

To: Legislative Committee to Review State Bar Disciplinary Process

Date: 29 February 2024

Re: Collaborative Working Proposals (State Bar and defense counsel)

EXPUNGEMENT OF DISCIPLINARY ACTIONS

Misconduct Not Eligible for Expungement:

Rule 1.19: Sexual Conduct with Clients Prohibited

Rule 3.3(a): False statement of material fact or law to a tribunal

Rule 8.4(b): Criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness*

Rule 8.4(c): Conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness

**Criminal violations solely for personal income tax, violations would be eligible for expunction or sealing*

	Eligibility	Effect	Timing	Process
Expungement – Grievance Committee Discipline	Written discipline not involving violations of Rules 1.19, 3.3(a), or 8.4(b)* and (c); no additional discipline since; no pending grievances	Removal from lawyer's disciplinary record & State Bar website; cannot be used in future proceedings	5 years – Admonitions 10 years – Reprimands & Censures	Request to Grievance Committee Chair certifying eligibility; showing of rehabilitation.
Expungement – Disciplinary Hearing Commission Written Discipline	Written discipline not involving violations of Rules 1.19, 3.3(a), or 8.4(b)* and (c); no additional discipline since; no pending grievances	Removal from lawyer's disciplinary record & State Bar website; cannot be used in future proceedings	5 years – Admonitions 10 years – Reprimands & Censures	Petition filed in DHC certifying eligibility; showing of rehabilitation.

Sealing Orders of Stayed Suspension entered by DHC	Entirely-stayed suspensions <u>not</u> involving violations of Rules 1.19, 3.3(a), or 8.4(b)* and (c); no additional discipline since; no pending grievances	DHC file sealed; record of discipline removed from State Bar website; confidential record of disciplinary action maintained and may be used/considered in any future disciplinary action.	10 years after period of stay ends	Motion to Seal filed in DHC certifying eligibility; showing of rehabilitation
Discipline Ineligible for Expungement or Sealing	Disbarments, active suspensions, any other discipline involving violations of Rules 1.19, 3.3(a), or 8.4(b)* and (c)	N/A	N/A	N/A
Upon Lawyer's Death	One year after a lawyer is deceased, disciplinary record automatically removed from State Bar website.			
<p>For administrative purposes due to records-retention requirements, the State Bar would maintain confidential internal records of expunged disciplinary actions, but they would not appear on the State Bar's website nor would the agency acknowledge their existence in response to public inquiry. Expunged discipline could not be used or considered in any future investigation or proceeding against the lawyer.</p> <p>Sealed DHC discipline would not appear on the State Bar's website or be available for public inspection but <u>could</u> be used and considered in any future investigation or proceeding against the lawyer.</p>				

Implementation:

- Statutory impact: Add authority for expungement to G.S. 84-23: Powers of Council?
- Significant Administrative Rule Amendments

Resources:

- New Hampshire: <https://www.courts.nh.gov/rules-supreme-court-state-new-hampshire#page-id-3636>
- Delaware: <https://courts.delaware.gov/forms/download.aspx?id=160798>
- Rhode Island: <https://www.courts.ri.gov/PublicResources/disciplinaryboard/PDF/Article3.pdf>
- NC Criminal Expunction Act: https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_15A/GS_15A-145.5.pdf

COMPLAINANTS

1. Standing Requirement for Filing Grievances

Grievances against lawyers may be filed by:

1. A lawyer or judge pursuant to their professional obligation to report misconduct;
2. A judge, lawyer, court staff member, or juror in the legal matter that is the subject of the grievance;
3. A family member of a ward in a guardianship proceeding or family member of a decedent in a probate matter when the guardianship or probate matter is the subject of the grievance;
4. A trustee of a trust or an executor of an estate if the trust or estate is the subject of the grievance relates to the trust or estate;
5. A trustee in a bankruptcy that is the subject of the grievance;
6. Any other person who has a cognizable individual interest in or connection to the legal matter or facts alleged in the grievance;
7. The State Bar shall retain the ability to open and investigate grievances on its own initiative upon receipt of information indicating that a lawyer may have violated the Rules.

