



MEMORANDUM

June 22, 2020

To: All Interested Persons

From: Eileen D. Millett

Re: Request for Public Comment on the Proposed Amendment of 22 NYCRR § 1240.18 to Permit the Sharing of Otherwise Confidential Information with Federal Attorney-Disciplinary Authorities Under Certain Conditions (Amended)

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the New York State Federal Judicial Council (the “Council”) and further modified by the Administrative Board, to amend 22 NYCRR § 1240.18 to permit (but not require) Attorney Grievance Committees to share otherwise confidential information with disciplinary authorities of the federal court if the federal disciplinary authority has adopted a reciprocal policy regarding transmission of information with the Grievance Committees and if their reciprocal rule does not allow the federal disciplinary authority to disclose the confidential information without the approval of the Presiding Justice of the corresponding Appellate Division department (Exhibit A – Administrative Board amendments). The Council believes such a policy is warranted because it aids disciplinary authorities in gathering relevant information about an attorney’s prior similar conduct, promotes the protection of the public, and encourages judicial economy and the conservation of scarce resources (Exhibit B – Council proposal). The Council also notes that Judiciary Law § 90(10) provides the rule-making authority for the proposed amendment.

Upon further review, the Administrative Board has added language to the Council’s proposed amendment so that confidential information will only be disclosed if the federal disciplinary authority has adopted a rule that prohibits disclosure of confidential information (to another investigative body such as the police or Department of Justice, for example) without the approval of the Presiding Justice of the corresponding Appellate Division department (Exhibit A).

Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than August 12, 2020.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

22 NYCRR § 1240.18

(additional language proposed by the Federal Judicial Council underlined, language proposed by the Administrative Board double-underlined and highlighted)

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(b) All papers, records and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any respondent under these Rules are sealed and deemed private and confidential pursuant to Judiciary Law §90(10). This provision is not intended to proscribe (i) the free interchange of information among the Committees; or (ii) an interchange of information for use in a disciplinary investigation or proceeding by a duly-constituted disciplinary authority of a federal court within the state that has adopted a rule permitting the interchange of information with the Committees.

* * *

(f) Upon written request, a federal court within the State of New York that has before it an attorney discipline investigation or proceeding may seek from the Court (i) the expedited disclosure of confidential information for use in an investigation or proceeding, including prior similar act evidence; and (ii) a deferral of notice of the request for so long as the matter is in the investigative stage. The pendency of an investigation or proceeding before the federal court is deemed sufficient good cause for the disclosure under Judiciary Law § 90(10). Information disclosed upon such request may only be used for the purpose of the investigation or proceeding. This sub-section shall only apply if a duly-constituted disciplinary authority of the federal court within the state seeking disclosure has adopted a rule (a) permitting the interchange of information with the Committees; and (b) prohibiting it from making any disclosure of information as described in this sub-section without the approval of the Presiding Justice of the respective Department of the Appellate Division that appointed the Committee.

EXHIBIT B

NEW YORK STATE-FEDERAL JUDICIAL COUNCIL

PROJECT TO ENHANCE COLLABORATION AMONG NEW YORK'S ATTORNEY DISCIPLINARY AUTHORITIES: FEDERAL AND STATE

**Proposal to Amend New York State Rules for Attorney Discipline Matters
To Facilitate the Sharing of Confidential Information
As Defined in Judiciary Law § 90(10) and the Rules for Attorney Discipline Matters § 1240.18**

Summary of Proposal and Rationale

The attorney discipline rules adopted in 2016 by the Appellate Divisions includes in the confidentiality section a provision that permits the “free exchange of information among” among the Grievance Committees operating in the four Departments. 22 NYSCR §1240.18. The present proposal would permit but not require the Appellate Divisions to share, upon request, otherwise confidential information with a federal attorney-disciplinary authority for use in an attorney-disciplinary investigation or proceeding, provided that federal attorney-disciplinary authority had a similar, reciprocal policy regarding transmission of confidential information to the Grievance Committees.

Those investigating or prosecuting a disciplinary matter are frequently met with the argument that conduct in apparent violation of a disciplinary rule was inadvertent, unintentional or the product of mistake. Prior similar conduct by an attorney may bear on his or her intent and may influence the decision to proceed with charges and the ability to prove those charges. Exchanges of information between disciplinary authorities promotes the protection of the public from attorneys who violate the New York Rules of Professional Conduct.

There are also instances when it is apparent that one disciplinary authority is likely investigating an attorney for the same or similar conduct under investigation by another disciplinary authority. Collegial and expeditious discussion of how the two systems ought to proceed and which disciplinary authority is in the best position to proceed in the first instance is appropriate. A wall that prohibits an exchange of information between duly constituted attorney-disciplinary authorities may not always be in the public interest. It works against principles of judicial economy and the allocation of scarce administrative resources.

An existing rule permits a case-specific application to be made by any person to the Appellate Division showing “good cause” and specifying the “the papers, records or documents sought to be disclosed, or the proceedings that are sought to be opened” and “other methods, if any, of obtaining the information sought, and the reasons such methods are unavailable or impractical.” 22 N.Y.C.R.R. §1240(d). While the rule may be quite appropriate

for members of the public, it is impracticable, cumbersome, rarely used and of doubtful utility to a disciplinary authority at the investigative stage.

