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APPENDIX

DANIEL JACOB D'ATILLO ET AL. v. STATEWIDE
GRIEVANCE COMMITTEE ET AL.*

Superior Court, Judicial District of Hartford
File No. CV-16-6065012-S

Memorandum filed July 18, 2016

Proceedings

Memorandum of decision on defendants' motion to
dismiss. *Motion granted.*

Howard Altschuler, for the plaintiffs.

Jane R. Rosenberg, assistant attorney general, for
the defendants.

Opinion

SHERIDAN, J., This is an action seeking an order of mandamus and injunctive relief in connection with the dismissal of grievance complaints brought against five attorneys that had previously represented the plaintiffs. The defendants have moved to dismiss the plaintiffs' action based on lack of subject matter jurisdiction, asserting that the plaintiffs do not have standing to challenge the dismissal of the grievance complaints because they are neither statutorily nor classically aggrieved. For the reasons set forth below, the motion is granted.

I

FACTS

Cathy and Domenic D'Attilo are the parents of Daniel D'Attilo. In 2003, they retained the law firm of Koskoff, Koskoff, & Bieder, P.C. (KK&B) to represent them in connection with medical negligence that occurred during Daniel's birth. Suit was commenced and, after trial, the jury awarded the D'Attilos \$58.6 million in compensatory damages. In January, 2012, while the verdict was on appeal, the D'Attilos settled their medical malpractice claim for \$25 million. The D'Attilos hired the law firm of Day Pitney, LLP (Day Pitney) to advise them on various issues related to the settlement.

In February, 2015, the plaintiffs filed grievance complaints against seven attorneys—five from KK&B and two from Day Pitney. The grievances alleged that the KK&B attorneys had taken a 28 percent contingency fee from the D'Attilos' \$25 million settlement proceeds rather than the approximately 10 percent fee permitted under the fee cap statute, General Statutes § 52-251c. The statewide bar counsel referred the plaintiffs' complaints against the five KK&B attorneys to a Fairfield grievance panel and the complaints against the two Day Pitney attorneys to a Stamford grievance panel.

On July 17, 2015, the Fairfield Judicial District Grievance Panel issued decisions finding probable cause that two of the five KK&B attorneys had violated the Rules of Professional Conduct. The panel found no probable cause that the remaining three KK&B attorneys had engaged in professional misconduct.

On August 26, 2015, the Stamford-Norwalk Judicial District Grievance Panel found no probable cause that either of the Day Pitney attorneys had engaged in professional misconduct.

On January 4, 2016, the plaintiffs filed the present complaint against the Connecticut Statewide Grievance Committee, the statewide bar counsel, the Stamford-Norwalk Judicial District Grievance Panel, its counsel Eugene J. Riccio, the Fairfield Judicial District Grievance Panel, its counsel Steven P. Kulas, the chief disciplinary counsel, and the Office of the Chief Disciplinary

Counsel. The plaintiffs claim that the defendant grievance panels violated Practice Book § 2-32 (i) (2) by dismissing the plaintiffs' grievance complaints rather than forwarding them to the Statewide Grievance Committee for further review. The plaintiffs claim that their grievances alleged that the KK&B and Day Pitney attorneys engaged in criminal conduct; therefore the defendant grievance panels should not have dismissed their complaints and the other defendants had no power to accept the dismissals.

In count one of their complaint, the plaintiffs seek relief by way of mandamus, ordering the defendant grievance panels to "reissue their [decisions] removing the complete or partial dismissals of the above attorneys pursuant to Practice Book § 2-32 (i) (2), and then forwarding the grievance files in their entirety for the seven grievances listed [in the amended complaint] for further review pursuant to Practice Book § 2-34A (b) (1)."

In count two, plaintiffs seek relief by way of a temporary or permanent injunction preventing the grievance defendants from taking any further action, and exercising the court's inherent power "to take over all of the D'Attilo grievances against the Day Pitney and KK&B respondents, to hold a scheduling conference, and to proceed toward a hearing on all grievances as this court directs."

The defendants have moved to dismiss the plaintiffs' complaint for lack of standing. The plaintiffs filed their opposition, with documentary exhibits, on March 21, 2016. The parties were heard at oral argument on April 11, 2016.

II

STANDARD OF REVIEW

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Columbia Air Services, Inc. v. Dept. of Transportation*, 293 Conn. 342, 346, 977 A.2d 636 (2009). A motion to dismiss may be brought to assert, inter alia, "lack of jurisdiction over the subject matter" Practice Book § 10-30 (a) (1). "[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003).

