

TO: Advisory Committee on Rules

FROM: Subcommittee established to review Supreme Court Rule 37(9) and 37(16)

Date: May 16, 2022

At our March 11, 2022 meeting, Justice Donovan proposed that a subcommittee be established to consider possible changes to Supreme Court Rule 37(9) and 37(16) to address the procedures that apply to the immediate suspension of attorneys. The subcommittee consists of Justice Donovan, Attorney Sara Greene, Attorney Susan Lowry, and Timothy Gudas, Supreme Court Clerk. Attorney Russ Hilliard also participated in discussions.

The subcommittee determined that Rule 37 required an amendment to address ADO cases that involve attorneys who have engaged in serious misconduct that poses an immediate and substantial threat of serious harm, but who have responded to ADO requests for information or have not been convicted of a serious crime. At present, Rule 37(9-A) suggests that an "interim suspension" can be sought by the ADO in these circumstances. That procedure, however, provides that the attorney will be afforded 50 days to respond to the petition and prepare for a hearing before a referee or panel and another 10 days before a decision may be issued. The ADO believes that, in certain cases involving, for example client fund misappropriation, an immediate, summary suspension of the attorney is necessary to protect either the public or the integrity of the legal profession. The current language of Rule 37(9-A) and (9-B) has led some practitioners to suggest that an immediate summary suspension is available only when the attorney refuses or fails to respond to a subpoena issued by the ADO. A recent ADO case fell within this area which resulted in the litigation of the proper procedural vehicle under which the ADO could petition for an immediate or summary suspension. As a result, the subcommittee recommends that the rules be amended as follows.

Rule 37(9-A) Proceedings Where When an Attorney is Alleged to have Engaged in Conduct that Poses a Substantial Threat of Serious Harm.

(a) The attorney discipline office may file a petition for interim suspension or other relief in this court alleging that an attorney has engaged in conduct that poses a substantial threat of serious harm to the public. **[If the attorney discipline office's petition alleges that an attorney's serious misconduct poses an immediate and substantial threat of serious harm to the public or the integrity of the legal profession, the provisions of (9-B), Summary Suspension Procedure, shall apply.]**

(b) The term "substantial threat of serious harm" encompasses any non-serious crime, conduct, or course of conduct that substantially impairs the attorney's ability to continue to practice in conformity with the Rules of Professional Conduct and Rule 50, or creates a substantial risk of harm to the public if the attorney is not suspended on an interim basis.

(c) The petition must state with particularity the conduct alleged as well as **the bases upon which** why the interim suspension is necessary to prevent a threat of serious harm to the public. The attorney discipline office shall serve the petition on the attorney by first-class mail, and service shall be deemed complete upon mailing. Service upon the respondent attorney at the latest address provided to the New Hampshire Bar Association shall be deemed to be sufficient. The attorney shall have twenty (20) days from the date of mailing to respond. If the attorney contests the interim suspension, the court will convene a hearing before a judicial referee or a hearing panel of the professional conduct committee. If the attorney consents to the interim suspension, the court may issue an order of interim suspension which will be effective immediately. If the attorney fails to respond to the petition, the allegations of the petition shall be deemed to be admitted, and no hearing shall be required.

(d) The hearing on the petition shall be recorded. The parties shall have thirty (30) days to prepare for the hearing, but no continuance of the hearing shall be granted absent extraordinary circumstances. The attorney discipline office shall have the burden to prove the need for interim suspension by clear and convincing evidence. The referee or panel may consider whether measures short of interim suspension adequately safeguard the public against the threat of substantial harm.

(e) After the hearing, the referee or panel shall issue a recommendation with regard to the need for interim suspension within ten (10) days, and shall forward that recommendation, with the record of the hearing, to the court. The court shall review the recommendation and the record. It may enter an order of interim suspension, dismiss the petition for interim suspension, issue an order directing the attorney to abide by specific conditions in lieu of interim suspension, or remand the matter for

further proceedings. Any order issued by the court shall be effective immediately, and shall remain in effect unless it is modified by the court, or it is superseded by an order stemming from disciplinary proceedings arising out of the same or related conduct.

