

Citizens for Justice in New Jersey, Inc.

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Paula T. Granuzzo, Secretary
Professional Responsibility Rules Committee
P.O. Box 970
Trenton, NJ 08625

Dear Ms. Granuzzo:

We wish to bring a problem to the attention of the Professional Responsibility Rules Committee and/or the Disciplinary Oversight Committee. Since you serve as secretary for both committees, we ask for your assistance in directing this letter to appropriate body or bodies.

In brief, we believe that the secretaries of at least some of the District Ethics Committees are misinterpreting R.1:20-3(e) and thus declining grievances, at the screening stage, when those grievance should be docketed and assigned for investigation.

EVIDENCE OF THE PROBLEM

We have encountered nearly identical problems with the secretaries of two Ethics Committees--Districts XI and XIII. The exhibits in the tables below are attached to this letter. All information identifying the respondent attorneys has been redacted¹. If you wish copies of other documents, please contact me.

The Jane Doe² matter - District XI Ethics Committee

Exhibit No.	Exhibit Description
A1 - A3	Grievance - May 15, 2000 (3 pages)
B1 - B4	Respondent's response - June 9, 2000 (4 pages)
C1	Declination letter - June 14, 2000 (1 page)

In her grievance (A3), Jane Doe alleged that she "attempted to contact" the respondent "for several months" after an initial

¹ The exhibits pertaining the Jane Doe matter were redacted before they were sent to me.

² A fictitious name.

meeting in October 1998, but that her attempts were unsuccessful "beyond leaving messages with [respondent's] secretary." Except for receipt of a copy of a letter in July 1999, Jane Doe apparently received no attention from respondent until she met with him in December 1999.

Later on in her grievance, Jane Doe alleges that she first learned in January 2000 that her administrative matter had been denied in November 1998, that the respondent knew of the denial, but that he allowed the statute of limitations to run without filing a civil action.

Upon his receipt of Jane Doe's grievance, District XI Secretary Robert L. Stober apparently³ wrote to the respondent soliciting his response to Jane Doe's grievance. In his response of June 9, 2000 (Exhibits B1 - B4), respondent disputed several of the facts alleged in Jane Doe's grievance: a) the scope of respondent's representation, B1, ¶2; b) that he communicated with her during the period in question, B2, ¶¶ 6, 8. B3, ¶1; c) that he didn't know her appeal was dismissed as of November 30, 1998, B3, ¶2; d) that Jane Doe's claim that respondent had told her that he would file a civil action and that she had a good case "are inaccurate," B3, ¶ 6; and, e) that he had acted ethically and competently, B4, ¶ 1.

On June 14, 2000, Stober notified Jane Doe of his and the public member's decision to decline docketing her grievance (C1). In his letter, Stober states that he reviewed the respondent's response to the grievance prior to deciding whether the matter should be docketed or declined.

The Dawson matter - District XIII Ethics Committee

Exhibit No.	Exhibit Description
D1 - D2	Declination letter - August 1, 1997 (2 pages)
E1 - E2	Grievant's "appeal" - September 5, 1997 (2 pages)
F1	Chairman's Response - September 29, 1997 (1 page)

In 1997, Linda Dawson, Secretary of Citizens for Justice in Somerset County, Inc., filed a grievance against two attorneys. On August 1, 1997, District XIII Ethics Committee secretary Julie M. Marino sent Dawson a letter of declination (D1-D2). According to the first paragraph of the declination letter, Marino and the public member reviewed the respondents' responses to the grievance before the decision to decline was made.

³ See Exhibit B1, ¶ 1.

In ¶¶ 3 and 4 of the first page of declination letter (D1), Marino states that she and the public member "are persuaded by [the respondent's] response" to the grievance and that "[b]ased on the foregoing, we do not perceive that [respondent] violated the Rules of Professional Conduct with respect to this allegation."

In ¶5 of the first page of the declination letter (D1), Marino relies upon "resolutions provided with [respondent's] response" as well as respondent's factual assertion that he recused himself, to support her conclusion that the "proper procedure was followed and disclosure of the conflict made."

On September 5, 1997, I wrote to Anthony M. Rotunno, the then chair of the District XIII Committee in my capacity as president of Citizens for Justice in Somerset County, Inc. (E1 - E2). In my letter, I complained of the procedure Marino and the public member employed in declining Dawson's grievance, and asked Rotunno if he would reconsider the declination.

In his letter of September 29, 1997 (F1), Rotunno defended the procedure Marino employed and remarked that "[i]t is a procedure that is commonly used throughout the Districts in the State of New Jersey." Although he defended Marino's handling of the matter, Rotunno agreed to docket the specific matter complained of, "purely as an accommodation."

DISCUSSION

At issue is the proper interpretation and implementation of R.1:20-3(e)(1) and R.1:20-3(e)(3). Respectively, these rules state, in pertinent part:

The secretary shall evaluate all information received . . . alleging attorney misconduct or incapacity by an attorney maintaining an office in that district. If the attorney is subject to the jurisdiction of the Court and the grievance alleges facts which, if true, would constitute misconduct, . . . the matter shall be docketed and investigated.
(R.1:20-3(e)(1))

The secretary, with concurrence by a designated public member, shall decline jurisdiction if the facts alleged in the

inquiry or grievance, if true, would not constitute misconduct or incapacity.
(R.1:20-3(e)(3))

We believe that a secretary and public member, in deciding whether to decline a grievance under R.1:20-3(e)(1) and (3), should apply the same test that a court employs when deciding a dismissal motion brought under R.4:6-2(e). The Appellate Division articulated that test in Rieder v. State, 221 N.J.Super. 547 (App.Div. 1987):

On a motion made pursuant to R. 4:6-2(e) the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim. The court may not consider anything other than whether the complaint states a cognizable cause of action. For this purpose, all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted. A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted. (Internal quotations and citations omitted.)

