A CLOSER LOOK AT THE NEW WEB SITE FOR THE ATTORNEY DISCIPLINE SYSTEM

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The New Hampshire Supreme Court's Attorney Discipline Office ("ADO") has gone public with a new web site. In addition to providing detailed information regarding the disciplinary process, the site now provides the public for the first time with Internet access to records of proceedings involving New Hampshire lawyers going back to 2004. New Hampshire is not alone in providing Internet access to these proceedings. The majority of states have similar sites; some have been in business for many years.

This Advisory discusses the features of the new web site, notes differences between the site and those of other jurisdictions (most significantly, the inclusion of records regarding non-disciplinary dismissals with "warnings"); and discusses whether the existence of the site, while a positive development in many regards, has effectively eliminated the difference between the lowest level of sanction, the reprimand, and the more serious penalty of public censure.

I. THE NEW WEB SITE OF THE ATTORNEY DISCIPLINE SYSTEM

General Information Provided on the Web Site: The web site address is **www.nhattyreg.org**. Right off the bat, the web site's home page provides a link to an exceptionally useful "Organizational Chart", or flow chart, that presents on one page the steps in the processing of a grievance that can seem maze-like to those who do not practice before the ADO on a regular basis.

Reflecting the public education and regulatory focus of the web site, the first link on a menu that runs down the left side of the home page takes the user to information on "How to File a Grievance". An explanation regarding the information required for a grievance is included, and pdf forms are accessible that will facilitate the submission of grievances that meet the procedural requirements of Supreme Court Rule 37. The "How to File a Grievance" section also alerts users that the ADO does not have "authority to award money, resolve fee disputes, or affect the underlying action" - - cautions that are reiterated in the "Frequently Asked Questions" section of the site's menu.

The "Organizational Chart" available through a link on the home page introduces the various players in the disciplinary process, including the Offices of General Counsel and Disciplinary Counsel, the Complaint Screening Committee, the Hearing Committees and the Professional

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Conduct Committee. Separate links are then provided on the left-side menu for more detailed descriptions of the roles served and decisions made within each of these offices and committees.

Links are also provided to the Rules of Professional Conduct and to the Procedural Rules for the Attorney Discipline Process, a valuable convenience for professional responsibility lawyers as well as first time users of the site; and additional links are provided for the NH Judicial Branch, the Rule 55 Public Protection Fund, the NH Lawyer Assistance Program, the Bar Association's Dispute Resolution Committee, the Judicial Conduct Committee and the GAL Board.

One minor suggestion: "diversion", a non-disciplinary remedy for attorneys in cases of minor misconduct, does not receive focused attention on the site. The Organizational Chart available through the home page might be modified to include reference to diversion as one of the available "off ramps" at various stages of the disciplinary process. On balance, however, the ADO's new web site explains a complex process without unnecessary detail, and in straightforward language that will be clear to the general public.

Internet Access to the Records of New Hampshire Lawyers: By far the most dramatic change affected by the ADO's new web site is the access it provides to information regarding all New Hampshire lawyers who received any level of discipline since 2004 (from reprimand to disbarment); and any lawyer "warned" as a result of a complaint during the same time frame.

Warnings occur, under Supreme Court Rule 37A, in cases dismissed without a finding of misconduct and without the imposition of discipline, but under circumstances in which the General Counsel, the Complaint Screening Committee, or the Professional Conduct Committee nevertheless conclude that the lawyer's conduct requires "attention". Within the universe of cases included on the web site, warnings comprise close to half. More specifically, as of August 16, 2010, the site provided access to 122 cases resolved by non-disciplinary dismissals with warnings. Other categories included 30 cases resolved through reprimand, 31 cases resolved through public censure, 23 cases resolved through suspension up to 6 months, 14 cases resolved through suspension over 6 months, 27 cases resolved through disbarment, 25 cases resolved through recommendation to the Supreme Court, and 11 disciplinary matters titled "other".

These records are accessed through the menu item entitled "Search Disciplinary Decisions". A click takes the user to a page entitled "Search for Public Discipline (or Warnings) Issued Since January 1, 2004". The database of proceedings can then be searched by the name of the attorney the user is interested in; the year in which the proceeding was resolved; the identity of the complaining party; the docket number assigned to the case by the ADO; or by "Sanction/Warning".

A search by the identity of the attorney is the most likely to be used by members of the public seeking information about attorneys they may wish

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to retain. When the name of a lawyer is entered, the site generates a list of every lawyer with the same first name as that of the subject attorney. Lists are produced, therefore, in any search of an attorney with a common first name, although those lists generally will not contain the subject attorney (since most active lawyers do not appear anywhere on the site). If the subject attorney appears, and the user wishes further information, the user clicks on a pdf that contains documentation from the proceeding.

A search by "sanction/warning" is undertaken by selecting from the following scroll down menu:

Dismissal with warning
Reprimand
Public Censure
Suspension (up to 6 mos.)
Suspension (over 6 mos.)
Disbarment
Recommendation to Supreme Court
Other

A click on any category will then generate a list of attorneys whose proceedings have ended with the indicated regulatory response. Documentation related to the underlying proceeding is always provided in pdf form. For dismissals with warnings, the documentation is limited, consisting of the letter to the attorney from the ADO advising of the dismissal of the complaint, noting that the warning is not a sanction or a finding of misconduct, and then discussing some aspect of the attorney's conduct.

