

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

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

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- Share with the mentee 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 Indiana, and the reinstatement process. *See* Attached excerpts from Admission and Discipline Rule 23.
- Discuss alternatives to full litigation of a disciplinary complaint. i.e., a private administrative admonition for minor misconduct, a conditional agreement to discipline (including possible probation with involvement of JLAP, a CPA, or a mentor), consent to discipline, and resignation. *See* Admin. Disc. R. 23, sec. 12(a), 11(c), and 17.
- Discuss a lawyer's obligation to assist in a disciplinary investigation, including suspension for noncooperation. *See* Admin. Disc. R. 23, sec. 10(e) and (f).
- 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 Indiana disciplinary process. Marcia L. Proctor, *What to Do When Disciplinary Counsel Calls*, THE COMPLETE LAWYER, Winter 1998.
<http://www.abanet.org/genpractice/magazine/1998/winter/w98proctor.html>
- 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 address the grievance, especially if it was a result of simple miscommunication?
- Discuss the propriety of settling a grievance with your client, how doing so affects (if at all) your obligation to cooperate with the Disciplinary Commission. *See* Prof. Cond. Rule 1.8 and Admin. Disc. R. 23, sec. 10(e).

- Discuss when you have an obligation to report the misconduct of another attorney to a disciplinary authority. See Prof. Cond. Rules 8.3 and 8.4.

RESOURCES

INDIANA ADMISSION AND DISCIPLINE RULES

RULE 23. DISCIPLINARY COMMISSION AND PROCEEDINGS

Section 2. Grounds for Discipline or Suspension

- (a) Any conduct that violates the Rules of Professional Conduct or the Code of Judicial Conduct heretofore adopted or as hereafter amended by this Court or any standards or rules of legal and judicial ethics or professional responsibility then in effect or hereafter adopted by this Court shall constitute grounds for discipline. . . .

Section 3. Types of Discipline and Suspension

- (a) One of the following types of discipline may be imposed upon any attorney found guilty of misconduct: permanent disbarment from the practice of law; suspension for a definite or an indefinite period from the practice of law subject to reinstatement as hereinafter provided; suspension for a definite period, not to exceed six (6) months, from the practice of law with provision for automatic reinstatement upon such conditions as the Court shall specify in the order of suspension; a public reprimand; a private reprimand; or a private administrative admonition. . . .
- (c) In cases of misconduct or disability, this Court may, in lieu of permanent disbarment or suspension, place an attorney on probation and permit such attorney to continue practicing law if in its opinion such action is appropriate and desirable. In such event, the attorney will be subject to such conditions, limitations and restrictions as this Court may see fit to impose, and upon a violation of such conditions, restrictions or limitations, said attorney may be suspended or disbarred. . . .

Section 4. Reinstatement

- (a) A person who has been suspended from the practice of law may petition for reinstatement when the term of suspension prescribed in the order of suspension has elapsed. A person who has resigned as a member of the bar may petition for reinstatement when five (5) years have elapsed since the date of the order accepting the resignation. . . .
- (b) A petition for reinstatement may be granted if the petitioner establishes by clear and convincing evidence before the disciplinary commission of this Court that:
 - (1) The petitioner desires in good faith to obtain restoration of his or her privilege to practice law;
 - (2) The petitioner has not practiced law in this State or attempted to do so since he or she was disciplined;
 - (3) The petitioner has complied fully with the terms of the order for discipline;

- (4) The petitioner's attitude towards the misconduct for which he or she was disciplined is one of genuine remorse;
- (5) The petitioner's conduct since the discipline was imposed has been exemplary and above reproach;
- (6) The petitioner has a proper understanding of and attitude towards the standards that are imposed upon members of the bar and will conduct himself or herself in conformity with such standards;
- (7) The petitioner can safely be recommended to the legal profession, the courts and the public as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and an officer of the Courts;
- (8) The disability has been removed, if the discipline was imposed by reason of physical or mental illness or infirmity, or for use of or addiction to intoxicants or drugs;
- (9) The petitioner has taken the Multistate Professional Responsibility Examination (MPRE) within six (6) months before or after the date the petition for reinstatement is filed and passed with a scaled score of eighty (80) or above. . . .

