

Dealing with Problem Lawyers: Issues, Options, and Barriers

2016 North Carolina District Court Judges Conference

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This presentation will discuss issues, options, and barriers in dealing with problem lawyers. The session will emphasize judges' inherent authority over officers of the court, the wide variety of corrective measures that are available, and cooperation/collaboration with professional organizations in curtailing disruptive, abusive, and unprofessional behavior by lawyers. Topics will include:

Identifying "Problem Lawyers"

Certain types of conduct by lawyers are particularly likely to impact the efficient and orderly operation of the courts. For example:

- Chronic lateness
- Arguing with the judge
- Perseverating on frivolous arguments or objections
- Unprofessional comments directed to the court and/or opposing counsel
- Improper argument or comments in the presence of the jury
- Expressing disrespect or frustration through facial expressions/body language/gestures
- Frivolous allegations of misconduct by opposing party or counsel
- Public threats to report another lawyer or judge to a regulatory authority

Rules that May Regulate or Proscribe the Conduct of Problem Lawyers:

- Rule 12 of the General Rules of Practice ("Courtroom Decorum")
- Rule 11 of the Rules of Civil Procedure
- Rules of Professional Conduct:
 - Rule 3.1: A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous...
 - Rule 3.3(a)(1): A lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.
 - Rule 3.4: A lawyer shall not:
 - (c) knowingly disobey or advise a client or any other person to disobey an

obligation under the rules of a tribunal...

....

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused

- Rule 3.5(a)(4): A lawyer shall not engage in conduct intended to disrupt a tribunal, including:
 - (A) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;
 - (B) engaging in undignified or discourteous conduct that is degrading to a tribunal; or
 - (C) intentionally or habitually violating any established rule of procedure or evidence
- Rule 4.4(a): In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person...
- Rule 8.4(d): It is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice.

Harm Caused by Disruptive, Abusive, and Unprofessional Behavior:

- Undermining the ability of other lawyers to represent their clients
- Negative impact on public perception of the judicial process
- Further erosion of public perception of the legal profession
- Delay and expense

Barriers to Judges Taking Corrective Action:

- Allocating limited court time
- Uncertainty about whether the conduct is an isolated incident, and if so, whether it is worth pursuing.
- Concerns about being perceived as "taking things personally" when the lawyer is disrespectful toward the court
- Desire to complete a case when the jury is already empaneled
- Not wanting to prejudice a litigant for his lawyer's bad acts
- Time and effort involved
- Questions about how it might impact your ability to preside over the lawyer's cases in

the future

- Anticipation of continued or escalating tension with a home-county lawyer
- Concerns about stepping on toes if the problem lawyer is outside of your home district

Options for Addressing Misconduct

- Informal intervention or inquiry
- Arranging for mentoring
- Warning (privately or on the record)
- Referral to the Chief Justice’s Commission on Professionalism
- Disciplinary proceedings in the court—either via show cause procedure or initiated/prosecuted by the State Bar upon request
- Referral to the North Carolina State Bar for grievance investigation
- Contempt
- Rule 11 sanctions
- Fee awards (where available)
- Referral to the Lawyer Assistance Program, when the conduct appears to be attributable to mental health or substance abuse problems.

Presenter Contact Information:

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Other Resources:

For Questions About Conflicts of Interest or Interpretation of the Rules of Professional Conduct, contact State Bar Ethics Counsel Alice Mine at amine@ncbar.gov or 919-828-4620, ext. 236.

For Concerns About a Lawyer’s Mental Health or Substance Abuse, contact the Lawyers Assistance Program (<http://www.nclap.org>). LAP’s services are regional, so the contact person depends upon your location:

Raleigh and Areas East:
Nicole (“Nicky”) Ellington
919-719-9267

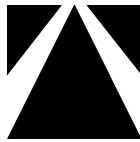
Piedmont Area:
Towanda Garner
919-719-9290

Charlotte and Areas West:
Cathy Killian
704-910-2310

If a Lawyer is Disappeared, Deceased, or Disabled, contact Root Edmonson or Brian Oten in the State Bar’s Office of Counsel to discuss whether a trustee should be appointed to protect clients and wind down the law practice.

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The North Carolina State Bar
Office of Counsel

MEMORANDUM

TO: North Carolina Superior Court Judges and District Court Judges

FROM: The North Carolina State Bar Office of Counsel

RE: Liaison to the Judiciary

In order to enhance communication, improve collaboration, and provide better assistance to North Carolina judges, the State Bar's Office of Counsel has designated Deputy Counsel Carmen Bannon as the office's Judicial Liaison.

