

MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: # 2017-003. Sup.Ct.R.37A(II)(a)(3)(A)-(B). Procedure after Receipt of Grievance.
Date: March 8, 2017

Justice Lynn requests that the Advisory Committee on Rules consider whether Supreme Court Rule 37A(II)(a)(3)(A)-(B) should be amended to make clear that the Attorney Discipline Office (ADO) may decline to docket a grievance as a complaint if it concludes that a hearing panel would not likely find clear and convincing evidence that the attorney violated the rules of professional conduct.

The New Hampshire Supreme Court issued an opinion on February 3, 2017 in an appeal from a decision of the Office of General Counsel of the ADO and the Complaint Screening Committee. *See Petition of Sanjeev Lath & a.* (attached). One of the issues in the case was whether the ADO had authority under Supreme Court Rule 37A to decline to docket the grievance as a complaint after reviewing the allegations, assessing the claimed violations and concluding that a hearing panel would not likely find clear and convincing evidence that the attorney violated the rules of professional conduct. The Court concluded that the petitioner lacked standing, so it did not reach the issue.

In its brief in the case, the ADO conceded that “a literal reading of the language of SC Rule 37A(II)(a)(3) would require the docketing of the Petitioner’s Grievance as a complaint.” ADO Brief (excerpts attached) at page 11. However, the ADO argued that such a reading would “mandate the docketing of frivolous complaints, render aspects of the SC Rules meaningless, unnecessarily elevate form over substance in applying the SC Rules, and undermine the purposes of attorney discipline.” ADO Brief at page 11. The ADO asserted that it therefore “has the authority to evaluate a grievance based upon its merits and to non-docket a grievance based upon the same.” ADO Brief at page 11.

Supreme Court Rule 37A(II)(a)(3) currently reads as follows:

(3) *Procedure after Receipt of Grievance*

(A) *Initial Screening of Grievance.* General counsel shall review each grievance upon receipt to determine whether the grievance is within the jurisdiction of the attorney discipline system and whether the grievance meets the requirements for docketing as a complaint.

When necessary, general counsel may request additional information or documents from the grievant. Except for good cause shown, failure of a grievant to provide such additional information and/or documents within twenty (20) days may result in general counsel processing the grievance based on the then existing file, or dismissing the complaint without prejudice.

Upon receipt of the above information, general counsel may allow a respondent thirty (30) days to file a voluntary response if it is deemed necessary to assist in the evaluation process.

Extensions of time are not favored.

(B) *Requirements for Docketing Grievance as a Complaint.* A grievance shall be docketed as a complaint if it is within the jurisdiction of the attorney discipline system and it meets the following requirements:

(i) *Violation Alleged.* It contains: (a) a brief description of the legal matter that gave rise to the grievance; (b) a detailed factual description of the respondent's conduct; (c) the relevant documents that illustrate the conduct of the respondent, or, if the grievant is unable to provide such documents, an explanation as to why the grievant is unable to do so; and (d) whatever proof is to be provided, including the name and addresses of witnesses to establish a violation of a disciplinary rule.

(ii) *Standing.* With the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, it must be filed by a person who is directly affected by the conduct complained of or who was present when the conduct complained of occurred, and contain a statement establishing these facts.

(iii) *Oath or Affirmation.* It is typed or in legible handwriting and, with the exception of an attorney discipline office-initiated inquiry or a referral by a judge or attorney, signed by the grievant under oath or affirmation, administered by a notary public or a justice of the peace. The following language, or language that is substantially equivalent, must appear above the grievant's signature: "I hereby swear or affirm under the pains and penalties of perjury that the information contained in this grievance is true to the best of my knowledge."

(iv) *Limitation Period.* It was filed with the attorney discipline office within the period of limitation set forth in section (I)(i).

(C) *Treatment of Grievance Not Within Jurisdiction of Attorney Discipline System or Failing to Meet Complaint Requirements.* A grievance that is not within the jurisdiction of the attorney discipline system or that does not meet the requirements for docketing as a complaint as set forth in section (II)(a)(3)(B) shall not be docketed and shall be dismissed in accordance with section (II)(a)(4).

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THE SUPREME COURT OF NEW HAMPSHIRE

Original
No. LD-2016-0005

PETITION OF SANJEEV LATH & a.