Rule 37(9-B) Summary Suspension Procedure.

(a) **[[The foregoing Summary Suspension Procedure shall apply to cases in which the attorney discipline office alleges that a lawyer has:**

(1) engaged in serious misconduct which poses an immediate and substantial threat of serious harm to the public or the integrity of the legal profession, or;

(2) failed] ~~failure of an attorney under investigation to comply with a subpoena validly issued under Rule 37(8), or [failed] failure of an attorney under investigation to respond to requests for information by attorneys from the attorney discipline office made in the course of investigating a docketed matter. may be grounds for summary suspension as set forth herein.~~

(b) "Serious misconduct," for purposes of this Rule, is any misconduct involving (1) mishandling or misappropriation of client or third party property or funds or (2) any other misconduct which by itself could result in a suspension or disbarment.

(c) The attorney discipline office may file a petition for summary suspension with this court, with copies to the subject attorney, which sets forth **[with specificity] the violation of this section[. The petition must state with particularity the conduct alleged as well as the bases upon which the summary suspension is necessary to prevent an immediate and substantial threat of serious harm to the public or the integrity of the legal profession. When the petition for summary suspension is based upon a lawyer's failure to respond pursuant to Rule 37 (9-B)(a)(2), the petition shall be]** supported by an affidavit of the attorney discipline office affirming the facts set forth in subsection (d). Upon such filing, this court may enter an order of summary suspension and may order such emergency relief as this court deems necessary to protect the public **[or the integrity of the legal profession.]**

(d) The affidavit in support of the petition for summary suspension shall affirm:

(1) that the lawyer was served with the subpoena or was mailed the request(s) for information at the latest address provided to the New Hampshire Bar Association;

(2) that the lawyer was afforded a reasonable period of time to **[comply]** ~~for compliance~~ with the request for information or the subpoena, and has failed to comply, to answer, or to appear; and

(3) that the subpoena or request for information was accompanied by a statement advising the attorney that failure to comply with the subpoena or request for information may result in summary suspension without further hearing.

(4) Notice of intent to seek summary suspension was both sent by certified mail and was provided in hand to the attorney or attempted in hand without success, despite reasonable efforts.

(e) Any suspension under the provisions of **[this Rule]** ~~subsection (e) above~~ shall be immediately effective upon entry of the suspension order and shall be subject to the provisions of Rule 37(16)(g).

(f) An attorney suspended under the provisions of subsection (c) above may request a hearing by the deadline set forth in the order of suspension. The hearing shall be conducted by a judicial referee or a hearing panel, and shall occur within ten (10) days of the effective date of the suspension. The judicial referee or hearing panel shall issue a report within ten (10) days of the hearing recommending whether the suspension should be lifted.

(g) **[In the interest of justice, the court may, upon the filing of a petition for reinstatement, terminate such suspension at any time after affording the attorney discipline office an opportunity to be heard.]** ~~If an attorney cures the failure to comply with the subpoena or other request for information, the attorney may file a petition for reinstatement with this court. The petition~~ **[for reinstatement]** shall be accompanied by an affidavit of compliance stating the extent to which **[the lawyer]** ~~he or she~~ has **[cured or abated the immediate threat of serious harm to the public or the integrity of the legal profession, or has otherwise]** complied with the subpoena or request for information. A copy of the petition and affidavit shall be sent to the attorney discipline office, which may file a response to the petition and affidavit within 10 days. The court may take such action on the petition as it deems appropriate.

(h) If not reinstated pursuant to Rule 37(9-B)(f) or (g), the attorney shall become subject to the provisions of Rule 37(17).

(i) A lawyer suspended in another jurisdiction pursuant to a procedure similar to that set forth herein may be suspended in this jurisdiction on a reciprocal basis as provided in Rule 37(12)