

# Attorney Grievance and Legal Malpractice: A Primer

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Attorneys perform countless functions on behalf of their clients, often taking on an amalgamated role of trusted advisor, evaluator, negotiator, and educator, among many others, in furtherance of their overall duty as zealous advocates. However, it is also due to the multi-faceted nature of the profession that attorneys are often faced with tough or nuanced ethical and professional dilemmas that, without an informed response or action, can expose oneself to a potential grievance before Ohio's Board of Professional Misconduct (the "Board") or on the wrong side of a legal malpractice lawsuit.

Indeed, Ohio attorneys are expected to represent their clients to the best of their abilities, using all reasonable, available, ethical and legal means to achieve their clients' goals. Likewise, an attorney owes a duty to their clients to carry out their representation within the generally recognized professional standard of care. As such, it is critical for attorneys to understand how to adequately navigate the ethical and legal landscape while also keeping in mind that these two professional pitfalls—professional misconduct and professional malpractice—are not one in the same. See *DeMeo v. Provident Bank*, 8th Dist. Cuyahoga No. 89442, 2008-Ohio-2936, 2008 WL 2426559, ¶¶ 44-45 ("To begin with, not every violation of the ethical rules contained in the Rules of Professional Conduct constitutes legal malpractice, and

not every act of legal malpractice constitutes a violation of ethical rules requiring discipline.") Not only are the two adjudicative processes subject to entirely different substantive standards, but what is required of an attorney participating in a grievance investigation may be dissimilar or even contradictory to what is required of an attorney during the course of a complaint for malpractice. Moreover, just because a grievance committee does not find an attorney to be in violation of the Rules of Professional Conduct does not equate to a finding that actionable malpractice did not occur.

Accordingly, this article hopes to further an attorney's understanding as to what is required in carrying out the attorney-client relationship, how to address the grievance process as well as the requirements of the Ohio Board of Professional Misconduct, and the overall the distinction between professional misconduct and legal malpractice.

## Professional Misconduct

What is professional misconduct? Pursuant to the Ohio Rules of Professional Conduct, professional misconduct consists of an attorney that does any of the following:

- (a) violates or attempts to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commits an illegal act that reflects adversely on the lawyer's honesty or trustworthiness;
- (c) engages in conduct involving dishonesty, fraud, deceit, or misrepresentation;

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- (d) engages in conduct that is prejudicial to the administration of justice;
- (e) states or implies an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;
- (f) knowingly assists a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;
- (g) engages, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;
- (h) engages in any other conduct that adversely reflects on the lawyer's fitness to practice law.

While an attorney's ethical obligations can often arise out of complex circumstances, the governing Rules of Professional Conduct only generally define an attorney's ethical obligations, which, if not strictly followed, can constitute misconduct in violation of same. Such ethical obligations an attorney owes to their clients or, at times, prospective clients consist of but are not limited to the following: competent representation, carrying out an agreed scope of representation, diligence and timely communication, lawful and reasonable attorneys' fees and expenses, maintaining confidentiality, refraining from conflicts of interest, safekeeping client funds and property, properly soliciting clients, and complying with disciplinary matters before the Ohio's Board of Professional Conduct of the Supreme Court, among various other ethical obligations.

With the above in mind, initial allegations of misconduct asserted against an attorney are brought in the form of a grievance. While anybody can file a grievance, the majority of grievances are filed by clients, other attorneys, opposing parties, or judges. These grievances are received either by the Office of Disciplinary Counsel or a certified grievance committee of a local bar association, both of which are appointed by Ohio's Board of Professional Conduct of

