

No. 208PA15

TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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THE NORTH CAROLINA	)	
STATE BAR,	)	
	)	
Plaintiff,	)	<u>BEFORE THE DISCIPLINARY</u>
	)	<u>HEARING COMMISSION OF</u>
v.	)	<u>THE NORTH CAROLINA</u>
	)	<u>STATE BAR</u>
JERRY R. TILLET,	)	15 DHC 7
	)	
Defendant.	)	

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DEFENDANT'S NEW BRIEF

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Defendant.	)	

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DEFENDANT'S NEW BRIEF

\*\*\*\*\*

ISSUES PRESENTED

DO THE NORTH CAROLINA STATE BAR COUNCIL AND THE DISCIPLINARY HEARING COMMISSION HAVE THE JURISDICTIONAL AUTHORITY TO DISCIPLINE A JUDGE OF THE GENERAL COURT OF JUSTICE FOR CONDUCT AS A JUDGE FOR WHICH THE JUDGE HAS ALREADY BEEN DISCIPLINED BY THE JUDICIAL STANDARDS COMMISSION?

(a) IS THE STATE BAR AND ITS DISCIPLINARY HEARING COMMISSION DENIED JURISDICTION BY THE STATE CONSTITUTION TO DISCIPLINE A JUDGE OF THE GENERAL COURT OF JUSTICE FOR CONDUCT OF A JUDGE?

(b) IS THE STATE BAR ESTOPPED TO PROSECUTE JUDGE TILLET FOR CONDUCT THAT HAS ALREADY BEEN SUBJECT TO A BINDING AND FINAL ORDER OF DISCIPLINE ISSUED BY THE JUDICIAL STANDARDS COMMISSION?

(c) HAS THE STATE BAR AND ITS DISCIPLINARY HEARING COMMISSION VIOLATED JUDGE TILLET'S PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS?

### **STATEMENT OF THE CASE**

The Judicial Standards Commission ("JSC") entered an order of public reprimand on 8 March 2013 as to certain judicial conduct of Judge Tillett. (R pp 34-39). Nearly two years later, on 6 March 2015, the State Bar commenced this disciplinary proceeding by filing a complaint before its Disciplinary Hearing Commission ("DHC") against Judge Tillett arising out of the same conduct as was subject to the JSC's inquiry and Order of Public Reprimand. (R pp 4-14).

Judge Tillett filed a motion to dismiss in lieu of answer on 19 March 2015. (R. pp. 18-39), and an answer on 30 March 2015. (R pp 40-74). The State Bar filed a response to the motion to dismiss on 6 April 2015. (R pp 75-82). Without notice that Judge Tillett's motion to dismiss was under consideration, and without an opportunity to submit a brief or be heard, the DHC denied Judge Tillett's motion to dismiss in an order entered on



4 May 2015. (R pp 83).

Tillett filed a Motion for Judgment on the Pleadings on 9 July 2015. (Supp. R pp 96-103). The State Bar filed a response to this Motion on 27 July 2015. (Supp. R pp 104-116). The DHC denied Judge Tillett's motion for judgment on the pleadings without a hearing by an order entered on 21 August 2015. (Supp. R pp 117).

The State Bar filed a Motion for Summary Judgment on 9 September 2015. (Supp. R pp 118-145). Tillett filed a Motion for Summary Judgment on 25 November 2015. (Supp. R pp 146-159). The State Bar filed a response to Tillett's Motion for Summary Judgment on 7 December 2015. (Supp. R pp 160-187). A hearing was held by the DHC on 10 December 2015, and an order granting the State Bar's Motion for Summary Judgment, and denying Judge Tillett's Motion for Summary Judgment, was entered on 18 December 2015. (Supp. R pp 188-89). The DHC, at the request of the State Bar, scheduled a 3-day hearing on what discipline to impose on Judge Tillett. That hearing has now been stayed by this Court.

On 12 February 2016, Tillett filed a Motion in Support of Summary Judgment on Discipline and Request for Hearing and Oral Argument.

(Supp. R pp 190-200). On the same day, Tillett filed a Motion and Request for a Conference to Narrow the Issues to be Presented and Hearing on Summary Judgment. (Supp. R pp 201-204). The State Bar filed a response to Tillett's Motion for Summary Judgment on 18 February 2016. (Supp. R pp 209-220). The State Bar also filed a response to Tillett's Motion to Narrow the Issues. (Supp. R pp 205-205). The DHC denied Tillett's Second Motion for Summary Judgment regarding discipline, denied Tillett's Request for Hearing and Oral Argument, and denied Tillett's Motion for Conference to Narrow Issues by orders entered on 11 March 2016. (Supp. R pp 221-223). On 24 May 2016, Tillett filed a Motion to Dismiss and for Appropriate Relief. (Supp R pp 224-249).

On 27 May 2016 this Court invoked its supervisory jurisdiction, issued a writ of certiori by order entered *ex mero motu*, and stayed all proceedings herein pending this Court's determination of the authority of the North Carolina State Bar to discipline a sitting judge for conduct of a judge for which the judge has already been disciplined by the JSC.

## **STATEMENT OF GROUNDS FOR REVIEW**

This Court entered an order dated 27 May 2016, *ex mero motu*,

issuing a writ of certiorari in the exercise of its supervisory authority over inferior tribunals. Pursuant to the North Carolina Constitution, this Court “may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts.” N.C. Const. Art. IV, Sec. 12.

### **STATEMENT OF THE FACTS**

Judge Jerry R. Tillett is the Senior Resident Superior Court Judge for North Carolina’s First Judicial District. He was initially appointed to the bench in 1993, and has served continuously since that time. Judge Tillett was re-elected for an eight year term in 2010.

On 8 March 2013, the JSC issued a Public Reprimand to Judge Tillett regarding his conduct as a judge. (R. pp. 34-39).<sup>1</sup> As described in the Public Reprimand, Judge Tillett’s conduct consisted of engaging in private meetings in chambers with public officials, law enforcement officers and attorneys, signing an order consented to by the Town of Kill Devil Hills preserving copies of personnel files, writing letters to public

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<sup>1</sup> Copies of public reprimands, including Judge Tillett’s, are available online at <http://www.nccourts.org/Courts/CRS/Councils/JudicialStandards/PublicReprimands.asp> (last visited 4 May 2016).

employees about complaints he received about them, and drafting an order. This judicial conduct occurred in 2010 and 2011. (R. pp. 34-39)

On 6 March 2015, almost two years after the JSC issued its Public Reprimand, the State Bar commenced this action by filing a complaint before the DHC. The complaint seeks to prosecute Judge Tillett for the same judicial conduct and transactions that gave rise to the JSC's inquiry and Public Reprimand. (R pp 4-14).

Judge Tillett is not seeking to re-litigate or challenge the JSC's findings in this forum. So a restatement of the findings in the JSC's Order of Public Reprimand is not necessary. What is important to the determination of the issues herein is that the State Bar is attempting to discipline Judge Tillett for conduct of a judge that has already been fully adjudicated by the JSC. Also significant is that the State Bar is attempting to suspend and/or disbar Judge Tillett, thus causing the removal of Judge Tillett from the bench. (*See* State Bar Rule 27 NCAC 01B.0113(k) – (m)).

