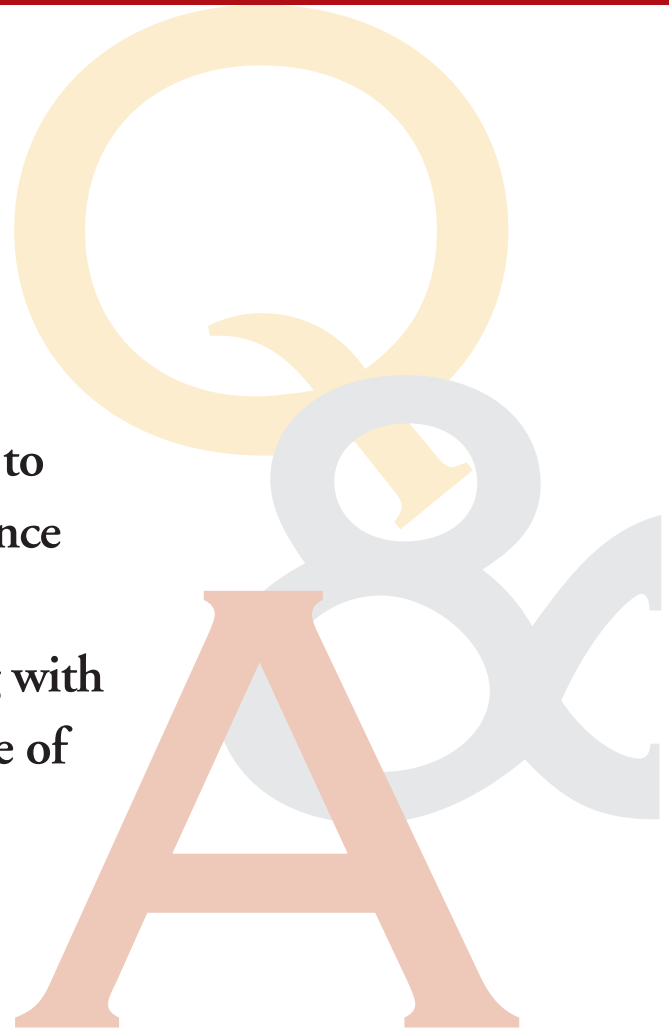


BY JOHN L. COTÉ

# THE DEFENSE OF

The following questions and answers distill the author's experience over two decades of deciding and defending grievances. I offer them in the hope that they will assist my colleagues both to avoid the trauma and expense of grievance proceedings and, when they cannot be avoided, to respond to them in keeping with the obligations imposed by the privilege of being licensed to practice law.



# GRIEVANCES

## WHAT RESPONDENTS NEED TO KNOW

### WHAT ARE THE CHANCES THAT YOU MAY HAVE A GRIEVANCE FILED AGAINST YOU?

With more than 36,000 attorneys licensed in Michigan, the odds are relatively small. For over 3,500 attorneys, however, the odds were 100 percent in 2003. Since 1994 the number of grievances filed annually has averaged from 3,500 to over 4,000.

### WHO CAN FILE A GRIEVANCE?

Anyone. It need not be a client or former client. Grievances are sometimes filed by opposing counsel. This always raises a question about the motive. Does a real basis exist to grieve an opponent or is someone trying to gain a tactical advantage in a pending litigation?

### HOW CAN I AVOID A GRIEVANCE BEING FILED?

Grievances or complaints are filed for a variety of reasons.

One of the biggest is the attorney's failure to maintain a good avenue of communication with the client. Conduct frequently cited in complaints includes not returning client phone calls on a timely basis and not answering mail from the client. In short, not keeping the client reasonably well informed

often will prompt a complaint, even when nothing is amiss.

When possible, anticipate client questions and initiate the call or write a status letter, especially if you know the client is concerned and anxious to know what is going on. Failure to do so may result in having to answer a Request for Investigation or defend against a Formal Complaint, which will take much more time out of your already busy schedule than communicating with your client.

### WHAT IS THE FIRST THING I SHOULD DO IF I RECEIVE A REQUEST FOR INVESTIGATION?

First, don't panic. Far fewer formal complaints are issued than requests for investigation. Second, keep in mind the old adage, "He who represents himself/herself has a fool for a client," especially if the matter holds the potential for a possible suspension of one's license to practice law.

It is hard (very hard for some) to remain objective and detached from the fear, stigma, and concern that a grievance naturally causes.

