

2016-003

Carolyn A. Koegler

From: David M Rothstein <dmrothstein@nhpd.org>
Sent: Wednesday, March 16, 2016 9:33 AM
To: Justice Robert J Lynn; Carolyn A. Koegler
Cc: Sara Greene (SGreene@nhattyreg.org)
Subject: Summary Suspension and Vertical Prosecution
Attachments: 2-8-16 Ltr to PCC Re Vertical Integration.pdf

Justice Lynn and Secretary Koegler:

Attached are materials from Sara Greene, Disciplinary Counsel, regarding proposed rules and rule changes necessary to permit summary suspension under certain limited circumstances, and to allow vertical prosecution at the discretion of General Counsel.

The PCC and the ADO unanimously support these initiatives. Sara is drafting a summary suspension rule that will be modeled on the Massachusetts rule.

Please let me know if you have any questions.

-David

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February 8, 2016

Hand Delivered

David M. Rothstein, Esquire
New Hampshire Supreme Court
Professional Conduct Committee
4 Chenell Drive, Suite 102
Concord, New Hampshire 03301

Re: Summary Suspension Procedure and Vertical Prosecution

Dear Mr. Rothstein:

At the January 19, 2016 meeting, the Committee discussed the advantages and disadvantages of a possible "summary suspension" procedure for respondents who fail to respond or cooperate with the ADO. I write to set forth a possible framework for such a rule. I would be happy to draft proposed language in the event the Committee believes this is fruitful ground for a rule change.

In addition, I address below rule changes that would allow for vertical prosecution in appropriate cases.

Summary Suspension

A handful of states employ some form of summary suspension procedure for respondents who do not cooperate with the disciplinary authority. As the name implies, this procedure is summary in nature and does not provide respondents with the usual amount of process. Some states limit the use of summary suspension procedures to "serious" misconduct cases or to cases

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involving financial misconduct.¹ Some states that limit the use of summary suspension to serious cases of misconduct define serious cases as those which present underlying facts which would give rise to a suspension or disbarment.

Massachusetts' rule is attached hereto; see Section 3(2). The ADO believes that this is a good starting point for a summary suspension procedure. Massachusetts does not limit the kind of cases in which a summary suspension could be pursued. However, the ADO believes that any summary suspension procedure that New Hampshire may adopt should apply only in cases involving serious misconduct.

Thus, if after notice and a reasonable time to comply, as well as a statement from the ADO that failure to cooperate could result in suspension, a respondent fails to respond to requests for information or production of records, the following procedure would apply:

- ADO files a petition for summary suspension with the Supreme Court. The petition is supported by an affidavit of ADO Counsel setting forth the information requested, chronology, etc.;
- Upon receipt of petition, a summary suspension "shall result";
- Respondent must cure within 30 days for the suspension to be lifted. Absent such curative action, the suspension requirements of Rule 37(13) are triggered, as well as the reinstatement requirements under Rule 37(14).

This procedure would protect the public from respondents who flout their obligation to cooperate with the disciplinary authority in that it results in a swift suspension (note that Rule 37(9-A) takes at a minimum 50 days from the filing of a petition). The procedure also provides, however, a window of time for a respondent to cure a failure to cooperate. In the absence of such cooperation, the suspension would remain in place. (Presumably, any suspension ultimately imposed after a hearing could be retroactive to the date of the summary suspension.)

¹ Compare Virginia Supreme Court Rule 13-8(A)(6) (empowering Bar Counsel to "[f]ile a notice of noncompliance requesting the Board to suspend the Attorney's License until such time as the Attorney fully complies with a subpoena issued by the Bar Counsel, a District Committee or the Board, for the production of trust account, estate account, fiduciary account, operating account or other records maintained by the Attorney or the Attorney's law firm") with Colorado Rule 251.8.6 (providing for "Suspension for Failure to Cooperate" in cases "alleging serious misconduct").

Permissive "Vertical Prosecution"

In order to permit vertical prosecution, it is the ADO's position that several amendments to Rules 37 and 37A would be required. These proposed amendments would essentially do three things. First, they remove language prohibiting Disciplinary Counsel from participating in meetings of the Complaint Screening Committee. Second, they add language to allow Disciplinary Counsel to assist General Counsel in performing their duties (the rules already allow the reverse, i.e. that General Counsel assist Disciplinary Counsel). Finally, a "catch all" provision would be added to the preliminary provisions of Rule 37 and Rule 37A to allow vertical prosecution in the discretion of General Counsel in appropriate cases.

