

THE COURT'S INHERENT AUTHORITY TO DISCIPLINE LAWYERS

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The court's inherent authority to discipline lawyers is well recognized and is not superseded by the State Bar's disciplinary powers.

The North Carolina Supreme Court has expressed concern about the loss of civility in the courts and has encouraged trial courts to take appropriate action.

"We have viewed with concern the apparent decline in civility in our trial courts. This Court shall not tolerate, and our trial courts must not tolerate, comments in court by one lawyer tending to disparage the personality or performance of another. Such comments tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand. We admonish our trial courts to take seriously their duty to insure that the mandates of Rule 12 [of the General Rules of Practice for the Superior and District Courts] are strictly complied with in all cases and to impose appropriate sanctions if they are not." — *State v. Rivera*, 350 NC 285, 291 (1999)

1. **Disciplinary action may be imposed by either the court or State Bar** — Both statute and case law recognize that the court's inherent authority to discipline lawyers is not restricted by the parallel authority of the State Bar.

"Inherent powers of courts unaffected. — Nothing contained in this Article [North Carolina State Bar] shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys." — NC Gen Stat § 84-36

"Furthermore, it has been held repeatedly that in North Carolina there are two methods by which disciplinary action or disbarment may be imposed upon attorneys — statutory and judicial. [citations omitted] The judicial method is not dependent upon statutory authority. It arises because of a court's inherent authority to take disciplinary action against attorneys licensed before it. . . . This power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice." — *In re Northwestern Bonding Co.*, 16 NC App 272, 275 (1972)

"This inherent power is co-equal and co-extensive with the statutory grant of powers to the North Carolina State Bar, and, while the interests of the two entities having disciplinary jurisdiction may, and often do, overlap, they are not always identical and as the interests sought to be protected by the court's inherent power are distinct from

those of the North Carolina State Bar, the action of a court in disciplinary or disqualifying an attorney practicing before it is not in derogation or to the exclusion of similar action by the Bar.” — *Swenson v. Thibaut*, 39 NC App 77, 109 (1978)

2. **The court’s authority does not depend on there being a pending matter before it** — The authority to discipline does not depend on there being a matter currently pending before the court. Thus, the trial court may discipline a lawyer for failing to perfect an appeal even after the notice of appeal has been filed and the trial court otherwise has lost jurisdiction over the case; nor does it matter whether the trial court acts during a criminal or civil session. *In re Robinson*, 37 NC App 671 (1978).

“It [judicial authority to discipline] arises because of a court’s inherent authority to take disciplinary action against attorneys licensed before it; an authority which extends even to matters which are not pending in the particular court exercising the authority.” — *In re Northwestern Bonding Co.*, 16 NC App 272, 275 (1972)

“[I]t is incontrovertible that our courts have inherent authority to take disciplinary action against attorneys practicing therein, even in relation to matters not pending in the particular court exercising the authority.” — *In re Robinson*, 37 NC App 671, 677 (1978)

“Respondent’s argument that this action was taken during a session of court for the trial of criminal cases instead of a session for the trial of civil matters is without merit. Although disciplinary proceedings against an attorney are civil in nature, in this case the judge was exercising an inherent power of the court which is not dependent upon the type of session of court over which he was then presiding.” — *In re Robinson*, 37 NC App 671, 678 (1978)

3. **There is no set rule on when disciplinary matters should be referred to the State Bar instead of being handled by the court** — There is no clear guidance in the case law on when a court should refer a disciplinary matter to the State Bar rather than the court handling the matter itself. In *Gardner v. North Carolina State Bar*, 316 NC 285, 287 (1986), the court quotes from *McMichael v. Proctor*, 243 NC 479, 485 (1956), that “questions of propriety and ethics are ordinarily for the consideration of the . . . Bar” but nevertheless upholds the trial court’s disciplinary authority. Nor does the court explain further the distinction between matters of “propriety and ethics” and other disciplinary matters. In *Swenson v. Thibaut*, 39 NC App 77, 110 (1978), the Court of Appeals says that a lawyer’s improper use of a client’s confidences and acquisition of an improper interest in the litigation would have to be addressed by the trial court for the litigation to proceed to trial but suggests that questions about solicitation and appearance of impropriety issues could and probably should have been referred to the State Bar. The trial court went ahead and addressed those latter issues, however, and the appellate court recognized its inherent authority to do so.

Although the cases do not explicitly say so, it would appear that the court and State Bar could both discipline a lawyer for the same conduct. In practice the State Bar defers to the court discipline. Section .0102 of the State Bar’s Discipline and Disability Rules states:

“Whenever the North Carolina State Bar learns that a court has initiated an inquiry or proceeding regarding alleged improper or unethical conduct of an attorney, the North Carolina State Bar may defer to the court and stay its own proceeding pending completion of the court’s inquiry or proceeding. Upon request, the North Carolina State Bar will assist in the court’s inquiry or proceeding.”

4. **Summary discipline may be invoked when the lawyer’s actions take place before the court, otherwise notice and a hearing are required** — “Summary judicial disciplinary action is appropriate when the attorney’s dereliction occurs in a matter then pending before the court and where the facts underlying the dereliction are not in dispute.” *In re Hunoval*, 294 NC 740, 744 (1977). Otherwise, the lawyer must be given notice of the charges and a reasonable time to prepare a response.

