NO. 208PA15 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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THE NORTH CAROLINA STATE BAR, Plaintiff vs. JERRY R. TILLETT, Attorney, Defendant	)	From North Carolina State Bar No. 15 DHC 7

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PLAINTIFF-APPELLEE'S NEW BRIEF

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INTRODUCTION

The issue before the Court is whether the Disciplinary Hearing Commission of the North Carolina State Bar has jurisdiction to review, under the North Carolina Rules of Professional Conduct, the actions of a licensed attorney who is serving as a judge. The principal argument made by Appellant, Judge Jerry R. Tillett, is that the General Statutes do not confer such authority on the State Bar. Appellant's statutory analysis is erroneous and incomplete. In fact, as discussed further below, the General Statutes explicitly recognize that "[a]ny attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of

the [State Bar]." N.C. Gen. Stat. § 84-28(a) (2016) (emphasis added). Moreover, the General Assembly has explicitly recognized that judges may be disbarred or have their licenses suspended by the State Bar, and has enacted a special procedure that applies when a judge is "no longer authorized to practice law." N.C. Gen. Stat. § 7A-410 (2016).

By contrast to the explicit statutory support for the State Bar's jurisdiction, Appellant cannot s upport the contention that, upon taking the bench, a North Carolina lawyer is no longer responsible for following the Rules of Professional Conduct approved by this Court. Judges in this State undertake a solemn responsibility to do justice, and they bear special burdens, including those set forth in the Code of Judicial Conduct. But a judge's robe is not a shield from the ethical rules that bind all attorneys. The State Bar does not relish the prospect of pursing a disciplinary matter against a sitting judge. However, the State Bar is bound by statute to investigate and pursue discipline against any attorney who engages in conduct that is prejudicial to the administration of justice. The State Bar's jurisdiction in this area coexists with the Judicial Standards Commission's important role in evaluating judges' conduct under the Code of Judicial Conduct, and this Court's ultimate role as the final authority with respect to the discipline of judges, through its original and appellate jurisdiction.

The remaining arguments in Appellant's brief are outside the scope of the writ of *certiorari* issued by this Court. They are issues that are more appropriately reviewed on appeal from a final judgment of the DHC, pursuant to the well-defined appellate process established by the General Assembly. In any event, Appellant is incorrect that the doctrines of collateral estoppel or *res judicata*, or that his contentions about due process, warrant relief. The DHC should be allowed to continue its evaluation of this important case under the Rules of Professional Conduct, consistent with its grant of jurisdiction.

STATEMENT OF THE FACTS

Appellant, Jerry R. Tillett, is a licensed North Carolina attorney and an active member of the North Carolina State Bar. (R p 4) Appellant is also the Senior Resident Superior Court Judge of North Carolina's First Judicial District. (R p 4) The town of Kill Devil Hills ("KDH") is within the First Judicial District. The State Bar alleges the Appellant, as an attorney, violated the Rules of Professional Conduct based on these facts:

1. On 4 April 2010, Appellant's adult son was detained but not charged by KDH Police Officers. (R p 4) Later that day, Appellant had a telephone conversation with Dan Merrell, the town attorney for KDH concerning the incident. (R p 5) Appellant met with KDH officials, Police Chief Gary Britt, and Assistant Chief Dana Harris in his judicial chambers on

15 April 2010. Merrell arranged the meeting at Appellant's request. (R p 5) During the meeting, Appellant complained about his son's detention by the police department and about other incidents of alleged misconduct involving the KDH Police Department. The meeting became confrontational and Appellant's demeanor during the meeting was described by other participants as stern, aggressive, agitated and angry, and several participants felt threatened by Appellant's conduct and his discussion of a superior court judge's ability to remove officials from office. (R p 35) Defendant warned the officials attending the meeting that they needed to address the matters he had discussed or he would "take care of it for them." (R pp 5-6) The subject of the meeting did not involve or arise from any legal matter pending before Appellant. (R pp 5-6)

2. In 2011, Appellant received communications from KDH police officers with grievances against Chief Britt and Assistant Town Manager Shawn Murphy. Appellant provided the complaints he received about Chief Britt to the District Attorney, Frank Parrish. Appellant demanded that the District Attorney file a petition for the removal of Chief Britt. (R p 6-7)

3. On 24 June 2011, Appellant sent a letter to Chief Britt printed on his judicial stationery. The letter stated that Appellant had received "complaints of professional misconduct" against Chief Britt and warned Chief Britt that "to the extent, that allegations involve,[sic] conduct prejudicial to the administration of justice, conduct violative of the public policy, and/or violations of criminal law including obstruction of justice, oppression by official, misconduct in public office and/or substantive offense, this office will act appropriately in accord with statutory and/or inherent authority." (R p 7)

4. On 19 September 2011, on his own initiative, Appellant drafted and executed an order requiring that copies of the private personnel records of certain employees of the Town of KDH, including Chief Britt and Assistant Town Manager Murphy, be copied and brought to him "for an in camera review, for the protection of integrity of information, to prevent alteration, spoliation, for evidentiary purposes and or [sic] for disclosure to other appropriate persons as directed by the Court." At the time, no court proceeding had been filed and no order had been requested by the District Attorney's Office, the town, or any of the complaining police officers. Appellant had no legal or factual basis for this order. (R p 36)

5. Appellant delivered the order to Merrell. Appellant told Merrell that Appellant would not allow town officials to keep a copy of the order. Merrell showed the order to the town officials. In compliance with Appellant's Order, KDH officials copied the personnel records specified in the order and delivered the files to Appellant's Office. Eventually, Appellant conceded that the KDH clerk could retain a copy under seal to be opened only with his permission. (R p 9, *see also In re Officials of Kill Devil Hills Police Dept.*, 223 N.C. App. 113, 733 S.E.2d 582 (2012)).

