

**27 NCAC 01B .0112 INVESTIGATIONS: INITIAL DETERMINATION; NOTICE AND RESPONSE;
COMMITTEE REFERRALS**

(a) Investigation Authority - Subject to the policy supervision of the council and the supervision of the chair of the Grievance Committee, the counsel, or other personnel under the authority of the counsel, will review the grievance, conduct any investigation the counsel determines to be necessary and appropriate, and submit to the chair a report detailing the facts established by the investigation and a recommendation for disposition of the grievance.

(b) Letter of Notice, Respondent's Response, and Request for Copy of Grievance - If the counsel serves a letter of notice upon the respondent, it will be served by certified mail or by personal service. If the respondent consents to accept service of the letter of notice by email, the letter of notice may be served by emailing the letter of notice to the respondent's email address of record with the State Bar membership department. The respondent's response to the letter of notice will be due within 15 days of service of the letter of notice upon the respondent. The response to the letter of notice shall include a full and fair disclosure of all facts and circumstances pertaining to the alleged misconduct. The response must be in writing and signed by the respondent.

(c) Provision of Written Grievance and Supporting Materials to Respondent. Upon request of the respondent, the counsel will provide to the respondent a copy of the written grievance and any supporting material the complainant submitted with the grievance; provided that, if the grievance was submitted by a judge or an attorney pursuant to the obligation to report professional misconduct in accordance with Rule of Professional Conduct 8.3, and if the judge or attorney requests anonymity pursuant to Rule .0111(d) of this Subchapter, the State Bar may redact the judge's or attorney's identifying information.

(d) Request for Copy of Respondent's Response – If the complainant requests it, and unless the respondent objects in writing, the counsel may provide to the complainant a copy of the respondent's response to the letter of notice.

(e) Subpoenas - For reasonable cause, the chair of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and to compel the production of documents, records, writings, communications, and other data of any kind that the chair determines are necessary or material to the inquiry. Each subpoena will be issued by the chair or by the secretary at the direction of the chair. The counsel, deputy counsel, investigator, or any members of the Grievance Committee designated by the chair may examine any such witness under oath or otherwise.

(f) Grievance Committee Action on Final Reports – The Grievance Committee will consider the grievance as soon as practicable after it receives the final report of the counsel, except as otherwise provided in these rules.

(g) Dismissal Upon Request of Complainant - The investigation into alleged misconduct of the respondent will not be abated by settlement or compromise of a dispute between the complainant and the respondent, or by the respondent's payment of restitution. The chair of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of the counsel where it appears that there is no probable cause to believe that the respondent violated the Rules of Professional Conduct.

(h) Referral to Law Office Management Training

(1) If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the committee may offer the respondent an opportunity to voluntarily participate in a law office management training program approved by the State Bar before the committee considers discipline.

If the respondent accepts the committee's offer to participate in the program, the respondent will be required to complete a course of training in law office management prescribed by the chair which may include a comprehensive site audit of the respondent's records and procedures as well as attendance at continuing legal education seminars. The respondent must participate personally in the program, must communicate directly with the program staff, and must provide required documentation directly to the program staff. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Law Office Management Training Program – If the respondent successfully completes the law office management training program, the committee may consider the respondent's successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to successfully complete the program as agreed, the grievance will be returned to the committee's agenda for consideration of imposition of discipline. The requirement that a respondent complete law office management training pursuant to this rule shall be in addition to the respondent's obligation to satisfy the minimum continuing legal education requirements contained in 27 NCAC 01D .1517.

(i) Referral to Lawyer Assistance Program

- (1) If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance use disorder or mental health condition, the committee may offer the respondent an opportunity to voluntarily participate in a rehabilitation program under the supervision of the Lawyer Assistance Program Board before the committee considers imposition of discipline.
If the respondent accepts the committee's offer to participate in a rehabilitation program, the respondent must provide the committee with a written acknowledgement of the referral on a form approved by the chair. The acknowledgement of the referral must include the respondent's waiver of any right of confidentiality that might otherwise exist to permit the Lawyer Assistance Program to provide the committee with the information necessary for the committee to determine whether the respondent is in compliance with the rehabilitation program. The respondent must participate personally in the program, must communicate directly with the program staff, and must provide required documentation directly to the program staff. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.
- (2) Completion of Rehabilitation Program – If the respondent successfully completes the rehabilitation program, the committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the Lawyer Assistance Program will report that failure to the counsel and the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(j) Referral to Trust Accounting Compliance Program

- (1) Voluntary Deferral to Trust Account Compliance Program. If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound trust accounting techniques, the committee may offer the respondent an opportunity to participate voluntarily in the Trust Account Compliance Program of the State Bar's Trust Account Compliance Department (the program) for up to two years before the committee considers imposition of discipline. Policies governing the criteria and procedures for eligibility to participate in the program, participation in, and completion of the program shall be established by the Council. If the respondent accepts the committee's offer to participate in the compliance program, the respondent must fully cooperate with the staff of the Trust Account Compliance Department and must produce to the staff all documentation and proof of compliance requested by the staff. The respondent must participate personally in the program, must communicate directly with the program staff, and must provide required documentation directly to the program staff. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.
- (2) Completion of Trust Account Compliance Program. If the respondent successfully completes the program, the committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent does not fully cooperate with the staff of the Trust Account Compliance Department and/or does not successfully complete the program, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.
- (3) Ineligible for Referral. The committee will not refer to the program:
 - (A) any respondent whose grievance file involves possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or any other alleged misconduct the committee determines to be inappropriate for referral;
 - (B) any respondent who has not cooperated fully and timely with the committee's investigation;
 - (C) any respondent who has already participated in the program as the result of the conduct in issue; or
 - (D) any respondent who declined an offer to participate in the program before the conduct at issue was referred to the Grievance Committee.