Submitted: November 17, 2016
Opinion Issued: February 3, 2017

Sanjeev Lath and Barbara Belware, self-represented parties, by brief.

Janet F. DeVito, general counsel (Brian R. Moushegian, deputy general counsel, on the brief), for the attorney discipline office.

Devine, Millimet & Branch, Professional Association, of Concord (Mitchell M. Simon and Joshua M. Wyatt on the brief), for John F. Bisson.

BASSETT, J. The petitioners, Sanjeev Lath and Barbara Belware, have petitioned for a writ of certiorari, see Sup. Ct. R. 11, challenging the decisions of the Office of General Counsel of the Attorney Discipline Office (ADO) and the Complaint Screening Committee (CSC). The ADO had dismissed a grievance filed by the petitioners against Attorney John F. Bisson. Upon the petitioners' request for reconsideration, the CSC affirmed the ADO's decision. In their petition, the petitioners argue that the ADO and the CSC erred by declining to docket their grievance as a complaint, and that the CSC erred by failing to answer the questions raised in the petitioners' request for reconsideration. The respondents—the ADO and Attorney Bisson—challenge the merits of the

petitioners' claims, and also assert that the petitioners lack standing to bring this petition. Because we conclude that the petitioners lack standing, we dismiss the petition.

We begin by providing background regarding the attorney discipline system. Pursuant to our rule-making authority under the State Constitution, see N.H. CONST. pt. II, art. 73-a, we have established an attorney discipline system to discharge our inherent and statutory authority to discipline attorneys, Petition of Brooks, 140 N.H. 813, 817 (1996); RSA 311:8 (2015); RSA 490:4 (2010); see also Sup. Ct. R. 37, 37A. “[T]he purpose of attorney discipline is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar [mis]conduct in the future” Bosse’s Case, 155 N.H. 128, 131 (2007).

The attorney discipline system is governed by the Supreme Court Rules, see Sup. Ct. R. 37, 37A, and has “disciplinary jurisdiction” over “[a]ny attorney admitted to practice law in this State,” Sup. Ct. R. 37(1)(b). The standards of conduct for New Hampshire attorneys are set forth in the New Hampshire Rules of Professional Conduct. N.H. R. Prof. Conduct Statement of Purpose. An attorney may be disciplined under the Supreme Court Rules if it is determined by clear and convincing evidence that the attorney violated the Rules of Professional Conduct. See Young’s Case, 154 N.H. 359, 366 (2006); see also Sup. Ct. R. 37A(III)(d)(2)(C).

One of the responsibilities of the ADO is to conduct an initial review of a grievance submitted by an individual. See Sup. Ct. R. 37A(II)(a)(2)(A), (3)(A). A grievance is a written submission that “call[s] to [the ADO’s] attention conduct that the grievant believes may constitute misconduct by an attorney.” Sup. Ct. R. 37A(I)(c). When a grievance is filed, the ADO reviews the grievance to determine whether the attorney in question is subject to the disciplinary jurisdiction of the attorney discipline system and whether the grievance meets certain other enumerated requirements. Sup. Ct. R. 37A(II)(a)(3)(A)-(B).

If the ADO concludes that a grievance satisfies those requirements, it docket the grievance as a complaint—otherwise, the grievance is dismissed. Sup. Ct. R. 37A(II)(a)(3)(C), (5)(A). If the ADO declines to docket a grievance, the grievant may file a request for reconsideration. Sup. Ct. R. 37A(II)(a)(4)(C). The request is reviewed by the CSC, id., a nine-member panel composed of five attorneys and four “non-attorneys,” Sup. Ct. R. 37(5)(a). The CSC must either “affirm the decision of the [ADO] or direct that the grievance be docketed as a complaint.” Sup. Ct. R. 37A(II)(a)(4)(C). Once a grievance is docketed as a complaint, the respondent attorney must file an answer to the complaint, and the ADO may conduct a further investigation “as may be appropriate.” Sup. Ct. R. 37A(II)(a)(5)(C), (a)(6).

