

*State of New York
Supreme Court, Appellate Division
Attorney Grievance Committee
Third Judicial Department
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Overview of the Attorney Disciplinary Process

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, and again amended, effective November 1, 2018.

JURISDICTION

The Rules for Attorney Disciplinary Matters ("Atty. Disc. Rules") 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 (including those who are engaged in temporary practice pursuant to 22 NYCRR Part 523); 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 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 for the Third Judicial Department ("Committee") has jurisdiction over those complaints filed in the Third Judicial Department, which includes the Third, Fourth and Sixth Judicial Districts. The Committee's jurisdiction includes the majority of out-of-state and out-of-country attorney admissions, as they are generally admitted through the Third Judicial Department. The Committee's Chief Attorney or the Appellate Division, Third Judicial Department ("Court") may transfer a complaint or proceeding to an Attorney Grievance Committee in another Judicial Department as justice may require.

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 Court. 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 and other professional staff for the Committee as it deems appropriate.

In accordance with the Atty. Disc. Rules, the Chief Attorney reviews and takes appropriate action with respect to all complaints concerning conduct by an attorney or entity to whom the Atty. Disc. Rules apply.

INVESTIGATIONS

Committee staff investigates conduct, which might constitute a violation of any of the Rules of Professional Conduct (22 NYCRR Part 1200) ("RPC"), including the violation of any RPC or announced standard of the Court 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 are authorized to investigate the professional misconduct of an attorney upon the Committee's receipt of a complaint. In the alternative, where the attorney's conduct comes to the Committee's attention from another source, the Committee is authorized to investigate pursuant to a Chief Attorney's Complaint.

When the Committee receives a complaint, the Chief Attorney, after initial screening, can decline to investigate a complaint for several reasons, including, but not limited to: (a) the matter involves a person or conduct not covered by the Atty. Disc. Rules, (b) the allegations, if true, would not constitute professional misconduct, (c) the complaint seeks a legal remedy more appropriately obtained in another forum, or (d) 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 matter, 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 the complainant may then submit a written request for reconsideration of the Chief Attorney's decision within thirty (30) days.

When the Chief Attorney assigns a complaint for investigation, the Chief Attorney forwards a copy of the complaint to the attorney within sixty (60) days, along with a Notice of Complaint of Professional Misconduct ("Notice"). 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.

Pursuant to Atty. Disc. Rule §1240.7(b), the Chief Attorney is authorized to direct a respondent to provide a written response to a complaint, to appear before the Chief Attorney or a staff attorney for a formal interview or examination under oath, and/or to produce records before the Committee, to interview witnesses, to obtain records, materials and other information necessary to determine the validity of a complaint, to apply to the Clerk of the Court for a subpoena to compel the attendance of a person or the production of books and papers, and to take any other action deemed necessary for the proper disposition of a complaint.

Following the conclusion of the investigation, the case is then presented to the Committee for its review and determination in accordance with Atty. Disc. Rule §1240.7(d)(2). Prior to the case being presented to the Committee, the Chief Attorney provides 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. Committee staff do not determine nor vote on cases presented to the Committee, but provide 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

If Committee staff recommends that a case be dismissed because there is no evidence or insufficient evidence of professional misconduct, it is placed on the Committee's monthly "Dismissal Agenda", which is reviewed and determined by the Committee. If no Committee member requests that a specific case be removed for discussion or further investigation, the cases are dismissed with letters notifying the complainants and the attorneys. The complainant may submit a written request for reconsideration of the Committee's determination to dismiss the complaint within thirty (30) days.

2. Letter of Advisement or Admonition

If Committee staff recommends action other than dismissal on a particular complaint, the case is placed on the Committee's monthly "Chair Agenda". The Committee, by majority vote, determines what action should be taken on each 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.

Under the Atty. Disc. Rules, non-disciplinary action can be imposed by the Committee by the issuance of a Letter of Advisement, when the attorney has engaged in conduct requiring comment that, under the facts of the

case, does not warrant the imposition of discipline. Within the Letter of Advisement, the Committee will bring to the attention of the attorney the conduct which warrants comment and refer to a particular RPC. A Letter of Advisement is confidential, does not constitute discipline, and is maintained in the records of the Committee. In addition, a Letter of Advisement may be considered by the Committee or the Court in determining action to be taken or discipline to be imposed upon a subsequent finding of misconduct.