The proposed rule changes are as follows:


- (1) Rule 37(5)(c) and Rule 37A(II)(a)(6) — delete "disciplinary counsel."
This addresses the issue of who cannot attend CSC meetings.
- (2) Rule 37(6)(b) — add a section (6) to provide: "To assist general counsel in performing the duties of general counsel as needed." This language would mirror the provision in Rule 37(6)(c)(7), which empowers General Counsel to "assist disciplinary counsel in performing the duties of disciplinary counsel as needed."
- (3) Rule 37A(I)(c) — add to the definition of General Counsel, so that the language would mirror the definition of Disciplinary Counsel, the following language: "and such other attorneys of the attorney discipline office as may from time to time be designated to assist general counsel."
- (4) include a catch all provision at Rule 37(1)(f) and Rule 37A(I)(k) providing that "Disciplinary matters may be handled by attorneys of the Attorney Discipline Office fulfilling functions of either general counsel or disciplinary counsel, as the general counsel may from time to time assign."

Please see the attached memorandum illustrating the proposed changes.

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Thank you for your attention to these matters. As always, I would be happy to appear before the Committee to answer any questions this letter may prompt.

Sincerely,


Sara S. Greene
Disciplinary Counsel

SSG/ges
Enclosures

cc: Janet F. DeVito, Esquire
James L. Kruse, Esquire
Brian R. Moushegian, Esquire
Elizabeth M. Murphy, Esquire

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RULE 4:01 BAR DISCIPLINE
(As amended through – Mass. – (9/1/2009))

Section 1. Jurisdiction.

- (1) Any lawyer or foreign legal consultant admitted to, or engaging in, the practice of law in this Commonwealth shall be subject to this court's exclusive disciplinary jurisdiction and the provisions of this rule as amended from time to time.
- (2) Any Information, report, or other pleading filed in the Supreme Judicial Court pursuant to this rule shall be filed with the clerk of this court for Suffolk County. It shall be presented to the chief justice, who shall designate a justice to hear the matter.

Section 2. Venue of Disciplinary Hearings.

Unless the Board Chair or the Chair's designee specifies a different venue, a hearing on a petition for discipline shall take place at the offices of the Board. The Board Chair or the Chair's designee shall consider the convenience of the complainant, witnesses, the Respondent and hearing committee in selecting a hearing location.

Section 3. Grounds for Discipline.

- (1) Each act or omission by a lawyer, individually or in concert with any other person or persons, which violates any of the Massachusetts Rules of Professional Conduct (see Rule 3:07), shall constitute misconduct and shall be grounds for appropriate discipline even if the act or omission did not occur in the course of a lawyer-client relationship or in connection with proceedings in a court. A violation of this Chapter 4 by a lawyer, including without limitation the failure without good cause (a) to comply with a subpoena validly issued under section 22 of this rule; (b) to respond to requests for information by the Bar Counsel or the Board made in the course of the processing of a complaint; (c) to comply with procedures of the Board consistent herewith for the processing of a petition for discipline or for the imposition of public reprimand or admonition (See section 4 of this rule); or (d) to comply with a condition of probation or diversion to an alternative educational, remedial, or rehabilitative program shall constitute misconduct and shall be grounds for appropriate discipline.
- (2) Failure to comply with (a) or (b) of subsection (1) or failure to file an answer as required by section 8(3) of this rule or to appear at a hearing before a hearing committee, special hearing officer, or panel of the Board shall result in the entry of an order of administrative suspension upon the Bar Counsel's filing with this Court of a petition for administrative suspension which sets forth the violation of this section and an affidavit of the Bar Counsel affirming that the lawyer was served

Section 3

with the request for information, the subpoena, the petition for discipline, or the notice of hearing in accordance with the provisions of section 21 of this rule; that the lawyer was afforded a reasonable period of time for compliance with the request for information or the subpoena, or to answer the petition, or with reasonable notice of the hearing and had failed to comply, to answer, or to appear; and that the request for information, subpoena, petition, or notice of hearing was accompanied by a statement advising the Respondent-lawyer that failure to comply with the request for information or subpoena, or to answer timely the petition, or to appear at the hearing would result in administrative suspension without further hearing.

- (3) Any suspension under the provisions of subsection (2) above shall be effective forthwith upon entry of the suspension order and shall be subject to the provisions of section 17(4) of this rule. If not reinstated within thirty days after entry, the lawyer shall become subject to the other provisions of section 17 of this rule. As a condition precedent to reinstatement, such lawyer shall file with the Board and with the Bar Counsel an affidavit stating the extent to which he or she has complied with subsection (1) of this section and with the applicable provisions of section 17 of this rule. The lawyer shall also as a condition of reinstatement pay all expenses incurred by the Office of Bar Counsel and the Board in obtaining compliance with this section and in seeking suspension, including an administrative fee of twenty-five dollars.

Section 4. Types of Discipline.

Discipline of lawyers may be (a) by disbarment, resignation pursuant to section 15 of this rule, or suspension by this court; (b) by public reprimand by the Board; or (c) by admonition by the Bar Counsel.

Section 5. The Board of Bar Overseers.

