

TAB:

**Frequent Grievances
Involving Prosecutors**

ROADMAP OF THE DISCIPLINARY PROCESS

All North Carolina lawyers must follow a code of ethics called the North Carolina Rules of Professional Conduct (<https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/>). The North Carolina State Bar's job is to investigate and, when appropriate, prosecute lawyers for violating those rules. The purposes of the State Bar's disciplinary process are to protect the public from harm that could result from unethical conduct of lawyers, and to protect the integrity of the justice system. The process begins when allegations of possible professional misconduct come to the State Bar's attention.

If you think a lawyer has done something dishonest or unethical, you may file a complaint (<https://www.ncbar.gov/for-the-public/i-am-having-a-dispute-with-a-lawyer/>) about the lawyer with the State Bar. Once filed with the State Bar, a complaint is referred to as a "grievance." The State Bar will review your grievance and, if the misconduct is proven, the lawyer may be disciplined. Click here to see examples of the kinds of conduct that the State Bar can and cannot investigate. (<https://www.ncbar.gov/lawyer-discipline/what-the-state-bar-does-and-does-not-investigate/>)

Initiation of Grievances

Grievances come to the State Bar from many sources: clients of the lawyer who is the subject of the grievance, other parties to a controversy, lawyers, judges, or members of the public. The Office of Counsel (the State Bar's legal department) also initiates grievances based upon information available from the press or other sources.

Each year the State Bar investigates hundreds of grievances. All grievances are carefully reviewed by lawyers in the Office of Counsel.

Time Limit for Filing a Grievance

Grievances must be initiated within six years after the last act giving rise to the grievance. 27 N.C.A.C. §1B .0111 (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0111-grievances-form-and-filing/>). However, there is no time limitation for initiation of any grievance based upon a plea of guilty to a felony or upon conviction of a felony; any grievance based upon allegations of conduct that constitutes a felony, without regard to whether the lawyer is charged, prosecuted, or convicted of a crime for the conduct; or any grievance based upon conduct that violates the Rules of Professional Conduct and has been found by a court to be intentional conduct by the lawyer.

Confidentiality of Grievances

The existence and substance of a grievance are confidential unless and until one of several things happens, most commonly that the Grievance Committee imposes public discipline or the State Bar files a complaint in the Disciplinary Hearing Commission. 27 N.C.A.C. §1B .0133 (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0133-confidentiality/>) and N.C.G.S. §84-32.1 (http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_84/GS_84-32.1.html) clarify that documents in the State Bar's possession relating to grievances are not public records. As a result, Grievance Committee members and State Bar employees cannot discuss pending or completed grievances with members of the public or with anyone who is not a member of the Grievance Committee or an employee in the State Bar's Office of Counsel.

The Grievance Committee

The Bar's Grievance Committee acts much like a grand jury, considering complaints in private and deciding whether there is probable cause to refer a case to the Disciplinary Hearing Commission (DHC), an independent tribunal, for public trial and possible sanctions.

The State Bar's Grievance Committee acts upon alleged violations of the North Carolina Rules of Professional Conduct. All members of the Grievance Committee (<https://www.ncbar.gov/for-lawyers/directories/committees/>) are appointed to serve on the committee by the president of the State Bar. All but three of the members must be members of the State Bar's governing body, called the State Bar Council (<https://www.ncbar.gov/for-lawyers/directories/leadership/councilors/>). Three of the councilor members of the committee are nonlawyers appointed by state officials. The remainder are lawyers elected by their peers from local judicial district bars. The Grievance Committee also includes advisory members, both lawyers and nonlawyers, who are not members of the State Bar Council. The Grievance Committee is divided into three subcommittees. Each subcommittee has direct responsibility for reviewing the Reports of Counsel (see below) and supporting documents in approximately 1/3 of the total grievances and recommending appropriate resolutions to the full Grievance Committee. The full committee votes upon the subcommittees' recommended resolutions. The State Bar's legal department, the Office of Counsel, serves as counsel to the Grievance Committee.

THE GRIEVANCE PROCESS AND DISPOSITION OF GRIEVANCES

Grievances are investigated by one of the lawyers in the State Bar's Office of Counsel assisted by one or more of its investigators. Investigations are summarized in a "Report of Counsel" that is prepared in each grievance file.

Confidentiality

Generally, grievance proceedings are confidential unless the Grievance Committee imposes and the lawyer accepts public discipline, or unless a formal disciplinary complaint is filed in the DHC against the lawyer. Additional exceptions to the confidentiality rule apply infrequently.

Dismissal

When the allegations of a grievance, even if proven, would fail to constitute a violation of the Rules of Professional Conduct or if available evidence conclusively disproves the allegations, the Office of Counsel submits a report to the chair of the Grievance Committee recommending dismissal with no further action. If the chair agrees with that recommendation, the grievance is dismissed. 27 N.C.A.C. §1B .0105(a)(19) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0105-chairperson-of-the-grievance-committee-powers-and-duties/>). In such cases, the respondent lawyer is not asked to respond and may not even be aware that the grievance was filed.

If the allegations of the grievance would constitute a violation of the Rules of Professional Conduct, the respondent lawyer is required to respond to the allegations (see Letter of Notice below). If, after reviewing all of the available evidence, the Office of Counsel concludes that the evidence does not support the allegations, the Office of Counsel recommends that the grievance be dismissed without further action. If the chair of the Grievance Committee and the chair of the subcommittee assigned the case agree, the grievance is dismissed. 27 N.C.A.C. §1B .0105(a)(19). (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0105-chairperson-of-the-grievance-committee-powers-and-duties/>)

Letter of Notice

When the allegations, if proven, would constitute a violation of the Rules of Professional Conduct and available evidence does not conclusively disprove the allegations, the Office of Counsel sends the respondent lawyer a Letter of Notice and accompanying Substance of Grievance detailing the allegations of misconduct. 27 N.C.A.C. §1B .0107(2) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0107-counsel-powers-and-duties/>).

The respondent must submit a written response within 15 days from receipt of the Letter of Notice, although extensions of time to respond are regularly granted. 27 N.C.A.C. §1B .0112(c) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0112-investigations-initial-determination-notice-and-response-committee-referrals/>).