The procedural history and arguments of the State Bar also bear on the issues presented herein. The State Bar moved for summary judgment, arguing that Judge Tillett was collaterally estopped from

denying the force and effect of the JSC's Order of Public Reprimand. (Supp. R. 118-145).

Specifically, the State Bar argued that summary judgment is appropriate "because the material factual allegations in the State Bar's Complaint are established by the JSC Reprimand and Defendant's admissions." (Supp. R. p. 119, ¶ 6). Based upon this theory, the State Bar asked the DHC to enter an order finding that Judge Tillett violated Rule 8.4(d) of the Rules of Professional Conduct ("RPC"), which prohibits conduct prejudicial to the administration of justice. (Supp. R. 134, ¶ 36). The State Bar concluded that "the conduct established by the JSC Reprimand along with the additional conduct established by Defendant's admissions should be found by this Hearing Panel to be conduct prejudicial to the administration of justice in violation of . . . Rule 8.4(d)[.]" (Supp. R. 134, ¶ 36). The "admissions" to which the State Bar refers to in its motion is little more than a recognition by the parties that the facts alleged in the State Bar's complaint are identical to the findings of the JSC's Public Reprimand. (*See* Supp. R. pp. 127-128, 9(b)). Ultimately, the State Bar successfully persuaded the DHC to adopt the

JSC's findings and conclude that a violation of Rule 8.4(d) had occurred based on those facts and legal conclusions previously made by the JSC.

In arguing to the DHC, the State Bar has successfully asserted the preclusive and binding effect of the JSC Public Reprimand in stating: (1) “[t]he prior findings in the JSC Reprimand . . . should be given preclusive effect in this proceeding” (Supp. R. 129, ¶ 13); (2) “[b]oth the JSC proceeding and the disciplinary proceeding concern the same conduct of Defendant’s and the nature of that conduct as prejudicial to the administration of justice” (Supp. R.131, ¶ 23); and (3) [p]reclusive effect should be given to the findings of the JSC Reprimand.” (Supp R. p. ¶ 29).

In response to Judge Tillett’s first motion for summary judgment, the State Bar has argued that the JSC’s Order of Public Reprimand should be recognized and given preclusive effect as to the issues determined therein that are relevant to the DHC disciplinary proceeding. (Supp. R. pp. 179, ¶ 49). The State Bar also conceded that “[t]he conduct of Defendant and whether such conduct constitutes conduct prejudicial to the administration of justice are present in the pending disciplinary case and that were present and determined by the JSC proceedings.” (R. p. 186, ¶ 66). These issues are, according to the State Bar, “established

by the JSC Order of Public Reprimand by collateral estoppel.” (Supp. R. p. 186, ¶ 66).

In support of the same motion, the State Bar also argued that the JSC’s Public Reprimand should not be given preclusive effect as to the punishment imposed. (Supp. R. p. ¶¶ 63-68). The State Bar’s argument was that there was no identity of issues. However, the State Bar had also asserted that “[b]oth the JSC proceeding and the disciplinary proceeding concern the same conduct of Defendant’s and *the nature of that conduct* as prejudicial to the administration of justice.” (Supp. R. p. 131, ¶ 13) (emphasis supplied). In sum, the State Bar’s positions before the DHC do not appear reconcilable. Either the JSC Public Reprimand is entitled to preclusive effect, or it is not.

## ARGUMENT

### **I. THE STATE BAR AND DHC LACK JURISDICTION TO DISCIPLINE A JUDGE OR JUSTICE OF THE GENERAL COURT OF JUSTICE FOR CONDUCT OF A JUDGE.**

The State Bar and the DHC lack subject matter jurisdiction to discipline and/or remove from the bench a judge or justice of the General Court of Justice for conduct of a judge. The DHC has therefore erred in failing to grant Judge Tillett’s motion to dismiss, motion for judgment on

the pleadings, and motions for summary judgment. The DHC likewise erred in granting the State Bar's motion for summary judgment, as it lacked jurisdiction.

Article IV, Section 17(2) of the Constitution of North Carolina provides that "The General Assembly shall prescribe a procedure . . . for the censure and removal of a Justice or Judge of the General Court of Justice for . . . conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Article IV, Section 17(2).<sup>2</sup> In discussing this Constitutional provision, and the Judicial Standards Act (N.C. Gen. Stat. § 7A-374.1 *et seq.*) that was passed in anticipation of the Constitutional amendment, this Court stated that "[i]t seems both appropriate and in accordance with the constitutional plan that the Supreme Court . . . should also have final jurisdiction over the censure and removal<sup>3</sup> of the judges and justices." *In re Martin*, 295 N.C. 291, 299-300, 245 S.E.2d 766, 771 (1978).

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<sup>2</sup> The Constitution of North Carolina also provides an impeachment process by which the General Assembly may remove a judge or justice of the General Court of Justice. *See* Article IV, Section 17(1).

<sup>3</sup> In 1978, censure and removal were the only two statutorily available forms of discipline for judges and justices.



This Court further held that “we are of the opinion that ratification of the [Constitutional] amendment . . . empower[ed] the Legislature to confer upon [the Supreme] Court original jurisdiction over the censure and removal of judges.” *Id.* at 300, 254 S.E.2d at 772. Further, “[b]y accepting and acting upon the original jurisdiction authorized by the people and conferred by the Legislature, this Court does not usurp power constitutionally reserved to another branch of government.” *Id.*

The procedure prescribed by the General Assembly to discipline judges and justices under Art. IV, Sec. 17 of the Constitution is the Judicial Standards Act, which is codified in Chapter 7A. *In re Martin*, 295 N.C. at 300, 254 S.E.2d at 771. Under Chapter 7A, the “[f]inal authority to discipline judges lies solely with the Supreme Court.” *In re Inquiry Concerning a Judge*, 356 N.C. 389, 398, 584 S.E.2d 260, 266 (2002).

Effective 1 January 2007, the JSC was given the authority to issue to judges letters of caution and public reprimands under certain circumstances. (Session Law 2006-187, s. 11). In providing for these two additional forms of discipline for judges, the legislature maintained the mandatory nature of the Supreme Court and JSC’s discipline of judges.

Pursuant to N.C. Gen. Stat. § 7A-374.1 (2006), “[t]he procedure for discipline of any judge or justice of the General Court of Justice *shall be in accordance with this Article [30 of Chapter 7A].*” (emphasis supplied). The statute also acknowledges the power of the legislature to impeach a judge. N.C. Gen. Stat. § 7A-374.1. The statute does not, however, grant authority to the State Bar to discipline judges pursuant to Chapter 84. The mandatory nature of this statute supports this Court’s holding that the Supreme Court acts as the court of original jurisdiction in judicial discipline cases. *In re Peoples*, 298 N.C. 109, 250 S.E. 2d 890 (1978).

To permit the State Bar to prosecute Judge Tillett after a JSC proceeding, however, would fundamentally alter this Court’s review and undermine this Court’s original jurisdiction. The standard of review for State Bar disciplinary rulings is the whole record test. *N. Carolina State Bar v. Talford*, 356 N.C. 626, 632, 576 S.E.2d 305, 309 (2003). Under the “whole record test,” the reviewing court is “to determine if the DHC’s findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusion of law[.]” *Id.* Such a standard is fundamentally different from having original jurisdiction and sitting as the finder of fact over judicial disciplinary

matters. *In re Inquiry Concerning a Judge*, 356 N.C. 389, 584 S.E.2d 260 (2002). This is significant departure from the constitutional and statutory process – it is essentially an end-run around this Court’s original jurisdiction in judicial discipline cases. The Legislature could not have intended this result.