6. On or about 23 September 2011, KDH Town Officials were informed that the District Attorney would seek the removal of the Chief. KDH placed Chief Britt on non-disciplinary, paid suspension. During this leave, the Town of KDH arranged for an outside review of Chief Britt's performance. (R p 9)

7. On or about 1 November 2011, Appellant notified the Honorable Milton F. Fitch that Appellant would refer the petition for removal of Chief Britt to Judge Fitch. (R pp 9-10, 63)

8. On 22 December 2011, Chief Britt was reinstated to active duty. On 30 December 2011, Merrell sent Appellant a copy of a 22 December 2011 email from Assistant Town Manager Murphy with an attachment

captioned "Police Issues For Implimentation [sic] By The Police Chief As Of January 2012." Appellant forwarded the information about the new policies to Judge Fitch. (R pp 11-12)

9. On January 5, 2012, Appellant met with Parrish and a member of Parrish's staff in Appellant's office. At that meeting, Appellant discussed Parrish's failure to file a petition against Chief Britt and discussed information Appellant had about individuals who wanted to file petitions to remove Parrish. Appellant requested that a sheriff's deputy be present outside his office during the meeting with Parrish. Defendant pressed Parrish to file a petition to remove Chief Britt and made it clear to Parrish that there would be repercussions for Parrish if he did not file the petition to remove Chief Britt. (R p 10)

10. On that same date, Appellant sent Murphy a letter on his judicial stationery that stated that "complaints of professional misconduct have been received by this office against you." The letter further stated that, "to the extent,[sic] that allegations involve, conduct prejudicial to the administration of justice, conduct violative of the public policy, and/or violations of criminal law including obstruction of justice, oppression by official, misconduct in public office and/or substantive offense, this

office will act appropriately in accord with statutory and/or inherent authority." (R p 10-11)

11. Shortly before 19 January 2012, Appellant drafted and sent to Judge Fitch a proposed order that would rescind parts of the new policies applied to Chief Britt. On 19 January 2012, Judge Fitch entered an *ex parte* order, in substantially the form drafted by Appellant, in Dare County Superior Court styled as "In the Matter of Complaints Against Officials of Kill Devil Hills Police Department." There was no such court proceeding pending. The order purported to authorize any KDH employee to present any complaint about the KDH Police Department to Appellant and that any petitions or other filings by the District Attorney must be presented to Appellant. (R pp 11-12, 64) *See also In re Officials of Kill Devil Hills Police Dept.*, 223 N.C. App. 113, 733 S.E.2d 582 (2012).

12. The Town of KDH appealed Judge Fitch's order. The Court of Appeals vacated the order, holding that the trial court had no jurisdiction to enter the order because there was no proceeding pending, there was no inherent authority to enter the order, and the order was beyond the scope of a writ of mandamus. In addition, the Court held that the order violated the due process rights of the town and its officials because it was entered without

any notice or opportunity to be heard. *In re Officials of Kill Devil Hills Police Dept.*, 223 N.C. App. 113, 733 S.E.2d 582 (2012).

13. Despite his purported recusal and even though he was not a party, Appellant petitioned this Court for discretionary review of the Court of Appeals decision. Appellant moved to withdraw his petition on 8 March 2013.

14. On 8 March 2013, the JSC entered its Public Reprimand which found facts consistent concerning Appellant's misuse of the powers of his judicial office resulting in the public perception of a conflict of interest. (R pp 34-39)

ARGUMENT

The Court granted *certiorari* "to review this question posed in [Appellant's] petition [for discretionary review]":

> 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?

The question as posed by Appellant, however, obscures crucial details. The issue is more accurately stated:

> Do the North Carolina State Bar Council and the Disciplinary Hearing Commission have the jurisdiction to discipline a lawyer for conduct engaged in while serving as a judge of the

> General Court of Justice that violates the North Carolina Rules of Professional Conduct, even if the judge has been disciplined by the Judicial Standards Commission for his violation of the Code of Judicial Conduct based upon the same conduct?[1]

There is no doubt that the North Carolina State Bar Council (Council) and the Disciplinary Hearing Commission (DHC) have jurisdiction to discipline a lawyer for conduct that violates the Rules of Professional Conduct. The Council and the DHC do not lose jurisdiction when the lawyer takes on the role of judge. A judge is a lawyer before assuming office, while in office, and after leaving office, unless disbarred. Neither taking the bench, nor the issuance of judicial discipline by the JSC, can insulate a judge from the consequences of a violation of the Rules of Professional Conduct. A judge must comply with both the Code of Judicial Conduct and the Rules of Professional Conduct.

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[1] Appellant was issued a public reprimand on 8 March 2103 by the Judicial Standards Commission without a recommendation to this Court under authority conferred by N.C. Gen. Stat. § 7A-376 as amended in 2006, effective January 1, 2007. S.L. 2006-187, § 11. On 23 July 2013, the General Assembly amended N.C. Gen. Stat. § 7A-376 to repeal the authority of the Commission to issue public reprimands. Thus, the question, even as revised, will not recur unless the statute is again changed.

I. THE JURISDICTION OF THE STATE BAR COUNCIL AND THE DHC TO DISCIPLINE A LAWYER WHO IS SERVING AS A JUDGE IS CONCURRENT WITH AND IS NOT ABROGATED BY THE SEPARATE JURISDICTION OF THE SUPREME COURT UNDER CHAPTER 7A TO DISCIPLINE A JUDGE.

A. THE STATE BAR COUNCIL AND THE DHC HAVE JURISDICTION TO DISCIPLINE LAWYERS WHO VIOLATE THE RULES OF PROFESSIONAL CONDUCT WHILE HOLDING PUBLIC OFFICE.

Appellant's primary argument is that the General Assembly did not confer jurisdiction on the State Bar Council to discipline attorneys for violations of the Rules of Professional Conduct that occur while serving as a judge. (*See, e.g.*, Appellant's New Brief at 16-17.) This is not correct. The General Statutes implicitly and explicitly recognize the State Bar's authority to discipline – and even to disbar – an attorney serving as a judge. The General Assembly intended to confer such jurisdiction on the State Bar.

As a licensed North Carolina attorney, Appellant is subject to the attorney disciplinary jurisdiction of the Council and the DHC. Subject matter jurisdiction is the authority to adjudicate a legal issue and is conferred either by the Constitution or by statute. *See Harris v. Pembaur*, 84 N.C. App. 666, 353 S.E.2d 673 (1987). By statute, every lawyer licensed to practice law in North Carolina is a member of the North Carolina State Bar. N.C. Gen. Stat. § 84-16 (2016). The General Assembly expressly provided that "[a]ny attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the Council under such rules and procedures as the Council shall adopt..." N.C. Gen. Stat. § 84-28(a) (2016)

(emphasis added). The General Assembly further provided that specified acts by a member of the North Carolina State Bar, including violations of the Rules of Professional Conduct, "shall constitute misconduct and shall be grounds for discipline whether the act or omission occurred in the course of an attorney-client relationship or otherwise." N.C. Gen. Stat. § 84-28(b) (2016) (emphasis added).

