

## **Overview of the Attorney Disciplinary Process**

### ***Attorney Grievance Committee Third Judicial Department***

#### **PURPOSE**

*A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.*

- From the Preamble for the New York Rules of Professional Conduct

#### **INTRODUCTION**

On December 29, 2015, Judge Lippman, former Chief Judge of the Court of Appeals, announced the promulgation of Rules for Attorney Disciplinary Matters, 22 NYCRR Part 1240, effective October 1, 2016. These rules provide for a harmonized and uniform approach to the investigation, adjudication and post-proceeding administration of attorney disciplinary matters in New York State. In addition, on July 1, 2016, the Rules of the Appellate Division, Third Department (22 NYCRR) Part 806, relating to attorney disciplinary matters were amended, effective October 1, 2016.

#### **JURISDICTION**

The Rules for Attorney Disciplinary Matters apply to all attorneys who are admitted to practice in the State of New York; all in-house counsel registered in the State of New York; all legal consultants licensed in the State of New York; all attorneys who have an office in, practice in, or seek to practice in the State of New York; and the law firms that have as a member, retain, or otherwise employ any person covered by the Rules.

A complaint of professional misconduct shall be filed initially in the Judicial Department encompassing the respondent's registration address on file with the Office of Court Administration and if the respondent's address lies outside New York State, the complaint shall be filed in the Judicial Department in which the respondent was admitted to the practice of law or otherwise professionally licensed in New York State. The Attorney Grievance Committee has jurisdiction over those complaints filed in the Third Judicial Department, which includes the Third, Fourth and Sixth Judicial Districts. This

includes the majority of out-of-state and out-of-country attorney admissions, as they are generally admitted through the Third Department.

## **THE COMMITTEE AND ITS FUNCTION**

The Committee is comprised of twenty-one members (eighteen lawyers and three non-lawyers), all of whom are appointed by the Appellate Division, Third Department. All members serve without compensation as a service to the public and legal profession. The Committee meets monthly to review and determine cases of professional misconduct.

The Court appoints a Chief Attorney of the Attorney Grievance Committee and other professional staff as necessary.

The Chief Attorney on behalf of the Committee must review and take appropriate action with respect to all complaints concerning conduct by an attorney or entity to whom the Rules apply.

## **INVESTIGATIONS**

Committee staff investigate conduct which might constitute a violation of the Rules of Professional Conduct and/or announced standards of the Appellate Division governing the personal or professional conduct of attorneys. Complaints primarily come to the Committee from clients, former clients, attorneys, judges, interested third parties and members of the public.

Committee staff must, in accordance with the Court rules, receive complaints in writing signed by the complainant or, in the alternative, where the conduct comes to its attention from some other source, the Committee is empowered to authorize an investigation pursuant to a Chief Attorney's Complaint.

When the Committee receives a complaint the Chief Attorney, after initial screening, can decline to investigate for several reasons, including, but not limited to: (1) the matter involves a person or conduct not covered by the Rules; (2) the allegations, if true, would not constitute professional misconduct; (3) the complaint seeks a legal remedy more appropriately obtained in another forum; or (4) the allegations are intertwined with another pending legal action or proceeding. In addition, the Chief Attorney may, when it appears that a complaint involves a fee dispute, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum. The complainant is notified that the Chief Attorney has declined to investigate the complaint and may then submit a written request for reconsideration of the Chief Attorney's decision within thirty (30) days.

When the Chief Attorney determines to investigate a complaint, the Chief Attorney shall forward a copy of the complaint to the attorney within sixty (60) days, along with a Notice of Complaint of Professional Misconduct. The attorney is directed to submit a detailed written response to the complaint addressing each allegation contained in the complaint, within twenty-five (25) days. In the event an attorney fails to respond to the initial Notice, a Second Notice is forwarded to the attorney directing them to submit a detailed written response within fifteen (15) days. If a timely and complete response is not received, the Committee may apply, pursuant to Rule §1240.7(b)(3), for a judicial subpoena to compel the attorney's attendance as a respondent, and the production of documents, at a duly-ordered examination.

Pursuant to Rule § 806.7(b), if it is necessary to obtain a subpoena, the Committee shall be entitled to reimbursement by the attorney of all costs associated with the making of a record pursuant to that subpoena.

The Chief Attorney is authorized to direct an attorney to appear for a formal interview, to appear for an examination under oath, to produce records, to interview witnesses, to obtain records, materials and other information necessary to determine the validity of a complaint, and to take any other action deemed necessary for the proper disposition of a complaint.

Following the conclusion of Committee staff's investigation, the matter is then presented to the Committee for its review and determination in accordance with Rule §1240.7. Prior to the matter being presented to the Committee, the Chief Attorney is obligated to provide the attorney with the opportunity to review "all written statements and other documents that form the basis of the proposed Committee action, excepting material that is attorney work product or otherwise deemed privileged by statute or case law, and materials previously provided to the Committee by the respondent", and a Notice of Disclosure is forwarded to the attorney. Please note that Committee staff does not vote on matters presented to the Committee, but provides recommendations based on the facts and circumstances of each case, and any mitigating and/or aggravating factors related thereto, to assist the Committee in making its determination.