After the Office of Counsel receives the written response and conducts any necessary investigation, a lawyer in the Office of Counsel prepares a Report of Counsel to the Grievance Committee. The Report of Counsel contains summaries of the complaint and the response, analysis of the evidence, the respondent's disciplinary history, and a recommended resolution. 27 N.C.A.C. §1B .0107(4) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0107-counsel-powers-and-duties/>).

Case Moves to the Grievance Committee

If the Office of Counsel concludes there is probable cause to believe the respondent violated one or more of the Rules of Professional Conduct, the grievance will be considered by the Grievance Committee at its next quarterly meeting. The Grievance Committee also hears every grievance in which the evidence does not support a finding of probable cause that the respondent violated a Rule of Professional Conduct, but in which the respondent should be cautioned that his or her conduct was not in conformity with accepted standards of professional practice. 27 N.C.A.C. §1B .0106(4) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0106-grievance-committee-powers-and-duties/>).

At the Grievance Committee's quarterly meeting, each grievance is considered on the written record, consisting of the complaint with any attachments, the response with any attachments, the results of any additional investigation conducted by the Office of Counsel, and the Report of Counsel. Live testimony is not received. 27 N.C.A.C. §1B .0113(e) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0113-proceedings-before-the-grievance-committee/>). Initially, each grievance is considered by one of three subcommittees of the Grievance Committee. The subcommittee makes a recommendation to the full Grievance Committee, which either adopts the subcommittee's recommendation or reaches a different resolution.

Grievances considered by the Grievance Committee at the quarterly meetings are resolved in one of the following ways:

- **Dismissal, Letter of Caution, or Letter of Warning** - Sometimes the Grievance Committee disagrees with the Office of Counsel's recommendation that committee action is warranted and dismisses the grievance. The committee can also dismiss a grievance with a Letter of Caution when no Rule violation occurred but the lawyer's conduct was inconsistent with accepted professional practice. It can also dismiss a grievance with a Letter of Warning when the respondent committed a technical or inadvertent Rule violation. Letters of Caution and Letters of Warning do not constitute professional discipline. 27 N.C.A.C. §§1B .0113(i) and (j)(1). (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0113-proceedings-before-the-grievance-committee/>)
- **Discipline Imposed (Admonition, Reprimand, or Censure)** - When the Grievance Committee believes the appropriate discipline is less than suspension or disbarment, the committee can impose three levels of discipline—admonitions, reprimands, and censures, in ascending order of severity. 27 N.C.A.C. §§1B .0106(6), (7), and (8) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0106-grievance-committee-powers-and-duties/>). See below for information on these types of discipline.
- **Referral to the DHC** - When it finds probable cause to believe that misconduct occurred warranting more discipline than a censure, the Grievance Committee can refer the grievance to the Disciplinary Hearing Commission for trial. 27 N.C.A.C. §1B

.0106(2) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0106-grievance-committee-powers-and-duties/>). The Grievance Committee does not have authority to impose suspension or disbarment. Cases involving misappropriation of client or fiduciary funds, criminal acts or other acts of dishonesty, sexual misconduct, and serial neglect of professional responsibilities, including failing to communicate with clients and failing to respond to inquiries from the State Bar, are the ones most frequently referred to the DHC for trial.

Rejection of the Grievance Committee's Determination

A respondent may reject a letter of warning, an admonition, a reprimand, or a censure. 27 N.C.A.C. §1B .0113(j)(3) and 27 N.C.A.C. §§.0113(l)(3) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0113-proceedings-before-the-grievance-committee/>). Even though the respondent has an opportunity to respond fully to the allegations in writing and by written exhibits, and in fact is required by Rule of Professional Conduct 8.1 to do so, the respondent does not have an opportunity before the Grievance Committee for a full evidentiary hearing with live witnesses. A respondent can obtain a full evidentiary hearing by rejecting the Grievance Committee's determination, in which case the Office of Counsel will file a complaint in the Disciplinary Hearing Commission, initiating a trial before the DHC. 27 N.C.A.C. §§1B .0113(j)(4), (l)(5) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0113-proceedings-before-the-grievance-committee/>).

Forms of Professional Discipline Imposed by the Grievance Committee

Admonitions, Reprimands, and Censures

Admonitions are permanent, private discipline that do not appear on the judgment docket of the State Bar, although they may be considered in any later disciplinary proceedings against the respondent. 27 N.C.A.C. §1B .0127(a)(1) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0127-imposition-of-discipline-findings-of-incapacity-or-disability-notice-to-courts/>).

Reprimands and censures are permanent discipline and are recorded in the State Bar's judgment book and sent to the complainant. Censures are also sent to the clerk of superior court in the respondent's home county and any county in which respondent maintains a law office and to the clerks of the North Carolina Court of Appeals, the North Carolina Supreme Court, the United States District Courts in North Carolina, the Federal Fourth Circuit Court of Appeals, and the United States Supreme Court. 27 N.C.A.C. §1B .0127(a)(2)-(3) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0127-imposition-of-discipline-findings-of-incapacity-or-disability-notice-to-courts/>). Notices of both reprimands and censures appear in the State Bar's quarterly magazine, the *Journal* (<https://www.ncbar.gov/news-publications/the-journal/>), and on the State Bar's website (<https://www.ncbar.gov/lawyer-discipline/search-past-orders/summaries-of-orders-by-quarter/>).

THE DISCIPLINARY HEARING COMMISSION

The Disciplinary Hearing Commission (DHC) is an independent court that hears all contested disciplinary cases. The DHC is composed of 12 lawyers appointed by the State Bar Council and eight nonlawyers appointed by the governor and the General Assembly. The DHC sits in panels of three; two lawyers and one nonlawyer. In addition to disciplinary cases, the DHC hears cases involving contested allegations that a lawyer is disabled, and hears petitions from disbarred and suspended lawyers seeking reinstatement.

The DHC sits as the judge and jury in disciplinary cases. The DHC conducts the trial, finds the facts, applies the law, and alone decides which disciplinary sanctions, if any, are appropriate.

The State Bar is the plaintiff in proceedings before the DHC. The Office of Counsel represents the State Bar.

The defendant is the lawyer against whom the DHC case is brought. Defendants in DHC cases are entitled to be represented by counsel.

