To: State Bar Grievance Review Committee of the General Assembly
From: Troy D. Shelton
Date: March 13, 2026
Re: Recommendations for Reforming the North Carolina State Bar

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This memorandum proposes a series of reforms to the Disciplinary Hearing Commission to make lawyer disciplinary proceedings fair, democratically accountable, and consistent with our state constitution.

I am an appellate lawyer practicing with Dowling PLLC. My practice concentrates almost exclusively on appeals in the North Carolina Court of Appeals and Supreme Court of North Carolina. I have over 20 active appeals between those two courts. The State Bar has certified me as an appellate specialist because of my competence and experience handling appellate litigation.

My appellate practice runs the gamut of civil litigation: from state constitutional law to arbitration disputes to personal injury. A particular subset of my practice is devoted to state administrative law, including appeals from decisions of occupational licensing boards like the State Bar. Outside of licensing board appeals, the types of clients that I represent are as varied as the types of appeals I handle. I represent businesses large and small, including Fortune 500 companies and the U.S. Chamber of Commerce. I also represent individuals in wrongful death and severe injury cases. My practice also includes representation of elected state officials and governmental entities.

Among the individuals that I represent on appeal are defendants in State Bar prosecutions brought in the Disciplinary Hearing Commission (DHC). Appeals from disciplinary orders entered by the DHC go straight to the Court of Appeals. Appeals from all other occupational licensing boards (which I also handle) go to superior court.

Background of the Disciplinary Hearing Commission

By statute, the State Bar is controlled by the Bar Council. The Council is composed of about 60 lawyers who are elected by licensed lawyers in each of the state's judicial districts. The Council chooses its own executive director, as well as the Bar's own general Counsel. The Council adopts the Rules of Professional Conduct that lawyers must follow, interprets those rules through formal opinions, chooses when to prosecute violations of the rules, and appoints most of the lawyers who judge the violations of the rules.

Lawyer disciplinary proceedings have two parts. The first part is the grievance proceeding, which this committee is already familiar with. The Bar receives grievances against lawyers, investigates, and makes an initial decision about imposing discipline. This is akin to a probable cause hearing in criminal court. If the Grievance Committee wishes to impose discipline that the lawyer does not consent to, then the proceeding moves into the second phase, which is before the DHC. The reforms outlined in this memo are addressed at this second phase.

The DHC hears all disputed disciplinary cases within the Bar. The DHC is composed of multiple members, who then sit in panels of three members to hear and decide cases prosecuted by the Bar against licensed attorneys. Currently, the members of the Commission are both lawyers and non-lawyers, and are appointed by a variety of appointing authorities.

Recommendation 1: Restructure the Disciplinary Hearing Commission

The U.S. Supreme Court has identified attorney disciplinary proceedings as quasi-criminal in nature, and therefore requires heightened procedural protections to provide for due process. And as Justice Tamara Barringer noted before this Committee, lawyers like everyone else have a state constitutional right to earn a living, which is protected against unreasonable interference by the State and its administrative agencies like the Bar.

Many lawyers who have seen or experienced DHC proceedings believe them to be unfair. Many members of the DHC seem to be aligned with the Bar prosecutors. From a structural perspective, this is unsurprising. The Bar controls both the DHC (the judges) and the prosecutors through its existing statutory appointment powers. It is unsurprising, therefore, when the DHC judges align with or act like prosecutors.

Consider a recent example from the DHC, where the majority of the panelists were appointed by the Bar. In the middle of the trial, after the lawyer-defendant had testified, the panelists began asking questions about issues not before the Panel, and then essentially directed the prosecutor to amend the complaint and add new charges against the attorney. Adding new charges mid-trial has been a violation of the federal constitution for nearly sixty years. The Chair of that panel was the former chair of the Grievance Committee, who made the final decision to prosecute attorneys. It's unsurprising, therefore, that he would continue to act like a prosecutor when he was moved to the DHC. That's not to say that the Chair was acting in bad faith. But it is unfortunate that lawyers are appointed to the DHC who have trouble distinguishing between the judicial role and the prosecutorial role. If nothing else, it creates the appearance of partiality to any reasonable observer.

