal complaint be issued in a different matter after a lawyer has received a private reprimand, the fact of the reprimand is recited in the complaint and otherwise becomes public. Again, you are not required to stipulate to a reprimand.

4. If you decline to stipulate to a diversion or reprimand, or the OLR director believes that there is sufficient evidence of misconduct that could result in more serious sanctions such as a suspension or revocation, then the director will present the matter to the preliminary review committee to determine whether

> there is cause to proceed to more formal action. If the preliminary review committee finds cause to proceed, the OLR director then determines what action to take.

If a stipulation is not reached or not offered, the OLR files a complaint with the Supreme Court. (SCR 22.11.) At this point, the fact that you are under investigation becomes public. If a complaint is filed, you will need to file an answer, and then the matter proceeds similarly to a civil trial, except the Supreme Court will appoint a referee to act as the hearing officer. (SCR 22.16.) Referees may be practicing or retired lawyers, or retired judges; you have the right to substitute referees once as a matter of course and thereafter for cause.

The referee will confer with the parties or their counsel and enter one or more scheduling orders (see SCR 22.15), which will provide for discovery (including depositions), witness disclosures, briefing if requested or required, and a hearing date or dates. During the course of the proceeding, it is possible to stipulate to findings, conclusions, and recommended discipline, which the Supreme Court can approve or reject (rejected stipulations have no evidentiary value), or direct the parties to consider specific modifications. (SCR 22.12.) Stipulations are not supposed to be the product of plea bargaining and should generally include a disclaimer of same.[5]

The hearing itself is less formal than a court trial—it often occurs in a hotel or bar association conference room (SCR 22.16 provides that the hearing occur in the county of the respondent's principal office unless the referee for cause designates a different location). A court reporter will make a record of the proceeding. The hearing is open to the

[5] If you realize that you can't defend against serious charges that would give rise to revocation, SCR 22.19 provides a procedure for petitioning for consensual revocation.

public. The OLR is represented by either staff or retained counsel. Both the OLR and the accused lawyer may present witnesses and exhibits, and cross-examine the other party's witnesses. Hearsay is admissible though the referee may not give it particular weight. Opening and closing arguments may be made on the record, may be waived, or the referee may request briefing. The OLR has the burden of showing with clear, convincing, and satisfactory evidence that the attorney has committed misconduct.

Within the later of 30 days after the conclusion of the hearing or the filing of the transcript, the referee is supposed to file a report and recommendation with the Supreme Court. This report and recommendation sets forth findings of fact, conclusions of law, and recommendation for dismissal or specific discipline.

The referee also must file a recommendation as to the assessment of costs following the OLR's statement and the lawyer's objections if any; per SCR 22.24 the full cost of the proceeding (including OLR's time, the referee's time, hearing room rental, court reporter, copying, etc.) is imposed on the lawyer if misconduct is found. If no misconduct is found the parties pay their own costs; unfortunately, if no misconduct is found the accused lawyer is not entitled to reimbursement. However, the Court has the discretion to reduce the amount of costs based on the circumstances.

Once the referee's report and recommendation is filed, either party has 20 days to file an appeal. (SCR 22.17.) If no appeal is filed, the Supreme Court considers the report on its own (though in rare cases may order briefs); if either party appeals, the appeal proceeds in a manner similarly to other Supreme Court appeals, except the Court hears the appeal automatically and does not have the discretion to decline it. The parties file briefs and appendices, and in most cases, the Court orders oral argument.

Whether or not an appeal is filed, the Court acts on its own timeline and eventually renders a decision, which is final (subject to motions for reconsideration under 22.18 which are rarely successful). The Court considers the referee reports and the briefing of the parties, and can adopt, reject, or modify the referee's findings, conclusions, and disciplinary recommendations. (A common disposition is the Court's general acceptance of findings of fact and conclusions of law, but deviating from the disciplinary recommendation in some fashion.)

If the Court finds no misconduct occurred, then the matter is dismissed. Sometimes, the Court finds that there is evidence of some minor or technical violation but not sufficient to warrant discipline. If the Court does determine that there is sufficient evidence of misconduct warranting discipline, the Court may impose a private reprimand, public reprimand, suspension ranging from 60 days to three years, or revocation. "Revocation" is a term of art, as there is no mechanism for permanently disbarring a Wisconsin attorney; an attorney whose license has been revoked can apply for reinstatement after five years.

If the Court's disposition is anything other than a private reprimand or dismissal, the decision is published in official reporters as well as in the *Wisconsin Lawyer* magazine. (A party may request publication of a dismissal, for instance, if the matter got significant publicity and the lawyer wishes to clear his or her name.) The OLR will send notice of a public reprimand, suspension, or revocation to the State Bar and to a newspaper of general circulation in each county in which the attorney maintained an office; the OLR sends all judges in Wisconsin notice of a suspension or revocation. (SCR 22.23.)

V. How Do I Avoid or Mitigate Grievances?

It's important to remember that anyone can file a grievance about any lawyer for any reason. However, there are certain things you can do during the course of representation to lessen that possibility, or reduce the potential liability should a grievance be filed.

- Keep the channels of communication open (SCR 20:1.4). Some grievances get filed simply because the client thinks you forgot about them, or that you aren't keeping them sufficiently in the loop. A good engagement letter may spell out how and when you communicate with clients (for instance, it may state that you will copy the client on particular documents); during representation it is helpful to remind clients that there may be periods of time when nothing is happening and they shouldn't expect to hear from you.

- Similarly, manage client expectations (SCR 20:1.2, 1.4). It's easy to say "don't overpromise and under-deliver" but some complaints can be avoided by being realistic about your client's prospects. The fact you lost at trial is not, in itself, a basis for discipline, but if your client went into trial with realistic expectations for success he or she is less likely to complain when it does not come out as wanted.

- Keep the case moving (SCR 20:1.3). Clients complain when things seem stalled. Often, there is nothing you can do about how long a matter is taking—there are mandatory waiting periods and court delays and uncooperative opposing parties (in which case, communication is key). However, when speed is within your control, try to get things done expeditiously and don't procrastinate.

- Make sure your fees are reasonable and transparent (SCR 20:1.5, 1.15). Again, fee disputes are not in themselves something the OLR is concerned with, but a client is far more likely to complain to OLR about a large unexpected bill than they are to complain about that same bill when they knew it was coming.

- End the relationship properly (SCR 20:1.16). Sometimes, grievances come because the relationship ended abruptly, on a bad note, or with unfinished business. If your client has responsibilities that will extend past the representation (e.g. payments to third parties, monitoring), make sure it is spelled out in a closing letter that the client needs to handle it and that you won't be involved. Make sure any trust account refunds or settlement funds are disbursed properly and with clear documentation; OLR will take notice of funds that aren't where they're supposed to be (even if it looks like a "fee dispute" at first blush). Also, remember that Wisconsin does not permit attorneys to assert a "retention lien" on file materials; you have an obligation to surrender most file contents (with the exception of your notes of personal impressions, interoffice memos delegating work, and similar) upon request and without charge at the conclusion of representation. Outstanding bills should be handled separately.

Conclusion

In many cases, reasonable and ethical practitioners will have different interpretations and different answers to the questions posed; it is important to remember that such issues should be resolved "through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules." (Preamble to SCR Chapter 20, ¶ 9.)

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