The General Assembly granted specified powers to the Council:

> The Council is vested, as an agency of the State, with the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals. Among other powers, the Council shall administer this Article; ... formulate and adopt rules of professional ethics and conduct; investigate and prosecute matters of professional misconduct; ... The Council may do all things necessary in the furtherance of the purposes of this Article that are not otherwise prohibited by law.

N.C. Gen. Stat. § 84-23 (2016).

In 1975, the General Assembly created the Disciplinary Hearing Commission of the North Carolina State Bar (DHC). The DHC is empowered to hold hearings and enter orders in disciplinary matters delegated to it by the State Bar Council. N.C. Gen. Stat. § 84-28.1(b) (2016).

The statutes contain no provision exempting judges from the express disciplinary authority granted to the Council and the DHC over lawyers. Appellant has cited no authority that deprives the Council or the DHC of jurisdiction over lawyers who serve as judges. To the contrary, the General Assembly explicitly

recognized the State Bar's jurisdiction to discipline attorneys who serve as judges, and created a procedure that applies if the State Bar disbars or suspends an attorney serving as a judge. N.C. Gen. Stat. § 7A-410, titled "Vacancy exists upon disbarment," provides in pertinent part:

> When a judge of the district court, judge of the superior court, judge of the Court of Appeals, justice of the Supreme Court, or a district attorney is no longer authorized to practice law in the courts of this State, the Governor shall declare the office vacant ... For purposes of this Article, the term "no longer authorized to practice law" means that the person has been disbarred or suspended and all appeals under G.S. 84-28 have been exhausted.

N.C. Gen. Stat. § 7A-410 (2016) (emphases added).

The only appeal authorized under N.C. Gen. Stat. § 84-28 is "an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals." This explicit reference to the statutory procedure for appealing from the DHC, plus the use of the terms "disbarred" and "suspended," which are terms of art with respect to an attorney's licensure, demonstrate the General Assembly's explicit acknowledgment and intention that the State Bar Council and DHC have jurisdiction to discipline attorneys who are serving as judges.

The General Assembly enacted N.C. Gen. Stat. § 7A-410 because it correctly determined that it would be inappropriate for a person who is no longer authorized to practice law to continue serving as a judge. Appellant argues that

N.C. Gen. Stat. § 7A-374.1 shows the General Assembly's intent for judges to be outside the DHC's jurisdiction. (*See* Appellant's New Brief at 12.) However, Section 7A-410 was enacted after Section 7A-374.1, further demonstrating that Appellant misreads the General Assembly's intent. *Compare* N.C. Session Law 2007-104 (providing that Section 7A-410 went into effect on 21 June 2007) *with* N.C. Session Law 2006-187 (providing that Section 7A-374.1 went into effect on 1 January 2007). Section 7A-374.1 was enacted in furtherance of the Constitutional mandate to provide a means to censure or remove a judge for misconduct, not to immunize a judge from compliance with the law. Even if the statute can be interpreted as in conflict with Section 7A-410, Section 7A-410 must be read as the last expression of legislative intent. *In re Guess*, 324 N.C. 105, 107, 376 S.E.2d 8, 10 (1989) ("It is a generally accepted rule that where there is an irreconcilable conflict between two statutes, the later statute controls as the last expression of legislative intent.")

Furthermore, N.C. Gen. Stat. § 7A-410 (and its companion § 7A-410.1) would simply have no meaning if the General Assembly intended that the Council and the DHC should have no jurisdiction to discipline a lawyer who was also sitting as a judge. Appellant's contention disregards the unambiguous language of

the statute and the obvious purpose of the statute.[2] It would render Section 7A-410 a nullity, contrary to this Court's longstanding rules of statutory construction. *See In re Hardy*, 294 N.C. 90, 95-96, 240 S.E.2d 367, 371-72 (1978).

For all these reasons, Appellant's core argument fails. The General Assembly plainly intended for the State Bar Council and DHC to have the jurisdiction to discipline attorneys who are serving as judges, including through suspension or disbarment when appropriate under the Rules of Professional Conduct.

B. THE PROCESS BY WHICH THE COUNCIL AND THE DHC DISCIPLINE LAWYERS IS DISTINCT FROM THE PROCESS FOR DISCIPLINING JUDGES UNDER CHAPTER 7A AND SERVES A DIFFERENT PURPOSE.

Judicial discipline concerns the fitness of a judge to serve as a judge. Attorney discipline concerns the fitness of a lawyer to be a lawyer. The same conduct may implicate both fitness to be a judge and fitness to be a lawyer.

This Court has long recognized that the Council has jurisdiction over the discipline of attorneys. As the Court stated in *McMichael v. Proctor*, 243 N.C. 479, 485, 91 S.E.2d 231, 235 (1956), "questions relating to the propriety and ethics of an attorney are ordinarily for the consideration of the North Carolina Bar, Inc.,

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[2] In fact, Appellant's New Brief avoids any mention of Section 7A-410. Nor has Appellant challenged the constitutionality of that statute.

which is now vested with jurisdiction over such matters."[3] *See also, In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962); *In re Northwestern Bonding Co., Inc.*, 16 N.C. App. 272, 192 S.E.2d 33 (1972), *appeal dismissed*, 282 N.C. 426, 192 S.E.2d 837 (1972). The jurisdiction of the State Bar involves a "broad range of questions relating to the propriety and ethics of an attorney." *Cunningham v. Selman*, 201 N.C. App. 270, 284, 689 S.E.2d 517, 526 (2009). The purpose of attorney discipline is to address the harm and potential harm to clients, the profession, members of the public, and the administration of justice caused by the misconduct of an attorney. *See* N.C. Gen. Stat. § 84-28(c) (2016); *N.C. State Bar v. Talford*, 356 N.C. at 636-638, 576 S.E.2d at 312-313.

Grounds for attorney discipline are established by statute: "(1) [c]onviction of, or a tender and acceptance of a plea of guilty or no contest to a criminal offense showing professional unfitness; (2) [t]he violation of the Rules of Professional Conduct adopted and promulgated by the Council in effect at the time of the act; [or] (3) [k]nowing misrepresentation of any facts or circumstances surrounding any complaint, allegation, or charge of misconduct..." N.C. Gen. Stat. § 84-28(b) (2016). Grounds for judicial discipline are set out in a different statute: violations of the Code of Judicial Conduct, "willful misconduct in office, willful and

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[3] The reference to the "North Carolina Bar, Inc." should have read the North Carolina State Bar.

persistent failure to perform the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C. Gen. Stat. § 7A-376 (2016). JSC reviews the complaints about judges only for purposes of determining whether grounds exist for imposition of judicial discipline pursuant to N.C. Gen. Stat. § 7A-376. JSC has no authority to examine whether a judge's conduct violates the Rules of Professional Conduct or to levy discipline affecting the judge's license to practice law.

