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LAWYER DISCIPLINE IN THE FIRST AND SECOND DEPARTMENTS: A PRIMER

Few practicing attorneys are familiar with the disciplinary process and the procedures followed by the various disciplinary/ grievance committees within the city of New York and therefore are probably ill-equipped to handle grievance matters involving either themselves or other attorneys. In order to assist those attorneys in dealing with what may seem a complex and threatening process, this article will describe the disciplinary systems in the Appellate Division's First and Second Departments, that is, what they are, how they function, who their principles are, pitfalls to avoid and hazards to watch out for. In dealing with these topics, I will be discussing the duties of the attorney who is the subject of an investigation or prosecution, his or her, rights, applicable rules and procedures and the basic steps of the disciplinary process.

As all members of the bar are aware, each of the Appellate Divisions has exclusive jurisdiction to admit attorneys to the practice of law.[1] In addition, the Appellate Divisions also have exclusive jurisdiction to impose discipline on members of the bar. Only the Appellate Divisions can impose "public" sanctions, namely censure, suspension or disbarment.[2]

The Appellate Division, Second Department, delegates certain powers of investigation and prosecution to three grievance committees, namely for the Ninth Judicial District (Westchester and four other counties in lower New York state), the Tenth Judicial District (Nassau and Suffolk Counties) and the Second and Eleventh Judicial Districts (Brooklyn, Queens and Staten Island).[3]

The Appellate Division, First Judicial Department, has designated the Departmental Disciplinary Committee as its official disciplinary agency with jurisdiction over attorneys in Manhattan and the Bronx.[4]

Each of these committees has the power to investigate complaints against lawyers and to prosecute attorney disciplinary proceedings. The Committee for the Second and Eleventh Judicial Districts consists of 19 members, 16 of whom are attorneys, and has a staff consisting of one chief counsel, one deputy counsel, three or four staff attorneys and several paralegals. The Departmental Disciplinary Committee consists of 36 members, two-thirds of whom are attorneys, and the staff consists of one chief

counsel, two deputy counsels, ten or eleven staff attorneys and various paralegals and investigators.

Very often the staff of the various committees consists of some attorneys who are young and inexperienced, which may result in what I call the "intimidation factor," namely where the respondent-attorney who is the subject of the investigation usually has far more practical experience in the subject field than the staff attorney. However, that staff attorney has enormous control over his or her own caseload. Therefore, do not make the staff attorney look or feel "young and inexperienced". When the respondent-attorney informs staff counsel that "in my 25 years at the bar I've never had a complaint," in most cases the staff attorney will respond negatively since from his or her point of view that really means that "in 25 years I've never gotten caught."

The role of the staff attorney is both that of an investigator and as a prosecutor, and to this extent it is a somewhat conflicting role. In some states, for example, in Colorado, the disciplinary system maintains two separate offices, one office for the investigation of complaints and a separate and distinct office for the prosecution of disciplinary proceedings. However, that is not the system that is currently in place within the city of New York.

INVESTIGATION METHODS

Cases are assigned to staff attorneys under a "vertical" system, meaning simply that that attorney handles all aspects of the case from beginning to end. Probably ninety percent of all the information gathered in the course of the complaint investigation comes from the respondent-attorney himself. The first step in the process is that following receipt a complaint is usually reviewed by a paralegal to determine whether it is a "complaint", that is, whether it alleges facts sufficient to constitute a violation of the Code of Professional Responsibility. Simple fee disputes, for example, are not "complaints" since they do not allege a violation of the Code.

Once a matter has been determined to be a "complaint," the next step in the process is that the complaint is forwarded to the respondent-attorney with a request for a written answer.

Upon receipt of the complaint, the subject attorney may be sorely tempted to telephone the staff attorney to tell counsel that the complaint is worthless and that the complainant is crazy. Do not under any circumstances telephone the Committee's offices upon receipt of the complaint. There are in effect two phases to every complaint, namely the merit or lack of merit of that complaint, and two, how the attorney handles himself during the investigation. Very often the complaint is determined to be

without merit, but the attorney may subsequently be accused of making false or misleading statements, of intimidating or attempting to intimidate the complainant, which are usually exceedingly more serious matters than that set forth in the original complaint. It should also be noted parenthetically that even if the complainant withdraws the complaint, that withdrawal is not binding on the Committee which may take action notwithstanding the withdrawal.

