

OUTLINE OF ABA REPORT ON NH LAWYER DISCIPLINARY SYSTEM

RECOMMENDATIONS:

1. REMAIN UNDER COURT OVERSIGHT SEPARATE FROM NH BAR ASSOCIATION

Current Procedure: Currently the Attorney Discipline system is separate from the NH Bar Association. The Vice President of the NHBA sits on the PCC as a full voting member.

Proposed Changes: NH Bar Association VP would not participate in the hearing of prosecuted disciplinary complaints, serving instead on a new "administrative oversight committee" of the PCC.

-Revision of Rule 37(3)(d) to provide that the VP serve in an ex officio capacity, as opposed to having the same voting authority as other PCC members, in particular to address personnel and budgetary matters

A. Open and Transparent Appointment Process to Fill Attorney Disciplinary Office Committee Vacancies

Current Procedure: The NH Supreme Court appoints volunteers to serve on the CSC, HC, and PCC.

Proposed Changes: It is recommended that the Court utilize an open, well publicized nomination process.

-Court would appoint a nominating committee to review applications

-Amend rules to require that a lawyer member serve as HC Chair and Vice-Chair and that lawyer members serve as chairs of Hearing Panels

B. Complaint Screening Committee, HC and PCC Members Serve Two rather than Three consecutive terms

Current Procedure: Currently CSC, HC and PCC appointees are able to serve up to three consecutive terms of three years each.

Proposed Changes: Amend rules to limit reappointment to two consecutive terms.

C. Employment Status of ADO Staff

Current Procedure: Currently staff of the ADO are neither NHBA nor judicial branch employees.

Proposed Changes: Recommends consultation with the NH Attorney General and other jurisdictions in order to craft best approach for NH.

-Strongly encourages that ADO personnel not be considered employees of the NH Bar Association

2. RESTRUCTURING OF OPERATIONS OF THE ADO

A. The Court should Appoint One Chief Counsel for the System

Current Procedure: Currently the General Counsel's staff receives, screens, docket, and investigates complaints and grievances. The General Counsel may dismiss a complaint with or without a warning, direct a lawyer to the diversion program or forward the complaint to the Complaint Screening Committee. When the CSC determines there is sufficient cause to prosecute a matter, the case is transferred to Disciplinary Counsel. Disciplinary Counsel then conducts further investigation and prosecutes the matter.

Proposed Changes: Amend Rule 37 and upon recommendation of the PCC appoint one Chief Disciplinary Counsel to serve as head of the ADO.

-Responsibilities of this individual would include, responsibility for administration of the Office, including budget responsibilities, hiring, supervision and retention of staff, and day-to-day caseload management

B. Complaint Screening Processes for the ADO Should be Streamlined

Current Procedure: The General Counsel may dismiss a complaint with or without a warning, direct a lawyer to the diversion program or forward the complaint to the Complaint Screening Committee. When the CSC determines there is sufficient cause to prosecute a matter, the case is transferred to Disciplinary Counsel.

Proposed Changes: Revise procedures so that the CSC will no longer make dismissal or diversion recommendations, except when asked by a grievant to reconsider such decisions by the ADO counsel.

-provides ADO counsel with dismissal authority without the need to receive CSC approval for that action

-Less formal initial review of grievances or potential grievances, direct phone contact should be used more often

-streamline and speed up intake procedures

C. Assignment of Investigative and Prosecutorial Duties to Separate ADO Counsel should be Eliminated

Current Procedures: Both ADO staff and Disciplinary Counsel conduct investigations.

Proposed Changes: Amend Rule 37 and 37A and adopt an integrated system in which a well-trained, qualified lawyer is responsible for investigating and prosecuting each complaint.

D. Provide ADO with Ability to Issue Investigative Subpoenas

Current Procedures: Currently the ADO lacks the authority to issue investigative subpoenas.

Proposed Changes: Amend Rules 37 and 37A to allow lawyers in the ADO to issue subpoenas during the investigative state of proceedings

E. Services of Investigator and a Paralegal

Current Procedure: The ADO does not have a full-time investigator or paralegal on staff.

Proposed Changes: Retain services of a professional investigator and a paralegal to assist in the investigation and prosecution of cases.
-investigator and paralegal may help ease burden on accountant

3. CREATE AN ADMINISTRATIVE OVERSIGHT COMMITTEE WITHIN THE PCC

Current Procedure: Currently the PCC oversees the administration of the NH lawyer discipline system.

Proposed Changes: Amend Rule 37 and 37A to create an Administrative Oversight Committee within the PCC

- Committee would consist of experienced PCC members (two lawyers and one non-lawyer) with the VP of the NH Bar serving ex officio
- Members would not participate in adjudication of the cases
- members would rotate, staggering terms

A. Resource Planning

- Chief Disciplinary Counsel develop the budget relating to the office operations
- Administrative Oversight Committee develops the budget necessary for the operations of the PCC, HC and CSC
- Work together to create comprehensive budget
- Court to make a determination if increased fee is required to implement changes

B. System Administrative Oversight

- Administrative Oversight Committee ensures that HC and its panels and the PCC operate efficiently and that reports and recommendations are timely filed
- Recommends 60 day filing requirement for HC panel reports and suggested similar standard be incorporated into PCC rules
- Hearing and oral argument dates be set one year in advance so available when needed

C. Training and Outreach

- Develop mandatory and well-constructed training program for the system's volunteers
- pamphlets and other outreach materials revised and updated
- more concerted efforts made to address the public

4. REWORK ADO'S ROLE IN CONDUCTING CHARACTER AND FITNESS INVESTIGATIONS

Current Procedure: The Bar Admissions Administrator works within the ADO and conducts character and fitness evaluations.