This kind of problem is not new. Our founders recognized it and sought to fix it through the separation of powers. With the Bar, however, all three powers—executive, legislative, and judicial—are commingled. From my perspective, the most important reform that this Committee can recommend to the legislature is to separate the Bar's powers by making the DHC's judicial power independent of the Bar.

Under current law, the Bar Council appoints the majority of the lawyer members of the DHC, which then hears the very cases the Council approves for prosecution. This creates a structural conflict of interest: The prosecutor is choosing the judges. The solution is to remove the power of the Bar Council to appoint any members of the DHC.

The Current Law. Under the current version of N.C. Gen. Stat. § 84-28.1, the DHC has 26 members. Eighteen of the members are lawyers, and 8 are non-lawyers (so called "public members"). The State Bar Council appoints 12 of the 18 lawyer members of the DHC; the other

six lawyers are appointed by the Senate, the House of Representatives, and the Chief Justice. The public members are appointed by the Governor, the Senate, and the House.

Presumably, the inclusion of public members on the DHC is intended to ensure that lawyers are not just protecting their own but are instead protecting the public from harmful lawyers. But in practice, that concern is both unwarranted and ineffective. This Committee is considering reforms because existing disciplinary proceedings are overly harsh and unfair to lawyers.

Attorneys are subject to complex ethical rules. Replacing lay members with attorneys ensures that the DHC has the confidence and competence to challenge the Bar prosecutors when the evidence is weak. In practice, public members are not a check on overreach in DHC proceedings but instead go along with whatever the attorney members on the Panel recommend. This denies accused attorneys a true jury of their peers.

In one case that I've worked on, a former judge was being prosecuted. He sought to explain some of the technicalities of the type of proceeding at issue so the public member could understand his testimony. But the lawyer-Chair of the DHC panel prohibited him from explaining the law to the public member, and stated that, if the public member didn't understand, then she would have to ask the lawyers on the DHC panel. This is why the inclusion of public members doesn't work as a policy measure.

The solution to these problems is twofold: Remove the Bar's power to appoint DHC members, and convert the public members into lawyer members. Below is a proposed rewriting of N.C. Gen. Stat. § 84-28.1, which accomplishes both of these goals. Only subsections (a) and (a1) of the current statute are proposed for revision.

Proposal:

> **§ 84-28.1. Disciplinary hearing commission.**
>
> (a) There shall be a Disciplinary Hearing Commission of the North Carolina State Bar which shall consist of 26 members. All members of the commission shall be active members of the North Carolina State Bar. The commission shall elect a chair and a vice-chair from among its members. The chair shall have actively practiced law in the courts of the State for at least 10 years. Appointments to the commission shall be made as follows:
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>> (1) Seven members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.
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>> (2) Seven members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.
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>> (3) Seven members appointed by the Governor.
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>> (4) Five members appointed by the Chief Justice of the Supreme Court of North Carolina.

> (a1) To ensure the impartiality and independence of the commission, the following persons are ineligible for appointment to or service on the Disciplinary Hearing Commission: Any person who has served as a member of the Council of the North Carolina State Bar or any committee thereof, as an officer of the North Carolina State Bar, or as an employee of the North Carolina State Bar.
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> (b) The disciplinary hearing commission of the North Carolina State Bar, or any committee of the disciplinary hearing commission, may hold hearings in discipline, incapacity and disability matters, make findings of fact and conclusions of law after these hearings, enter orders necessary to carry out the duties delegated to it by the Council, and tax the costs to an attorney who is disciplined or is found to be incapacitated or disabled, and comply with the requirements of this Chapter.
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> (b1) The disciplinary hearing commission of the North Carolina State Bar, or any committee thereof, acting through its chairman, shall have the power to hold persons, firms or corporations in contempt as provided in Chapter 5A.
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> (c) Members of the disciplinary hearing commission shall receive the same per diem and travel expenses as are authorized for members of State commissions under G.S. 138-5.

This amendment does multiple things.

First, it redistributes the Bar's appointments among the Governor, General Assembly, and Chief Justice. Because the members of the DHC are all now democratically accountable, there is no reason for public members. Every member is controlled by a person elected by the public. (This committee could alternatively decrease the number of members on the DHC if it believes the current number of members is excessive.)