The last reason not to communicate by telephone directly with the staff attorney is that at this stage of the investigation, that attorney probably knows little if anything about the complaint since it is still in the earliest stages of processing. Of course anything that Respondent may say to the staff attorney can be used against him. In preparing the written answer to the complaint, you should be guided by the following factors: accuracy, brevity and clarity. Lengthy responses with numerous non-material facts and exhibits should be avoided.

In dealing with the disciplinary/grievance committee, the respondent-attorney has an absolute duty to cooperate with the committee in its investigation of the complaint. Failure to cooperate alone is grounds for discipline.[5] However, no duty is without limits. Therefore, it must be balanced against the right all lawyers enjoy to full due process in all phases of the disciplinary process.[6] While the attorney must cooperate, he must also protect his own interests.

The written answer to the complaint should be formatted in the following manner: the alleged misconduct should be denied (if that is appropriate); a brief but accurate factual background of the matter should be given; and documents and exhibits should be supplied sparingly and only when absolutely necessary to give a meaningful response. As you can well imagine, if a 50-page answer is submitted to a two-page complaint, the committee will believe something is wrong even if the complaint appears to be minor on its face. In addition, the answer should address only the specific allegation made in the complaint, and the attorney should not anticipate that some other yet undisclosed problem is at issue unless it is obvious that it will come to light at some point in time before the matter is concluded.

It should be noted parenthetically that the most common types of complaints and the least worrisome are failures to communicate, that is "my lawyer doesn't answer my phone calls or letters." Every attorney of course has a duty to respond to the reasonable requests for information from the client, and in order to avoid these types of complaints lawyers should promptly answer their telephone messages and letters from their clients. The least common type of complaint but the most worrisome are those

in which there is directly or indirectly an accusation that the attorney has mishandled client funds, namely "my lawyer won't give me my money."

Most complaints are closed without sanction, but lawyers who are proven to have intentionally misappropriated clients' funds usually get disbarred.

Further, the attorneys who get the most numbers of complaints have high-volume practices such as personal injury, matrimonial, collection, immigration and bankruptcy. The attorneys who get the most serious complaints are those holding clients' escrow funds, namely estate matters, real estate and personal injury cases.

The next step in the investigation process occurs after the answer is received and reviewed by the committee staff attorney. The attorney may then take anyone of the following actions: request further information from the respondent-attorney for – usually in writing – and if it is not received promptly, the attorney may be subpoenaed to produce the information. If the Respondent feels that he has appropriate grounds for invoking his Fifth Amendment privilege, he must nevertheless respond to the request for the subpoena and at that time assert his privilege against self-incrimination.

The respondent may at this stage be summoned to the offices of the grievance committee for a "Q&A" interview or on-the-record interview.

If staff counsel feels that the investigation is complete, he or she may submit the matter to a full committee for approval of a recommendation that the matter be: dismissed; a letter of caution be issued (that is a finding that although no violation of the code has been established there is evidence of troublesome conduct that requires a warning for the future); a letter of admonition, that is a private sanction based upon a minor code violation – although the sanction is private it nevertheless becomes a part of the attorney's permanent record.

In the Second Department Grievance Committee, staff counsel may recommend to the full Committee that formal disciplinary proceedings be undertaken either before a subcommittee or the Committee where there is evidence of serious misconduct, or in the Appellate Division directly if there is evidence of serious misconduct which is immediately threatening to the public interest based upon the respondent's admission thereof or upon other undisputed evidence, or based upon a failure to cooperate, namely a default by the attorney or a failure to respond, or lastly based upon a criminal conviction which constitutes a "serious" crime.[7]

In the Departmental Disciplinary Committee formal proceedings are instituted solely and exclusively upon the approval of chief counsel and without any prior approval by the committee.

The "Q&A" is initiated for basically two reasons: that staff counsel intends to close a case but needs to tie up "loose ends" or that staff counsel has decided to recommend the institution of full disciplinary proceedings and/or a motion for an immediate suspension and wants to get the respondent "on the record." At the "Q&A" stage the respondent-attorney usually has nothing to gain and everything to lose by testifying. The interview is solely for the benefit of investigating staff counsel.

Moreover, the Court of Appeals has permitted the "immediate" suspension--where the disciplinary hearing is held subsequent to the hearing--in only two limited situations, namely where the respondent has admitted serious misconduct immediately threatening the public interest, or allegations of serious misconduct are "uncontroverted", that is, where the attorney defaults and therefore does not "controvert" the allegations.[8]

Therefore, if the Respondent testifies at a "Q&A" and if his testimony is construed to constitute admissions of serious misconduct, he will very likely find himself the subject of a motion for an immediate suspension.

