

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 Office Of Counsel's Liaison to the Judiciary to determine what discipline has been imposed for similar offenses by calling (919) 828-4620, ext. 283. 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, § .0119. A copy of § .0119 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, ext. 283. 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 (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.

Appendix A—Form 1

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

_____ COUNTY

FILE NO. _____

IN THE MATTER OF THE DISCIPLINE)

of)

ORDER OF DISCIPLINE

_____, Attorney,)
Respondent)

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

Appendix A—Form 2

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

Appendix A—Form 3

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

Appendix B—27 N.C. Admin. Code Ch. 1B, § .0115

Rule .0119: EFFECT OF A FINDING OF GUILT IN ANY CRIMINAL CASE

(a) Conclusive Evidence of Guilt - A certified copy of the conviction of an attorney for any crime or a certified copy of a judgment entered against an attorney where a plea of guilty, *nolo contendere*, or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member. For purposes of any disciplinary proceeding against a member, such conviction or judgment shall conclusively establish all elements of the criminal offense and shall conclusively establish all facts set out in the document charging the member with the criminal offense.

(b) Interim Suspension - Any member who has been convicted of, pleads guilty to, pleads no contest to, or is found guilty by a jury of a criminal offense showing professional unfitness in any state or federal court may be suspended from the practice of law as set out below.

(1) The counsel shall file with the clerk of the commission and serve upon the member a motion for interim suspension accompanied by proof of the conviction, plea, or verdict.

(2) The member shall have ten days in which to file a response.

(3) The chairperson of the commission may hold a hearing to determine whether the criminal offense is one showing professional unfitness and whether, in the chairperson's discretion, interim suspension is warranted. In determining whether interim suspension is warranted, the chairperson may consider harm or potential harm to a client, the administration of justice, the profession, or members of the public, and impact on the public's perception of the profession. The parties may present additional evidence pertaining to harm or to the circumstances surrounding the offense, but the member may not collaterally attack the conviction, plea or verdict.

(4) The chairperson shall issue an order containing findings of fact and conclusions of law addressing whether there is a qualifying conviction, plea, or verdict, and whether interim suspension is warranted, and either granting or denying the motion.

(5) If the member consents to entry of an order of interim suspension, the parties may submit a consent order of interim suspension to the chairperson of the commission.

(6) The provisions of Rule .0128(c) of this subchapter will apply to the interim suspension.