Turning to the present petition, the record reflects the following facts. On December 30, 2015, the petitioners filed a grievance with the ADO. The petitioners' grievance arises out of the annual meeting of the Oak Brook Condominium Owners' Association, which took place in November 2015. The petitioners are unit owners at Oak Brook Condominium. Attorney Bisson represented the condominium association at the meeting. The petitioners allege that, during the meeting, Attorney Bisson violated the Rules of Professional Conduct by, among other things, recording the meeting without the petitioners' knowledge or consent.

The ADO reviewed the factual allegations in the petitioners' grievance, along with the exhibits that the petitioners provided. On January 15, 2016, the ADO's assistant general counsel sent a three-page letter to the petitioners, in which he reviewed the allegations, assessed the claimed violations, and explained the reasoning that led to his conclusion that "a hearing panel would not likely find clear and convincing evidence that" Attorney Bisson violated the Rules of Professional Conduct. Regarding the claim that Attorney Bisson made a recording without the petitioners' knowledge or consent, he noted that one of the petitioners' exhibits showed that, in fact, the meeting had not been recorded. Based upon the analysis of the petitioners' allegations, the ADO declined to docket the petitioners' grievance as a complaint.

The petitioners filed a request for reconsideration, asserting that their grievance satisfied the requirements for docketing and that the ADO erred by dismissing their grievance. In their request, the petitioners listed a number of alleged errors in the ADO's decision, which they labeled "[q]uestion[s]." In a letter dated February 25, 2016, the CSC informed the petitioners that it had affirmed the ADO's decision. The petitioners then filed a "Motion for Clarification" with the CSC, asking that the CSC answer the questions that the petitioners had raised in their request for reconsideration. The CSC responded to the motion by letter, dated March 18, 2016, acknowledging receipt of the motion, and stating that "th[e] matter is now closed." This petition followed.

In their petition, the petitioners argue that the Supreme Court Rules required the ADO to docket their grievance as a complaint and initiate an investigation. They assert that the ADO and the CSC erred by declining to docket their grievance on the basis that a hearing panel would be unlikely to find, by clear and convincing evidence, that Attorney Bisson violated the Rules of Professional Conduct.

The petitioners further contend that the CSC erred by failing to answer the questions that the petitioners raised in their request for reconsideration. Although the petitioners do not identify a rule that requires the CSC to explicitly answer questions posed in a request for reconsideration, we read the petitioners' argument to be that the CSC was required to respond to each

specific question raised. Thus, all of the petitioners' claims on appeal relate to alleged violations of the Supreme Court Rules by the ADO and the CSC.

The respondents dispute the merits of the petitioners' arguments. However, they also argue that the petitioners lack standing to bring this petition. We agree.

Certiorari is an extraordinary remedy that is not granted as a matter of right, but rather at the discretion of the court. Petition of State of N.H. (State v. MacDonald), 162 N.H. 64, 66 (2011); see Sup. Ct. R. 11(1). Our review of an agency's decision on a petition for a writ of certiorari entails examination of whether the agency "acted illegally with respect to jurisdiction, authority or observance of the law or has unsustainably exercised its discretion or acted arbitrarily, unreasonably or capriciously." Petition of Chase Home for Children, 155 N.H. 528, 532 (2007). "We exercise our power to grant such writs sparingly and only where to do otherwise would result in substantial injustice." Id.

Generally, "[i]n evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect." Libertarian Party of N.H. v. Sec'y of State, 158 N.H. 194, 195 (2008) (quoting Asmussen v. Comm'r, N.H. Dep't of Safety, 145 N.H. 578, 587 (2000)). This requirement "rests upon the constitutional principle that the judicial power ordinarily does not include the power to issue advisory opinions." Id. at 196; see also Duncan v. State, 166 N.H. 630, 641-43 (2014) (discussing constitutional significance of the doctrine of standing). In the context of a petition for a writ of certiorari, we have held that a party has standing if his "rights may be directly affected by the decision of a lower tribunal." Melton v. Personnel Comm'n, 119 N.H. 272, 277 (1979) (emphasis omitted).