The State Bar has sought to discipline Judge Tillett for conduct “prejudicial to the administration of justice.” What that actually means is that the State Bar is seeking to either suspend his law license or disbar him. *See* State Bar Rule 27 NCAC 01B.0113(k) – (m).<sup>4</sup> If permitted, the State Bar’s suspension or disbarment of Judge Tillett would cause his removal from the judiciary, as only licensed attorneys may serve as judges. N.C. Const., Art. IV, Sec. 22 (1980).

Chapter 84 of the North Carolina General Statutes, which created the State Bar, is devoid of any reference to disciplining judges or justices of the General Court of Justice. There is likewise no precedent from either the court of appeals or this Court that has held that the State Bar

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<sup>4</sup> Pursuant to 27 NCAC 01B .0113(k)-(m), if something short of a suspension or disbarment is sought, the Grievance Committee would first offer a lesser form of discipline to the attorney, like an admonition. In the present case, no offer to accept any form of written discipline was offered prior to filing the complaint. Manifestly, the State Bar is pursuing either a suspension or disbarment. The State Bar has not denied that it seeks a suspension or disbarment.

has jurisdiction to discipline a judge, much less cause the removal of a judge or justice of the General Court of Justice, for conduct of a judge. The cases involving former judges that the State Bar has relied upon do not address jurisdiction.

The State Bar erroneously contends that it has jurisdiction to discipline Judge Tillett merely because he is a licensed lawyer. *See* N.C. Gen. Stat. § 84-28. The specific statutory framework dealing with judges (codified in Chapter 7A) controls over Chapter 84 which addresses licensed attorneys generally. *See Oxendine v. TWL, Inc.*, 184 N.C. App. 162, 165, 645 S.E.2d 864, 866 (2007) (“When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature . . . unless it clearly appears that the legislature intended the general statute to control.”) “When a statute confers powers on a court or administrative body to adjudicate cases involving the members of a certain class, a court’s attempt to exercise its power over one who is not a member of that class is void for lack of jurisdiction. *In re Peoples*, 296 N.C. at 143, 250 S.E.2d at 910. The General Assembly has conferred upon the JSC and the Supreme Court statutory authority to adjudicate cases involving judges and

justices of the General Court of Justice. No such jurisdiction has been granted to the State Bar.

To permit the State Bar to exercise such authority would allow the State Bar and its DHC to effectively reject what the Supreme Court has determined to be appropriate discipline for a member of the judiciary. If the State Bar is allowed to discipline judges, a judge may be punished twice for the same conduct. That is precisely what the State Bar is attempting to do in this disciplinary proceeding against Judge Tillett. The State Bar is knowingly attempting to impair the disciplinary powers of this Court and to negate the finality of JSC disciplinary proceedings.

Any suggestion by the State Bar that only it is empowered to take the law license of an attorney is incorrect. This Court, of course, has the power to disbar an attorney. *See Matter of Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977).

Permitting the State Bar to prosecute a sitting judge who has already been subject to judicial discipline for the same conduct will drastically impair the JSC's ability to reach a resolution by consent with a judge. As the State Bar has done herein, those same facts to which the disciplined judge consented can later be used to satisfy the clear, cogent

and convincing evidence standard and employed to justify the imposition of much harsher discipline by the State Bar.

What the State Bar is attempting to do is readily apparent in this disciplinary proceeding. The JSC determined that Judge Tillett's conduct, while prejudicial to the administration of justice, was minor in nature. *See* N.C. Gen. Stat. § 7A-374.1 (defining "public reprimand" as a finding by the Supreme Court that a judge has engaged in misconduct "but that misconduct is minor"). The State Bar is now seeking a far more extreme form of discipline, either the suspension of his law license or disbarment, for the same conduct. The DHC has rejected the argument that it is bound by the JSC's finding of minor conduct. (Supp. R. p. 221) (DHC order denying Tillett's motion summary judgment on punishment). The State Bar's and DHC's actions could not have been contemplated by the General Assembly when it enacted the Judicial Standards Act and N.C. Gen. Stat. § 7A-374.1 in 2006. Nor are such actions by the State Bar supported by this Court's interpretation of the Judicial Standards Act.

Had the General Assembly intended to confer jurisdiction upon the State Bar to discipline judges and justices for judicial conduct, it would have so provided, and would not have used the mandatory exclusive

language of N.C. Gen. Stat. § 7A-374.1. Instead, the Judicial Standards Act provides the sole means, aside from legislative impeachment, for a judge or justice to be disciplined and/or removed from the bench for conduct of a judge.

No dispute exists that the conduct alleged in the State Bar's Complaint was conduct of a judge. The State Bar specifically alleged that "[a]t all times relevant to this Complaint, Defendant was a Superior Court Judge of the First Judicial District[.]" (R. p. 4, ¶ 3). The Complaints goes on to describe, among other things, meetings Judge Tillett held in chambers (R. pp. 4-6; 10-11); an order entered by Judge Tillett (R. pp. 6-9); and continued judicial involvement after referring complaints against KDH police officers to Judge Fitch (see, e.g., R. pp. 11-12). This is all conduct of a judge that was properly subject to a JSC inquiry. After investigation and review of this judicial conduct, the JSC issued a public reprimand. No further proceedings before the DHC are appropriate.

The Separation of Powers Clause of the North Carolina Constitution is violated in that the State Bar, a regulatory agency and executive board, is attempting to discipline a member of the judiciary.

The executive branch is thereby usurping the power afforded the judiciary by the State Constitution to discipline judges. As this Court recently held, “[t]he clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch.” *State v. Berger*, \_\_\_ N.C. \_\_\_, \_\_\_, 781 S.E.2d 248, 256 (2016). Moreover, the State Bar, by pursuing a suspension or revocation of Judge Tillett’s law license, actually seeks the *de facto* removal of Judge Tillett from the bench. The removal of a sitting judge is solely within the province of the Supreme Court and JSC.

The State Bar and DHC have also contravened Article IV, Section 1 of the North Carolina Constitution which provides in pertinent part that “The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government[.]”

Accordingly, this Court should hold that the State Bar and DHC lack authority to discipline a judge for conduct of a judge. This Court should therefore dismiss the disciplinary proceeding against Judge Tillett with prejudice.



## **II. THE DHC IS ESTOPPED TO EXERCISE JURISDICTION.**

Because Judge Tillett has already been disciplined by the JSC for the identical conduct which is the subject of this proceeding before the DHC, the DHC's purported exercise of jurisdiction over this disciplinary proceeding is barred by the doctrines of *res judicata*, collateral estoppel, and judicial estoppel.

Significantly, the DHC actually applied the doctrine of collateral estoppel herein in granting summary judgment in favor of the State Bar. The DHC found a violation of Rule 8.4(d) of the RPC based entirely upon the findings of the JSC in its Order of Public Reprimand. (Supp. R. p. 188) (order of DHC on summary judgment); (Supp. R. pp. 119-146) (State Bar's motion for summary judgment on collateral estoppel grounds).