The judicial liaison will serve as the primary point of contact for judges who seek information or assistance from the State Bar, and as a resource for information about various options available to judges to address the conduct of lawyers who appear before them. The liaison will also track concerns reported by judges, even in instances where the judge does not wish to initiate a formal grievance at the time of the report. This will enable the State Bar to identify when a lawyer begins engaging in a pattern of problematic conduct. The liaison will also be available to you to answer questions about the Rules of Professional Conduct, and to discuss the benefits and drawbacks of addressing a particular situation either in the court or through the State Bar's grievance process.

The type of issues you may want to report to—or discuss with—the liaison include:

- A lawyer has recently been removed from the appointed list due to concerns about performance
- Is incivility (between counsel or directed at the court) merely a professionalism issue, or is it something the court or the Bar should get involved in?
- A lawyer is chronically late and/or absent from court
- A lawyer gave false testimony or made a false statement to the court
- A lawyer filed a wholly frivolous lawsuit or motion
- A lawyer has alleged misconduct by another lawyer

Katherine E. Jean, Counsel

A. Root Edmonson, Fern Gunn Simeon, David R. Johnson, Jennifer A. Porter, Margaret T. Cloutier,
Carmen Hoyme Bannon, Brian P.D. Oten, Leanor Bailey Hodge, Barry S. McNeill, Mary D. Winstead,
G. Patrick Murphy, Alyssa M. Chen, Susannah B. Cox - Deputy Counsel
Peter G. Bolac - Trust Account Compliance Counsel

To ensure that judicial inquiries receive a prompt response, and to provide for consultation and/or reporting outside of regular business hours, judges may contact Carmen any time, either at her direct office number, 919-719-9283, or on her cell phone, 919-302-8034. If a judge calls the main State Bar number and does not request to speak to a specific member of the staff, the call will be routed to Carmen.

JUDICIAL LIAISON CONTACT INFORMATION:



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Raleigh, NC 27611
cbannon@ncbar.gov
919-719-9283 (direct)
919-302-8034 (cell)
919-834-8156 (fax)

JUDICIAL DISCIPLINE

I. INITIAL CONSIDERATION – WHETHER TO CONDUCT A PROCEEDING BEFORE THE COURT OR REFER THE MATTER TO THE STATE BAR?

A. An Attorney is Before the Court Pleading to a Criminal Offense

1. If the attorney's criminal offense shows that the attorney is professionally unfit, the Court can summarily disbar the attorney, either in the criminal judgment or by a separate civil order. (See suggested language in form 1 contained in Appendix A.) It is preferable that the order of discipline be in a separate civil order.
2. If the attorney's criminal offense doesn't warrant disbarment, the Court can still summarily impose a less severe form of discipline. The Court may consult with the State Bar to determine what discipline has been imposed for similar offenses by calling (919) 828-4620. Alternatively, the Court may decline to impose discipline and refer the convicted attorney to the State Bar for discipline to be imposed pursuant to 27 NCAC 1B, § .0115. A copy of § .0115 is attached as Appendix B.

B. An Attorney is Being Tried for a Criminal Offense

1. If the attorney is convicted of the offense, the Court has the same options as in A above.
2. However, if the Court knows before trial that discipline will be considered if the attorney is convicted, the Court should give the attorney notice that the Court will consider imposing discipline upon an adverse jury verdict by using form 2 contained in Appendix A.

C. Improper Conduct Occurs During the Course of a Proceeding before the Court

1. If the attorney's conduct occurred in the presence of the Court, the Court may summarily discipline the attorney or hold the attorney in contempt.
2. If the attorney's conduct occurred outside the presence of the Court, or the facts relating to the attorney's conduct are in dispute, the Court may initiate a judicial disciplinary proceeding or refer the matter to the State Bar. In making this decision, the Court should consider:
 - a. whether the integrity of the judicial system or some other compelling circumstance requires an immediate resolution of the matter (e.g. attorney falsely claims in court or in a pleading that some judicial official has engaged in a corrupt act;)

- b. whether an investigation of the attorney's conduct which would be outside the scope of a judicial disciplinary proceeding may be needed (necessitating a State Bar investigation);
- c. whether the attorney's conduct violates the General Rules of Practice for the Superior and District Courts as opposed to the Rules of Professional Conduct;
- d. whether sanctions that the State Bar can't impose may be appropriate, such as a monetary sanction (for a Rule 11 violation) or jail sentence (for contempt);
- e. whether the Court is willing to accept whatever result the State Bar's consideration of the matter may produce;

II. PROPER PROCEDURE FOR A JUDICIAL DISCIPLINARY HEARING

A. Summary Procedure

1. When an attorney is charged with a criminal offense involving moral turpitude and amounting to a felony and pleads guilty or is convicted or pleads *nolo contendere* with agreement that the attorney will surrender his or her license, the judge conducting the criminal trial may summarily disbar the attorney without further proceedings. *In re Burton*, 257 N.C. 534 (1962). (See form 1 in Appendix A.)
2. When an attorney's alleged misconduct is related to pending litigation and the facts are not disputed, the judge may take summary judicial action. *See, e.g., In re Hunoval*, 294 N.C. 740 (1977).