In other words, a person seeking to challenge an agency's action through a petition for a writ of certiorari must show that his personal rights have been or will be "impaired or prejudiced" by the agency's decision. Duncan, 166 N.H. at 640-45 (discussing constitutional requirements for standing). A party does not satisfy this requirement if his only injury is a "generalized wrong allegedly suffered by the public at large." Id. at 646 (quotation omitted). Similarly, a mere general interest in an administrative proceeding—for example, an interest in ensuring the "proper administration of the laws"—is not sufficient to confer standing. Id. at 644 (quotation omitted); see also Appeal of N.H. Right to Life, 166 N.H. 308, 314-15 (2014).

To determine whether a grievant has a personal interest in an attorney disciplinary proceeding that is sufficient to confer standing, we examine the nature and purposes of the attorney disciplinary system. See Appeal of Campaign for Ratepayers Rights, 142 N.H. 629, 632 (1998) (assessing whether

parties had standing to appeal decision of Public Utilities Commission by reference to the nature of the commission's determination). As noted above, the purposes of attorney discipline include the protection of the public and the maintenance of public confidence in the bar. See Bosse's Case, 155 N.H. at 131. Attorney discipline is not intended to punish attorneys, id., nor does it exist "as a means of redress for one claiming to have been personally wronged by an attorney," Cotton v. Steele, 587 N.W.2d 693, 699 (Neb. 1999). Instead, "the real question at issue in a [disciplinary] proceeding is the public interest and an attorney's right to continue to practice a profession imbued with public trust." State v. Merski, 121 N.H. 901, 909 (1981) (quotation omitted); see also Cotton, 587 N.W.2d at 699.

As a consequence, disciplinary proceedings are not treated as "lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent [attorney]." Merski, 121 N.H. at 909 (quotation omitted). The grievant participates in the proceedings not to enforce his or her own rights, but to "supply evidence of the alleged attorney malfeasance." Akinaka v. Disciplinary Board, 979 P.2d 1077, 1085 (Haw. 1999). This principle is reflected in the rules governing the attorney discipline system, which make clear that a grievant may not control the prosecution of a charge, see Sup. Ct. R. 37(18), and that the complainant is not a party to the disciplinary proceeding, Sup. Ct. R. 37A(I)(j).

Because attorney disciplinary proceedings are structured in this manner, no personal rights or remedies of the grievant are adjudicated in, or directly affected by, a disciplinary proceeding. The grievant neither receives a legally cognizable benefit when an attorney is disciplined, nor sustains a legally cognizable injury when the attorney is not disciplined. Rather, the benefit of attorney discipline is bestowed upon the public at large, Merski, 121 N.H. at 909, and "the only one who stands to suffer direct injury in a disciplinary proceeding is the lawyer involved," Doyle v. Oklahoma Bar Assn., 998 F.2d 1559, 1567 (10th Cir. 1993). Nor does the grievant have a personal stake in the proceedings by virtue of his participation in the disciplinary process. As we have observed, an agency may "permit third parties to participate in proceedings before it . . . without creating a right in those parties to review a negative decision that the [agency] may ultimately make." Ruel v. N.H. Real Estate Appraiser Bd., 163 N.H. 34, 41 (2011) (quotation omitted). Simply put, regardless of how the ADO or the CSC ultimately addresses a grievance, no legally cognizable interest of the grievant is implicated in an attorney disciplinary proceeding. See In re Attorney Disciplinary Appeal, 650 F.3d 202, 204 (2d Cir. 2011) (stating that a complainant lacks standing because his interest "results only from [his] status as a member of the public at large").

Our reasoning is similar to that employed when courts consider whether, and to what extent, a victim may participate in a criminal prosecution. As a general proposition, "a private citizen lacks a judicially cognizable interest in

the prosecution or nonprosecution of another.” Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973). It is for this reason that, generally, a victim has no right to intervene in the criminal case of the accused, see Rullo v. Rullo, 121 N.H. 299, 300 (1981), to appeal the substantive rulings of the trial court, see, e.g., Cooper v. District Court, 133 P.3d 692, 703-05 (Alaska Ct. App. 2006) (collecting cases), or to contest the prosecutor’s decision to dismiss criminal charges, Gansz v. People, 888 P.2d 256, 258-59 (Colo. 1995) (en banc). These cases reflect the underlying principle that “[a] crime is a public wrong, raising an issue between the state and the accused,” rather than between the accused and the accuser. 1 R. McNamara, New Hampshire Practice: Criminal Practice and Procedure § 1.01, at 1 (2010). This logic—that, given the purpose and design of the criminal justice system, a victim does not have standing to seek judicial review of a criminal disposition—applies with equal force to the attorney discipline system.