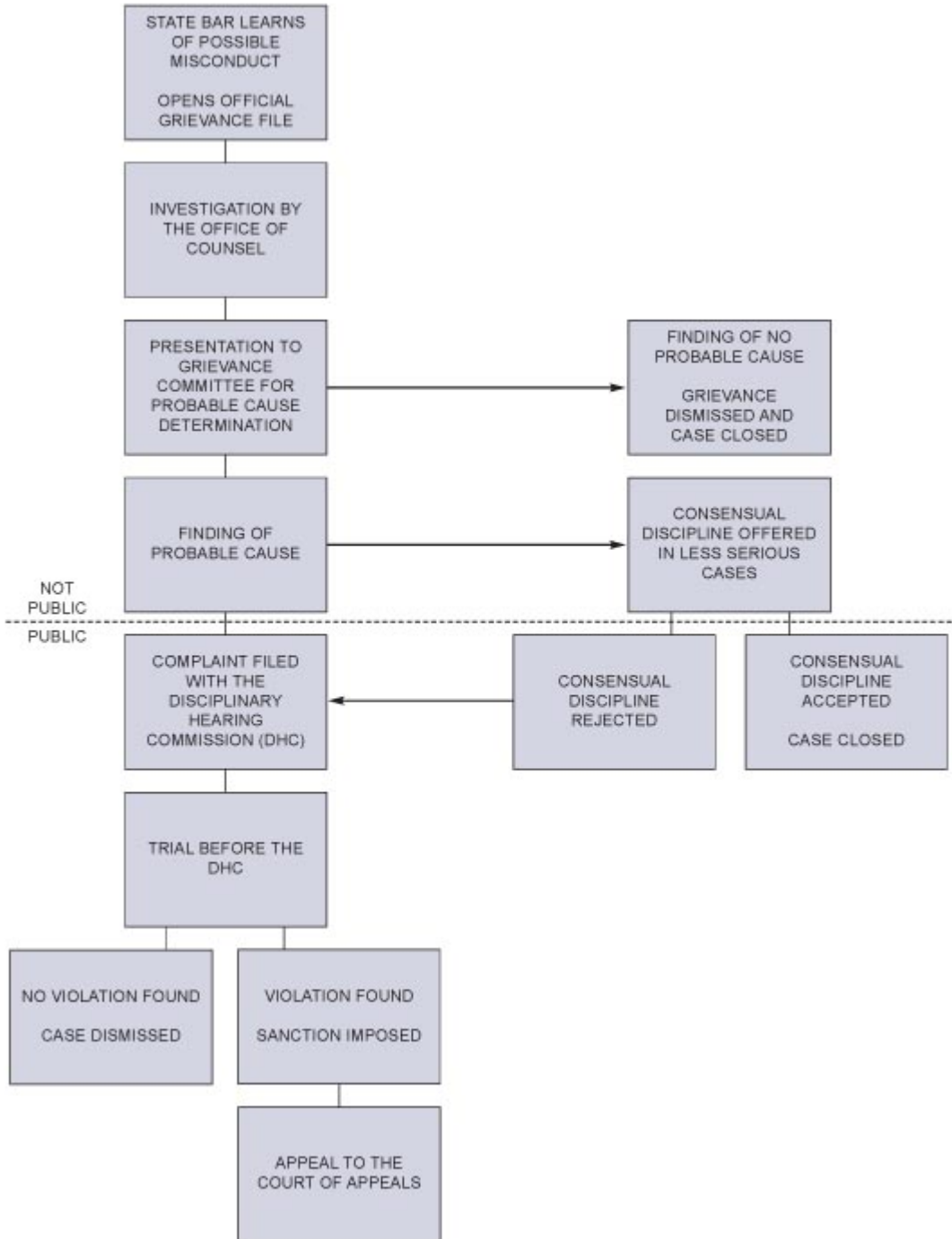
DHC trials are open to the public and are conducted according to the North Carolina Rules of Evidence and the North Carolina Rules of Civil Procedure. The State Bar's complaint and a summons issued by the clerk of the DHC are served on the defendant according to the requirements of the North Carolina Rules of Civil Procedure. The complaint must "allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint." 27 N.C.A.C. §1B .0115(b) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0115-proceedings-before-the-disciplinary-hearing-commission-pleadings-and-prehearing-procedure/>). The defendant must file an answer within 20 days of service of the complaint. 27 N.C.A.C. §1B .0115(c) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0115-proceedings-before-the-disciplinary-hearing-commission-pleadings-and-prehearing-procedure/>). Discovery procedures are available to both parties. 27 N.C.A.C. §1B .0115(h)

(<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0115-proceedings-before-the-disciplinary-hearing-commission-pleadings-and-prehearing-procedure/>). Both parties have the right to compel the production of documents and the attendance of witnesses by subpoena. 27 N.C.A.C. §1B .0114(f) (<https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/0114-proceedings-before-the-disciplinary-hearing-commission-general-rules-applicable-to-all-proceedings/>).

Hearings are divided into two phases. In the first phase, the hearing panel determines whether the lawyer committed any violations of the Rules of Professional Conduct. If the hearing panel finds that a lawyer violated one or more of the Rules of Professional Conduct, the hearing panel decides in the second phase what discipline to impose.

The DHC can dismiss the charges or can admonish, reprimand, censure, suspend (for up to five years), or disbar a defendant. 27 N.C.A.C. §1B .0127(a) ([/for-lawyers/governing-rules-of-the-state-bar/0127-imposition-of-discipline-findings-of-incapacity-or-disability-notice-to-courts/](#)). The DHC can stay all or part of a suspension upon compliance with stated conditions. 27 N.C.A.C. §1B .0118 ([/for-lawyers/governing-rules-of-the-state-bar/0118-proceedings-before-the-disciplinary-hearing-commission-stayed-suspension/](#)). It can also impose conditions precedent to reinstatement of a suspended or disbarred lawyer. N.C. Gen. Stat. § 84-28(c) (http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_84/gs_84-28.html). A disbarred lawyer is eligible to apply for reinstatement five years after the effective date of disbarment.

Either party can appeal an order of discipline issued by the DHC to the North Carolina Court of Appeals. Disbarments and suspensions exceeding 18 months are stayed on appeal only upon writ of *supersedeas*. All other discipline imposed by the DHC is automatically stayed on appeal. N.C. Gen. Stat. § 84-28(h) (http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_84/gs_84-28.html).



