

A PRIMER ON ETHICS PROCEDURES

By Fredric L. Shenkman, Esq.

Lawyers subjected to ethics grievances, and the lawyers who represent them, often have little familiarity with the procedural aspects of the disciplinary system. The common assumption is that the Rules of Court governing the Superior Court are applicable directly or by analogy to the disciplinary process. This is incorrect and often leads to less than optimal results. What is already an anxious moment in the life of a professional is needlessly exacerbated. This primer, providing an overview of the process, should lessen that anxiety.

ENTITIES WITH RESPONSIBILITIES FOR DISCIPLINARY PROCEEDINGS: The entities charged with the responsibility for processing disciplinary matters are the New Jersey Supreme Court, Constitution of 1947, Art. 6, § 2, ¶ 3; the Disciplinary Review Board (“DRB”), R. 1:20-1(a), and R. 1:20-15; the District Ethics Committees (“DEC”), R. 1:20-1(a), and R. 1:20-3; and the Office of Attorney Ethics (“OAE”), R. 1:20-1(a), and R. 1:20-2.

JURISDICTION: Every attorney and entity authorized to practice law in New Jersey, including lawyers admitted pro hac vice, is subject to the disciplinary jurisdiction of the Supreme Court, R. 1:20-1(a). This authority is of constitutional dimension, Constitution of 1947, Art. 6, § 2, ¶ 3 and *In Re Greenberg*, 155 N.J. 138, 152 (1998).

There are no geographical limitations on the New Jersey disciplinary system. Lawyers admitted in New Jersey, regardless of where they practice or where the questioned conduct occurs, are subject to discipline. The system can reach a non-member of the New Jersey bar if that lawyer provides, or offers to provide, services in New Jersey. Rule of Professional Conduct (“RPC”) 8.5(a).

VENUE: All DEC’s have jurisdiction over attorneys whose offices are located within their assigned geographical areas. There are two exceptions: (1) if an ethics matter is instituted by a grievant who is incarcerated, venue is laid with the DEC whose assigned geographical area includes the place of incarceration; and (2) DEC XIV. DEC XIV is not subject to any geographical limitations. It is staffed by the OAE for investigative and presentation purposes. It deals with matters such as: (1) a case involving serious or complex issues that must be addressed immediately or that require emergent action; (2) a case in which an attorney is a defendant in a criminal matter; (3) a case in which a DEC requests intervention; (4) a case in which a DEC has not resolved a matter within one year of the filing of a grievance; (5) a case that the DRB or the Supreme Court determines should be assigned to the Director of the OAE; (6) a case involving multijurisdictional practice or the practice of in-house counsel; or (7) a case involving a lawyer whose conduct, in the discretion of the Director of the OAE, may be grounds for discipline or transfer to disability-inactive status. R. 1:20-2(b).

STATUTE OF LIMITATIONS: There is none. R. 1:20-7.

CONFLICTS OF LAW: New Jersey will apply the law of the place where the underlying tribunal (if a matter involves a tribunal) is situate, RPC 8.5(b)(1). If the ethical issue does not involve a tribunal, the law of the jurisdiction where the conduct occurred or where it had its principal impact will apply, RPC 8.5(b)(2).

MEMBERS OF THE DEC: Each DEC, except DEC XIV, consists of a chairperson, vice-chairperson, secretary, lawyer members and public members, R. 1:20-3(c). The chairperson is responsible for administering the DEC generally and overseeing investigative matters up to the time of the filing of a complaint, R. 1:20-3(c). The vice-chairperson acts as chairperson in the event of the chair's absence. The vice-chairperson administers all matters after the filing of a complaint, R. 1:20-3(c). The secretary, who is not a member of the DEC, R. 1:20-3(c), keeps records of DEC proceedings and maintains its files. The secretary is also the custodian of records of grievances received and investigations undertaken. The secretary acts, with certain exceptions discussed below, as the clerk of the DEC. The secretary's office serves as the office of the DEC, R. 1:20-3(d).