The DHC determined, however, that while it was bound by the JSC's finding that Judge Tillett's conduct was prejudicial to the administration of justice, it was not bound by the JSC's finding that his conduct was minor in nature. (Supp. R. p. 221) (DHC order denying summary judgment); (Supp. R. pp. 190-200) (Tillett's second motion for summary judgment on punishment); *see also* N.C. Gen. Stat. § 7A-374.1 (defining "public reprimand" as a finding by the Supreme Court that a

judge has engaged in misconduct “but that misconduct is minor”). No hearing was granted on Judge Tillett’s second motion for summary judgment. (R. p. 222).

The DHC rulings are irreconcilable. Either the JSC’s Order on Public Reprimand is given preclusive effect, as the State Bar has specifically stated (Supp. R. p. 179, ¶ 49), or it is not. Consequently, the State Bar should be judicially estopped from denying the estoppel doctrines’ application to the JSC finding of minor conduct.

**A. The State Bar’s Disciplinary Proceeding is Barred by *Res Judicata* and Collateral Estoppel.**

*Res judicata* and collateral estoppel are closely related doctrines. *Whitacre P’ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). As such, they are discussed together. The doctrines apply to administrative decisions like the JSC’s order and the State Bar’s proceeding. *See, e.g., Maines v. City of Greensboro*, 300 N.C. 126, 133, 265 S.E.2d 155, 160 (1980).

Under *res judicata* or claim preclusion, “a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies.” *Whitacre*, 358 N.C. at

15, 591 S.E.2d at 880. Collateral estoppel or issue preclusion differs slightly, in that “the determination of an issue in a prior judicial or administrative proceeding precludes relitigation of that issue in a later action[.]” *Id.* It has been generally held that for collateral estoppel to apply, the “party against whom the estoppel is sought [must have] enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.” *Id.* The doctrine likewise applies to quasi-judicial decision like those of the JSC. *See Hillsboro Partners, LLC v. City of Fayetteville, 226 N.C. App. 30, 36, 738 S.E.2d 819, 824 (2013).*

**(1) The State Bar’s Complaint alleges and the DHC’s order granting summary judgment against Judge Tillett adjudicates the preclusive effect of the JSC Order.**

The State Bar’s complaint alleges and the DHC’s order on summary judgment against Judge Tillett finds his conduct was prejudicial to the administration of justice based solely on the same issues and facts that were fully and conclusively litigated and resolved before the JSC. As such, the first prong of *res judicata* and collateral estoppel has been met.

The State Bar has not disputed that the same facts are involved in both the JSC proceeding and the DHC proceeding. (R p. 78). The State Bar has likewise conceded that the facts are identical, and has prevailed

on summary judgment based upon a collateral estoppel theory. For example, the State Bar has argued that “the JSC’s Order of Public Reprimand should be recognized and given preclusive effect for the issues determined therein that are relevant to” the DHC proceeding. (Supp. R. p. 179, ¶ 49). The State Bar has likewise maintained that “[t]he conduct of Defendant and whether such conduct constitutes conduct prejudicial to the administration of justice are present in the pending disciplinary case and that were present and determined by the JSC proceedings.” (R. p. 186, ¶ 66). Moreover, the State Bar argued in support of its motion for summary judgment the following: (1) “[t]he prior findings in the JSC Reprimand . . . should be given preclusive effect in this proceeding” (Supp. R. p. 129, ¶ 13); (2) “[b]oth the JSC proceeding and the disciplinary proceeding concern the same conduct of Defendant’s and the nature of that conduct as prejudicial to the administration of justice” (Supp. R. p. 123, ¶ 23); and (3) [p]reclusive effect should be given to the findings of the JSC Reprimand.” (Supp. R. p. 133, ¶ 29).

Despite this, the State Bar has argued that there is a lack of identity of issues between the JSC proceeding and the DHC proceeding. (Supp. R. p. 185, ¶ 63). Given the State Bar’s own statements on this

point, the position is not tenable. Regardless, the identity of issue element is satisfied: as the State Bar has acknowledged, at issue before the JSC was whether Judge Tillett's conduct was prejudicial to the administration of justice and the "nature of that conduct[.]" (Supp. R. p. 123, ¶ 23). It is not necessary for the JSC to have made highly specific findings, as collateral estoppel "prevails as to matters essentially connected with the subject matter of the litigation and necessarily implied in the final judgment, although no specific findings may have been made in reference thereto." *King v. Grindstaff*, 284 N.C. 348, 359, 200 S.E.2d 799, 807 (1973). There can be no meaningful dispute that the JSC found and determined both that Judge Tillett's conduct was prejudicial to the administration of justice, but that it was minor in nature.

As such, this element is fully satisfied. The only remaining issue, therefore, is that of privity.

**(2) The JSC and State Bar are in privity for purposes of the application of claim preclusion and/or issue preclusion.**

Before addressing the privity issue, it is first necessary to note the apparent ambiguity in the law as to whether privity is required. This

Court has held that mutuality of parties *is* required for *offensive* use of collateral estoppel, while it is *not* required for the *defensive* use of the doctrine. *Sawyers v. Farm Bureau Ins. Of N.C., Inc.*, 170 N.C. App. 17, 30-31, 612 S.E.2d 184, 193-94 (Steelman, J. dissenting) (“However, the mutuality requirement still applies when collateral estoppel is used offensively and for all applications of *res judicata*.”), *rev’d per curiam for reasons stated in dissent*, 360 N.C. 158, 622 S.E.2d 490 (2005). The Court of Appeals has recently acknowledged the confusion over the privity issue. *See In re K.A.*, 233 N.C. App. 119, 126, 756 S.E.2d 837, 842 (2014).

Whatever the standard is, the JSC and State Bar are in privity for purposes of the application of *res judicata* and/or collateral estoppel. As such, the second element of the doctrines has been satisfied, and the State Bar’s action against Judge Tillett should be barred.

This Court has previously held that the State and a State agency are in privity with each other for purposes of collateral estoppel. *State By & Through New Bern Child Support Agency ex rel. Lewis v. Lewis*, 311 N.C. 727, 733, 319 S.E.2d 145, 149-50 (1984). In that case, the State had brought criminal charges against a parent for non-support. *Id.* Five years later, the New Bern Child Support Agency brought a civil action

for non-support against the same parent. *Id.* The defendant attempted to dispute paternity in the civil suit, but the Court held that he was estopped, as that matter was previously determined in the criminal matter. *Id.* This Court held that both the State and the State agency were in privity with one another. *Id.*

The court of appeals has also given *res judicata* affect to a decision by a city's police department to discipline one of its police officers. *Matter of Mitchell*, 88 N.C. App. 602, 604, 364 S.E.2d 177, 179 (1988). In that case, the city's civil service board subsequently punished the police officer for the same conduct that resulted in punishment from the police department. *Id.* The court of appeals held that the punishment by the civil service board "is invalid on the grounds of *res judicata*["] *Id.* Importantly for the instant case, the court reasoned that, "[i]n our jurisprudence it is axiomatic that no one ought to be twice vexed for the same cause." *Id.* (emphasis supplied). Here, the State Bar is attempting to do precisely that.

