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**DEALING WITH DIFFICULT ATTORNEYS**  
**(Attorney Grievance Committee)**

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**2014 New York State Magistrates Association Conference**  
**Syracuse, New York**



# **REGULATION OF LAWYER CONDUCT**

NEW YORK STATE MAGISTRATES ASSOCIATION  
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## **I. Role of the Attorney Grievance Committee (AGC)**

### **A. Purposes of the Attorney Disciplinary System**

- 1) Protection of the public.
- 2) Preserve the integrity of the profession and the legal system.
- 3) Education of the bar and the public.

### **B. Authority & Rules**

- 1) Judiciary Law § 90 governs discipline of attorneys and creates the authority for the Appellate Divisions to admit and regulate attorneys.
- 2) Rules of Professional Conduct (formerly known as the Disciplinary Rules) found at 22 NYCRR §1200, set forth standards of conduct binding upon all New York lawyers.
- 3) Each Appellate Division establishes procedures for regulating the conduct of attorneys and appoint disciplinary committees, as auxiliary agencies of the Appellate Divisions, to investigate reports of attorney misconduct. 22 N.Y.C.R.R. Part 603 (1<sup>st</sup> Dept.), 22 N.Y.C.R.R. Part 691 (2<sup>nd</sup> Dept.), 22 N.Y.C.R.R. Part 806 (3<sup>rd</sup> Dept.), 22 N.Y.C.R.R. Part 1022.19 (4<sup>th</sup> Dept.).

C. Structure

- 1) Attorney Grievance Committees (AGCs) - Each Judicial District in Fourth Department (5<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup>) has an Attorney Grievance Committee comprised of 18 lawyers and 3 lay members to "consider and cause to be investigated alleged misconduct by attorneys in their district." 22 NYCRR §1022.19(b); contrast other Departments.
- 2) Professional Staff - function is to investigate and report on allegations of professional misconduct and dispose of by dismissal, private letter, or formal disciplinary proceeding in Appellate Division.
- 3) Local Bar Association Grievance Committees - process allegations of minor delay, fee disputes, personality conflicts, and other minor matters.

D. Investigative Procedures

- 1) Most files are based on written complaints submitted to AGC, which are forwarded to the attorney for a written response. AGC may also initiate *sua sponte* investigations.
- 2) AGC has authority to order a respondent attorney to appear at the AGC to be examined under oath and to subpoena respondent attorneys and third party witnesses.
- 3) Attorneys are ethically obligated to cooperate in AGC investigations, and failure to do so constitutes professional misconduct. "Full and forthright cooperation with the Committee is the lawyer's obligation." Matter of Fraser, 515 NYS2d 361(4th); *NYSBA Op. # 348*.

E. Disposition of Complaints

- 1) Confidential actions.
  - a) Dismissal by letter.
  - b) Letter of Caution - a formal comment on an attorney's conduct not necessarily rising to a Disciplinary Rule violation. It is educational rather than disciplinary in nature. However, it remains a permanent record and may be considered in evaluating subsequent complaints.

- c) Letter of Admonition - a formal disciplinary sanction based upon a finding by Committee of professional misconduct which violates one or more of the Disciplinary Rules.
- 2) Public disciplinary actions.
- a) Censure - public declaration by the Appellate Division which finds conduct of the lawyer to be a serious violation of a Rule of Professional Conduct.
  - b) Suspension - reinstatement is not automatic, attorney must make application to Appellate Division to return to practice.
  - c) Disbarment - lawyer's name stricken from the roll of attorneys and counselors. This is not permanent in New York, may apply for reinstatement after 7 years (but rarely granted).
  - d) Interim suspension - pending completion of disciplinary proceedings, court may suspend attorney where there is uncontroverted proof of serious misconduct which is an immediate threat to public/clients. 22 NYCRR §1022.19(f)(2).
  - e) The burden of proof in disciplinary proceedings is a fair preponderance of the evidence. Matter of Capoccia 59 NY2d 549, 466 NYS2d 268; Matter of Friedman, 196 AD2d 280, 609 NYS2d 578, 586.
- 3) Only the Committee, not professional staff, has authority to vote to issue a Letter of Admonition or to initiate formal charges by filing a Petition in the Appellate Division.
- 4) Only the Appellate Division has authority to order public disciplinary sanction after sustaining charges of misconduct alleged in a Petition, usually after an evidentiary hearing before a referee or judicial hearing officer.
- 5) The Chairperson and Chief Counsel may authorize the issuance of Letter of Caution or dismissal of complaint.