How the State Bar Rules on Questions of Legal Ethics

By Alice Neece Mine

Any member of the North Carolina State Bar (the “Bar”) may request a ruling from the Bar on the actual or contemplated professional conduct of a member of the Bar. Unfortunately, the process used by the Bar to respond to ethics inquiries is unknown or unclear to many lawyers. The following series of questions and answers are designed to provide guidance to lawyers who are unfamiliar with or mystified by the procedure for ruling on questions of legal ethics.

What is the Ethics Committee of the State Bar?

The Ethics Committee is a standing committee of the Council of the State Bar. It meets on a quarterly basis in conjunction with the Council’s quarterly meetings. The meetings are open to the public. The current chairman of the committee is Mark W. Merritt from the 26th judicial district in Charlotte. In addition to the 22 members of the State Bar Council who serve on the committee, there are 11 advisory members appointed to the committee. The advisory members are lawyers from the general membership of the bar and include law professors from four of the law schools in North Carolina (chosen on a rotating basis). All members of the committee are eligible to vote on any issue coming before the committee. The president of the State Bar annually appoints the members of the Ethics Committee to terms of one year.

The assistant executive director of the State Bar, Alice Neece Mine, is the legal counsel to the Ethics Committee and provides legal advice and administrative support to the committee. Assistant ethics counsel Suzanne S. Lever and Nichole McLaughlin also support the committee. Ms. Mine, Ms. Lever and Ms. McLaughlin are not voting members of the committee.

The primary purpose of the Ethics Committee is to provide advice to the members of the State Bar relative to their own ethical dilemmas. In so doing, the committee applies the provisions of the North Carolina Rules of Professional Conduct (the “Rules”) to facts presented by inquiring lawyers.

What kinds of opinions does the Ethics Committee issue?

Three kinds of written opinions are issued by the Ethics Committee: published opinions, known as “Formal Ethics Opinions,” which appear in each issue of the *State Bar Journal* where they are identified as proposed opinions with respect to which comment is solicited; unpublished opinions, known as “ethics decisions,” which are privately transmitted to inquiring lawyers and concern matters that are not thought to be of interest or concern to the broader membership of the bar; and “ethics advisories,” which are opinions offered by designated staff counsel of the State Bar to inquiring lawyers who seek advice about their own contemplated conduct. Informal oral or email opinions that concern a lawyer’s own actual or contemplated conduct also may be obtained from the ethics lawyers of the State Bar.

How do I get an opinion on an ethics question?

You may call or write to the State Bar. You also may make an appointment to discuss your question in person with an appropriate member of the State Bar staff. Telephone calls and appointments may be made during the hours of nine a.m. to five p.m. Monday through Friday.

If you call the State Bar, you should tell the receptionist that you have an ethics question. Your call will be directed to the assistant executive director or one of the assistant ethics counsel. If they are not available, your call may be directed to the executive director. The telephone number of the Bar is listed at the end of this article along with the names of the ethics lawyers at the State Bar.

If you write to the State Bar, your inquiry may become part of the records of the Ethics Committee of the State Bar. The records of the Ethics Committee are public. Therefore, you may want to express your ethics question in a hypothetical format. Also, your letter should indicate that you have provided a copy to all persons who you believe will be substantially affected by the question advanced in the letter. It is particularly important that you provide a copy of your inquiry to any lawyer whose conduct may be at issue in your inquiry. If you have not done so, the assistant director will contact you and ask you to provide a copy to the affected lawyer. This is done to give the lawyer an opportunity to comment on the inquiry.

Are there any limitations on the inquiries addressed by the Bar?

Yes. Opinions will not be provided if the material facts of the inquiry are in dispute or the inquiry requires an interpretation of law rather than legal ethics. Written inquiries that disclose a possible violation of the Rules of Professional Conduct may be referred to the grievance committee of the State Bar for investigation. If a verbal inquiry discloses a possible violation of the Rules, the caller may be encouraged to file a formal report with the State Bar. An inquiry regarding a conflict of interest, which is the subject of a pending motion to disqualify counsel, will not be answered unless the tribunal requests that the opinion of the State Bar be obtained. In these instances, the Ethics Committee defers to the concurrent jurisdiction of the court to rule on questions of professional conduct.

If you telephone, email, or visit the State Bar, you may receive an oral or emailed response to an inquiry that involves your own actual or contemplated conduct. Your inquiry is confidential. If your inquiry involves the conduct of another lawyer, you will be asked to put your inquiry in a letter to the State Bar. As previously stated, a copy of the letter must be mailed to the lawyer whose conduct is in issue and who may be affected by the opinion rendered in response to the inquiry. These written inquiries are not confidential.

Verbal or email inquiries that involve novel questions that are not clearly answered by the Rules or by prior published ethics opinions will not be answered by the ethics lawyers. The inquiring lawyer will be asked to put the question in writing for submission to the Ethics Committee.

May I rely on the verbal advice I receive in response to a telephone ethics inquiry?

Yes. Informal oral ethics opinions (given by phone or in person) and emailed ethics opinions are intended to provide feedback and guidance to lawyers who are trying to deal with difficult ethical dilemmas. Although an opinion of a Bar ethics lawyer is not a formal ethics ruling because it cannot be reviewed and approved by the Ethics Committee, you may rely

upon the advice that you receive. If a grievance is subsequently filed against you, the fact that you sought and followed the advice of the staff of the State Bar will be the best evidence of your good faith effort to comply with the Rules.

Will the Bar staff review a legal advertisement before it is published or broadcast?

Yes. Although prior review of an advertisement is not required by the Rules, the ethics staff of the Bar will provide an advance informal oral or email opinion on whether an advertisement complies with Rule 7.1 of the Rules of Professional Conduct. Rule 7.1 prohibits false and misleading communications about a lawyer's services. The advertisement may be submitted in the form of written copy, tape recording, or, if it is a television advertisement, video, DVD, or a link to a website. Frequently, the staff will recommend changes to the advertisement to help the lawyer avoid statements that, although not clearly misleading, may have a tendency to mislead. Like other verbal or emailed, informal ethics opinions, an opinion of a Bar ethics lawyer on a legal advertisement is not binding upon the Grievance Committee if a grievance is subsequently filed. Nevertheless, compliance with the advice of the staff lawyer is evidence of a lawyer's good faith and carries substantial weight with the Grievance Committee.