## **COMMITTEE ACTION**

1. **Dismissal**
2. **Action: Letter of Advisement or Admonition**
3. **Review**

### **1. Dismissal**

If Committee staff recommends that a case be dismissed because there is no evidence or insufficient evidence of professional misconduct, it is placed on a "dismissal calendar", which is reviewed and voted upon by the Committee each month. If no Committee member requests that a specific case be placed on the Action Agenda for discussion or further investigation, the case is dismissed with letters so notifying the complainant and the attorney. The complainant may submit a written request for reconsideration of the Committee's decision to dismiss the complaint within thirty (30) days.

### **2. Action: Letter of Advisement or Admonition**

If Committee staff recommends discipline or other action on a particular complaint, the case is placed on the Committee's Action Agenda. The entire Committee, by majority vote, decides what action should be taken on the case. The standard of proof which must be established for the Committee to make a finding of professional misconduct is a fair preponderance of the evidence.

The Committee can dispose of a case on the Action Agenda, by dismissing it with a finding of insufficient evidence of professional misconduct. The Committee may also issue a Letter of Advisement to the attorney, when the attorney has engaged in conduct requiring comment that, under the facts of the case, does not warrant the imposition of discipline. A particular Rule of Professional Conduct, a standard

of conduct, and/or a New York State Bar Association ethics opinion is brought to the attention of the attorney. A Letter of Advisement shall be confidential, shall not constitute discipline and shall be maintained in the records of the Committee. In addition, a Letter of Advisement may be considered by a Committee or the Court in determining action to be taken or the discipline to be imposed upon a subsequent finding of misconduct.

Under the new Rules, private discipline is imposed against an attorney by the issuance of a written Admonition issued by the Attorney Grievance Committee. The Committee considers an Admonition to be the highest form of private discipline and the issuance of this sanction to be of a most serious nature. An Admonition constitutes private discipline, and is an official finding of professional misconduct and shall be maintained in the records of the Committee. In addition, an Admonition may be considered by a Committee or the Court in determining the action to be taken or the discipline to be imposed upon a subsequent finding of misconduct. In addition, if the Committee wants to impress upon the attorney the seriousness of the misconduct and the severity of the possible consequences should the attorney engage in further misconduct in the future, the Committee may determine to deliver the Admonition to the attorney by personal appearance before the Committee or its Chairperson.

Taken into consideration by the Committee when making determinations and imposing discipline are both mitigating and aggravating factors, such as whether the attorney has a prior disciplinary history, harm to the client or others, degree of cooperation with the Committee's investigation, depth of the attorney's professional or life experience, and the existence of and treatment of substance abuse, medical or mental health conditions.

All Committee action is confidential pursuant to Judiciary Law §90(10) and Rule §1240.18. Where an attorney has been issued a Letter of Advisement or an Admonition, pursuant to Rule §1240.7(d)(3), the complainant must be provided with a brief description of the basis for any disposition of a complaint by the Committee. In balancing both confidentiality and the need for limited disclosure to the complainant, the Committee informs a complainant that action has been taken with respect to the attorney's conduct.

### **3. Review**

#### **Letter of Advisement**

Where an attorney receives a Letter of Advisement, they may file a written request for reconsideration with the Chair of the Committee within thirty (30) days. Reconsideration provides the attorney with an opportunity to explain why they believe the Committee's determination was incorrect. The Chair has the discretion to deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.

Within thirty (30) days of the final determination denying a request for reconsideration, an attorney may seek review of a Letter of Advisement by submitting an application to the Court upon a showing that the issuance of the Letter of Advisement was in violation of a fundamental constitutional right.

#### **Admonition**

Prior to the imposition of an Admonition to an attorney, the Committee shall give the attorney twenty (20) days' notice by mail of the Committee's proposed action, and the attorney shall have the

opportunity within fourteen (14) days to request reconsideration of the proposed Admonition. A request for reconsideration shall be considered by the Executive Committee, and if it is determined by a majority of the Executive Committee that reconsideration is warranted, the matter shall be resubmitted to the full Committee. Reconsideration provides the attorney with an opportunity to explain why they believe the Committee's determination was incorrect.

Within thirty (30) days of the issuance of an Admonition (whether or not the attorney sought reconsideration of the proposed Admonition), an attorney may make application to the Court to vacate the Admonition. The Court may take whatever action it deems appropriate.