- (1) This court shall appoint a Board of Bar Overseers (Board) to act, as provided in this Chapter Four, with respect to the conduct and discipline of lawyers and in such matters as may be referred to the Board by any court or by any judge or justice. The Board shall consist of such number of members as the court may determine from time to time. The court, by order, shall request the submission of nominations to fill vacancies in such manner as it may determine. The Massachusetts Bar Association and each county bar association (including, for the purposes of this section, the Boston Bar Association as the bar association for Suffolk County) may submit to this court in writing the names of two nominees for each vacancy in the Board. Any lawyer may submit in writing the names of nominees. The court may, but need not, make appointments to the Board from the nominees so submitted and, in making appointments, shall give appropriate consideration to a reasonable geographical distribution of appointees among disciplinary districts. The court shall from time to time designate one member of the Board as Chair and

**ADO's Proposed Amendments to Rules 37 & 37A to Allow for Permissive
Vertical Prosecution**

Rule 37(5)(c) – Delete the words, “disciplinary counsel.”

The current Rule 37(5)(c) provides:

(c) Meetings of the complaint screening committee shall be in the nature of deliberations and shall not be open to the public, respondents, respondents’ counsel, disciplinary counsel or the complainant. Records and reports of recommendations made shall in all respects be treated as work product and shall not be made public or be discoverable. However, the decision of the committee shall be public.

The amended Rule 37(5)(c) would provide:

(c) Meetings of the complaint screening committee shall be in the nature of deliberations and shall not be open to the public, respondents, respondents’ counsel, or the complainant. Records and reports of recommendations made shall in all respects be treated as work product and shall not be made public or be discoverable. However, the decision of the committee shall be public.

Rule 37A(II)(a)(6) – Delete the words, “disciplinary counsel.”

The current Rule 37A(II)(a)(6) provides:

(6) Investigation.

Either prior to or following receipt of the respondent’s answer, general counsel and his or her deputies and assistants shall conduct such investigation as may be appropriate.

Upon completion of the investigation, general counsel may (1) dismiss or divert a complaint on the grounds set forth in Rule 37(6)(c); or (2) present the complaint to the complaint screening committee with recommendations for diversion as provided in section (I)(g), dismissal for any reason or referral to disciplinary counsel for a hearing.

At any time while general counsel is investigating a docketed complaint, the respondent may notify general counsel that the respondent waives the right to have the matter considered by the complaint screening committee and consents to the matter being referred to disciplinary counsel for a hearing. Agreement by the respondent to referral for a hearing shall not be considered an admission of misconduct or a waiver of any defenses to the complaint.

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Rule 37(6)(b) – Add section (6) to provide: “To assist general counsel in performing the duties of general counsel as needed.” This language would mirror the provision in Rule 37(6)(c)(7), which empowers General Counsel to “assist disciplinary counsel in performing the duties of disciplinary counsel as needed.”

The current Rule 37(6)(b) provides:

(b) Disciplinary counsel shall perform prosecutorial functions and shall have the power and duty:

(1) To review complaints referred by the complaint screening committee for hearings.

(2) To contact witnesses, conduct discovery and prepare the complaints for hearings before a panel of the hearings committee.

(3) To try cases before panels of the hearings committee.

(4) To present memoranda to and appear before the professional conduct committee for oral argument.

(5) To represent the attorney discipline office and, in appropriate cases, the professional conduct committee in matters filed with the supreme court.

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(6) To assist general counsel in performing the duties of general counsel as needed.

Rule 37A(I)(c): Add the following language: “and such other attorneys of the attorney discipline office as may from time to time be designated to assist general counsel.” to the definition of *General Counsel*, so that the language would mirror the definition of *Disciplinary Counsel*.

The current Rule 37A(I)(c) provides:

General Counsel: The attorney responsible for (a) receiving, evaluating, docketing and investigating grievances filed with the attorney discipline office; (b) dismissing or diverting complaints on the grounds set forth in Rule 37(6)(c) or presenting complaints to the complaint screening committee with recommendations for diversion, dismissal for any reason or referral to disciplinary counsel for a hearing; (c) assisting disciplinary counsel in the

performance of the duties of disciplinary counsel as needed; (d) performing general legal services as required for the committees of the attorney discipline system; and (e) overseeing and performing administrative functions for the attorney discipline system. General counsel shall include a full-time attorney so designated, such deputy and assistants as may from time to time be deemed necessary, and such part-time attorney or attorneys as may from time to time be deemed necessary.

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Proposed "catch all" provisions;

Rule 37(1)(f):

Disciplinary matters may be handled by attorneys of the Attorney Discipline Office fulfilling functions of either general counsel or disciplinary counsel, as the general counsel may from time to time assign.

Rule 37A(I)(c):

Disciplinary matters may be handled by attorneys of the Attorney Discipline Office fulfilling functions of either general counsel or disciplinary counsel, as the general counsel may from time to time assign.