C. DISCIPLINE ISSUED BY THE COUNCIL OR BY THE DHC DOES NOT CONFLICT WITH JUDICIAL DISCIPLINE OR INFRINGE UPON JUDICIAL DISCIPLINARY AUTHORITY VESTED UNDER CHAPTER 7A.

Remedies the State Bar is authorized to pursue in the DHC for violations of the Rules of Professional Conduct are set forth in N.C. Gen. Stat. § 84-28. The DHC has the authority to issue a letter of warning, an admonition, a reprimand, a censure, a suspension or an order of disbarment. The DHC cannot order that a lawyer serving in elected or appointed office of any kind be removed from office. Any consequences arising from an order suspending or disbarring a lawyer who is a judge are outside the purview of the DHC.

Appellant argues that the State Bar is seeking to remove him from office because N.C. Const. Art. IV, § 22 would require his removal if he were suspended or disbarred.[4] The constitutional provision in question provides:

> Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a Justice of the Supreme Court, Judge of the Court of Appeals, Judge of the Superior Court, or Judge of District Court. This section shall not apply to persons elected to or serving in such capacities on or before January 1, 1981.

N.C. Const. Art. IV, § 22.

This provision was adopted as a constitutional amendment by general election held 4 November 1980. It was adopted after the Constitution was amended to allow the creation of JSC. At the time the amendment was proposed, there were a number on lay judges who had held office, at least one of whom was disciplined by the Court upon recommendation of JSC. *See, e.g., In re Martin*, 295 N.C. 291, 245 S.E.2d 766 (1978). The amendment did not impose a requirement

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[4] Appellant also argues that the State Bar is seeking to suspend or disbar him from the mere fact that it filed a complaint with the DHC rather than the Grievance Committee issuing written discipline. This is pure conjecture. The rule provides in pertinent part: "If probable cause is found and the committee determines that a hearing is necessary, the chairperson will direct the counsel to prepare and file a complaint against the respondent." 27 N.C.A.C. Ch 1, Sub B § .0113(h). Any number of factors may result in a determination that a hearing is required, not simply the possible level of discipline. The State Bar will argue and the DHC will determine the appropriate level of discipline based on the facts and conclusions concerning discipline in phase 2 of its proceedings. 27 N.C.A.C. Ch 1, Sub B § .0114.

that a judge must have a law license to serve; in fact, it contained a savings clause to permit lay judges to complete their terms. The amendment only imposed an eligibility requirement for election or appointment after its effective date. This provision of the Constitution does not, in and of itself, mandate removal of a judge from office if the DHC enters an order of suspension or disbarment.[5]

Because the Constitution does not require a judge to be authorized to practice law to serve out his or her term of office, the General Assembly implemented procedures to address that circumstance. Section 7A-410 provides that when a judge is no longer authorized to practice law in the courts of this State, the Governor will declare the office "vacant," but only after the exhaustion of all appeals under N.C. Gen. Stat. § 84-28 and only after the judge is given "the opportunity to be heard on the matter." N.C. Gen. Stat. § 7A-410 (2016). Thus, before any judge is removed from office by the Governor as a result of suspension or disbarment, the judge has first had an opportunity under Section 84-28 to appeal the disciplinary order imposing suspension or disbarment to the appellate courts, ultimately including this Court. *See* N.C. Gen. Stat. § 84-28(h) (2016) . The judge then also has the opportunity to challenge the removal to the Governor . *See* N.C.

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[5] Although the issue of jurisdiction over a judge was not raised on appeal, the Court of Appeals affirmed the DHC's Order disbarring Judge James Ethridge for conduct that occurred before he was appointed a judge. *N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 657 S.E.2d 378 (2008). Judge Ethridge eventually resigned from the bench after entry of the DHC's Order.

Gen. Stat. § 7A-410. As such, the possible path from discipline imposed by the DHC to any effect on continued service in judicial office requires action by another party, the Governor, and abounds with opportunities for redress of any error or injustice.

Appellant's argument also disregards other disciplinary options available to the DHC. The DHC is not required to suspend or disbar an attorney for violations of the Rules of Professional Conduct; the DHC may determine that an admonition, reprimand, or censure is the appropriate discipline. Regardless, the potential collateral effects of suspension or disbarment do not negate the jurisdiction of the DHC.

Appellant's argument appears to presume that only one set of standards and one enforcement agency can apply to his conduct. This clearly is not accurate. Surely Appellant recognizes that a judge is subject to criminal prosecution for violations of the criminal law he may commit while serving as a judge, with the potential for serving a prison sentence. He could not possibly expect to remain on the bench and hear cases from jail. The courts have jurisdiction to try a lawyer who is serving as a judge criminally even though this might have a potential collateral effect upon his ability to continue serving as a judge. The IRS certainly has the authority to impose tax liens if a judge fails to pay his or her federal taxes. A creditor has the right to sue on a judge's debt. The North Carolina Board of

Elections has jurisdiction to inquire into a judge's campaign finance reporting. Holding office as a judge does not insulate or excuse the judge's obligations as a citizen and a lawyer.

Appellant essentially argues that he is immunized from attorney discipline simply because he is a judge. Accepting Appellant's argument would be devastating to the ethical credibility of the legal profession and the courts. Under Appellant's theory, a judge could be removed from judicial office for conduct that included lying to an SBI agent investigating his judicial misconduct but maintain his license to practice law. *See, e.g., In re Badgett*, 362 N.C. 482, 666 S.E.2d 743 (2008). A judge could be removed from office and convicted of criminal offenses for taking bribes but maintain his license to practice law. This is simply untenable. The protection of the public, the profession, and the administration of justice necessitates that the DHC have the jurisdiction to impose discipline on attorneys for violations of the Rules of Professional Conduct that occurs while the attorney holds judicial office.[6]

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[6] Appellant also suggests that that the jurisdiction of the Council and the DHC creates a separation of powers issue because the State Bar is an executive branch agency. (Appellant New Brief pp 17-8) Yet, Appellant's answer contended that the State Bar was "a creature of the legislative branch of government." (R p 48) The statutes do not specifically assign the State Bar to a particular branch of government. However, the State Bar performs a judicial branch function, the regulation of attorneys and the legal profession. The State Bar rules fall under the supervision of this Court. *See* N.C. Gen. Stat. § 84-21 (2016); 27 N.C.A.C. Ch 1,

