

MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: #2019-010. Supreme Court Rule 37A. Electronic Filing of Grievances.
Date: August 20, 2019

The Attorney Discipline Office is in the process of developing a system to allow grievances against attorneys to be filed electronically. Existing New Hampshire Supreme Court Rule 37A does not provide for/address the filing of grievances electronically. Therefore, the Attorney Discipline Office has drafted suggested revisions to Rule 37A to facilitate electronic filing through the Attorney Discipline Office website, as follows:

- Rule 37A(I)(c)(“Definitions”), as set forth in Appendix A;
- Rule 37A(II)(a)(2)(“Initiation of Investigation Process”), as set forth in Appendix B;
- Rule 37A(II)(a)(3)(“Procedure after Receipt of Grievance”), as set forth in Appendix C.

APPENDIX A

Amend Supreme Court Rule 37A(I)(c) (“Definitions”) as follows (proposed deletions are in ~~strikethrough~~ format; additions are in **[bold and in brackets]**);

(c) *Definitions*: Subject to additional definitions contained in subsequent provisions of this rule which are applicable to specific questions, or other provisions of this rule, the following words and phrases, when used in this rule, shall have, unless the context clearly indicates otherwise, the meaning given to them in this section:

Answer: The response filed by, or on behalf of, the respondent to a complaint or a notice of charges.

Attorney: Unless otherwise indicated, "Attorney," for purposes of this rule, means any attorney admitted to practice in this State, any attorney specially admitted to practice by a court of this State, any attorney not admitted or specially admitted in this State who provides or offers to provide legal services in this State or any non-lawyer representative permitted to represent other persons before the courts of this State pursuant to RSA 311:1.

Complaint: A grievance that, after initial review, has been determined by the attorney discipline office to be within the jurisdiction of the attorney discipline system and to meet the prerequisites for docketing as a complaint as set forth in section (II)(a)(3)(B) of this rule, and that is docketed by the attorney discipline office, or a complaint that is drafted and docketed by the attorney discipline office after an inquiry by that office. If after docketing, the attorney discipline office general counsel or the complaint screening committee determines that a complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the prerequisites for docketing set forth in sections II(a)(3)(B)(i)-(iv) of this rule, it shall be removed from the docket and it shall thereafter be treated for all purposes as a grievance that has not been docketed as a complaint.

[Conventionally: The filing of a grievance with the attorney discipline office in paper form, delivered to the attorney discipline office in person, by United States mail, or by other means.]

Court: The New Hampshire Supreme Court.

Disbarment: The termination of a New Hampshire licensed attorney’s right to practice law in this State and automatic expulsion from membership in the bar of this State. A disbarred attorney may only apply for readmission to the bar of this State upon petition to the court, after having complied with the terms and conditions set forth in the disbarment order promulgated by the court which shall

include all requirements applicable to applications for admission to the bar, including passing the bar examination and a favorable report by the professional conduct committee and the character and fitness committee.

Disciplinary Counsel: The attorney responsible for the prosecution of disciplinary proceedings before any hearings committee panel, the professional conduct committee and the supreme court. Disciplinary counsel shall include a full-time attorney so designated, such deputy and assistants as may from time to time be deemed necessary, such part-time attorney or attorneys as may from time to time be deemed necessary, and such other attorneys of the attorney discipline office as may from time to time be designated to assist disciplinary counsel.

Disciplinary Rule: Any provision of the rules of the court governing the conduct of attorneys or any rule of professional conduct.

Discipline: Any disciplinary action authorized by Rule 37(3)(c), in those cases in which misconduct in violation of a disciplinary rule is found warranting disciplinary action.

Diversion: Either a condition attached to discipline imposed by the professional conduct committee; or a referral, voluntary in nature, when conduct does not violate the rules of professional conduct; or non-disciplinary treatment by the attorney discipline office general counsel, the complaint screening committee or the professional conduct committee as an alternative to discipline for minor misconduct.

[Electronically: The filing of a grievance with the attorney discipline office in electronic form through the attorney discipline office website.]

***Electronic Signature:* A signature, other than an inked signature, as set forth in sections II(3)(B)(iii)(1) and (2).]**

Formal Proceedings: Proceedings subject to section (III) of this rule.

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, and such other attorneys of the attorney discipline office as may from time to time be designated to assist general counsel.

Grievance: "Grievance" means a ~~written~~ submission filed [**conventionally or electronically**] with the attorney discipline office to call ~~to~~ its attention **[to]** conduct that the grievant believes may constitute misconduct by an attorney. A grievance that is determined, after initial screening, not to be within the jurisdiction of the attorney discipline system and/or not to meet the prerequisites for docketing as a complaint shall not be docketed and shall continue to be referred to as a grievance. A grievance that is determined, after initial screening, to be within the jurisdiction of the attorney discipline system and to meet the prerequisites for docketing as a complaint shall be docketed as a complaint and shall be referred to thereafter as a complaint; provided, however, that if the attorney discipline office general counsel or complaint screening committee later determines that the docketed complaint is not within the jurisdiction of the attorney discipline system and/or does not meet the prerequisites for docketing set forth in sections II(a)(3)(B)(i)-(iv) of this rule, it shall be removed from the docket and it shall thereafter be treated for all purposes as a grievance that has not been docketed as a complaint.

Hearing Panel: A hearing panel comprised of members of the hearings committee.

