

# Second Dept. Issues Report On Admissions & Discipline

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**A** committee of thirty judges, lawyers, academicians and lay persons chaired by Justice Gabriel M. Krausman, Appellate Division, Second Department, has issued its Report and Recommendations on issues of lawyer admission, discipline and reinstatement in the Second Judicial Department. Presiding Justice A. Gail Prudenti has asked for public comment during the thirty day period ending Nov. 4, 2004.

The Second Judicial Department covers 10 counties and is divided into four judicial districts. It contains more than half the people in the entire State. The Department 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 Department has two committees on character and fitness, one for the Tenth District and one for all the other Districts.

The Committee was divided into three subcommittees the Admission Subcommittee, the Disciplinary Subcommittee, and the Reinstatement Subcommittee each chaired by a Justice of the Appellate Division and one other member.

## **I. The Admission Subcommittee**

The Subcommittee noted that the State Board of Law Examiners, the Office of Court Administration, and the Committee on Character and Fitness are all involved in the process of examining and admitting candidates for the Bar. This makes it difficult to implement the practice of other states in shortening the admission process.

CPLR article 94 requires investigation into the character and fitness of applicants for admission. The Subcommittee asked: Is a personal interview by a member of the Committee on Character and Fitness a necessary ingredient of the investigation? Omission of the interview would help to shorten the admission process. Or, interviews could be limited to those cases in which an application raised a question about the character of the applicant or disclosed some other problem.

After considering the alternatives, the Subcommittee rejected the proposal for fewer interviews.

...the value of the personal interview to the applicant, the Committee...and the bar is such that it should not be eliminated....The personal interview sends a signal to the applicant that other members of the bar seek to maintain the integrity of the profession and provides the Committee on Character and Fitness with a screening mechanism...that can uncover dishonest responses, or other problems...that would otherwise escape detention.

The Admission Subcommittee submitted the following additional recommendations:

**A training program** should be established for members of the Committee on Character and Fitness who conduct the interview of applicants.

**Term limits** should be imposed upon members of the Committee on Character and Fitness. Presently, CPLR § 9401 provides that members shall serve until death, resignation, or the appointment of a successor. "The use of a term limit would work to insure a diverse panel."

**A statement of reasons** for his dissent by a dissenting member of a Committee on Character and Fitness should be forwarded to the Appellate Division with the recommendation for admission of the Committee as a whole.

**Denials of admission** by the Appellate Division following the referral of an application by the Committee on Character and Fitness should be supported by a "detailed statement of reasons." At present, the Appellate Division does not inform the applicant of the reasons for denial.

**Criminal background checks** on applicants, presently omitted, should be reinstated by the statewide Advisory Committee on Bar Admissions. It may be necessary to adopt a new rule to make this possible. Checks could be done either by running the applicant's name and social security number through the Division of Criminal Justice Services or by checking fingerprints.

**An Orientation program** for applicants to the bar, similar to the program of the First Department, should be instituted. The program should cover a code of civility; the pro bono obligation; common disciplinary issues; available resources dealing with alcohol and other substance abuse problems; and the significance of the lawyer's oath. Attendance should be made a requirement of admission under a new court rule. The program should be conducted monthly and should be run by the Appellate Division, not by a bar association.

## **II. The Discipline Subcommittee**

The Subcommittee did not attempt "a wholesale revision of the current rules of the Second Department governing attorney discipline." Instead, it looked for ways to improve the existing system, with specific attention to sanctions and interim suspensions.

Under the broad category of "sanctions," it considered suspensions of less than one year, the use of combinations of sanctions, reasonable alternatives to suspension, plea bargaining or discipline on consent, and the input of Special Referees in determining an appropriate sanction.