Under the Atty. Disc. Rules, private disciplinary action can be imposed by the Committee by the issuance of a written Admonition. The Committee considers an Admonition to be the highest form of private discipline and discipline of a most serious nature. Within the written Admonition, the Committee will clearly state the facts forming the basis for its finding, and the specific RPC(s) or other announced standard(s) that was violated. An Admonition constitutes private discipline, 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 the Committee or the Court in determining the action to be taken or the discipline to be imposed upon a subsequent finding of misconduct. 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 Chair.

Taken into consideration by the Committee when making determinations as to the appropriate action 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 a claim of impairment based on alcohol or substance abuse, or other mental or physical health issues.

All Committee action is confidential pursuant to Judiciary Law §90(10) and Atty. Disc. Rule §1240.18. Where an attorney has been issued a Letter of Advisement or an Admonition pursuant to Atty Disc. 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 on an attorney, the Committee gives the attorney twenty (20) days' notice by mail of the Committee's proposed action, and the attorney has the opportunity within fourteen (14) days to request reconsideration of the proposed Admonition. A request for reconsideration is considered by the Executive Committee, and if it is determined by a majority of the Executive Committee that reconsideration is warranted, the case is 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

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 discipline is appropriate to protect the public, maintain the integrity and honor of the profession, or deter others from committing similar misconduct, the Committee may authorize a formal disciplinary proceeding before the Court. Committee staff institutes the disciplinary proceeding by the service of a notice of petition and petition on the attorney, on no less than twenty (20) days' notice, 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 Atty. Disc. Rules require disclosure between the parties. Within twenty (20) days after service of respondent's answer, the Committee files a statement of facts identifying those allegations that it contends are undisputed and disputed for which a hearing is required. Within twenty (20) days of the Committee's submission, the respondent responds to the Committee's statement. In the alternative, 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 provides the other party with disclosure concerning the allegations of disputed facts. Disclosure identifies: (a) the witnesses and a "general description" of information possessed by each witness, and (b) copies of documentary evidence in its possession (or an opportunity to inspect and copy said documentary evidence). In addition, a hearing referee may grant requests for additional disclosure as justice may require.

2. Discipline by Consent

A disciplinary proceeding can be resolved between the parties, with the consent of the Court. 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: (a) a stipulation of facts, (b) conditional admissions as to the act(s) of professional misconduct and specific rules or standards of conduct violated, (c) any relevant aggravating and mitigating factors, including an attorney's prior disciplinary record, if any, (d) agreed upon discipline to be

imposed, which may include monetary restitution, and (e) 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 there are disputed facts for which a hearing is required, application is made to the Court for the appointment of a referee for a hearing on any issues the Court deems appropriate. Upon appointment of a referee, a 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 attorney, 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 are heard before the Court 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 will issue a decision and 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, and/or deter others from committing similar misconduct. The Court may impose a censure, suspension or disbarment. These decisions of discipline are public.

INTERIM SUSPENSION

Upon application or motion by the Committee, a respondent may be suspended from practice of law on an interim basis during the pendency of an investigation or proceeding upon a finding by the Court that a respondent has engaged in conduct immediately threatening the public interest. A finding may be based upon: (1) respondent's default in responding to a petition, notice to appear for formal interview, examination or pursuant to subpoena, (2) respondent's admission under oath to the commission of professional misconduct, (3) respondent's failure to comply with a lawful demand of the Court or Committee, (4) respondent's willful failure or refusal to pay money owed to a client, which debt is demonstrated by an admission, judgment or other clear and convincing evidence, or (5) other uncontroverted evidence of professional misconduct.

An order of interim suspension entered by the Court sets forth the basis for the suspension and provides the respondent with an opportunity for a post-suspension hearing. An order and decision of interim suspension is deemed a public record, however, the papers upon which any such order is based is deemed confidential. After the issuance of an order of interim suspension, if a respondent fails to respond to or appear for further investigatory

or disciplinary proceedings within six (6) months, the respondent may be disbarred by the Court without further notice.

DIVERSION TO A MONITORING PROGRAM

The Atty. Disc. 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: (a) the nature of the alleged misconduct, (b) whether the alleged misconduct occurred during a time period when the respondent suffered from the claimed impairment, and (c) whether diverting the respondent to a monitoring program is in the public interest. Upon the successful completion of a monitoring program, the Court may: (a) discontinue the investigation or disciplinary proceeding, (b) resume the investigation or disciplinary proceeding, or (c) 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 and privileged pursuant to Judiciary Law §§90(10) and 499.

CONFIDENTIALITY

Pursuant to Judiciary Law §90(10) and Atty. Disc. Rules §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.

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