

# **Avoiding Ethical Pitfalls and Navigating the State Bar's Grievance Process**

**Brian Oten, Esq.  
Deputy Counsel  
North Carolina State Bar**



Brian Oten, Deputy Counsel for the North Carolina State Bar, is a native of Chicago, Illinois. He graduated from the University of North Carolina in 2002, and from the University of North Carolina Law School in 2005. He is licensed to practice in North Carolina and Illinois, is a member of the North Carolina Bar Association, and is also a member of the 10<sup>th</sup> Judicial District's Memorial Committee. In addition, Mr. Oten has served as an Adjunct Professor of Law for UNC School of Law (2011), and for Campbell University Law School from 2011 to present.

## **AVOIDING ETHICAL PITFALLS & NAVIGATING THE STATE BAR'S GRIEVANCE PROCESS**

**BRIAN OTEN, DEPUTY COUNSEL  
THE NORTH CAROLINA STATE BAR  
RALEIGH, NC**

### **I. INTRODUCTION**

Currently, there are more than 24,000 attorneys licensed to practice in North Carolina. Each year the North Carolina State Bar receives thousands of complaints about lawyers and opens 1300 to 1600 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: domestic and criminal law. Paralegals can assist lawyers by being aware of the lawyer's ethical responsibilities and ensuring the practice avoids ethically tenuous situations.

#### **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 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 witnesses; or
- (c) "coerced" 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.

These types of client 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. No matter what your area of practice, there are certain ethical pitfalls to be aware of. The most frequent problem areas, and the Rules of Professional Conduct that govern them, are discussed below.

## II. AVOIDING POTENTIAL PITFALLS

### ADVERTISING

Getting the word out about your practice is important, but you must familiarize yourself with the restrictions on lawyer advertising so your marketing efforts don't cause more trouble than they're worth.

**Rule 7.1** - No false or misleading communications about you or your services. A communication is false or misleading if it:

- (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
- (3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Communications containing a dramatization depicting a fictional situation are misleading unless they comply with requirements above and contain conspicuous statements, at the beginning and the end, explaining that they do not depict actual events or real persons.

### **Rule 7.2**

- Advertisements “shall include the name and office address of at least one lawyer or law firm responsible for its content”
- General Rule = “A lawyer shall not give anything of value to a person for recommending the lawyer's services”
- This Rule contains specific requirements for a permissible lawyer referral service

### **Rule 7.3**

- No in-person or live telephone solicitation of business
- Targeted Communications: Must include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (“the advertising notice”).
- Additional requirements:
  - Written communications shall be mailed in an envelope with the advertising notice on the front, in font that is as large as any other printing on the envelope. Front of the envelope may not contain anything other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice must also be printed at the beginning of the body of the letter in font as large or larger than the lawyer's or law firm's name in the letterhead or masthead.
  - Electronic Communications. The advertising notice must appear in the “RE:” block of the communication, and no other statement may appear in this block. The advertising notice must also appear, at the beginning and end of the message in a

font as large or larger than the lawyer's or law firm's name in any masthead on the communication.

#### **Rule 7.4**

You may indicate that a lawyer does, or does not, practice in particular fields of law, but you may not state or imply that a lawyer is certified as a specialist in a field of practice unless the certification was granted by: (1) the North Carolina State Bar; (2) an organization that is accredited by the North Carolina State Bar; or (3) an organization that is accredited by the American Bar Association under procedures and criteria endorsed by the North Carolina State Bar. The name of the certifying organization must be clearly identified in the communication.

There's No Need to Wing It: State Bar Ethics Counsel will review proposed advertising, solicitation letter, or letterhead and recommend any changes to comply with the Rules.