It is also hard to think clearly, especially if a basis exists for the issuance of a Formal Complaint.

A respondent is well advised to seek professional help from someone familiar with

the disciplinary process. I assure you, it will take a big load off your mind and enable you to get on with the representation of your clients, free of the distraction that can result from trying to be your own advocate.

### ARE THERE ANY SPECIAL THINGS I SHOULD KNOW ABOUT ANSWERING A REQUEST FOR INVESTIGATION?

Yes. Answering a Request for Investigation is not like filing an answer to a civil complaint. You cannot simply "leave the Plaintiff to their proofs" or file a vague, non-specific denial. MCR 9.113 is very clear: Within 21 days after being served with a Request for Investigation, the *respondent* (not the respondent's attorney) shall file a signed, written answer in duplicate, "fully and fairly disclosing *all* the facts and circumstances pertaining to the alleged misconduct" (emphasis added). Obviously, the respondent's attorney can assist in the formulation of a proper answer, but the respondent is responsible for answering fully.

And note this: "Misrepresentation in the answer *is* grounds for discipline" (emphasis added).

Any attempt to deceive or be less than candid will only come back to haunt you. An added count for misrepresentation could

result in far more serious consequences than the initial charge might warrant.

Learn a lesson from several Presidents of the United States: It's the cover-up (or attempt to do so) that can become more damaging than any offense.

That sounds like self-incrimination. It is!

That's part of the price your privilege to be licensed carries with it.

Only two grounds are cited in the rule that may justify refusal to answer: "expressed constitutional or professional grounds" MCR 9.113(13)(1). Unless there is possible criminal exposure, asserting a constitutional privilege may not get you too far.

A person who files a grievance, however, waives any attorney-client privilege "as to matters relating to the request" MCR 9.113(C). If you reveal attorney-client privileged matters that go beyond "matters in your answer relating to the request," you may have gone too far, however, so caution is required.

**A word of caution:** Do not dump a huge file on the Commission and expect them to sort out whether there is an answer buried in there somewhere for them to find. If the "answer" looks evasive, sounds evasive, or smells evasive, it may be deemed to constitute misrepresentation, and could result in the respondent being called in to give a statement before a court reporter.

### IS THERE SUCH A THING AS PLEA-BARGAINING?

Yes. MCR 9.115(F)(5) provides for Discipline by Consent:

*"A respondent may offer to plead nolo contendere or to admit all essential facts contained in the complaint or any of its allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the Commission and the hearing panel" (emphasis added).*

### WHO IS ON THE HEARING PANEL?

Hearing panels are made up of three attorneys, often from the same locale as the respondent, who volunteer their time. They are appointed by the Attorney Discipline Board. Approximately 420 attorneys volunteer their service. A case may be assigned to a special master to conduct a hearing and file a report with the hearing panel.

## FAST FACTS:

**ANYONE CAN FILE A GRIEVANCE.**

**ANY ATTEMPT TO DECEIVE OR BE LESS THAN CANDID WILL ONLY COME BACK TO HAUNT YOU.**

**A PERSON WHO FILES A GRIEVANCE WAIVES ANY ATTORNEY-CLIENT PRIVILEGE "AS TO MATTERS RELATING TO THE REQUEST."**

### IF A PLEA IS REJECTED, WHAT THEN?

The case will be assigned to a different panel and proceed to trial.

### MUST THE RESPONDENT TAKE THE STAND?

Yes. "The respondent shall personally appear at the hearing and is subject to cross-examination as an opposite party under MCL 600.2161; MSA 27A.2161."

### IS THERE SUCH A THING AS PROBATION?

In certain cases "contractual probation" may be an option.

If a respondent asserts in response to a Formal Complaint that his/her "ability to practice law competently was materially impaired by *physical or mental disability* or by *drug or alcohol addiction*," that "the impairment was the cause of or substantially contributed to that conduct," that "the cause of the impairment is susceptible to treatment," and that "he or she in good faith intends to undergo treatment, and submit a detailed plan for such treatment," then the respondent *may* be placed on probation for a specific period not to exceed two years. A hearing panel may order a respondent to submit to a physical or mental examination by a physician selected by a hearing panel MCR 9.121(C) (emphasis added).

### WHAT HAPPENS IF A PANEL FINDS THAT MISCONDUCT HAS OCCURRED?

The case will move on to stage two, the determination of what is the appropriate discipline.