- (4) Termination of Deferral Upon Discovery of Evidence of Serious Misconduct. If the Office of Counsel or the committee learns of evidence that a respondent who is participating in the program may have misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, the chair will terminate the respondent's participation in the program and the disciplinary process will proceed.
- (5) Referral No Defense to Allegations of Professional Misconduct. Referral to the Trust Accounting Compliance Program is not a defense to allegations of professional misconduct and does not immunize a lawyer from the disciplinary consequences of such conduct.

(k) Individualized Deferrals Program

- (1) If, at any time before a finding of probable cause, the Grievance Committee, the Chair of the Grievance Committee, or a representative of the Grievance Committee Chair appointed by the Chair determines that, due to the nature of the respondent's alleged misconduct, the respondent should be offered a deferral agreement as an alternative to discipline, the Grievance Committee may defer disposition of the grievance and offer the respondent an opportunity to comply voluntarily with a deferral agreement. If the respondent rejects the offer, the grievance shall proceed as otherwise provided in this chapter.
- (2) The deferral agreement shall impose specific conditions the respondent must satisfy during a specified period not to exceed one year. For good cause shown, the committee may extend the time during which compliance with the conditions is required. The respondent shall collaborate with the Office of Counsel in development of conditions to include in the deferral agreement that address the underlying misconduct. However, the Grievance Committee shall determine all conditions to be included in the deferral agreement. Deferral agreement conditions may include, but are not limited to, the following:
 - (A) Appointment of a practice monitor for the respondent's practice;
 - (B) Successful completion of specified continuing legal education courses, or other courses of study;
 - (C) Successful completion of an educational or other consulting program including, but not limited to, a program offered by the respondent's malpractice insurance carrier;
 - (D) Attainment of a passing score on the Multistate Professional Responsibility Exam;
 - (E) Restitution, if practicable;
 - (F) Written statement of reconciliation or apology to the court, client, or other person or institution adversely affected by the respondent's conduct.
- (3) If the respondent accepts the Grievance Committee's offer to enter into a deferral agreement, the terms of the deferral agreement shall be set forth in writing. The written deferral agreement shall include the following:
 - (A) The respondent's admission to the misconduct at issue in the grievance investigation;
 - (B) The respondent's agreement that, should the respondent fail to comply with the deferral agreement, the respondent's admission to the misconduct at issue in the grievance investigation may be considered by the Grievance Committee and/or offered into evidence without objection in any subsequent proceeding arising from the underlying grievance;
 - (C) A statement by the respondent that the respondent is participating in the deferral agreement freely and voluntarily and understands the nature and consequences of participation;
 - (D) A statement that the respondent accepts responsibility for the costs of the deferral conditions;
 - (E) An agreement by the respondent not to violate the Rules of Professional Conduct of this or any other jurisdiction while the deferral agreement is in effect;
 - (F) A statement specifying the general purpose of the deferral agreement;
 - (G) A specific and complete list of all conditions of the deferral agreement;
 - (H) A description of how the respondent's compliance with the deferral agreement's conditions will be monitored;
 - (I) The date by which the conditions of the deferral agreement must be completed;
 - (J) A description of how the respondent will provide evidence of the successful completion of the deferral agreement;
 - (K) The respondent's signature.

- (4) A respondent is eligible to participate in a deferral agreement as an alternative to discipline when there is little likelihood of harm to the public, the respondent's participation in the deferral agreement is likely to benefit the respondent, and the deferral agreement conditions are likely to accomplish the goals of the deferral agreement. A respondent is not eligible for a deferral agreement as an alternative to discipline if any of the following circumstances are present:
- (A) The respondent's alleged misconduct, standing alone, is likely to result in discipline that is more severe than a reprimand;
 - (B) The respondent's alleged misconduct is part of a pattern of misconduct that is unlikely to be changed by a deferral;
 - (C) The respondent's alleged misconduct is of the same nature as misconduct for which the respondent has been previously disciplined;
 - (D) The respondent's alleged misconduct involves dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer;
 - (E) The respondent's alleged misconduct resulted in substantial harm to a client or other person or entity;
 - (F) The respondent's alleged misconduct involves misappropriation of funds or other property;
 - (G) The respondent's alleged misconduct involves a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
 - (H) The respondent's alleged misconduct involves sexual activity with a client, sexual communications with a client, or request, requirement, or demand for sexual activity or sexual communications with a client as a condition of any professional representation.
- (5) The respondent shall pay all costs incurred in connection with completing the conditions of the deferral agreement.
- (6) The respondent must participate personally in the deferral program, must communicate directly with the deferral program staff, and must provide required documentation directly to the deferral program staff.
- (7) Upon the respondent's successful completion of the conditions in the deferral agreement, the Grievance Committee, the Chair of the Grievance Committee, or a representative of the Grievance Committee Chair appointed by the Chair shall dismiss the underlying grievance. If the grievance is dismissed, the respondent shall not be considered to have been disciplined; however, the respondent's participation in a deferral agreement as an alternative to discipline may be considered by the Grievance Committee in reviewing any subsequent grievance and offered into evidence without objection in any subsequent disciplinary proceeding within three years after the expiration of the deferral agreement.
- (8) If the respondent fails to comply with the terms of the deferral agreement, the Office of Counsel shall notify the respondent of the apparent noncompliance and shall provide the respondent an opportunity to respond to those allegations. The respondent shall be given an opportunity to respond to the allegations in the same manner as prescribed by Rule .0112(b) of this subchapter. If the Grievance Committee determines that the respondent has failed to comply with the deferral agreement, the Grievance Committee may modify the deferral agreement or terminate the deferral agreement and proceed with the matter as otherwise provided in this chapter.

*History Note: Authority G.S. 84-23;
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