Therefore, in light of the nature and purposes of the attorney discipline system, we conclude that a grievant does not have a personal interest in the outcome of an attorney disciplinary proceeding that is sufficient to confer standing. In reaching this conclusion, we join the many courts that have likewise held that a grievant does not have standing to challenge the disciplinary authority’s disposition of a grievance. See, e.g., In re Request for Investigation of an Atty., 867 N.E.2d 323, 324-25 (Mass. 2007); Rousseau v. Statewide Grievance Committee, 133 A.3d 947, 951 (Conn. App. Ct. 2016) (per curiam); see also In re Attorney Disciplinary Appeal, 650 F.3d at 203 (collecting cases); Akinaka, 979 P.2d at 1084-86. We agree with those courts that have reasoned that to confer standing upon a private individual in these circumstances would shift the focus of the disciplinary process from the public interest to the private interests of the grievant. See, e.g., Akinaka, 979 P.2d at 1085. To do so would contravene the essential purpose of the attorney discipline system—to protect the public.

Accordingly, because the petitioners lack standing to appeal the disposition of their grievance, we dismiss their petition for a writ of certiorari. See Libertarian Party of N.H., 158 N.H. at 196.

Dismissed.

DALIANIS, C.J., and CONBOY and LYNN, JJ., concurred.

*Excerpt from ADO Brief,
Petition of Sanjeer Keth et al.*

proceeding, the Petitioners lack standing to challenge the disposition of the proceeding. To the extent that the Petitioners believe that they sustained damages as a result of the Association's or Mr. Bisson's alleged conduct, the Petitioners' remedy is to file a civil action to recover such damages.

It is also instructive that the SC Rules specifically provide that an attorney can appeal decisions by the Professional Conduct Committee imposing a reprimand, public censure or a suspension of six (6) months or less. *See* SC Rule 37(2) (defining appeal); SC Rule 37(16)(a) (procedure for filing an appeal); 37A(III)(d)(3) and (4). In contrast, the SC Rules do not provide for the filing of an appeal, by either the respondent attorney or complainant, of a CSC decision. *See Binns*, 343 N.E.2d 868, 869 (denying complainant's appeal, Massachusetts court noting that "[n]owhere in the [Massachusetts attorney discipline] rule has provision been made for an appeal by a complainant from any decision of the board").

Pursuant to SC Rule 37A(I)(j), the Petitioners were not parties to the underlying disciplinary matter and lack standing to challenge the ADO's decision not to docket the Grievance as a complaint. Accordingly, the Court should decline further consideration of the Petitioners' Petition and dismiss this matter in its entirety.

B. The ADO, through General Counsel, did not err by concluding that the Petitioners' Grievance did not meet the standards of a complaint because the ADO had discretion to non-docket the Grievance.

The Petitioners argue that General Counsel and the CSC "erred as a matter of Law by stating that the Grievance did not meet the standards of a complaint." Pet. Brief, at p. 10. In essence, the Petitioners contend that SC Rules 37 and 37A prohibit General Counsel and the CSC from evaluating the merits of a Grievance and, based on the evaluation, to non-docket the Grievance. The Petitioners' rigid interpretation of SC Rules 37 and 37A would mandate the

docketing of frivolous complaints, render aspects of the SC Rules meaningless, unnecessarily elevate form over substance in applying the SC Rules, and undermine the purposes of attorney discipline. The ADO, therefore, asserts that it has the authority to evaluate a grievance based upon its merits and to non-docket a grievance based upon the same.

In support of their interpretation of the SC Rules, the Petitioners attempt to analogize disciplinary proceedings and civil actions. Pet. Brief, pp. 11-12 (Petitioners asserting that “[t]he protocol followed by the Attorney Discipline Office..., from a grievance being initiated by members of the general public, mirrors the litigation protocol in a traditional Court of Law”). However, disciplinary actions are neither civil nor criminal in nature. *Wolterbeek’s Case*, 152 N.H. 710, 718 (2005); *see also Lawyer Disciplinary Bd. v. Stanton*, 760 S.E.2d 453, 463 (W. Va. 2014) (disciplinary proceedings are considered “sui generis, unique, and are neither civil nor criminal in character”).

