

Chapter 1

Unique Nature of Attorney Discipline in New York

1-1 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, setting it apart from almost all other jurisdictions.

1-2 LEGISLATIVE AUTHORITY TO REGULATE ATTORNEYS

First, it is unusual that the New York 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 §§ 90, 476, 478, 479, and 484 through 487 (among others), has assumed substantial responsibility for the framework of our regulatory system. Judiciary

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 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.

Law § 90 vests each of the four intermediate appellate courts with the authority to oversee attorney discipline and to process admissions and reinstatement applications. Judiciary Law §§ 476, 478, 479, and 484 through 487 set forth prohibitions, civil remedies, and criminal sanctions in connection with the unauthorized practice of law and certain misconduct by attorneys.

1-3 JUDICIAL SUPERVISION OF ATTORNEY REGULATION

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, 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.

1-4 NONUNIFORM REGULATION

Third, delegation to the Appellate Divisions led to a wholly nonuniform system of regulation, whereby local rules of procedure varied by geographic area. Although the Appellate Divisions adopted a core of statewide uniform procedural rules, effective October 1, 2016, New York's disciplinary system remains uniquely decentralized. Each of the four Appellate Divisions still separately supervises attorney discipline in its geographic jurisdiction, allowing for disparate treatment dependent, for example, on the location of a lawyer's principal office.

1-5 GENERAL FUND

Fourth, and finally, New York's legislature—unlike in most jurisdictions, where 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,² 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.

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 applicants 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.

² Currently, the registration fee is \$375 every two years.

