CHAPTER 1

INTRODUCTION

The popular notion that lawyers belong to a "self-regulating" profession is accurate only to a limited degree. While almost every jurisdiction in the United States has adopted a basic set of ethical standards premised on the American Bar Association's "Model Rules of Professional Conduct," the actual regulation and enforcement of the substantive rules of conduct is largely in the hands of governmental entities, not the Bar.[1] In that sense, lawyers no longer truly regulate themselves. That is certainly the case in New York.

But New York is atypical in at least four ways, and they set us apart from almost all other jurisdictions. First, it is unusual that the legislature, as well as the judiciary, exercises authority to regulate lawyers. Generally, attorney regulation is the exclusive province of the courts. Yet in New York, the legislature, by enacting Judiciary Law sections 90, 476, 478, 479, and 484—487 (among others), has assumed substantial responsibility for the framework of our regulatory system. Judiciary Law section 90 vests each of the four intermediate appellate courts with the authority to oversee and supervise attorney discipline, and to process admissions and reinstatement applications. Judiciary Law sections 476, 478, 479, and 484—487 set forth prohibitions, civil remedies, and criminal sanctions in connection with the unauthorized practice of law and certain misconduct by attorneys.

Second, unlike in most jurisdictions, where typically the state's highest court supervises attorney regulation, delegation of exclusive jurisdiction to the four Appellate Divisions has effectively relegated the New York Court of Appeals, our supreme court, to the status of virtual bystander. While the Court has, sporadically, entertained an appeal concerning an important question of ethics law or procedure, for the most part it defers to the lower courts and is quite restrained—for historic and constitutional reasons—when it comes to attorney regulation. Thus,

[1] Some states, such as California, operate an integrated (mandatory) bar, in which the statewide bar association is integrated with the judiciary and active membership therein is required in order to practice law. The State Bar of California is a public corporation that acts as the administrative arm of the California Supreme Court, to which it is directly responsible, in matters involving the admission, regulation, and discipline of attorneys.

for example, the Court of Appeals will not review a claim that a disciplinary sanction is too harsh (or too lenient), or that a disciplinary agency got the facts wrong.

Third, delegation to the Appellate Divisions has led to a wholly nonuniform system of regulation, whereby local rules of procedure vary by geographic area. Some commentators, including the authors of this book, have come to believe that this regulatory decentralization has led to significant unfairness. While the reader can be the judge, it seems anomalous, for example, that: the rules of the Second, Third and Fourth Departments—but *not* the First Department—contain similar provisions with respect to "diversion" or "monitoring" programs that are applicable if, during the course of an investigation or formal disciplinary proceeding, it appears that the attorney is or may be suffering alcoholism or other substance abuse;[2] in the Third and Fourth Departments—but *not* in the First and Second Departments—the court may or must give an attorney subject to formal disciplinary charges the opportunity to be heard *by the court* in mitigation or otherwise;[3] and, in the First Department—but *not* in the other Departments—a Hearing Panel composed of lawyers and laypersons reviews and is empowered to modify the referee's report and recommendation with regard to sanction, thus providing advocates with a valuable opportunity to submit briefs and present oral arguments *on disposition* before the referee's report and Hearing Panel's determination go to the court.[4]

Fourth, and finally, New York's legislature—unlike in most jurisdictions, where, as noted, the judicial branch exclusively controls the attorney regulatory system and its financing through mandated bar dues—has not only promulgated statutes pertaining to lawyer conduct, but also controls the purse strings. As a consequence, and notwithstanding the theoretical establishment of a dedicated fund paid for by lawyers' biennial registration fees (currently $375 every two years), the legislature, in a little known practice, diverts a substantial portion of lawyers' registration fees to the General Fund. While contrary to the letter of the law, this practice also results in the underfunding of disciplinary agencies. The consequences are obvious: substantial backlogs in the resolution of bar complaints; underpaid and overworked staff attorneys; and public dissatisfaction with the often slow and perfunctory handling of grievances.

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[2] 22 NYCRR § 691.4(m); 22 NYCRR § 806.4(g); 22 NYCRR § 1022.20(d)(3).

[3] 22 NYCRR § 806.5; 22 NYCRR §1022.20(d)(2).

[4] *See* NYCRR § 605.15(g); *see also* Hal Lieberman, *New York's Lawyer Disciplinary System: Is it Fair*?, 3/1/2010 NYLJ 3, (col. 1).

This unhappy picture is not meant to be overly negative. Rather, the authors' intention is to provide a critical but realistic framework for a better understanding of how lawyer regulation works in New York. Our goal is to make the process and procedure more accessible and understandable for lawyers who receive complaints, for lawyers who represent lawyers potentially subject to discipline or who wish to get admitted to practice, for staffs and committee members of disciplinary agencies, and for consumers of legal services. The authors further believe that judges, academics, and law firms throughout the state will benefit from a better understanding of just how the system works. In short, this book is an attempt to provide the bar and legal services consumers with an orderly, in depth, clear picture of how New York, with its unusual system, addresses attorney regulation.