The JSC is an agency of the State. *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977) (holding that the JSC "is an administrative agency created as an arm of the court"). The State Bar is likewise an

agency of the State. N.C. Gen. Stat. § 84-15. As State agencies, both the JSC and the State Bar are in privity. *Lewis*, 311 NC at 753, 319 S.E.2d at 149-50. *Res judicata* and collateral estoppel therefore apply, and Judge Tillett “ought [not] be twice vexed for the same cause.”

Not only are the JSC and State Bar in privity as State agencies, the State Bar Council appoints approximately 30% of the membership of the JSC. Further, approximately 70% of the members of the JSC are members of the State Bar. Despite this, the State Bar has argued before its DHC that it “did not have the opportunity to participate in the JSC proceedings,” and thus, estoppel does not apply. (R. p. 80). The State Bar, however, ignores that it places four members on the JSC, which has only thirteen total members. N.C. Gen. Stat. § 7A-375. The State Bar Council, which elects the members to serve on the JSC, makes up the “government” of the State Bar. N.C. Gen. Stat. § 84-17. Participation does not require appearance as a party or a specific level of advocacy from the State Bar. Thus, not only did the State Bar, through its duly appointed representatives, have an opportunity to participate in the JSC litigation and investigation, it actually *sat in judgment of Judge Tillett*. This fact, alone, should be sufficient to establish privity.



Even assuming *arguendo* that the parties are not in privity, a judicially recognized exception applies. See *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E.2d 492 (1957) (holding that a “person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications”); see also *Lancaster v. Harold K. Jordan and Co., Inc.*, \_\_\_ N.C. App. \_\_\_, 776 S.E.2d 345, 351(2015) (same). As noted, the State Bar appoints four of the JSC’s thirteen member panel, of which an additional five are members of the State Bar. N.C. Gen. Stat. § 7A-375. As such, the State Bar controlled the JSC action in cooperation with others, and should therefore be bound by the JSC’s adjudication.

Under these circumstances, this Court should find that the State Bar is prohibited from disciplining and/or removing Judge Tillett from the bench under the doctrine of res judicata and/or collateral estoppel.

**B. The State Bar is Judicially Estopped to Deny the Preclusive Effect of the JSC Order.**

The State Bar has taken several inconsistent and irreconcilable legal and factual positions herein. As a result, the State Bar should be barred by the doctrine of judicial estoppel from disputing the preclusive effect of the JSC’s Order of Public Reprimand.

The doctrine of “[j]udicial estoppel forbids a party from *asserting a*

*legal position* inconsistent with one taken earlier *in the same or related litigation.*” *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (emphasis supplied).<sup>5</sup> Judicial estoppel “prevents the use of ‘intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.’” *Id.*

In *Price*, for example, the court of appeals exercised its discretion and barred the defendant from asserting an inconsistent legal position as to whether a Guilford County Court order should be given preclusive effect. *Id.* at 192, 609 S.E.2d at 454. There, the defendant argued to a state court in Washington that a March 1994 order in Guilford County was conclusive on the issue of child support. *Id.* The defendant, however, also argued to the Guilford County Court that child support order should be vacated because service was improper. *Id.* The court of appeals prohibited the defendant from taking these inconsistent positions, and therefore rejected his arguments that service was improper. *Id.* In short, the defendant in *Price* was bound by his argument as to the validity and

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<sup>5</sup> Prior to the decision in *Price*, this Court held that judicial estoppel does not apply to inconsistent legal positions. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 32, 591 S.E.2d 870, 890 (2004). The Court in *Price*, however, was addressing inconsistent legal positions “in the same or related litigation,” not different litigation that was at issue in *Whitacre*. The inconsistent positions in this disciplinary proceeding arise out of the same proceeding.

enforceability of the Guilford County order that he made in a state court in Washington.

Similar procedural facts are present in this case. The State Bar has argued successfully and repeatedly in this disciplinary proceeding that the JSC's Order of Public Reprimand should be given preclusive effect. For example, the State Bar argued to the DHC that "*the JSC's Order of Public Reprimand should be recognized and given preclusive effect for the issues determined therein that are relevant to this proceeding.*" (Supp. R. p. 179, ¶ 49) (emphasis supplied). Further, the State Bar also conceded that "[t]he conduct of Defendant and whether such conduct constitutes conduct prejudicial to the administration of justice *are present in the pending disciplinary case and that were present and determined by the JSC proceeding.*" (Supp. R. p. 186, ¶ 66) (emphasis supplied). Further still, in support of its motion for summary judgment, the State Bar argued the following: (1) "[t]he prior *findings* in the JSC Reprimand . . . should be given preclusive effect in this proceeding" (Supp. R. p. 129, ¶ 13); (2) "[b]oth the JSC proceeding and the disciplinary proceeding concern the same conduct of Defendant's and the nature of that conduct as prejudicial to the administration of justice" (Supp. R. p. 131, ¶ 23); and

(3) [p]reclusive effect should be given to the *findings* of the JSC Reprimand” (Supp. R. p. 133, ¶ 29) (emphasis added). The JSC *found* Judge Tillett’s conduct to be minor.

Directly contrary to these positions, the State Bar is also arguing that the JSC’s Order of Public Reprimand should *not* be given preclusive effect as it relates to the finding of minor conduct. (Supp. R. p. 185, ¶¶ 63-68). This is contrary to the State Bar’s successful arguments made to the very DHC Panel that granted its motion for summary judgment. The State Bar should therefore be judicially estopped from denying the preclusive effect of the JSC’s public reprimand.

The State Bar has clearly articulated the proper outcome on the issue of claim preclusion: “the JSC’s Order of Public Reprimand should be recognized and given preclusive effect for the issues determined therein that are relevant to this proceeding.” (Supp. R. p. 179, ¶ 49). The State Bar should therefore be judicially estopped from denying the preclusive effect of the JSC’s finding of minor conduct.

The State Bar’s previous decisions as to the scope of its own authority over the judiciary are also clearly inconsistent with the position it has taken herein. As recently as 2013, the State Bar opined in a formal

ethics opinion that: “*Opinion on the professional conduct of judicial officers is outside the purview of the Ethics Committee.*” 2013 Formal Ethics Opinion 6 (emphasis supplied); (App. 1-2). The State Bar stated that “no opinion will be offered in response” to whether a judge “violate[d] *the [State Bar’s] Rules of Professional Conduct* or the Code of Judicial Conduct[.]” 2013 Formal Ethics Opinion 6. (emphasis supplied).

Further, in RPC 208 (filed July 21, 1995), the State Bar opined that: “*Judges are subject to the Code of Judicial Conduct and the regulation of the Judicial Standards Commission. Therefore, no opinion is expressed as to the ethical duty of a judge in this situation.*” RPC 208 (emphasis supplied); (App. 3-4). The State Bar’s own website states that “Complaints about North Carolina judges go to the NC Judicial Standards Commission[.]” See <http://www.ncbar.gov/public/intro.asp> (last visited on 4 May 2016).

The Rules of Professional Conduct likewise direct lawyers with an ethical concern about a judge to the JSC. Rule 8.3 of the Rules of Professional Conduct states that when a judge violates “applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office [an attorney] *shall inform the North Carolina Judicial*

*Standards Commission*[.]” R. P. Con. 8.3(b) (emphasis supplied).