Section 10. Investigatory Procedures

- (a) Upon receipt of a written, verified claim of misconduct (hereinafter referred to as “the grievance”), from a member of the public, a member of this bar, a member of the Commission, or a Bar Association (hereinafter referred to as “the grievant”) and completion of such preliminary investigation as may be deemed appropriate, the Executive Secretary shall:
 - (1) Dismiss the claim, with the approval of the Commission, if the Executive Secretary determines that it raises no substantial question of misconduct; or
 - (2) If the Executive Secretary determines that it does raise a substantial question of misconduct, send a copy of the grievance by certified mail to the attorney against whom the grievance is filed (hereinafter referred to as “the respondent”) and shall demand a written response. The respondent shall respond within twenty (20) days, or within such additional time as the Executive Secretary may allow, after the respondent receives a copy of the grievance. . . .
- (b) Thereafter, if the Executive Secretary, upon consideration of the grievance, any response from the respondent, and any preliminary investigation, determines there is a reasonable cause to believe that the respondent is guilty of misconduct the grievance shall be docketed and investigated. . . .
- (c) If the grievance is docketed for investigation, the Executive Secretary shall conduct an investigation of the grievance. Upon completion of the investigation the Executive Secretary shall promptly make a report of the investigation and a recommendation to the Commission at its next meeting.
- (d) In conducting an investigation of any grievance, or in considering the same, the Executive Secretary or the Commission shall not be limited to an investigation or

consideration of only matters set forth in the grievance, but shall be permitted to inquire into the professional conduct of the attorney generally. . . .

- (e) It shall be the duty of every attorney against whom a grievance is filed under this Section to cooperate with the Commission's investigation, accept service, comply with the provisions of these rules, and when notice is given by registered or certified mail, claim the same in a timely manner either personally or through an authorized agent. Every attorney is obligated under the terms of Admission and Discipline Rule 2 to notify the Clerk of any change of address or name within thirty (30) days of such change, and a failure to file the same shall be a waiver of notice involving licenses as attorneys or disciplinary matters.
- (f) An attorney who is the subject of an investigation by the Disciplinary Commission may be suspended from the practice of law upon a finding that the attorney has failed to cooperate with the investigation. . . .

Section 11. Pre-hearing Procedures

- (a) The members of the Commission shall consider and make a determination of the report and recommendations of the Executive Secretary not later than the meeting following the submission of the report. If the Commission determines that there is not reasonable cause to believe that the respondent is guilty of misconduct the grievance shall be dismissed, and the grievant and the respondent shall be given written notice of the Commission's determination.
- (b) If after such consideration, the Commission determines there is a reasonable cause to believe the respondent is guilty of misconduct which would warrant disciplinary action, it shall file with the Clerk a complaint as provided in Section 12. Upon the filing of a complaint, the Supreme Court shall appoint a hearing officer or officers, not to exceed three (3) in number, who shall be members of the Bar of this Court, none of whom shall be members of the Disciplinary Commission, to hear and determine said charges. A respondent may on a showing of good cause petition the Court for a change of hearing officer within ten (10) days after the appointment of such hearing officer.
- (c) After the filing of a complaint with the Clerk, the parties (commission and respondent) may conditionally agree upon the discipline to be imposed, in which event they shall jointly submit to the Division of Supreme Court Administration Office a statement of circumstances which shall contain the charges, the facts agreed to, the facts in dispute, the evidence the parties separately believe would be adduced in a hearing, the charge(s) which the parties agree are established, and the discipline with which the parties are in conditional agreement. . . .

Upon such submission, the Court will consider the same and (1) enter an order for the discipline conditionally agreed to or (2) submit to the parties a proposed disposition for such discipline as the Court shall deem appropriate, or (3) notify the parties that it declines to approve the agreement or recommend a disposition.

In the event an order is entered as set forth under (1) above, such order shall be a final disposition of the matter. . . .

It is the intent of this rule to encourage appropriate agreed dispositions of disciplinary matters. A conditional agreement shall not be admitted into evidence at any hearing of the matter.

