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NUTS AND BOLTS
of
ATTORNEY DISCIPLINE

Cydney A. Kelly
Principal Counsel
Attorney Grievance Committee, Eighth Judicial District
438 Main Street, Suite 800
Buffalo, New York 14202
(716) 845-3630

I. Role of the Attorney Grievance Committees (“AGC”) and its Counsel

A. Purposes of the Attorney Disciplinary System

1. Protection of the public
2. Preserve the integrity of the profession and the legal system
3. Education of the bar and the public

B. Authority and Rules

1. AGC is an auxiliary agency of the Appellate Division, Fourth Judicial Department. 22 NYCRR §§1020.2, 1240.4
2. Statewide Rules for Attorney Disciplinary Matters, effective October 1, 2016, (22 NYCRR Part 1240) promulgated to conform procedures in all four Appellate Divisions for investigating and adjudicating attorney misconduct.
3. Additional authority is found in the Fourth Department’s Procedures for Attorney Disciplinary Matters at 22 NYCRR Part 1020 (“local rules” for attorney disciplinary matters in the Fourth Department), effective October 1, 2016.
4. Additional authority regarding attorney discipline is found in Judiciary Law §90.

C. Structure

1. Grievance Committees - Each of the three Judicial Districts in the Fourth Department has an Attorney Grievance Committee comprising eighteen (18) lawyers and three (3) nonlawyers. At least one member is from each County in each Judicial District. The Grievance Committee considers and investigates all matters involving allegations of misconduct by attorneys in

the respective Judicial District.

2. Professional Staff - Investigate and report to the Grievance Committee allegations of professional misconduct and recommends that the Committee dispose of matters by private letter, or direct a formal disciplinary proceeding in the Appellate Division.
3. Local Bar Association Grievance Committees - process allegations of minor delay, fee disputes, personality conflicts, and other minor matters, under the supervision of the AGC.
4. AGC does NOT have jurisdiction over:
 - a. Legal malpractice complaints, or issues concerning an attorney's strategy and exercise of professional judgment in a case.
 - b. Legal fee disputes.
 - c. AGC is unable to direct an attorney to take any particular action in a case, refund fees, turn over money or property to anyone, or direct an attorney to withdraw from representation.

D. Investigative Procedures

1. Investigations of professional misconduct may be authorized upon receipt of a written original complaint, signed by the complainant. AGC may also initiate *sua sponte* investigation.
2. Copy of complaint is forwarded to a respondent attorney, with request for a written response within 14 days.
3. AGC Counsel is authorized to interview witnesses and obtain any records and other materials and information necessary to determine validity of complaint.
4. AGC Counsel has authority to direct a respondent attorney to appear for a formal interview or examination under oath, and to direct a respondent attorney to produce records.
5. AGC Counsel is authorized to seek a subpoena from Appellate Division to compel attendance of a respondent attorney or witness, and to compel

production of relevant books and papers.

E. Disposition of Complaints

1. Confidential actions [Judiciary Law §90(10)]
 - a. Dismissal by letter
 - b. Diversion - Certain complaints may be disposed of by reference to a Court-approved monitoring program, where the attorney has an alcohol or substance abuse problem and is in treatment.
 - c. Letter of Advisement - Issued when the Committee finds that an attorney has engaged in conduct requiring comment that, under the facts of the case does not warrant imposition of discipline. It is confidential, but remains a permanent record and may be considered in evaluating subsequent complaints. 22 NYCRR § 1240(d)(2)(iv).
 - d. Letters of Admonition - A formal disciplinary sanctions based upon a finding by the Committee that an attorney has engaged in professional misconduct, but that public discipline is not required to protect the public, maintain the integrity and honor of the legal profession, or deter the commission of similar conduct. 22 NYCRR § 1240.7(d)(2)(v).
 - e. All final action at the Committee level (Letter of Admonition or Letter of Advisement) is private and confidential.
2. Public disciplinary actions - If the Committee finds that public discipline is warranted then it will authorize a formal disciplinary proceeding and a Petition is submitted to the Appellate Division for action. Note: only the Appellate Division can impose public discipline.
3. Only the Committee, not professional staff, has authority to vote to issue a Letter of Advisement, Letter of Admonition or to initiate formal charges in the Appellate Division.
4. Only the Appellate Division has authority to order public disciplinary

sanction after sustaining a Petition charging serious misconduct, usually after a hearing before a referee.

