

Judicial and Lawyer Disciplinary Procedures in South Carolina

The Supreme Court of South Carolina's Office of Disciplinary Counsel's Statement on Alleged Lawyer or Judicial Misconduct and the Disciplinary Process

The Supreme Court of South Carolina strives to ensure that lawyers and judges in South Carolina conduct themselves with highest ethical standards established by the rules governing lawyer and judicial conduct in South Carolina. As part of that effort, the Supreme Court created the Office of Disciplinary Counsel (ODC) to independently review, investigate, and prosecute allegations of lawyer misconduct. The Court has also created the Commissions on Lawyer or Judicial Conduct to preside over those prosecutions and make recommendations to the Court.

ODC's review and investigation of any complaint is confidential. Yet the Court and ODC are often asked about whether or why the Court is, or is not, being more vocal or taking quicker action. Sometimes someone asks the Court or ODC to comment on the alleged misdeeds of a Bar member or a judge. Those requests may become even more pronounced when there are public reports involving allegations of some form of impropriety. To help address these concerns, we believe it is important to provide an explanation of our disciplinary process.

The Supreme Court will not tolerate unethical or illegal conduct by Bar members or members of the judiciary. The Court has a robust system for investigating and responding to reports of such conduct. The Court has created the Commission on Lawyer Conduct and the Commission on Judicial Conduct to preside over disciplinary matters. These Commissions review evidence that ODC and the lawyer or judge provide under procedures the Supreme Court established. The Commission then makes recommendations to the Supreme Court as to the disposition of each matter. The Court has the ultimate authority over lawyer or judicial discipline.

ODC commences disciplinary investigations when information comes to ODC's attention that, if true, would constitute misconduct under any of the ethical

rules applicable to lawyers or judges. In the vast majority of matters the information comes from a formal written complaint to ODC regarding the lawyer or judge, but not always. Sometimes ODC originates the complaint on its own based upon public information, such as news reports or the public records.

An ODC lawyer evaluates the information as if everything stated is true to see if the information constitutes misconduct. Sometimes ODC reaches out to the source for additional information to clarify what the complaint is about, and sometimes to establish who the complaint is about. ODC will dismiss the complaint without starting any investigation if: (1) the complaint is about someone who is not a lawyer or judge; (2) the complaint is about a lawyer or judge but the lawyer or judge is not licensed or acting in South Carolina; (3) the complaint challenges a result before a tribunal and is in the nature of an attempted appeal or is seeking post-conviction relief; (4) the complaint is a dispute over whether a lawyer has earned a fee that has been paid but is more appropriately handled by the South Carolina Bar's Resolution of Fee Disputes Board; or (5) the complaint contains no information which, if true, would be misconduct under South Carolina's ethics rules. ODC does not have jurisdiction to investigate any of these allegations.

If the information does not fall within one of those categories, and it meets the "if true" threshold, ODC acknowledges receipt of the complaint to the complainant and advises the complainant that he or she will be told of the ultimate disposition of the matter. ODC then sends a notice of investigation to the lawyer or judge with a copy of the complaint, a statement of the particular rules of conduct implicated by the allegations, and a request for a response from the lawyer or judge. By rule, the lawyer or judge must respond in full within the prescribed deadline, admitting or denying the allegations in the notice. ODC then proceeds with its investigation, which may include interviewing

witnesses, obtaining documents, and obtaining statements under oath from the lawyer or judge.