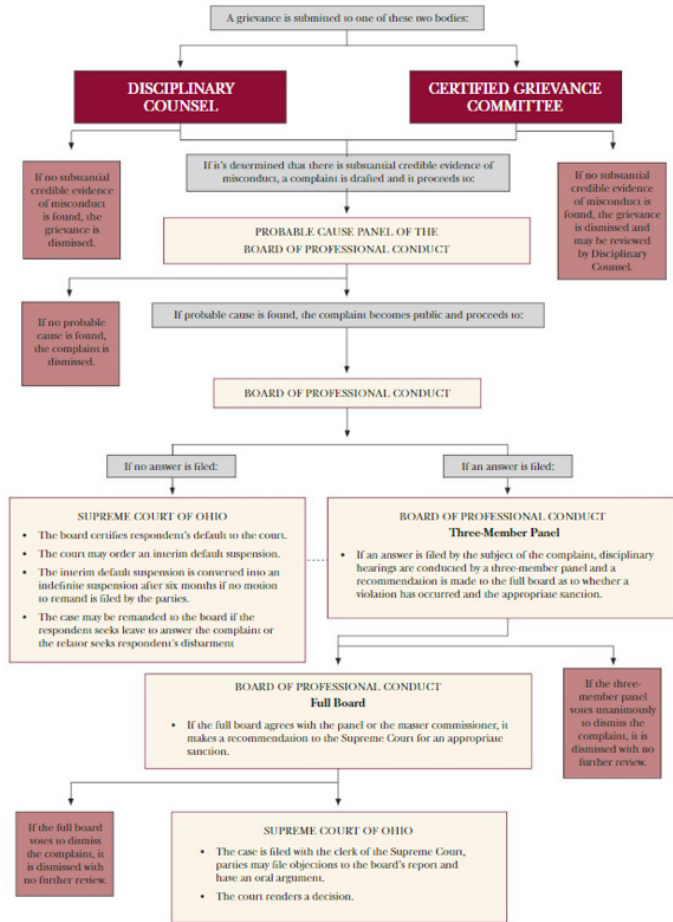
the Supreme Court to primarily investigate allegations of misconduct committed by attorneys.

Once the grievance process is initiated, any investigation by the Office of Disciplinary Counsel or a certified grievance committee must be concluded within two hundred seventy days from the date of the receipt of the grievance (but is more often concluded between sixty and ninety days). Thereafter, any decision as to the disposition of the grievance must be made within thirty days after conclusion of the investigation.

Ultimately, allegations of misconduct asserted against an attorney hinge upon a finding of probable cause. If the investigation does not find probable cause that the attorney violated the Rules of Professional Conduct, the grievance will be dismissed. Conversely, if the investigation does find probable cause, the grievance is then converted into a formal Complaint and submitted to the Probable Cause Panel of the Board of Professional Conduct. Upon subsequent review, the Probable-Cause Panel may certify the Complaint and make it available to the public, if such probable cause is upheld. Thereafter, the Board of Professional Conduct requires the attorney subject to its review to file an Answer responding to the allegations of misconduct, followed by their attendance at a three-member panel disciplinary hearing. Following the disciplinary hearing, the Board of Professional Conduct will either dismiss the Complaint or recommend the appropriate sanction to Supreme Court of Ohio, which will ultimately make the final determination upon clear and convincing evidence. When imposing a sanction for attorney misconduct, several factors are considered. Specifically, the Supreme Court considers (1) the duties violated; (2) the actual injury caused; (3) the attorney's mental state; (4) the existence of aggravating or mitigating circumstances; and (5) sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818. Sanctions range from a public reprimand, to suspension, to possible disbarment.

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For a visual demonstration of the grievance process, consider the following flow chart:



While attorneys are generally aware of the ethical obligations they owe to the public, many may not have a sufficient understanding of what is required of them in during the investigation of a grievance or in the event probable cause is subsequently found, causing a certified Complaint to be submitted to the Board of Professional Conduct. More specifically, an attorney's cooperation (or failure to cooperate) in the investigation can result in very different outcomes. Specifically, Ohio attorneys have an express obligation to cooperate with the Board during the course of its investigation into alleged misconduct, as outlined not only by the Professional Rules of Conduct (Rule 8.1) but also by the Supreme Court Rules for the Government of the Bar (Rule 5). An attorney's obligation to cooperate with an investigation may be viewed by many professionals as absolute, even if such cooperation without limitation could inevitably lead to the suspension or potential disbarment of that attorney. Such compliance can include but not limited to producing requested information and documentation,

responding to correspondence from disciplinary counsel or a grievance committee, appearing at deposition, failing to file an affidavit of compliance in response to court order relating to disciplinary proceedings, or failing to file an Answer to a certified Complaint submitted to the Board of Professional Conduct.