#### Advertising - Rules & Resources

Rule 7.1 – Communications Concerning a Lawyer's Services

Rule 7.2 – Advertising

Rule 7.3 – Direct Contact with Potential Clients

Rule 7.4 – Communication of Fields of Practice & Specialization

Rule 7.5 – Firm Names & Letterheads

Rule 8.4(c) – Misconduct (*See* New Ethics Opinion – 2010 FEO 14 (adopted April 2012) – Use of Search Engine Company's Keyword Advertisements)

- Ethics Article: “Misleading Communications: The Bad, the Ugly, and the ???”  
[http://www.ncbar.gov/ethics/eth\\_articles\\_11,1.asp](http://www.ncbar.gov/ethics/eth_articles_11,1.asp)
- Ethics Article: “Walking the Ethical Line with Lawyer Advertising”  
[http://www.ncbar.gov/ethics/eth\\_articles\\_10,4.asp](http://www.ncbar.gov/ethics/eth_articles_10,4.asp)
- Ethics Article: “The Ethical Website”  
[http://www.ncbar.gov/ethics/eth\\_articles\\_11,4.asp](http://www.ncbar.gov/ethics/eth_articles_11,4.asp)

#### STARTING OUT WITH A NEW CLIENT

**First Impressions:** Explaining the representation, including the respective roles of attorney and client and the expected cost and timeframe, goes a long way towards avoiding problems down the line.

#### **Fee Agreements**

- Understand your fee – Distinguish contingent fee, flat fee, hourly fee (if paid in advance, held in trust), minimum fees, & “true retainer.”
- 2008 FEO 10—Guidelines for Fees Paid in Advance: This recent ethics opinion surveys prior opinions on legal fees, sets forth the ethical requirements for the different types of fees paid in advance, authorizes “minimum fees” earned upon payment, and provides model fee provisions. *It is an excellent resource* for defining your fee, understanding the ethical considerations and trust accounting requirements for each type of fee, and drafting a fee agreement that complies with the Rules.

- Explain your fee to clients.
- Consider Using a Written Fee Agreement: The Rules of Professional Conduct only require written fee agreements if the fee is contingent on the outcome of the matter. (Rule 1.5(c)). The drafters of the Rules, however, recognized that written fee agreements are desirable even when the fee is not contingent. *See* Comment 2 to Rule 1.5.

### **Defining the Representation**

Carefully delineate what the practice will, and will not, be undertaking for the client for the quoted fee. For example:

- Trial, but not appeal
- Through entry of an order, but not actions to enforce the order
- Equitable distribution, alimony, and divorce, but not child custody
- Purchase of property, but not obtaining necessary permits for commercial use
- Your role in representation as opposed to attorney's role
- Etc.

### **Reality Check**

Never create "great expectations," particularly when you have only heard client's version of situation. If you imply you can achieve a certain result, you will have great difficulty getting client to accept anything less.

### Starting Out with a New Client - Rules & Resources

Rule 1.2 - Scope of Representation/Allocation of Authority between Client and Lawyer

Rule 1.5 – Fees

2008 Formal Ethics Opinion 10

- Ethics Article: "Reservations Accepted" (minimum fees)  
[http://www.ncbar.gov/ethics/eth\\_articles\\_13,3.asp](http://www.ncbar.gov/ethics/eth_articles_13,3.asp)
- Ethics Article: "The Problem with Attorney Charging Liens"  
[http://www.ncbar.gov/ethics/eth\\_articles\\_12,4.asp](http://www.ncbar.gov/ethics/eth_articles_12,4.asp)

### **KEEPING IN TOUCH: COMMUNICATION**

**Rule 1.4** requires a lawyer to keep his or her client "reasonably informed about the status of a matter," to "promptly comply with reasonable requests for information," and to "[e]xplain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

**Failure to Communicate is the #1 Complaint about Lawyers:** The most common version of this complaint is that a lawyer won't answer calls and letters. It is therefore critical that staff understands the importance of relaying messages from clients. When an attorney gets a letter or call from a client, s/he must answer it as soon as practical. It takes a little time to respond to clients' inquiries, but not nearly as much as having to respond to their grievances.

Paralegals/other staff can assist by developing a reliable notification and follow-up system to ensure all client inquiries are addressed.

**A “CC” Goes a Long Way:** Get the attorney and staff in the habit of routinely sending copies of letters, pleadings and briefs to clients.

Send clients invoices—show clients the firm’s time-keeping so they can see what’s been done and there won’t be any surprises about how much they owe.

**“No news” Calls:** When you can, check in with clients to let them know you haven’t forgotten about their cases. Even if there’s nothing new to report, it demonstrates commitment and makes for happier clients.

Remember every case you’re hired to handle is a “big deal” to your client—people don’t hire lawyers for things they can handle themselves or things they don’t care about.

