

John Caher: Welcome to Amici, news and insights from the New York Judiciary and Unified Court System. Today, we are chatting with the Honorable Barry A. Cozier, a former Appellate Division, Second Department, justice and current Vice Chair of Chief Judge Lippman's Commission on Statewide Attorney Discipline. Judge Cozier is Senior Counsel to the Law Firm of LeClairRyan. Chief Judge Lippman announced the Commission during the State of the Judiciary address in February. Chief Administrative Judge A. Gail Prudenti chairs the Committee, and Judge Cozier serves as Vice Chair. There are 29 members tasked with conducting a comprehensive review of the State's Attorney Discipline System.

Okay, Judge, thank you for chatting with us today. First of all, can you give us the bird's eye view of what this Commission is doing?

Judge Cozier: Thank you for the invitation, and I will do my best to give you the bird's eye view. The charge of the Commission is to conduct, I think, a fairly comprehensive review of New York State's attorney disciplinary system, and to identify both the procedural and substantive aspects that work well now and those that may be in need of improvement, as well as, I think, to offer recommendations to Chief Judge Jonathan Lippman to enhance the efficiency, fairness, and uniformity in the system.

John Caher: It sounds like the Commission has a very broad mandate. I understand three different subgroups have been established, one on uniformity and fairness, another on enhancing efficiency, and a third on transparency and access. Let's address them sequentially, if we could. First, the Subcommittee on Uniformity and Fairness. What is that looking into?

Judge Cozier: Okay. Now, before actually describing that, I just wanted to point out that New York State is unique in that it is one of only a few states in the nation that does not have a centralized attorney disciplinary authority administered by its highest court or another centralized body and governed by a uniform set of rules. Rather, under Judiciary Law Section 90 the power and control over the conduct of attorney discipline resides in the Appellate Division of the Supreme Court in each of the four judicial departments, which operate independently under its own set of rules and procedures. So, the current structures raises, I think, an issue whether New York's departmental-based system leads to regional disparities in the implementation of discipline and the imposition of sanctions.

The Subcommittee on Uniformity and Fairness is examining in detail the varying and different rules, procedures, and operations of New York's departmental-based attorney disciplinary system with a view towards recommendations to reconcile possible disparities in the statewide administration of discipline, and also to explore the benefits of uniform rules, procedures, and standards.

John Caher: What about the Subcommittee on Enhancing Efficiency? What's that all about?

Judge Cozier: The Subcommittee on Enhancing Efficiency is focused on approaches to increasing the overall efficiency of the disciplinary system, from the processing of the complaints through the investigation of complaints, the initiation of formal discipline, and ultimately the disposition of both informal and formal discipline, and, of course, the imposition of sanctions. One of the principal, I think, concerns of this Subcommittee is to eliminate any unwarranted delays in the processing of the disciplinary complaints, so that complainants, the public, and attorneys will receive fair and efficient treatment. Again, you can't entirely separate the Subcommittee on Enhancing Efficiency from the issues regarding uniformity throughout the four departments.

John Caher: I see. Finally, the Subcommittee on Transparency and Access. What is the focus there?

Judge Cozier: The Subcommittee on Transparency and Access is examining issues of confidentiality, privacy, access to records and documents, and adjudicative hearings related to disciplinary proceedings, as well as the right of public access, including press access, to the disciplinary process.

Again, Judiciary Law Section 90 Subdivision 1 contains a presumption that papers, records, and documents and proceedings will be private and confidential, except upon good cause shown. So, essentially there is a presumption in Judiciary Law of closure rather than a presumption of openness with respect to disciplinary records and proceedings. Now, I would point out that that section is really silent specifically with respect to hearings that are held in disciplinary proceedings, and that's something that the Subcommittee will also be focusing on.

There are issues regarding if in fact there will be greater public access, and therefore, greater access by attorneys as well, to both records and the proceedings, what stage is it appropriate for there to be greater public access?

John Caher: Changing that presumption, of course, would require an action by the Legislature, I believe. Correct?

Judge Cozier: Absolutely. Yes. Any change to the current provisions, including, of course, a departmental-based system, would have to be legislatively imposed.

John Caher: Okay. There's been a lot of discussion over a lot of years about what this system that now exists, which as you noted is administered regionally by the four departments of the Appellate Division, lacks uniformity from region to region and area to area. What are the pros and the cons of a statewide disciplinary system, keeping in mind that Manhattan is a fundamentally different place than, say, Chautauqua County.

Judge Cozier: Certainly, New York State is a large state. In terms of the fact that we have such a large number of practicing attorneys in New York State, and the majority are based in the First and Second Departments, which tend to be more populous, and certainly have more of the practicing attorneys.