On the other hand, if an attorney fails to cooperate with an investigation this would more than likely lead to an even harsher result, given that such noncooperation is also found to be a violation of the Rules of Professional conduct. See *Butler Cty. Bar Assn. v. Williamson*, 117 Ohio St. 3d 399, 2008-Ohio-1196, 884 N.E.2d 55 (2008) (a lawyer's failure to cooperate in a disciplinary investigation, pursuant to Ohio R. Prof. Cond. 8.1, in and of itself, may warrant an actual suspension from practice); see also *Disciplinary Counsel v. Morgan*, 114 Ohio St.3d 179, 2007-Ohio-3604, 870 N.E.2d 1171, ¶ 9 (Because respondent repeatedly ignored investigative inquiries, we agree with the board that he violated Gov.Bar R. V(4)(G) (requiring a lawyer to cooperate in an investigation of professional misconduct)).

Over the years, an attorney's requirement to cooperate with a grievance investigation has often been met with resistance, perhaps because such requirement can ostensibly be viewed as a Catch-22—to comply may lead to unwarranted discipline while failure to comply will lead to the same if not worse discipline. Particularly, attorneys subject to an investigation by disciplinary counsel or grievance committee have raised whether they may invoke their Fifth Amendment privilege in responding to an investigatory request as well whether initiating disciplinary proceedings after the invocation of the Fifth Amendment is unconstitutional. The classic law professor answer never fails to apply in situations like this: it depends.

To begin, the Supreme Court of the United States in *Spevack* in fact held that "the special responsibilities that [an attorney] assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, Fifth Amendment rights." *Spevack v. Klein*, 385 U.S. 511, 520, 87 S.Ct. 625, 630, 17 L.Ed.2d 574 (1967). *Spevack* was an attorney who refused to comply with a subpoena *duces tecum* to produce financial records

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detailing aspects of contingent-fee litigation and also refused to testify in a judicial inquiry. His failure to comply ultimately led to his disbarment. However, the Supreme Court disagreed with the sanction, finding that “lawyers also enjoy first-class citizenship,” and that “the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it.” *Spevack*, 385 U.S. at 514.

More than forty years later, the holding in *Spevack* was raised before the Supreme Court of Ohio in *Heiland*. The attorney, Heiland, maintained that the board was precluded from finding a violation against him for failure to cooperate because he had invoked his Fifth Amendment right against self-incrimination. *Disciplinary Counsel v. Heiland*, 116 Ohio St.3d 521, 2008-Ohio-91, 880 N.E.2d 467, ¶¶ 26-30. However, the Supreme Court of Ohio was unpersuaded, finding that *Spevack* did not apply in the context of the case *sub judice*. More specifically, that beyond Heiland’s violation for failure-to-cooperate, he was also charged in three counts with seven other separate disciplinary violations. Moreover, Heiland failed to invoke his right against self-incrimination until he appeared before the three-member panel of the Board of Professional Conduct, long after the grievance investigation took place. As such, his charge of failure to cooperate stemmed from events that occurred before he invoked his Fifth Amendment privilege.

Ultimately, it can be surmised that invoking the Fifth Amendment early on in a grievance process may provide grounds to negate a finding that the attorney violated the Rules of Professional Conduct for failure to cooperate with a disciplinary proceeding. However, the likelihood that an attorney can outright avoid disciplinary proceedings or possible sanctions based upon the invocation of the Fifth Amendment is highly unlikely and unreasonable. This is because the “standards of due process in a disciplinary proceeding are not equal to those in a criminal matter.” *In re Judicial Campaign Complaint Against Carr*, 76 Ohio St.3d 320, 322, 667 N.E.2d 956 (1996).

In fact, due process requirements in attorney-discipline proceedings have been held to be satisfied when the

respondent is afforded a hearing, the right to issue subpoenas and depose witnesses, and an opportunity for preparation to explain the circumstances surrounding his actions. *Disciplinary Counsel v. Character*, 129 Ohio St.3d 60, 2011-Ohio-2902, 950 N.E.2d 177, ¶ 76.

If faced with a cognizable complaint for professional misconduct, an attorney has several avenues for defending their conduct or lack thereof. While upholding one’s ethical responsibilities as outlined by the Rules of Professional Conduct should be at the forefront of every attorney’s professional judgment, it is also critical that all attorneys are knowledgeable of process behind a grievance for professional misconduct, which highly differs from an action for legal malpractice.