"The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Internal quotation marks omitted.) *Burton v. Commissioner of Environmental Protection*, 291 Conn. 789, 802, 970 A.2d 640 (2009); see *Carraway v. Commissioner of Correction*. 317 Conn.

594, 601 n.9, 119 A.3d 1153 (2015); see also Practice Book § 10-33 (lack of subject matter jurisdiction cannot be waived). “Whenever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction.” (Internal quotation marks omitted.) *Federal Deposit Ins. Co. v. Peabody N.E., Inc.*, 239 Conn. 93, 99, 680 A.2d 1321 (1996). Because standing implicates the court’s subject matter jurisdiction, it is a proper basis for granting a motion to dismiss. *Electrical Contractors, Inc. v. Dept. of Education*, 303 Conn. 402, 413, 35 A.3d 188 (2012); *Connecticut Associated Builders & Contractors v. Anson*, 251 Conn. 202, 205–206, 740 A.2d 804 (1999).

In reviewing a motion to dismiss, the court must presume “the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader.” *Sullins v. Rodriguez*, 281 Conn. 128, 132, 913 A.2d 415 (2007). “[W]henever a court discovers that it has no jurisdiction, it is bound to dismiss the case” (Internal quotation marks omitted.) *Pet v. Department of Health Services*, 207 Conn. 346, 351, 542 A.2d 672 (1988).

III ANALYSIS

“Standing is the legal right to set judicial machinery in motion.” (Internal quotation marks omitted.) *Briggs v. McWeeny*, 260 Conn. 296, 308, 796 A.2d 516 (2002). “One cannot rightfully invoke the jurisdiction of the court unless [one] has, in an individual or representative capacity, some real interest in the cause of action Standing is established by showing that the party claiming it [1] is authorized by statute to bring suit or [2] is classically aggrieved.” (Internal quotation marks omitted.) *Id.*

When a plaintiff is neither statutorily nor classically aggrieved, the court lacks subject matter jurisdiction over his claims.

A Statutory Aggrievement

“Statutory aggrievement . . . exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation.” (Internal quotation marks omitted.) *Lewis v. Slack*, 110 Conn. App. 641, 644, 955 A.2d 620, cert. denied, 289 Conn. 953, 961 A.2d 417 (2008).

In determining whether a statute regulating certain conduct also affords a private remedy, Connecticut courts generally hold to the rule that when the legisla-

ture intends to create a new cause of action it does so explicitly in the statute itself. *Antinerella v. Rioux*, 229 Conn. 479, 495, 642 A.2d 699 (1994), overruled on other grounds by *Miller v. Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003).

Although the operating presumption is that a statute does not create a private right of action unless explicitly stated, that presumption may be overcome on rare occasions. See *Provencher v. Enfield*, 284 Conn. 772, 780, 936 A.2d 625 (2007) (“it is a rare occasion that [the Connecticut Supreme Court] will be persuaded that the legislature intended to create something as significant as a private right of action but chose not to express such an intent in the statute”). In *Napoletano v. CIGNA Healthcare of Connecticut, Inc.*, 238 Conn. 216, 249, 680 A.2d 127 (1996) (overruled on other grounds by *Batte-Holmgren v. Commissioner of Public Health*, 281 Conn. 277, 284–85, 914 A.2d 996 [2007]), cert. denied, 520 U.S. 1103, 117 S. Ct. 1106, 137 L. Ed. 2d 308 (1997), the Connecticut Supreme Court held that a party asserting the existence of an implicit private remedy must satisfy an exacting three part test: “First, is the plaintiff one of the class for whose . . . benefit the statute was enacted . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?” (Internal quotation marks omitted.) *Rollins v. People’s Bank Corp.*, 283 Conn. 136, 142, 925 A.2d 315 (2007).

Additionally, in order to overcome the presumption that no private right of action is implied in the statutory enactment, the plaintiff must demonstrate that “no factor weighs against affording an implied right of action and [that] the balance of factors weighs in [the plaintiffs’] favor.” (Internal quotation marks omitted.) *Id.* “In examining these three factors, each is not necessarily entitled to equal weight. Clearly, these factors overlap to some extent with each other, in that the ultimate question is whether there is sufficient evidence that the legislature intended to authorize [the plaintiff] to bring a private cause of action despite having failed expressly to provide for one.” (Internal quotation marks omitted.) *Id.*