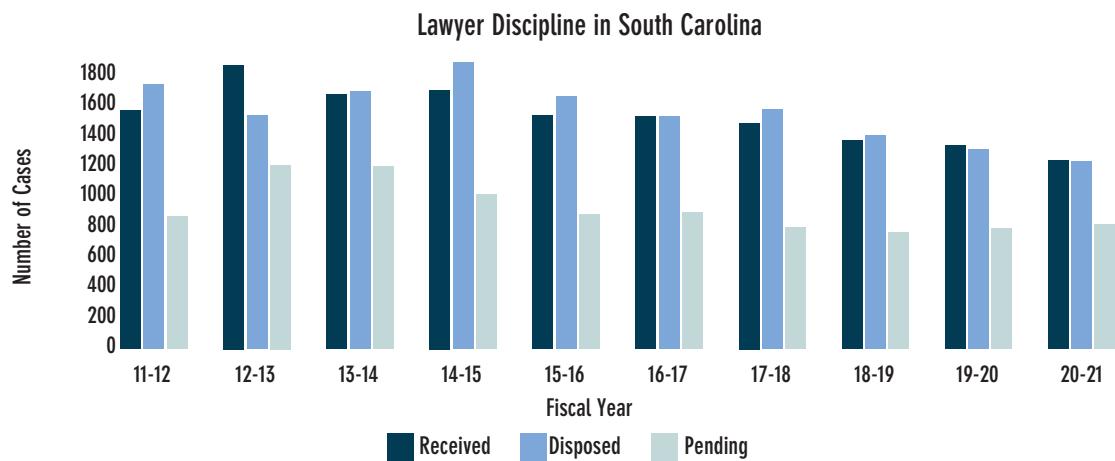
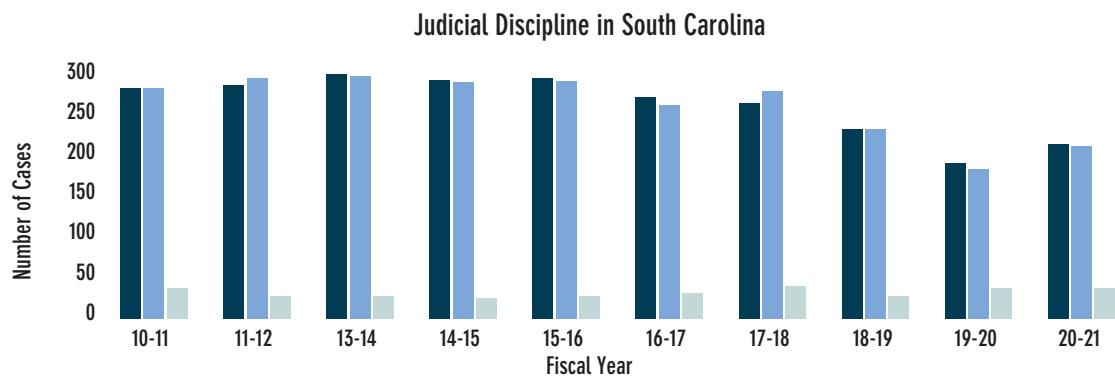
Once the ODC lawyer completes the investigation, he or she must determine whether there is clear and convincing evidence of misconduct. If not, then the ODC lawyer may either dismiss the complaint or conclude the matter with a private letter of caution. If the ODC lawyer concludes the matter with a letter of caution, ODC advises the complainant that the matter was resolved in a private manner but was not dismissed. If the ODC lawyer dismisses the complaint, ODC sends a notice to the complainant of ODC's intent to dismiss the matter. The complainant then has 30 days to request review of ODC's decision by an investigative panel of the Commission. If the Commission panel agrees with ODC then the matter is closed without further review.

If the ODC lawyer believes there is clear and convincing evidence of misconduct, the ODC lawyer may: (1) propose an agreement for discipline by consent; (2) recommend to a Commission panel that the matter be concluded with

a letter of caution or a confidential admonition; or (3) recommend that a Commission panel authorize the filing of formal charges. The Commission's investigative panel may adopt, reject or modify ODC's recommendations. Both the Commission and the Court reviews any agreement for discipline by consent.