## **FORMAL DISCIPLINARY PROCEEDINGS**

- 1. Disciplinary Proceeding**
- 2. Discipline by Consent**
- 3. Hearings**
- 4. Public Discipline**

### **1. Disciplinary Proceeding**

An Admonition, which is private discipline, is not the only form of discipline available where professional misconduct has been found. When the Committee finds that there is probable cause to believe that an attorney engaged in professional misconduct warranting the imposition of public discipline, and that such discipline is appropriate to protect the public, maintain the integrity and honor of the profession, or deter others from committing similar misconduct, it may authorize a formal disciplinary proceeding before the Appellate Division, Third Judicial Department. Committee attorneys institute the disciplinary proceeding by the service of a Notice of Petition and Petition of Charges on the attorney, which is filed with the Court. An Answer to the Petition shall be filed with the Court at least five (5) days before the time at which the Petition is noticed to be heard and marked returnable before the Court.

After the pleadings are filed, the Rules require disclosure between the parties. Within twenty (20) days after service of a respective pleading, each party shall file a statement of facts identifying those allegations that it contends are disputed and undisputed, or within thirty (30) days, the parties may file a joint statement of disputed and undisputed facts. Within fourteen (14) days after the filing of a statement of facts, each party must provide the other party with disclosure concerning the allegations of disputed facts. Disclosure shall identify: (1) the identity of witnesses and a "general description" of information possessed by each witness, and (2) copies of documentary evidence in its possession (or provide an opportunity to inspect and copy said documentary evidence). In addition, a hearing referee may also grant requests for additional disclosure as justice may require.

## **2. Discipline by Consent**

The new Rules provide for "plea bargaining" in disciplinary proceedings. After the filing of a Petition, the parties may file a joint motion with the Court requesting the imposition of discipline by consent. The joint motion must include: (1) a stipulation of facts; (2) conditional admissions as to the act(s) of professional misconduct and specific rules or standards of conduct violated; (3) any relevant aggravating and mitigating factors, including an attorney's prior disciplinary record, if any; (4) agreed upon discipline to be imposed, which may include monetary restitution; and an affidavit of the respondent attorney conditionally admitting the facts set forth in the stipulation, giving consent, freely and voluntarily without coercion or duress, to the agreed upon discipline and stating an awareness of the consequences of consenting to such discipline.

If the motion is granted, the Court will issue a decision consistent with the motion. If the motion is denied, the conditional admissions shall be deemed withdrawn and the disciplinary proceeding will continue.

## **3. Hearings**

If an attorney denies any of the charges set forth in the Petition in their answer, application is made to the Appellate Division for the appointment of a referee. Upon appointment of a referee, an evidentiary hearing is conducted and the Committee has the burden of proof. The referee may receive evidence regarding any defense or mitigating factor raised by the attorneys, and any aggravating factor raised by the Committee. A record of the hearing is made. Following the hearing and the parties' submission of proposed findings of fact, if required by the referee, the referee files a written report with the Court setting forth findings of fact with respect to all issues of fact and making an advisory determination as to whether the Committee has established, by a preponderance of the evidence, each element of the charge or charges of misconduct. The referee does not make a recommendation as to any appropriate sanction. Once the referee's report is received either party may move to confirm or disaffirm the report, in whole or in part. The parties shall be heard on the issue of appropriate discipline to be imposed for any misconduct that might be determined by the Court. In addition, the parties may cite any relevant factor, including, but not limited, to the nature of the misconduct, aggravating and mitigating circumstances, the parties' contentions regarding the appropriate sanction under the American Bar Association's Standards for Imposing Lawyer Sanctions, and applicable case law and precedent.

## **4. Public Discipline**

Upon a finding that an attorney has committed professional misconduct, the Court may impose discipline or take other action that is authorized by law and, in the discretion of the Court, is appropriate to protect the public, maintain the honor and integrity of the profession, or deter others from committing similar misconduct. The Court may order a censure, suspension or disbarment. These forms of discipline are public.

## **DIVERSION TO A MONITORING PROGRAM**

The new Rules provide for diversion to a monitoring program in all four judicial departments. When in defense, or as a mitigating factor, in an investigation or formal disciplinary proceeding, the respondent raises a claim of impairment based on alcohol or substance abuse, or other mental or physical health issues,

the Court may stay an investigation or proceeding and direct the attorney to complete an appropriate treatment and monitoring program approved by the Court. In making such a determination, the Court shall consider: (1) the nature of the alleged misconduct; (2) whether the alleged misconduct occurred during a time period when the respondent suffered from the claimed impairment; and (3) whether diverting the respondent to a monitoring program is in the public interest. Upon the successful completion of a monitoring program, the Court can: (1) discontinue the investigation or disciplinary proceeding; (2) resume the investigation or disciplinary proceeding; or (3) take other appropriate action. All aspects of a diversion application of an attorney's participation in a monitoring program and any records related thereto, are confidential or privileged pursuant to Judiciary Law Sections 90(10) and 499.

### **CONFIDENTIALITY**

Pursuant to Judiciary Law §90(10) and Rule §1240.18, all records, papers, and documents associated with the investigation of an attorney are sealed and deemed private and confidential. Upon good cause being shown, the Court, upon application, is empowered in its discretion, to permit to be divulged all or any parts of such records, papers, and documents.