That is a separate and distinct phase of the disciplinary process. It can take place "as

soon after the finding of misconduct as is practicable and may be held immediately following the panel's ruling," or it may take place on a new date to be set by the panel.

### WHAT ARE THE FORMS OF DISCIPLINE?

Reprimand, suspension for a stated period of time, or revocation (disbarment). In certain instances, probation may be ordered, or an admonition by consent of the respondent.

### OH, WHAT A DIFFERENCE A DAY MAKES! WHY?

A suspension for 179 days or less does *not* require the filing of a petition for reinstatement. It does require the filing of two affidavits, however; one to prove that notice to the respondent's clients has been made and, later, one to the clerk of the Supreme Court attesting that all terms and conditions of the suspension have been met.

A suspension for 180 days or more *does* require the filing of a petition to reinstate. Reinstatement is by no means assured and can add many more months to the period of suspension before a hearing is held and a determination made. Many requirements must be met in a petition to reinstate. The Respondent (petitioner) has to demonstrate by clear and convincing evidence that all criteria required have been met.

### WHAT FACTORS CAN AFFECT THE LENGTH OF SUSPENSION?

There are many.

Step two of the proceedings is when evidence is introduced in aggravation (or mitigation) of the misconduct found by the panel.

Such factors can include, but are not limited to, previous admonitions and orders of discipline; prior contractual probation; what restitution has been made, if any, and when, in the case of misappropriation; the length of time respondent has been in practice; a prior unblemished record; and almost any other relevant and material factor that may be present. A recent Michigan Supreme Court decision requires that the level of discipline must be based on the ABA's standards for imposing sanctions.

### WHAT IS THE DIFFERENCE BETWEEN THE ATTORNEY DISCIPLINE BOARD (ADB) AND THE ATTORNEY GRIEVANCE COMMISSION (AGC)?

Before 1978, grievances were handled by the State Bar (State Bar Grievance Board). The Board wore many hats: investigator, prosecutor, judge, and appellate court. That changed in October of 1978 when the Supreme Court bifurcated the system and created two separate bodies, each with distinct functions.

The ADB (Board) is the adjudicative arm of the Supreme Court. The Board appoints hearing panels consisting of three attorneys to try cases sent to the Board when the AGC (Commission) files a Formal Complaint against a respondent after it conducts an investigation. Thus, the Commission serves as the Supreme Court's investigatory and prosecution arm.

The Supreme Court appoints all members to both the Board and the Commission, who serve without pay. Each body is composed of six attorneys and three lay persons.

The issue before both bodies is, has "misconduct" occurred in one or more ways, as alleged?

The rules of civil procedure and the rules of evidence govern the procedure for conducting a trial.

### CAN A DECISION OF THE HEARING PANEL BE APPEALED?

Yes.

#### BY WHOM?

By the respondent, the Commission, or the complainant.

#### TO WHOM IS THE APPEAL TAKEN?

A sub-board of at least three Board members, who make a recommendation to the full Board. Only the full Board can make a final decision.

#### IS AN APPEAL FROM THE BOARD PERMITTED?

Appeal of a decision of the Board is by leave only, to the Supreme Court. In that sense the full Board acts much like the Court of Appeals. Leave is rarely granted.

### MUST I REPORT WHAT I CONSIDER TO BE MISCONDUCT BY ANOTHER ATTORNEY?

An attorney who perceives that another attorney is engaged in misconduct should report the conduct to the Attorney Grievance Commission. The Commission will conduct its own investigation and obtain the facts necessary to decide whether or not to issue a Formal Complaint.

Remember, "It is the duty of every attorney to conduct himself or herself *at all times* in conformity with the standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court" MCR 9.103(A) (emphasis added).

MCR 9.103(B) imposes a duty on an attorney to "assist a member of the public to communicate to the administrator, in appropriate form, a Request for Investigation of a member of the bar."

### WHEN POSSIBLE, ANTICIPATE CLIENT QUESTIONS AND INITIATE THE CALL OR WRITE A STATUS LETTER, ESPECIALLY IF YOU KNOW THE CLIENT IS CONCERNED AND ANXIOUS TO KNOW WHAT IS GOING ON.

MCR 9.103(C) imposes a further duty to assist the administrator (AGC) in the investigation and prosecution of a Request for Investigation.

Failure to report clear and egregious misconduct, in the end, hurts all members of the legal profession, not to mention potential victims of such conduct.

Remember, "Discipline for misconduct is not intended as punishment for wrongdoing, but for protection of the public, the courts, and the legal profession" MCR 9.105.