Proposed Changes: The ADO would be relieved of the role of conducting character and fitness investigations.

-The NH Supreme Court should consider using the National Conference of Bar Examiners (NCBE) to conduct character and fitness investigations.

5. THE ADO BE PROVIDED WITH ENHANCED TECHNOLOGY RESOURCES

Current Procedure: The ADO does not use off-site electronic storage and back-up data on its computer system, does not have investigative software, does not have electronic access to NH Bar Association member information, and does not have a case management system.

Proposed Changes: Maintain secure, offsite electronic back up.

-Provide support to maintain and update computer system, including updating website

-Acquire software for investigations

-"Read-only" electronic access to member directory of NH Bar Association

-Acquire a sophisticated case management system tailored to the ADO functions

-The Committees have password-protected access to portions of ADO website to conduct business electronically

6. THE ADO AND PCC SHOULD DEVELOP AND IMPLEMENT PERFORMANCE STANDARDS

-Adopt time guidelines for all stages of proceedings

-Set individual performance goals for each staff member and conduct periodic reviews throughout the year

7. ADO COMMITTEE MEMBERS SHOULD RECEIVE FORMAL TRAINING

Current Procedure: Members of the CSC, HC and PCC receive little, in any, training.

Proposed Changes: Chair and Vice-Chairs of the PCC work with the General Counsel and Disciplinary Counsel to develop a comprehensive training program and accompanying training manuals for all system volunteers.

-All incoming volunteers should receive mandatory initial training and mandatory annual reviews and updates.

8. SUGGESTED RULE MODIFICATIONS FOR THE HEARING COMMITTEE AND PROFESSIONAL CONDUCT COMMITTEES

A. Pre-Hearing Conferences Mandatory in All Cases

Current Procedure: Currently pre-hearing conferences may be requested by any party or the trier of fact.

Proposed Changes: Amend Rules to require that pre-hearing conferences be mandatory in all cases.

- Strict time limits should be set with continuances granted only for good cause
- Hearing panel chair should be permitted to encourage resolution in appropriate cases

B. The Court Should Amend the Rules to Require Use of the ABA Standards for Imposing Lawyer Sanctions

Current Procedure: The ABA found what it characterized as a lack of consistency in substance of hearing panel reports and the types of sanctions recommended.

Proposed Changes: Amend Rule 37 and 37A to utilize ABA Standards for Imposing Lawyer Sanctions.

- Require all hearing panel reports to include a procedural summary, clear findings of facts and conclusions of law relating to each alleged violation and a recommendation for the imposition of appropriate sanction.

C. The Court Should Adopt an Appellate Standard of Review for the PCC

Current Procedure: Present standard applied is "clear and convincing evidence of violations of the rules of professional conduct."

Proposed Changes: Suggests adoption of a standard of review that would require the PCC to uphold the hearing panels' findings of fact unless they are clearly erroneous or manifestly in error. Conclusions of law and sanction recommendations would still be subject to de novo review.

9. AMEND RULE ELIMINATING RESTRICTION ON WHO MAY FILE A GRIEVANCE AND THE REQUIREMENT THAT GRIEVANTS PROVIDE RESPONDENTS WITH COPIES OF COMMUNICATION WITH THE ADO

Current Procedure: NH Supreme Court Rule 37A(II)(a)(3)(B)(ii) states that a grievance may be filed by a "person who is directly affected by the conduct complained of or who was present when the conduct complained of occurred...."

Proposed Change: Amend rules to provide that anyone can file a grievance against a NH lawyer.

- Suggests that rules be amended to allow for anonymous complaints, a change to Rule 37A(II)(a)(3)(B)(iii)
- Eliminate requirement that the complainant serve upon Respondent copies of all pleadings and communications with the ADO

10. DISCIPLINARY MATTERS SHOULD BE EXEMPT FROM THE STATUTE OF LIMITATIONS

Current Procedure: Rule 37A(I)(i) provides for a statute of limitations of six years for misconduct prior to April 1, 2000 and two years for alleged misconduct committed after April 1, 2000. Where the lawyer's act or omission were not, or could not reasonably have been discovered within that time frame, the grievance must be filed within two years after the grievant learns or reasonably should have learned of the misconduct.

Proposed Change: Amend Rule 37A(I)(i) to eliminate the statute of limitations.

11. RE-EVALUATE CERTAIN ASPECTS OF CONFIDENTIALITY RULES

-Court should evaluate how Rules 37 and 37A could be crafted to be clearer and more user-friendly.