Accordingly, the State Bar should be judicially estopped from now taking a different position by prosecuting Judge Tillett before the DHC.

### **III. THE STATE BAR DISCIPLINARY PROCEEDING AGAINST JUDGE TILLETT VIOLATES HIS DUE PROCESS RIGHTS.**

The State Bar’s prosecution of Judge Tillett violates his due process rights and is fundamentally unfair. Due to the egregious nature of the State Bar’s actions herein, this Court should dismiss the DHC proceeding with prejudice.

“Due process must be afforded when State seeks to deprive an individual of a protected liberty or property interest.” *Wake Cty. ex rel. Carrington v. Townes*, 53 N.C. App. 649, 650, 281 S.E.2d 765, 767 (1981), *modified*, 306 N.C. 333, 293 S.E.2d 95 (1982). “[A] license to practice law constitutes a property interest which cannot be taken away without due process of law.” *In re Lamm*, 116 N.C. App. 382, 385, 448 S.E.2d 125, 128 (1994), *aff’d*, 341 N.C. 196, 458 S.E.2d 921 (1995). Due process is “a flexible concept, to insure fundamental fairness in judicial or administrative proceedings which may adversely affect the protected rights of an individual.” *Id.* “Due process means simply a procedure

which is fair and does not mandate a single, required set of procedures for all occasions; it is necessary to consider the specific factual context and the type of proceeding involved.” *Id.*

The prior sections of this brief as to the lack of jurisdiction to discipline Judge Tillett, and the preclusive effect of the JSC disciplinary proceedings against Judge Tillett, are incorporated herein by this reference. The State Bar’s prosecution of Judge Tillett without jurisdiction, and in disregard of the preclusive effect and estoppel bar resulting from the discipline of Judge Tillett by the JSC for the same conduct, are fundamentally unfair and deny to him due process of law.

The process employed in the instant proceeding was fundamentally flawed and contrary to applicable law. The State Bar has unlawfully procured the JSC’s investigation file relating to the inquiry of Judge Tillett, (*See* Supp. R. pp. 224-249), and prosecuted Judge Tillett based on this unlawfully obtained file. The statutory provision applicable to Judge Tillett’s JSC inquiry provides that “all papers filed with and proceedings before the [JSC], including any investigation that the Commission may make, are confidential[.]” N.C. Gen. Stat. § 7A-377(a1) (2007). A copy of the applicable 2007 version of N. C. Gen. Stat. § 7A-377

is attached to the Appendix. (App. 5-7). Under applicable law, “no person shall disclose information obtained from [JSC] proceedings or papers filed with or by the [JSC], except as provided herein.” *Id.* The JSC proceedings are likewise exempt from the Public Records Act. *Id.*

Judge Tillett has not waived the confidential nature of the JSC file. (Supp. R. p. 226, ¶ 12; p. 233, ¶ 14). Notwithstanding the confidential nature of the JSC inquiry, the State Bar has unlawfully obtained the confidential JSC investigation file. (Supp. R. p. 226, ¶ 12; pp. 231-32, ¶¶ 9-12). The State Bar’s possession and use of this confidential file violates Judge Tillett’s due process rights.

Further, the State Bar has in its possession the original, handwritten and confidential attorney notes of the JSC attorney who was involved in the JSC’s inquiry of Judge Tillett. *Id.* The State Bar has no legal right to this information. Perhaps most telling is a note that accompanied the delivery of the JSC file to the State Bar: “After all of that, all they gave him was a public reprimand!” (Supp. R. p. 232, ¶ 11).

Moreover, the incidents alleged in the Complaint are now over six (6) years old. With the passage of time, memories have faded resulting in the loss of evidence. A major participant in the events relating to the



Town of Kill Devil Hills and the DA's office, District Attorney Parrish, is now deceased. The passage of time, loss of evidence, death of an essential witness, Judge Tillett's acceptance of a Public Reprimand from the JSC in reliance on the State Bar's position that it was not empowered to discipline judges, and unreasonable delay by the State Bar (waiting almost two years after the JSC Public Reprimand to file its complaint) have denied to Judge Tillett fundamental fairness and due process of the law under the Law of the Land Clause of the State Constitution and the 14<sup>th</sup> Amendment to the Federal Constitution.

The Chairman of the DHC at the time the Complaint herein was filed, who was empowered to select the DHC hearing panels, was the attorney for the Town of Kill Devil Hills ("KDH"), an interested party. KDH was also directly involved in a disciplinary proceeding against a former Town Attorney for KDH which was initiated by the same DHC Chairman. That disciplinary proceeding has significant implications for Judge Tillett in that the former Town Attorney is a material witness in the disciplinary proceedings against Judge Tillett before the DHC. The current Town Attorney and then DHC Chairman may also be a witness in the State Bar's disciplinary proceeding.

The Panel appointed to hear the Complaint against Judge Tillett has failed and refused to grant Judge Tillett a hearing on any motion filed by him, stricken allegations by Judge Tillett that he cannot receive a fair and impartial hearing, and has denied every motion filed by Judge Tillett.

Under the facts and circumstances of this case, the DHC is not an independent, objective tribunal separate from the State Bar. The process by which the DHC Hearing Panel was selected has failed to assure that the allegations against Judge Tillett will be fairly and objectively considered by an independent tribunal.

Given the unauthorized conduct in which the State Bar has engaged to prosecute Judge Tillett, this disciplinary proceeding is replete with due process violations and a noticeable absence of fundamental fairness. As a result, this Court should find that the State Bar's prosecution of Judge Tillett, on these facts, violates Judge Tillett's due process rights under the North Carolina and U.S. Constitutions.

Judge Tillett therefore respectfully requests that this Court dismiss this proceeding with prejudice.

## CONCLUSION

This Court should dismiss this proceeding with prejudice in that: (1) the DHC lacks subject matter jurisdiction to discipline Judge Tillett for conduct of a judge when the JSC has already finally adjudicated the identical facts and issues involved in the proceeding; (2) the State Bar is estopped by the JSC Order of Public Reprimand; and (3) the lack of jurisdiction, estoppel, passage of time, erosion of memories and resulting loss of evidence, death of an essential witness, the JSC's imposition of a public reprimand of Judge Tillett for the same conduct involved in the State Bar's disciplinary proceeding, and unreasonable delay by the State Bar, have denied to Judge Tillett fundamental fairness and due process.

Respectfully submitted, this the 14<sup>th</sup> day of July 2016.

/s/ Norman W. Shearin  
Norman W. Shearin  
NC. State Bar No.: 3956  
nshearin@vanblacklaw.com

I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

/s/ David P. Ferrell  
David P. Ferrell  
NC State Bar No.: 23097  
dferrell@vanblacklaw.com

/s/ Kevin A. Rust  
Kevin A. Rust  
NC. State Bar No.: 35836  
krust@vanblacklaw.com

Vandeventer Black LLP  
Post Office Box 2599  
Raleigh, North Carolina 27602-2599  
Telephone: (919) 754-1171  
Facsimile: (919) 754-1317  
*Counsel for Defendant*

## CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **DEFENDANT'S NEW BRIEF** upon the parties, by depositing the same in the United States mail, addressed as follows:

G. Patrick Murphy  
Jennifer A. Porter  
The North Carolina State Bar  
PO Box 25908  
Raleigh, NC 27611  
*Attorneys for Plaintiff*

This the 14<sup>th</sup> day of July 2016.

