

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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December 6, 2017

Ms. Carolyn Koegler
Secretary, New Hampshire Supreme Court Committee on Rules
One Charles Doe Drive
Concord, N.H. 03301

Re: Proposed Amendment to Supreme Court Rule 37A(II)

Dear Secretary Koegler:

We write to comment on the proposed amendment to procedures for the review and docketing of grievances filed with the Attorney Discipline Office (ADO). The proposal is set forth in Appendix F to the Court's October 23, 2017 Public Hearing Notice.

The amendment, found at proposed Rule 37A(II)(a)(3)(B)(v), would establish a new "prerequisite" to be met before an allegation of attorney misconduct is docketed and investigated by the ADO, and would allow the ADO to non-docket the grievance if it determines that "a hearing panel *would be unlikely* to find clear and convincing evidence that the respondent attorney violated the rules of professional conduct." (Emphasis added.) Unlike the existing "prerequisites"—traditional jurisdictional requirements such as standing, timely filing, an oath or affirmation, and the allegation of a rule violation that falls within the ADO's jurisdiction—the new "prerequisite" is not jurisdictional. Rather, it authorizes an early assessment of prosecutorial merit, and would allow potentially meritorious grievances to be terminated, inadvertently, without significant investigation of the alleged violation.

The early assessment of evidentiary sufficiency—if focused on the elimination of frivolous complaints against lawyers—makes sense. Any prosecuting entity, whether it is a police department, the Attorney General, or

the Attorney Discipline Office, needs to be able to focus its resources on meritorious and potentially meritorious cases. If a complaint is filed for purposes of harassment, or if it clearly has no merit, the ADO should have the authority to dismiss it. However, the PCC believes that the proposed amendment—because it authorizes dismissal without significant independent investigation, and the required showing of evidentiary sufficiency is unrealistic for grievants who lack legal training—may result in a failure to pursue meritorious cases. Accordingly, the PCC proposes alternative language that accounts for this potential, while still affording the ADO the ability to dismiss grievances that have no prosecutorial merit.

Background:

Typically, a grievance is filed by a non-lawyer. Even if they were clients of the Respondent lawyer, they will generally not have the lawyer's complete file—the repository for much relevant evidence in attorney disciplinary proceedings—when the grievance is filed. They will also have little knowledge of the ethical standards or work practices of the lawyer or the law firm. In short, as in other areas of law enforcement and regulation, grievances are filed by parties without access to or knowledge of substantial evidence that goes to the issue of prosecutorial merit. This deficit handicaps their ability to meet the sufficient evidence prerequisite as it is proposed.

Under current procedures, the ADO's pre-docketing inquiry is limited to (1) requests for additional information from the grievant and (2) voluntary responses to the grievance from the Respondent. *See Rule 37A(II)(a)(3)(A)*. Extensions of time for this pre-docketing review are discouraged. *Id.* It is, by rule, a superficial screening process—focused on screening out cases that clearly do not belong in the attorney discipline system.

The proposed amendment does not change the superficial nature of the pre-docketing review process. However, the proposed amendment would require the grievant to demonstrate a likelihood of success on the merits. This alters the current procedural scheme for preliminary review of grievances, and risks the early dismissal of meritorious complaints.

If a grievance is docketed, significant additional investigation into the merits of the allegations occurs. This includes a mandatory Answer by the Respondent lawyer to the complaint, further input from the grievant in response to the Answer, the production of the Respondent's files if requested by the ADO, and an interview of the Respondent. *See Rule 37A(II)(a)(5)*.

Under the amendment now under review by the Court, none of this post-docketing investigation work product would be available to the ADO when it makes its determination regarding the "likelihood" of proof of a violation by

clear and convincing evidence. This creates the risk that a category of grievances will be dismissed, even though they allege a rule violation, because the grievant did not meet the new evidentiary threshold.

Discussion:

A grievant will not have recourse to Supreme Court review if the ADO decides to “non-docket” a grievance based on the perceived lack of sufficient supporting evidence—as would be authorized by the proposed amendment. *See Petition of Sanjeev Lath & A., No. LD-2016-0005 (N.H. Feb. 3, 2017)* (holding that the grievant does not have standing to pursue an appeal to the Supreme Court from a non-docketing decision). Because judicial review will not be available, the Court’s rules need to be sufficiently stringent, and protective of the public interest, to avoid the inadvertent dismissal of meritorious cases during the pre-docketing screening process.

The proposed amendment is deficient in two respects. First, it sets a standard for non-docketing that is too lenient. Second, it allows for the dismissal of a grievance, without judicial or screening committee review, before the ADO has access to additional material that will be gathered if the grievance is docketed, and that will provide a more reliable basis for assessing the merits of a complaint.

We will start with the standard for non-docketing, since a more stringent standard will eliminate most concerns about the evidence available to the ADO for a pre-docketing decision. In lieu of the standard that is now being considered by the Rules Committee, the PCC would recommend the following:

(v) Sufficiency of Evidence Supporting Allegations: The attorney discipline office may decide not to docket a grievance as a complaint if it determines, based on its evaluation of the grievance, that clear and convincing evidence of a violation *does not exist* and *will not be developed* through reasonable investigation after docketing.

(Emphasis added.) This standard allows for expeditious dismissal of grievances that will clearly never have evidentiary support, grievances that are filed for harassment purposes or other improper motive, or grievances that are met by a showing of ethical conduct by the Respondent lawyer in his or her voluntary response. On the other hand, this standard would preclude pre-docketing dismissal unless further investigation clearly will not support a prosecutable case.

In addition, while the proposed amendment would allow pre-docketing dismissal when the ADO determines that a hearing panel is “not likely” to find clear and convincing evidence, the standard recommended by the PCC allows

pre-docketing dismissal only upon a determination that clear and convincing evidence does not exist and will not be developed. This standard is more protective of the public interest in the prosecution of meritorious allegations of attorney misconduct, in that it warrants a preliminary investigation before a final decision to dismiss a grievance on the merits is made.

We are aware of arguments that if the proposed standard is not adopted, lawyers will be unfairly prejudiced by the docketing of complaints that are subsequently dismissed, but that will be available to the public, upon inquiry to the ADO, due to their docketed status. We agree that the disciplinary process must be managed in a way that avoids unnecessary prejudice to the reputation of lawyers targeted by specious complaints. However, there is no way to pursue strong enforcement of the rules of professional conduct, with transparency, without some potential impact on the attorneys who are implicated in disciplinary proceedings. That damage will be substantially mitigated if the docketed complaint is ultimately dismissed on the merits. More fundamentally, however, the answer to our concern over public access to docketed cases is to change the confidentiality rules. It is not to expand the scope of the pre-docketing dismissal of grievances.

The attorney discipline system exists 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 proposed amendment authorizes the rejection of potentially sufficient grievances on an inadequate evidentiary record. It also establishes a standard for non-docketing that is too lenient to protect the countervailing public interest in effective enforcement of the rules of professional conduct.

We will be available at the December 8th hearing to answer any questions the Rules Committee may have.

Sincerely,


David M. Rothstein
PCC Chair


Peter G. Beeson
PCC Member