State of New Hampshire
Supreme Court

IN THE MATTER OF

TIMOTHY O'MEARA, ESQUIRE

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

OBJECTION TO BRIEF OF *AMICUS CURIAE* AND MOTION FOR CLARIFICATION OF ISSUES

NOW COMES Timothy O'Meara, Esquire, by and through his attorney, Joshua L. Gordon, and respectfully objects to James and Anita Conant's motion for leave to file *Amicus Curiae* brief, objects to the conditional brief filed therewith, and requests clarification of issues in light of the *amicus* filing.

As grounds it is stated:

1. James and Anita Conant were the plaintiffs in the underlying case which gave rise to this Professional Conduct Committee (PCC) Petition. They have filed a request to be heard as *amicus curiae*, and along with their request have filed a conditional brief of *amicus curiae*. Although Attorney O'Meara is aware that participation of *amici* is generally allowed, he "seasonably" objects. SUP.CT.R. 30(2).

I. Four Additional Questions Raised by *Amicus*

2. The PCC poses four questions for this Court: 1) Whether Attorney O'Meara violated Rule 1.2 regarding authority to settle; 2) Whether he violated Rule 1.7(b) regarding an alleged conflict of interest; 3) Whether he violated Rule 8.4(c) regarding the veracity of his testimony; and 4) Whether a three-year suspension is an appropriate sanction.

3. Although the *amicus* brief does not contain a statement of questions presented, it explicitly raises two additional questions: 5) Whether disbarment is the appropriate sanction; and 6) Whether disgorgement is an appropriate sanction. Present in the brief also is the unavoidable but unstated question: 7) Whether this Court may impose sanctions that were declined by the PCC.

II. Issues Raised by *Amicus* Are Not Preserved for Review

4. These three additional issues were rejected by the PCC. Because they are not posed or addressed by the PCC in its brief, they are not preserved for review here. Moreover, they are probably novel in New Hampshire. Addressing them would involve constitutional property rights, due process, and the authority of this Court to consider issues beyond the scope of the PCC brief. It would also involve a discussion of the facts of the case as they implicate these limitations.

5. "The amicus," however, "is not entitled to present additional questions for review." Gressman, Geller, Shapiro, SUPREME COURT PRACTICE Ch. 13.14 at 738 (9th ed. 2007) (citing *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981)). The United States Supreme Court wrote:

> "We decline to consider this argument [of *amicus*] since it was not raised by either of the parties here or below. Our grant of certiorari was to consider which state limitations period should be borrowed, not whether such borrowing was appropriate."

United Parcel, 451 U.S. at 60 n.2 (citations omitted). Likewise:

> The NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae*, argues that federal courts have inherent authority to correct conditions of pretrial confinement and that the practices at issue in this case violate the Attorney General's alleged duty to provide inmates with "suitable quarters" under [federal law]. Brief for the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 22-46. Neither argument was presented to or passed on by the lower courts; nor have they been urged by either party in this Court. Accordingly, we have no occasion to reach them in this case.

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Bell v. Wolfish, 441 U.S. 520, 532, n.13 (1979). Also:

> Some point is made in an amicus curiae brief of the fact that Knetsch in entering into these annuity agreements relied on individual ruling letters issued by the Commissioner to other taxpayers. This argument has never been advanced by petitioners in this case. Accordingly, we have no reason to pass upon it.

Knetsch v. United States, 364 U.S. 361, 370 (1960). *See e.g.*, Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669 (2008) (empirical study surveying federal judges regarding the influence of *amici*) (conspicuously absent whether courts considered issues or granted remedies suggested by *amici* rather than parties); Kearney and Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000) (empirical study of United States Supreme Court cases between 1946 and 1995 in which *amicus curiae* briefs were filed) (same).

6. Because the three additional issues raised by the Conants do not appear in the PCC's brief, they were not preserved for review by this Court. Thus the Conant's advocacy for answers to their questions and suggestions for remedies is beyond the reach of this case. Rather their brief appears to be an effort to make the PCC's position look reasonable by comparison. Accordingly the brief of *amicus curiae* should be rejected.