## Legal Malpractice

What is legal malpractice? An attorney commits legal malpractice in Ohio when he or she fails to provide legal services to a client that meet the minimum standard of care. A claim for legal malpractice requires proof of the following elements: (1) the attorney owed a duty or obligation to the plaintiff, (2) there was a breach of that duty or obligation and the attorney failed to conform to the standard required by law, and (3) there is a causal connection between the conduct complained of and the resulting damage or loss. *Woodrow v. Heintschel*, 194 Ohio App.3d 391, 2011-Ohio-1840, 956 N.E.2d 855 ¶ 17 (6th Dist.).

True, a violation of the Rules of Professional Conduct may overlap with actionable conduct for legal malpractice. For example, an attorney’s conflict of interest in relation to the interests of a client falls within the realm of legal malpractice, as an attorney may not abandon a client and take an adverse position in the same case. Similarly, an attorney may be liable for malpractice if the attorney disobeys a client’s instructions or breaches confidentiality. However, establishing an actionable malpractice claim is more than just a determination of probable cause that a violation of the applicable rule occurred.

For example, if an attorney is alleged to have disobeyed a client’s express instructions, which purportedly led to adverse judgment of the case, a plaintiff may be required

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to demonstrate the merits of their underlying claim. This is known as the case-within-a-case doctrine. Boiled down, a plaintiff must prove that, but for the attorney's negligence, the plaintiff would have obtained a better outcome in the underlying case. While this can be seen as a rather onerous burden to carry, the trier of fact is also permitted to consider whether the attorney's misconduct made it more difficult for the plaintiff to prove what would have been the result in the original trial. *R & J Solutions, Inc. v. Moses*, 2021-Ohio-1315, 171 N.E.3d 478 (10th Dist.2021).

Moreover, expert testimony may be required when there is a question concerning the attorney's professional judgment, in order to determine whether the standard of care was breached by the attorney's alleged misconduct. This is particularly true in a complex malpractice case involving matters which are normally not within the realm of understanding of the layman.

Perhaps the most significant difference inherent in legal malpractice claims is the availability of a statute of limitations defense. While disciplinary proceedings for professional misconduct are not subject to any general statutes of limitations, an action upon a legal malpractice claim against an attorney must be commenced within one year after the cause of action accrued. See R.C. 2305.117. Moreover, the Ohio legislature recently enacted a four-year statute of repose for legal malpractice actions, effective June 14, 2021, now barring all claims commenced more than four years "after the occurrence of the act or omission constituting the alleged basis of the legal malpractice claim."

Relatedly, it is important to point out that Ohio courts consider a client's filing of a grievance against their attorney as terminating their attorney-client relationship and also constituting the accrual of the one-year statute of limitations for a legal malpractice claim. *Steindler v. Meyers, Lamanna & Roman*, 8th Dist. Cuyahoga No. 86852, 2006-Ohio-4097, 2006 WL 2297204, ¶ 11. With this in mind, an attorney should be aware that it is entirely possible that they may be required to simultaneously participate in an action for malpractice while a grievance arising out of the same occurrence is still under investigation. However, it is important to point out that the Supreme Court of Ohio

created a substantive right of privacy with respect to the disclosure of uncertified grievances. See Gov.Bar R. V(11) (E). What this means is that this substantive right may not be infringed by a trial court's order of discovery. Better put, so long as a grievance has not yet resulted in a certified determination of probable cause, it cannot be subject to disclosure or considered discoverable evidence in the related malpractice action.

Ultimately, under the Civil Rules of Procedure, an attorney is still undoubtedly required in some fashion to cooperate and respond to discovery requests propounded by a plaintiff. Failure to comply may result in sanctions or adverse judgment, just as with any typical civil case. However, unlike the unmitigated investigatory powers of disciplinary counsel or a grievance committee, an attorney-defendant in a legal malpractice action will always have numerous grounds to object at his disposal. Moreover, unlike the objectively lower probable cause standard for a grievance for professional misconduct, a plaintiff has much larger burden to carry in order for a court to find an actionable claim for legal malpractice, often requiring them to litigate not one but two cases on the merits, incur expert witness fees, as well as ensure that their claim is brought timely.

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