In both the Jane Doe and Dawson matters, however, the secretaries and public members did not apply this test to the grievances before them. In both cases, the secretaries and public members solicited responses from the respondent attorneys and used the information contained in those responses to support their declinations.

In the Dawson matter, it is evident from the face of the declination letter (D1 - D2) that the respondents' responses to the grievance supported Marino's and the public member's declination. Marino's candid admission that she and the public member "were persuaded" by the respondents' responses and exhibits leaves no doubt that the Rieder test was not employed.

In the Jane Doe matter, the grievance clearly alleges facts, which if true, violate the Rules of Professional Conduct. For example, ignoring a client's repeated requests for

information as to the status of her case violates R.P.C. 1.4. In re Rosenblatt, 60 N.J. 505, 507 (1972). Also, failing to file suit before the statute of limitations has run violates R.P.C. 1.3. Matter of Cohen, 120 N.J. 304, 306 (1990).

Had Stober restricted himself to deciding only whether the alleged facts constituted one or more R.P.C. violations, he would have docketed the grievance and assigned it for investigation. In his letter of June 14, 2000 (C1), however, Stober admits that his decision to decline was made after his review of "the response submitted on behalf of the attorney in question." Despite his claim to the contrary, Stober didn't decline the grievance pursuant to R.1:20-3(e)(3). Rather, his "declination" was a *de facto* adjudication on the merits.

Further, he mischaracterizes R.1:20-3(e)(3) in the second paragraph of his letter. In that paragraph, he bases his decision to decline upon his conclusion that "there is no **evidence** of unethical conduct or incapacity" [emphasis supplied]. Nothing in R.1:20-3 empowers a secretary, in performing his screening function, to decline on the basis of insufficient evidence. That decision is left to the chair, and may be made after the filing of the investigator's report. R.1:20-3(h).

CONCLUSIONS

We feel that the secretaries' and public members' processing of these grievances went well beyond the limited screening function contemplated by R.1:20-3(e). Instead of limiting themselves to weighing the legal sufficiency of the alleged facts, these secretaries and public members conducted, in effect, mini-investigations by soliciting responses from the respondents. After receiving and reviewing those responses, the secretaries and public members conducted, in effect, mini-hearings where the merits of the grievances were adjudicated.

By shoehorning the investigative and adjudicatory processes into their limited screening function, these secretaries and public members have deprived the grievants from participating⁴ in a formal investigation. More importantly, however, since no appeal may be taken from a secretary's declination, R.1:20-

⁴ For example, once a grievance is docketed and assigned for investigation, the grievant is entitled to receive and reply to the respondent's written response.

3(e)(6), these grievants have also been deprived⁵ of their right to appeal.

A total of 1,294 grievances were filed and docketed by the disciplinary system in 1999⁶. "It is estimated that secretaries receive five times as many initial inquiries as are docketed."⁷ Accordingly, secretaries and public members declined approximately 6,000 grievances in 1999 by authority of R.1:20-3(e).

It is unknown--perhaps unknowable--how many of those grievances were "declined" in a manner similar to Jane Doe and Dawson--after the secretary and public member considered the respondent's response, absorbed the roles of the investigator, chair and hearing panel, and decided the grievances on the merits.

We are assured, however, that this problem extends far beyond the two⁸ cases discussed here. As Rotunno stated in his correspondence of September 27, 1997, the procedure Marino employed in the Dawson matter "is commonly used throughout the Districts in the State of New Jersey."

RECOMMENDATIONS

We ask that a directive be issued to all District Ethics Committees and that amendments to R.1:20 be proposed to the Supreme Court. The directives and proposed amendments should embrace the following points:

- That the standard used by secretaries and public members in deciding whether to decline a grievance under R.1:20-3(e)(1), (3) and (4) shall be the same standard that a court uses in deciding motions to dismiss under R.4:6-2(e).
- That secretaries and public members do not solicit or review responses from respondents or any other matters outside the

⁵ Had the grievances been docketed and dismissed after investigation, the grievant would have a right to appeal the dismissal to the Disciplinary Review Board. R.1:20-3(e)(6), R.1:20-3(h), R.1:20-15(e)(1)(i).

⁶ State of the Attorney Discipline System Report, 1999, p. 6.

⁷ Ibid. p. 8.

⁸ Grievants are required to keep the fact that they filed a grievance strictly confidential. (See item "**F. Investigative Confidentiality**" at the bottom of Exhibit A2.) Accordingly, the fact that other grievants may not have brought similar complaints to your attention, or to the attention of groups like Citizens for Justice, does not support a conclusion that the problem presented here is of minimal scope.

grievance itself when deciding whether or not to decline a grievance under R.1:20-3(e)(1), (3) or (4).

- That R.1:20-3(e)(6) be amended to provide at least a limited right of appeal from a secretary's declination of a grievance.

Thank you very much for your kind attention to this matter. I would appreciate being kept informed of your Committees' progress.

Sincerely,

**CITIZENS FOR JUSTICE
IN NEW JERSEY, INC.**

John T. Paff
President