When is an ethics advisory issued?

In her capacity as legal counsel to the Ethics Committee, the assistant executive director initially reviews written inquiries sent to the State Bar. She determines whether the inquiry can be answered immediately with an ethics advisory or should be referred to the Ethics Committee for initial consideration.

If the written inquiry involves a routine matter, either of the ethics staff lawyers may issue an ethics advisory. An ethics advisory is a written ruling on a question of legal ethics, which is transmitted in a letter format to the lawyer making the inquiry. Ethics advisories are designated by the letters "EA" and are consecutively numbered. A copy of each ethics advisory is kept on file at the Bar's headquarters. Ethics advisories are sent by the staff without the prior review of the Ethics Committee. However, all ethics advisories sent during a quarter are included in the agenda for the quarterly meeting of the Ethics Committee and are reviewed and discussed by the committee at the quarterly meeting. A lawyer who receives an ethics advisory prior to its review by the Ethics Committee may rely upon the advice contained in the advisory unless and until he or she is notified that the advisory has been modified. If the committee determines that an ethics advisory should be modified, the committee may issue a revision of the ethics advisory and the inquiring lawyer is informed and asked to comply. The inquiring lawyer is held blameless for conduct undertaken in good faith reliance upon the ethics advisory prior to its modification. The committee may also determine that the inquiry raises a question of legal ethics that is important to the general membership of the bar and withdraw the advisory to publish a proposed formal ethics opinion.

When is an ethics decision or a formal ethics opinion issued?

If the assistant director determines that an ethics inquiry cannot be answered with an ethics advisory because the inquiry involves a matter of first impression, relates to the conduct of someone other than the inquiring lawyer, or involves an issue that may be of concern to the general membership of the bar, an ethics advisory will not be issued. Instead, the written inquiry will be presented to the Ethics Committee for consideration at its next quarterly

meeting. The committee will discuss the inquiry and decide on the appropriate response. The committee will also decide whether the proposed opinion should be issued as an unpublished ethics decision that is privately transmitted to the inquiring lawyer or published as a proposed formal ethics opinion. A proposed opinion will generally be published if the committee believes that it will be of interest to the members of the bar at large. Proposed opinions are published in the *Journal* under the section captioned “Proposed Ethics Opinions” and on the State Bar’s website, www.ncbar.com. Regardless of the significance of the opinion, the committee generally respects a request from the inquirer that an opinion not be published.

A copy of the proposed ethics decision or formal ethics opinion is provided to the inquiring lawyer as well as all other interested persons, including any other lawyer whose conduct may be in issue, and anyone who submitted written comments or addressed the Ethics Committee about the proposed opinion.

When do proposed ethics decisions and formal ethics opinions become final ethics opinions of the State Bar?

Proposed formal ethics opinions are published in the *State Bar Journal* and on the State Bar’s website (www.ncbar.com) with a notice that any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. If written comments or requests to be heard are received about a proposed formal ethics opinion, it is reconsidered by the Ethics Committee at its next quarterly meeting after publication. Written comments or remarks are carefully considered and debated. As a result of this reconsideration process, the Ethics Committee may decide to amend the proposed opinion and republish it in the *Journal* and website for further comment. Alternatively, the committee may decide that the proposed opinion is the proper response to the inquiry and request that the Council approve the proposed opinion as published. A proposed formal ethics opinion may, on occasion, go through the reconsideration process several times. (If a proposed opinion is revised, it will be noted in the caption of the opinion in the *Journal*.) On occasion, as a part of the reconsideration process, difficult or controversial proposed opinions are submitted to a subcommittee of the Ethics Committee for closer scrutiny. The subcommittee will meet between quarterly meetings to discuss the inquiry and will make a recommendation to the full committee at the next quarterly meeting.

Proposed formal ethics opinions and ethics decisions are not final until they are considered and approved by the Council of the State Bar, typically upon motion made by the Ethics Committee, at the quarterly meeting immediately following the publication or transmission of the opinions in question. Of course, if a proposed opinion is reconsidered and revised, it will be republished and will not be submitted to the Council for final approval until the Ethics Committee determines that no further revisions should be made to the opinion. Also, at the meeting of the Council at which a proposed ethics decision or formal ethics opinion is scheduled for final approval, any interested person or group may request to be heard before the Council’s vote on the proposed decision or opinion. The Council may, in its discretion, allow or deny such a request.

Where are adopted formal ethics opinions published?

Adopted formal ethics opinions are not republished in the *Journal*. Therefore, it is important to read the introduction that precedes the “Proposed Opinions” section of the *Journal*. The

introduction explains which opinions published in the last edition of the *Journal* were finally approved by the Council at its most recent meeting.

All formal ethics opinions are published on the State Bar's website (www.ncbar.com) which is updated after every quarterly meeting. Also, the annual edition of the *Lawyer's Handbook*, sent to all active members of the bar each spring, contains all formal ethics opinions through the date of publication. Formal Ethics Opinions are designated "FEOs" and are individually identified by the year and order of their publication (i.e., the third Formal Ethics Opinion adopted in 2011 will be published as 2011 FEO 3).

What are "RPCs" and where do I find them?

In 1997, the North Carolina Supreme Court repealed the Rules of Professional Conduct originally adopted in 1985 and adopted the Rules of Professional Conduct. When the 1985 Rules were in effect, the formal opinions issued by the Ethics Committee were designated "RPCs." The acronym corresponds to the name of the Rules under which the opinions were issued. Although the RPCs were adopted under the superseded (1985) Rules, they still provide guidance on issues of professional conduct except to the extent that a particular opinion is overruled by a subsequent opinion or by a provision of the Rules of Professional Conduct. The complete RPCs are published in the *Lawyer's Handbook* and on the website. Be sure to check the text of the Rules as well as the index to be sure that all subsequent history is considered.

The ethics opinions that were issued under the Code of Professional Responsibility, in effect from 1973 through 1985, are called "CPRs." They are referenced infrequently in the RPCs and the formal ethics opinions. You may obtain a copy of a CPR by calling the Bar.

What can I do to facilitate the processing of my ethics inquiry?