/s/ Norman W. Shearin  
Norman W. Shearin  
*Counsel for Defendant*

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**App. 1****2013 Formal Ethics Opinion 6****July 19, 2013****State Prosecutor Seeking Order for Arrest for Failure to Appear When Defendant is Detained by ICE**

*Opinion rules that a state prosecutor does not violate the Rules of Professional Conduct by asking the court to enter an order for arrest when a defendant detained by ICE fails to appear in court on the defendant's scheduled court date.*

**Inquiry #1:**

A defendant is an undocumented alien who is arrested for a crime. He is given a secured bond by the magistrate, placed in custody in the jail, and served with a US Immigration and Customs Enforcement (ICE) detainer. The defendant hires a bondsman to pay the secured bond and the bondsman does so. ICE comes to the jail and takes the defendant into custody, transporting him to a federal holding facility. The defendant's court-appointed lawyer brings verification of the defendant's detention by ICE to the prosecutor handling the case. Later, the defendant's lawyer appears in court on the defendant's court date and explains to the court that the defendant is in the custody of ICE. The defense lawyer asks the state to have the defendant brought to trial, enter a voluntary dismissal, or dismiss the case with leave pursuant to N.C. Gen. Stat. §15A-932.

The prosecutor asks the judge to call the defendant for failure to appear and to issue an order for his arrest pursuant to N.C. Gen. Stat. §15A-305(b)(2) which provides that "[a]n order for arrest may be issued when: ...[a] defendant who has been arrested and released from custody pursuant to Article 26 of this Chapter, Bail, fails to appear as required."

The court enters a forfeiture of the bond pursuant to N.C. Gen. Stat. §15A-544.3(a), which provides that when a defendant who was released upon execution of a bail bond fails to appear before the court as required, the court shall enter a forfeiture for the amount of the bail bond in favor of the state and against the defendant and the surety on the bail bond. Nevertheless, N.C. Gen. Stat. §15A-544.3(b)(9) provides that a forfeiture of a bail bond will be set aside if, on or before the final judgment date, "satisfactory evidence is presented to the court" that one of a number of listed "events" has occurred. That list includes the following "event" at subparagraph (vii):

the defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

N.C. Gen. Stat. §15A-544.3(b)(9); *accord* N.C. Gen. Stat. §15A-544.5(b)(7).

If ICE decides to release the defendant from custody and there is an outstanding order for his arrest from a North Carolina court, ICE will detain the defendant until he can be released to the custody of the State.<sup>1</sup> See N.C. Gen. Stat. §15A-761.

Is the prosecutor's conduct a violation of Rule 3.8 or any other Rule of Professional Conduct?

**Opinion #1:**

No. Rule 3.8, on the special responsibilities of a prosecutor, prohibits a prosecutor from prosecuting a charge that the prosecutor knows is not supported by probable cause. The comment to the rule, moreover, emphasizes the prosecutor's duty to seek justice. However, there is no legal requirement that a defendant's failure to appear in court be willful. In the instant inquiry, the legal requirements for requesting an order of arrest were satisfied and there was a procedural reason for seeking the order of arrest. Therefore, although the prosecutor knows that the defendant's failure to appear is not willful, the prosecutor's exercise of his professional discretion within the requirements of the law does not violate the Rules of Professional Conduct.

**Inquiry #2:**

Did the judge violate the Rules of Professional Conduct or the Code of Judicial Conduct by issuing the order for arrest and forfeiting the bond?

**Opinion #2:**

Opining on the professional conduct of judicial officers is outside the purview of the Ethics Committee. Therefore, no opinion will be offered in response to this question.

## **App. 2**

### **Endnote**

1. As a practical matter, however, a person who is detained by ICE is rarely released. Deportation or federal incarceration is more likely.

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### **THE NORTH CAROLINA STATE BAR**

217 E. Edenton Street • PO Box 25908 • Raleigh, NC 27611-5908 • 919.828.4620

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**App. 3****RPC 208****July 21, 1995****Avoiding Offensive Trial Tactics**

*Opinion rules that a lawyer should avoid offensive trial tactics and treat others with courtesy by attempting to ascertain the reason for the opposing party's failure to respond to a notice of hearing where there has been no prior lack of diligence or responsiveness on the part of opposing counsel.*

**Inquiry #1:**

Attorney A, who represents the defendant in a civil matter, did not receive the notice of hearing from opposing counsel, Attorney X, because Attorney A's address had changed. At the civil district court calendar call for the first day of the session, when hearing dates are set, Attorney A did not appear nor did his client. Attorney X asked the court to set the matter for trial at the earliest possible date. The case was set for trial two days later. Neither the judge nor Attorney X inquired as to whether Attorney A had received the notice of hearing nor did they attempt to ascertain whether Attorney A was prevented from appearing at the calendar call by an emergency or otherwise. Attorney L, who was at the calendar call on an unrelated matter and who is not associated with either Attorney A or Attorney X, subsequently advised Attorney A of the trial date. Under these circumstances, before asking the court to set the case for trial, must Attorney X verify that the notice of hearing was actually received and that there was no emergency or other problem preventing the appearance of Attorney A or his client at the calendar call?

**Opinion #1:**

No, Attorney X is not required to verify that the notice of hearing was actually received by the opposing lawyer. However, Rule 7.1(a)(1) of the Rules of Professional Conduct provides that a lawyer does not violate the duty to zealously represent a client

...by acceding to reasonable requests by opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

Avoiding offensive tactics and treating others with courtesy includes not taking advantage of the opposing party or the opposing counsel's failure to respond to a notice of hearing when there has been no prior lack of diligence or responsiveness on the part of the opposing counsel. Under these circumstances, as a matter of professionalism, Attorney X should make a reasonable effort to ascertain Attorney A's whereabouts or the reason for his absence before asking the judge to schedule the hearing at the earliest possible date.

**Inquiry #2:**

Does the court have a duty to verify that Attorney A has received notice of the hearing?

**Opinion #2:**

Judges are subject to the Code of Judicial Conduct and the regulation of the Judicial Standards Commission. Therefore, no opinion is expressed to the ethical duty of a judge in this situation.

**Inquiry #3:**

Do the other lawyers at the calendar call have a responsibility to verify that Attorney A has received notice of the hearing or that there was no emergency or other problem preventing Attorney A's appearance at the hearing?

**Opinion #3:**

**App. 4**

No. However, as a matter of professionalism, lawyers are encouraged to treat other practitioners with courtesy and to assist other practitioners in meeting the duty of competent representation.

