

## **27 NCAC 01B .0122      DISABILITY**

(a) Transfer by Secretary where Member Judicially Declared Incompetent. Where a member of the North Carolina State Bar has been judicially declared incapacitated, incompetent, or mentally ill by a North Carolina court or by a court of any other jurisdiction, the secretary, upon proper proof of such declaration, will enter an order transferring the member to disability inactive status effective immediately and for an indefinite period until further order of the Disciplinary Hearing Commission. A copy of the order transferring the member to disability inactive status will be served upon the member, the member's guardian, or the director of any institution to which the member is committed.

(b) Transfer to Disability Inactive Status by Consent. The chairperson of the Grievance Committee may transfer a member to disability inactive status upon consent of the member and the counsel.

### **(c) Initiation of Disability Proceeding**

#### **(1) Disability Proceeding Initiated by the North Carolina State Bar**

(A) Evidence a Member has Become Disabled. When the North Carolina State Bar obtains evidence that a member has become disabled, the Grievance Committee will conduct an inquiry which substantially complies with the procedures set forth in Rule .0113 (a)-(h) of this subchapter. The Grievance Committee will determine whether there is probable cause to believe that the member is disabled within the meaning of Rule .0103(19) of this subchapter. If the Grievance Committee finds probable cause, the counsel will file with the commission a complaint in the name of the North Carolina State Bar, signed by the chairperson of the Grievance Committee, alleging disability. The chairperson of the commission shall appoint a hearing panel to determine whether the member is disabled.

(B) Disability Proceeding Initiated While Disciplinary Proceeding is Pending. If, during the pendency of a disciplinary proceeding, the counsel receives evidence constituting probable cause to believe the defendant is disabled within the meaning of Rule .0103(19) of this subchapter, the chairperson of the Grievance Committee may authorize the counsel to file a motion seeking a determination that the defendant is disabled and seeking the defendant's transfer to disability inactive status. The hearing panel appointed to hear the disciplinary proceeding will hear the disability proceeding.

(C) Pleading in the Alternative. When the Grievance Committee has found probable cause to believe a member has committed professional misconduct and the Grievance Committee or the chairperson of the Grievance Committee has found probable cause to believe the member is disabled, the State Bar may file a complaint seeking, in the alternative, the imposition of professional discipline for professional misconduct or a determination that the defendant is disabled.

(2) Initiated by Hearing Panel During Disciplinary Proceeding. If, during the pendency of a disciplinary proceeding, a majority of the members of the hearing panel find probable cause to believe that the defendant is disabled, the panel will, on its own motion, enter an order staying the disciplinary proceeding until the question of disability can be determined. The hearing panel will instruct the Office of Counsel of the State Bar to file a complaint alleging disability. The chairperson of the commission will appoint a new hearing panel to hear the disability proceeding. If the new panel does not find the defendant disabled, the disciplinary proceeding will resume before the original hearing panel.

(3) Disability Proceeding where Defendant Alleges Disability in Disciplinary Proceeding. If, during the course of a disciplinary proceeding, the defendant contends that he or she is disabled within the meaning of Rule .0103(19) of this subchapter, the defendant will be immediately transferred to disability inactive status pending conclusion of a disability hearing. The disciplinary proceeding will be stayed pending conclusion of the disability hearing. The hearing panel appointed to hear the disciplinary proceeding will hear the disability proceeding.

### **(d) Disability Hearings**

#### **(1) Burden of Proof**

(A) In any disability proceeding initiated by the State Bar or by the commission, the State Bar bears the burden of proving the defendant's disability by clear, cogent, and convincing evidence.

(B) In any disability proceeding initiated by the defendant, the defendant bears the burden of proving the defendant's disability by clear, cogent, and convincing evidence.

- (2) Procedure. The disability hearing will be conducted in the same manner as a disciplinary proceeding under Rule .0114 to .0118 of this subchapter. The North Carolina Rules of Civil Procedure and the North Carolina Rules of Evidence apply, unless a different or more specific procedure is specified in these rules. The hearing will be open to the public.
  - (3) Medical Examination. The hearing panel may require the member to undergo psychiatric, physical, or other medical examination or testing by qualified medical experts selected or approved by the hearing panel.
  - (4) Appointment of Counsel. The hearing panel may appoint a lawyer to represent the defendant in a disability proceeding if the hearing panel concludes that justice so requires.
  - (5) Order
    - (A) When Disability is Proven. If the hearing panel finds that the defendant is disabled, the panel will enter an order continuing the defendant's disability inactive status or transferring the defendant to disability inactive status. An order transferring the defendant to disability inactive status is effective when it is entered. A copy of the order shall be served upon the defendant or the defendant's guardian or lawyer of record.
    - (B) When Disability is Not Proven. When the hearing panel finds that it has not been proven by clear, cogent, and convincing evidence that the defendant is disabled, the hearing panel shall enter an order so finding. If the defendant had been transferred to disability inactive status pursuant to paragraph (c)(3) of this rule, the order shall also terminate the defendant's disability inactive status.
- (e) Stay/Resumption of Pending Disciplinary Matters
- (1) Stay or Abatement. When a member is transferred to disability inactive status, any proceeding then pending before the Grievance Committee or the commission against the member shall be stayed or abated unless and until the member's disability inactive status is terminated.
  - (2) Preservation of Evidence. When a disciplinary proceeding against a member has been stayed because the member has been transferred to disability inactive status, the counsel may continue to investigate allegations of misconduct. The counsel may seek orders from the chairperson of the commission, or the chairperson of a hearing panel if one has been appointed, to preserve evidence of any alleged professional misconduct by the member, including orders which permit the taking of depositions. The chairperson of the commission, or the chairperson of a hearing panel if one has been appointed, may appoint counsel to represent the member when necessary to protect the interests of the member during the preservation of evidence.
  - (3) Termination of Disability Inactive Status. Upon termination of disability inactive status, all disciplinary proceedings pending against the member shall resume. The State Bar may immediately pursue any disciplinary proceedings that were pending when the member was transferred to disability inactive status and any allegations of professional misconduct that came to the State Bar's attention while the member was in disability inactive status. Any disciplinary proceeding pending before the commission that had been stayed shall be set for hearing by the chairperson of the commission.
- (f) Fees and Costs. The hearing panel may direct the member to pay the costs of the disability proceeding, including the cost of any medical examination and the fees of any lawyer appointed to represent the member.

*History Note:* Authority G.S. 84-23; 84-28(g); 84-28.1; 84-29; 84-30;  
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