F. Proceedings Before Grievance Committee

1. When the Chief Attorney recommends a Letter of Admonition or Formal Charges:
 - a. A respondent attorney is provided with written notice of the recommendation, the date on which the matter will be presented to the full Committee, and the right to appear before the Committee with counsel of their choosing. Such notice must be provided at least 20 days prior to the date of the meeting.
 - b. Committee Counsel prepares a written Report to the Committee, a copy of which is provided to the respondent attorney. The Report sets forth the alleged misconduct, ethical rule violations, and the Chief Attorney's recommendation for disposition. The respondent attorney has the right to appear before the Committee and to be heard in response to the Report.
 - d. A respondent attorney has opportunity to submit written response to the Report prior to meeting.
 - e. A respondent attorney, and/or their counsel, are invited to make a statement or presentation, after which Committee members have opportunity to ask questions of the respondent attorney.
 - f. Committee then holds an executive session to deliberate and vote on a disposition. The respondent attorney is notified of disposition following the meeting.
 - g. Appearance before Committee is voluntary. The respondent attorney may waive opportunity to appear.
 - h. Complainants and witnesses do not appear personally before the Committee. No stenographic record is made of the respondent attorney's presentation.
2. When Chief Attorney recommends a Letter of Advisement, the respondent attorney has no right to appear. The Committee votes after review of written summary of conduct.
3. Meetings are conducted at the Grievance Committee Office for the respective district. Two-thirds of the Committee membership constitutes a quorum for the conduct of business (14 members). Committee action requires an affirmative vote of at least a majority of the members

present.

4. All papers and proceedings of Attorney Grievance Committee are deemed private and confidential. (Judiciary Law §90[10])

G. Formal Disciplinary Proceedings in Appellate Division

1. When the Committee authorizes the filing of a formal disciplinary proceeding, the Chief Attorney files a Notice of Petition and Petition with the Court and serves the respondent attorney at least 20 days prior to the commencement of the Court term.
2. The respondent attorney must file and serve an Answer to the Petition.
3. When the answer denies a material allegation in the Petition and raises an issue of fact, the Court may refer the matter to a Referee designated by the Appellate Division to hear the matter and to report without recommendation.
4. When no issue of fact is raised, or after completion of the hearing and report, the Appellate Division will schedule a time for the respondent attorney to appear and be heard in mitigation.
5. Public Disciplinary Dispositions by the Appellate Division:
 - a. Only the Appellate Division has authority to order public disciplinary sanction after sustaining charges of professional misconduct, usually after a hearing before a referee.
 - b. Censure - public declaration by Appellate Division finding conduct of a lawyer to be in serious violation of a Rule of Professional Conduct.
 - c. Suspension - reinstatement not automatic; an attorney must make application to Appellate Division.
 - d. Disbarment - an attorney's name stricken from the roll of attorneys. May apply for reinstatement after seven years, but rarely granted.
 - e. Interim suspension - pending completion of disciplinary proceedings before Committee determination, Appellate Division may suspend an attorney where there is uncontroverted proof of serious misconduct that is an immediate threat to public/clients.

6. Diversion - 22 NYCRR §1240.11 and §1020.11
 - a. When the subject attorney raises alcohol or substance abuse or other mental or physical health issues in defense or mitigation of allegations of professional misconduct, any party may apply to the Appellate Division for an order diverting the subject attorney to a monitoring program to address such issues.
 - b. Any such application must be supported by proof that the attorney has entered into a monitoring program with the New York State Bar Association Lawyer Assistance Program or an equivalent program approved by the Court in advance of the filing of the application.

II. How to Respond if a Complaint is Filed Against You

A. Remain calm

1. Vast majority of complaints filed with AGC result in dismissal.
2. Even larger proportion of AGC files remain private and confidential pursuant to Judiciary Law §90(10).
3. Staff counsel at AGC will discuss with you any questions regarding the complaint, procedures, etc. - do not hesitate to call.
4. A meritless complaint is not a "black mark" against the attorney - it can happen to any lawyer, even the most ethical.

B. Cooperate in the Disciplinary Investigation

1. Failure to cooperate is considered to be conduct prejudicial to the administration of justice, contrary to Rule 8.4(d), and may result in the opening of a *sua sponte* Non-Cooperation Complaint by the AGC. This would be in addition to the initial complaint filed.
2. 22 NYCRR §1020.5(a) calls for a respondent attorney to submit written response to the complaint within 14 days. Never ignore Grievance Committee correspondence - if more time is needed, ask for extension.
3. Response should address the ethical issues raised by the complaint.
 - a. Resist temptation to respond in kind to any personal attacks which may have been made in the complaint.

- b. Refrain from attempts to intimidate the complainant with threats of libel/defamation suits or disclosure of embarrassing or incriminating client confidences/secrets.
- c. Do not seek to have complainant "drop the complaint" or allege that the complainant does not have "standing." Once AGC receives a complaint alleging *prima facie* ethical violation, the respondent attorney must provide written explanation.
- d. The filing of a grievance by the client does not constitute automatic discharge of the lawyer. An attorney must continue to represent a client's interests until discharged or has withdrawn as provided under Rule 1.16.