Applying the *Napoletano* factors to the present case, it appears that the plaintiffs are within the class of persons intended to be protected by the grievance process established under General Statutes § 51-90g and the parallel rules of practice. That process was created “to protect the public and the court from unfit practitioners.” *Massameno v. Statewide Grievance Committee*, 234 Conn. 539, 554, 663 A.2d 317 (1995). Plainly, the plaintiffs are members of the public who have had dealings with a legal practitioner that they consider to be unfit. Cf. *Pane v. Danbury*, 267 Conn. 669, 680, 841

A.2d 684 (2004) (the class of persons for whom Freedom of Information Act was enacted “consists of members of the general public who desire information about the conduct of their government”), overruled on other grounds by *Grady v. Somers*, 294 Conn. 324, 349, 984 A.2d 684 (2009). Accordingly, the first *Napoletano* factor is satisfied or, at the very least, does not weigh against recognizing a private remedy for these plaintiffs.

Turning to the second *Napoletano* factor, the plaintiffs concede that there is no provision in either the Practice Book rules or the General Statutes that expressly grants them permission to commence a civil action of any sort to challenge the dismissal of an attorney grievance complaint. Also, the parties have not provided anything in the nature of a “legislative history” that would contain an expression of intent (or lack thereof) to create such a remedy. The record before this court is silent in this respect, and therefore fails to indicate any intent to create a private right to challenge Statewide Grievance Committee decisions or procedure.

In seeking to discern the intent behind a legislative enactment, the court may also look to the “circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.” (Internal quotation marks omitted.) *Maxwell v. Freedom of Information Commission*, 260 Conn. 143, 147–48, 794 A.2d 535 (2002).

General Statutes § 51-90e grants any person the right to file a written complaint alleging attorney misconduct. From that point forward, by design, further action on the complaint becomes the responsibility of the statewide bar counsel, not the complainant. Should proceedings be conducted, § 51-90g (b) and General Statutes § 51-90h expressly define the role of the complainant in those grievance proceedings. Section 51-90g (b) grants the complainant the right to be present and represented by counsel at all hearings, and the opportunity to make a statement at the conclusion of the evidence. Section 51-90h grants a complainant a right to submit a statement in support or against any proposed decision. Had the legislature intended the complainant to have some right to challenge the outcome of any proceeding, or to challenge procedural irregularities in any proceeding, it could have easily inserted appropriate provisions. The fact that it did not militates against any finding of legislative intent to create a private remedy for the complainant.

In this case, the plaintiffs seek review of the defendant grievance panels’ alleged violation of Practice Book § 2-32 (i) (2) in dismissing the plaintiffs’ grievance complaints rather than forwarding them to the Statewide Grievance Committee for further review. It is

undisputed that § 2-32 (i) makes no mention whatsoever of a complainants' right to appeal that determination. However, a similar or parallel provision, § 2-32 (c), expressly states that where the statewide bar counsel dismisses a complaint pursuant to § 2-32 (a) (2), the "complainant shall have fourteen days . . . to file an appeal of the dismissal" with the statewide bar counsel. (Emphasis added.) The fact that § 2-32 (c) expressly provides for an appeal by the complainant, whereas § 2-32 (i)—in which a grievance panel dismisses a complaint pursuant to § 2-32 (a) (1)—makes no mention of any right of appeal, compels a conclusion that the omission in § 2-32 (i) was deliberate and that no intent can be implied to grant the complainant a right to seek a review of the dismissal. See *State v. Kevalis*, 313 Conn. 590, 603, 99 A.3d 196 (2014) ("[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed" [internal quotation marks omitted]).

The court concludes with respect to the second *Napoletano* factor that the plaintiffs have failed to demonstrate that either the legislature or the drafters of the Practice Book rules evidenced any intention, express or implicit, to grant a complainant the right to seek review of a dismissal of a grievance complaint by a grievance panel.

Finally, turning to the third *Napoletano* factor (consistency of a private cause of action with the underlying purpose of the legislative scheme), the plaintiffs suggest that finding an implicit right to challenge a dismissal through appeal, writ, or injunction is consistent with the underlying purposes of the legislative scheme in that it gives those who file complaints "remedies to protect their rights." The argument appears to be that, without the remedy of an appeal from a dismissal, persons who file grievance complaints will be denied procedural rights to appear and be heard, and deprived of any chance of restitution ("the grievance defendants' failure to follow the law and the rules has denied the plaintiff specific procedural rights as well as the extreme likelihood that the grievances will result in restitution and an accounting").

At the outset, although an award of restitution may be a "virtual certainty" in cases where attorney misconduct relates to moneys properly due to a client, it is not a "right" guaranteed to a person making a grievance complaint. A statutory right of action cannot be implied in a statute to protect a "right" that is not expressly stated in that statute. As to the denial of "procedural rights" which are expressed in the statutes, those same statutes authorize the Statewide Grievance Committee to adopt rules of procedure as a mechanism for protecting procedural rights. See General Statutes § 51-90a.