Inquiry: A preliminary investigation of a matter begun by the attorney discipline office on its own initiative to determine whether a complaint should be docketed.

Investigation: Fact gathering by the attorney discipline office with respect to alleged misconduct.

Minor Misconduct: Conduct, which if proved, violates the rules of professional conduct but would not warrant discipline greater than a reprimand. Minor misconduct (1) does not involve the misappropriation of client funds or property; (2) does not, nor is likely to, result in actual loss to a client or other person of money, legal rights or valuable property rights; (3) is not committed within five (5) years of a diversion, reprimand, censure, suspension or disbarment of the attorney for prior misconduct of the same nature; (4) does not involve fraud, dishonesty, deceit or misrepresentation; (5) does not constitute the commission of a serious crime as defined in Rule 37(9)(b); and (6) is not part of a pattern of similar misconduct.

Notice of Charges: A formal pleading served under section (III)(b)(2) of this rule by disciplinary counsel.

Public Censure: The publication by the court or the professional conduct committee, in appropriate New Hampshire publications, including a newspaper of general statewide circulation, and one with general circulation in the area of respondent's primary office, as well as the New Hampshire Bar News, of a summary of its findings and conclusions relating to the discipline of an attorney, as defined in this section.

Referral: A grievance received by the attorney discipline office from any New Hampshire state court judge or from any member of the bar of New Hampshire, in which the judge or attorney indicates that he or she does not wish to be treated as a grievant.

Reprimand: Discipline administered by the professional conduct committee after notice of charges and after a hearing before a hearings committee panel and the right to request oral argument to the professional conduct committee in those cases in which misconduct in violation of the rules of professional conduct is found. A reprimand is administered by letter issued by the chair of the professional conduct committee, subject to an attorney's right to appeal such discipline to the court.

Suspension: The suspension of an attorney's right to practice law in this State, for a period of time specified by the court or by the professional conduct committee. Suspension by the professional conduct committee may not exceed six (6) months. The suspended attorney shall have the right to resume the practice of law, after the expiration of the suspension period, upon compliance with the terms and conditions set forth in the suspension order promulgated by the court or the professional conduct committee and pursuant to the procedure set forth in section (II)(c)(2) regarding reinstatement.

APPENDIX B

Amend Supreme Court Rule 37A(II)(a)(2) (“Initiation of Investigation Process”)

as follows (proposed deletions are in ~~striketrough~~ format; additions are in **[bold and in brackets]**):

(2) *Initiation of Investigation Process*

(A) *Grievance*. Any person may file a grievance with the attorney discipline office to call to its attention the conduct of an attorney that he or she believes constitutes misconduct which should be investigated by the attorney discipline office, subject to section II(a)(3)(B)(ii). If necessary, the general counsel or his or her deputy or assistant will assist the grievant in reducing the grievance to writing.

In accordance with a judge’s obligation under canon 3 of the code of judicial conduct to report unprofessional conduct of any attorney of which the judge is aware, a judge of the supreme, superior, district or probate courts of New Hampshire, may refer any matter to the attorney discipline office which he or she believes may constitute misconduct by an attorney that should be investigated by the attorney discipline office. In accordance with an attorney’s obligation under Rule 8.3 of the rules of professional conduct to report unprofessional conduct of an attorney of which he or she has knowledge, a member of the bar of New Hampshire, may refer any matter to the attorney discipline office which he or she believes may constitute misconduct by an attorney that should be investigated by the attorney discipline office. Except as otherwise provided, a referral from a court or attorney shall be treated as a grievance. Upon receipt of a referral, if the attorney discipline office shall determine that the referring judge or attorney does not wish to be treated as a grievant, and, if it is determined after initial screening that the grievance is within the jurisdiction of the attorney discipline office and meets the prerequisites for docketing as a complaint as set forth in section II(a)(3)(B), the attorney discipline office shall process the grievance as an attorney discipline office generated complaint.

(B) *Attorney Discipline Office-Initiated Inquiry*. The attorney discipline office may, upon any reasonable factual basis, undertake and complete an inquiry, on its own initiative, of any other matter within its jurisdiction coming to its attention by any lawful means. Unless the attorney discipline office later docketed a complaint against an attorney in accordance with section II(a)(5)(B), all records of such an inquiry shall be confidential.

(C) *Filing*. A grievance shall be deemed filed when received **[conventionally or electronically]** by the attorney discipline office.

APPENDIX C

Amend Supreme Court Rule 37A(II)(a)(3) (“Procedure after Receipt of Grievance”) as follows (proposed deletions are in ~~striketrough~~ format; additions are in **[bold and in brackets]**):

(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 prerequisites 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 up to 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) *Prerequisites 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 prerequisites:

(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, **[manually or electronically]** 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."

[An electronically signed Oath or Affirmation shall be considered a signed original if presented by the grievant in either one of two ways: (1) the typed symbol /s/ followed by the typed name of the registered filer submitting the document (example: /s/ John Smith); or (2) a graphic representation of the filer's actual signature.]

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

(v) *Sufficiency of 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 there is no reasonable likelihood that a hearing panel would find clear and convincing evidence that the respondent attorney violated the rules of professional conduct.

(C) *Treatment of Grievance Not Within Jurisdiction of Attorney Discipline System or Failing to Meet Complaint Prerequisites*. A grievance that is not within the jurisdiction of the attorney discipline system or that does not meet the prerequisites 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).