LAW OFFICE OF JOSHUA L. GORDON • CONCORD, NH • WWW.APPEALSLAWYER.NET

State of New Hampshire
Supreme Court

IN THE MATTER OF

TIMOTHY O'MEARA, ESQUIRE

N.H. Sup.Ct. No. LD-2011-0002

NOTIFICATION OF EXTENDED BRIEF
or in the alternative,
MOTION FOR EXTRA PAGES
or in the alternative,
REQUEST FOR INSTRUCTIONS

NOW COMES Timothy O'Meara, Esquire, by and through his attorney, Joshua L. Gordon, and respectfully notifies this Court that he is filing herewith a conditional extended brief, or in the alternative, respectfully requests leave to file a brief of extended length beyond the page limitations.

As grounds it is stated:

I. Page Limitations Do Not Apply to Attorney Discipline Cases Where Penalty is Greater than Six Months Suspension

A. Attorney Discipline Cases Where Penalty is Greater than Six Months Suspension are Not Appeals

1. This case is not an appeal. An appeal is defined as "review of rulings adverse to a party, after a final decision on the merits in a trial court." N.H. SUP.CT. R. 3. "Decision on the merits" is defined as an "order, verdict, opinion, decree, or sentence following a hearing on the merits or trial on the merits and the decision on motions made after such order, verdict, opinion, decree or sentence." N.H. SUP.CT. R. 3.

2. Because the Supreme Court is the *only* forum with the authority to suspend lawyers from the practice of law for a period greater than six months, in such cases there necessarily has been no "decision on the merits" in any lower tribunal, and thus they are not an appeal. N.H. SUP.CT.R. 37(4)(c)(1) (hearings committee makes recommendations); N.H. SUP.CT.R. 37(3)(c)(5) (PCC has authority to "institute proceedings in this court in all matters which the professional conduct committee has determined warrant the imposition of disbarment or of suspension for a period in excess of six (6) months"); N.H. SUP.CT.R. 37(16)(f) ("The court may suspend attorneys or disbar New Hampshire licensed attorneys"); N.H. SUP.CT.R. 37A(I)(c) ("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."); N.H. SUP.CT.R. 37A(I)(e)(1)(B) (types of discipline includes "[s]uspension for more than six months - by the court").

3. If Attorney O'Meara had been disciplined by the PCC, for example, to a penalty of something less than six months suspension, and he appealed, this proceeding would be an appeal. N.H. SUP.CT.R. 37(2)(a) ("'Appeal' means an appeal to this court by a respondent or disciplinary counsel of a decision of the professional conduct committee.… An appeal shall be based on the record before the professional conduct committee and shall be limited to issues of errors of law and unsustainable exercises of discretion."); N.H. SUP.CT.R. 37(3)(c) ("Any attorney aggrieved by a finding of professional misconduct or by a sanction imposed by the professional conduct committee shall have the right to appeal such finding and sanction to this court; disciplinary counsel shall have the right to appeal a sanction."); N.H. SUP.CT.R. 37(16)(g) ("Either a respondent attorney or

LAW OFFICE OF JOSHUA L. GORDON • CONCORD, NH • WWW.APPEALSLAWYER.NET

disciplinary counsel may appeal findings of the professional conduct committee and the imposition of a reprimand, public censure or a suspension of six (6) months or less by filing a notice of appeal with the supreme court. The appeal shall not be a mandatory appeal. If the appeal is accepted by the court, the court may affirm, reverse or modify the findings of the professional conduct committee.").

B. This is Not an Agency Appeal or a Standard Original Jurisdiction Appeal

4. If this were an appeal, the supreme court rule providing for appeals from an administrative agency would apply. N.H. SUP.CT.R. 37(16)(j) (in attorney disciplinary matters, "[a]ppeals to the court shall be in the form prescribed by Rule 10, unless otherwise ordered by the court. Such appeals shall be based on the record and there shall not be a *de novo* evidentiary hearing.").

5. Although attorney discipline cases with PCC recommendations for greater than six-month suspensions clearly conjure the original jurisdiction of this Court, they are not the type of cases provided by the court rule defining its original jurisdiction:

> The following, while neither controlling nor fully measuring the court's discretion, indicate the character of the reasons that [original jurisdiction] will be considered: When a trial court or administrative agency has *decided* a question of substance not theretofore determined by this court; or has *decided* it in a way probably not in accord with applicable decisions of this court; or has so far *departed* from the accepted or usual course of judicial or administrative agency proceedings as to call for an exercise of this court's power of supervision.