Proposed language

Amend the confidentiality section in § 1240.18 by revising sub-section (b) and adding a new sub-section (f):

(b) All papers, records and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any respondent under these Rules are sealed and deemed private and confidential pursuant to Judiciary Law §90(10). This provision is not intended to proscribe (i) the free interchange of information among the Committees; or (ii) an interchange of information for use in a disciplinary investigation or proceeding by a duly-constituted disciplinary authority of a federal court within the state that has adopted a rule permitting the interchange of information with the Committees

“(f) Upon written request, a federal court within the State of New York that has before it an attorney discipline investigation or proceeding may seek from the Court (i) the expedited disclosure of confidential information for use in an investigation or proceeding, including prior similar act evidence; and (ii) a deferral of notice of the request for so long as the matter is in the investigative stage. The pendency of an investigation or proceeding before the federal court is deemed sufficient good cause for the disclosure under Judiciary Law § 90(10). Information disclosed upon such request may only be used for the purpose of the investigation or proceeding. This sub-section shall only apply if a duly-constituted disciplinary authority of the federal court within the state seeking disclosure has adopted a rule permitting the interchange of information with the Committees.”

Authority to Act

Judiciary Law § 90(10) requires that attorney disciplinary information “be sealed and be deemed private and confidential.” (Appendix A.) It permits, upon a showing of good cause, the issuance of a written order by the Justices of the empowered Appellate Division allowing the unsealing of information.

The statute also provides as follows: “In furtherance of the purpose of this subdivision, said justices [of the appellate divisions] are also empowered, in their discretion, from time to time to make such rules as they may deem necessary.” It was this rule-making authority that permitted the adoption of the 2016 amendment permitting an exchange of information from one state Grievance Committee to another. It is this rule-making authority that would permit the proposed amendment

Disciplinary Authorities Falling Within the Rule

There are five federal courts within the state to which the rule may apply. The United States Court of Appeals for the Second Circuit and the four federal district courts: Southern, Eastern, Northern and Western Districts of New York. Each of the five courts has its own attorney-disciplinary mechanism.

As noted, the proposed rule would permit but not require information exchanges. Federal courts within the state would be expected to make plain in their rules that they would provide comparable information to state disciplinary authorities upon request. In making a written request under the proposed amended rule, a federal disciplinary authority would be expected to describe the confidentiality protection (by federal court order or otherwise) that would govern the information to be disclosed.

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We stand ready and willing to answer any questions.

Respectfully submitted,

Hon. P. Kevin Castel, Chair
Hon. Michael J. Garcia, Vice-Chair
New York State-Federal Judicial Council

**APPENDIX A
NEW YORK STATE STATUTE AND RULES
REGARDING ATTORNEY DISCIPLINE**

Judiciary Law § 90(10)

Any statute or rule to the contrary notwithstanding, all papers, records and documents . . . upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justice of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding justice or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. . . .

RULES FOR ATTORNEY DISCIPLINARY MATTERS, 22 NYCRR Part 1240

§ 1240.2 **Definitions**

(d) Committee: an attorney grievance committee established pursuant to these Rules.

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(h) Foreign jurisdiction: a legal jurisdiction of a state (other than New York State), territory, or district of the United States, and all federal courts of the United States, including those within the State of New York.

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§ 1240.13 Discipline for Misconduct in a Foreign Jurisdiction

- (a) Upon application by a Committee containing proof that a person or firm covered by these Rules has been disciplined by a foreign jurisdiction, the Court shall direct that person or firm to demonstrate, on terms it deems just, why discipline should not be imposed in New York for the underlying misconduct.
- (b) The respondent may file an affidavit stating defenses to the imposition of discipline and raising any mitigating factors. Any or all of the following defenses may be raised:
 - (1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
 - (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the respondent's misconduct; or
 - (3) that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York.
- (c) After the respondent has had an opportunity to be heard, and upon review of the order entered by the foreign jurisdiction, and the record of the proceeding in that jurisdiction, if such record or part thereof is submitted by a party and deemed relevant by the Court, the Court may discipline the respondent for the misconduct committed in the foreign jurisdiction unless it finds that the procedure in the foreign jurisdiction deprived the respondent of due process of law, that there was insufficient proof that the respondent committed the misconduct, or that the imposition of discipline would be unjust.
- (d) Any person or firm to whom these Rules shall apply who has been disciplined in a foreign jurisdiction shall, within 30 days after such discipline is imposed, advise the appropriate Court (as described in section 1240.7(a)(2) of these Rules) and Committee of such discipline. Such notification shall be in writing and shall be accompanied by any judgment, order or certificate memorializing the discipline imposed. The person or firm shall thereafter provide the

Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation.

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§ 1240.18 Confidentiality

- (a) All disciplinary investigations and proceedings shall be kept confidential by Court personnel, Committee members, staff, and their agents.
- (b) All papers, records and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any respondent under these Rules are sealed and deemed private and confidential pursuant to Judiciary Law §90(10). This provision is not intended to proscribe the free interchange of information among the Committees.
- (c) All proceedings before a Committee or the Court shall be closed to the public absent a written order of the Court opening the proceedings in whole or in part.
- (d) Application to Unseal Confidential Records or for Access to Closed Proceedings. Unless provided for elsewhere in these Rules, an application pursuant to Judiciary Law §90(10) to unseal confidential documents or records, or for access to proceedings that are closed under these Rules, shall be made to the Court and served upon such other persons or entities as the Presiding Justice may direct, if any, and shall specify:
 - (1) the nature and scope of the inquiry or investigation for which disclosure is sought;
 - (2) the papers, records or documents sought to be disclosed, or the proceedings that are sought to be opened; and
 - (3) other methods, if any, of obtaining the information sought, and the reasons such methods are unavailable or impractical.
- (e) Upon written request of a representative of The Lawyers' Fund for Client Protection ("Fund") certifying that a person or persons has filed a claim or

claims seeking reimbursement from the Fund for the wrongful taking of money or property by any respondent who has been disciplined by the Court, the Committee is authorized to disclose to the Fund such information as it may have on file relating thereto.

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