All members of the DEC serve staggered four year terms, R. 1:20-3(b). A member may be appointed to a successive four year term, R. 1:20-3(b). Members who are designated to serve as officers pursuant to R. 1:20-3(c) shall serve an additional two years from the date of designation or until the end of their initial appointment term, whichever is longer. There are no prohibitions on members leaving a DEC and returning after a hiatus.

Secretaries serve at the pleasure of the Director of the OAE, R. 1:20-3(c). In addition to clerical functions, the secretary screens matters to insure that the DEC has jurisdiction. The secretary must decline to process a grievance: (1) if a lawyer is not a member of the bar and the conduct or principal impact of the alleged ethical breach is outside of New Jersey, R 1:20-3(e)(2)(A) ; (2) if the matter involves an inquiry or grievance relating to advertising, R. 1:20-3(e)(2)(B); (3) if the facts alleged constitute circumstances that the Supreme Court has determined shall not be entertained by a DEC, e.g. there is pending civil or criminal litigation arising out of a substantially similar allegation, R. 1:20-3(f), R. 1:20-3(e)(2)(c); or (4) if a matter involves a substantial fee dispute, until such time that a Fee Committee has resolved the dispute, R. 1:20-3(e)(2)(D).

A secretary, with the concurrence of a public member of the DEC, must also decline to process a grievance if the alleged facts do not constitute unethical conduct or incapacity, R. 1:20-3(e)(4). The rule is analogous to R. 4:6-2(e) or Fed. R. Civ. P. 12(b)(6). There is no appeal from a declination, R. 1:20-3(e)(6).

The constitutionality of R. 1:20-3(e)(6) was recently challenged in *O'Boyle v. District I Ethics Committee*, 421 N.J. Super. 457 (App. Div. 2011), cert. den. 208 N.J. 597 (2011). The Plaintiff argued that R. 1:20-3(e)(6) violated substantive due process, procedural due process, and equal protection. The Appellate Court rejected the challenges and affirmed the validity of the "no appeal" provision governing declinations for failure to state a violation of an RPC.

INVESTIGATIONS: The jurisdiction of the ethics system is usually invoked by the filing of a written grievance with the secretary. There is no standing requirement for a grievant. Anonymous grievances are investigated if the grievance states a factual predicate based on personal knowledge.

Judges can refer matters to the OAE or a DEC for investigation. In such circumstances, the judge is not deemed a grievant. When a judge refers a matter, the OAE or the DEC is the "grievant" for purposes of all investigations and pleadings.

Once a grievance or judicial referral is screened by the secretary, and the exercise of jurisdiction is deemed appropriate, the grievance is docketed, assigned a docket number, and sent to a lawyer member of the DEC for investigation, R. 1:20-3(g)(1). The investigator must notify the lawyer who is the subject of the grievance or referral (“respondent”). The respondent must be given an opportunity to respond, R. 1:20-3(g)(2). Notification is not required if a grievance is dismissed, declined or designated as untriable prior to an investigation being undertaken, R. 1:20-3(g)(2). This response is communicated to the grievant, and the grievant is given an opportunity to reply, R. 1:20-3(g)(5).

After investigation, the investigator prepares a written report, R. 1:20-3(h). The report can make one of two recommendations: (1) to dismiss because there is no reasonable prospect of proving unethical conduct or incapacity by clear and convincing evidence, R. 1:20-3(h); or (2) to proceed because there is a reasonable prospect of a finding of unethical conduct by clear and convincing evidence, R. 1:20-3(i). If a dismissal is granted pursuant to R. 1:20-3(h), it may be appealed to the DRB pursuant to R. 1:20-15(e)(1)(i) and (2).

If there is a reasonable prospect of finding unethical conduct but the conduct is deemed minor, an Agreement in Lieu of Discipline (“AILD”) can be requested by the chairperson, R. 1:20-3(i)(2)(B). Minor conduct is conduct which would result in discipline not greater than an admonition subject to certain exceptions, R. 1:20-3(i)(2)(A).