Learn the procedures for ruling on questions of legal ethics. Remember that informal oral and emailed ethics opinions and written ethics advisories are provided only if the inquiry involves your own actual or contemplated conduct. If your inquiry involves the conduct of another lawyer, it must be in writing and your letter to the Bar should indicate that a copy was mailed to the lawyer whose conduct is in issue. Remember that no opinion will be given if the facts are in dispute, the inquiry involves an interpretation of the law, or the inquiry involves past conduct that may be a violation of the Rules of Professional Conduct. In written and oral inquiries, state the facts clearly and succinctly. Do not send copies of pleadings, documents and correspondence that must be waded through to determine the facts or the ethics dilemma at issue. Clarify whether you are asking about your own conduct or the conduct of another lawyer. Be sure to ask a specific question and all pertinent collateral questions.

Please call or write as soon as it is clear that you have an ethics question. Some questions require research or consultation. Because the Ethics Committee meets only four times a year, questions that are referred to the committee may not receive a responsive opinion for several months. The sooner the matter is placed on the committee's agenda, the earlier you can expect a response.

Who do I talk to at the State Bar about a question of legal ethics?

All of the lawyers on staff at the State Bar are experienced and knowledgeable about legal ethics. However, the assistant director and the two assistant ethics counsel are primarily responsible for responding to questions of legal ethics. Please contact us if you have an ethics problem. We are here to help: Alice Neece Mine, Ethics Counsel and Assistant Director; Suzanne Lever, Assistant Ethics Counsel; and Nichole McLaughlin, Assistant Ethics Counsel and Deputy Counsel.

What is the contact information for the State Bar?

Ethics Lawyers: Alice Neece Mine, Suzanne Lever, Nichole McLaughlin

Telephone: 919/828-4620

Address: PO Box 25908, Raleigh, North Carolina 27611-5908

Web Address: www.ncbar.gov

NAVIGATING THE STATE BAR'S GRIEVANCE PROCESS

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THE NORTH CAROLINA STATE BAR

I. INTRODUCTION

Currently, there are more than 28,000 attorneys licensed to practice in North Carolina. Each year the North Carolina State Bar receives thousands of complaints about lawyers, and opens 1200 to 1500 grievance files. There is a substantial chance that a lawyer will have to respond to a grievance at some point in his or her career, especially if s/he practices in one of the areas where grievances are most common, such as domestic and criminal law. By way of example, these are common complaints in grievances filed with the State Bar:

Domestic

Grievances are often motivated by litigants' intense emotional involvement in these cases. Most frequent allegations in this area are that the attorney:

- (a) did more for the client's spouse than for the client,
- (b) failed to get the case scheduled for a hearing promptly,
- (c) refused to investigate or subpoena all evidence, or
- (c) "coerced" the client into signing an agreement that was not fully explained to the client.

Criminal

Typical allegations related to criminal representation are that the lawyer:

- (a) failed to thoroughly investigate the case,
- (b) failed to interview or subpoena witnesses the defendant wanted to testify at the trial,
- (c) coerced a guilty plea (this is almost always refuted by the transcript of the plea),
- (d) failed to perfect an appeal,
- (e) failed to turn over the transcript of the trial testimony after completion of an appeal, or
- (f) for prosecutors—failed to turn over discoverable material, brought charges without probable cause, or refused to bring charges the complainant thought were warranted.

Such complaints, while common in these practice areas, are by no means confined to them. The State Bar receives grievances related to trusts and estates, bankruptcy, real estate, personal injury, immigration, and just about every other type of law.

II. UNDERSTANDING & NAVIGATING THE STATE BAR'S GRIEVANCE PROCESS

THE FIRST LINE OF DEFENSE—THE ATTORNEY-CLIENT ASSISTANCE PROGRAM (ACAP)

Triage for the Attorney-Client Relationship

ACAP was established to assist clients and lawyers with communication and common problems before they result in grievances. In 2017, ACAP responded to 12,420 calls, 2,024 inmate letters, and 2,643 emails from the public and lawyers. ACAP staff contacted 3,223 North Carolina lawyers last year to help resolve minor conflicts and communication problems with clients.

Fee Dispute Resolution

ACAP also facilitates resolution of disputed fees in an effort to avoid litigation between the lawyer and the client. 640 fee dispute files were opened in 2017.

- Fee disputes may be handled by ACAP facilitators on the State Bar staff or by local district bar fee dispute resolution committees.
- Although the State Bar's fee dispute resolution process is non-binding, the Rules of Professional Conduct require lawyers to participate in good faith. *See* Rule 1.5(f).

THE GRIEVANCE PROCESS

The Birth of a Grievance (1,305 were opened in 2017)

- Filing By: Clients, judges, opposing parties, other lawyers, or members of the public.
- With certain exceptions, the State Bar may keep confidential the identity of an attorney or judge who reports alleged misconduct of another lawyer pursuant to Rule 8.3.
- The State Bar may initiate a grievance if a lawyer's alleged misconduct is brought to the State Bar's attention by media or other sources (e.g. violations of trust account rules revealed by random audit or notification of NSF trust account check).
- The complainant is asked to fill out a form summarizing the grievance and to attach copies of relevant documents.
- Time Limitations: Grievances generally must be filed within 6 years from the last act giving rise to the grievance, except grievances based on: (a) conviction of a felony; (b) conduct that constitutes a felony, regardless of whether the lawyer was charged, prosecuted, or convicted; or (c) conduct that violates the Rules and that a court has found to be intentional conduct by the lawyer. 27 NCAC 1B § .0111 (e).

Investigation & Dismissals

- Once a grievance is received by the State Bar, a file is established and assigned to one of 17 staff attorneys in the Office of Counsel.
- Investigation of grievances (at any stage) may be conducted by one of the State Bar's 10 investigators, most of whom previously worked for state or federal law enforcement agencies (e.g. FBI, SBI, IRS).
- No unilateral decisions are made by staff: All grievances must be considered and acted upon by one or more members of the Grievance Committee.

