May 20, 2024

VIA EMAIL ONLY

NH Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord NH 03301
rulescommittee@courts.state.nh.us

RE: Comment on Proposed Rule Change to Supreme Court Rule 37 (20) (l); and Comment on Rule 37 (20) (m)

Dear Members of the Advisory Committee:

I am writing with respect to the changes to Rule 37 (20) (l) proposed by the PCC. I am also writing with respect to Rule 37 (20) (m), which does not appear to be subject to the proposed changes to Rule 37. I actively practiced law in NH from 1988 until 2015 when I retired. My NH bar license is presently in inactive/retired status. While I certainly am not a constitutional or free speech expert, I feel that the committee should consider the issues raised by this comment and the case law cited herein.

Notwithstanding the proposed changes to Rule 37 (20) (l), I am concerned that Rule 37 (20) (l) as amended, as well as Rule 37 (20) (m), impose restrictions on free speech that do or may violate the First Amendment of the US Constitution and/or applicable parts of the NH Constitution.

The NH Supreme Court recently opined on prior restraints of speech in the context of the First Amendment to the US Constitution. In S.D. v. N.B, No. 2022-0114 (2023), former Justice Hicks wrote:

"The First Amendment to the United States Constitution prohibits the passage of laws 'abridging the freedom of speech'. U.S. CONST. amend I. It applies to the states through the Fourteenth Amendment to the United States Constitution. Lovell v. Griffin, 303 U.S. 444, 450 (1938). It affords 'special protection against orders that prohibit the publication or broadcast of particular information or commentary—that impose a `previous' or `prior' restraint on speech.' Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976). 'Courts and commentators define prior restraint as a judicial order or *administrative system that restricts speech, rather than merely punishing it after the fact*.' Mortgage Specialists v. Implode-Explode Heavy Indus., 160 N.H. 227, 240 (2010). [emphasis supplied by the author of this comment]. Because prior restraints have the 'immediate and irreversible sanction' of freezing speech for a period of time, 'any prior restraint on expression comes with a heavy presumption against its constitutional validity.' Id. at 42 (quotations, brackets, and ellipsis omitted).

The United States Supreme Court has stated that 'above all else, the First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter, or its content.' Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Therefore, a content-based restriction, that is, a governmental regulation of speech based on the topic discussed or the idea or message conveyed, is 'presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve [a] compelling state interest[].' Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)." S.D. v. N.B., supra.

In summary, content-based speech generally may not be the subject of prior restraint by the government. Any such restraint is presumptively unconstitutional and is lawful only when the restriction is narrowly tailored to serve a compelling State interest.

The NH Supreme Court has also held that the NH Constitution typically prohibits prior restraints on speech, including those restraints that interfere with citizen's rights to raise "public attention to matters they consider of importance". In State v. Chong, 121 NH 860 (1981), the Court wrote that:

"… [O]ur [NH] constitution guarantees the people the right 'in an orderly and peaceable manner' to assemble and petition the public or their representatives. N.H. CONST. pt. 1, art. 32; State v. Nickerson, 120 N.H. 821, 824, 424 A.2d 190, 192 (1980). 'It is not surprising that both the State and Federal Constitutions address themselves to the right of the people to peacefully assemble and raise public attention to matters they consider of importance because `[m]aintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy.' *Id. See also* N.H. CONST. pt. 1, art. 22. The ordinance unjustifiably inhibits the defendants' opportunity to engage in free political discussion.

Prior restraints are inherently suspect because they threaten the fundamental right to free speech. Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559 (1976); Keene Publishing Corp. v. Cheshire County Superior Court, 119 N.H. 710, 712, 406 A.2d 137, 138 (1979)." Chong, supra at 862."

Furthermore, the government's attempts to restrain speech are unconstitutional when the language used with respect to the attempted restraint is vague. A statute, ordinance or rule can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement. State v. Gatchell, 150 N.H. 642, 643, 843 A.2d 332 (2004). An ordinance or rule is particularly offensive from a constitutional perspective when it gives one governmental official unfettered discretion to determine who may engage in speech including when there are no standards to guide the official in making that decision. The United States Supreme Court has consistently held statutes placing

unlimited discretion in one governmental official unconstitutional. See Cantwell v. Connecticut, 301 U.S. at 305; Lovell v. Griffin, 303 U.S. at 452. Chong, supra.

