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## Wisconsin Formal Ethics Opinion EF-20-01: Responsibilities of a Lawyer when a Grievance is filed against the Lawyer

February 12, 2020

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**Synopsis:** *The fact that a client has filed a grievance against a lawyer who is currently representing the client does not by itself create a conflict that requires the lawyer to withdraw from the matter or seek the informed consent of the client to continue the representation. In routine situations, where the lawyer is confident that the lawyer behaved appropriately, neither consent nor withdrawal from the representations will be required. Such situations, however, may sometimes provide grounds for permissive withdrawal. In other situations, the allegations contained in the grievance will be of sufficient gravity and merit, such as when they may involve the lawyer's own unlawful acts, that the lawyer's self-defense interest will conflict with the client's interests and the lawyer must withdraw. A similar analysis applies to grievances filed by third parties, such as opposing counsel or parties.*

*When a grievance is filed against a lawyer, the lawyer is obligated to cooperate with the investigation of the matter. The failure to cooperate is itself misconduct. A lawyer does not violate the duty of confidentiality by providing reasonable responses to requests for information from the disciplinary agency. The lawyer is not obligated to hold the fact of the grievance itself in confidence, but the lawyer continues to have confidentiality obligations with respect to information that relates to the representation of current and former clients notwithstanding the fact that that information may have been provided to the disciplinary agency.*

*A lawyer is not prohibited from communicating with a client who has filed a grievance against the lawyer. If the representation continues, the lawyer must continue to communicate with the client about the ongoing representation as required by the rules. There is no prohibition on communicating with the client about the grievance, but the lawyer may not attempt to induce the client to cease cooperation with the investigation of the grievance or otherwise impede the investigation of the matter.*

## Introduction

When a client or third party files a grievance against the lawyer who is currently representing that client, serious consequences may follow for the lawyer.<sup>1</sup> First, although the lawyer has an obligation to cooperate with the disciplinary office,<sup>2</sup> responding to a grievance may be expensive and time consuming.<sup>3</sup> Second, if the allegations are meritorious, the result may be professional discipline, sometimes public, for the lawyer, which may result in financial losses for the lawyer.<sup>4</sup> Third, accusations of misconduct may damage the lawyer-client relationship. Most grievances, however, are closed without any finding of misconduct by the lawyer, and many are the result of the client's misunderstanding of the role of the lawyer or court system. It is through the receipt of grievances by the Office of Lawyer Regulation that the Wisconsin Supreme Court regulates the practice of law and protects the public.

In this opinion, the State Bar's Standing Committee on Professional Ethics (the "Committee") discusses a lawyer's responsibilities under Wisconsin's Supreme Court Rules ("SCRs") when a grievance is filed against the lawyer in connection with the representation of a current or former client. The term "grievant" refers to a person who has filed a grievance and "respondent" refers to a lawyer who is the subject of a grievance.

## Discussion

### I. Conflicts

#### Grievances filed by Clients

In Wisconsin, when a grievance is filed against a lawyer, the lawyer is normally put on notice of the allegations and, when deemed necessary by the staff of the Office of Lawyer Regulation ("OLR"), the lawyer is asked for a response.<sup>5</sup> Once the respondent is notified of the grievance,

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<sup>1</sup> The term "grievance" as used in this opinion refers specifically to a request for investigation with a disciplinary agency that has jurisdiction over the lawyer. In Wisconsin, the disciplinary agency that has jurisdiction over Wisconsin-licensed lawyers is the Office of Lawyer Regulation.

<sup>2</sup> In Wisconsin, the duty to cooperate with the Office of Lawyer Regulation applies to all lawyers, and an intentional failure to cooperate may be misconduct regardless of the merits of the underlying grievance. See SCR 21.15(4).

<sup>3</sup> Not all grievances require a response from the respondent lawyer, as matters may be closed after an initial review. See SCR 22.02(c).

<sup>4</sup> Not all grievances result in sufficient evidence to support a violation of one or more disciplinary rules. Some grievances that may support a finding of misconduct may result in an offer of Diversion to an Alternative to discipline program pursuant to SCR 22.10.

<sup>5</sup> See SCR 22.03(2)(c). Some grievances are filed telephonically, and if the matter is in the intake stage the lawyer may be notified and asked for information telephonically. The duty to cooperate does not arise until a matter is referred for formal investigation, so at the intake stage, the lawyer will be "asked, rather than "required to respond if a response is deemed necessary.

the lawyer must consider whether the allegations create a conflict between the lawyer and the client.<sup>6</sup> Concurrent conflicts of interest are governed by Supreme Court Rule (“SCR”) 20:1.7, which states in relevant part:

- (a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Therefore the lawyer must consider whether the lawyer’s personal interests pose a significant risk of materially limiting the lawyer’s ability to represent the client after the client has filed a grievance against the lawyer.

