

# Second Department Adopts New Disciplinary Procedures

BY LAZAR EMANUEL

Following many of the recommendations of the Krausman Committee (*see*, NYPRR, November 2004, page 1), the Appellate Division, Second Department has adopted a number of “significant procedural and substantive changes” designed to improve and streamline the processes of admission, attorney discipline, and reinstatement after discipline. The changes are described in the Court’s Report, adopted on July 27 (available at [www.nycourts.gov/courts/ad2/](http://www.nycourts.gov/courts/ad2/)), and are contained in amendments to 22 NYCRR, Parts 690 and 691.

The Second Judicial Department covers ten counties and contains more than half the people in the entire state. It has three Grievance Committees: one for the Second and Eleventh Judicial Districts (Richmond, Kings and Queens); one for the Ninth Judicial District (Westchester, Dutchess, Orange, Rockland and Putnam); and one for the Tenth Judicial District (Nassau and Suffolk).

The Court’s Report is divided into three principal sections. The sections and the changes described in each are as follows.

## The Admission Process

The Court will introduce a new Orientation to the Profession Program for lawyers admitted to the bar after January 1, 2006. “Loosely modeled” after a similar program in the First Department, the Program will focus on “the profession of law as a calling whose practitioners must maintain the highest standards of ethical and personal behavior.” It will emphasize civility among lawyers; common disciplinary pitfalls (maintaining communication with clients, fee disputes, and bank and bookkeeping responsibilities); pro bono obligations; resources dealing with alcohol and substance abuse; and the significance of the lawyer’s oath.

Rejecting proposals that it expedite applications for admission by adopting uniform processing standards for the Department’s two Committees on Character and Fitness, the Court decided instead to impose a time limit of sixty days within which the Committees must act upon any admissions application.

It also decided to retain the present practice of requiring each candidate for admission to participate in a personal interview by a member of the Committee on Character and Fitness. The Court concluded that the interview was the best way to explore the candidate’s background and would impress each candidate with the Court’s interest in seeing that “those admitted to practice are men and women of good character.”

Availing itself of the speed and accuracy afforded by computers, the Court expressed its intention to restore criminal background checks, eliminated many years ago, to the application process. However, because the four Appellate Divisions share a uniform admissions process and a common set of admission

forms, the Court referred the issue of implementing criminal background checks to the Statewide Committee on Bar Admissions.

## **The Attorney Disciplinary Process**

The Court adopted many important changes in the disciplinary process.

**Suspensions of less than one year.** It has been the Court's practice to impose suspensions of not less than one year. The Krausman Committee had recommended that this be changed to permit suspensions of not less than six months but not more than one year. Recognizing that its one-year suspension rule may have "unduly restricted its discretion in appropriate cases," the Court approved the use of shorter suspensions, without specifying a particular period of time.

The Court made it clear, however, that its new policy of shorter suspension periods was not intended to replace public censures. "Rather, the new policy supplies an additional option to consider when misconduct warrants a sanction more severe than a public censure but less than a suspension from practice for a full year."

**Minor violations.** The Court indicated that it was considering a combination of sanctions in cases of minor disciplinary violations such as failure to register with the OCA and minor tax offenses. The steps being considered are a combination of public censure and a requirement either that the lawyer provide community service, undertake pro bono representation, or complete a stated number of CLE hours.

**Credit for time spent under suspension.** The Court adopted what it called "a marked change" in its practice by agreeing to exercise its discretion in giving credit for time served under an interim suspension when considering the final measure of discipline in a particular proceeding. It agreed that giving credit was a matter of fundamental fairness, but reserved the right to deny credit in specific cases.

**Diversions Program.** To enable a lawyer faced with a disciplinary investigation to enter a court-approved monitoring program for alcohol or substance abuse, the Court has adopted a new rule authorizing suspension of the investigation pending the respondent's completion of the program.

**Referees.** The Court approved two important instructions to referees in disciplinary proceedings: 1) Focus on the important task of fact-finding. Refrain from making final recommendation on sanctions, "an area best left to the exclusive province of the Court." This will ensure consistency in the discipline imposed. 2) Submit your report within 60 days after the hearing or the submission of post-hearing memoranda. This will assist in reducing delays in the process.

**Discovery and hearing procedures.** To eliminate surprise, permit review of records, and enable counsel to prepare for the hearing, lawyers for respondents are required to give written notice to Grievance Committee counsel that they intend to offer medical or psychological evidence in mitigation of charges. At the same time, they must give authorization to obtain and make copies of the records of the health care providers involved in treatment of the respondent. A new rule requires that the medical reports of court-appointed medical experts be filed with the court clerk and made available to the parties.

**Disqualification of committee personnel.** New rules prohibit staff counsel to a grievance committee or a former member of the committee to accept a retainer from or represent any lawyer who is the subject of an investigation or of a disciplinary proceeding, if the investigation or proceeding was pending before the committee during the term of service of such counsel or committee member.

## **The Reinstatement Process**

Several of the changes adopted by the Court relate to the process of reinstatement after suspension or disbarment.

**Continuing knowledge of the law.** The Court strongly endorsed the need for suspended lawyers to remain current in their knowledge of the law. Lawyers suspended for less than one year must complete one credit hour of accredited CLE for each month of suspension. Lawyers suspended for one year must show that during the period of suspension they have either 1) completed 18 credit hours of CLE (6 of the 18 in ethics and professionalism), or 2) completed 12 hours of CLE and attained a passing score on the MPRE. Attorneys who are disbarred or suspended for more than a year must show that during the period of disbarment or suspension they have passed the MPRE, and that during that period and within two years prior to reinstatement, they have completed one credit hour of CLE for each month of disbarment or suspension up to a maximum of 24 credits.

**Expediting Reinstatement.** The Krausman Committee had reported that lawyers attempting to apply for reinstatement were having difficulty getting the necessary information. The Court has adopted detailed instructions regarding the form of the reinstatement applications. These are now available on the Court's website and from the office of the clerk of court.

Also, a simple and expeditious process has been put in place to enable lawyers who have voluntarily resigned from the bar to seek reinstatement. The application for reinstatement must be made in the form of a motion to the Grievance Committee in the judicial district in which the application last had an office.

The Court's prior practice was to refer an application for reinstatement to a Committee on Character and Fitness or to a judge or referee for investigation and review. This practice will no longer be followed in cases involving suspensions for one year or less, or for reinstatement after voluntary resignation. In those cases which are referred to a Committee on Character and Fitness, the Court will expect that the Committee's investigation and review will be completed within 60 days.

The Court's purpose in introducing these new practices is to enable respondents who have been disciplined and who are fit to resume the practice to be reinstated "in a timely fashion."