As SC Rules 37 and 37A are regulatory in nature, one must apply the principles of statutory construction in order to interpret them. *See Appeal of Old Dutch Mustard Co., Inc. (New Hampshire Waste Management Council)*, 166 N.H. 501, 506 (2014) (noting that the same principles of construction are used to interpret both statutes and regulations). The interpretation of a regulation by the agency charged with its administration is entitled to deference. *See id.* (citation omitted). However, the Court, which reviews an agency’s determination *de novo*, will reject an agency’s interpretation if it clearly conflicts with the express statutory or regulatory language. *See Id.*

The ADO acknowledges that a literal reading of the language of SC Rule 37A(II)(a)(3) would require the docketing of the Petitioners’ Grievance as a complaint. *See e.g., State v. Brest*, 167 N.H. 210, 212 (2014) (“When examining the language of a statute, we ascribe the

plain and ordinary meaning of the words used.”). However, in examining a statute or regulation, the Court will,

...interpret statutes and regulations in the context of the overall statutory and regulatory scheme and not in isolation. [The Court’s] goal is to apply statutes and regulations in light of the legislature’s or commissioner’s intent in enacting them, and in light of the policy sought to be advanced by the entire statutory and regulatory scheme.

Appeal of Old Dutch Mustard Co., Inc., 166 N.H. at 506.

The ADO asserts that SC Rule 37 and 37A, *read as a whole*, authorizes General Counsel to evaluate a grievance’s merits and to non-docket a grievance based on the evaluation. General Counsel’s evaluation of a grievance’s merits is consistent with the overall regulatory scheme and purposes of attorney discipline. In contrast, the Petitioners’ literal reading of SC Rule 37A(II)(a)(3) would render aspects of SC Rules 37 and 37A unjust and meaningless, unnecessarily favor form over substance, and, in turn, undermine important policy considerations that the SC Rules were intended to effectuate. *See State Employees’ Ass’n of New Hampshire v. State*, 161 N.H. 730, 738 (2011) (Court “construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result”); *see also State v. Maxfield*, 167 N.H. 677, 681 (2015) (Court will look beyond the plain reading of a statute if such a reading “would compel an absurd result”) (citation omitted); *State v. Breest*, 167 N.H. at 212-213.

1. *A literal reading of SC Rule 37A(II)(a)(3) would require the ADO to docket frivolous complaints.*

Even if General Counsel concluded that a grievance had no merit whatsoever, a literal reading of SC Rule 37A(II)(a)(3) would mandate (unjustly) docketing the grievance as a complaint. A grievance would simply need to meet SC Rule 37A(II)(a)(3)’s basic requirements. Such a result would not accomplish the purposes of attorney discipline. *See Coddington’s Case*, 155 N.H. 66, 68 (2007) (“The purpose of attorney discipline is not to inflict punishment, but

rather ‘to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future.’”).

The docketing of a frivolous complaint does nothing to protect the public or maintain public confidence in the bar. In addition, the harm to the respondent attorney could be substantial. The grievance, no matter how frivolous, would become a permanent part of the respondent attorney’s public discipline history, requiring the attorney to report the complaint in response to requests for discipline records. Under such circumstances, an attorney’s professional reputation could also be compromised whenever a member of the public contacts the ADO and inquires about the attorney’s public discipline history. Even if no misconduct was found, the inquirer could incorrectly conclude that the mere docketing of a complaint against the attorney demonstrates wrongdoing. Furthermore, the unnecessary docketing of such a grievance could cause direct financial harm to the respondent attorney in the form of increased insurance premiums. A copy of the meritless complaint would also be publically available at the ADO for three years instead of two years (as required with grievances). *See* SC Rule 37(20)(a) and (c). Based on all of these actual or potential harms, the ADO’s evaluation of a grievance’s merits and potential non-docketing of a grievance is both just and consistent with the overall regulatory scheme and stated purposes of attorney discipline.

