#2016-003

Carolyn A. Koegler

From: Tracy Pearson <tracy@seacoastlawfirm.com>
Sent: Friday, October 21, 2016 4:09 PM
To: RulesComment
Subject: Comment about Amendment to 37.1

Please accept this email as my opposition to the proposed Amendment to 37.1. I have 13 years of legal experience, solely in New Hampshire.

The current process precludes the potential for collusion by General Counsel and Disciplinary Counsel, and provides multiple due process protections, whereas the proposed process specifically authorizes collusion and provides an advantage to the ADO over the Respondent Lawyer.

Under the current process, it is anticipated that General Counsel will review complaints, conduct a timely investigation, and present that information to the Complaint Screening Committee. Incidentally, although the ADO is permitted to dismiss matters, it does not do so, and instead presents these matters almost routinely to the Complaint Screening Committee (which seems to call into question why the rule was changed in the first instance), and which causes the years long delays for attorneys, and which impacts their health, among other things, like certification renewals or obtaining or renewing insurance coverage. Thereafter, if the Complaint Screening Committee believes the matter should move forward, Disciplinary Counsel engages in the process, with what should be fresh eyes, without any advantage that the Respondent doesn't also have. The Disciplinary Counsel can also dismiss matters.

What is proposed is that Disciplinary Counsel would be involved from the very beginning, could assist in the investigation, and would be part of the Screening Committee Process. It also eliminates the ability of Disciplinary Counsel to disagree with General Counsel, and to have an independent authority over resolutions, fostering, instead, group think, and placing Respondent Attorneys at a disadvantage. Because the Respondent cannot participate in the Screening Committee Process, what is proposed gives Disciplinary Counsel an advantage over the Respondent. The Disciplinary Counsel can be present during the deliberations – which gives them an added advantage to hear about the deficiencies in their case, to potentially correct those during the process (or after), and to secure the outcome they are seeking. By contrast, the Respondent has no idea what was said or

presented. They can't even testify in their own defense. They don't have the ability to adjust their case, by using this test group of people.

The only purpose that could be served by changing this rule is to increase workforce to deal with backlog or to balance out work load of the employees presently there (there was a recent addition to the Disciplinary Office).

It is unclear to me why this change is necessary and why we are changing the approach we have used for years. If there are concerns with the way matters are being handled, then I would propose a comprehensive assessment of the work being done by this office and recommendations being made to both protect and defend the rights of those facing complaints, but also focused on improving the work being done. For example:

1. Provide time frames for completion of investigations, barring an articulable good cause shown subject to specific criteria. Keeping people in a holding pattern is patently unfair, and requiring that deadlines be met, similar to deadlines that exist in the law (criminal indictments, speedy trial, even child abuse and neglect investigations by DCYF) and administratively (60 day limits for investigations of Title IX Complaints by colleges and universities mandated by the Office for Civil Rights) will move cases forward so that they have finality. What are you supposed to do when you are facing a disciplinary investigation but need to explore a new insurance policy due to cost or other reasons? You can't. If cases can't be concluded within a period of time, without good cause shown, the lawyer should not have to endure this disadvantage. Indeed, as time passes, memories fade, witnesses go missing, people die or become ill, and no one is served by a process that can't swiftly move forward fairly.

2. Exercise the power that the ADO does have. In speaking with one of the general counsel attorneys, I learned that the ADO routinely does not exercise their authority to dismiss cases, choosing to have cases reviewed by the complaint screening committee. When I first joined the Bar 13 years ago, not having this authority was a huge complaint by attorneys in the office, and they were excited about the rule change. That rule change was made. Now, it would seem that the ADO is looking for cover from the Complaint Screening Committee, rather

than dispensing with many of these complaints using their own judgment.

3. Engage an alternative dispute resolution process that provides for self-determination and with a balancing of power through an impartial/multipartial mediator so as to informally resolve grievances, without lawyers feeling like they have to take it or face worse if they disagree with what is being proposed by Disciplinary Counsel.

Lawyers can do nothing to stop complaints. They happen, sometimes legitimately, many times out of anger or through an attempt to leverage someone in litigation. Complaints are made about one alleged issue, and the ADO decides that a wholly different problem exists that the attorney wasn't on notice of, years later when they finally get around to looking at it. There is zero purpose for creating a system or process that doesn't mimic the process and protections that we all promise to protect as lawyers. If there are deficiencies, then rather than band-aide solutions, there should be comprehensive analysis and widespread overhaul, if warranted, with participation by all stakeholders. The outcome of bad or hasty decisions has a serious impact on people who have incurred thousands of dollars in debt to obtain these educations and who are essentially sitting ducks. Those who eventually decide they no longer want the stress of being an attorney are placed in an impossible position of trying to explain to non-lawyers that while a decision was made, it doesn't reflect on their ability to do something else or that it is not as serious as it sounds to the untrained, non-lawyer ear. People suffer mentally, financially, and for many of these complaints, the overall costs are disproportionate to the conduct.

I am very, very disturbed by this proposal, and I urge you to reject it. If the ADO is not performing to meet expectations, examining the entire process and office is necessary. There are many ways the process can be improved, and our current system doesn't mimic the expectations for those using our legal system.

Very respectfully,

Tracy A. Pearson