F. Indefinite Suspension for Incapacitation or Incompetency-22 NYCRR §1022.23.

G. Confidentiality - Judiciary Law § 90(10).

- 1) All complaints and proceedings of AGC investigations are deemed private and confidential. They become public records only if an order of censure, suspension, or disbarment is entered by the Appellate Division.
- 2) Only exception is that the Appellate Division may, for good cause, grant a petition for disclosure upon notice to the respondent attorney and the AGC pursuant to 22 NYCRR §1022.36 (rarely granted).

## **II. How to React When a Lawyer Is Unresponsive or Appears Incapacitated**

A. Duty of Lawyers to Report Lawyer Misconduct: Rule 8.3.

- 1) Requires a lawyer who knows that another lawyer has committed a violation of the Rules of Prof. Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. (viz. any violation of Rule 8.4).
- 2) Requires lawyers who possess knowledge or evidence of another lawyer or a judge to respond to lawful demands for information from a tribunal or other authority empowered to investigate such conduct.
- 3) Exempts from mandatory disclosure::
  - (a) Attorney conduct disclosed as a confidence during representation of the attorney in a legal matter (Rule 1.6);
  - (b) Information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

B. Misconduct, as defined in Rule 8.4, requires report:

- 1) Includes knowingly assisting or inducing another to violate or violating through acts of another;
- 2) Illegal conduct that adversely reflects on the lawyers honesty, trustworthiness or fitness as a lawyer;

- 3) Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;
- 4) Conduct that is prejudicial to the administration of justice;
- 5) Stating or implying an ability
  - (a) to influence improperly or upon irrelevant ground any tribunal; achieve results;
  - (b) to achieve results using means that violate Rules of Prof. Conduct.
- 6) Knowingly assisting a judge in conduct that violates rules of judicial conduct or other law;
- 7) Any other conduct adversely reflecting on lawyer's fitness as a lawyer<sup>1</sup>.

NOTE: The most common instance when lawyer conduct should be reported to a disciplinary committee to investigate fitness issues is the arraignment of an lawyer on criminal charges, especially DWI.

C. Duty of Judges to Report Misconduct by Lawyers and Judges: Canon 3(D)(2) of the Code of Judicial Conduct.

- 1) A judge who receives information indicating a substantial likelihood that a lawyer or another judge has committed a substantial violation of the Rules of Professional Conduct to take "appropriate action." 22 NYCRR 100.3(D)(1), & (2).
- 2) If the misconduct is so serious that it calls into question a judge's fitness to continue in office, or an attorney's honesty, trustworthiness or fitness as a lawyer, the judge must report the conduct to the appropriate disciplinary authority. (NYS Advisory Committee on Judicial Ethics, Opinions: 10-85, 08-146, 08-83; Joint Opinion 05-105/05-108/05-109).
- 3) If the conduct is not so serious, the judge has the discretion to take some action other than reporting the conduct to a disciplinary authority. (NYS Advisory Committee on Judicial Ethics, Opinion: 10-85).
- 4) If the conduct is an insubstantial or technical violation, it is within

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<sup>1</sup> Town and Village Court Justices often observe other reportable conduct, such as repeated failure of attorney to appear without prior notification to the Court.

the judge's discretion to take or not take some appropriate action.  
(NYS Advisory Committee on Judicial Ethics, Opinion: 09-190).