### WHAT ABOUT IMMUNITY?

Absolute immunity applies to communications solely to the Attorney Grievance Commission and/or its staff.

### ARE HEARINGS HELD BEFORE A HEARING PANEL OPEN TO THE PUBLIC?

Yes. Once a Formal Complaint is issued by the Commission, the matter is open to the public.

If a complaint is dismissed by the Commission and no Formal Complaint is filed, the matter remains confidential.

### WHAT IS MISCONDUCT?

"Misconduct" can occur outside an attorney-client relationship. It includes, but is not limited to, violation of the standards or rules of professional responsibility; conduct that is contrary to justice, ethics, honesty, or good morals; conduct that exposes the legal profession or courts to obloquy, contempt, censure, or reproach; conduct that is criminal in nature; the knowing misrepresentation of any facts or circumstances surrounding a Request for Investigation or complaint; and failure to answer a Request for Investigation are among the more common grounds cited in MCR 9.104.

### A FEW INTERESTING STATISTICS

Funding of the disciplining system comes from a portion (\$120) of annual dues.

The cost of self-discipline is high, but it is an expense necessary to maintain the integrity of and respect for the legal profession. It is the State Bar's largest single expense item, funded by dues.

Budgets for 2004 exceed \$5,000,000, \$3,033,433 for the Attorney Grievance Commission, \$985,869 for the Attorney Discipline Board, and \$922,000 for the Judicial Tenure Commission.

### A FEW DO'S AND DON'TS

- DON'T accept a client who has unrealistic expectations in terms of results or service. It's just not worth it.
- DON'T sue a client for a fee unless you are prepared for both a countersuit claiming malpractice and having a grievance filed against you.
- DON'T over-promise results or service.
- DON'T engage in the representation of a client without an engagement letter or retention agreement that spells out

exactly what is expected of you and what you expect of the client.

- DON'T be afraid to fire a client, but include in the retention agreement or letter of engagement what conduct by the client may be grounds for your withdrawal from further representation. Once you're in trial or preparing for trial, it may be too late.
- DO be prepared to finish the job, even if you are not being paid to do so. You may be released from your contract, but you may not, that will be for the court to decide.
- DO maintain a good rapport with your client. It can be the difference between a grievance or a satisfied client, or, if not satisfied, at least an understanding client.
- DO prepare a client for a bad result, if appropriate.
- DO put yourself and your counsel, advice, and recommendation on record, in writing, communicated to your client, before embarking on and while engaged in a major matter. Document, document, document!
- DO confirm oral discussions on critical matters in writing. In this day and age, think defensively.
- DO treat your client with respect. If you cannot, don't undertake the representation.
- DO be candid and forthright with all parties and counsel. Your most valuable asset is your own credibility. Always be sure it is intact.

#### **HOW ARE FEE DISPUTES WITH A CLIENT HANDLED?**

The Commission may assist the parties in agreeing to binding arbitration.

#### **CAN I, AND SHOULD I, CONTACT THE COMPLAINANT TO TRY TO DISSUADE HIM/HER FROM PURSUING A GRIEVANCE OR TO EXPLAIN MY ACTIONS OR INACTION?**

Don't, without seeking competent professional advice and counsel. It could be dangerous and compound the problem.

### **THE APPLICANT BEARS THE BURDEN OF DEMONSTRATING BY CLEAR AND CONVINCING EVIDENCE THAT HE OR SHE POSSESSES THE REQUISITE CURRENT GOOD MORAL CHARACTER AND FITNESS TO WARRANT ADMISSION TO THE BAR.**

Even if the complainant decides to withdraw charges, the Commission may still pursue the charges/allegations.

Any contact should be written, so there is no dispute about what was said in an oral communication. If there was a breakdown in communication to begin with, it may be too late to try and put the trolley back on the track. Preventing derailment is the best way to avoid a problem.

#### **WHEN AN APPEAL IS TAKEN TO THE ATTORNEY DISCIPLINE BOARD CAN THEY INCREASE THE DISCIPLINE ORDERED BY A HEARING PANEL?**

Yes. The Board has the power to affirm, amend, reverse, or nullify the order of a hearing panel.

Statistics for 2000 show that 20 attorneys were disbarred, 66 were suspended, 37 received reprimands, and two were placed on probation. Of 11 petitions for reinstatement, seven were granted, three were denied or dismissed.

