



State Supreme Court Rules that the State Bar Can't Discipline a Sitting Judge for Judicial Misconduct

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Judges are lawyers, and lawyers are subject to discipline by the State Bar. Does that mean that judges are subject to discipline by the State Bar? Generally not, according to a recent ruling by the Supreme Court of North Carolina.

Background. The case is [N.C. State Bar v. Tillett](#). It began when police detained the son of a superior court judge. The judge subsequently launched an investigation into what he viewed as misconduct by the police department, city officials, and the district attorney's office. The details of the judge's conduct are not important for present purposes. It is enough to know that the Judicial Standards Commission ultimately issued a public reprimand to the judge, available [here](#), finding that he had been "overly aggressive" in pursuing a "public feud" and had taken "actions that fell outside of the legitimate exercise of the powers of his office."

State Bar proceedings. Two years after the reprimand, the State Bar initiated disciplinary proceedings against the judge. The State Bar alleged that the judge's conduct during the feud violated Rule 8.4 of the North Carolina Rules of Professional Conduct, which prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice. The judge moved to dismiss the complaint, and when that motion was denied, asked the state supreme court to intervene.

Ruling. The court agreed to review the matter. It held that "while a judge remains in office, only this Court or the [Judicial Standards Commission] may impose discipline for his or her conduct as a judge." The lead opinion notes that the Judicial Standards Commission was created in the early 1970s based on the understanding that the State Bar's disciplinary procedures did not apply to judges. There was, therefore, a lack of an appropriate formal means to discipline judges short of removal, and the Judicial Standards Commission was "intended to fill that void" and to be the exclusive means of disciplining judges while in office for conduct that occurs during their judicial service.

Chief Justice Martin's concurring opinion supports "the wisdom of the overall scheme that the General Assembly has prescribed." The Chief Justice argues that precluding the State Bar from disciplining sitting judges "preserves judicial independence" and avoids putting judges at the mercy of the lawyers who appear before them.

Justice Ervin, joined by Justices Hudson and Beasley, concurred in the result. These Justices concluded that the State Bar and the Judicial Standards Commission might have concurrent disciplinary jurisdiction in some cases, but not where the root of the issue was misconduct as a judge that would not violate the judge's duties and responsibilities as an attorney.

Comments. Many variations on the issue presented in this case are possible, and the opinion helps to address at least some of them:

- May the State Bar take action against a sitting judge for judicial misconduct if the Judicial Standards Commission, for whatever reason, fails to discipline the judge? I don't think so, in light of the court's statement that "only" the court or the Judicial Standards Commission may discipline a sitting judge. In other words, the problem in *Tillett* was that the State Bar lacked jurisdiction, not that the State Bar was piling on after the Judicial

Standards Commission had already disciplined the judge.

- May the State Bar act if the complaint is based on conduct by the judge prior to his or her elevation to the bench? I think so, because it would not be the judge's conduct "as a judge" that would be at issue. That is what happened in *N.C. State Bar v. Ethridge*, 188 N.C. App. 653 (2008) (affirming the disbarment of a judge for defrauding an elderly client before taking the bench). Apparently, a majority of states -- though not all -- allow bar discipline in such a scenario. See Andrew E. Brashier, *Ex Parte Alabama State Bar: Who Has Jurisdiction When Judges Act Unethically As Lawyers?*, 33 Am. J. Trial Advoc. 187 (2009).
- May the State Bar act based on judicial misconduct, so long as it waits until after the judge resigns, retires, or is not re-elected? I don't know. That is what happened in *N.C. State Bar v. Badgett*, 212 N.C. App. 420 (2011) (unpublished) (affirming the disbarment of former judge based on misconduct as a judge). The lead opinion in *Tillett* notes that *Badgett* is "not binding" but doesn't directly address whether the outcome in *Badgett* was proper. One could argue that if the state supreme court and the Judicial Standards Commission have exclusive jurisdiction over judicial misconduct, the State Bar shouldn't gain jurisdiction just because a judge leaves the bench. On the other hand, one could argue that a person should not be allowed to practice law after demonstrating his or her unfitness to do so while serving as a judge, nor should a person be able to evade punishment for judicial misconduct by stepping down before the Judicial Standards Commission is able to act. The *Tillett* court's inclusion of the phrase "while a judge remains in office" at least leaves the door open to the latter interpretation.