C. Respond with Accuracy and Thoroughness

- 1. Review files and all pertinent records before preparing response, even if you have to get them out of storage. Do not rely on memory alone.
- 2. Attach all pertinent documents and records to support response.
- 3. Do not ignore requests to provide specific records or address specific questions.
- 4. Assume that AGC will seek to verify the relevant factual allegations of both the complainant and respondent attorney.
- 5. Be aware that the complainant will be sent a copy of the attorney's written explanation for review and comment.
- 6. Attorneys are permitted to reveal confidences or secrets necessary to defend the lawyer (and his/her associates or employees) against an accusation of wrongful conduct. Rule 1.6(b)(5)(I).
- 7. Because disciplinary proceedings are civil in nature, Fifth Amendment privilege against self-incrimination is not applicable. Zuckerman v. Greason 20 NY2d 430,285 NYS2d 1. Therefore, invoking Fifth can result in adverse inference against a respondent attorney.
- 8. A respondent attorney has a right to be represented by counsel at all stages of the proceedings.
- 9. Seek any necessary help from the County Bar Foundation, Lawyers

III. Rules Governing Professional Conduct and Where to Find Them

- A. Professional Misconduct is defined as a "violation of any rule . . . as set forth in 22 NYCRR Part 1200" or "any rule or announced standard of the Appellate Division governing the personal or professional conduct of attorneys." 22 NYCRR §1240.2(a); Judiciary Law §90(2).
- B. The rules governing lawyer conduct are primarily contained in the Rules of Professional Conduct, as adopted by the four Appellate Divisions of the New York State Supreme Court.
 - 1. The Rules of Professional Conduct are formally promulgated as joint rules of all four Appellate Divisions, effective April 1, 2009. 22 NYCRR §1200.
 - 2. The New York State Bar Association publication of the Rules of Professional Conduct includes both the Rules and unofficial interpretive Comments.
 - 3. McKinney's Judiciary Law, Book 29 and Appendix contain the Rules of Professional Conduct and digests of case law and some ethics opinions.
 - 4. McKinney's New York Rules of Court (State) (annual paperback publication) includes Rules of Professional Conduct, 22 NYCRR Part 1200
- C. Other "announced standards" - a non-exhaustive list:
 - 1. Appellate Division, Fourth Department Rules relating to attorneys. 22 NYCRR Part 1015, effective October 1, 2016. (See McKinney's New York Rules of Court [State])
 - 2. Statutes relating to "Attorneys and Counselors," Article 15 of the Judiciary Law (§§460-499).
 - 3. The Matrimonial Rules, 22 NYCRR §§137, 202.16, and Part 1400. (Procedure for Attorneys in Domestic Relations Matters).
 - 4. Rules of the Chief Administrator of the Courts:
 - I. Registration of Attorneys (22 NYCRR Part 118)
 - ii. Costs and Sanctions for Frivolous Conduct in Civil Litigation, Signing and Certification of Papers (22 NYCRR Part 130)
 - iii. Fee Dispute Resolution Program (22 NYCRR Part 137)

5. Joint Rules of the Appellate Divisions:
 - I. Statement of Client's Rights (22 NYCRR Part 1210)
 - ii. Dishonored Check Reporting Rule for Attorney Special, Trust and Escrow Accounts (22 NYCRR Part 1300)
 - iii. Procedure for Attorneys In Domestic Relations Matters (22 NYCRR Part 1400)
 - iv. Mandatory Continuing Legal Education (22 NYCRR Part 1500)
 - v. Standards of Civility (22 NYCRR Part 1200, Appendix A)
 - vi. Written Letters of Engagement (22 NYCRR Part 1215)

D. Resources

1. New York State Bar Association Committee on Professional Ethics provides advice, informal opinions, and published formal opinions. For Ethics Opinions, *see*, www.NYSBA.org, click Ethics Opinions tab. (518) 463-3200 or e-mail: ethics@nysba.org.
2. County Bar Associations' Ethics Committees, CLE and mentor programs.
3. Publications
 - a. New York Law Journal - frequent articles on ethics and professionalism, publishes disciplinary decisions and bar ethics opinions in full. (on-line version: www.nylj.com).
 - b. Simon's New York Code of Professional Responsibility Annotated 2018 Edition by Professor Roy Simon of Hofstra School of Law, has the annotated Rules of Professional Conduct, in one volume with helpful commentary including leading cases and ethics opinions. (Annual publication, Thomson Reuters)