III. Stiffer Sanctions, Waived by the PCC, Resurrected by *Amicus*

7. When the PCC considers a violation but determines not to go forward with it, this Court considers the matter waived. *Wyatt's Case*, 159 N.H. 285, 306 (2009) ("The PCC briefly mentioned this [additional] violation at oral argument. However, in its brief the PCC makes only passing reference to the alleged [additional] violation … without any analysis or argument. We therefore

consider it waived.") (citation omitted); *Bruzga's Case*, 145 N.H. 62, 70 (2000). This Court has noted on numerous occasions that in lawyer ethics cases, it will consider only those facts found by the prosecuting authority. *Douglas' Case*, 156 N.H. 613, 618-19 (2007) ("'We review the findings made by the referee to determine whether a reasonable person could reach the same conclusion based upon the evidence presented.' 'It is not our role to make independent findings and substitute them for the judgment of the referee.'") (quoting *Coffey's Case*, 152 N.H. 503, 507 (2005) and *Sheridan's Case*, 146 N.H. 736, 738 (2001)). Thus when the PCC finds a violation warrants a certain sanction but Disciplinary Counsel argues for a greater sanction before the PCC, this Court may chose to impose the greater sanction. *Morse's Case*, 160 N.H. 538, 546 (2010) (Court ordered disbarment after "[d]isciplinary counsel requested oral argument before the PCC on the sanction, and argued that Morse should be disbarred. The PCC, however, recommended a two-year suspension from the practice of law."). Here however, neither the PCC nor Disciplinary Counsel have requested the relief suggested by the Conants.

8. Rather, the additional questions the Conants have raised here were explicitly rejected by the PCC. In her argument to the PCC regarding sanctions, Disciplinary Counsel noted that regarding:

> The issue of disgorgement of fees, … I could have brought that issue … and [put] Mr. O'Meara on notice that I was going to seek that as a remedy.… I did not, as an exercise of my prosecutorial discretion. I elected not to bring that charge."

SANCTION HEARING (Dec. 14, 2009) at 11-12. Likewise, the PCC recommended Attorney O'Meara suffer a two-year suspension. Disciplinary Counsel filed a pleading with the PCC in which Disciplinary Counsel argued that the PCC should recommend disbarment, MOTION TO RECONSIDER (Aug. 31, 2010), which the PCC rejected, recommending instead a three-year suspension.

9. In the absence of the *amicus*, Attorney O'Meara understands he faces disbarment if this Court chooses, a three-year suspension as requested by the PCC, or something altogether less if his arguments prevail. With the presence of the amicus, however, there appears to be a greater possibility of disbarment, and a resurrected possibility of disgorgement.

IV. Prejudice Caused By Filing *Amicus Curiae* Brief

10. As noted, the Conant's conditional *amicus* brief poses three additional questions not raised by the PCC. In order to materially answer them, Attorney O'Meara must address in his brief significant factual and legal matters which would not be present in the absence of the *amicus* filing. He would be forced to devote briefing resources, pages, and oral time to defend against disgorgement, disbarment, and this Court's authority to issue orders contrary to positions taken in the PCC's brief. The necessary inclusion of these questions will result in a brief that will differ in strategy and focus, and be more lengthy and expensive, than if he were to address only the matters contained in PCC's brief.

11. The PCC's brief runs 35 pages. The Conant's conditional *amicus* brief on its additional questions is also 35 pages long. If the Conant's questions remain before the Court, Attorney O'Meara will be essentially forced to write two briefs. Accordingly, Attorney O'Meara should be allowed double the time and double the pages.

12. Thus Attorney O'Meara has anticipated, in accord with his review of the law, that he would brief those questions raised by the PCC, and would not have to address those previously waived. If this Court allows consideration of the Conant's additional questions, fairness suggests the Conants should be required to fund Attorney O'Meara's resulting litigation of them.

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13. As noted, the presence of the *amicus* brief necessarily raises the question of whether Attorney O'Meara might face tougher sanctions than requested by the PCC, and creates uncertainty regarding the scope of his response. That uncertainty creates a constitutional due process issue. Attorney O'Meara has a right to know what he is defending against and the scope of the deprivation he may suffer at a time when he can affect the outcome. *See Douglas v. Douglas*, 143 N.H. 419, 423 (1999) ("notice to the parties must give the defendant actual notice of the hearing and the issues to be addressed."). There is a great difference between a three-year suspension as requested by the PCC, and disbarment and disgorgement as requested by the Conants, and because it impinges on deprivations of livelihood and property, the difference is of constitutional proportion.