**Term of Suspension.** Until now, the Second Department has not imposed suspensions from practice of less than one year. The Subcommittee considered and rejected suspensions of three months because of the practical hardship upon a lawyer of closing and reopening his office in so short a time, Misconduct which warranted such a short term of suspension could be dealt with by censure. The Subcommittee recommended that suspension of six months but less than one year would constitute an effective form of discipline but still be practical. For suspensions of less than one year, the Subcommittee recommended that taking and passing the MPRE be dropped as a prerequisite to reinstatement, and that no interview be

conducted by a member of the Committee on Character and Fitness. For suspensions of one year, applicants for reinstatement would be given the option of taking the MPRE or fulfilling six CLE credits in attorney ethics. All applicants would be required to file an affidavit of compliance under 22 NYCRR 691.10(F). "Reinstatements after suspension of one year or less should be automatic but not self executing. A court order requiring reinstatement should remain a requirement in all cases."

**Alternatives to Suspension.** The committee rejected probation and court sponsored mentoring as alternatives to suspension. Probation would impose problems of supervision on an overburdened system. Instead, the authorities could use letters of caution, admonitions and reprimands, "as well as the seldom used court sanctions of a private censure."

The problem with court sponsored mentoring "is that the court would be perceived as holding out as competent to practice law an attorney who suffers from clinical depression or who is a substance abuser when, in fact, there is some doubt as to the attorney's competence." Mentoring is a valuable tool, but it should be encouraged by bar associations, not by the courts.

**Combining Sanctions.** For certain minor violations e.g., failure to register with the OCA, minor tax offenses censure can be combined with CLE, community service, or pro bono representation.

**Plea bargaining.** Many cases could be disposed of efficiently and fairly, and without the necessity of extended hearings, by permitting respondent attorneys to invoke the procedure of plea bargaining. Bargaining would be conducted by the respondent and grievance counsel. Any agreement would be presented to the Grievance Committee for its approval and would be subject to the court's approval.

**Special Referees.** Currently, Special Referees appointed to conduct hearings and to report their findings do not make recommendations as to sanctions. Because they are in a unique position to assess the credibility of witnesses and to make recommendations, they should be required to recommend an appropriate sanction to the court, which will continue to have the responsibility for final determination.

#### **Interim Suspensions:**

**Failure to Cooperate.** The current practice of the Grievance Committee when a complaint is filed is to send the lawyer a copy of the complaint by regular mail, together with a letter requesting a reply within ten days. This is followed by a second request sent by regular mail and by certified mail. The lawyer is told that continuing failure to cooperate is itself professional misconduct which can result in interim suspension. If the lawyer fails to reply, the Committee attempts to verify that the complaint was received. At times, its investigation reveals that the lawyer has died or become incapacitated, or that he has moved. Once the Committee is satisfied that it has a "solid case" of the lawyer's failure to cooperate, it will move for the attorney's interim suspension. Because each case is unique, the Committee recommended that each case should continue to be treated on its merits.

**Substantial Admission Under Oath.** When a lawyer appears at the Grievance Committee's office in response to a complaint, he has a right to counsel and is free to invoke the Fifth Amendment privilege against self incrimination. If during the examination, the lawyer reveals misconduct that is of such severity as to warrant the Grievance Committee's belief that the court would authorize a disciplinary proceeding with a view towards public discipline, the Grievance Committee may move for interim suspension pending prosecution of the disciplinary proceeding. Several members of the Committee

expressed the fear that this ground for interim suspension could penalize a lawyer for truthfulness under oath. The committee concluded that "to encourage the candor, truthfulness, and cooperation of respondent attorneys," the use of admissions made under oath during the course of an investigation should not be the sole basis for interim suspension. Independent evidence of misconduct should exist to substantiate the admission.

***Credit for Time Under Interim Suspension.*** In appropriate cases, the court should give a lawyer credit for time spent under interim suspension before imposing final sanctions.

***Notification by District Attorneys.*** District Attorneys within the Second Department should be obligated to notify the appropriate Grievance Committee of convictions, arrests and indictments of lawyers, as well as of any ongoing investigation. This will help the court to investigate and determine whether the lawyer may be guilty of a "serious crime" within the meaning of Judiciary Law § 90(4)(d) or 22 NYCRR 691.7(b) and to decide whether interim suspension is warranted.