Section 11.1. Summary Suspensions

- (a) Upon finding that an attorney has been found guilty of a crime punishable as a felony, the Supreme Court may suspend such attorney from the practice of law pending further order of the Court or final determination of any resulting disciplinary proceeding. . . .
- (b) If it appears to the Disciplinary Commission upon the affirmative vote of two-thirds (2/3) of its membership, that: (i) the continuation of the practice of law by an attorney during the pendency of a disciplinary investigation or proceeding may pose a substantial threat of harm to the public, clients, potential clients, or the administration of justice, and (ii) the alleged conduct, if true, would subject the respondent to sanctions under this Rule, the Executive Secretary shall petition the Supreme Court for an order of interim suspension from the practice of law or imposition of temporary conditions of probation on the attorney. . . .

Section 12. Prosecution of Grievances

- (a) If the Commission determines that there is reasonable cause to believe respondent is guilty of misconduct and the misconduct would not likely result in a sanction greater than a public reprimand if successfully prosecuted, and if the respondent and the Commission agree to an administrative resolution of the complaint, the Commission may resolve and dispose of minor misconduct by private administrative admonition without filing a verified complaint with the Court. Without limitation, misconduct shall not be regarded as minor if any of the following conditions exist:
 - (1) The misconduct involves misappropriation of funds or property;
 - (2) The misconduct resulted in or is likely to result in material prejudice (loss of money, legal rights or valuable property rights) to a client or other person;
 - (3) The respondent has been publicly disciplined in the past three (3) years;
 - (4) The misconduct involved is of the same nature as misconduct for which the respondent has been publicly or privately disciplined in the past five (5) years;
 - (5) The misconduct includes dishonesty, misrepresentation, deceit, or fraud on the part of the respondent; or
 - (6) The misconduct constitutes the commission of a felony under applicable law.
- (b) An administrative admonition shall be issued in the form of a letter from the Executive Secretary to the respondent summarizing the facts and setting out the applicable violations of the Rules of Professional Conduct. . . . The administrative admonition shall be final within thirty (30) days thereafter, unless set aside by the Court. If not set aside by the Court, the admonition shall be sent to the respondent, and notice of the fact that a respondent has received a private administrative admonition shall be given by the Executive Secretary to the grievant. The fact that an attorney has received a private administrative admonition shall be a public record, which shall be filed with the Clerk of this Court and shall be kept by the Executive Secretary.

- (c) In the event the Commission determines that the misconduct, if proven, would warrant disciplinary action and should not be disposed of by way of an administrative admonition, the Executive Secretary shall prepare a verified complaint which sets forth the misconduct with which the respondent is charged and shall prosecute the case. . . .

Section 14. Proceedings Before the Hearing Officer

- (a) The rules of pleading and practice in civil cases shall not apply. No motion to dismiss or dilatory motions shall be entertained. The case shall be heard on the complaint and an answer which shall be filed by the respondent within thirty (30) days after service of the summons and complaint
- (c) When a respondent has failed to answer a complaint as required by this section and that fact is made to appear by affidavit and an application for judgment on the complaint, the allegations set forth in the complaint shall be taken as true. . .
- (d) Discovery shall be available to the parties on terms and conditions that, as nearly as practicable, follow the Indiana Rules of Civil Procedure pertaining to discovery proceedings. . . .
- (f) Within thirty (30) days after the hearing officer is appointed and has qualified, the hearing officer shall schedule a date for a final hearing on the complaint, which date, absent good cause to the contrary, shall be within ninety (90) days of the same.
- (g) The grievant, the respondent, and the Commission shall be given not less than fifteen (15) days written notice of the hearing date. The respondent shall have the right to attend the hearing in person, to be represented by counsel, to cross-examine the witnesses testifying against him or her and to produce at the hearing and require the production of evidence and witnesses in his or her own behalf at the hearing, as in civil proceedings. . . .
- (h) The proceedings may be summary in form and shall be without the intervention of a jury and shall be conducted on the record.
- (i) Within thirty (30) days after the conclusion of the hearing, the hearing officer shall determine whether misconduct has been proven by clear and convincing evidence and shall file with the Clerk a written "Hearing Officer's Report" with findings of fact and conclusions of law. Either party may request or the hearing officer at his or her own motion may make a recommendation concerning the disposition of the case and the discipline to be imposed. Such recommendation is not binding on the Supreme Court. . . .