2. *A literal reading of SC Rule 37A(II)(a)(3) would render an important part of that SC Rule meaningless.*

A literal reading of SC Rule 37A(II)(a)(3) would, for all intents and purposes, render an important part of that SC Rule meaningless. Pursuant to SC Rule 37A(II)(a)(3)(A), following receipt of a grievance, General Counsel can “allow a respondent (30) days to file a voluntary response if it is deemed necessary to assist in the **evaluation process**” (emphasis added). If General Counsel were required to docket a grievance based solely on the requirements of SC

Rule 37A(II)(a)(3)(A), there would be almost no reason to request a respondent attorney's voluntary response. Upon receipt of a grievance, General Counsel can discern whether (a) it was filed against an attorney licensed to practice or providing legal services in New Hampshire, (b) the grievant had standing to file the grievance, (c) the grievance was signed under oath, (d) the grievance alleged a violation of the Rules of Professional Conduct, and (e) whether the alleged misconduct occurred within the requisite time period for filing the grievance. If any of the foregoing prerequisites were not met, the ADO would simply non-docket the matter, making a voluntary response unnecessary. SC Rule 37A(II)(a)(3)(A), therefore, allows General Counsel to evaluate a grievance's merits by requesting and reviewing a respondent attorney's voluntary response before making a docketing decision.

3. *A strict reading of SC Rule 37A(II)(a)(3) unnecessarily favors form over substance.*

The ADO asserts that a rigid interpretation of SC Rule 37A(II)(a)(3) unnecessarily favors form over substance, interfering with the efficiency of the attorney discipline system, and doing nothing to protect the public or the integrity of the profession. *See e.g., In re Zachary G.*, 159 N.H. 146, 154 (2009) (Court stating that it would not frustrate the purpose of parental termination statute by elevating form over substance) (citation omitted). Pursuant to Rule 37A(II)(a)(7)(B), after a grievance has been docketed as a complaint, both the General Counsel and the CSC are permitted to dismiss the complaint on the grounds of no professional misconduct or for any other reason. *See* Rule 37A(II)(a)(7)(B). The Petitioners' literal interpretation of SC Rule 37A(II)(a)(3)(A) would mandate that General Counsel docket a grievance despite General Counsel's determination that the grievance lacked merit. The unnecessary docketing of a meritless grievance elevates form over substance in that General Counsel or the CSC could then simply dismiss the complaint soon after it is docketed, pursuant

to 37A(II)(a)(7)(B). This rigid adherence to procedure does nothing to protect the public or promote the integrity of the profession. *See Coddington's Case*, 155 N.H. at 68 (setting forth the purposes of attorney discipline). Rather, the needless docketing of clearly meritless grievances would interfere with the ADO's efficiency, diverting time and attention from those matters with more substance.

C. **The Petitioners were not entitled to due process and the evidentiary standard that General Counsel applied in its decision not to docket the Petitioners' Grievance was correct.**

The Petitioners conclude that "General Counsel erred as a matter of [l]aw by setting a standard of evidence to 'clear and convincing' at [the] complaint stage of [the] attorney discipline process."² Pet. Brief, p. 23. Based on the foregoing, the Petitioners claim that they "were denied due process." *Id.* The Petitioners were not entitled to due process and the evidentiary standard that General Counsel applied in its decision not to docket the Grievance as a complaint was correct.

1. **The Petitioners were not entitled to due process.**

The Petitioners were not entitled to due process under the New Hampshire or United States Constitutions.³ Specifically, General Counsel's decision not to docket the Petitioners' Grievance as a complaint did not threaten the Petitioners' life, liberty or property interests. *See* N.H. Const., Pt. I, Art. 15 (providing that "[n]o subject shall be...deprived of his property, immunities, or privileges...or deprived of his life, liberty, or estate, but by...the law of the land"); U.S. Const. amend. V and XIV (providing that no person shall "be deprived of life, liberty, or property, without due process of law"); *WMUR Channel Nine v. N.H Dept. of Fish*

² The ADO presumes that the Petitioners meant to refer to General Counsel's use of the "clear and convincing" evidentiary standard at the "grievance stage," rather than the "complaint stage."

³ Notwithstanding the Petitioners' failure to reference the due process clause under the United States Constitution, the ADO has analyzed the Petitioners' due process claims under both the State's and the United States' Constitutions' due process clauses.