N.H. SUP.CT.R. 11 (emphasis added). All of the examples in Rule 11 are where a "trial court or administrative agency" has "decided" a case or "departed" from normal procedure. In attorney discipline cases with greater than six-month suspensions, no court or agency has yet "decided," nor is there any allegation that the PCC has "departed" from its normal procedure.

LAW OFFICE OF JOSHUA L. GORDON • CONCORD, NH • WWW.APPEALSLAWYER.NET

6. Thus this case is not an ordinary agency appeal. Because it is not an appeal, it is also not the type of case contemplated by this Court's original jurisdiction rule.

C. Even the Case Caption Shows it is Not an Appeal

7. Even the captioning conventions of attorney discipline cases betray their non-appeal status. For reasons lost to history, PCC cases are called *"Attorney Name advs. Complainant Name*." What "advs." is an abbreviation for, research does not disclose. From bankruptcy practice it can perhaps be surmised that it stands for "adversary"; and from old civil law it can perhaps be surmised it stands for "adversus," meaning "against." But insofar as attorney disciplinary cases are prosecuted in the public interest and not on behalf of a particular complainant, the captioning is probably no more than a charming antiquity. *See e.g.*, *Morgan's Case*, 143 N.H. 475, 477 (1999) ("[T]he purpose of the court's disciplinary power is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future."); *Conner's Case*, 158 N.H. 299, 303 (2009) ("When determining whether to impose the ultimate sanction of disbarment, we focus not on punishing the offender, but on protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future."); N.H. R. PROF. COND., *Statement of Purpose* ("The Rules [of Professional Conduct] are not designed to be a basis for civil liability. The purpose of the Rules can be subverted when the Rules are invoked by opposing parties as procedural weapons. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.").

8. In the Supreme Court attorney discipline cases are called either *Matter of Attorney Name*

LAW OFFICE OF JOSHUA L. GORDON • CONCORD, NH • WWW.APPEALSLAWYER.NET

LAW OFFICE OF JOSHUA L. GORDON • CONCORD, NH • WWW.APPEALSLAWYER.NET

or *In re Attorney Name*. If attorney discipline cases were mere Rule 11 original jurisdiction appeals, however, they would probably be captioned *Professional Conduct Committee v. Attorney Name*, or would retain the PCC name including the "*advs*." *See* N.H. SUP.CT.R. 28 ("In a case entered by a petition requesting the supreme court to exercise its original jurisdiction, the party filing the petition shall be designated as the petitioner, even though the party may have filed the petition in the supreme court by reason of proceedings pending in a trial court or in an administrative agency in which the party is the defendant. In all other types of cases entered, the parties shall retain their trial court or administrative agency designations as plaintiffs and defendants.").

D. Page Limitations Rule Applies to Appellate Briefs

9. The rules of this Court enumerate five types of appeals: Appeals from a court decision on the merits (mandatory and discretionary), interlocutory appeals from a ruling, interlocutory transfers without ruling, agency appeals, and original jurisdiction. N.H. SUP.CT.RS. 7, 8, 9, 10, 11. As noted, this is not an appeal from a decision on the merits (Rule 7), neither type of interlocutory transfer (Rules 8 and 9), not an agency appeal (Rule 10), and not the sort of original jurisdiction referred to in Rule 11.

10. The rules of this Court limit appellate briefs to 35 pages.

> Except by permission of the court received in advance, no reply brief (or response thereto) shall exceed 10 pages, and, except in a case with a *cross-appeal*, no other brief shall exceed 35 pages.… If a *cross-appeal* is filed, the opening brief and answering brief of the moving party shall not exceed 35 pages, and the opposing brief of the cross-*appellant* shall not exceed 50 pages.… The cross-*appellant* may file a reply brief, which shall not exceed 10 pages.

N.H. SUP.CT.R. 16(11) (emphasis added).

LAW OFFICE OF JOSHUA L. GORDON • CONCORD, NH • WWW.APPEALSLAWYER.NET

11. All the page limitations referred to in Rule 16(11) appear to apply to *appellate* briefs. Each brief the rule discusses refers to an "appeal," a "cross-appeal," or an "appellant." Thus Rule 16(11) does not apply to non-appellate briefs filed in this Court.

