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ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports™

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Discipline

New York Standardizes Lawyer Disciplinary Procedures

By Samson Habte

Jan. 4 — The four departments of the New York Supreme Court Appellate Division announced Dec. 29 they have adopted new rules harmonizing their respective procedures for investigating and adjudicating lawyer misconduct cases.

The rules, which take effect in July, were drafted to inject uniformity into what a court-appointed commission described as a "uniquely decentralized system for handling attorney grievances," one that has been criticized for producing disparities in the way disciplinary sanctions were meted out against lawyers in different regions of the state.

Uniformity of rules and procedures was one of the main recommendations made in September by the New York State Commission on Statewide Attorney Discipline. See 31 Law. Man. Prof. Conduct 583.

New York Court of Appeals Chief Judge Jonathan Lippman made disciplinary reform a priority at the end of his tenure. Lippman stepped down Dec. 31 after reaching mandatory retirement age.

In a statement, Lippman hailed the new rules as "historic" changes that will "eliminate regional variations," lead to "a more effective attorney discipline system" and promote "the fair administration of justice and the integrity of the legal profession throughout the state."

State and local bar officials reactions were more mixed. In interviews with Bloomberg BNA, some officials expressed approval for certain aspects of the judicial reforms but disappointment with others.

BNA Snapshot

New York Rules for Attorney Disciplinary Matters.

Development: New York court system adopts uniform rules to harmonize standards and procedures in attorney misconduct proceedings around the state.

Significance: Changes include rules that (1) allow a form of plea bargaining; (2) specify when a targeted lawyer may see information behind the charges; and (3) codify the "preponderance of the evidence" standard of proof rather than the heightened "clear and convincing evidence" standard used by most states.

Decades in the Making

David P. Miranda, president of the New York State Bar Association (NYSBA), said the new rules are "a step in the right direction" because the lack of "uniformity and consistency" in the state's lawyer disciplinary procedures was a problem that had to be addressed.

The lack of uniformity was a result of a fragmented approach to attorney discipline that has set New York apart from other states for nearly three decades.

Every other U.S. jurisdiction has a central body responsible for policing attorney conduct. However, lawyer oversight in New York is managed independently by the four departments of the Appellate Division—each of which had its own nomenclature and procedures. The new reforms don't centralize discipline within one body, but they do harmonize procedures.

The four Appellate Division departments are headquartered in Manhattan, Brooklyn, Albany and Rochester.

According to Lippman's statement, the rules

> set forth a uniform approach to the full panoply of issues in attorney discipline, including: standards of jurisdiction and venue; appointment of disciplinary committees and staff; screening and investigation of complaints; proceedings before the Appellate Division; rules of discovery; the name and nature of available disciplinary sanctions and procedural remedies for further review; expanded options

for diversion to monitoring programs; reinstatement; and confidentiality.

Same Standard of Proof

Marian C. Rice, former president of the Nassau County Bar Association (NCBA), lamented the fact that the new rules codify a "fair preponderance of the evidence" standard of proof in attorney discipline proceedings.

Rice, who drafted comments to the proposed rules on behalf of the NCBA and Suffolk County Bar Association, had urged the Appellate Division departments to adopt a "clear and convincing evidence" standard of proof. She practices with L'Abbate, Balkan, Colavita & Contini LLP in Garden City, N.Y.

Rice acknowledged that use of a "preponderance of the evidence" standard, which was established in New York through case law, has withstood constitutional attack. "But just because something is constitutional doesn't mean it should be used," said Rice, who noted that the majority of U.S. jurisdictions have adopted a "clear and convincing evidence" standard in lawyer disciplinary proceedings.

"The current changes are a small improvement, but early discovery by a respondent would have created a fairer system...."

Richard M. Maltz
New York County Lawyers' Association

The NYSBA and New York County Lawyers' Association (NYCLA) also supported a "clear and convincing" standard. Richard M. Maltz, with Frankfurt, Kurnit, Klein & Selz P.C. in New York, said in a report prepared for the NYCLA that a higher standard is justified "considering what is at stake—a respondent's livelihood and a professional and personal reputation that will be affected forever."

Discovery Rules

In an interview with Bloomberg BNA, Maltz said he also believes the courts missed an opportunity to adopt rules allowing lawyers to obtain discovery at an earlier stage of disciplinary proceedings.

The adopted rules require grievance prosecutors to give lawyer-respondents the names of persons "likely to have relevant and discoverable information" and copies of documents that may be used "to support or contest" a charge. But those disclosures do not have to be made until after a lawyer answers a petition for discipline.

Maltz said due process would be served by earlier disclosures—before an answer is filed. "The current changes are a small improvement, but early discovery by a respondent would have created a fairer system because a critical stage of a disciplinary investigation is early in the process when the attorney submits the first answer and is deposed," Maltz said.

The ultimate disposition of a case "can be heavily affected" by what a lawyer says in the early stages of an investigation, Maltz said. Delaying discovery could thus "stymie respondents from properly addressing the issues in a timely manner," he said.

Rice too said she was disappointed with the limited discovery the new rules authorize. But she acknowledged that more expansive discovery could increase costs for disciplinary authorities and constitute an unfunded mandate if not accompanied by additional appropriations.

Plea Bargaining

Bar leaders did express approval for a rule that for the first time permits a type of plea bargaining in the lawyer discipline system. Participants will be able to file joint motions "requesting the imposition of discipline by consent," as is allowed in many other jurisdictions.

Maltz said discipline by consent "will be a great tool for both sides and greatly reduce the burden on bar counsel while allowing respondents the opportunity to put an investigation behind them."

Another rule allows courts to stay disciplinary proceedings when lawyers raise claims of impairment based on alcoholism, substance abuse or mental or physical health issues.

Confidentiality of Charges

Bar leaders said they also were relieved about the courts' rejection of proposals that would have lifted confidentiality rules prohibiting the release of information about charges of misconduct against lawyers unless and until public discipline is imposed.

New York University law professor Stephen Gillers, who served on the commission Lippman appointed to

study disciplinary reform, advocated for changes to publicize disciplinary charges upon a finding of probable cause that a lawyer engaged in misconduct.

"The new rules do little to end secrecy," Gillers wrote in an e-mail to Bloomberg BNA.

"Forty jurisdictions open the process on a finding of probable cause," Gillers said. "In order to protect the very few lawyers who are exonerated after a hearing, we deny New York clients information about lawyers who are headed for public discipline including disbarment."

Sanctions Uniformity

One of the new rules addresses factors courts should consider when imposing sanctions.

It states that "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."

Gillers said it remains to be seen whether this rule will reduce what he sees as gross inconsistencies among the four departments in the way they have imposed sanctions. "We have to wait to see how the courts treat the Standards and whether they similarly interpret them," he said.

Gillers said it also was unfortunate that disciplinary committees were not directed to use the ABA Standards for private discipline. "So we can have no confidence of uniformity of sanctions at the Committee level, where most discipline occurs," he said.

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For More Information

Full text of New York's Rules for Attorney Disciplinary Matters at http://src.bna.com/bWo.

ISSN 1521-5083