It has not been shown how creating a remedy of appeal by the complainant for procedural deviations is consistent with an evident statutory scheme to vest authority for creating and implementing the procedural framework for grievance proceedings in the Statewide Grievance Committee.

The attorney disciplinary process exists “within the broader framework of the relationship between attorneys and the judiciary. . . . This unique position as officers and commissioners of the court . . . casts attorneys in a special relationship with the judiciary and subjects them to its discipline.” (Internal quotation marks omitted.) *Massameno v. Statewide Grievance Committee*, supra, 234 Conn. 554. Thus, an attorney grievance proceeding is not a civil action whose objective is to provide restitution to a victim or redress civil wrongs inflicted upon a victim. Its purpose is to investigate and regulate the conduct of court officers in order to safeguard the courts from persons unfit to practice before them. See *In re Application of Pagano*, 207 Conn. 336, 339, 541 A.2d 104 (1988), abrogated in part on other grounds by *Scott v. State Bar Examining Committee*, 220 Conn. 812, 823–24 n.8, 601 A.2d 1021 (1992). Against this background, granting an individual complainant the right to challenge the outcome of the grievance process is not necessarily consistent with the underlying purposes of the scheme of attorney discipline. A person who files an attorney grievance has only a limited role in the resulting proceedings. It is not essential to superintending the relationship between an attorney and the court that the client/complainant have a right to challenge the outcome of those proceedings. Input from the complaining party is a logical component of the attorney discipline process. Granting the complainant the right to challenge, or appeal from, the outcome of the process, is not.

For these reasons, the court concludes with respect to the third *Napoletano* factor that the plaintiffs have failed to demonstrate that the implication of a remedy of appeal by a complaining party from a local panel’s dismissal of a grievance complaint is consistent with the underlying purposes of the disciplinary process.

“[A]s the party seeking to invoke an implied right of action, the plaintiffs bear the burden of demonstrating that such an action is created implicitly in the statute.” *Asylum Hill Problem Solving Revitalization Assn. v. King*, 277 Conn. 238, 246, 890 A.2d 522 (2006). The plaintiffs have not carried their burden and have not met the rigorous requirements for creation of a private cause of action by implication from the enactment of a statute. They have not shown statutory aggrievement.

B

Classical Aggrievement

“Standing is established by showing that the party

claiming it is authorized by statute to bring suit or is classically aggrieved The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected.” (Internal quotation marks omitted.) *May v. Coffey*, 291 Conn. 106, 112, 967 A.2d 495 (2009).

The relevant case authority has repeatedly held that persons filing attorney grievance complaints lack any cognizable specific, personal and legal interest in the discipline of an attorney. See, e.g., *Rousseau v. Statewide Grievance Committee*, 163 Conn. App. 765, 769–71, 133 A.3d 947, cert. denied, 321 Conn. 908, 135 A.3d 280 (2016); *Lewis v. Slack*, supra, 110 Conn. App. 647–48.

The plaintiffs attempt to distinguish these cases and establish a specific personal and legal interest in the decision as to whether to discipline the grieved attorneys in their particular case. They argue that since they are entitled to—and will invariably receive—an award of restitution if their complaint is reviewed by the Statewide Grievance Committee, the decision as to whether to discipline these attorneys directly affects the plaintiffs’ receipt of monetary restitution, which is an interest separate and apart from that of the general public. On this basis, the plaintiffs argue, they have been “harmed in a unique fashion” by the conduct of the defendants and have established a “colorable claim of injury” (Internal quotation marks omitted.) *Lewis v. Slack*, supra, 110 Conn. App. 647.

The court is not persuaded. Regardless of the statistical probabilities the plaintiffs may bring to bear, the potential for restitution is theoretical and conjectural, rather than established fact. It is impossible to know with certainty whether the Statewide Grievance Committee, if it conducted a review, would ultimately decide to discipline the attorneys involved, much less the sanctions or penalties the Statewide Grievance Committee, in its discretion, would deem appropriate for the offense. Under the statutes, rules and case law governing attorney grievance proceedings, the plaintiffs have no legally protected *right* to restitution. Moreover, the decision as to whether or not to require restitution from a grieved attorney is made in the context of a sanction or punitive measure, and not for the purpose of compen-

sating the victim. It is the interest in appropriate attorney discipline that is arguably affected by the decision to require restitution—not the financial interest of the person making the complaint. In that regard, the plaintiffs’ stake in the outcome of these proceedings is no different from that of all members of the community—that attorney misconduct be discouraged and deterred through a comprehensive system of attorney discipline.