This raises the question of whether or not the respondent should invoke his Fifth Amendment privilege against self-incrimination. It is recognized by the United states Supreme Court that attorneys may not be disciplined solely for invoking their privilege against self-incrimination.[9] It should equally be recognized that a failure to testify means that inculpatory evidence against the respondent is not challenged and remains contested.

Therefore, the Fifth Amendment privilege should be invoked only when it's absolutely necessary to protect the respondent, namely in a scenario where in testifying the respondent would provide evidence constituting admissions which would enable the committee to seek an immediate suspension. As an alternative, the respondent may offer to testify if the grievance committee will give its assurance that any testimony given by him will not be used against him on a motion for an immediate suspension. It is the usual practice that the committees will decline such an offer, and in that case the respondent may invoke his privilege.

If the respondent does testify, he should be aware that historically lawyers make extremely poor witnesses for the simple reason that attorneys usually find themselves as the inquirers rather than the inquirees. As a guideline, the same rules apply

as are used in preparing any witness for litigation, namely if the answer is no the answer is "no". If the answer is I don't know, the attorney should simply state, "I don't know." Don't volunteer information, and if the question is confusing or unclear, simply state "I do not understand" and do not attempt to interpret the question for the staff attorney.

Thereafter the staff attorney may interview witnesses either himself or through investigators and may issue subpoenas to third parties for production of documents, most often bank records. Search warrants and wiretaps are not authorized expressly by the Appellate Division rules and do not appear to be used unless the committee is working together with a local district attorney.

The last step in the investigation stage in the Second Department is that the matter is submitted to a subcommittee for hearing.[10] Although this is initiated on the basis of a statement of charges, it is nevertheless still considered to be part of the investigative stage since the end result is or may be a determination that probable cause exists for the recommendation of full disciplinary hearings in the Appellate Division. The subcommittee consists usually of two or three committee members appointed ad hoc by the chair. At the hearing before the subcommittee the respondent-attorney is entitled to his full due process rights, including notice of the charges, opportunity to appear and introduce evidence in his own behalf, representation by counsel, confrontation of witnesses, cross-examination and presentation of legal memoranda where appropriate. Dispositions by the subcommittee are made by recommendation to the full committee and may include dismissal, reprimand (an admonition following a hearing), or a recommendation that formal disciplinary proceedings be instituted in the Appellate Division.

PROSECUTION

Where the matter has been the subject of a subcommittee hearing, the respondent-attorney is nevertheless entitled to a full de novo hearing in the Second Department before a special referee appointed by the Appellate Division. In the First Department, as indicated above, formal charges are filed on the basis of a determination made by chief counsel, and once the matter is at issue it is heard before a hearing panel of the Departmental Disciplinary Committee. Most hearing panels consist at this time of a chair and usually two or three committee members.

Disciplinary proceeding based upon criminal convictions are referred directly to the Appellate Division for either an order striking the attorney's name from the roll of attorneys if the conviction is a New York felony or a foreign crime which would be substantially similar to a New York felony.[11] If the conviction

is for a "serious" crime, the Appellate Division rules provide for an automatic suspension pending prosecution of the formal disciplinary proceedings and the proceeding would be solely for the purpose of permitting the respondent to offer evidence in mitigation and explanation of his criminal conviction.[12]

If an attorney is acquitted of criminal charges he may nevertheless be prosecuted in a disciplinary proceeding since the burden of proof in the latter proceeding is by a "fair preponderance" test and not "beyond a reasonable doubt" as applies to criminal prosecutions.[13]

Lastly, the Respondent may tender his resignation to the Appellate Division in which he acknowledges the nature of the charges or allegations against him, does not admit guilt of those charges or allegations but states that he cannot successfully defend against them and requests that his resignation be accepted. By tendering his resignation, the attorney waives his right to a due process hearing which may affect his ability to be reinstated at the end of a seven-year period, since the Court of Appeals has held that an attorney does not have a constitutional right to a hearing on an application for reinstatement.

The power of the referee in hearing disciplinary charges in the Second Department – to "hear and report with his findings" – does not include the power to recommend a sanction to the Appellate Division. In the First Department, counsel is permitted, if not required to make a recommendation on sanction to the hearing panel, and the hearing panel specifically makes a . . recommendation to the Appellate Division.