The proposed changes to Rule 37 (20) (l) allows "participants" to publicize certain types of categories of speech including the fact the grievance has been filed, a description of the underlying conduct forming the basis for the grievance, and, the response of the attorney against whom the grievance was filed. At the same time, the Rule continues to provide that participants may not publicize "… those portions of such filings otherwise confidential to Rule 37 (20)"." It is unclear to me what is specifically being referred to by the proposed changes to Rule 37 (20) when it references "those portions of such filings otherwise confidential pursuant to Rule 37 (20)"? Does it mean that communications between the ADO and participants may not be publicized? How about any rulings or decisions issued by the ADO or PCC? Does it include the complaint itself made to the ADO/PCC? It seems to me that one is left guessing as to what type of speech is permitted per the amended version of Rule 37 (20) (l) when a grievance is filed as contrasted to the speech which will continue to be prohibited by the Rule. As a result, will the proposed changes to Rule 37 (20) (l) provide people of ordinary intelligence a reasonable opportunity to understand what conduct and speech the amended Rule prohibits and that which it allows? For this reason, it seems that the Rule is vague and therefore potentially unconstitutional. Because the proposed changes are vague, it is also the case that too much discretion is or may be provided to the ADO and PCC, or to a particular official within those offices, to decide what speech is permitted and which is not. In turn such will or may lead to arbitrary and discriminatory enforcement of the Rule including in violation of Cantwell, Gatchel and Chong.

Notwithstanding the proposed changes to Rule 37 (20) (l), the Rule also seemingly continues to focus on the content of the speech made in determining whether the speech is permissible or not. As such, I feel that the Rule as amended is presumptively violative of both the US and NH constitutions. The NH Supreme Court has previously considered the constitutionality of a prior version of Rule 37 which imposed confidentiality restrictions with respect to professional conduct complaints against attorneys in Petition of Brooks, 140 NH 813 (1996). The Court in Brooks wrote that:

"We think it obvious, and the PCC does not dispute, that the rule [the prior version of Rule 37at issue in Brooks] was triggered by the content of the expression in question. The rule suppressed speech based on the perceived beneficial effects of confidentiality, and a determination of what speech was subject to the rule could not be made without reference to the content of the speech. *See* Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n, 429 U.S. 167, 175-76 (1976); Doe v. State of Fla. Judicial Qualifications Com'n, 748 F. Supp. 1520, 1523-24 (S.D. Fla. 1990)."

The scope of prior Rule 37(17)(a) extended to speech traditionally accorded the most solicitous protection of the first amendment; namely, criticism of the government's performance of its duties. *See* Butterworth v. Smith, 494 U.S. 624, 632 (1990); Mills v. Alabama, 384 U.S. 214, 218-19 (1966). Under the rule, a complainant wishing to criticize the PCC's handling of a particular investigation might have been permanently barred from doing so because disclosure of the mere fact that an investigation took place, as well as the specific actions taken by the committee, would have violated the confidentiality of the process. More generally, public discussion on the conduct of particular attorneys and corresponding investigations by the PCC would have been hindered, when not altogether stifled, by the rule. It cannot be gainsaid that protection of such debate lies at the heart of the first amendment. Any regulation attempting to rein in that debate must pass the strictest of constitutional tests. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964)." Brooks, supra at 819.

At minimum, like the prior version of Rule 37 that was the subject of Brooks, the proposed amendments to current Rule 37 (20) (l) relate or potentially relate to criticism of the government's performance of its duties including when the proposed changes to the Rule seemingly do not or may not allow a complainant to disclose the contents of his or her communications with the ADO or the decision(s) of the ADO or PCC.

In any event, it seems clear the proposed changes must serve a compelling governmental interest and must be as narrowly tailored as possible to protect that interest in order to comport with Brooks and the other cases referenced in this comment.

The Brooks' Court focused primarily on three purposes ostensibly served by having a confidentiality rule for attorney discipline proceedings. They are: (a) protection of attorneys' reputations from meritless claims; (b) protection of the anonymity of persons filing grievances, and (c) maintenance of the integrity of pending PCC investigations.[1] The Court found that none of the purposes cited in the decision were sufficient to permit the limits on speech imposed by the prior rule. In each instance, the Brooks' Court rejected the notion that the purposes on which the case turned justified the preemptive restrictions set forth in the prior version of Rule 37. Brooks, supra at 820-823.

First, Brooks held that the interests of an individual attorney or the State Bar Association in protecting a lawyer's reputation are not sufficient to impose prior

[1] The PCC argued in Brooks that purposes other than the 3 purposes primarily relied on by the Court were served by the confidentiality provisions of the former version of Rule 37. The Supreme Court ruled, however, that such additional purposes did not support a finding that the State had a compelling interest sufficient to justify the restraints on speech set forth in former Rule 37. Alternatively, the Court ruled that the confidentiality provisions in the former rule were not sufficiently narrow to comply with the First Amendment of the US Constitution.

restraints on constitutional free speech rights. The Court wrote that:

"In Landmark Communications, Inc., the United States Supreme Court stated, in the judicial discipline context, 'that injury to official reputation is an insufficient reason for repressing speech that would otherwise be free.... [T]he institutional reputation of the courts[] is entitled to no greater weight in the constitutional scales.' Landmark v. Virginia, 435 U.S. 829 at 841-42 (1978) (quotation and citations omitted). Surely the reputation of the State bar is entitled to no more protection than is the reputation of the State judiciary.