Be careful to explain to client what options are available, which option is recommended, and why. Similarly, explain to clients why any witness (or other evidence) they think should be presented is not being used. If you can do all this in writing, even better!

#### Communication - Rules & Resources

##### Rule 1.4 – Communication

- Ethics Article: “Postcard Communications: Just Because Everyone Does It, Does Not Make It Ethical” [http://www.ncbar.gov/ethics/eth\\_articles\\_12,2.asp](http://www.ncbar.gov/ethics/eth_articles_12,2.asp)

#### **GETTING THE JOB DONE: NEGLIGENCE & PROCRASTINATION**

**Rule 1.3** provides “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”

Clients often complain that their attorney doesn’t seem to be doing anything for them. In some cases, the lawyer has not been diligently pursuing the client’s case, but in many instances the problem is merely that the client doesn’t know what steps the lawyer has taken (see “communication,” above).

Your supervising attorney must handle client matters with reasonable promptness and diligence and decline to undertake matters that s/he cannot handle with reasonable promptness/diligence. For example, attorneys need to make sure that orders are drafted promptly after the conclusion of a hearing. A lawyer’s failure to promptly draft the order is a common complaint in domestic cases. Paralegals/staff can greatly assist a practice by 1) being aware of the status of the firm’s/attorney’s cases, 2) anticipating what needs to be drafted, filed, etc. and reminding the attorney, and 3) ensuring communication between the practice and the client.

Although an isolated instance of neglect or malpractice is not generally treated as an ethics issue, chronic neglect can, and does, result in discipline.

### Neglect - Rules & Resources

#### Rule 1.3 - Diligence

### **SAYING GOODBYE: ENDING THE REPRESENTATION GRACEFULLY**

**Rule 1.16** provides circumstances under which an attorney may, *or must*, withdraw from representation. It also states that an attorney must comply with applicable law regarding notice to or permission from the tribunal re: withdrawal. Finally, pursuant to 1.16(d), an attorney must take steps, upon termination of the representation, to protect a client's interests, such as:

- Giving reasonable notice to client
- Allowing time for employment of other counsel
- Surrendering and papers and property to which the client is entitled
- Refunding any funds not earned as fees or used for costs.

**Refunding Unearned Fees:** A refund may be due upon discharge or withdrawal -- If the attorney withdraws or is discharged prior to completing the case, he or she must refund the unearned portion of any advance fee. Rule 1.16 (d).

**Collecting Unpaid Fees:** An attorney can bring an action to collect a debt from a former client, but the attorney must notify the former client of the State Bar's fee dispute mediation program "at least 30 days prior to initiating legal proceedings to collect the disputed fee" (Rule 1.5(f)).

Do Not Bill a Client for Withdrawing! *See* 2007 FEO 8.

### **Hostage Files**

- Common Problem = Lawyer who has withdrawn or has been discharged wishes to retain the file until client pays in full. This violates Rule 1.16 (d).
- The File Belongs to the Client. Rule 1.16 and the comments thereto provide that all file materials belong to the client, except incomplete work product and the attorney's personal notes.
- Copies: The attorney may keep copies of the file materials. The original file materials belong to the client, however, and the attorney may not charge the client for copying the file, unless it has been previously provided to the client.

Paralegals/staff can assist by anticipating what needs to be done at the end of representation (making copies of client file, ensuring motions to withdraw have been filed, etc.).

### Saying Good Bye - Rules & Resources:

#### Rule 1.16 - Declining or Terminating Representation

- Ethics Article: "Hostage Files"  
[http://www.ncbar.gov/ethics/eth\\_articles\\_3,1.asp](http://www.ncbar.gov/ethics/eth_articles_3,1.asp)

## **STAFF SUPERVISION**

Lawyers must take reasonable steps to ensure that non-lawyer assistants act in accordance with the Rules of Professional Conduct. Lawyers and paralegals/staff need to work together in enacting effective procedures to ensure all members of the office are informed, regulated, and supervised closely.

Lawyers pay the price for their staff's mistakes -- A lawyer who directs, ratifies, or knowingly fails to prevent misconduct by a non-lawyer assistant is responsible for the misconduct. See Rule 5.3 (c).

Paralegals/staff can assist by remaining aware of ethical obligations, following up on client matters and lawyer responsibilities, and regularly discussing ethical concerns with attorneys and other staff members.