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adjudication of "willful misconduct in office" by the Supreme Court in a proceeding instituted by the Judicial Standards Commission, in which the judge or justice involved has been accorded due process of law and his guilt established by "clear and convincing evidence," is equivalent to an adjudication of guilt of "malpractice in any office" as used in N.C. Const., Art. VI, § 8. Therefore, the legislature acted within its power when it made disqualification from judicial office a consequence of removal for willful misconduct under this section. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**When Judge May Be Disqualified from Future Office.** — When a judge is removed for "mental or physical incapacity" upon the recommendation of the Judicial Standards Commission, the remedy allowed by statute is limited to removal from office. On the other hand, when a judge is removed for reasons other than incapacity, this section (like N.C. Const., Art. IV, § 17, which it was intended to supplement), provides for both removal and disqualification from future judicial office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

#### VII. LOSS OF RETIREMENT BENEFITS.

**Loss of Retirement Benefits Is Additional Sanction.** — In addition to the sanctions which follow removal by impeachment (loss of office and disqualification to hold further judicial office), this section imposes an additional sanction, the loss of retirement benefits. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**The constitutional source for the remedy of loss of retirement benefits** does not lie in the impeachment provisions of N.C. Const., Art. IV, § 4, but in N.C. Const., Art. IV, § 8, which gives the General Assembly the power to "provide by general law for the retirement of Justices and Judges." Under this power the General Assembly may condition retirement benefits upon good conduct in office. Thus, the General Assembly acted well within its constitutional authority when it provided in this section that a judge who is removed from office for cause other than mental or physical incapacity shall receive no retirement compensation. In re Peoples, 296 N.C. 109, 250 S.E.2d

890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**Right to Recover Contributions to Retirement Fund.** — Loss of retirement benefits as the result of the removal of a judge from office for cause other than mental or physical incapacity does not mean that the judge forfeits his right to recover the contributions which he paid into the fund. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

#### VIII. FUNCTION OF COMMISSION.

**The Commission can neither censure nor remove a judge.** It functions as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The Commission can neither censure nor remove a judge. It is an administrative agency created as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. To that end, it is authorized to investigate complaints, hear evidence, find facts, and make a recommendation thereon. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**Focus of Inquiry for Commission.** — Whether the conduct of a judge can fairly be characterized as "private" or "public" is not the inquiry that the Judicial Standards Commission needs to make; rather, the proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

**The recommendations of the Commission are not binding upon the Supreme Court,** which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove or decline to do either. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978); In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

**Each case arising from the Commission is to be decided upon its own facts.** In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

#### § 7A-377. Procedures.

(a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the

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ART. 30. JUDICIAL STANDARDS COMMISSION

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General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary. The Commission may also make an investigation on its own motion. The Commission may issue process to compel the attendance of witnesses and the production of evidence, to administer oaths, and to punish for contempt. No justice or judge shall be recommended for censure, suspension, or removal unless he has been given a hearing affording due process of law.

(a1) Unless otherwise waived by the justice or judge involved, all papers filed with and proceedings before the Commission, including any investigation that the Commission may make, are confidential, and no person shall disclose information obtained from Commission proceedings or papers filed with or by the Commission, except as provided herein. Those papers are not subject to disclosure under Chapter 132 of the General Statutes.

(a2) Information submitted to the Commission or its staff, and testimony given in any proceeding before the Commission, shall be absolutely privileged, and no civil action predicated upon that information or testimony may be instituted against any complainant, witness, or his or her counsel.

(a3) If, after an investigation is completed, the Commission concludes that a letter of caution is appropriate, it shall issue to the judge a letter of caution in lieu of any further proceeding in the matter. The issuance of a letter of caution is confidential in accordance with subsection (a1) of this section.

(a4) If, after an investigation is completed, the Commission concludes that a public reprimand is appropriate, the judge shall be served with a copy of the proposed reprimand and shall be allowed 20 days within which to accept the reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with subsection (a5) of this section. A public reprimand, when issued by the Commission and accepted by the respondent judge, is not confidential.

(a5) If, after an investigation is completed, the Commission concludes that disciplinary proceedings should be instituted, the notice and statement of charges filed by the Commission, along with the answer and all other pleadings, are not confidential. Disciplinary hearings ordered by the Commission are not confidential, and recommendations of the Commission to the Supreme Court, along with the record filed in support of such recommendations are not confidential. Testimony and other evidence presented to the Commission is privileged in any action for defamation. At least five members of the Commission must concur in any recommendation to censure, suspend, or remove any judge. A respondent who is recommended for censure, suspension, or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if the respondent has objections to it, to have the record settled by the Commission's chair. The respondent is also entitled to present a brief and to argue the respondent's case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of censure, suspension, or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A justice of the Supreme Court or a member of the

Commission who is a judge is disqualified from acting in any case in which he is a respondent.

(b) Repealed by Session Laws 2006-187, s. 11, effective January 1, 2007.

(c) The Commission may issue advisory opinions to judges, in accordance with rules and procedures adopted by the Commission.

(d) The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process issued by the Commission.

#### History.

1971, c. 590, s. 1; 1973, c. 808; 1989 (Reg. Sess., 1990), c. 995, s. 2; 1997-72, s. 2; 2006-187, s. 11.

#### Legal Periodicals.

For note on the Judicial Standards Commission, see 54 N.C.L. Rev. 1074 (1976).

For survey of 1977 law on professional responsibility and the administration of justice,

see 56 N.C.L. Rev. 871 (1978).

For note discussing the power of the North Carolina Supreme Court to remove state judges in the context of *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978), see 14 Wake Forest L. Rev. 1187 (1978).

For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

#### CASE NOTES

**Commission's procedures are required to meet constitutional due process standards,** since a judge's interest in continuing in public office is an individual interest of sufficient importance to warrant constitutional protection against deprivation. *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

Because of the severe impact which adverse findings by the Judicial Standards Commission and censure or removal by the Supreme Court may reasonably be expected to have upon the individual, fundamental fairness entitles the judge to a hearing which meets the basic requirements of due process. *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

**Due Process Not Violated by Commission's Functions.** — The combination of investigative and judicial functions in the Judicial Standards Commission does not violate a respondent's due process rights under either the federal or North Carolina Constitutions, since it is an administrative agency created as an arm of the court, and any alleged partiality of the Commission is cured by the final scrutiny of the Supreme Court. *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

**Section 7A-376 in Pari Materia.** — The provisions of this section and G.S. 7A-376 are parts of the same enactment, relate to the same class of persons, and are aimed at suppression of the same evil. The statutes are therefore in *pari materia* and must be construed accordingly. *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978).

A proceeding begun before the Judicial Standards Commission is neither a civil

nor a criminal action. Such a proceeding is merely an inquiry into the conduct of one exercising judicial power to determine whether he is unfit to hold a judgeship. Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice. *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

**The function of the Commission** is to conduct hearings upon complaints filed against judges and justices, to find facts and make recommendations so as to bring before the Supreme Court the questions of whether a judge or justice should be censured or removed in order to maintain proper administration of justice, public confidence in the judicial system and the honor and integrity of judges. *In re Martin*, 295 N.C. 291, 245 S.E.2d 766 (1978).

**Powers of Commission.** — The Judicial Standards Commission is empowered by this section to investigate complaints, compel the attendance of witnesses and the production of evidence, conduct hearings which afford due process of law, and make recommendations to the Supreme Court about what disciplinary action, if any, should be taken. *In re Renfer*, 345 N.C. 632, 482 S.E.2d 540 (1997).

**Article Does Not Vest Absolute Discretion in Commission.** — There is no merit in the contention that this Article illegally vests unguided and absolute discretion in the Judicial Standards Commission to choose which complaints to investigate and what evidence it will accept. *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977).

The quantum of proof required in proceedings before the Commission of this