#### **CAN A GRIEVANCE BE FILED AGAINST A LAW FIRM?**

No, only against individual attorneys.

#### **HOW SERIOUS IS COMMINGLING OF CLIENT FUNDS OR MISAPPROPRIATION?**

Very serious. Misappropriation is the more serious, and can result in a suspension. Each case is sui generis and fact-driven: The old adage, "Out of the facts arises the law," is especially true in disciplinary proceedings.

#### **CAN A CLIENT MAINTAIN A GRIEVANCE AND A CIVIL SUIT FOR LEGAL MALPRACTICE AT THE SAME TIME?**

Yes. However, the Commission must remain alert to ensure that the filing of a grievance is not used solely to harass the respondent or to gain some tactical advantage in the civil action.

#### **IS THERE A STATUTE OF LIMITATIONS ON FILING A GRIEVANCE?**

No. However, a factor to consider is the reason for a long delay and whether the ends of justice would be properly served.

#### **OBSERVATION:**

It has been my experience that it does not take very long to tell the truth.

I never cease to be amazed at the number of defaults taken against respondents over the years. Why? An otherwise competent attorney may be frozen into inaction over the worry and fear that preparing an answer to a Request for Investigation entails, knowing that a completely candid response will mean admitting conduct that may constitute misconduct.

If the truth hurts, better that than to attempt a cover up and dissemble, compounding any offense.

That is not to say that complex facts may not warrant a full explanation, only that an explanation should never be designed to conceal the facts.

#### **NEW SELF-REPORTING REQUIREMENT**

Renewal of Bar dues now requires compliance with a self-reporting requirement consistent with MCR 9.120. The lawyer, prosecutor, and defense attorney must notify both the Attorney Grievance Commission and the Attorney Discipline Board of any criminal conviction in writing within 14 days of any conviction. The Bar form requires the reporting of "any misdemeanor or felony." Advice: When in doubt, report.

#### **CAN A GRIEVANCE BE FILED AGAINST A JUDGE?**

Yes. Any judge, including justices of the Supreme Court, may be the subject of a grievance. The Judicial Tenure Commission, unlike the bifurcated system for lawyers, both investigates complaints and provides a forum for trial before a "master."

#### **WHAT ARE THE GROUNDS FOR A CLAIM OF JUDICIAL MISCONDUCT?**

Grounds include persistent incompetence, persistent neglect, persistent failure to treat persons fairly and courteously, habitual





intemperance, misuse of judicial office for personal gain, and conduct in violation of the Code of Judicial Conduct or the Rules of Professional Conduct. (Note: a grievance can be based on conduct that occurred before or after the respondent became a judge.)

**A WIDE RANGE OF SANCTIONS EXISTS, INCLUDING DISMISSAL WITH A CAUTIONARY LETTER, ADMONISHMENT OR PRIVATE CENSURE. FOR MORE EGREGIOUS CONDUCT, SUSPENSION (WITH OR WITHOUT PAY) OR REMOVAL FOR CONVICTION OF A FELONY.**

### WHAT ARE THE SANCTIONS?

A wide range of sanctions exists, including dismissal with a cautionary letter, admonishment or private censure. For more egregious conduct, suspension (with or without pay) or removal for conviction of a felony.

In 2003, 577 grievances were filed against judges covering a wide range of subject matters. Complaints against circuit and district judges composed the vast majority of grievances.

### CHARACTER AND FITNESS

An applicant for Bar admission has three levels of hearing available when the applicant's character and fitness are called into question by the State Bar.

The first level is before a District Committee. The next level, if necessary, is the Standing Committee. The final level is the Board of Law Examiners.

The applicant bears the burden of demonstrating by clear and convincing evidence that he or she possesses the requisite current good moral character and fitness to warrant admission to the Bar.

Professional representation is highly recommended at all stages.

The author would like to thank Cynthia C. Bullington, of the Attorney Grievance Commission, John F. Van Bolt, of the Attorney Discipline Board, and Paul J. Fischer, of the Judicial Tenure Commission, for their assistance in providing statistical data. ◆

*John L. Coté's background in the attorney grievance and disciplinary area includes his appointment by the Supreme Court in 1978 to the then newly created Attorney Discipline Board. The Supreme Court acknowledged his service with its Distinguished Service Award. Coté has represented over 150 attorneys in grievance and other matters as well as many judges. He recently received a Service Mark from the state of Michigan for the statement, "Attorney and Counselor to the Legal Profession."*