### **Staff Supervision - Rules & Resources**

Rule 5.3 - Responsibilities Regarding Nonlawyer Assistants

## **SOMEBODY ELSE'S MONEY: TRUST ACCOUNTS**

### **Understanding Trust Accounts**

- What is a Trust Account?—Trust accounts are for somebody else's money, held by a fiduciary (the word root of "fiduciary" relates to faith, belief, confidence, and trust). This money must be kept separate for tracking and safekeeping. Trust account also protects client funds from lawyer's creditors and ensures it's not part of the estate if the lawyer dies.
- Distinguish from an operating account, which contains money to which the lawyer is currently entitled
- No commingling!
- State Bar Oversight of Lawyer Trust Accounts: Handling client funds one of lawyers' most important professional responsibilities. Lawyers are trusted, by virtue of our profession, to handle others' money appropriately. Unfortunately, trust accounts are also an opportunity for theft, and there is a risk that poor accounting may lead to mishandling of funds.
- One method of oversight = Insufficient funds (NSF) notification, whereby banks notify the State Bar of trust account checks written on insufficient funds. A trust account should never be overdrawn.
- Other method of oversight is the random audit program, discussed momentarily . . .

### **Keeping track of what you have (records & accountings)**

- Accounting Rules (Rule 1.15) were established to reduce the possibility of theft/mishandling of client money--better records make these problems easier to avoid and detect.

- Minimum Records (can be digital, as long as you can retrieve them for at least 6 years):
  - Receipts—Journal, file of receipts/deposit slips, etc. Must list source, client, and date of receipt
  - Cancelled instruments (or digital images thereof)—i.e., record of checks from trust account that have been endorsed and deposited
  - Instructions/authorizations to transfer, disburse, withdraw entrusted funds
  - Bank statements & other documents from bank
  - Ledger containing a record for each client for whom funds were received—shows current balance for each and description of transactions involving client’s funds
- Quarterly and monthly reconciliations—make sure your records match the bank records.
- These records aren’t just for you (or the auditor)—clients are entitled to an accounting of any money held in trust (at least annually, upon request, & when all of the funds have been disbursed)

## **Audits**

- You’ve probably heard of State Bar Auditor Bruno DeMolli (who is not remotely as scary as his name suggests; retired in December 2012).
- Random audits:
  - Truly random (the Bar goes to 2 districts per quarter & audits 60 lawyers—choice of districts & names of lawyers are generated by randomized software program).
  - Not a surprise inspection
  - Not more than once every 3 years
  - Review preceding 12 months of trust account records
  - Are procedural only—not an in-depth financial audit tracking the flow of money. Designed to monitor compliance with record keeping requirements & to educate lawyers. (See pp. 19-20 in handbook for checklist)
- Correcting problems discovered by the audit
  - Auditor provides written feedback—if deficiencies are identified, there may be follow-up monitoring to show that the lawyer is now complying.
  - Auditor may report violations of Rules to Grievance Committee, but may also allow lawyer some time to correct procedural problems
- Trust Account Supervisory Program
  - New Program
  - Run by Peter Bolac (State Bar’s Trust Account Compliance Counsel/District Bar liason)
  - Allows the Chair of the Grievance Committee or the Grievance Committee to defer instances of record-keeping mistakes (that do not result in misappropriation) to a 2-year supervisory program rather than pursue discipline.
  - Successful completion of program may result in matter being dismissed.
- Subpoena for cause audits
  - Issued by the Chair of the Grievance Committee when there is reason to believe there may be a problem
  - Far beyond “procedural audit”
  - May also review operating account

## **Trust Account Problems**

- Not using/having a trust account
- Checks made out to “cash”
- Payment of lawyer’s expenses out of trust account
- Lawyer delegates trust account record keeping to staff
- Staff has signature authority on trust account
- Bounced trust account check
  - For all trust accounts, lawyer must direct bank to notify State Bar of any NSF check
  - If bank/administrative error leads to NSF, lawyer must determine source of problem and act promptly, even if it requires deposit of personal funds into trust account. Must document everything for file.
- Client disappears—funds still in trust account. Lawyer must:
  - Make diligent effort to find the client
  - Hold the funds for the period required by statute
  - Escheat to State
- Failure to reconcile—most common violation of trust account rules. Must be done quarterly. Failure to reconcile allows any problems to continue and may lead to additional misuse of client funds
- Outstanding (un-negotiated) checks
  - “Void after 90 days” (may or may not work)
  - Contact the payee
  - If unable to contact payee, stop payment (funds must be noted as “returned” on client ledger)
- Embezzlement
  - There is *no such thing* as “borrowing” entrusted funds
  - Using entrusted money for anything other than designated purpose = embezzlement!
  - Majority of disbarments every year involve embezzlement