If the Commission authorizes the filing of formal charges, ODC may still attempt to resolve the matter through an agreement for discipline by consent, subject to review by the Commission and the Court. Otherwise, ODC will file formal charges with the Commission, giving specific notice to the lawyer or judge of the allegations of misconduct, the relevant rule violations, and the sanctions ODC will request that the Commission recommend to the Supreme Court. ODC will also assert, and must prove, any aggravating circumstances that may justify a harsher sanction than would otherwise be warranted.

The lawyer or judge then has 30 days to file an answer to the formal charges. The lawyer or judge may admit all, some or none of the allegations, and may raise other defenses to



Disciplinary complaints against lawyers and judges have decreased over the past decade. Many attribute this decrease, at least in part, to Judicial Merit Selection Commission screenings and enhanced judicial education.

the complaint. The lawyer or judge may also bring forth information the lawyer or judge believes will mitigate the particular sanction for any rule violations.

The proceedings become public 30 days after the period of time in which the lawyer or judge may file an answer. All subsequent records and proceedings relating to the misconduct allegations are open to the public including any letter of caution or admonition issued thereafter.

The Commissions initially resolve all contested issues, either pre-hearing or at the hearing itself. The hearing takes place before a panel of the Commission, and ODC has the burden of proof throughout the process except as to affirmative defenses or mitigation evidence. The parties may subpoena witnesses and produce evidence subject to admissibility rules. The hearing is essentially a bifurcated trial, with the first issue being whether misconduct occurred and the second being the appropriate recommended sanction upon a finding of misconduct.

At the conclusion of the hearing the Commission provides the Court with a written report on the Commission's findings of fact, conclusions of law, and recommendations as to disposition. Either party may take exceptions to the report, and must file those exceptions along with a brief outlining their respective positions. Each party may file a respondent's brief to the brief of exceptions, and then a reply to the respondent's briefs. Any party who fails to file exceptions is deemed to accept the Commission's recommendations.

The Supreme Court then decides the matter based upon the Commission report and any exceptions and briefs the parties file. The Court may decide it with or without oral argument, and may enter an order accepting, rejecting, or modifying in whole or in part the Commission's report. The Supreme Court gives notice of any public disposition by its published decisions; the Commission and ODC will provide a complainant with notice of any other disposition by the Court.

The disciplinary process can appear unnecessarily lengthy because of the confidential nature of the investigation and the due process protections in the proceedings. Even though complainants are not parties to disciplinary matters they often request "status updates" or other information about

the investigation. The Court, the Commission, ODC and the staff members of each entity may not, however, discuss the details of an investigation with the complainants. In fact, the staffs of these entities may not even reveal the existence of a pending matter to anyone else until after the matter is fully at the formal charges stage. The confidential nature of these proceedings can understandably be frustrating to complainants as well as to members of the public in general.

Sometimes the alleged misconduct involves criminal charges against the lawyer or judge. ODC ordinarily holds the disciplinary investigation in abeyance pending the outcome of those proceedings, but not always. Delaying the disciplinary process avoids interference with the criminal prosecution or placing the lawyer or judge in the untenable position of having to assert constitutional protections against compelled evidence against the lawyer or judge. Fairness and due process dictate the disciplinary matter yield to the criminal process.

The confidentiality rules in the disciplinary process have been the subject of scrutiny as well as criticism. They are necessary, however, to ensure fairness and due process to all involved in the matter. It would be irresponsible for ODC or the Commission to disclose confidential information or to prejudge a matter without first allowing the process to run its course. Disciplinary matters are designed to protect everyone's rights throughout the process which necessarily leads to a lengthy process.

ODC and the Commissions, as agents of the Supreme Court, take very seriously their roles in assisting the Court in administering the ethical requirements that govern lawyers or judges. The Court expects adherence to the highest standards by lawyer or judges, and holds accountable those who breach those standards. To that end, ODC, the Commissions and the Bar constantly evaluate the rules governing conduct of those involved in the legal profession and seek input from the public as well as Bar members on ways to improve the process. We shall continue to listen to feedback from all sources to improve our efforts to carry out our mission to protect the public and the administration of justice.