Second, the nature of the redistribution preserves the existing allocation of appointment authority among the branches of state government.

Third, the amendment further ensures a wall of separation between the Bar and the DHC by disqualifying certain lawyers with prior service to the Bar from serving on the DHC. The regulation of the legal profession should not be a revolving door between the Bar and DHC, and regulation is enhanced by including lawyers on the DHC who have not otherwise helped regulate the profession.

Overall, these changes separate the executive (prosecutorial) power from the judicial power, living up to the promise of our state constitution. *See* N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.").

These changes also accord with the recommendations of the American Bar Association (ABA). In 1992, the ABA Commission on Evaluation of Disciplinary Enforcement issued a landmark report called *Lawyer Regulation for a New Century*, which is available at this link: https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mc

kay_report/. The report recognized that self-regulation of the legal profession undermines the public interest and the public's confidence in lawyer disciplinary proceedings. In Recommendation 5, the ABA recommended that Bar disciplinary officials be independent from elected bar officials (lawyers elected by other lawyers). The ABA further recommended that elected bar officials "have no investigative, prosecutorial, or adjudicative functions in the disciplinary process." Recommendations 5 and 6 would have the judiciary appoint disciplinary officials and disciplinary counsel.

Recommendation 2: Confidentiality in DHC Proceedings

Concerns have also been raised about the lack of confidentiality of DHC proceedings. Presently, when disciplinary proceedings move from the grievance phase into the DHC phase, the proceedings transition from confidential to public. For example, the initiating complaint filed by the Bar prosecutor in the DHC is a public document, and any final order of the DHC is also public.

This can create an anomalous situation. Imagine that the Grievance Committee recommends a reprimand as discipline, but the accused attorney rejects that recommended discipline and instead goes to trial in the DHC. The accused attorney loses, and the DHC imposes a reprimand as a sanction. Ordinarily, reprimands (and admonitions) are a form of private discipline. Had the attorney accepted the reprimand from the Grievance Committee, the sanction would never have been made public. But because DHC proceedings are fully public, the lawyer gets punished with a public form of discipline merely because he chose to proceed to the DHC.

That makes little sense. Instead, the Committee may want to consider amending the confidentiality rules in N.C. Gen. Stat. § 84-32. To prevent the anomalous circumstance described above, the statute should be amended to make records in DHC proceedings confidential, unless and until a form of public discipline (i.e., disbarment, suspension, or censure) is imposed by the DHC at the conclusion of the proceeding. If this Committee wanted to go further, it could make DHC records fully confidential until the conclusion of all appellate proceedings.

Recommendation 3: Enact a Statute of Limitations

Currently, the General Assembly has not enacted a statute of limitations for disciplinary actions against lawyers. The Bar has enacted a rule creating a limitations period, but its exceptions are so broad that it does not function as a time bar at all. The existing rule also provides a time cap only on the filing of a grievance; Bar prosecutors are allowed to investigate and sit on a grievance for an infinite amount of time before filing a complaint with the DHC.

Bar prosecutors are able to abuse this power. When a complaint or grievance comes in, Bar prosecutors frequently expand their investigation in an effort to find anything the attorney has ever done wrong, no matter how unrelated it is to the original grievance. For instance, I have seen a Bar prosecutor turn a $60 trust account discrepancy into a demand for every tax return and mortgage application that the attorney has ever submitted. I have seen a revolving door of Bar

prosecutors take over seven years to follow through with a grievance, during which time important witnesses have died and memories have faded.