## Trust Accounts - Rules & Resources

### Rule 1.15 – Safekeeping Property

1.15-1: Definitions

1.15-2: General Rules

1.15-3: Records & Accountings

- NEW RESOURCE: Trust Account Handbook  
<http://www.ncbar.gov/PDFs/Trust%20Account%20Handbook.pdf>

## **III. 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. ACAP responded to approximately 14,000 calls, 2,350 letters,

and 550 emails from the public in 2011. ACAP staff contacted 3,300 North Carolina lawyers to help resolve minor conflicts and communication problems with clients.

### **Fee Dispute Mediation**

ACAP also administers mediation of disputes over fees in an effort to avoid litigation between lawyer and client. 621 fee dispute files were opened in 2011.

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

## **THE GRIEVANCE PROCESS**

### **The Birth of a Grievance** (1,499 were filed in 2011)

- Filing By: Clients, judges, opposing parties, other lawyers, or members of the public.
- With certain exceptions, State Bar may keep confidential the identity of an attorney or judge who reports alleged misconduct of another lawyer pursuant to Rule 8.3.
- 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).
- Complainant is asked to fill out form summarizing the grievance and may attach copies of relevant documents.
- Statute of Limitations-Type Rule: 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 the 12 staff attorneys in the Office of Counsel.
- Investigation of grievances (at any stage) may be conducted by a State Bar investigator, all of whom previously worked for state or federal agencies (e.g. FBI, SBI, IRS and Naval Intelligence).
- 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 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 Grievance Committee and one other member of Committee agree that there is insufficient evidence, the file will be dismissed. (27 NCAC 1B § .0105 (a)(20)). (In 2011, approximately 81% of grievances were dismissed)

#### **Disposition of Grievances by Grievance Committee:**

- The Grievance Committee has approximately 42 members, most of whom are members of the State Bar Council, appointed by the State Bar President to serve on Grievance Committee. Several non-attorneys are also appointed to the Grievance Committee.
- If there is evidence 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 re: 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, respondent, and 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. (29 Letters of Caution were issued in 2011)
  - 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. (43 Letters of Warning were issued in 2011)

- 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. (39 files resulted in Admonition in 2011)
  - 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. (22 files resulted in Reprimand in 2011)
  - 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 and the clerks of the NC appellate courts. (14 files resulted in Censure in 2011)
  - 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 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 2011, the Committee referred eighty-two files (involving fifty-one lawyers) for hearing before 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 lawyer has had a grievance filed against him or whether grievances are pending.

## **INTERACTING WITH THE STATE BAR**

### **What to do if a lawyer gets 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(s) in the sand! No matter how baseless the allegations are, a lawyer must respond! Think of it this way—if a frivolous lawsuit was 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.
- Explain as concisely as possible and provide any documents that may illustrate what happened.
- Request more time if needed
- Don’t attack the client/complainant

- 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 a lawyer's 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 a lawyer who has not engaged in a serious violation of the Rules.
- If you are concerned that a 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/>

- PALS → substance abuse
- FRIENDS → mental health
- Confidential

**IV. CONCLUSION**

WE ARE YOUR STATE BAR—WHEN IN DOUBT, ATTORNEYS SHOULD CALL ETHICS COUNSEL (OR PETER) AND ASK!!! Many common problems can be avoided. It's always better to ask than to find out the hard way. Attorneys should not hesitate to communicate with the Bar about any of their obligations as a North Carolina attorney.

**NC State Bar Phone: (919) 828-4620**

**Website: [www.ncbar.gov](http://www.ncbar.gov)**

# OVERVIEW OF NORTH CAROLINA STATE BAR GRIEVANCE PROCESS