B. Plenary Procedure

1. When an attorney is convicted in another court or the conduct complained of is not related to litigation before the court investigating the attorney's alleged misconduct:
 - (a) Disciplinary proceeding must be initiated by a sworn, written complaint, *In re Burton*, 257 N.C. 534 (1962), or initiated by a judge upon information in court records, *In re Dale*, 37 N.C. App. 680 (1978).
 - (b) The judge should issue a ruling or an order:
 - (1) advising the attorney of the specific charges, *see, e.g., In re Dale*, 37 N.C. App. 680 (1978) ("Notice of Hearing and Specification of Charges") and directing the attorney to show cause why disciplinary action should not be taken and giving the attorney time to answer and to prepare a defense. *See*, form 3 in Appendix A.
 - (2) Unlike orders determining a case, which require some action by a party or which affect a party's rights, a show cause order need not be signed in the county in which the case is to be heard. *In re License of Delk*, 336 N.C. 543 (1994) (order issued out of term, but because party to whom show

cause order is directed is not entitled to be present when order is signed issuing judge retained jurisdiction).

- (c) The attorney should be given a full opportunity to be heard.
 - (d) The attorney should be permitted to have counsel.
 - (e) The judge may appoint the district attorney, another licensed attorney or the State Bar's Office of Counsel to prosecute the disciplinary hearing. *In re Robinson*, 37 N.C. App. 671 (1978).
 - (f) The standard of proof is clear and convincing evidence. *In re Palmer*, 296 N.C. 638 (1979).
 - (g) Because the question of disciplining an attorney is not a part of the criminal action against him or her, it may be considered at a later time and is unaffected by the doctrines of res judicata or collateral estoppel. *In re License of Delk*, 336 N.C. 543 (1994).
 - (h) A judicial order of disbarment is effective on the date of order. Unlike State Bar proceedings, the Court need not give the attorney a 30-day period in which to wind down his or her affairs. *In re License of Delk*, 336 N.C. 543 (1994).
2. An attorney has no right to a jury trial in a judicial disciplinary proceeding. *In re Bonding Co.*, 16 N.C. App. 272 (1972).
 3. If a judge is biased, or if the order to show cause makes it appear that the judge has already made up his/her mind, the judge should not preside over the disciplinary proceeding. *See, e.g., In re Robinson*, 37 N.C. App. 671 (1978) (Order stated, “[y]ou have negligently and willfully failed to perfect the appeal” rather than, “[t]he records of this Court indicate that no action has been taken to perfect the appeal. This inquiry is to hear evidence bearing upon why no action has been taken and to determine whether discipline should be imposed upon you by this Court.”)
 4. If the Court suspends or disbars an attorney, consideration must also be given to whether the Court will retain jurisdiction to consider the possible reinstatement of the attorney or whether jurisdiction for reinstatement should be referred to the State Bar. Suggested language to confer reinstatement jurisdiction to the State Bar:

-- [attorney] is herewith **DISBARRED** from the practice of law in North Carolina;
-- [attorney] should forthwith transmit his [her] license certificate and membership card to the NC State Bar, 217 E. Edenton St., Raleigh, NC, 27601; or mail it to PO Box 25908, Raleigh, NC 27611-5908;
-- [attorney] shall not practice law in North Carolina until relicensed pursuant to the reinstatement procedures of the North Carolina State Bar.

III. POSSIBLE SANCTIONS

- A. Before imposing sanctions, it is wise to investigate the attorney's current status with the State Bar by calling the Office of Counsel at (919) 828-4620. It may be that the matter before the Court is not an isolated incident.
- B. Levels of discipline that the Court may impose include [*See*, NCGS § 84-28(c)]:
 1. Disbarment;
 2. Suspension of the attorney's license for a definite period of time not to exceed five years, any portion of which may be stayed upon specified conditions with which the attorney must comply before and/or during the stay;
 3. Censure – A censure is a written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession or members of the public, but the protection of the public does not require suspension of the attorney's license;
 4. Reprimand – A reprimand is a written form of discipline more serious than an admonition issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct, but the protection of the public does not require a censure. A reprimand is generally reserved for cases in which the attorney's conduct has caused harm or potential harm to a client, the administration of justice, the profession or members of the public; or
 5. Admonition – An admonition is a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.
- C. Other sanctions the Court may consider include:
 1. Contempt (*See*, NCGS Chapter 5A);
 2. Monetary sanctions (for violations of the NC Rules of Civil Procedure or the General Rules of Practice for the Superior and District Courts);
 3. Removal of the attorney from the list of attorneys who handle appointed cases;
 4. Suspension of the attorney from appellate work;
 5. Referral to the Lawyers Assistance Program.