***Special Referees.*** To expedite the hearing process, the pool of Special Referees should be expanded and time limits should be imposed on their reports. The Committee recommended that the court undertake a recruitment effort to expand the number of Referees. Recruitment should include former Disciplinary Committee members and other experienced members of the Bar, in addition to former judges. Referees should be required to submit a report within 60 days following conclusion of the hearing, or the submission of posthearing memoranda by all parties.

## **Disciplinary Hearings.**

***Due Process Considerations.*** The Subcommittee rejected as unworkable in the high volume Second Department the practice of allowing all respondent attorneys to appear before the Disciplinary Committee or its subcommittee before authorization of a proceeding. The committee also rejected a proposal that respondent lawyers be allowed to review the submissions made by counsel to the Grievance Committee. Instead the Committee recommended that all members of the Grievance Committee be provided with the respondent's answer to every complaint on which the staff is recommending either the issuance of a letter of caution, an admonition, or the commencement of a disciplinary proceeding.

## **Discovery.**

The Subcommittee recommended adoption of a rule similar to § 605.17 of the rules of the Appellate Division First Department with respect to subpoenas, depositions and motions. It also recommended a rule requiring respondents who wish to offer psychological and medical evidence in mitigation to give advance notice to the Grievance Committee and to execute a waiver permitting the records to be viewed in advance of a hearing. The reports of court appointed medical experts should be accessible to the respondent and to grievance counsel.

***Statute of Limitations.*** To avoid the impression by the general public that attorney misconduct is being protected, the Committee rejected a statute of limitations. However, the court should consider remoteness in time in measuring credibility.

*Costs.* The imposition of costs was rejected. The process of computing costs and attempting to collect them would strain already limited resources "with little tangible benefit."

*Deceased or Incapacitated Attorneys.* Most of the problems involving these lawyers would be resolved if DR 9102(g) were expanded to require the designation of successor signatories on lawyer escrow accounts. [Editor's note: DR 9102(g) is presently limited to cases of lawyer death and requires an application to the court before a successor signatory may act.] Grievance counsel should not be required to provide legal counsel to lawyers seeking advice in these matters.

*Practice Limitations on Former Grievance Counsel.* Former grievance counsel and committee members should be prohibited from representing a respondent on any matter pending during the counsel's employment or the committee member's term of office. The Subcommittee rejected imposing the prohibition for a fixed period of time, in part because this would prevent these lawyers from earning a living.

*Meeting Registration and CLE Requirements.* Suspended attorneys should be required to meet all biennial registration and CLE requirements during the entire term of suspension. Compliance with these requirements should be considered on any application for reinstatement.

*Additional Recommendations.* The Committee also recommended: 1) merging the informational pamphlets of the three Grievance Committees into one pamphlet; 2) cooperation between the Administrative Board and the OCA in confirming the accuracy of the attorney registration database before the OCA refers allegedly delinquent attorneys to the Grievance Committees for disciplinary action; and 3) providing notices, via either telephone call or electronic transmission, of disciplinary court decisions, orders and opinions before they appear in the New York Law Journal.

### **III. The Reinstatement Subcommittee**

*Conduct and Employment of Suspended or Disbarred Lawyers.* Because the division between "the practice of law and other activities that relate to the practice of law" remains obscure, and the definition of the practice of law remains elusive, suspended and disbarred lawyers are under special pressure to avoid crossing the clouded line into practice. Judiciary Law §90(2) prohibits suspended and disbarred lawyers from practicing law in any form and Judiciary Law § 486 makes it a misdemeanor to do so.

Recognizing that the activities of suspended and disbarred lawyers are scrutinized carefully by the Appellate Division when these lawyers apply for reinstatement, and that the employment of these lawyers presents special hazards to law firms that seek to hire them, the Committee recommended a procedure similar to that provided for judges by the Advisory Committee on Judicial Ethics. Under that procedure, a suspended or disbarred lawyer could apply for an advisory opinion on whether a proposed employment or activity would constitute the practice of law. The opinion would be prima facie evidence that the activity or employment was not the practice of law, as well as a prima facie defense to any disciplinary charge against any lawyer employing the suspended or disbarred lawyer.