Upon submission of the referee's report or the report of the hearing panel as the case may be, the Appellate Division renders a decision in which it either confirms or disaffirms the charge or charges and imposes a sanction consisting of either a censure, suspension for a term of months or years, or a disbarment. The court will consider factors in mitigation, namely:

- the character of the respondent,
- his or her prior good record as an attorney,
- medical or mental disability (however, if the disability is severe, it may warrant separate grounds for an immediate suspension),
- alcohol and drug addiction. However, in the First Department these latter factors will be considered only if they are "causally related" to the misconduct, which in effect makes them a matter of defense and not mitigation.[14] It should be further noted that drug and alcohol problems are very common but extremely difficult to determine, usually because only the respondent himself is capable of admitting the problem, which he is often disinclined to do unless he is in recovery at some stage. Restitution and cooperation with the grievance committee

or the district attorney if the proceeding is based upon a criminal conviction are also considered as mitigating factors.

A suspended, resigned or disbarred attorney is under an absolute obligation in accordance with the Appellate Division rules to comply with the order of discipline and the rules to the extent that they require notice of the discipline to the attorney's clients, that he close his practice and file an . . affidavit of compliance with the Appellate Division.[15] In addition, the suspended/disbarred attorney may not be employed in any legal or quasi-legal capacity during the time of his suspension or disbarment.[16]

Appeals from disciplinary orders are of a very limited nature. There is no appeal as of right unless there is a dissenting opinion in the Appellate Division, which is extremely rare or on constitutional grounds.[17] The motion for leave to appeal to the Court of Appeals must be made within thirty days of the date of service of the order of discipline with notice of entry, and that time may not be extended.[18]

Further, the scope of review by the Court of Appeals is again extremely limited. The Court will not review sanctions if there is any evidence to sustain the charge and they will review issues of law only.[19]

Appeals to the federal court system consist of a petition for a writ of certiorari to the U.S. Supreme Court from the final decision of the Court of Appeals. Certiorari is rarely granted. Actions commenced in the federal district court or in which review of state court disciplinary actions are sought are of very limited success since the prevailing "abstention" doctrine mandates that the federal courts will refrain from interfering with state court regulation of its bar absent clear, unequivocal constitutional abuse.[20]

REINSTATEMENT

The Appellate Division rules provide that the suspended respondents may apply for reinstatement after the expiration of his term of suspension or seven years after the effective date of his disbarment or resignation.[21] The burden placed upon the attorney is to establish compliance with the order of discipline and current good character and fitness by clear and convincing evidence. In addition, proof must be submitted that the applicant has passed the multi-state ethics exam, in the First Department within six months of the date of the application and in the Second Department during the period of suspension or disbarment.

It is particularly important when representing a resigned or disbarred attorney seeking reinstatement that the papers be

impeccable since they must establish prima facie his right to be reinstated. As noted above, the applicant has no right to a hearing and must therefore convince the court on his papers that he should likely be reinstated and that a hearing should be granted.[22]

The disciplinary process can oft-times be a complex and threatening process. The respondent-attorney who is the subject of an investigation or prosecution will usually benefit by consulting with experienced counsel at the earliest stages of the proceedings. Lawyers should not lose sight of the fact that every complaint, no matter how seemingly insignificant, has the potential for being a serious matter.

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1 Judiciary Law, § 90(1).

2 Judiciary Law, § 90(2).

3 22 NYCRR § 691.4.

4 22 NYCRR § 603.4.

5 *Matter of Kove*, 103 AD2d 968, 485 NYS2d 191.

6 *Matter of Ruffalo*, 390 U.S. 544; *Matter of Mitchell*, 40 NY2d 153, 386 NYS2d 95.

7 22 NYCRR § 691.4. and 7.

8 *Matters of Padilla and Grey*, 67 NY2d 440, 503 NYS2d 550.

9 *Spevak v. Klein*, 285 U.S. 511.

10 22 NYCRR § 691.4(f) and (g).

11 Judiciary Law, § 90(4).

12 22 NYCRR § 603.12 and 691.7.

13 *Matter of Feola*, 37 AD2d 879.

14 *Matter of Levine*, 101 AD2d 49, 474 NYS2d 507.

15 22 NYCRR § 603.13 and 691.10.

16 Judiciary Law, § 90(2); *Proopis v. Equitable*, 183 Misc. 379, 48 N.Y.S.2d 50.

17 CPLR § 5601(a) and (b).

18 CPLR § 5513(b).

19 *Matter of Flannery*, 212 NY 610.

20 *Younger v. Harris*, 401 U.S. 37.

[21] 22 NYCRR § 603.14 and 691.11.

[22] *Matter of Rowe*, 73 NY2d 336, 540 NYS2d 231.