The plaintiffs cannot demonstrate a colorable claim of injury to an interest which is arguably protected by the statute in question and, therefore, have failed to establish classical aggrievement.

C

Exercise of Discretionary Authority To Intervene in Grievance Proceedings

In the alternative, the plaintiffs suggest that this court has inherent equitable powers that would permit it, in certain circumstances, to intervene, investigate, and control the attorney discipline process. To alleviate the “cumulative effect” of the defendants’ purported multiple abuses of discretion, the plaintiffs urge the court to exercise those powers and “take over the grievance process” in this case in order to “protect [the] rights” of the plaintiff. The exact “rights” that would be protected by this court (acting in place of the Statewide Grievance Committee) are not specified; the court assumes it would be protection of the plaintiffs’ “near certain” potential for an award of restitution. But, as already explained, attorneys are not disciplined by the courts so as to compensate a victimized client, and the plaintiffs have already commenced a separate civil action to recover compensation for any losses attributable to misconduct of their attorneys.

This court, in the exercise of its discretion, declines to invoke its inherent powers to displace the ongoing disciplinary process. Discretion involves “something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.” (Internal quotation marks omitted.) *Tuccio v. Garamella*, 114 Conn. App. 205, 209, 969 A.2d 190 (2009).

It is true that judges possess the inherent authority to regulate attorney conduct and to discipline members of the bar, and that is a responsibility this court takes quite seriously. However, “[i]n exercising their inherent supervisory authority, the judges have authorized grievance panels and reviewing committees to investigate allegations of attorney misconduct and to make determinations of probable cause. . . . In carrying out these responsibilities, these bodies act as an arm of the court.” (Internal quotation marks omitted.) *Simms v. Seaman*, 308 Conn. 523, 552–53, 69 A.3d 880 (2013). “Allowing parties to circumvent the established grievance proce-

dures, at least in the absence of a compelling justification for doing so, would so undermine the process as to render it ineffectual. Such a result reasonably could not have been contemplated by the framers of the administrative scheme, who created the [Statewide Grievance Committee] and its subcommittees to act as an arm of the court in safeguarding the administration of justice, preserving public confidence in the system, and protecting the public and the court from unfit practitioners.” *Johnson v. Statewide Grievance Committee*, 248 Conn. 87, 99–100, 726 A.2d 1154 (1999).

The case the plaintiffs have cited, *Bradley v. Statewide Grievance Committee*, Superior Court, judicial district of New Haven, Docket No. CV-08-4029843-S (July 14, 2008) (45 Conn. L. Rptr. 846), highlights the exceptional and extremely serious circumstances warranting court intervention in the established grievance process: “Although a complainant, under certain circumstances may have an equitable right of review, such is not necessarily the case when a complainant is seeking judicial review of the [Statewide Grievance Committee’s] dismissal of her complaint. See also *Pinsky v. Statewide Grievance Committee*, 216 Conn. 228, 234 n.4, 578 A.2d 1075 (1990) (court observed that plaintiff may not be able to use equitable arguments to obtain judicial review of ‘the decision of the [Statewide Grievance Committee] dismissing her complaint against her former attorney [a]s the complainant, her interest in that decision was not equivalent to the right of an attorney . . . in preserving his professional reputation’). While it is true that the judiciary has the powers necessary to grant review of acts violating constitutional rights under article fifth of the Connecticut constitution, courts may only use these powers if ‘egregious and otherwise irreparable violations of state and federal constitutional guarantees are being or have been committed by such proceedings.’ . . . *Circle Lanes of Fairfield, Inc. v. Fay*, [195 Conn. 534, 542–43, 489 A.2d 363 (1985)].”

The court is keenly aware of the plaintiffs’ frustration with and disappointment in the handling, if not the outcome, of the grievance proceedings. The facts and circumstances outlined in the complaint, if true, are deplorable. But these proceedings are not marked by “egregious and otherwise irreparable violations of state and federal constitutional guarantees.” Mere disagreement with how the grievance process has been handled, standing alone, does not provide appropriate justification for this court to supplant or usurp the established disciplinary process.

IV

CONCLUSION

Because the plaintiffs are neither statutorily nor classically aggrieved, the court lacks subject matter juris-

diction over their claims. The motion to dismiss is therefore granted.

* Affirmed. *D'Attilo v. Statewide Grievance Committee*, 329 Conn. 624, A.3d (2018).