## **Reinstatement Applications in general.**

The Subcommittee made the following recommendations:

1. The court should consider adopting the model rule on the reinstatement of attorneys proposed by the Committee on Professional Discipline of the NYSBA.
2. To expedite reinstatements, the court should incorporate the reinstatement questionnaire, petition and application in § 691.11 of its rules, as in the 1st and 4th Departments.
3. As in the Fourth Department, all interested parties, including the complainant, should receive notice of the application for reinstatement.
4. To reduce delays, the Committee on Character and Fitness considering an application should be authorized to vote by telephone conference call, be directed to meet more frequently, and should be given copies of the application before or when they are filed with the court.
5. The order determining the application should recite the papers on which the court relied, but the court need not detail in its decisions the reasons for denying reinstatement.
6. In light of Matter of Anonymous, 97 NY2d 332 and Matter of Citrin, 94 NY2d 459, the applicant should be advised of any information in the court's possession that played a significant role in deciding the application for reinstatement.

## **Reinstatement after Suspension.**

The Subcommittee made the following recommendations.

1. In the Second Department, the procedure for reinstatement after suspension takes an unduly long time. Although suspension orders usually permit lawyers to apply for reinstatement six months before the suspension expires, the process often takes longer than six months. Applicants do not learn in advance of the need to fill out the lengthy questionnaire. Also, the court does not impose suspensions of less than one year. It would be appropriate in some cases to impose a shorter suspension.
2. In short suspensions, reinstatement could be accomplished by affidavit. This would allow for immediate reinstatement upon the expiration of one year or less. The application would be made 30 days before the end of the suspension period. The Grievance Committee would be given notice and an opportunity to be heard.
3. The period of any interim suspension should be credited against the period of suspension imposed as discipline.
4. Suspended attorneys should not be required to pay their biennial fees during the period of suspension; attorneys suspended for more than two years should be required to complete 24 credits of CLE.
5. In the case of an attorney who claims disability for alcohol or substance abuse, the disciplinary proceeding or investigation should be deferred to permit the respondent to enroll in a monitoring program. The court can dismiss the proceeding when the monitoring program is completed.

## **Reinstatement after Disbarment.**

The Subcommittee made the following recommendations:

1. Multiple applications by disbarred lawyers are presently unregulated. The rules should be modified to require a minimum interval of one year between the denial of an application and the next application. (The minimum interval in the First Department is two years.)
2. A disbarred lawyer may be reinstated after a period of seven years. It's difficult for a lawyer to maintain his legal knowledge over that long a period. Under § 691.11(b)(2) of its rules, the Second Department requires that an applicant for reinstatement attain a passage grade on the MPRE. It is doubtful whether it can also require the applicant to retake the bar exam. Instead, the applicant should be required to provide proof of at least 24 CLE credits and pass the MPRE.
3. Section 691.11(b)(2) of the Dept's rules requires the court to refer the application to the Committee on Character and Fitness before granting it. The recommendation of the Committee should be given substantial consideration by the court, but it "shall not preclude the court from denying the application."

## **Reinstatement after Voluntary Resignation.**

The Subcommittee made the following recommendations:

1. Only the Fourth Department presently gives separate consideration to applications for reinstatement by lawyers who have resigned voluntarily without facing any disciplinary proceeding or investigation. The Second Department should adopt a similar practice.
2. Applicants should be required to "explain the circumstances of their resignation, the reason for applying for reinstatement, and whether they have been the subject of disciplinary proceedings elsewhere during the period of resignation."
3. Applicants should be required to complete at least 24 CLE credits if they have been removed from the rolls for more than two years, and to pay a modest fee (\$100). All biennial registration fees should be waived.

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