As discussed above, many grievances do not support findings of misconduct, and that may be readily apparent to the lawyer.<sup>7</sup> Moreover, grievances that are the result of the client’s misunderstanding of the law, the court system or the lawyer’s role may be addressed through communication with the client.

The State Bar of Oregon addressed the question of whether a grievance filed by a current client created a conflict of interest that required the lawyer to withdraw from the representation in Ethics Opinion 2009-182. The Oregon opinion held that there is no *per se* conflict of interest created by the filing of a grievance. In addressing the fact situation where a client has filed a grievance but the lawyer believes that that no disciplinary rule was violated, the opinion states:

Like a malpractice claim, the filing of a Bar complaint carries with it the potential for public embarrassment, damage to a lawyer’s professional reputation, and significant financial loss. However, in regard to Client’s concerns with Lawyer’s failure to interview certain witnesses, those risks appear to be minimal. Lawyer is aware of Client’s desire to have additional witnesses contacted, but also is presumably in a far better position to assess whether those witnesses would be permitted to testify at trial. As a result, Lawyer’s potential exposure to Bar sanctions is probably not great. Lawyer also is willing to address Client’s concerns, and appears able to do so without delaying trial or otherwise prejudicing Client’s case. Thus there is no apparent motive for Lawyer to act contrary to Client’s best interest, and consequently one could reasonably conclude that there was no

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<sup>6</sup> Further information about the disciplinary process can be found at the OLR’s website at <https://www.wicourts.gov/courts/offices/olr.htm>.

<sup>7</sup> According to the OLR Annual Report for fiscal year 2018-2019, out of 1666 grievances received, 1544 were closed at the intake stage as not warranting investigation.

significant risk that Lawyer's representation will be materially limited. See *In re Obert*, 336 Or at 648 (under former DR 5- 101(A), there must be some reasonable likelihood that lawyer's judgment will be affected before a conflict will be found). It follows that there is little risk that Lawyer would be found in violation of Oregon RPC 1.7 for failing to either withdraw or obtain Client's informed consent, at least not in the absence of some clear indication that Lawyer acted to protect Lawyer's, and not Client's, best interests.

Courts have similarly held that the mere filing of a grievance does not create a conflict that requires withdrawal from the representation.<sup>8</sup>

The Committee agrees that the mere fact of the filing of a grievance does not in itself give rise to a conflict of interest under SCR 201.7(a)(2) that would require the lawyer to withdraw or seek the informed consent of the client under SCR 20:1.7(b) to continue the representation. However, the Committee understands that the filing of a grievance may create tension between the client's interest and that of the lawyer that may be difficult to reconcile. In most cases, where the grievance does not raise a plausible claim that the lawyer violated a disciplinary rule, the lawyer may respond to OLR and if appropriate, address the client's concerns directly, while continuing the representation. If, however, the grievance sets forth credible allegations of misconduct, and the lawyer may attack the client's credibility or otherwise damage the client's interest, the lawyer has a conflict that would require withdrawal. In the opinion of the Committee, such conflicts may not normally be consented to by the client.

Notwithstanding the fact that a grievance may not create a conflict which requires the lawyer to withdraw, it may provide grounds for permissive withdrawal under SCR 20:1.16(b). If, for example, the filing of a grievance is part of a pattern of hostile behavior towards the lawyer, the client may have rendered the representation "unreasonably difficult" under SCR 20:1.16(b)(6), or the nature of the accusations against the lawyer so damage the lawyer-client relationship so as to constitute good cause under SCR 20:1.16(b)(7).<sup>9</sup> While it will often be the case that filing a grievance against the lawyer may be part of circumstances that rise to permissive grounds for

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<sup>8</sup> See e.g. *Malede v. US*, 767 A.2d 267 (D.C. 2001) ("...we decline to hold that the bare filing of the disciplinary complaint created a conflict of interest necessitating Farquhar's discharge from the case."); *Mendes v. United States*, 595 A.2d 972 (D.C.App.1991) (defendant's filing of grievance against defense counsel alleging ineffective assistance found by trial court to be a "blatant attempt to subvert the judicial process"); *State v. Michael* (App.1989), 161 Ariz. 382, 778 P.2d 1278 (defendant's filing of grievance does automatically create conflict of interest requiring withdrawal of counsel; there was "no abuse of discretion in the trial court's refusal to find an actual conflict of interest preventing Howard from representing defendant").