14. This Court is the ultimate sanctioner in the lawyer disciplinary process. *Bosse's Case*, 155 N.H. 128, 130-31 (2007) ("In attorney discipline matters, [this Court] retain[s] ultimate authority to determine whether, upon the facts found, a violation of the rules governing attorney conduct has occurred and, if so, the proper sanction."); *Richmond's Case*, 153 N.H. 729, 735 (2006) ("In attorney discipline matters, [this Court] defer[s] to the referee's factual findings if supported by the record, but retain[s] the ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred and, if so, the appropriate sanction."). Thus the time at which Attorney O'Meara can affect the outcome is now, and the time he needs to know what he is defending against is also now. Accordingly, he must be apprised – before he writes his brief – whether this Court plans to limit its consideration of sanction to only that which the PCC requested, or whether it may go beyond as the *amicus* has suggested.

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V. Conants are Complainants, Not *Amici*

15. In their motion the Conants cite four instances in which *amicus* parties were allowed to participate in PCC cases. None are relevant here. The *amicus* in *Kersey's Case*, 147 N.H. 659, 660, 797 A.2d 864, 865 (2002), was a receiver appointed by the court, and thus a necessary interested party. The *amici* in *Matter of Unnamed Attorney*, 138 N.H. 729 (1994), were title companies who had institutional interests in the outcome of the case. In *Petition of Tocci*, 137 N.H. 131 (1993), the lawyer argued for "'disintegration'" of the State Bar," and the *amici* were several past presidents of the Bar Association advancing the Bar's obvious institutional interests. Likewise, the *amicus* in *Broderick's Case*, 104 N.H. 175 (1962), which involved conduct that aroused the involvement of a Massachusetts grand jury, was the then-president-elect of the Bar Association.

16. To undersigned counsel's knowledge, there are no reported attorney discipline cases in which a complainant has participated as *amicus*.

17. Unlike the cases cited by the Conants, here there are no official or institutional interests. The Conants, rather, are analogous to a victim or complaining witness in a criminal appeal. Although they have obvious personal interest in the outcome of this litigation, their legal interests are no different than any member of the public, and are fully represented by the PCC – the institutional forum designated to carry out the public's interest in attorney integrity.

> 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. Violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer from a position or from pending litigation.

N.H. R. PROF. COND., *Statement of Purpose*. "[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." *Morgan's Case*, 143 N.H. 475, 477 (1999); *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.").

18. The Conant's interest is purely personal and remunerative. By raising the issue of disgorgement, the Conants have put this Court squarely in the middle of a fee dispute, a matter which has been explicitly delegated to other established forums. There has already been a fee arbitration in accord with Bar Association rules, and by declining to request disgorgement, Disciplinary Counsel and the PCC demurred becoming directly involved in it.

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

A. Deny the Conants motion for leave to file an *amicus* brief, and deny their request to be heard orally;

B. Issue an order apprising the parties whether the additional issues posed by the Conants will be considered by this Court so that Attorney O'Meara will know whether he should spend the resources necessary to address the additional issues; and

C. Stay the deadline for Attorney O'Meara's brief until such time as this Court issues such an order.

If this Court nonetheless determines that the Conant's *amicus* brief will be accepted, Attorney O'Meara respectfully requests this honorable Court:

D. Grant Attorney O'Meara 35 extra pages to address their additional issues, which is the number of extra pages it took for the Conants to argue their side of the additional issues;

E. Grant Attorney O'Meara 15 extra minutes of oral argument to address the additional issues, regardless of whether the *amici* themselves are heard orally; and

F. Order that the additional expenses incurred by addressing the additional issues be paid by the *amicus*.

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

Dated: August 23, 2011

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

I hereby certify on this 23nd day of August 2011, a copy of the foregoing is being forwarded to James L. Kruse, Disciplinary Counsel; and to James B. Bassett, Esq., for the Conants.

Dated: August 23, 2011

Joshua L. Gordon, Esq.