D. THE JURISDICTION OF THE JUDICIAL STANDARDS COMMISSION IS NOT EXCLUSIVE.[7]

Appellant argues that the Supreme Court has exclusive jurisdiction over the conduct of judges through the procedures established in Chapter 7A, Article 30 of the North Carolina General Statutes. None of the authorities cited by Appellant, however, hold that this Court's jurisdiction over the censure and removal of judges precludes other legal consequences for the same conduct. Appellant cites *In re Martin*, 295 N.C. 291, 254 S.E.2d 766 (1978) and *In re Inquiry Concerning a Judge*, 356 N.C. 389, 584 S.E.2d 260 (2002) in support of his argument. These cases do not address the jurisdiction of the Council or the DHC over licensed attorneys or the jurisdiction of other tribunals or authorities over a person who also happens to be a judge. Instead, they concern the relationship between the Supreme

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Sub A. § 1403. Appeals from the DHC are direct to the appellate courts rather than to Superior Court as required of nearly all executive branch agencies. *See* N.C. Gen. Stat. § 84-28(h) (2016). The Court's Order granting review in this case invokes the supervisory jurisdiction of the Court. Any action of the Council or the DHC concerning discipline over a particular attorney does not raise a separation of powers issue. Judicial Standards is also a "creature" of the legislative branch as it was also established by statute. N.C. Gen. Stat. § 7A-375 (2016).

[7] Under the statutes, judicial discipline proceedings originate with JSC which reviews all complaints against judges from whatever source, investigates when required, conducts a hearing when required, and submits the record and a recommendation to this Court. N.C. Gen. Stat. § 7A-376 (2016). *See also* RULES OF THE JUDICIAL STANDARDS COMMISSION, Rules 9, 10, 11, 12, 24, and 25.

Court and JSC and the authority of the General Assembly to confer original jurisdiction upon the Supreme Court to censure or remove a judge or justice.

Appellant confuses the concept of original jurisdiction with the concept of exclusive jurisdiction. It is well-established that this Court has original jurisdiction to review findings of the JSC and to substitute its judgment for the judgment of JSC. *See e.g., In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978). Original jurisdiction is not the same thing as exclusive jurisdiction over all violations of law a judge might commit. A judge is a lawyer first. Judges have law licenses and must conform their conduct to the ethical precepts in the Rules of Professional Conduct. Neither the Constitution nor the General Statutes exempts a judge from fulfilling the duties established under the Rules of Professional Conduct. Neither the Constitution nor the General Statutes provides that a judge is subject only to discipline under the Code of Judicial Conduct to the exclusion of all other obligations as a citizen or lawyer.

Appellant argues that the statute granting jurisdiction over judicial discipline to JSC trumps the statute granting jurisdiction over attorney discipline to the Council. Appellant cites *Oxendine v. TWL, Inc.*, 184 N.C. App. 162, 645 S.E.2d 864 (2007) for the proposition that, in statutory interpretation, a "special" statute takes precedence over an overlapping general statute. This principle is inapplicable because the statutes do not overlap. The statutes establish entirely

different and separate types of proceedings, judicial and attorney discipline. The statutes require application of two different standards of conduct, with the Code of Judicial Conduct applicable to imposition of judicial discipline and the Rules of Professional Conduct applicable to imposition of attorney discipline. The interests to be protected are different and separate. Appellant is a member of two classes: judge and lawyer. The Council and the DHC are not exercising jurisdiction over him as a judge. The Council and the DHC are exercising jurisdiction over him as a member of the class over which the Council and the DHC are authorized to act, a licensed attorney.

Appellant also argues that the DHC has no jurisdiction over him because the conduct at issue was his conduct as a judge. As the facts show, Appellant was not acting in any legitimate judicial role. Appellant faces professional discipline because, while a licensed attorney, he utilized the trappings of judicial office to intimidate people in order to pursue a purely personal matter when there was no legal matter pending before him in the courts and he therefore had no authority to exercise the powers of judicial office. Appellant had no authority or jurisdiction to issue orders demanding personnel records from the town. He had no authority to summon government officials to his chambers to harangue them over his purely personal agenda. He had no authority to threaten to remove government officials from office if they did not comply with his demands for retribution. None of the

acts in issue was committed in the appropriate course and scope of Appellant's role as a judge. Yet they were prejudicial to the administration of justice in the courts of this State, in violation of Appellant's duties as a licensed attorney, and they warrant attorney discipline.[8] The DHC has issued discipline to other lawyers who took actions purportedly under color of authority when in fact the law provided no such authority, including the following: *State Bar v. Michael Crowe*, 16 DHC 9 (active suspension for lawyer who issuing subpoenas under Rule of Civil Procedure 45 to take depositions of witnesses in criminal case without notice to opposing counsel); *State Bar v. Janice P. Paul*, 12 DHC 33 (stayed suspension of assistant district attorney for instructing law enforcement to initiate baseless charges to achieve a goal that was not permitted by law); and *In re: John Constantinou*, 93G1212 (reprimand for conduct including obtaining medical records for an improper purpose and through improper means.)[9]

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[8] A record of attorney discipline would be easily accessible to the public looking at an attorney's record if a judge resumes practicing law after leaving the bench. Members of the public might not be aware of the attorney's term as a judge.

[9] Each of the Orders of Discipline is available on the State Bar's website, www.ncbar.gov.

E. THE COUNCIL AND THE DHC'S JURISDICTION OVER ATTORNEY DISCIPLINE DOES NOT INTERFERE WITH THE PROCESSES OF THE JUDICIAL STANDARDS COMMISSION.

Appellant argues that if the Council and the DHC exercise jurisdiction over a lawyer who is also a judge, it will impair the ability of JSC to reach a resolution by consent. This argument was rendered moot when the legislature divested JSC of authority to issue public reprimands without review by the Court. N.C. Gen. Stat. § 7A-376(a)(2016). Now, JSC and a judge may stipulate to any or all of the allegations and propose a recommended disposition to this Court. This Court reviews the stipulations and recommended disposition, as it does any other judicial discipline case before it, but the ultimate disposition is entirely the decision of this Court. RULES OF THE JUDICIAL STANDARDS COMMISSION, Rule 22. A judge who engaged in wrongful conduct that might bear scrutiny by other interested agencies, such as the Council, law enforcement, or the IRS, cannot rely on such stipulations as resolving all of his potential legal consequences. For instance, stipulation to judicial discipline will certainly not preclude criminal prosecution in cases of bribery or perjury. It is common for parties with potential liability in different venues to resolve issues with each agency.