<sup>9</sup> If the lawyer seeks to withdraw from a formal proceeding permission of the tribunal will generally be required. It is important for the lawyer to be mindful of their obligation of confidentiality in explaining the basis for the withdrawal request. See SCR 20:1.16, ABA Comment [3]. Whether or not court approval is required, the lawyer must also be mindful of their obligation pursuant to SCR 20:1.16(d) to protect the interests of the client upon termination, such as providing adequate notice of the termination, refunding any unearned fees in the lawyer's possession and promptly surrendering the file upon request. See Wisconsin Formal Ethics Opinion EF-16-03.

withdrawal, the mere fact that the client has filed a grievance against the lawyer does not in itself constitute grounds for withdrawal.

### **Grievances filed by Third Parties**

Some grievances are filed by opposing parties, opposing counsel or other third parties. Just as with grievances filed by clients, a grievance filed by a third party does not automatically create a conflict of interest for the respondent lawyer. SCR 20:1.7(a)(2) governs such situations and the critical question is whether the lawyer's own interests in defending against the grievance pose a significant risk of materially limiting the lawyer's ability to represent the client. In the large majority of such cases, there will be no such risk and no conflict caused by the filing of a third party grievance. An exception would be for example, a situation where the lawyer is credibly accused of engaging in misconduct with the client so that the lawyer's response would involve disclosing the client's misconduct. This creates a conflict that would not normally be subject to client consent. It may also be the rare case that the demands of responding to serious allegations of misconduct made by a third party prevent the lawyer from providing competent representation and require withdrawal under SCR 20:1.16(a)(1).<sup>10</sup>

Third party grievances normally will not give rise to permissive grounds for withdrawal under SCR 20:1.16(b), as the majority of the grounds set forth in that Rule relate to the behavior of the client.<sup>11</sup>

## **II. Confidentiality**

### **The Duty of Confidentiality and the Duty to Cooperate**

All lawyers in Wisconsin have an obligation to cooperate with the OLR in "the investigation, prosecution and disposition of grievances, complaints filed with or by the director, and petitions for reinstatement. An attorney's willful failure to cooperate with the office of lawyer regulation constitutes violation of the rules of professional conduct for attorneys."<sup>12</sup> This duty applies whether or not a lawyer is the subject of a grievance, or contacted by the OLR for another reason, such as when the lawyer is a witness. Lawyers are also obligated by SCR 20:1.6 to hold in

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<sup>10</sup> The ABA addressed a lawyer's responsibilities when a grievance is filed by opposing counsel in Formal Opinion 94-384 and stated: "If the filing of a complaint by an opposing counsel were alone considered sufficient cause for a lawyer to withdraw, or seek to withdraw, from representation, the result too often would interfere substantially with the functioning of the courts, with the effective representation of clients, and with the orderly disposition of cases. We therefore conclude that ordinarily, a lawyer is not required to withdraw when a complaint is filed against him by an opposing lawyer; nor is such withdrawal ordinarily permitted without the client's consent, if the client would be adversely affected by such withdrawal." The Committee agrees.

<sup>11</sup> If the circumstances of the case were such that the withdrawal could be accomplished without material adverse effect on the interests of the client, withdrawal would be permitted under SCR 20:1.16(b)(1).

<sup>12</sup> See SCR 21.15(4).

confidence any information that relates to the representation of a current or former client, whatever its source.<sup>13</sup>

When a lawyer is the subject of a grievance, SCR 20:1.6(c)(4) allows the lawyer to respond to the OLR. That Rule permits lawyers to disclose information that relates to the representation of current or former clients to the extent reasonably necessary “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.” ABA Comment [10] further explains

Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

A lawyer who is the subject of a grievance, even a grievance filed by a third party such as opposing counsel, thus does not violate the duty of confidentiality by responding to the OLR's requests for information concerning the grievance.<sup>14</sup>

When responding to a grievance filed by a third party, the lawyer should be mindful that SCR 22.03(5) requires the OLR to provide the grievant with a copy of the lawyer's response unless good cause is shown to provide a summary prepared by OLR staff instead. When responding to a third-party grievance requires a lawyer to disclose information that relates to the representation of a current or former client,<sup>15</sup> particularly information that is sensitive or could be detrimental to the interests of the client, the lawyer should consider requesting that the OLR withhold or summarize certain information in order to protect the interests of the client. The fact that an adequate response to the OLR requires disclosing such information does not excuse a lawyer from the duty to cooperate.

On occasion, a lawyer may be contacted by the OLR as a witness in connection with an investigation. The lawyer's duty to cooperate applies in such circumstances. If the lawyer must

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<sup>13</sup> For an extensive discussion of the duty of confidentiality, see Wisconsin Formal Ethics Opinion EF-17-02.

<sup>14</sup> The ability to respond pursuant to SCR 20:1.6(c)(4) applies at the intake stage of an OLR investigation before the formal duty to respond has attached.