12. Because attorney discipline cases where the suspension is for greater than six months are not appellate cases, the briefs filed in them are not appellate briefs. Thus the 35-page limitation does not apply here.

II. Due Process Requires Greater Space Than 35 Pages Permits

13. Even if the court rules suggest a 35 page brief in this case, due process prevents such a rule from applying.

14. There is a federal and New Hampshire due process right in the acquisition and retention of professional occupation licenses. *Schware v. Bd. of Bar Examiners*, 353 U.S. 232 (1957) (lawyer); *Appeal of Plantier*, 126 N.H. 500 (1985) (doctor). The New Hampshire Constitution further provides that "Every subject shall have a right to produce all proofs that may be favorable to himself … and to be fully heard in his defense," N.H. CONST., pt. 1, art. 15, which is at least as protective as the right to due process. *State v. Newcomb*, 140 N.H. 72 (1995).

15. To determine whether the process provided is all that is due, the court balances:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Appeal of Plantier, 126 N.H. at 507.

16. First, the private interest here is Attorney O'Meara's right to practice his profession, to earn a living in his field of knowledge, and to maintain his status among his peers and the public. It is a weighty right, in which he has a constitutional interest.

17. Second, for reasons explained below, Attorney O'Meara cannot competently impart his understanding of events relevant to the allegations against him, explain the errors committed by the PCC, set forth the relevant law, and also cogently present his argument in 35 pages. Squeezing all this into 35 pages, he will be forced to either discard crucial information, exclude relevant law, or drop his arguments. That would deny this court a complete picture of events, and thus pose a significant risk of erroneous deprivation of his professional license. Providing Attorney O'Meara adequate space would completely eliminate the risk. Because this Court is the only tribunal with the authority to take a lawyer's licence for more than six months, constraining Attorney O'Meara to tell his story in a foreshortened form is like requiring a litigant to conduct a one-week trial in just two days.

18. Third, by providing adequate space, the court's additional effort is marginal – it actually might be lessened because it will make things clear that would otherwise be muddled.

19. For these reasons, due process and fundamental fairness requires providing Attorney O'Meara the space necessary to recite his case, and "to be fully heard in his defense."

III. Three Charges, Two Records, One Big Story

20. In counsel's experience, Attorney's O'Meara's case is *sui generis*.

21. It involves two records. The first was from the arbitration of the fee dispute between the Conants and Attorney O'Meara. It was heard over five days in 2006. The second is from the

LAW OFFICE OF JOSHUA L. GORDON • CONCORD, NH • WWW.APPEALSLAWYER.NET

Hearings Committee, which was heard over six days in 2009 and 2010. Some of the documents in the first were entered into the second, but collectively there are hundreds.

22. If there were just 11 days of hearing transcripts, the case might not be so big. *See*, *Kalled's Case*, 135 N.H. 557, 559 (1992) ("After three days of hearings and fifteen witnesses, the committee concluded that the respondent violated Rules 1.4(b), 1.7(b), 1.8(c), 1.14(a) and 8.4(a)"). For several reasons, however, that is not an adequate measure of its expanse.

23. First, there are three separate and discrete charges. The facts comprising each, however, are completely unrelated. This is not like a long criminal trial, for example, where a defendant faces allegations of a conspiracy to a crime, the crime, and the sentence. In cases like that, there is a direct relation of the charges to each other. Here, Attorney O'Meara is charged with settling without authority, conflicts of interest, and deceit. There is no overlap. The portions of the record relevant to each charge do not share any details with the portions related to the others. Consequently, the statement of the case comprises three unrelated sets of facts, each of which must be related in detail.

24. Second, the deceit allegation detailed in the second set of transcripts stems from statements Attorney O'Meara made in the first set of transcripts. This makes both sets of transcripts relevant, and makes it necessary to compare one with the other. Moreover, Attorney O'Meara's burden of showing non-deceit is proof of a negative. Most important, it is the surrounding circumstances that shows Attorney O'Meara conduct was honest. Deleting the surrounding circumstances and viewing only the narrow facts the PCC urges, prejudges the result.