- Dismissal by Chair: If a grievance fails to state a violation of the Rules, even taking every allegation as true, the staff attorney will file a report to the Chair of the Grievance Committee recommending that the grievance be dismissed. If the Chair agrees, the file is dismissed without further investigation or action. 27 NCAC 1B § .0105 (a)(19). The lawyer is not asked to respond and generally is not aware that a grievance has even been filed.
- Letters of Notice: Where a grievance at least alleges a violation of the Rules, the respondent lawyer is sent a formal Letter of Notice by the Office of Counsel. The Letter of Notice is accompanied by a summary of alleged misconduct, called the Substance of Grievance. The respondent has 15 days from receipt of the Letter of Notice to file written response, although extensions are frequently requested and readily granted.
- Further Review of Grievances: After the response is received, the State Bar staff attorney reviews the file and determines whether additional information or investigation is needed. If additional evidence is needed, the staff attorney or an investigator may interview witnesses and/or gather documents necessary to understand the problem.
- Dismissal by Chair & Vice-Chair: Where there is insufficient evidence of a violation of the Rules after the response is received and any additional investigation is complete, the staff attorney will recommend that the grievance be dismissed. If the Chair of the Grievance Committee and one other member of the Committee agree, the file will be dismissed. (27 NCAC 1B § .0105 (a)(20)). Approximately 75% to 80% of grievances are ultimately dismissed.
- In 2017, of the 1,387 grievances resolved, 1,082 were dismissed by Chair or dismissed by Chair and Vice-Chair.

Disposition of Grievances by the Grievance Committee:

- The Grievance Committee has 44 members, 41 of whom are members of the State Bar Council, appointed by the State Bar President to serve on the Grievance Committee. Thirty-eight of those are lawyer-members of the Council and three are non-lawyer members of the Council. There are also three advisory members of the Committee who are not members of the Council.
- If the investigation reveals that the respondent may have violated one or more Rules, the grievance must be considered by the full Committee, which meets quarterly (with materials distributed in advance). At the meeting, Committee members discuss grievances and vote on the appropriate disposition of each case. A lawyer can receive disciplinary action only by a majority vote of Grievance Committee.
- The Grievance Committee has been compared to a grand jury, since its job is to determine whether there is probable cause to believe that a respondent has violated the Rules. Grievance Committee meetings, unlike other State Bar committees, are closed to the public and neither the respondent nor the complainant may be present or represented. There is no formal hearing or live testimony—the Committee makes decision based upon written material submitted by the complainant, the respondent, and the staff attorney.
- Dispositions NOT Involving Discipline
 - Where the Committee finds no probable cause to find that professional misconduct occurred, the file is dismissed.
 - The Committee may issue a Letter of Caution along with the letter dismissing a grievance. A Letter of Caution is a confidential communication from the

Committee to the respondent, stating that the respondent's conduct, while not the basis for discipline, is unprofessional or not in accord with accepted professional practice. 27 NCAC 1B § .0103 (28). The purpose of a letter of caution is to suggest ways in which the respondent could improve his or her practice. It is not discipline. Twenty-one Letters of Caution were issued in 2017.

- The Committee may issue a Letter of Warning along with the letter dismissing a grievance. Letters of Warnings are issued where the respondent committed an unintentional, minor, or technical violation of the Rules, which has not caused significant prejudice to the client. 27 NCAC 1B § .0103 (30). A Letter of Warning is not discipline, but the previous issuance of a Letter of Warning may be revealed in any subsequent disciplinary proceeding within 3 years after the Letter of Warning is issued. Because a Letter of Warning could be introduced against the respondent in disciplinary proceeding, the respondent has the right to reject a Letter of Warning and request a hearing before DHC. Rejection of Letters of Warning is uncommon. Sixty-seven Letters of Warning were issued in 2017.
- Dispositions Involving Discipline (where the Committee finds probable cause exists to believe the respondent violated one or more Rules).
 - Admonition: An admonition is private discipline—not public record, but may be revealed in any later disciplinary action against the respondent. The complainant is notified that the respondent received an admonition, but is not given a copy of the actual order. Thirty-eight files resulted in Admonition in 2017.
 - Reprimand: Reprimands are public discipline imposed in less serious cases than those which warrant censure. Reprimands are available to the public and announced in the State Bar Journal. Thirty-three files resulted in Reprimand in 2017.
 - Censure: Censures are public discipline imposed in the most serious cases which do not require suspension or disbarment. Censures are available to the public, announced in the State Bar Journal, and are also filed with the Clerk of Superior Court in the respondent's home county, the NC appellate courts, the federal district courts in NC, the Fourth Circuit and the United States Supreme Court. Six files resulted in Censure in 2017.
 - Acceptance/Rejection of Grievance-Level Discipline: Discipline issued by the Grievance Committee is served on the respondent, who may accept or reject it. If the respondent rejects Committee discipline, the State Bar files a formal complaint before the DHC and the respondent is entitled to a hearing on the conduct underlying the discipline. 27 NCAC 1B § .0114 (k) & (l).
 - Referral to DHC: If the Grievance Committee determines that suspension or disbarment may be warranted, it will refer the matter to the Disciplinary Hearing Commission for trial. Misappropriation, dishonesty, repeated neglect or criminal conduct are most often referred to the DHC. In 2017, the Committee referred 99 files (involving 59 lawyers) for hearing before the DHC.
 - Disposition by the DHC: In 2017, the DHC disposed of 46 cases representing 74 grievance files referred. The DHC imposed 8 orders of disbarment, 3 active suspensions, 2 suspensions with the possibility that some portion might be stayed, and 16 suspensions that were entirely stayed upon compliance with conditions. The DHC also censured one lawyer.

- In 2017, a total of 176 grievances, or 13% of grievances considered by the Grievance Committee, resulted in either imposition of discipline by the Grievance Committee or referral to the DHC.
- Confidentiality: Unless an attorney receives a reprimand or censure (or a DHC complaint is filed), grievance proceedings are confidential. The State Bar cannot disclose that a grievance was opened or whether grievances are pending. Materials in the State Bar's possession relating to grievance proceedings are not public records. N.C. Gen. Stat. §84-32.1.