<sup>15</sup> SCR 22.03(3) requires that the respondent lawyer “fully and fairly disclose all facts and circumstances pertaining to the alleged misconduct.”

disclose information that relates to the representation of a current or former client, SCR 20:1.6(c)(5), permits disclosures “to comply with other law” and the lawyer does not violate the duty of confidentiality by such cooperation. As discussed, if the information provided to OLR is sensitive or possibly detrimental to a current or former client, the lawyer should consider requesting the OLR to redact or summarize any information provided to others.

### **The fact of the grievance**

SCR 22.40 requires that the OLR hold in confidence all information about a grievance prior to the filing of a public complaint. This Rule does not govern persons who file grievances and no other rule or law restrict the ability of grievants to disclose information about the grievance. The Rule also does not govern respondent lawyers, and there is no obligation of lawyers to refrain from disclosing the fact that a grievance has been filed against them. Lawyers, however, are still governed by the duty of confidentiality with respect to information that relates to the representation of current or former clients. Therefore, while a lawyer may be free to disclose that a grievance has been filed against the lawyer, details about the matter, such as identities or current or former clients,<sup>16</sup> may still be protected.<sup>17</sup>

### **III. Duties to Clients**

As discussed, the fact that a current client has filed a grievance against a lawyer does not itself require withdrawal. When a lawyer continues to represent a client after the client has filed a grievance, the lawyer continues to owe all duties that the lawyer would owe to any client, including the duty of communication. Thus, after a lawyer is notified that a client has filed a grievance against the lawyer, until the representation ends, the lawyer must continue to competently and diligently represent the client and communicate with the client as required by SCR 20:1.4.

Although lawyers are required to respond to OLR’s requests for information about the grievance, there is no obligation to communicate with the client who has filed the grievance *about* the grievance. Many lawyers may in fact prefer not to discuss the grievance with the client, and there is no obligation to do so. That said, there is no prohibition in the Rules on communicating with the client about the grievance if the lawyer wishes to do so. In certain cases, communication with the client may help resolve some of the issues that caused the client to file the grievance.

When a lawyer does choose to communicate with the client about the grievance, the lawyer should be cautious. The duty of cooperation prohibits the lawyer from requesting or demanding

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<sup>16</sup> See Wisconsin Formal Ethics Opinion EF-17-02.

<sup>17</sup> While SCR 20:1.6(c)(4) permits a lawyer to respond to OLR the extent required by the duty of cooperation, that exception does not permit the lawyer to disclose the information to others. Therefore, while a lawyer may have disclosed information that relates to the representation of a client to the OLR, that information does not lose its protected status. See Wisconsin formal Ethics op. EF-17-02.

that the client “withdraw” the grievance,<sup>18</sup> and a lawyer may not offer inducements to grievants to stop cooperating with the investigation.<sup>19</sup> This duty not to interfere with an investigation applies equally to grievances filed by third parties. Further, SCR 20:1.8(h)(3) prohibits making any agreement, such as a fee agreement or a release, which seeks to limit a person’s ability to file a grievance. Lawyers who do choose to communicate with clients who have filed a grievance about the grievance must be careful not to imply that the lawyer wants to encourage the client not to cooperate with the investigation. In many cases, a lawyer may wish to acknowledge that the client has filed the grievance, but that the matter is between the client and the OLR and that the lawyer wishes to focus on the representation of the client. It is good practice to memorialize such communications.

### **Conclusion**

The mere fact that a client or third party has filed a grievance against a lawyer does not itself create a conflict of interest that requires withdrawal, but may give rise to grounds for permissive withdrawal. If the lawyer continues to represent the client, the lawyer must be mindful of the duties owed to the OLR and to the client.

As a final word, the Committee understands that a lawyer may have an initial feeling of betrayal or aggrievement when a grievance is filed. This being so, it is usually good practice to discuss the grievance with a colleague or other lawyer knowledgeable about the process and delay any required answer to OLR until the attorney has the opportunity for a reflective and balanced response.<sup>20</sup> Of course, the lawyer is free to retain their own counsel to represent them in the process, but even if the lawyer does not choose to retain counsel, consultations with a trusted colleague are often advisable.

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<sup>18</sup> The OLR does not represent grievants and is not obligated to cease an investigation if the grievant so requests, so grievances may not be “withdrawn.”

<sup>19</sup> See e.g. Disciplinary Proceedings against Arrieh, 174 Wis.2d 331, 496 N.W.2d 601 (WI 1993); Disciplinary Proceedings against Crandall, 2011 WI 21, 798 N.W.2d 183.

<sup>20</sup> SCR 20:1.6(b)(3) permits lawyers to disclose otherwise protected information to secure advice about the lawyer’s conduct under the rules.



