

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 98-2

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SYLLABUS: It is improper under the privacy provisions of Governing Bar Rule V§11(E) for an attorney to state in an affidavit of disqualification of a judge that the attorney has filed a disciplinary grievance against the judge when the grievance has not been certified as a formal complaint. The rule protects the privacy of disciplinary matters under investigation until there has been a finding of probable cause and certification of the complaint by the Board of Commissioners on Grievances and Discipline. An attorney is not prohibited from including in an affidavit of disqualification the facts underlying a grievance. An attorney may reveal the facts underlying a grievance for that is different from revealing that a grievance has been filed.

OPINION: This opinion addresses whether it is proper under the privacy provisions of Governing Bar Rule V for an attorney to reveal in an affidavit of disqualification of a judge that a grievance has been filed by the attorney against the judge. Under the proposed facts, an attorney is a party in a proceeding before a judge. The attorney files a grievance against a judge. The attorney also wants to file an affidavit of disqualification of the judge. The attorney claims that revealing the grievance in the affidavit is necessary “to protect his or her right under the United States Constitution to an impartial adjudicator.” The Board has no authority to opine on the requester’s concerns regarding constitutional rights. The Board will advise upon the application of the disciplinary rule.

Does it violate the privacy provisions Governing Bar Rule V § 11(E) for an attorney to reveal in an affidavit of disqualification of a judge that the attorney has filed a disciplinary grievance against the judge?

Privacy and confidentiality of disciplinary procedures are governed under Rule V § 11(E) of the Supreme Court Rules for the Government of the Bar of Ohio. The rule sets forth what is private and what is public in disciplinary matters. All proceedings and documents relating to an investigation of a grievance are private. All certified formal complaints and all subsequent proceedings are public, with the exception that deliberations by the Board are confidential and its recommendations are private until filed with the Supreme Court.

The demarcation between private and public occurs when a grievance is certified as a formal complaint by the Board of Commissioners on Grievances and Discipline. A grievance is certified as a formal complaint upon two probable cause findings of misconduct. The first finding is by an investigating body under Gov. Bar R. V § 4(C).

The second finding is by a probable cause panel of the Board under Gov. Bar R. V § 6(A) and (D).

The rule balances competing concerns. It protects an individual's privacy needs during investigation of what may be an unsupported grievance, while promoting free flow of information to the public on disciplinary matters in which there has been a determination of probable cause of misconduct. The rule is set forth below.

Gov. Bar R. V § 11(E) *Proceedings Private; Public.*

(1) All proceedings and documents relating to review and investigation of grievances made under these rules shall be private except as follows:

- (a) Where the respondent requests in writing that they be public;
- (b) Where the respondent voluntarily waives privacy of the proceedings;
- (c) Where the proceedings reveal reasonable cause to believe that respondent is or may be addicted to alcohol or other chemicals, or is abusing the use of alcohol or other chemicals, in which event the information giving rise to this belief shall be communicated to a committee or subcommittee of a bar association, or to an executive officer or employee of a non-profit corporation established by a bar association, designed to assist lawyers with substance abuse problems.

(2)(a) From the time a complaint has been certified to the Secretary of the Board by a probable cause panel, the complaint and all subsequent proceedings in connection with the complaint shall be public; except that deliberations by the panel and deliberations by the Board shall be confidential and the recommendations of the Board shall be private until filed with the Supreme Court. The Board-approved ADR process shall be confidential. Any knowledge obtained by a mediator or facilitator shall be privileged for all purposes under DR 1-103, provided the knowledge was obtained while the mediator or facilitator was acting as a mediator or facilitator.

(b) Proceedings by a Certified Grievance Committee and Disciplinary Counsel shall be private until certified by a probable cause panel; except that deliberations by a Certified

Grievance Committee, Disciplinary Counsel, panel, or Board shall be confidential.