Section 15. Supreme Court Review

- (a) The respondent or Commission shall have thirty (30) days after the filing of the Hearing Officer's Report to petition for a review of the same before the Supreme Court. Instead of a petition for review, the respondent or the Commission may file a brief on sanctions. If no petition for review or brief on sanctions is filed within thirty (30) days of the filing of the Hearing Officer's Report, the Supreme Court shall enter judgment or such other appropriate order.
- (b) In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the

petition for review a record of all the evidence before the hearing officer relating to this factual issue. Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review. . . .

- (c) The respondent or Commission may file a brief at the time a petition for review is filed. Opposing parties shall have thirty (30) days from the date of service of the petition for review or brief on sanctions to file a response brief. The party opposing a petition for review may raise in its brief any issues for review that were not raised in the brief of the party filing the petition for review. The party filing the petition for review or brief on sanctions shall then have fifteen (15) days from the date of service of the response brief to file a reply brief. . . .

Section 17. Resignations and Consents to Discipline on Admission of Misconduct

- (a) An attorney who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may resign as a member of the bar of this Court, or may consent to discipline, but only by delivering an affidavit and five copies to the Supreme Court Administration Office and providing a copy to the Commission. The affidavit shall state that the respondent desires to resign or to consent to discipline and that:
 - (1) The respondent's consent is freely and voluntarily rendered; he or she is not being subjected to coercion or duress; he or she is fully aware of the implications of submitting his or her consent;
 - (2) The respondent is aware that there is a presently pending investigation into, or proceeding involving, allegations that there exist grounds for his or her discipline the nature of which shall be specifically set forth;
 - (3) The respondent acknowledges that the material facts so alleged are true; and
 - (4) The respondent submits his or her resignation or consent because the respondent knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, he or she could not successfully defend himself or herself.
- (b) Upon receipt of the required affidavit in support of resignation, this Court may enter an order approving the resignation. In the case of consent to discipline, the Commission and the respondent may file a brief regarding an appropriate sanction within thirty (30) days of delivery of the required affidavit. The Court shall then enter an order imposing a disciplinary sanction on consent.
- (c) An order entered under (b) above shall be a matter of public record. However, the affidavit required under the provisions of (a) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of this Court.

Section 18. Petitions for Reinstatement

- (a) A person who has been suspended from the practice of law under the provisions of this rule, except pursuant to Section 11.1(c) of this rule [non-payment of child support], may apply for reinstatement by filing with the Clerk a petition conforming with the requirements of Section 4 of this rule. . . .

Upon the filing of such petition and filing fee under this subsection, the commission shall schedule a hearing. After such hearing, the commission shall determine whether the petitioner has met the requirements set forth in Section 4 of this rule and may recommend that the Supreme Court enter an order continuing the suspension or reinstating the petitioner as a member of the Bar of this Court on such terms and conditions as the Supreme Court may deem proper. The applicant for reinstatement may petition this Court for a review of the recommendation of the Commission within thirty (30) days of the entry thereof.

- (b) For the purpose of conducting hearings on petitions for reinstatement, the Commission may request the appointment of a hearing officer or hearing officers, who may but shall not be required to be members of the Commission. Such hearing officers shall have the same powers as the hearing officers provided for in Section 13, and shall hear such petition for reinstatement and make written findings of fact and recommendations to the Commission. Following the receipt of the findings and recommendations of the hearing officer or officers, the Commission shall make its recommendation to this Court on such petition, as set forth in subsection (a) above. . . .

(Emphasis added)

INDIANA RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP

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

- (h) A lawyer shall not:
- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
 - (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

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 appropriate professional authority.
- (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 appropriate authority.

- (c) This Rule does not require reporting of a violation or disclosure of information if such action would involve disclosure of information that is otherwise protected by Rule 1.6, or is gained by a lawyer while providing advisory opinions or telephone advice on legal ethics issues as a member of a bar association committee or similar entity formed for the purposes of providing such opinions or advice and designated by the Indiana Supreme Court.
- (d) The relationship between lawyers or judges acting on behalf of a judges or lawyers assistance program approved by the Supreme Court, and lawyers or judges who have agreed to seek assistance from and participate in any such programs, shall be considered one of attorney and client, with its attendant duty of confidentiality and privilege from disclosure.

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 improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (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) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

To view comments to these Professional Conduct Rules, *see*
http://www.in.gov/judiciary/rules/prof_conduct/index.html