It is apparent that Bar prosecutors have trouble focusing on the complaints actually filed, and are unable to properly prioritize important offenses over unimportant offenses. To ensure fairness in the disciplinary process, and to assist Bar prosecutors with prioritizing their case load, the legislature should adopt a statute of limitations for disciplinary proceedings. I recommend the enactment of the following new statute:

> **N.C. Gen. Stat. § 84-28.5. Limitations on Disciplinary Proceedings.**
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> (a) Time Limit for Commencement of Proceedings. The Disciplinary Hearing Commission lacks disciplinary jurisdiction to consider discipline for conduct that falls outside the time limit in this section. Except as provided in subsection (d) of this section, the North Carolina State Bar shall not commence a disciplinary proceeding against an attorney more than four years after the date of the alleged acts or omissions constituting the misconduct, or two years after the date a grievance regarding the misconduct is received by the North Carolina State Bar, whichever is later; provided, however, that the grievance must have been received within the four-year period following the alleged acts or omissions.
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> (b) Commencement Defined. For purposes of this section, a disciplinary proceeding is deemed to commence upon the filing of a formal complaint with the Disciplinary Hearing Commission pursuant to G.S. 84-28.
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> (c) Tolling of the Limitations Period. The time limits set forth in subsection (a) of this section shall be tolled during any period in which:
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>> (1) Civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the alleged misconduct are pending before any governmental agency, court, or tribunal;
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>> (2) The attorney continues to represent the complainant, or the complainant's business, in the specific legal matter that is the subject of the grievance; or
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>> (3) The attorney and the Bar have entered into a written agreement to toll the application of the limitation period in this statute.
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> (d) Exception. The limitation period set forth in this section shall not apply to disciplinary proceedings based on a conviction of, or a tender and acceptance of a plea of guilty or no contest to, a felony showing professional unfitness.
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> (e) Affirmative Defense of Laches. Nothing in this section shall preclude the dismissal of a disciplinary proceeding based on the equitable doctrine of laches if the Disciplinary Hearing Commission finds that an unreasonable delay in the commencement of proceedings, even if within the limitations period, has resulted in actual prejudice to the

attorney's ability to present a defense. Laches may be treated by the Commission as a complete defense. Even without proof of prejudice, a lawyer may argue for the passage of time since the misconduct as a mitigating factor for choice of discipline.

(f) Other liability unaffected. This section applies solely to disciplinary proceedings commenced by the North Carolina State Bar. Nothing in this section shall be construed to limit, extend, or otherwise affect the statutes of limitation or repose applicable to civil actions against attorneys, including but not limited to actions for professional negligence, breach of fiduciary duty, or fraud.

The proposed statute has several features that will assist both accused lawyers in defending themselves and the Bar in the performance of its duties.

First, this new statute would create a new, four-year statute of limitation for disciplinary actions. The period is taken from the existing statute of repose for malpractice actions (applying to lawyers and other professionals). Under existing law, no action for malpractice against a lawyer can be filed more than four years after the lawyer's last act giving rise to the malpractice action. N.C. Gen. Stat. § 1-15(c). Malpractice actions are brought by clients who are actually harmed by a lawyer's unprofessional conduct. It is incongruous for malpractice actions that result in actual harm to a client to have a rigid four-year time bar, while disciplinary actions that do not require any actual harm to have essentially no time bar.

The time limitation also has two tiers, designed to spur Bar prosecutors to act. The Bar is given four years to discover misconduct. The proposal includes a two-year spur that prevents Bar prosecutors from sitting on grievances indefinitely. If a grievance is filed within the four-year period, Bar prosecutors must file a formal complaint within the next two years, or else not proceed at all. That spur will assist the Bar in focusing its investigatory efforts on the most important cases.

Second, the proposal creates tolling provisions and exceptions that benefit both accused attorneys and Bar prosecutors.

When there are parallel proceedings before other tribunals, the accused attorney should be allowed to focus on those proceedings. Bar prosecutors should also want to conserve their resources and await the outcome of those proceedings, which may eliminate the need for or narrow the issues of a disciplinary proceeding.

Another provision tolls the limitation period while a matter is ongoing. This protects the public. Often, a client realizes their lawyer has acted improperly but is afraid to file a grievance because that lawyer is still handling their matter. This rule says the clock does not run against the Bar while the lawyer still holds power over the client.

A final provision creates broad authority for the attorney and the Bar to enter into a consensual, written tolling agreement. Tolling agreements are broadly recognized in ordinary civil litigation. This exception recognizes that the accused attorney and the Bar may agree that tolling is mutually beneficial.