INTERACTING WITH THE STATE BAR

What to do if you get a Letter of Notice

- Don't panic, and don't assume the State Bar thinks the allegations are well-founded. (That's not the standard for sending a Letter of Notice).
- Don't put your head in the sand! No matter how baseless the allegations are, you must respond! Think of it this way—if a frivolous lawsuit were brought against your client, you wouldn't ignore it and default. Rule 8.1 requires lawyers to respond to requests for information from a disciplinary authority (including local district bar grievance committees). Lawyers who fail to respond to the State Bar regarding a grievance are generally reprimanded by the Committee for violating Rule 8.1 even if the allegations underlying the original grievance have no merit.
- Explain as concisely as possible and provide any documents that may illustrate what happened.
- Request more time if you need it.
- Don't attack the client/complainant. If the complainant is unreasonable, incredible or delusional, we will already have figured that out.
- Don't denigrate the Committee, State Bar staff, or the grievance process.

The Grievance Process - Rules & Resources

Rule 8.1 – Bar Admission & Disciplinary Matters

State Bar Administrative Rules--Discipline and Disability (Subchapter B)

<http://www.ncbar.gov/rules/index.asp>

You are Your Brother's Keeper

Reporting Misconduct Under Rule 8.3: Even if you are acutely aware of your obligations under the Rules and always adhere to them, that doesn't mean you won't come into contact with the disciplinary process. Rule 8.3 (a) provides that a "lawyer having knowledge 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 North Carolina State Bar or the court having jurisdiction over the matter."

Other Concerns About a Fellow Lawyer

- Serious misconduct must be reported to the State Bar pursuant to Rule 8.3, but sometimes you may have concerns about another member of the Bar who has not engaged in a serious violation of the Rules.
- If you are concerned that another lawyer may be struggling with addiction or mental health problems, there are ways to help:
 - LAP (PALS/FRIENDS)
 - District Bar Lawyer Assistance Programs
 - Friends, Coworkers, and Bar Leaders

You are Your Brother's Keeper - Rules & Resources

Rule 8.3 – Reporting Professional Misconduct

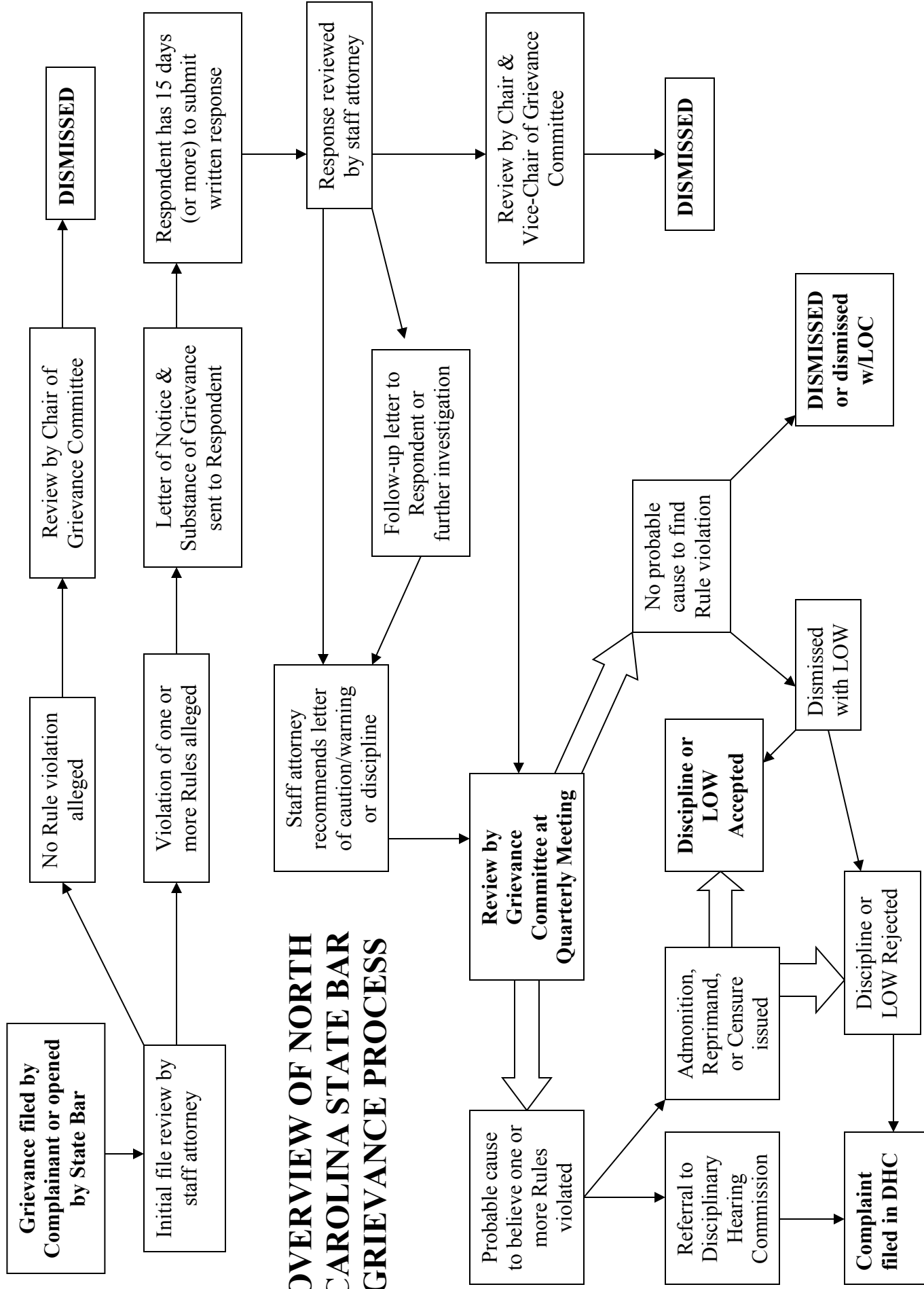
NC Lawyer Assistance Program <http://www.nclap.org/>

III. CONCLUSION

WE ARE YOUR STATE BAR—WHEN IN DOUBT, CALL. Call the Ethics Counsel for confidential advice about how you should proceed. Call the Lawyer Assistance Program if you know a lawyer who needs help with a mental health or substance abuse problem. Call the Office of Counsel if you must report professional misconduct by another lawyer. We are here to serve the people of North Carolina and the administration of justice in North Carolina.

NC State Bar Phone: (919) 828-4620

Website: www.ncbar.gov



OVERVIEW OF NORTH CAROLINA STATE BAR GRIEVANCE PROCESS