In its *amicus* brief, JSC adds that allowing the State Bar to exercise jurisdiction over judges might create confusion in the public concerning where complaints against judges should be filed. This speculative concern does not

invalidate the jurisdiction conferred upon the Council and the DHC by the General Assembly. In addition, there are other agencies that have concurrent authority to review complaints against judges, including the North Carolina Ethics Commission with no apparent confusion resulting. *See* N.C. Gen. Stat. § 138A-12 (2016).[10] The fact that multiple agencies may have jurisdiction to address the conduct of an individual serving as judge does not divest any agency of such jurisdiction.

II. THE DHC IS NOT ESTOPPED FROM EXERCISING JURISDICTION OVER THIS PROCEEDING AND THE STATE BAR IS NOT BARRED FROM PROCEEDING BECAUSE OF *RES JUDICATA* OR COLLATERAL ESTOPPEL.

The State Bar objects to Appellant raising this issue as beyond the scope of the order granting *certiorari*. The Court's order granting *certiorari* limited the issue to the question of jurisdiction of the Council and the DHC. This appeal does not concern other matters that have arisen before the DHC as they do not go to the jurisdictional question. The General Assembly has prescribed an appellate procedure following a judgment entered by the DHC. *See* N.C. Gen. Stat. § 84-28(h). Furthermore, Section 7A-410 provides additional opportunities for judicial review in the event Appellant's license is suspended or he is disbarred. The

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[10] Judicial Standards also states that its investigations are confidential. Grievance investigations by the State Bar are also confidential until the issuance of public discipline or the filing of a complaint with the DHC. N.C. Gen. Stat. § 84-32.1(2016); 27 N.C.A.C. Ch 1, Sub B § .0129. The confidentiality of investigations is similar and certainly does not provide a reason to revoke the jurisdiction of the State Bar to discipline its members.

remaining issues raised by Appellant in his New Brief may be appropriately considered in a future appeal under one of these routes, but should not be heard by this Court at this time.

Without waiving these objections, the State Bar will respond briefly to Appellant's other arguments as follows.

A. THE DHC IS NOT ESTOPPED UNDER THE DOCTRINES OF *RES JUDICATA* OR COLLATERAL ESTOPPEL.

Appellant's analysis of the application of *res judicata* and collateral estoppel is fundamentally flawed. The DHC is a hearing tribunal exercising quasi-judicial jurisdiction over attorney disciplinary proceedings. The DHC is not a party to a DHC proceeding. The doctrines of *res judicata* and collateral estoppel apply only to litigants, not tribunals.[11] Appellant cites no authority for the erroneous assertion that *res judicata* or collateral estoppel divests the DHC of jurisdiction.

In granting the State Bar's motion for summary judgment, the DHC ruled that Appellant is precluded from challenging the facts established by the JSC Public Reprimand. Contrary to Appellant's assertion in his new brief, the DHC did

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[11] While some cases concerning collateral estoppel indicate that the tribunal is bound, that short-hand description fails to reflect a crucial requirement for the doctrine's applicability. Collateral estoppel cannot apply unless the party against whom it is raised can be bound by the prior determination at issue. The doctrine of collateral estoppel applies to parties, and cannot operate otherwise to bind a tribunal. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004)

not rule that the DHC was bound in any way. Instead, it granted summary judgment based on the fact that Appellant was bound by the facts to which he assented and that were found in the JSC's final judgment to which he was a party.[12] (Supp. R pp 188-189) The DHC's denial of Appellant's defenses of *res judicata* and collateral estoppel does not conflict with the DHC's grant of summary judgment on a determination that Appellant is collaterally estopped from challenging the facts established by the JSC Public Reprimand. The State Bar is not bound by the determination of JSC because the State Bar was not a party in the JSC proceeding and the issues determined in the JSC proceeding differ from the issues in the DHC proceeding. While the doctrines of *res judicata* and collateral estoppel are related, they are distinct and their applications require different analyses.

B. THE STATE BAR IS NOT ESTOPPED UNDER THE DOCTRINE OF *RES JUDICATA* FROM PURSUING DISCIPLINE FOR APPELLANT'S VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT.

While the doctrines of *res judicata* and collateral estoppel are related, they are distinct and their applications require different analyses.

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[12] Even if the DHC had not determined that Appellant was bound because of collateral estoppel, by consenting to the Public Reprimand, Appellant admitted the facts as true in a written statement that could be used as an evidentiary basis for summary judgment. N.C. Gen. Stat. § 8C-1, Rule 801(d) (2016).

Under the doctrine of *res judicata*, 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 those in privity with a party. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). *Res judicata* is often called "claim preclusion." A party raising *res judicata* "must show (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) identity of parties or their privities in the two suits." *Gregory v. Penland*, 179 N.C. App. 505, 510, 634 S.E.2d 625, 629 (2006) (internal quotation and citation omitted). Appellant cannot satisfy the second and third requirements for *res judicata*.

The cause of action before the JSC was judicial discipline for violations of Canons 1, 2A, and 3A(3) of the Code of Judicial Conduct. Canon 1 provides that "[a] judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved." N.C. Code Judicial Conduct, Canon 1. Canon 2A provides that "[a] judge should respect and comply with the law and should conduct himself/ herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." N.C. Code Judicial Conduct, Canon 2A. Canon 3A(3) provides that [a] judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers

and others with whom the judge deals in the judge's official capacity, and should require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control." N.C. Code Judicial Conduct, Canon 3A.

The cause of action before the DHC is professional discipline for violation of Rule 8.4(d) of the Rules of Professional Conduct, which provides that "it is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice." N.C. R. Prof. C., Rule 8.4(d). These codes of conduct, and the specific rules considered by the JSC and the DHC, are different in the two proceedings. JSC could not have considered the question of whether Appellant violated Rule 8.4(d), because its jurisdiction is limited to consideration of judicial discipline. N.C. Gen. Stat. § 7A-376. Appellant's contention that *Matter of Mitchell,* 88 N.C. App. 602, 604, 364 S.E.2d 177, 179 (1988), precludes the DHC case is simply wrong. In *Mitchell,* a police officer faced two separate disciplinary proceedings before the same entity and was twice suspended for violating the same departmental residency requirement based on the same occurrence.