25. Third, the conflict of interest allegations are mushy, and potentially unpreserved. As noted in Attorney O'Meara's Conditional Brief, it is not obvious what conduct the attorney discipline

LAW OFFICE OF JOSHUA L. GORDON • CONCORD, NH • WWW.APPEALSLAWYER.NET

LAW OFFICE OF JOSHUA L. GORDON • CONCORD, NH • WWW.APPEALSLAWYER.NET

system considers a conflict. Because of this lack of specificity, Attorney O'Meara's entire course of actions must be inspected.

26. Fourth, to the extent it can be determined what the PCC considers the conduct giving rise to the conflict of interest allegations, there are as many as eight of them. Each of them comprise essentially a separate set of facts. The complete surrounding circumstances of all eight have to be described so that the Court can perceive, from the entire course of conduct pertaining to each one, that there were no conflicts.

27. Fifth, the PCC's version of events for all the allegations represent a close-up snapshot. The PCC's brief is like inspecting Attorney O'Meara through a pin-hole. When seen from the entire representation of the Conants, however, Attorney O'Meara's actions appear reasonable. It is not until the entire course of conduct is globally reviewed that one can understand the difficult choices Attorney O'Meara faced, how he resolved them, and the reasoned judgment he employed. Describing that entire course of conduct takes time and attention, and thus pages.

28. Sixth, the allegations are not only factually unrelated to each other, but each also implicates a separate body of law. This is true not only for each underlying allegation, but also for the sanctions stemming from each allegation.

29. The PCC's brief is not lengthy, but it ignores so much. In showing the full truth of his situation, however, Attorney O'Meara is compelled to tell the entire story – which spans nearly a year and comprises the details of trial preparation, two significant client meetings in which the details matter, and a mediation session. Again, this takes significant space.

30. Accordingly the standard page limitations, insofar as they apply here, are an artificial barrier to the task.

LAW OFFICE OF JOSHUA L. GORDON • CONCORD, NH • WWW.APPEALSLAWYER.NET

IV. Suspension of Rules

31. Although the page limitation rules do not apply to attorney discipline cases where the penalty is greater than six months suspension, if they do, they should be waived. The rules provide:

> In the interest of expediting a decision, or for other good cause shown, the supreme court or a single justice thereof may suspend the requirements or provisions of any of these rules in any instance on application of a party or on the court's or a single justice's motion, and may order proceedings in accordance with that direction.

N.H. SUP.CT.R. 1. There is good cause here, and thus the page limitations, insofar as they apply, should be waived.

V. Conditional Brief and Waiver

32. With this pleading, and ahead of the briefing deadline such that he attempts to comply with the requirement that permission be received in advance, N.H. SUP.CT.R. 16(11), Attorney O'Meara has filed a Conditional Brief. For convenience, a table of contents is attached to this pleading so that the Court can scan the relevant material presented in the conditional brief.

33. Attorney O'Meara hereby waives any objection to the PCC responding to his brief in whatever length it wishes or the Court allows.

LAW OFFICE OF JOSHUA L. GORDON • CONCORD, NH • WWW.APPEALSLAWYER.NET

WHEREFORE, Timothy O'Meara, Esquire, respectfully requests this honorable Court to:

A) Declare that page limitations do not apply to this case, and accept this notification of an extended brief;

B) If pages limitations do apply, waive them, and grant Attorney O'Meara leave to file an out-sized brief;

C) If page limitations do not apply or are waived, accept the conditional brief filed herewith as Attorney O'Meara's brief and strike the word "conditional" from the cover of his brief so that it becomes his filed brief;

D) If pages limitations apply and the court will not waive them, then provide instructions regarding what portion of Attorney O'Meara's situation to refrain from telling and what portion of the conditional brief to omit, and further, allow 30 days to comply with such instructions.

Respectfully submitted
for Timothy O'Meara, Esquire
by his attorney,

Dated: April 1, 2012

____

Joshua L. Gordon, Esq.
N.H. Bar. No. 9046
Law Office of Joshua Gordon
75 S. Main St., #7
Concord, NH 03301
603-226-4225

I hereby certify on this 1th day of April 2012, a copy of the foregoing is being forwarded to Julie A. Introcaso, Esq., Disciplinary Counsel.

Dated: April 1, 2012

____

Joshua L. Gordon, Esq.