A request for an AILD is made on notice to the grievant. The Director of the OAE has the discretion to grant an AILD. The Director’s exercise of such discretion is not appealable, R. 1:20-3(i)(2)(B)(i)–(ii). An AILD will not be granted unless the respondent admits the violation of an RPC, R. 1:20-3(i)(2)(B)(i). An AILD may require the respondent to remedy the consequences of the unethical conduct, to reimburse fees or costs, to complete legal work undertaken, to participate in alcohol or drug rehabilitation, psychological counseling or attend an other approved course of study. R. 1:20-3(i)(2)(B)(iii).

If the report determines that there is a reasonable probability of proving unethical conduct by clear and convincing evidence and an AILD is inappropriate, a formal presentation of the alleged violation will be initiated by the filing of a complaint, R. 1:20-3(i)(3).

FORMAL PROCEEDINGS: Formal disciplinary proceedings are instituted by a complaint, R. 1:20-4(a). Service of process is effectuated by the secretary, R. 1:20-4(d). The respondent is required to file a verified answer to the complaint within twenty-one (21) days of service, R. 1:20-4(e). A failure to answer will be deemed an admission that the allegations of the complaint are true, and the matter will proceed on a default basis, R. 1:20-4(f).

Limited discovery is available in ethics proceedings; parties are not permitted to serve interrogatories or requests for admission. Depositions are not permitted, R. 1:20-5(a)(4). The scope of discovery is substantially narrower than that permitted by R. 4:10-2(a); discovery in disciplinary proceedings is limited to items relevant to the investigation, prosecution or defense of a matter, R. 1:20-5(a)(2).

An ethics matter is conducted before a hearing panel consisting of two lawyer members and one public member of a DEC. The majority’s decision controls, R. 1:20-6(a)(2). In lieu of a hearing panel, a special master may be appointed; this procedure is utilized when it is anticipated that hearings will take three or more days, R. 1:20-6(b).

BURDEN OF PROOF: The presenter (who is often the investigator) bears the burden of proof as to unethical conduct and any aggravating factors. The respondent bears the burden of proof as to any defenses and mitigating factors. R. 1:20-6(c)(2)(C). All items which are the burden of the presenter or the respondent must be proven by clear and convincing evidence. R. 1:20-6(c)(2)(B). The New Jersey Rules of Evidence are relaxed

but the residuum rule applies. R. 1:20-7(b).

Aggravating factors include respondent's failure to cooperate with the investigation, R. 1:20-3(g); respondent's prior disciplinary history (N.B. prior disciplinary history is not a matter for consideration by the trier of fact until there has been a finding of unethical conduct - R. 1:20-7(n)); and respondent's failure to remediate despite the ability to do so. (In re Silber, 100 N.J. 517 (1985).

Mitigating factors include such things as contrition, no prior disciplinary history, service to the community, etc.

DISCIPLINE: A hearing panel or special master cannot impose discipline; instead, a written report must be issued. R. 1:20-6(a)(3)(B). The report may recommend (1) that the matter be dismissed R. 1:20-6(c)(2)(E)(i) (this may be appealed to the DRB pursuant to R. 1:20-15(e)(2)); (2) that the respondent be admonished R. 1:20-6(c)(2)(E)(ii); or (3) that the respondent be reprimanded, censured, suspended for a given term, suspended for an indeterminate period of time (minimum five years-see R. 1:20-15(A)(2)); (see In the Matter of Neil M. Cohen 220 N.J. 7 (2014)), or disbarred R. 1:20-6(c)(2)(E)(iii).