With regard to attorneys in their individual capacities, we have long held that attorneys are 'officer[s] of the court' State v.Merski, 121 NH 901 (1981). Although we recognize that attorneys are not public officials in the sense that judges are, the fundamental importance of the first amendment, combined with the role of attorneys as officers of the court, compels the application of similar principles of free expression to the reputational interests of attorneys, at least with respect to the issues in this case….Any interest that an attorney or the State bar as an institution might have in preventing damage to reputation caused by well-founded complaints is insufficient to justify curtailing a complainant's free speech rights. *See* N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963) (considering application of prohibitory rule to contexts different than those presented in that case)."

Likewise, the protection of an attorney's reputation simply does not constitute a compelling reason to justify the prior restraint on free speech that will result under the proposed changes to Rule 37 (20) (I). Moreover, the reputation of an attorney can be adequately protected against meritless or frivolous complaints per Supreme Court Rule 37 (5) (b) (2), (3) and (5) which allows the Complaint Screening Committee (the CSC") to dismiss complaints that do not have merit or for any good cause. Even before a complaint reaches the CSC, general counsel for the ADO is permitted per Supreme Court Rule 37 (6) (g) (2), (3) and (4) to dismiss a complaint that lacks merit or for other good cause. As provided in Brooks, an attorney can also institute a defamation action with respect to matters published outside of the complaint process since publication outside of the process is not afforded immunity. Frankly, one has to wonder why the right to sue for defamation is not sufficient to adequately protect lawyers against frivolous or no-meritorious complaints when coupled with the authority of the ADO and CSC to dispose of complaints that lack merit early in the complaint process.

It is not at all clear per the opinion in Brooks that the Court in that case was willing to tolerate a prior restraint on speech in attorney-discipline proceedings based on protecting the identity of the complainant. Even if one assumes the Court would tolerate such a restraint, protecting the identity of a complainant can be accomplished by more narrowly tailoring Rule 37 to require the prior consent of the complainant to publication

of his or her name. Alternatively, the rule could require that the complainant's name and identifying information must be redacted if disclosed outside of the disciplinary process.

The court in Brooks also found that State's interest in preserving the integrity of pending PCC or ADO investigations, and preventing those investigations from being used as "collateral attacks" or for purposes of pursuing "vendettas", under the prior version of Rule 37 was not so compelling as to permit a prior restraint on publication in attorney-discipline matters. Brooks, supra at 822.The Court took particular exception to the use of a prior restraint on speech when the disciplinary complaint "… has merit, because bringing a valid complaint can hardly qualify as a misuse of the disciplinary systems…." Id. The Court therefore rejected the notion that a prior restraint on speech can be applied to meritorious claims. I may be missing it, but I fail to see a distinction between the treatment of meritless and meritorious claims under the proposed changes to Rule 37 (20) (l). I therefore fear that application of the proposed changes will unconstitutionally bar publication of certain information even when a grievance-filing has merit. I suppose the changes to Rule 37 (20 (l) might be more narrowly tailored to provide that publication outside of the grievance process cannot occur until and unless the complaint is docketed for further action or investigation by the ADO. But even then, the prohibition may result in a constitutional violation.

My personal opinion is that the rules of secrecy surrounding disciplinary hearings for lawyers or other professionals do not serve the State's interest in any meaningful or legitimate way. Instead, with respect to disciplinary actions against attorneys, my opinion is secrecy primarily serves the interests of lawyers and bar associations in their quest to protect their own reputations and the reputations of their members. In my view, this does not provide the State with a compelling interest sufficient to impose prior restraints on speech in the fashion contemplated by the amended version of Rule 37 (20) (l). In fact, one might argue that *any and all* prior restraints on free speech in the context of disciplinary proceedings for lawyers run afoul of the US and/or the State constitutions.

I would also note that the proposed changes to Rule 37 (20) (l) preserve a penalty for violating the Rule as amended. See Supreme Court Rule 37 (20) (m). At the same time, the proposed changes continue to impose a prior restraint on the speech that forms the basis for the penalty to be imposed. This too may be unconstitutional in that it may violate the holding described above in the Mortgage Specialist case, supra. In addition, imposition of a penalty for violating a rule that is vague for constitutional purposes would seem to suffer from its own constitutional infirmities.

Thank you for your consideration.

Signed: *Gary A. Braun*

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