In addition, the exceptions recognize that the worst misconduct may warrant discipline even if it falls outside the time bar. The worst misconduct is that which actually results in a criminal conviction for or plea to a felony. This kind of misconduct is already an independent ground for discipline, and is subject to expedited disciplinary procedures under N.C. Gen. Stat. § 84-28. The current exception borrows from the language of N.C. Gen. Stat. § 84-28(b)(1), but it requires a felony rather than any kind of criminal offense.

This important exception also borrows from the Code of Judicial Conduct. Under that Code, most judicial disciplinary proceedings must be commenced within three years of violation of the Code. But an exception provides that "disciplinary proceedings may be instituted at any time against a judge convicted of a felony during the judge's tenure in judicial office."

The new laches provision recognizes that delay can prejudice an accused lawyer, even if the Bar complies with this section. The provision allows the lawyer to argue laches as either a defense to the disciplinary action, or as a mitigating factor when it comes to choice of discipline.

Finally, this proposal includes a savings provision that ensures that anyone harmed by lawyer misconduct does not have his or her private rights limited by these procedural limitations for disciplinary proceedings. This statute is intended to apply only to lawyer disciplinary proceedings.

Recommendation 4: Change the Appointment Authority for the Bar Counsel

Currently, the State Bar Council appoints its own general Counsel. N.C. Gen. Stat. § 84-31. That appointed Counsel has authority to employ assistant counsel, investigators, and administrative assistants. *Id.*

The Committee may believe that the appointment authority for the Bar Counsel also needs to be changed. For instance, changing the composition of the DHC does not change which complaints the Office of Counsel investigates or presents to the Grievance Committee for recommended discipline (the probable cause phase). Nor does changing the DHC composition necessarily alter how cases are litigated before the DHC (the adjudication phase).

Therefore, this Committee may wish to change the appointing authority for the Bar Counsel. To promote the separation of powers and democratic accountability, the Committee may consider assigning the appointment authority to the Chief Justice of the Supreme Court. This aligns with the recommendation in the previously mentioned ABA report, *Lawyer Regulation for a New Century*.

Recommendation 5: Paying for Transcripts in Appeals from Disciplinary Orders

One of the large expenses in an appeal is the cost of the transcript. The transcript for one full day of trial is more than $1,500, and DHC trials typically continue for multiple days. Under existing law, the expense of ordering the transcript falls on the appellant, which is virtually always the attorney appealing from a disciplinary order entered against him or her.

That is unlike appeals from disciplinary orders of every other occupational licensing board in the state. Right now, appeals from DHC orders go straight to the Court of Appeals. Appeals from disciplinary orders by all other licensing boards go instead to superior court, as controlled by the Administrative Procedure Act, N.C. Gen. Stat. ch. 150B. The Administrative Procedure Act requires the licensing board to pay the full costs of the transcripts when a disciplined licensee appeals to superior court.

There is no reason to treat lawyers more punitively than other regulated professionals. I strongly recommend that the Committee require the Bar to pay for the transcripts that the attorney orders for the appeal, or to reimburse the appealing attorney for the costs of those transcripts within 30 days of paying for them.

Recommendation 6: Fee-Shifting

If the Committee determines that the other reforms are insufficient to deter overreaching by the Bar, the Committee may also consider mandatory fee shifting. Although capable of representing themselves, it is wiser for an attorney to hire experienced counsel to represent him or her in Bar proceedings. But because the Bar tends to drag out its investigations and makes such overly broad document demands, the cost of representation is very expensive, even when the attorney prevails.

Currently, there is a very limited statute that permits (but does not require) an award of attorney's fees for disciplinary actions by licensing boards. N.C. Gen. Stat. § 6-19.1. The standard for getting fees under the statute is very high (the agency must have acted "without substantial justification") and the award is discretionary, rather than mandatory. It's also unclear whether the statute applies to Bar disciplinary proceedings.

To ensure fairness in disciplinary proceedings, the Committee may wish to recommend that the legislature either revise the existing statute or enact a new one, specific to Bar proceedings. In either case, the standard should be lower: if a court grants any relief to the appealing licensee from an order of discipline, then the court *must* award attorney's fees and costs related to or arising out of the agency's errors.