

MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: #2019-011. Supreme Court Rule 55. Public Protection Fund
Date: August 21, 2019

The Attorney Discipline Office requests that the Committee consider a suggested amendment to Supreme Court Rule 55 (“Public Protection Fund”) designed to “close a gap” in the language of Rule 55. The reasons for the request are set forth in the attached August 21, 2015 letter from the Attorney Discipline Office to the Chair of the Public Protection Fund. It is my understanding that no action was taken on the proposal in 2015.

Please note that attached to the 2015 letter is a copy of Supreme Court Rule 37(11) (“Resignation By Attorney Under Disciplinary Investigation”) as it existed at that time. No changes have been made to Rule 37(11) since 2015. Therefore, the language of current Rule 37(11) is identical to the language of the 2015 version of the rule. While changes were made in 2018 to the reinstatement and readmission rules set forth in Supreme Court Rule 37, those changes do not affect the suggested amendments set forth in the 2015 letter.

Please note also that when the Attorney Discipline Office agrees to support a request to resign while under investigation that implicates any form of misappropriation (or, as stated in Rule 55, “defalcation”), the Attorney Discipline Office requires the Respondent to waive the confidentiality of the affidavit in support of resignation.

New Hampshire Supreme Court

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August 21, 2015

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Re: Rule 55 - Public Protection Fund

Dear Tom:

Following up on our conversation, we write to highlight for you and for the Committee a potentially significant gap in the language of Rule 55 that could prejudice future claimants. The Attorney Discipline Office (ADO) believes that a simple amendment to Rule 55 would eliminate this gap and better effectuate the intent of Public Protection Fund (the "Fund").

The current language of Rule 55 allows claims to be made, and payments from the Fund to issue, "only after the lawyer in question has been suspended or disbarred from practice." Rule 55 does not reference one other important category of discipline that results in a lawyer being unable to practice law — resignation while under investigation pursuant to Sup. Ct. R. 37(11).¹

A lawyer who resigns under Rule 37(11) is constructively disbarred, and may not practice law without overcoming all of the same hurdles a disbarred lawyer must overcome should he or she seek to practice again. These requirements including passing the Bar Exam and the MPRE, and moving for readmission. Readmission procedures (unlike reinstatement

¹ The complete text of Rule 37(11) is enclosed herein for your reference.

procedures, which follow after a suspension) involve not only the ADO but also the Character and Fitness Committee.²

A lawyer may move to resign while under investigation at any point in the discipline process. Many times, for judicial economy, the ADO will support the resignation provided that the affidavit in support thereof is sufficiently detailed and captures all the misconduct at issue. To resign while under investigation, a lawyer must state that he or she is guilty of misconduct “the nature of which shall be specifically set forth,” must acknowledge that the material facts upon which the complaint is predicated are true, and must state that the request to resign is being submitted because the lawyer could not successfully defend charges of misconduct.

For the Committee’s convenience, I attach a straightforward proposed amendment which would close this gap. The proposed change would ensure that claimants who were harmed by a lawyer who resigns while under investigation are not barred from seeking relief from the Fund.

(3) CLAIMS AGAINST THE FUND. Claims for payment from the fund shall be submitted in writing, under oath, and shall explain specifically the defalcations which led to the losses in question. Such claims must be submitted within three years of the time when the victim discovered or first reasonably should have discovered the defalcations and the resulting losses, but in no event later than one year after the lawyer in question has been suspended or disbarred from practice, has resigned while under disciplinary investigation, or has died or been judged mentally incompetent before the suspension, ~~or~~ disbarment, or resignation proceedings have been commenced or concluded.

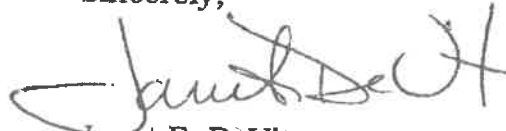
(4) PAYMENTS FROM THE FUND. Payments from the fund will be made only after the lawyer in question has been suspended or disbarred from practice; has resigned while under disciplinary investigation; or if the lawyer has died or been judged mentally incompetent before the suspension, ~~or~~ disbarment, or resignation proceedings have been commenced or concluded.

² See Rule 37(14) (governing reinstatement and readmission; requiring the Supreme Court to forward applications for readmission to the Professional Conduct Committee as well as to the Character and Fitness Committee “pursuant to Supreme Court Rule 42.”)

Thomas B.S. Quarles, Jr., Esquire
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Thank you in advance for your attention to this matter. The ADO believes these changes to the rule would further the intent of the Fund and prevent unintended consequences that would bar otherwise valid claims.

Sincerely,



Janet F. DeVito
General Counsel



Sara S. Greene
Disciplinary Counsel

SSG/ges
Enclosure

RULES OF THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

ADMINISTRATIVE RULES 35 TO 59

Rule 37. ATTORNEY DISCIPLINE SYSTEM

(11) Resignation By Attorney Under Disciplinary Investigation:

(a) An attorney who is the subject of an investigation into allegations of misconduct may file a request to resign by delivering to the professional conduct committee an affidavit stating that he or she desires to resign and that:

(1) the resignation is freely and voluntarily rendered; he or she is not being subjected to coercion or duress; he or she is fully aware of the implications of submitting the resignation;

(2) he or she is aware that there is presently pending an investigation into allegations that he or she has been guilty of misconduct the nature of which shall be specifically set forth;

(3) he or she acknowledges that the material facts upon which the complaint is predicated are true; and

(4) he or she submits the resignation because he or she knows that if charges were predicated upon the misconduct under investigation they could not be successfully defended.

(b) Upon receipt of the required affidavit, the professional conduct committee shall file it with the court, along with its recommendation, and the court may take such action as it deems necessary.

(c) The contents of affidavit of an attorney filed in support of his or her resignation from the bar shall not be disclosed publicly or made available for use in any other proceeding except on order of the court.