A. Publicly Available Information Would be Available Electronically

Current Procedure: Records available for public inspection are kept in file cabinets at the ADO Offices.

Proposed Changes: Existing records and index be scanned into electronic format and made available electronically.

B. Reconsider Retaining for Public Inspection Letters to Grievants Involving Individuals Not Subject to the Rules of Professional Conduct

Current Procedure: The ADO sends a letter to grievants who complain about someone not subject to the NH Rules of Professional Conduct advising them of their lack of jurisdiction. Rule 37A(IV) requires the ADO to retain and make available for public inspection for two years a copy of that letter to the grievant.

Proposed Changes: Because the public has access to this letter, but the person subject to the complaint (pursuant to Rule 37A(II)(4)(A)) is not notified, the rules should be amended to eliminate the requirement that such letters be available to the public.

C. Study the Privacy Implications of Requiring that All Records and Materials Relating to a Grievance be Publicly Available

Current Procedure: If a complaint is determined to not meet the requirements for being docketed as a complaint, the ADO notifies the lawyer and provides the opportunity for the lawyer to provide a reply. All records other than internal memorandum and deliberations are maintained for public inspection for two years. Supporting documentation may contain sensitive private information such as bank record, copies of checks, and other personal information.

Proposed Changes: Disclose only the grievance, respondent's response, and detailed closure letter to grievant explaining the decision not to docket to the public.

12. LAWYERS SHOULD BE REQUIRED TO MAINTAIN ALL CLIENT TRUST ACCOUNTS IN FINANCIAL INSTITUTIONS THAT PROVIDE FOR TRUST ACCOUNT OVERDRAFT NOTIFICATION

Current Procedure: Currently there is no trust account overdraft notification rule.

Proposed Changes: Court adopt an overdraft notification rule in order to provide an "early warning" system to identify when a lawyer is engaging in conduct likely to injure clients.

13. DISMISSALS WITH WARNINGS SHOULD NOT CONSTITUTE PRIOR DISCIPLINE FOR USE IN SUBSEQUENT FORMAL DISCIPLINARY PROCEEDINGS

Current Procedure: The General Counsel's Office, CSC or PCC may issue warnings to lawyers who have been the subject of complaint. They do not constitute discipline. These warnings may be considered by the PCC in the event a future finding of misconduct is found.

Proposed Changes: Amendment to Rule 37(A)(II)(b)(1)(B)(iii) and any related rules to provide that warnings cannot be considered by the PCC in subsequent disciplinary proceedings.

14. DISBARMENT SHOULD BE FOR A MINIMUM PERIOD OF FIVE YEARS

Current Procedure: Currently suspensions are for a specific period of time and there is no set minimum period of time for disbarment. A person disbarred could apply for readmission sooner than a suspended lawyer.

Proposed Changes: Recommends adoption of a Rule providing that no disbarred lawyer may petition for readmission until five years after the effective date of the disbarment order.

15. ELIMINATE THE OPTION OF RESIGNING WITH INVESTIGATION PENDING AND ADOPT A RULE PROVIDING FOR DISCIPLINE ON CONSENT

Current Procedure: Rule 37(11) provides that a lawyer subject to an investigation into allegations of misconduct may resign upon filing an affidavit containing certain information. A lawyer that resigns may apply for readmission in the same manner as a disbarred lawyer.

Proposed Changes: Amend Rules to eliminate resignations and adopt a Rule providing for discipline on consent that includes consensual disbarment.

16. THE COURT SHOULD ADOPT A RULE PROVIDING FOR PROBATION, MONITORING, AND REVOCATION OF PROBATION

Current Procedure: Rule 37A provides for Diversion as a disciplinary sanction.

Proposed Changes: Continue to allow for Diversion as non-disciplinary sanction. Institute Probation which includes monitoring and revocation, when appropriate, in the place of "mandatory diversion" imposed as a form of sanction.

-Rule should provide unambiguously each specific condition of probation

-Require prior to termination of probation an affidavit stating that the lawyer has complied with the terms of probation

-Disciplinary Counsel should oversee administration of the probation

-Probation monitors should report to Disciplinary Counsel

17. AMEND RULE 37(9) TO PROVIDE FOR INTERIM SUSPENSION UPON FINDING OF GUILT

Current Procedure: Rule 37(9) currently provides that a New Hampshire lawyer convicted of a serious crime is to be suspended pending final disciplinary proceedings. There may be delays between determination of guilt and entry of judgment of conviction.

Proposed Changes: Amend Rule 37(9) to provide that any lawyer found guilty of a serious crime is subject to immediate summary suspension.

18. ADOPT A RULE TO PROVIDE FOR INTERIM SUSPENSION FOR SUBSTANTIAL THREAT OF SERIOUS HARM

Current Procedure: The Court may make temporary orders as justice may require either with or without a hearing.

Proposed Changes: Adopt a new Rule providing for the interim suspension of lawyers whose conduct poses a substantial threat of serious harm to the public. Such a rule should provide that upon receipt of sufficient evidence that a lawyer has committed a violation of the Rules of Professional Conduct that would warrant such action, ADO counsel should transmit that evidence to the Court along with a request for entry of an interim suspension.