DRB: Upon the filing of an appeal by a grievant or the OAE, the DRB reviews the following actions of a DEC or a special master: (1) a determination to dismiss based on a finding following an investigation that unethical conduct that cannot be proven by clear and convincing evidence, R. 1:20-15(e)(1)(i); and (2) a determination to dismiss based on a finding following a hearing that unethical conduct has not been proven. R. 1:20-15(e)(1)(ii). The review by the DRB is de novo and may be made with or without oral argument, in the DRB's discretion. The DRB may affirm, modify, or reverse the decisions of the DEC or special master. Alternatively, the DRB may remand the matter, R. 1:20-15(e)(2)-(3).

All recommendations of discipline, except as to admonitions and matters reviewable as to the recommended sanction, are promptly heard de novo by the DRB, R. 1:20-15(f)(1). The DRB is the body that preliminarily imposes discipline.

SUPREME COURT: The Supreme Court receives all decisions by the DRB that recommend disbarment. The review is based on the record below as supplemented by the filing of briefs and oral argument. R. 1:20-16(b).

For matters other than disbarment, the DRB's decision is final unless the Court otherwise orders. R. 1:20-16(a). The Court, on its own motion, may review any determination of the DRB in which discipline other than disbarment has been recommended. R. 1:20-16(b). The Court will entertain a petition as to any recommendation of the DRB. R. 1:20-16(b)

It is worth noting that although R. 1:20-6(c)(2)(E)(iii) only refers to a suspension, R. 1:20-15(A) differentiates between an indeterminate suspension (R. 1:20-15(a)(2)) and a suspension for a given term. R. 1:20-15(a)(3).

CONFIDENTIALITY: The Supreme Court has addressed a First Amendment challenge to the confidentiality of disciplinary proceedings. *R.M. v. Supreme Court of New Jersey*, 185 N.J. 208 (2005). The decision in *R.M.* is, in part, embodied in R. 1:20-9.

Action prior to the filing of a complaint shall be kept confidential by other than the grievant unless: (1) the respondent has waived or breached confidentiality; (2) the proceeding is based on allegations of reciprocal discipline, a pending criminal charge, or a guilty plea or conviction; (3) there is a need to notify another organization or person in order to protect the public, the administration of justice, or the legal profession; (4) the Supreme Court has granted an emergent disciplinary application; or (5) the matter has become common knowledge, R. 1:20-9.

R. 1:20-9(b) provides that a grievant may make public statements regarding the disciplinary process, the filing and content of the grievance, and the result. However, *R.M.* cautions that although a grievant is immune from suit for filing a grievance or making statements within the context of disciplinary proceedings, he or she is not immune from statements made outside the context of an ethics proceeding, such as to the media or in public forums – *In re Hearing on Immunity for Ethics Complainants*, 96 N.J. 669 (1984). Thus, a grievant’s public statements about a respondent, if defamatory, are actionable. This is particularly important in light of the Supreme Court decision reaffirming defamation per se. *W.J.A. v. D.A.*, 210 N.J. 229 (2012).

The foregoing is not a detailed analysis of the procedural aspects of disciplinary proceedings. It is intended to provide broad parameters to encourage respondents and their attorneys to take the time necessary to familiarize themselves with the appropriate procedural rules. Such knowledge facilitates the process, serves the legal and personal interests of the parties, and optimizes the probability of a successful and fair result.

Fredric L. Shenkman, Esq. is a former member, Chair and Secretary of the District I Ethics Committee.

Fredric Shenkman joined Cooper Levenson in 1998. He brings to the firm over thirty three years of experience in both transactional work and commercial litigation.

His transactional experience include the drafting of: asset sales; cross-purchase and redemption agreements; asset based financing agreements; post-employment restrictive covenants; business separation agreements; PILOT Agreements (payment in lieu of taxes agreements) and work-outs.

His litigation experience, in both the State and Federal Courts includes: real estate, partnership dissolution; corporate dissolution; construction defects; oppressed shareholder/minority freeze-outs; condominium governance; corporate governance; public finance; state and federal taxation; FOIA; OPRA; title defense, environmental, ad valorem taxation, D & O and E & O defense, and foreclosures.

*He can be reached at **609.572.7330** or **fshenkman@cooperlevenson.com***