- (c) As used in Section 11 of this rule, the terms “private” and “confidential” shall have the following meanings:
- (i) “Private” acknowledges the right of the respondent to the right of privacy as to the proceedings relative to an uncertified complaint, which may be waived by the respondent as provided in Section 11(E)(1) of this rule.
 - (ii) “Confidential” acknowledges the oath of office of Section 11(E)(3) of this rule, acknowledges the necessity of confidentiality in the deliberative stage of the proceedings of the Certified Grievance Committee, Disciplinary Counsel, panel, and Board, and applies to members and employees of the Certified Grievance Committee, Disciplinary Counsel, panel, and Board, such that deliberations cannot be disclosed or waived by anyone for any reason.

(3) and (4) [omitted]

Affidavits of disqualification of judges of the courts of appeals or courts of common pleas are filed with the Supreme Court of Ohio. *See* Ohio Const IV § 5(C), Ohio Rev. Code Ann. §§ 2501.13, 2701.03 (Baldwin Supp. 1998). Some affidavits have included statements by attorneys averring that a grievance has been filed against a judge. The court has held that a judge is not disqualified solely because a party or counsel in a pending case has filed a grievance against the judge. *See In re Disqualification of Kilpatrick*, 47 Ohio St. 3d 605 (1989); *In re Disqualification of Lorig: State of Ohio v. Hurn* (June 15, 1992), S.C. No. 92-AP-064, unreported; *In re Disqualification of Walton: Leonard v. Scioto/Lawrence Area Manpower Drug Task Force* (Jan. 10, 1995), S.C. No. 94-AP-201, unreported.

In dismissing the affidavit in *Kilpatrick* the court commented briefly on confidentiality.

Complaints filed with the Disciplinary Counsel are, by rule, confidential at the preliminary stage, and this court has no independent knowledge of whether the claim that such a complaint has been filed is true.

A judge is presumed to be fair and impartial, and there is no evidence to suggest that the filing of such a complaint, even if true, has affected or would affect the conduct of this judge.

This court has previously held that a judge is not automatically disqualified solely because a litigant in a pending case before the judge has

named that judge as a defendant in a separate action. *In re Disqualification of Hunter* (1988), 36 Ohio St. 3d 607, 522 N.E. 2d 461. It follows that a judge is not automatically disqualified solely because a party in a case pending before him or her has filed a complaint against the judge with Disciplinary Counsel or a similar body. To hold otherwise would invite the filing of misconduct complaints solely to obtain a judge's disqualification, and "the orderly administration of judicial proceedings would be severely hampered and thwarted * * *." *Smith v. Smith* (App. 1977), 115 Ariz. 299, 303, 564 P. 2d 1266, 1270.

In dismissing the affidavit in *Lorig*, the court admonished the affiant regarding the rule of privacy: "Affiant is reminded that Section 43 of Rule V of the Rules for the Government of the Bar of Ohio [the predecessor of Gov. Bar R. V § 11(E)] requires that disciplinary complaints remain private until and unless formal proceedings begin before the Board of Commissioners on Grievances and Discipline." In both *Lorig* and *Walton* the court quoted from the *Kilpatrick* case that "[b]ecause complaints against judges and lawyers are, by rule, confidential, this Court has no independent knowledge of whether a complaint has been filed."

The above cases did not rule on whether the privacy rule is violated if an attorney states in an affidavit of prejudice that a grievance has been filed against the judge. Nevertheless, those cases and the rule itself call for privacy of documents and proceedings related to an investigation of a grievance. Attorneys are bound by the rules. Grievances that are not certified as a formal complaint are intended to be private under Ohio's rules governing disciplinary procedure. An attorney should not reveal that a grievance has been filed until the grievance has been certified as a formal complaint. An attorney may reveal the facts underlying a grievance for that is different from revealing that a grievance has been filed.

In conclusion, the Board advises that it is improper under the privacy provisions of Governing Bar Rule V § 11(E) for an attorney to state in an affidavit of disqualification of a judge that the attorney has filed a disciplinary grievance against the judge when the grievance has not been certified as a formal complaint. The rule protects the privacy of disciplinary matters under investigation until there has been a finding of probable cause and certification of the complaint by the Board of Commissioners on Grievances and Discipline. An attorney is not prohibited from including in an affidavit of disqualification the facts underlying a grievance. An attorney may reveal the facts underlying a grievance for that is different from revealing that a grievance has been filed.

Advisory Opinions of the Board of Commissioners on Grievance and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the

Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.