Appellant concedes that the parties are not the same, but argues that the State Bar is in privity with JSC. "The prevailing definition that has emerged from our cases is that 'privity' for purposes of res judicata and collateral estoppel

'denotes a mutual or successive relationship to the same rights of property.'" *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 416-17, 474 S.E.2d 127, 130 (1996) (quoting *Settle v. Beasley*, 309 N.C. 616, 620, 308 S.E.2d 288, 290 (1983)). "In general, privity involves a person so identified in interest with another that he represents the same legal right." *Id.* The Court further noted:

> Privity is not established, however, from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action.

Id. (emphasis added)

All state agencies are not in privity with each other. To be in privity, the parties must share a legal interest. *Masters v. Dunstan*, 256 N.C. 520, 124 S.E.2d 574 (1962). There must be an identity of rights and interests. *Id.* As stated in *Masters*, "[o]ne is 'privy,' when the term is applied to a judgment or decree, whose interest has been legally represented at the trial." *Id.* (emphasis in original). For example, in *Settle* the court found no privity between a mother-plaintiff in an action brought by a state agency seeking to recoup child support payments and a child-plaintiff in a subsequent action seeking support in his own right, because the

interests of the two plaintiffs were separate and distinct. *Settle*, 309 N.C. at 619, 308 S.E.2d at 290.[13]

JSC and the State Bar are distinct entities. They are created under different statutes, with legal rights and authority coming from different statutes and regulations. They were created for distinct purposes, and apply different standards to address different harms. The fact that in certain circumstances, such as this case, the two entities may be interested in the same facts, does not constitute privity. To the contrary, the lack of privity between JSC and the State Bar is illustrated by the differing legal interests outlined in the *amicus* brief filed by JSC. Appellant cannot credibly argue that he is not collaterally estopped from the findings by JSC because of the lack of mutuality and then argue that the State Bar and JSC are in privity for purposes of *res judicata.*

Nor does the State Bar Council's role in appointing four of thirteen members of JSC establish privity. The members appointed by the Council have no different or more power than the other members. JSC members appointed by the Council are not representatives of the State Bar; the Council does not direct their actions

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[13] *Contra, State By and Through New Bern Child Support Agency, ex rel. Lewis v. Lewis*, 311 N.C. 727, 319 S.E.2d 145 (1984) (privity was found where the state instituted a criminal action for nonsupport and later a civil action through the New Bern Child Support Agency, because the state was pursuing its same financial interest in securing support payments by a parent in both actions.) The State Bar is not pursuing the same interest as Judicial Standards with respect to Appellant.

and they do not report to the Council. They do not advocate any position on behalf of the State Bar in JSC proceedings. The State Bar had no control over the JSC proceedings by virtue of these appointments. Appellant's brief cites no authority to the contrary. These appointees exercise their independent judgment in applying the Code of Judicial Conduct to the matters before them. The State Bar has no role in and is not represented in JSC proceedings.

C. THE STATE BAR IS NOT ESTOPPED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL FROM PURSUING DISCIPLINE FOR APPELLANT'S VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT.

Under the doctrine of collateral estoppel, "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre*, 358 N.C. at 15, 591 S.E.2d at 880 (citations omitted). Appellant argues that the State Bar is collaterally estopped from reviewing his misconduct as a violation of the Rules of Professional Conduct because it purportedly participated in the JSC proceeding by appointing members to the JSC. This argument ignores the requirement that the party against whom estoppel is asserted must have enjoyed a full and fair opportunity to litigate the issue in the earlier proceeding. The case of *Vann v. N.C. State Bar*, 79 N.C. App. 166, 339 S.E.2d 95 (1986), in which Vann was a party to both proceedings, does not apply. The State Bar was not a party to

the JSC proceeding and had no opportunity to litigate or even be heard on any issue. JSC did not address the only question in issue in the DHC case, whether Appellant's conduct violated the Rules of Professional Conduct. The State Bar cannot be collaterally estopped.

D. MUTUALITY OF PARTIES IS NOT REQUIRED FOR APPLICATION OF OFFENSIVE COLLATERAL ESTOPPEL.

Appellant argues that the granting of summary judgment was based on an improper application of offensive collateral estoppel because there is no mutuality of parties as required in this Court's holding in *Sawyers v. Farm Bureau Ins. of N.C.*, 360 N.C. 158, 622 S.E.2d 490 (2005). In *Sawyers*, this Court reversed the Court of Appeals in a *per curiam* decision based upon the dissent by Judge Steelman. Judge Steelman's dissent was not based on collateral estoppel; he made a passing reference to offensive collateral estoppel requiring mutuality of parties while he was discussing the doctrine of *res judicata.* The case cited by Judge Steelman, *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986), did not state that mutuality of parties was required for offensive collateral estoppel. Instead, it cited with approval the national trend away from requiring mutuality of parties for either offensive or defensive use of collateral estoppel. The court in that case was considering defensive use of collateral estoppel and, thus, reached no holding on offensive use of collateral estoppel. As such, Judge Steelman's comment about offensive use of collateral estoppel was

mere dicta. *See Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 328 S.E.2d 274 (1985).

The Court of Appeals has held that mutuality is not required in North Carolina for offensive use of collateral estoppel. *Rymer v Estate of Sorrells*, 127 N.C. App 266, 488 S.E.2d 838 (1997). *Sawyers* did not overrule this decision. This Court has not yet considered the question of mutuality for offensive use of collateral estoppel.

E. THE STATE BAR IS NOT ESTOPPED UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL FROM PURSUING DISCIPLINE FOR APPELLANT'S VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT.

The doctrine of judicial estoppel prevents a party from taking inconsistent positions in the same or related litigation. *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (internal quotation and citation omitted). As stated in *N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 663 S.E.2d 1 (2008) rev. denied, 362 N.C. 682, 670 S.E.2d 234 (2008):

> Judicial estoppel requires proof of three elements: (1) the party's subsequent position is clearly inconsistent with an earlier position; (2) the earlier position was accepted by a court, thus creating the potential for judicial inconsistencies; and (3) the change in positions creates an unfair advantage or unfair detriment.