Implementation:

- Statutory Impact: Add at G.S. 84-28(a1)?
- Administrative Rule Amendment

Resources:

Texas: <https://capitol.texas.gov/tlodocs/88R/billtext/pdf/HB05010F.pdf#navpanes=0>;
<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=88R&Bill=HB5010>

2. Grievances Filed in Bad Faith

Proposal: Modify administrative rule to provide that Grievance Committee shall consider complainant's motive in filing grievance.

Note: Additional possible edits to this rule unrelated to complainant motive are also included in the modifications highlighted below.

27 N.C.A.C. 1B Rule .0113(k): Admonitions, Reprimands, and Censures

(1) If ~~probable-cause~~ there is clear and convincing evidence of misconduct ~~is found~~ but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the committee shall ~~issue~~ propose resolution of the matter with a private admonition in cases in which the respondent has committed a minor violation of the Rules of Professional Conduct, a reprimand in cases in which the respondent's conduct has violated one or more provisions of the Rules of Professional Conduct and caused harm or potential harm to a client, the administration of justice, the profession, or members of the public, or a censure in cases in which the respondent has violated one or more provisions of the Rules of Professional Conduct and the harm or potential harm caused by the respondent is significant and protection of the public requires more serious discipline. The Grievance Committee shall consider the motive of a complainant in determining the disposition of a grievance. To determine whether more serious discipline is necessary to protect the public or whether the violation is minor and less serious discipline is sufficient to protect the public, the committee shall consider the factors delineated in subparagraphs (2) and (3) below....

3. Vexatious Complainants

Proposal: Establish a gatekeeping mechanism (similar to California's "Vexatious Complainants" rule) based on objective criteria for complainants who serially file frivolous grievances.

Implementation:

- Statutory impact: Include in new G.S. 84-28(a1) with standing requirements discussed above?
- Administrative Rule Amendments

Resources:

- California:
<https://www.statebarcourt.ca.gov/Portals/2/documents/Rules/Rules-of-Procedure.pdf#page=197>

- Florida (3-7.17): https://www-media.floridabar.org/uploads/2024/02/2024_08FEBChapter3RRTFB2-15-2024.pdf

ENSURING THAT PRIVATE DISCIPLINE REMAINS PRIVATE

Proposal: Modify complainant notification to prevent publicizing of private discipline:

Current Form Letter Language	Proposed Revised Form Letter Language
<p>This is to advise that your grievance against the above attorney was considered by the Grievance Committee at its meeting on <Date>. The Committee determined that there was probable cause to believe that the attorney violated the Rules of Professional Conduct by <insert blurb> in violation of Rule <insert Rule>. The Committee further determined that the attorney should be disciplined by an admonition. Accordingly, I signed an admonition which has been served upon the attorney.</p> <p>An admonition is a written form of discipline issued in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct. A copy of the admonition will be maintained in the permanent files of the North Carolina State Bar.</p> <p>Since you filed a grievance and a violation of the Rules of Professional Conduct was found, you are hereby notified of this action. This admonition is considered confidential under the Rules and Regulations of the North Carolina State Bar. You are the only person other than the attorney receiving a communication from this office indicating that this action was taken.</p>	<p>As the complainant in the above-captioned grievance, you are receiving notice of its disposition. The Grievance Committee carefully reviewed the file, including all evidence and information you submitted. The Committee determined the matter did not warrant public disciplinary action and the grievance therefore was resolved privately, either by dismissal, deferral, or private action.</p>

OPPORTUNITY FOR RESPONDENTS TO ADDRESS THE GRIEVANCE COMMITTEE

Proposal: Add additional process whereby Respondents (a) are notified in advance that a grievance will be reviewed by the Committee and what disposition is recommended by staff counsel; (b) receive a copy of the materials that will be before the Committee (except work product/attorney-client privileged report from staff counsel to Committee); and (c) are afforded an opportunity to address the Committee before it deliberates on whether there is sufficient evidence of misconduct to warrant disciplinary action.

Question:

Would this process replace or be in addition to the current Grievance Review Panel process?

Implementation

- Statutory impact: G.S. 84-28(c1) amendment if GRP modified; add opportunity to address Committee elsewhere in 84-28?
- Extensive Administrative Rule Amendments