I guess the greater question is, should attorney discipline be administered based upon the location where an attorney practices or where an attorney resides? Should the location make a difference in terms of the types of procedures an attorney will face and, more importantly, ultimately the types of sanctions that an attorney may face, and possible disparities in the imposition of sanctions. I think that that's why it's very important to take a look at it and to at least, for the Commission at this point, to make some determination and recommendations as to whether or not there are disparities in different geographical regions, again, based upon the departmentally-based on administration of the attorney disciplinary system.

The pros, I think, are that an attorney, there will be much greater predictability, not just for attorneys subject to the grievance process and discipline, but also for the public at large, if there are a uniform set of procedures, uniform rules, and uniform standards. One of the problems with respect to Judiciary Law Section 90 is that it really, while it sets forth the general menu of formal discipline from censure through disbarment, it doesn't really include any standards with respect to the types of conduct which would fall within any particular category. Therefore, that becomes an issue that, again, is determined by each of the departmental disciplinary committees, and, of course, not necessarily in a uniform manner.

John Caher: Now as far as achieving more uniformity, are there things that can be done by the Chief Judge and the Administrative Board of the Courts that would not require legislative action that may forward that goal of greater uniformity?

Judge Cozier: Yes. I think that a goal of greater uniformity can certainly be addressed outside context of immediate legislative change by rule changes, which are under the jurisdiction of the Court of Appeals and the Administrative Board, under the direction of the Chief Judge.

Currently, we have four different sets of rules that govern both procedures and substantive proceedings with respect to formal discipline, and certainly we are examining all of those rules with a view towards whether or not recommending a uniform set of rules that would be operative in all four departments is a viable alternative.

John Caher: There's also been a lot of controversy for a whole lot of years over whether attorney disciplinary matters should become public much earlier in the process. I wonder if, to some extent, it's kind of a "tale of two states" issue. As we discussed earlier, it's a very diverse state, and a routine attorney disciplinary matter in, say, Manhattan or Brooklyn, is unlikely to make news at all, while it may well end up on the front page of the Daily Messenger in Canandaigua. How can that be balanced?

Judge Cozier: There are, I think, a few different considerations with respect to this issue of opening attorney disciplinary proceedings. One critical issue initially is: Does it benefit both the public and the bar at large to have more access to attorney disciplinary proceedings?

I certainly think that part of the purpose of the disciplinary system is to protect the public from unscrupulous attorney misconduct, and also to enhance the public perception of the integrity of the bar. That's a difficult balance. New York, again, New York State is the exception. In most other states, there is a presumption that disciplinary proceedings are open and that there is access to records and documents and disciplinary proceedings at a particular stage of the disciplinary process. So, the first question that has to be tackled is if, in fact, there's going to be greater access, at what stage should there be greater access that will be fair to the complainants, the attorneys who are subject to the proceeding, and to the public?

In most of the jurisdictions, the determination has been made that the proceedings and the records should become public at the stage that formal proceedings have been initiated, usually based on a finding of

probable cause—a standard that certainly doesn't exist currently, either in Judiciary Law 90 or within the departmental rules. So that's something that we will have to examine.

John Caher: Of course, earlier this year, the Unified Court System began posting attorney disciplinary records, information that was already public but almost impossible to find, on its website, largely as a consumer protection measure. What are your thoughts on that? Good idea? Bad idea?

Judge Cozier: Currently, again, because of the limitations in Judiciary Law 90, normally proceedings do not become public in New York until there has been an adjudication unfavorable to an attorney resulting in a public sanction, either censure, suspension, or disbarment. It seems to me it is helpful to have attorney disciplinary records available to the public based upon actual discipline has been imposed, and I think it's helpful not only to the public, who, of course, have to access attorneys and information on attorneys in making the decision as to who they wish to retain, but it's also helpful to the entire bar in terms of allowing attorneys to know the types of conduct or misconduct which will result in attorney discipline, and needs to be avoided. I think that it's positive to the extent we can expand public access to existing records.

John Caher: What sort of a timetable is the Commission looking at? When the public expect to see a report?

Judge Cozier: The hope is the Commission is going to be continuing its work through this summer, and we'll hopefully have a report at least in draft form available by September for review by the Chief Judge and the Court of Appeals.

John Caher: Great. Is there anything I forgot to ask about or anything you'd like to add?

Judge Cozier: I think that pretty much covers what the state and the Commission is currently [doing]. Everyone, I think, is working very diligently. All of the subcommittees have come up with their initial reports to the full Committee.

John Caher: Great. Thank you for your time, Judge.

Judge Cozier: My pleasure. Thank you very much.

John Caher: Okay. Thank you.

Thank you listening to this edition of Amici. If you have a suggestion for a topic on Amici, call John Caher at 518-453-8669, or send him a note at jcaher@nycourts.gov. In the meantime, stay tuned.