Id., 189 N.C. App. at 328, 663 S.E.2d 7 (citing *Whitacre*, 358 N.C. at 29, 591 S.E.2d at 888-89). The common factor in cases discussing the doctrine is that the

prior statement of a party to a judicial proceeding must be inconsistent with a subsequent statement by the same party in a judicial proceeding. *Whitacre*, 358 N.C. at 29 n.7, 591 S.E.2d at 887 n.7 (noting that for the doctrine to apply, there must be "'true inconsistency' such that the two statements 'cannot be reconciled;' statements that are "directly inconsistent;" statements of a nature that the "'truth of one position must necessarily preclude the truth of the other position'"). The positions of a party that may justify application of judicial estoppel are positions taken in judicial proceedings. *Id.*, 358 N.C. at 22-30, 591 S.E.2d at 884-89. Appellant has identified no position taken by the State Bar previously in litigation or otherwise before a tribunal that is inconsistent with its position in the DHC

Appellant's invocation of Rule 8.3 of the North Carolina Rules of Professional Conduct is unavailing. Rule 8.3(a) provides that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter." Rule 8.3(b) provides that "[a] lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the North Carolina Judicial Standards Commission or other appropriate authority." N.C. R. Prof. C., Rule 8.3. Thus,

Rule 8.3(a) requires a lawyer to report violations of the Rules of Professional Conduct to the State Bar, and Rule 8.3(b) requires a lawyer to report violations of the Code of Judicial Conduct to JSC. These facts support the State Bar's exercise of jurisdiction over Appellant for violations of the Rules of Professional Conduct.

Appellant's reliance upon opinions of the Ethics Committee of the State Bar is equally misplaced. The opinions do not state that the State Bar will not discipline a lawyer who is a judge for violations of the Rules of Professional Conduct. The opinions state that the Ethics Committee does not issue opinions on whether conduct violates the Code of Judicial Conduct. [14] The State Bar issues ethics opinions as a service, to assist and provide guidance to attorneys on ethical obligations and on the application of and compliance with the Rules of Professional Conduct. 27 N.C.A.C. Ch 1, Sub D, § .0100 *et seq* (Procedures for Ruling on Questions of Legal Ethics). There is no opinion of the Ethics Committee declaring that Appellant's conduct does not violate the Rules of Professional Conduct.

The purported positions Appellant draws from the ethics opinions and Rule 8.3 of the Rules of Professional Conduct are neither positions taken in prior litigation nor positions concerning the State Bar's statutory disciplinary jurisdiction

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[14] The questions presented on judges in both opinions cited by Appellant dealt with judicial rulings on matters properly before the court.

inconsistent with the position taken by the State Bar in this case. Accordingly, Appellant has failed to establish that the State Bar is estopped under the doctrine of judicial estoppel to bring this disciplinary case.

III. APPELLANT'S DUE PROCESS RIGHTS HAVE NOT BEEN VIOLATED BY THE STATE BAR OR THE DHC.

The State Bar objects to Appellant's raising this issue in this proceeding because it is outside the scope of the Court's order granting *certiorari.* The Court's order granting *certiorari* limited the issue to the question of jurisdiction of the Council and the DHC. Appellant's argument is partially based on matters about which the State Bar has not been able to respond and the DHC has not considered because of the Court's stay of the proceedings below. These matters may be addressed on appeal of a final judgment from the DHC. The State Bar particularly objects to any characterization by Appellant that the State Bar obtained unlawful access to the JSC files. The materials in question were voluntarily provided to the State Bar by employees of JSC. Appellant's argument should be disregarded in its entirety.[15]

Appellant first claims that the State Bar unlawfully obtained the JSC's file from its proceeding involving him. Appellant's claim is completely misplaced and has no basis in fact or law. He asserts that merely because he did not consent to its

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[15] Appellant cites no authority to support his arguments about any of the purported due process rights.

release, the State Bar obtained the document through illegitimate means. JSC provided the file to the State Bar pursuant to the provisions on N.C. Gen. Stat. §7A-377(a6), which provides that the record and the pleadings are not confidential after the issuance of a public reprimand, and Rule 6(a)(1)(C) of the Rules of the Judicial Standards Commission, which allows JSC to release its file to other state agencies "to protect the public or the administration of justice." The State Bar did not surreptitiously or unlawfully obtain the file; it was provided voluntarily by JSC. Appellant's consent was not required.

Appellant's assertions that his due process rights are being violated due to systemic bias have no foundation in fact or in law. He asserts that the DHC is biased against him because it decided his motion to dismiss without oral argument. Ruling on pretrial motions without oral argument is specifically contemplated by the applicable administrative rules ("[a]ny pretrial motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing panel." 27 N.C.A.C. Ch 1, Sub B § .0114(j)). Appellant was on notice from the above cited rule that his motion would be decided upon the parties' written submissions, and oral argument would only be allowed in the discretion of the chairperson of the hearing panel. Appellant cannot now complain when his motion was decided in accordance with

the DHC's established procedures. Certainly, such consideration by the DHC in accordance with its procedural rule is not evidence of any bias.

Appellant also complains because the town attorney for Kill Devil Hills, Steven D. Michael, served as chair of the DHC with the power to appoint the members of the Hearing Panel.[16] In his capacity as chair of the DHC, Mr. Michael would typically appoint DHC members to the hearing panel for a case. In this case, however, Mr. Michael did not perform that duty. Instead, as the record plainly shows, Vice Chair Fred M. Morelock appointed the members to the hearing panel of this case. (R pp 16-7) There is no evidence that Mr. Michael participated in this proceeding in any way.

Appellant asserts that the DHC Hearing Panel is biased because it has denied all of his motions. Appellant has presented nothing to suggest that his motions were denied because of bias rather than because they lacked merit.

Finally, Appellant contends that one potential witness died and other witnesses are biased against him. These are issues to be addressed by the chair of the hearing panel when the case is called for trial. None of these forms a basis for concluding that the DHC lacks jurisdiction to hold the proceeding.

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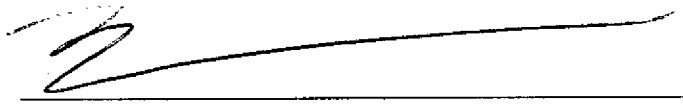
[16] Mr. Michael's term on the DHC ended on 30 June 2016.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee, the North Carolina State Bar, respectfully requests the Supreme Court of North Carolina hold that the Council and the DHC have jurisdiction to discipline an attorney serving as judge, even if that attorney has been disciplined by the JSC for the same underlying conduct and dissolve the stay of the proceedings before the Disciplinary Hearing Commission. To the extent the Court undertakes review of the DHC's order denying Appellant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Plaintiff-Appellee respectfully requests the Court affirm the Order of the Hearing Committee of the Disciplinary Hearing Commission denying Appellant's Motion to Dismiss for lack of Subject Matter jurisdiction and dissolve the stay of the proceedings before the Disciplinary Hearing Commission.

This the 15th day of August, 2016

Plaintiff –Appellee The North Carolina State Bar



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiff-Appellee's New Brief was served upon the Appellant by depositing a copy of the same in the U.S. Mail in a postage prepaid envelope addressed to the Appellant as follows:

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