D. Mechanics of Disclosures to Attorney Grievance Committees

- 1) Disclosures of attorney conduct are preferred in writing. However, Judges may usually call the disciplinary committee office to discuss concerns with staff counsel.
- 2) What happens when a judge reports misconduct.
  - Judge not made a complainant unless so requested.
  - Investigation Protocols
  - Confidentiality NY Judiciary Law 90(10).

E. Alternative Interventions and Disclosures

- 1) Reaction to signs of lawyer impairments due to substance abuse or unspecified mental conditions.
- 2) Familiarize yourself with local & state resources to assist impaired lawyers and judges, such as lawyer & judicial assistance programs.
- 3) Consider development of suggested procedures for intervention. (See: Suggested Procedures developed in the Fifth Judicial Dist., Attachment).
- 4) Judiciary Law §499 provides that communications between a lawyer acting on behalf of a duly authorized lawyer assistance program and an impaired lawyer is subject to the same confidentiality as the lawyer-client privilege.

F. Appellate Division Diversion Options for Impaired Lawyers.

- 1) All but the 1<sup>st</sup> Department have adopted diversion options which afford attorneys a stay of disciplinary investigations or proceedings and monitoring of rehabilitation treatment for chemical dependency. e.g. 4<sup>th</sup> Dept. - 22 N.Y.C.R.R. §1022.20((d)(3)(a).
- 2) Conditional Disciplinary Orders are commonly issued, conditioning a lesser level of discipline upon the lawyer's submitting to monitoring of treatments for chemical dependency or mental impairments.
- 3) Order of Suspension used in the 3<sup>rd</sup> & 4<sup>th</sup> Depts., accompanied by a stay, requiring attorneys to address an impairment issue and to avoid repetition of misconduct.

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Anthony J. Gigliotti received his undergraduate degree from Syracuse University in 1968 and went on to earn his law degree from St. John's University in 1971. He started his career as the Staff Attorney for Onondaga Neighborhood Legal Services, and in 1976 became the Executive Director of Legal Services of Central New York, a position he held for 10 years. It was during this time that he began his periodic work as adjunct professor at the Syracuse University College of Law which spanned over two decades. From 1987 to 1996, he held positions as Syracuse City Court Judge, General Counsel for the Widewaters Group, Assistant NYS Attorney General In Charge of the Watertown Regional Office, as well as private law practice.

Since 1996, Mr. Gigliotti has served as Principal Counsel for the Attorney Grievance Committee, Appellate Division Fourth Department, Fifth Judicial District and has lectured extensively on ethics at numerous continuing legal education programs. In 2001, Tony was appointed as one of the founding members of the New York State Lawyer Assistance Trust by Chief Justice Judith S. Kaye.

Tony is a member of the Onondaga County Bar Association's Lawyers Assistance Steering Committee, led the effort to establish the local Volunteer Lawyer's Project, and now serves on its oversight Pro Bono Practice Committee. He has been a member of the New York State Bar Association throughout his legal career, having served on the Real Estate Section's former Committee on Residential Landlord and Tenant Law, the Committee on Legal Aid, and currently serves on the Lawyer Assistance Committee.

Mr. Gigliotti advocated for and assisted in the authorship of Real Property Law §235-b which established New York's Implied Warranty of Habitability, and helped launch the first Pro Bono Service Awards, now awarded annually by the NYSBA President.



## **MARY E. GASPARINI**

A native of Central New York, Ms. Gasparini is a 1991 graduate of the George C. Taylor College of Law at the University of Tennessee in Knoxville. She began her legal career at the Legal Aid Society - Criminal Defense Division in New York City. In 1993, Ms. Gasparini returned to Syracuse for a position with the Hiscock Legal Society. From there Ms. Gasparini accepted a position as a Assistant Corporation Counsel for the City of Syracuse. In 1996, she moved into private practice where she focused in workers' compensation as well as corporate and business contracts. Ms. Gasparini returned to public service in 2007 when she joined the Attorney Grievance Committee. She is a frequent lecturer at Syracuse University College of Law, the New York State Bar Association and the Onondaga County Bar Association CLE programs.