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. _____

IN THE MATTER OF THE DISCIPLINE)
)
 of)
)
 _____, Attorney,)
 Respondent)

ORDER OF DISCIPLINE

THIS CAUSE, coming on to be heard and being heard before the undersigned judge presiding at the [date] session of [] County Superior Court upon notice to the respondent, [], who is present and represented by [], with the State of North Carolina being represented by [] [or, the North Carolina State Bar being represented by _____]; and the Court finds the following facts by clear, cogent, and convincing evidence:

FINDINGS OF FACT

1. The Respondent, [], is an attorney licensed to practice law in the State of North Carolina.
2. The Respondent [] was convicted by a jury in the Superior Court of [] County on [date] of [describe offense].
3. The offense of which the Respondent has been convicted directly involves the Respondent's practice as an attorney and reflects adversely upon his honesty, trustworthiness, and fitness as an attorney.
4. The Respondent's conduct is such as to demean and bring into disrepute and disgrace the practice and profession of attorney and to bring into contempt the administration of justice.

BASED UPON THE FOREGORING FINDINGS OF F ACT, the Court CONCLUDES AS A MATTER OF LAW:

1. This Court has authority to discipline the Respondent pursuant to its inherent authority over licensed attorneys in this state.
2. The Respondent, [], has been convicted of [a] felony[ies] which reflect adversely on his honesty, trustworthiness, or fitness as an attorney.
3. The Respondent's conduct is such as to warrant [suspension or disbarment] by this

Court.

NOW THEREFORE IT IS ORDERED:

1. Respondent, [], is hereby [disbarred, suspended] from the practice of law in the State of North Carolina effective []. [If suspension, state length of suspension.]
2. Respondent shall forthwith transmit his (her) license certificate and membership card to the North Carolina State Bar at 217 E. Edenton Street, Raleigh, NC 27602 or mail them to PO Box 25908, Raleigh, NC 27611-5908.
3. The Respondent shall not practice law in North Carolina unless and until his (her) license is restored by the North Carolina State Bar.
4. Respondent shall comply with the wind down provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, Rule .0124 of the NC State Bar Discipline & Disability Rules.
5. The Clerk of Superior Court of [] County shall forthwith certify a copy of this Order to the North Carolina State Bar.

This is the ____ day of _____, 2____.

Judge Presiding

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. ___ CRS _____

STATE OF NORTH CAROLINA)
)
 vs.)
)
 _____, Attorney,)
 Defendant)

NOTICE OF DISCIPLINARY ACTION

TO: _____, Attorney
Address
City, NC Zip

YOU ARE HEREBY GIVEN NOTICE that, if you are convicted of the offense(s) for which you are about to be tried, this Court, in the exercise of its inherent authority, will hold a civil inquiry into whether disciplinary action should be against you for that conviction. The hearing will be a summary proceeding based upon the records of this Court. You and your attorney will be heard concerning the issue of discipline, but no evidence will be presented relating to the question of guilt or innocence of the crime(s) of which you are convicted. The Court will take judicial notice of the fact that you are a licensed attorney at law and an officer of the Court.

The hearing will be held [at the same time as the Court considers sentencing for the conviction.] or [at (time) on (date) in Courtroom ____.]

This is the ____ day of _____, 2____.

Judge Presiding

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

_____ COUNTY

FILE NO. _____

IN THE MATTER OF THE DISCIPLINE)

of)

ORDER TO SHOW CAUSE

_____, Attorney,)
Respondent)

TO: _____, Attorney
Address
City, NC Zip

YOU ARE HEREBY GIVEN NOTICE that at _____(time)_____ on _____(date)_____, a hearing will be held in Courtroom _____ in the _____County Courthouse to determine whether disciplinary action should be taken against you by the Court as a result of your conduct in [state name of case in which alleged misconduct arose]. Specifically, the records and proceedings before this Court raise a question of whether you:

1. [State alleged misconduct, with citation to Rule(s) allegedly violated. For example: "Called opposing counsel in *Smith v. Jones* a 'liar' in the presence of the jury. If true, your conduct could constitute a violation of Rules 3.4(c), 3.5(a)(4)(B), and 8.4(d) of the Rules of Professional Conduct."]
2. [State any other alleged misconduct, with citation to Rule(s) allegedly violated.]

You and your attorney(s) should be present at this hearing and you will be heard. You may present any evidence or contention you have concerning whether you engaged in the alleged misconduct set out above, and, if so, whether discipline should be imposed for any violations found to have occurred.

This is the _____ day of _____, 2____.

Judge Presiding