For all forms of discipline from reprimand to disbarment, the documentation provided is far more extensive, including detailed factual stipulations or findings, conclusions of law regarding the rule(s) violated by the attorney, and an explanation of the sanction imposed and any special conditions.

II. NOTEWORTHY ASPECTS OF NEW HAMPSHIRE'S WEB SITE

Dismissals With Warnings: Based on a review of the sites of other states and inquiries to national listservs for professional responsibility lawyers, it appears that New Hampshire is the only state that has made the judgment that users should have Internet access to non-disciplinary dismissals with warnings. Not all states have provisions for non-disciplinary "warnings" or similar advisory resolutions. For those that do, however, the states have determined that in the absence of a finding of professional misconduct and actual discipline, the case should not be included in the Internet database. (Maine, for example, includes non-disciplinary warnings in its array of potential resolutions of a complaint; but does not provide information about these cases or the attorneys involved on its web site.)

New Hampshire's decision to include even non-disciplinary results places a premium on comprehensive transparency; underscores the scrutiny and standards to which all lawyers are held; and necessarily reflects a judgment that the consumer is well-served by having ready access to this

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information, even when the ADO has concluded that the evidence does not support a finding of professional misconduct.

While contrary policy arguments can obviously be made, New Hampshire's decision to provide Internet access to the identity of lawyers who have received these dismissals and related documentation exceeds the purpose of this Advisory. Given the decision, however, we will make the following observations about the manner in which the information is presented on the web site itself.

There is an enormous difference, under New Hampshire Supreme Court rules, between cases that result in discipline of one type or another and cases that are resolved without a finding of misconduct or discipline. If non-disciplinary warnings are to be presented to the public on the Internet, the difference between these dismissals and all other cases available on the web site needs to be as clear as possible. We would respectfully suggest consideration of some changes to the current web site to achieve greater clarity.

First, non-disciplinary warnings are now found by clicking on a menu item entitled "Search Disciplinary Records". The potential confusion created by this menu title could be eliminated by creating two separate menu items. One of many possibilities would be separate menu items entitled "Search Cases Resulting in Discipline" and "Search Cases Resulting in Non-Disciplinary Warnings".

The potential confusion that can arise due to the current single, undifferentiated search process is aggravated by the fact that the web site does not now explain what a dismissal with a warning is. In particular, the web site does not advise the user (except if one reads the warning letter sent to an individual lawyer) that the warning is not a sanction and does not represent a finding of misconduct or of a rule violation. Such an explanation might be placed, for example, in the "Frequently Asked Questions" section of the web site; and in prominent locations that the user will encounter when accessing these cases directly, or when searching a lawyer whose grievance has resulted only in a warning.

The potential for confusion stemming from the current structure and content of the site is not theoretical. Within days of going on line, the new web site was the subject of a story in the Concord Monitor headlined "Site Lists Disciplined Lawyers", which reported that "you can search... the penalties given, from disbarments to warnings." **http://www.devinemillimet.com/uploads/docs/NH_Legal_Ethics_AdvisoryNo28-_Special_Edition.pdf**. We are also confident, however, that the ADO will be reviewing these and other issues during this shake out period for the web site; and that changes can be made with relative ease that would address concerns of this variety.

Reprimands and Public Censures: A reprimand is the least serious form of sanction imposed by the disciplinary process. It is administered by a letter from the chair of the Professional Conduct Committee to the attorney/respondent. Prior to the ADO's new web site, reprimands were public in that they were maintained in the public files of the ADO and

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available for review upon request. Affirmative steps were not, however, taken to publicize reprimands or bring them to the attention of the public. As explained on the ADO's new web site, "(a) reprimand is the least onerous form of sanction, and although it is public, it is not publicized". (See Frequently Asked Questions.)

By contrast, when rule violations result in the next level of sanction of public censure the essence of the sanction itself is to publicize the misconduct and discipline in places likely to be read by the public, the lawyer's community and the profession. As explained in Supreme Court Rule 37(2)(g):

> "Public Censure" means 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 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. . . ."

The Internet has, many believe, substantially replaced newspapers as the most convenient and frequently-accessed source of information of all varieties. In addition, the disciplinary system database that is now available on the ADO's web site is a long-term repository of information; newspapers used to implement "public censures", by contrast, are published, read and discarded on a twenty-four hour cycle - - making it likely that despite best efforts, the "censure" does not reach most readers.

Those of us who represent lawyers before the ADO have not had a chance to gain significant experience with the processing of disciplinary proceedings against the backdrop of the new web site. However, the creation of an Internet repository of cases resulting in reprimands may have, for all practical purposes, eliminated any meaningful incentive to resolve cases on the basis of what has historically been the most discrete and least onerous form of sanction. More significantly, the publication of reprimands on the Internet, along with the identity of the lawyer/ respondent and details of the violations, has arguably eliminated the key distinction intended to exist between reprimands and public censures by the Court's rules.

The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct, Liability and Professionalism Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at AC&LPG@devinemillimet.com.

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