“Under the judicial method [of discipline] it is said that ‘where the attorney pleads guilty or is convicted in another court, or the conduct complained of is not related to litigation pending before the court investigating attorney’s alleged misconduct, the procedure, to meet the test of due process, must be initiated by a sworn written complaint, and the court should issue a rule or order advising the attorney of the specific charges, directing him to show cause why disciplinary action should not be taken, and granting a reasonable time for answering and preparation of defense, and attorney should be permitted to have counsel for his defense.’ *In re Burton*, *Supra*, 257 N.C. at 544, 126 S.E.2d at 588-89.” — *In re Northwestern Bonding Co.*, 16 NC App 272, 276 (1972)

Typically the disciplinary action is initiated by a judge by issuance of a show cause order which gives appropriate notice. “There is not a plaintiff in such a proceeding and a complaint does not have to be filed.” *In re License of Delk*, 336 NC 543, 550 (1994). The proceeding may be triggered by a complaint filed by a party, however. *See, e.g., In re Northwestern Bonding Co.*, 16 NC App 272 (1972) (disciplinary proceeding commenced by written complaint filed by district attorney). And the State Bar may request the court to issue the show cause order to commence a court disciplinary proceeding. *See, e.g., In re License of Delk*, 336 NC 543 (1994).

If factual issues are in dispute, the court may appoint a committee to investigate and report. *In re Burton*, 257 NC 534 (1962); *Brummitt v. Winburn*, 206 NC 923 (1934) (court appointed a committee of lawyers to review another lawyer’s conduct and recommend whether he should be disbarred).

The court may designate the district attorney or any other lawyer to present the case for disciplinary action. *In re Robinson*, 37 NC App 671 (1978).

There is no right to a jury trial in a proceeding before the court for discipline of a lawyer. *In re Northwestern Bonding Co.*, 16 NC App 272 (1972).

If the show cause order indicates that the judge issuing it has already prejudged the lawyer’s conduct, the judge should recuse from the case and refer it to another judge. *In re Robinson*, 37 NC App 671 (1978).

The standard of proof for a court to order disbarment of a lawyer is “clear and convincing evidence.” *In re Palmer*, 296 NC 638 (1979). Presumably the same standard applies to disciplinary action other than disbarment.

5. **The court is not limited to the Rules of Professional Conduct** — In exercising its inherent authority the court is not limited by the procedure followed by the State Bar in its disciplinary proceedings nor is the court restricted to imposing discipline only for violations of the Rules of Professional Conduct. The court’s authority is to discipline for unprofessional conduct. “Unprofessional conduct subject to this power and duty includes ‘misconduct, malpractice, or deficiency in character,’ . . . and ‘any dereliction of duty except mere negligence or mismanagement.’” *In re Hunoval*, 294 NC 740, 744 (1977) [citations omitted]. “In this case, the court proceeded against the respondent using its inherent power to discipline attorneys. It was not bound by the rules of the State Bar.” *In re License of Delk*, 336 NC 543, 550 (1994). “[A] court possesses inherent authority to discipline attorneys. *In re Delk*, 336 N.C. at 550, 444 S.E.2d at 201. This authority is not limited by the rules of the State Bar.” *Sisk v. Transylvania Community Hospital*, 364 NC 172, 182 (2010) (approving discipline of lawyer and revocation of *pro hac vice* admission even though the lawyer’s conduct did not violate the North Carolina Rules of Professional Conduct).
6. **The court may impose the same sanctions as the State Bar and then some** — A court imposing discipline on a lawyer has the same options as the State Bar but is not necessarily limited to those sanctions. “Judicial disciplinary action may take the form of an order of disbarment or suspension for a time of the attorney’s privilege to practice law.” *In re Hunoval*, 294 NC 740, 744 (1977). “Sanctions available include citations for contempt, censure, informing the North Carolina State Bar of the misconduct, imposition of costs, suspension for a limited time of the right to practice before the court, suspension for a limited time of the right to practice law in the State, and disbarment.” *In re Robinson* 37 NC App 671, 676 (1978). The trial court also has the authority to require the payment of attorney’s fees as a sanction, but in doing so the court must include findings that the fees are reasonable in light of what is customarily charged for similar services. *Couch v. Private Diagnostic Clinic*, 146 NC App 658 (2001).

Approved disciplinary action also has included, in the case of an out-of-state lawyer, revocation of the lawyer’s *pro hac vice* admission to practice in North Carolina, removal of the lawyer from other cases in the state, and requirements that the lawyer report the disciplinary action to other state bars and attend continuing legal education classes before seeking to represent clients in North Carolina again. *Couch v. Private Diagnostic Clinic*, 146 NC App 658 (2001).

Part of the discipline of a lawyer for neglect of an appeal in an indigent’s case was suspension of the lawyer’s right to represent indigents. *In re Hunoval*, 294 NC 740 (1977).

7. **The court may not dismiss a grievance filed with the State Bar for the same conduct** — A court disciplinary proceeding and a State Bar proceeding are separate matters. Thus, even if the court finds no basis for disciplinary action against a lawyer it has no authority to dismiss the grievance filed with the State Bar over the same conduct. *North Carolina State Bar v. Randolph*, 325 NC 699 (1989).

8. **A court's decision on disciplinary action is reviewed on appeal for abuse of discretion** — The standard of review in an appeal from a trial court's disciplinary action against a lawyer is abuse of discretion. *Couch v. Private Diagnostic Clinic*, 146 NC App 658 (2001). The trial court is not bound by the same standard as applies to the State Bar in its statutory disciplinary proceedings and thus is not required, as the State Bar would be, to make findings of fact concerning the potential harm of the lawyer's misconduct and a demonstrable need to protect the public. *In re Key*, 182 NC App 714 (2007).

Just as the State may appeal the decision not to discipline a lawyer in a statutory State Bar proceeding it may appeal such a decision by a trial court; the appeal is through certiorari. *In re Palmer*, 296 NC 638 (1979).

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